

operationalize the specific conditions pursuant to which a belligerent can be required to provide reparations for damage inflicted while engaged in the conduct of armed hostilities.

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On February 9, 2022, the International Court of Justice (ICJ) rendered its judgment on the reparations phase of the *Armed Activities (DRC v. Uganda)* case which related to the Democratic Republic of Congo's (DRC) claims against Uganda arising from the Second Congo War.¹ The judgment concluded a case which had all the hallmarks of a landmark: an exceptionally large-scale, protracted, and complex armed conflict, a key actor as the respondent, and virtually unfettered material jurisdiction of the Court. As a reminder, in 1999, the Court was seised with DRC's claims against Uganda arising from the (then ongoing) Second Congo War. Similar claims against Rwanda and Burundi failed before reaching the merits stage. In 2005, the Court rendered its judgment on the merits declaring Uganda responsible for violating the principle of non-use of force and non-intervention by the acts of its own forces and by supporting armed groups in the DRC.² The Court also found Uganda responsible for breaches of international humanitarian law and international human rights law, and for plundering DRC's natural resources.³ The Court concluded that Uganda had to make reparation to the DRC for the injury caused by its internationally wrongful acts and enjoined the parties to enter into negotiations for that purpose.⁴ After almost ten years of sporadic and fruitless discussions, in 2015, the DRC brought the case back to the Court for conclusive resolution.

The paper took a closer look at the 2022 judgment, focusing on the ways in which it dealt with the complex issue of the "personalization" of reparations for atrocities committed in war. By "personalization" of reparations, the paper denoted an approach which aims to reflect both the responsibility of the wrongdoer and the harm and circumstances of the victim. It argued that, from this perspective, the Court's approach is not amenable to wholesale reproduction in future cases.

It is trite that the obligation to make reparation is limited to injury *caused* by the internationally wrongful act.⁵ In this respect, the *Armed Activities* case posed significant challenges as, in the merits judgment, Uganda was found responsible not only for acts committed by its armed forces, but also for its incitement of acts committed by private armed groups and its failure to ensure public order in Ituri in which it was the occupying force. The Court held that the status of Ituri as occupied territory had "a direct bearing on questions of proof and the requisite causal nexus."⁶ The Court held that Uganda was responsible for all damage resulting from the conflict in Ituri even from actions of third parties, unless it could establish with respect to a particular injury that it was not caused by its failure to meet its obligations of vigilance as an occupying force.⁷ For damage

¹ *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, Reparations Judgment (Feb. 9, 2022), at <https://www.icj-cij.org/public/files/case-related/116/116-20220209-JUD-01-00-EN.pdf> (hereinafter, *Armed Activities*, Reparations).

² *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, Judgment, 2005 ICJ Rep. 16, para. 345(1) (Dec. 19).

³ *Id.*, para. 345(3)–(4).

⁴ *Id.*, paras. 261, 345(5)–(6).

⁵ ILC, *Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries*, II(2) Y.B. INT'L L. COMM'N 31, Art. 31 (2001).

⁶ *Armed Activities*, Reparations, *supra* note 1, para. 78.

⁷ *Id.*, paras. 78, 95.

occurring outside Ituri, the Court would assess on a case-by-case basis whether Uganda's actions or support was a sufficiently direct and certain cause.⁸ The Court also drew the same distinction for the purposes of the allocation of the burden of proof. The Court concluded that Uganda had to establish that a specific injury occurring in Ituri was not caused by its failure to discharge its obligation as an occupying force.⁹ As to other claims, the burden of proof remained in principle with the DRC.¹⁰

The Court's approach as to the issue of causation and the allocation of burden of proof raises several questions as it appears to treat the various Uganda's acts indistinctly. Yet, as a matter of principle, the Court's legal findings were much more nuanced. First, the Court clarified that "the causal nexus required may vary depending on the primary rule violated and the nature and extent of the injury."¹¹ Second, the Court affirmed that an award of compensation cannot be precluded solely on the basis that damage is due to multiple concurrent causes if there is a sufficiently direct and certain causal nexus with the internationally wrongful act of the respondent.¹² It also acknowledged that multiple internationally wrongful acts by different actors can lead to a single injury or multiple distinct injuries.¹³ Third, the Court cautioned that when "multiple causes attributable to two or more actors have resulted in injury, a single actor may be required to make full reparation for the damage suffered" or "responsibility for part of such injury should instead be allocated among those actors."¹⁴ This suggests that considerations of judicial economy called for a certain degree of selectivity and conciseness in the treatment of the responsibility arising from the complex wrongful acts in question. However, the ICJ's findings cannot be construed as a rejection of a differentiated approach to reparation depending on the specific wrongful act in question and, especially, whether the responsible state failed to prevent a harmful act, assisted or incited the harmful act, or committed the harmful act though conduct attributable to it.

Another vexing problem relating to the "personalization" of reparation was the identification and valuation of damage caused during the armed conflict. In this respect, following the antecedent of other dispute settlement bodies, the Court favored an attenuated standard of proof compared to proceedings on the merits.¹⁵ However, curiously, the Court did not indicate what the applicable standard of proof actually was.¹⁶ It rather proceeded to find that "the Court may on an exceptional basis, award compensation in the form of a global sum within the range of possibilities indicated by the evidence and taking account of equitable considerations."¹⁷ In applying this approach to the specific heads of damage at issue, the Court limited itself to indicating broad margins of possibilities or declared that it was impossible to determine, even approximately, the extent (e.g., injuries to persons or sexual violence) or value (e.g., deaths, injuries to persons, displacements) of damage due to lack of evidence.¹⁸ As a result, the Court proceeded to award "global sums" without transpiring from its reasoning what were the specific findings as to the extent and value of damage that

⁸ *Id.*, paras. 84, 97.

⁹ *Id.*, para. 118.

¹⁰ *Id.*, para. 119.

¹¹ *Id.*, para. 93.

¹² *Id.*, paras. 94, 97.

¹³ *Id.*, para. 94.

¹⁴ *Id.*, para. 98.

¹⁵ *Id.*, para. 124; *see, e.g.*, Er. Eth. Cl. Comm'n, Final Award—Eritrea's Damages Claims (Er./Eth.), 26 RIAA 512, para. 36 (2009); Prosecutor v. Katanga, ICC-01/04-01/07-3728, Ordonnance de réparation en vertu de l'article 75 du Statut, para. 38 (Mar. 24, 2017).

¹⁶ Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Reparations Judgment, para. 41 (Feb. 9, 2022) (sep. op., Robinson, J.), at <https://www.icj-cij.org/public/files/case-related/116/116-20220209-JUD-01-03-EN.pdf>.

¹⁷ *Armed Activities*, Reparations, *supra* note 1, para. 106.

¹⁸ *Id.*, paras. 162–64, 181, 192–93, 204–05, 223–24.

led to these numbers.¹⁹ The Court's failure to clearly lay down its methodological assumptions makes its decision vulnerable to the criticism of arbitrariness. In fact, it failed to fully convince even some of the judges who voted in favor of the *dispositif*.²⁰

The Court's "global sums" approach also sits uneasily with broader developments concerning the position of the individuals within the framework of international law. In this respect, "personalization" can also be understood as the channeling of reparation to the real victims of the internationally wrongful act and its tailoring to the specific harms suffered. Whilst it is firmly established that individuals may possess rights under international law,²¹ it is still unclear how reparation should "accrue" to individuals under the general law of international responsibility.²² Notably, in *Wall*, the ICJ hinted that the responsible state might owe its obligation to make reparation, at least in some cases, directly to the individuals which were injured by an internationally wrongful act.²³ Yet, in later decisions, the Court clarified that such an obligation allowed for derogations.²⁴ Also, when the responsible state has made reparations to a state, the injured individuals have no claim against the responsible state, if the receiving state has failed to distribute it to them.²⁵ Importantly, it is still an open question whether the state that has received reparations has the obligation to distribute it to individuals.²⁶ In the 2022 reparations judgment, the Court acknowledged that "the reparation awarded to the DRC for damage to persons and to property reflects the harm suffered by individuals and communities as a result of Uganda's breach of its international obligations."²⁷ However, it stopped short from affirming that customary international law required the distribution of funds to injured individuals, but only took note of an undertaking given by the agent of the DRC in this respect.²⁸ Be that as it may, the Court's openness to such a development stands in an awkward relationship with its vague approach to calculation of damages as any attempt to distribute reparations to injured individuals and communities presupposes a degree of "personalization" of harm.²⁹

¹⁹ See, e.g., *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, Reparations Judgment, para. 9 (Feb. 9, 2022) (dec., Tomka, J.), at <https://www.icj-cij.org/public/files/case-related/116/116-20220209-JUD-01-01-EN.pdf>; *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, Reparations Judgment, paras. 22–36 (Feb. 9, 2022) (sep. op., Yusuf, J.), at <https://www.icj-cij.org/public/files/case-related/116/116-20220209-JUD-01-02-EN.pdf>; *Armed Activities*, Reparations (sep. op., Robinson, J.), *supra* note 16, paras. 2–6; *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, Reparations Judgment, para. 18 (Feb. 9, 2022) (dec., Salam, J.), at <https://www.icj-cij.org/public/files/case-related/116/116-20220209-JUD-01-04-EN.pdf>.

²⁰ See, e.g., *Armed Activities*, Reparations (dec., Tomka, J.), *supra* note 19, para. 7; *Armed Activities*, Reparations (sep. op., Yusuf, J.), *supra* note 19, para. 42; *Armed Activities*, Reparations (sep. op., Robinson, J.), *supra* note 19, para. 47; *Armed Activities*, Reparations (dec., Salam, J.), *supra* note 19, para. 18.

²¹ See, e.g., *Jadhav (India v. Pak.)*, Judgment, 2019 ICJ Rep. 418, para. 115 (July 17).

²² ARSIWA, Art. 33(2).

²³ *Legal Consequences of the Construction of a Wall on the Occupied Palestinian Territory*, Advisory Opinion, 2004 ICJ Rep. 136, para. 153 (July 9).

²⁴ *Jurisdictional Immunities of the State (Ger. v. It.; Greece intervening)*, Judgment, 2012 ICJ Rep. 136, para. 94 (Feb. 3).

²⁵ *Id.*, para. 102.

²⁶ ILC, *Draft Articles on Diplomatic Protection with Commentaries*, II(2) Y.B. INT'L L. COMM'N 26, Art. 19(c) (2006); *Cyprus v. Turkey*, App. No. 25781/94, Just Satisfaction, para. 58 (Eur. Ct. Hum. Rts. May 12, 2014), at <https://hudoc.echr.coe.int/fre?i=001-144151>; *Georgia v. Russia*, App. No. 13255/07, Just Satisfaction, para. 77–79 (Eur. Ct. Hum. Rts. Jan. 31, 2019), at <https://hudoc.echr.coe.int/fre?i=001-189019>.

²⁷ *Armed Activities*, Reparations, *supra* note 1, para. 408.

²⁸ *Id.*

²⁹ *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, Reparations Judgment, para. 27 (Feb. 9, 2022) (diss. op., Daudet, J. *ad hoc*), at <https://www.icj-cij.org/public/files/case-related/116/116-20220209-JUD-01-06-FR.pdf>; Diane Desierto, *The International Court of Justice's 2022 Reparations Judgment in DRC v. Uganda: "Global Sums" as the New Device for Human Rights-Based Inter-State Disputes*, EJIL:TALK! (Feb. 14, 2022), at <https://www.ejiltalk.org/the->

The paper concluded that, in light of the complexities of the case and the practical and logistical obstacles that it faced as an institution with limited resources, the ICJ resorted to a nebulous “global sums” approach. This approach leaves little space for the “personalization” of reparation, namely, the consideration of the specific character of the wrongful act, the nature of the harm, and the identity and needs of the real victim. Thus, notwithstanding the high profile of the case and the ICJ’s unparalleled standing within the international legal profession, the temptation to generalize the Court’s approach should be resisted.