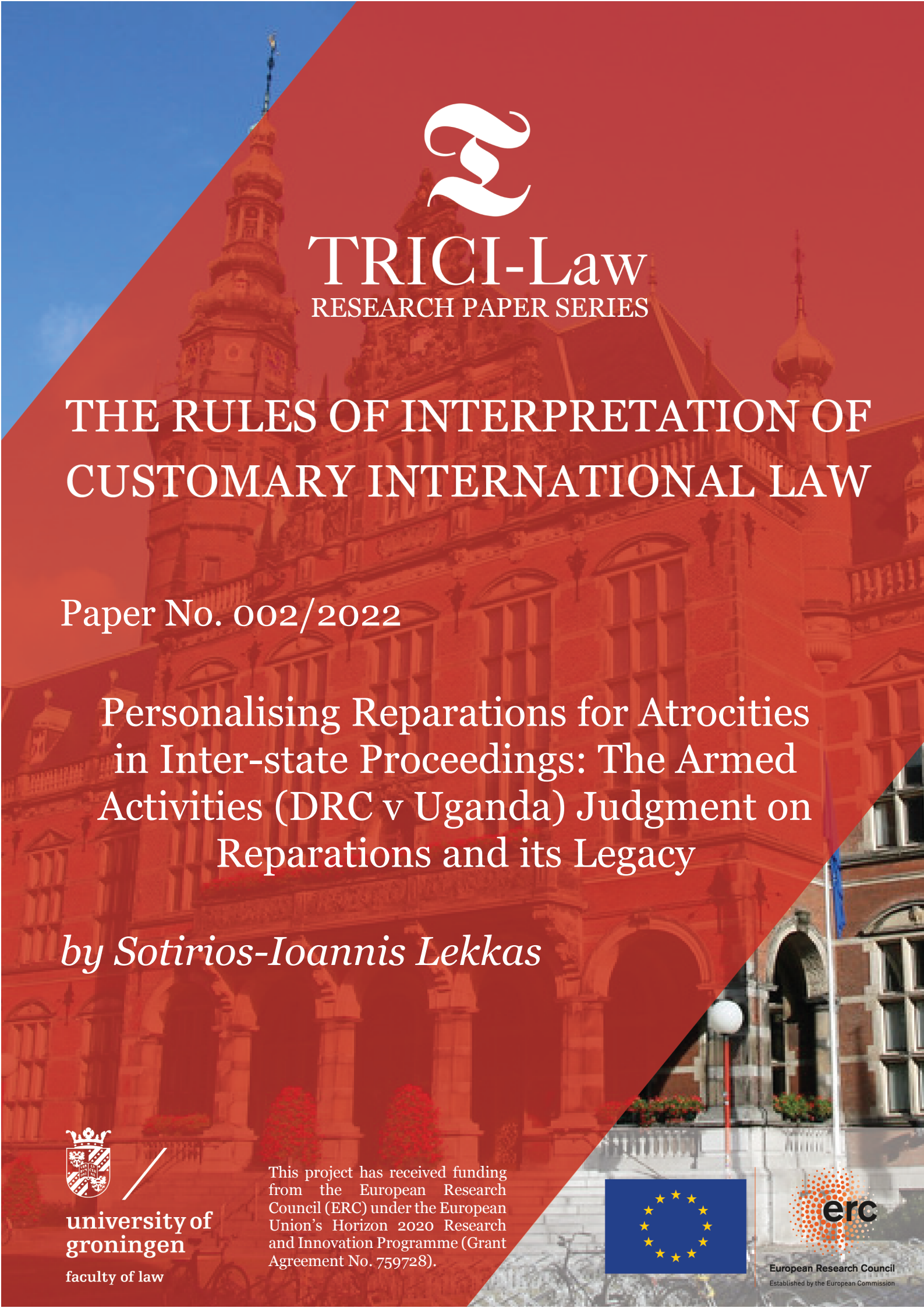

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Personalising Reparations for Atrocities in Inter-state Proceedings: The Armed Activities (DRC v Uganda) Judgment on Reparations and its Legacy

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This project has received funding from the European Research Council (ERC) under the European Union's Horizon 2020 Research and Innovation Programme (Grant Agreement No. 759728).

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Personalising Reparations for Atrocities in Inter-state Proceedings: The *Armed Activities (DRC v Uganda)* Judgment on Reparations and its Legacy

DRAFT

Sotirios-Ioannis Lekkas*

I. Introduction

On 9 February 2022, the International Court of Justice rendered its Judgment on the Reparations Phase of the *Armed Activities (DRC v Uganda)* case.[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.[2] DRC's application against Rwanda failed on grounds of jurisdiction,[3] whereas proceedings against Burundi were discontinued.[4] 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.[5] The Court also found Uganda responsible for breaches of international humanitarian law and international human rights law, and for plundering DRC's natural resources.[6] The Court concluded that Uganda had to make reparation to the DRC for the injury caused by its internationally wrongful acts and

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1 *Armed Activities on the Territory of the Congo (DRC v Uganda)* Reparations 2022 <https://www.icj-cij.org/public/files/case-related/116/116-20220209-JUD-01-00-EN.pdf> ('CO Reparations').

2 *Armed Activities on the Territory of the Congo (DRC v Uganda)* Application Instituting Proceedings ICJ Pleadings 3.

3 *Armed Activities on the Territory of the Congo (New Application: 2002) (DRC v Rwanda)* Jurisdiction and Admissibility [2006] ICJ Rep 6.

4 *Armed Activities on the Territory of the Congo (DRC v Burundi)* Order [2001] ICJ Rep 3.

5 *Armed Activities on the Territory of the Congo (DRC v Uganda)* Merits [2005] ICJ Rep 168 ('CO Merits') [345 (1)].

6 ibid [345 (3) and (4)].

enjoined the parties to enter into negotiations for that purpose.[7] After almost 10 years of sporadic and fruitless discussions, in 2015, the DRC brought back the case to the Court for conclusive resolution.

The recent *CO Reparations* Judgment raises several questions which relate mainly to procedure, but also to substance. First, I will outline the Court's legal findings on causation, their application on the facts of the case, and the allocation of the burden of proof and I will flag up a few legal issues pertaining to causal overdetermination that were left largely unaddressed. Second, I will discuss the general considerations that drove the Court's assessment of evidence relating to the establishment and valuation of damage and draw attention to certain methodological choices that proved divisive amongst its Members. Third, I will attempt to contexualise the Court's findings in this case within its broader jurisprudence relating to an individual right to reparation. Fourth, I will turn to the decision of the Court as to the modalities of payment. As I will try to show, despite the high profile of the case, the temptation to generalise the findings of the Court should be resisted.

II. Complexity, Causation, and Burden of Proof

From a legal perspective, the object of proof in the reparations phase was clear cut. Having already established certain internationally wrongful acts in its Merits Judgment, the Court had to determine in this phase only the injury caused by these acts and, particularly, the damage that is cognisable under international law as compensable.[8] Complications arose because the Merits Judgment did not identify Uganda's internationally wrongful acts with specificity, but rather relied on illustrative incidents to declare that Uganda was responsible for certain categories of internationally wrongful acts.[9] As a result, the reparations proceedings were not limited only to the determination of the form and amount of reparation, strictly speaking. In principle, it also required as an intermediate step the determination that the injury claimed was causally connected to a specific act of Uganda and that this act fell within a category of

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7 ibid [261] and [345 (5) and (6)].

8 CO Merits [260]; more generally, *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* Compensation [2012] ICJ Rep 324 [18]; Pierre D'Argent, *Les réparations de guerre en droit international public* (Bruylant 2002) 564.

9 CO Merits [205] and [237].

internationally wrongful acts laid down in the Merits Judgment.[10] This was an exceptionally difficult task given the complexity of the armed conflict in question. As will be shown, the Court tried to strike a delicate balance between tailoring a viable procedural approach for the allocation of the burden of proof in this particular case and upholding the uniformity of the substantive law on state responsibility. However, in so doing, the Court's reasoning lays itself open to misinterpretations.

From the outset, the Court identified in its Merits Judgment three types of wrongful conduct by Uganda. A first type of wrongful conduct consisted of actions of Uganda's armed forces in Ituri, which Uganda occupied, but also in other areas in which Uganda's armed forces, amongst other armed forces and groups, engaged directly in hostilities.[11] In the latter respect, the Court focused particularly on violence against the civilian population and objects during protracted hostilities between Ugandan and Rwandan forces in Kisangani.[12] A second type of wrongful conduct comprised Uganda's acts with respect to armed groups operating in Eastern DRC, such as the *Mouvement/Armée de libération du Congo* led by Jean-Pierre Bemba Gombo.[13] The third type of wrongful conduct was essentially Uganda's omissions to take measures to ensure public order and safety as an occupying force in Ituri where various armed groups committed atrocities against the civilian population and looted natural resources.[14]

The key question in the reparations phase was whether, and if so how, the differences between the different types of Uganda's wrongful conduct impacted the establishment of causation and the appropriate form of reparation. On the one hand, the DRC argued that all injury arising from the war was causally connected to Uganda's unlawful intervention in Eastern DRC.[15] The DRC proposed that Uganda made reparation for all damage in Ituri and for 45 per cent of the entirety of the injury outside Ituri to account for the participation of

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10 *Armed Activities on the Territory of the Congo (DRC v Uganda)* Merits (Declaration of Judge *ad hoc* Verhoeven) [2005] ICJ Rep 355 [2].

11 CO Merits [153], [207], [211], [219]-[220], [242]-[243], [250].

12 CO Reparations [98].

13 ibid [83]-[84].

14 CO Merits [345 (3) and (4)].

15 CO Reparations [86]-[87].

other actors.[16] On the other hand, Uganda claimed that it was obligated to make reparation only when there was a sufficiently direct and certain causal nexus with the injury claimed. Such test would be fulfilled with respect to the first type of conduct.[17] For the other two types of wrongful conduct, Uganda maintained that compensation would only be due if the DRC could prove that the injury would in fact had been averted had Uganda acted lawfully.[18]

The Court's approach as to the issue of causation and the allocation of burden of proof appeared more like a middle ground between these two competing narratives. The Court held that the status of Ituri as occupied territory had 'a direct bearing on questions of proof and the requisite causal nexus'.[19] 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.[20] For damage 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.[21] 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.[22] As to other claims, the burden of proof remained in principle with the DRC.[23] Whilst the situation of occupation seems to have played a role both in the context of the substantive law of state responsibility and the procedural law of the burden of proof, it is important to point out that the two remain distinct. In the context of the allocation of the burden of proof, the key consideration was which party was in a better position to furnish relevant evidence on account of the circumstances of the case.[24]

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16 ibid [75] and [80].

17 ibid [81].

18 ibid [77] and [81].

19 ibid [78].

20 ibid [78] and [95].

21 ibid [84] and [97].

22 ibid [118].

23 ibid [119].

24 ibid [115]-[117].

From the perspective of the law of state responsibility, the Court's findings with respect to the applicable standard of causation for damages occurring within and without Ituri raise a few questions. As a matter of principle, the Court held that an award of compensation requires a 'sufficiently direct and certain causal nexus between the wrongful act … and the injury suffered … consisting of all damage of any type, material or moral'.[25] It also cautioned that 'the causal nexus required may vary depending on the primary rule violated and the nature and extent of the injury'.[26] In so doing, the Court affirmed 'directness' as the applicable standard of causation, unlike other international courts and tribunals which variable refer to notions like 'proximity' or 'foreseeability', but introduced an element of flexibility akin to these other tests.[27] Along similar lines, the Court exercised restraint in laying down the principles applicable in situations of causal overdetermination. Importantly, 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.[28] It also acknowledged that multiple internationally wrongful acts by different actors can lead to a single injury or multiple distinct injuries.[29]

However, the interpretation and application of these principles in light of the applicable primary rules and the complex character of the acts raised several issues. A first issue related to the Court's finding that the causal nexus requirement was satisfied with respect to all injuries occurring in Ituri, unless it could be established with respect to a particular injury that it was not caused by Uganda's failure to discharge its obligation of vigilance as the occupying power. As Judge Yusuf pointed out, this obligation is one of best efforts. In other words, the occupying power is obligated to take appropriate measures to

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25 ibid [93]; similarly *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua)* Compensation [2018] ICJ Rep 15 [32]; *Diallo* Compensation Judgment (n8) [14].

26 CO Reparations [93]; see also ILC, 'Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries' (2001) II(2) YbILC 31*ff*. ('ARSIWA'), Commentary to 31 [10].

27 EECC, *Final Award—Eritrea's Damages Claims* [2009] XXVI RIAA 512, 529 [39]; EECC, *Final Award—Ethiopia's Damages Claims* [2009] XXVI RIAA 639, 656 [39]; *Lubanga* (Order for Reparations) ICC-01/04-01/06-3129-AnxA, AC (3 March 2015) [59]; *Katanga* (Ordonnance de réparation en vertu de l'article 75 du Statut) ICC-01/04-01/07-3728, TC-II (24 March 2017) [162]; *Al-Mahdi* (Reparations Order) ICC-01/12-01/15-236, TC-VIII (17 August 2017) [44]; see also Vladyslav Lanovoy, 'Causation in the Law of State Responsibility' [2022] BYBIL 47.

28 CO Reparations [94] and [97].

29 ibid [94].

prevent wrongful acts committed by third parties, not to achieve that no wrongful acts are committed at all times and under all circumstances.[30] In the *Bosnia Genocide* case, involving a violation of the obligation to prevent genocide, the Court held that 'such a nexus could be considered established only if the Court were able to conclude…that the genocide at Srebrenica would in fact have been averted if the Respondent had acted in compliance with its legal obligations'.[31] The Court reasoned its departure from this antecedent on the basis that 'the legal régimes and factual circumstances in question are not comparable, given that, unlike the above-mentioned *Genocide* case, the present case concerns a situation of occupation'.[32] There are reasons to doubt that the mere fact of occupation has a decisive bearing on the issue of causation. Arguably, a more important consideration was that the material scope of the obligation of vigilance of the occupying force to ensure public order—and hence, the scope of its responsibility—is evidently broader than the obligation to prevent the specific crime of genocide.[33]

A second, and related, issue is the causal analysis with respect to injuries committed by armed groups which Uganda supported. What is logically and normatively unsatisfactory is the implication that the required causal nexus is established with respect to damages arising from Uganda's mere failure to take appropriate action as an occupying power, whereas it would not be necessarily established where Uganda's armed forces committed or actively supported the physical authors of the injurious act.[34] In this respect, it is important to note that the Merits Judgment found that Uganda

> by the conduct of its armed forces, which … incited ethnic conflict and failed to take measures to put an end to such conflict*;* as well as by its failure, as an occupying

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30 *Armed Activities on the Territory of the Congo (DRC v Uganda)* Reparations (Separate Opinion of Judge Yusuf) 2022 < https://www.icj-cij.org/public/files/case-related/116/116-20220209-JUD-01-02-EN.pdf> [19].

31 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* Merits [2007] ICJ Rep 3 [462].

32 CO Reparations [95].

33 For the general point see: Ilias Plakokefalos, 'Causation in the Law of State Responsibility and the Problem of Overdetermination: In Search of Clarity' (2015) 26 EJIL 471, 478.

34 See, on the general point, Miles Jackson, *Complicity in International Law* (OUP 2015) 131-132; *contra* Olivier Corten and Pierre Klein, 'The Limits of Complicity as a Ground for Responsibility: Lessons Learned from the *Corfu Channel* Case' in Karine Bannelier, Theodore Christakis, and Sarah Heathcote (eds), *The ICJ and the Evolution of International Law* (Routledge 2011) 313, 315.

> Power, to take measures to respect and ensure respect for human rights and international humanitarian law in Ituri district, violated its obligations under international human rights law and international humanitarian law.[35]

Judge ad hoc Verhoeven, appointed by the DRC, emphasised that this point 'cannot be interpreted as relieving the Respondent of any duty of vigilance in areas where troops [were] present but which [were] not "occupied" within the meaning of the *jus in bello*'.[36] Similarly, in his individual opinion to the Merits Judgment, Judge ad hoc Koroma, appointed by Uganda, noted '[i]t is strange that Uganda, which had its military presence elsewhere in the DRC, should be accused of such a charge only in Ituri'.[37] This goes to show that, at the time of the Merits Judgment, there was no doubt that such an obligation was independent from the situation of military occupation as a matter of law. Indeed, in *Nicaragua*, the Court found the US responsible for encouraging violations of international humanitarian law by the *contras* and explicitly ordered the US to make reparation for injury caused by this violation, even though there was obviously no occupation.[38] Nonetheless, the Reparations Judgment proceeds from the premise that both duties were applicable only with respect to Ituri as a matter of fact, presumably because the Court's *motifs* in the Merits Judgment only refer to incidents occurring in Ituri.[39] Undeniably, this finding suggests a much more direct causal link between Uganda and the damages caused in Ituri by the various armed factions than its status as the occupying power.

Third, the Court did not address whether and to what extent the different types of Uganda's wrongful conduct had a bearing on the quantum of compensation. The Court only raised this issue with respect to injuries caused in the course of hostilities between the Ugandan and Rwandan armies in Kisangani and limited itself to enumerating a range of possibilities. According to the Court, 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

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35 CO Merits [345 (3)] (emphasis added).

36 CO Merits (Verhoeven) (n10) [4].

37 *Armed Activities on the Territory of the Congo (DRC v Uganda)* Merits (Dissenting Opinion of Judge *ad hoc* Kateka) [2005] ICJ Rep 361 [48].

38 *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 16 [255].

39 CO Reparations [214]; CO Merits [209].

suffered' or 'responsibility for part of such injury should instead be allocated among those actors'.[40] The Court gave no further guidance as to which considerations govern the choice between the two options in each case. In the event, the Court found that 'each state is responsible for damage in Kisangani that was caused by its own armed forces acting independently', even though it was unable to apportion to Uganda a specific share of the injury.[41] However, the open-ended reference of the Court to 'actors' could also imply that these considerations are applicable not only in the case of plurality of responsible states. They also could apply conceivably when the internationally wrongful act of a state is a concurrent cause of damage alongside the conduct of private actors. This is possibly relevant with regards to wrongful acts consisting of failure to prevent violations by third parties and support to armed groups. These types of conduct do not constitute necessarily 'cumulative' causes of injury in the sense that they are sufficient by themselves to bring about damage.[42] Rather, such wrongful acts can also be construed as 'complementary' (ie insufficient alone) causes of damage.[43] This distinction can imply whether a single or multiple injuries are involved.[44] Alternatively, it can also be relevant as to whether a state would be responsible for the entirety or for a portion of the damage.[45]

What emerges from this short exposition is that considerations of judicial economy called for a certain degree of selectivity and conciseness in the treatment of the legal issues relating to the responsibility arising from the complex wrongful acts in question. Undeniably, the most pressing issue for the Court was the availability of evidence and, most importantly, who would bear the consequences of gaps in the evidentiary record given the intricacies of the case. In this respect, the Court's well-reasoned decision clarified the circumstances under

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40 CO Reparations [98].

41 ibid [221] and [253]; for the contrary view see *Oil Platforms (Islamic Republic of Iran v United States of America)* Merits (Separate Opinion of Judge Simma) [2003] ICJ Rep 324 [76].

42 For the nomenclature see Brigitte Bollecker-Stern, *La préjudice dans la théorie de la responsabilité internationale* (Pedone 1973) 267*ff*..

43 see eg John E Noyes and Brian D Smith, 'State Responsibility and the Principle of Joint and Several Responsibility' (1988) 13 YJIL 225, 230 (as to obligations to prevent).

44 cf CO Reparations [94].

45 eg Pierre D'Argent, 'Reparation, Cessation, Assurances and Guarantees of Non-Repetition' in André Nollkaemper and Ilias Plakokefalos (eds), *Principles of Shared Responsibility: An Appraisal of the State of the Art* (CUP 2015) 208, 224; for an illustrative example from domestic courts see Supreme Court of the Netherlands, *Mothers of Srebrenica Association and ors v The Netherlands*, ECLI:NL:HR:2019:1223, Judgment (19 July 2019); *contra* Plakokefalos (n) 485; André Nollkaemper and ors, 'Guiding Principles on Shared Responsibility in International Law' (2020) 31 EJIL 15, 53-59.

which the burden of proof can be allocated more equitably. That said, the analysis of the Court with respect to evidentiary procedure, 'seminal' as it was,[46] was partly overshadowed by its methodology for the establishment and valuation of damage.[47] The section that follows focuses on the application and assessment of this methodology.

III. Standard of Proof and the Establishment and Valuation of Damage

Apart from complexity, another vexing problem was the identification and valuation of damage caused during the armed conflict. The crux of the contention centred around the deficiencies of the evidentiary record that consisted mainly of secondary sources (ie reports by inter- and non-governmental organisations, expert reports) and a registry of (largely unverified and unverifiable) claims.[48] This allowed the emergence of two irreconcilable narratives between the parties. On the one hand, Uganda insisted that any damage needed to be sufficiently documented for it to be compensable, arguing that the DRC had time at its disposal to compile evidence.[49] On the other hand, the DRC pointed to the uncontroversial character of the findings of the Court in its Merits Judgment, to the impossibility of collecting contemporaneous evidence due to the devastation caused by the armed conflict, and to the subsequent destruction of evidence on account of the lapse of time since the conflict.[50] To its credit, the Court tried to bridge this gap already during the pre-hearing phase of the reparations proceedings. After the first round of written pleadings, the Court submitted specific questions to the parties relating to the extent and valuation of damage.[51] Also, after receiving and evaluating their responses, it appointed four experts to assist it with the same issues.[52] Yet, despite these efforts, the evidentiary record of the case remained wanting in several respects, as it transpires from the Court's decision.[53]

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46 Ori Pomson, 'The ICJ's Armed Activities Reparations Judgment: A Brave New World?' (*Articles of War*, 4 February 2022) <https://lieber.westpoint.edu/icj-armed-activities-reparations-judgment/>.

47 Along similar lines, CO Reparations (Yusuf) (n30) [9].

48 CO Reparations [125], [138], [147].

49 ibid [113].

50 ibid [112].

51 ibid [17].

52 *Armed Activities on the Territory of the Congo (DRC v Uganda)* Order [2020] ICJ Rep 264.

53 CO Reparations [125].

In its final decision, the Court tried to remedy the evidentiary gaps by attenuating the applicable standard of proof. Specifically, the Court found 'the standard of proof required to establish responsibility is higher than in the present phase on reparation, which calls for some flexibility'.[54] In support of this finding, the Court took note of the practice of the Ethiopia-Eritrea Claims Commission ('EECC') and the International Criminal Court ('ICC') as well as the fact 'a large amount of evidence has been destroyed or rendered inaccessible over the years since the armed conflict'.[55] However, curiously, the Court did not indicate what the applicable standard of proof actually was.[56] In fact, the only indication as to its methodology with respect to the establishment and valuation of damage was the following:

> 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. Such an approach may be called for where the evidence leaves no doubt that an internationally wrongful act has caused a substantiated injury, but does not allow a precise evaluation of the extent or scale of such injury.[57]

In the end, the Court decided to award a global sum of US$325,000,000 broken down into three general heads (damage to persons – US$225,000,000; to property – US$40,000,000; and to natural resources - US$60,000,000).[58] But, as many of the Judges remarked in their individual opinions, it does not transpire from the reasoning what were the specific findings as to the extent and value of damage that led to these numbers.[59]

First, the uncertainty surrounding the applicable standard of proof had an obvious impact on the rejection of entire heads of damage. For instance, with respect to the

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54 CO Reparations [124].

55 ibid [123] and [124]; eg EECC Final Award (Eritrea's Damages) (n27) [36]; *Katanga* TCJ Reparations (n27) [38].

56 *Armed Activities on the Territory of the Congo (DRC v Uganda)* Reparations (Separate Opinion of Judge Robinson) 2022 <https://www.icj-cij.org/public/files/case-related/116/116-20220209-JUD-01-03-EN.pdf> [41].

57 CO Reparations [106].

58 ibid [405]

59 eg *Armed Activities on the Territory of the Congo (DRC v Uganda)* Reparations (Declaration of Judge Tomka) 2022 <https://www.icj-cij.org/public/files/case-related/116/116-20220209-JUD-01-01-EN.pdf> [9]; CO Reparations (Yusuf) (n30) [22]-[36]; CO Reparations (Robinson) (n56) [2]-[6]; *Armed Activities on the Territory of the Congo (DRC v Uganda)* Reparations (Declaration of Judge Salam) 2022 < https://www.icj-cij.org/public/files/case-related/116/116-20220209-JUD-01-04-EN.pdf> [18].

establishment of damage to civilian persons and property, the Court was at many points unable to lay down even approximately the extent of the damage but nonetheless found these damages compensable.[60] At the same time, it dismissed DRC's claims relating to killed soldiers and damage to state civilian and military property in their entirety for lack of evidence, even though they were largely substantiated by the same second-hand sources.[61] This rather minor finding in the Judgment illustrates best, in my view, the disparities in the application of the evidentiary standard. In essence, the finding implies that Uganda unlawfully occupied an area the size of Lithuania or Sri Lanka and unlawfully supported armed groups operating in an area the size of Continental France or Thailand without causing the death of a single soldier or damage to a single piece of state-owned military or civilian infrastructure.[62] One might wonder whether the assessment of damages would have been significantly different, had the Court found on the merits that Uganda's activities were justified in terms of *ius ad bellum*. The same criticism can also be levelled against the Court's wholesale rejection of DRC's claim of macroeconomic damage.[63] That said, the discrepancy can be justified on both conceptual and practical reasons. From a conceptual perspective, as will be explained in more detail in subsequent sections, the Court is aware that, with respect to claims relating to international human rights and humanitarian law, the DRC is seeking reparation for injuries sustained both in fact and in law by individuals not the state (at least not exclusively).[64] From a more practical viewpoint, whilst DRC's inability to produce evidence with respect to damage to individuals was justified due to the circumstances of the case, it should have been able to adduce at least some concrete evidence with respect to damage to its own personnel and property (which it did not).[65]

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60 eg CO Reparations [181], [193], [206], [257].

61 ibid [165], [255], and [256].

62 On similar comparisons see *Armed Activities on the Territory of the Congo (DRC v Uganda)* Merits (Separate Opinion of Judge Simma) [2005] ICJ Rep 334 [2].

63 CO Reparations [384]; CO Reparations (Robinson) (n56) [46]; but see EECC Final Award (Ethiopia's Damages) [461], [465], and [469].

64 CO Reparations [102]; also *Diallo* Compensation (n8) [57]; *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* (Compensation) (Declaration of Judge Greenwood) [2012] ICJ Rep 391 [1]; Giorgio Gaja, 'Is a State Specially Affected When its Nationals' Human Rights are Infringed?' in LC Vohrah et al (eds), *Man's Inhumanity to Man—Essays in Honour of Antonio Cassese* (Kluwer 2003) 373, 379.

65 CO Reparations [165], [255], and [256].

But apart from this point, the Court's open-ended findings with respect to the standard of proof and the applicable methodology pervaded all aspects of the establishment and valuation of damage, save perhaps those relating to damage to natural resources.[66] One notable feature of the decision is that the Court did not lay down the number of affected persons or property on the basis of which it calculated the amount awarded. At points, the Court established 'the range of possibilities indicated by the evidence'.[67] So, for instance, it identified specific–even if at times wide—margins as to lives lost (10,000 to 15,000), displaced persons (100,000 to 500,000), or child soldiers recruited (1,800 to 2,500).[68] As to other categories of claims, such as injuries to persons or sexual violence, the Court declared that it was impossible to determine, even approximately, the extent of damage.[69] At the same time, discrepancies can be observed with respect to the Court's approach on the valuation of damage. As to some heads of damage such as sexual violence or damage to property (but not, for instance, for recruitment of child soldiers), the Court took note of the findings of the Trial Chambers of the International Criminal Court in cases relating to the DRC.[70] As to other heads of damage, such as deaths, injuries to persons, displacements, the Court did not lay down any monetary value but limited itself to finding the evidentiary record unconvincing in this respect.[71] However, as the Court admitted these heads also entail non-material and moral damage, which by its 'nature…means that specific evidence cannot be required'.[72] Besides, even if a *de novo* evaluation of each head of damage was probably impossible, there are relevant pronouncements of international courts and tribunals, including of the ICJ, which lend themselves at least to comparison, if not transfer.[73]

At any rate, the 'global sums' approach of the Court in this case raises a few questions of consistency. On the one hand, as the Court very clearly acknowledged, it was bound to

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66 ibid [277].

67 ibid [106].

68 ibid [162], [204], [223].

69 ibid [181] and [193].

70 ibid [192], [205] and [249].

71 ibid [163]-[164], [180], and [224].

72 *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* Compensation (Declaration of Judge Greenwood) [2012] ICJ Rep 391 [7]; see CO Reparations [164].

73 *Diallo* (Greenwood) (n72) [11].

decide 'within the range of possibilities indicated by the evidence'.[74] Also, recourse to equitable considerations 'should not be used to make good a claimant's case by being substituted for evidence which would have been produced if it actually existed: equity is not alchemy'.[75] At the same time, in any case involving reparations, an international court or tribunal '*must* determine, insofar as possible, the appropriate compensation for each violation'.[76] This entails an 'obligation to determine appropriate compensation, even if the process involves estimation or guesswork within the range of possibilities indicated by the evidence'.[77] As a result, the application of a lower standard of proof should have enabled the Court to reach more conclusive figures.[78] As the Court itself admitted, it could exercise moderation in the establishment and evaluation of damage or reduce the overall amount of compensation due, once reached, as a trade-off for relying on such 'estimation or guesswork'.[79]

That said, the Court's iteration of the 'global sums' approach could be justified in moral or normative terms. Attaching a price tag to atrocity could create potentially perverse incentives instead of operating as a counter-incentive. However, 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 favour of the *dispositif*.[80] But, even from a more conceptual or normative perspective, it is not easily defensible. More importantly, such vague approach to calculation of damages makes any personalisation of losses, still more actual reparation to individuals, practically impossible.[81] The next section takes a closer look on this issue in turn.

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74 CO Reparation [106].

75 *Diallo* (Greenwood) (n72) [5].

76 EECC Final Award (Eritrea's Damages) [37] (emphasis added).

77 CO Reparations (Robinson) (n56) [8] citing EECC Final Award (Eritrea's Damages) 508.

78 CO Reparations (Robinson) (n56) [41].

79 ibid [8]; CO Reparations [164] (*in fine*) citing EECC Final Award (Ethiopia's Damages) [61] and [64].

80 see eg CO Reparations (Tomka) [7]; CO Reparations (Yusuf) [42]; CO Reparations (Robinson) [47]; CO Reparations (Salam) [18].

81 *Armed Activities on the Territory of the Congo (DRC v Uganda)* Reparations (Opinion dissident du M. le Juge ad hoc Daudet) 2022 < https://www.icj-cij.org/public/files/case-related/116/116-20220209-JUD-01-06-FR.pdf> [27]; 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!*, 14

IV. Individual Rights to Reparation under General International Law

The CO Reparations Judgment should also be contextualised within broader developments concerning the position of individuals in the law of state responsibility. It is trite that the traditional law of state responsibility views the state as the sole right-holder under international law that claims reparation for any injury caused by the violation including for any harm suffered by its nationals.[82] In this configuration, the individual is cynically reduced to 'a convenient scale for the calculation of the reparation due to the State'.[83] It is undeniable that this configuration has changed to some extent, albeit ambiguities as to the content of rights of individuals in international law and their implementation through the traditional mechanisms of state responsibility persist.

To start, it is no longer in doubt that individuals can have rights under international law.[84] However, it is intensely debated whether some of the rules involved in the context of the CO case entail rights of individuals under international law. Indeed, according to a widely shared view, individuals have certain rights or legally protected interests under international humanitarian law entailing a substantive entitlement to reparation under international law.[85] The silence of Article 3 of Hague Convention IV and Article 91 AP-I as to the beneficiaries of the states' obligation to pay compensation for violations of international humanitarian law has been interpreted as affirming this view.[86] Moreover, the antecedent of the UN Compensation Commission suggests that reparation provided by a state may also accrue to individuals in cases

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February 2022) <https://www.ejiltalk.org/the-international-court-of-justices-2022-reparations-judgment-in-drc-v-uganda-a-new-methodology-for-human-rights-in-inter-state-disputes/>.

82 eg *Mavrommatis Palestine Concessions (Greece v United Kingdom)* [1924] PCIJ Ser A No 2, 11-12; also *Nottebohm (Liechtenstein v Guatemala)* [1955] ICJ Rep 4, 24.

83 *Factory at Chorzów (Germany v Poland)* (Claim for Indemnity) (Merits) [1928] Ser A No 17, 28.

84 eg *Jadhav (India v Pakistan)* [2019] ICJ Rep 418 [115].

85 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law', annexed to UNGA Res 60/147 (21 March 2006) ('BPRV') [15]; ILA, 'Draft Declaration of International Law Principles on Reparation for Victims of Armed Conflict (Substantive Issues)—International Law Association—International Law Committee for Victims of Armed Conflict—Prepared by Professor Reiner Hoffmann' (2010) 74 ILARC 295, 299; Theodor Meron, 'The Humanization of Humanitarian Law' (2000) 94 AJIL 239, 251-253; *contra* eg René Provost, *International Human Rights and Humanitarian Law* (CUP 2002) 27-34; Kate Parlett, *The Individual in the International Legal System* (CUP 2011) 225.

86 eg *Jurisdictional Immunities of the State (Germany v Italy; Greece intervening)* (Dissenting Opinion of Judge Yusuf) [2012] ICJ Rep 291 [13]-[14]; Frits Kalshoven, 'State Responsibility for Warlike Acts of the Armed Force' (1991) 40 ICLQ 827, 833 and 850; Christopher Greenwood, 'International Humanitarian Law (Laws of War)' in F Kalshoven (ed), *The Centennial of the First International Peace Conference* (Nijhoff 2000) 161, 250; BPRV, preamble [1].

of violations of the *ius ad bellum*.[87] On the one hand, in the absence of special rules, the implementation of the international responsibility of the state for the violations under discussion remains primarily an inter-state affair.[88] On the other hand, as a matter of principle, 'it is scarcely necessary to point out that the capacity to possess civil rights does not necessarily imply the capacity to exercise those rights oneself.'[89] As the Court has enunciated, 'the duty to make reparation is a rule that exists independently of those rules which concern the means by which it is to be effected'.[90]

The existence of individual rights under international law should also entail in principle that the obligation of reparation should 'accrue' to individuals under the general law of international responsibility.[91] Notably, in *Wall*, the Court found 'that Israel also has an obligation to compensate, in accordance with the applicable rules of international law, all natural or legal persons having suffered any form of material damage as a result of the wall's construction.'[92] However, as one commentator has suggested, 'Israel's duties towards individuals [might] have been affirmed by the Court only to circumvent the difficult question of Palestinian statehood that would have arisen within the framework of diplomatic protection'.[93] In this latter respect, according to the International Law Commission, even when the secondary obligation of reparation exists towards a state, reparation does not accrue necessarily or exclusively to that state.[94] The ILC notes that when a state exercises diplomatic

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87 eg Andreas Fischer-Lescano, 'Subjektivierung völkerrechtlicher Sekundärregeln' (2007) 45 AdV 299, 330-331; A Gattini, 'The UN Compensation Commission: Old Rules, New Procedures on War Reparations' (2002) 13 EJIL 161, 170-171; see eg Governing Council of the UNCC, 'Criteria for Expedited Process of Urgent Claims' (2 August 1991) S/AC.26/1991/1; more generally: Yoram Dinstein, *War, Aggression and Self-Defence* (5th edn CUP 2011) 111 ('the obligation to indemnify the victims of aggression'.

88 D'Argent (n8) 580-581.

89 *Appeal from a Judgment of the Hungaro/Czecoslovak Mixed Arbitral Tribunal (The Peter Pázmány University) (Czechoslovakia v Hungary)* PCIJ Ser A/B No 61, 231

90 *Jurisdictional Immunities of the State (Germany v Italy; Greece intervening)* [2012] ICJ Rep 99, 140[94].

91 cf Art 33(2) ARSIWA.

92 *Legal Consequences of the Construction of a Wall on the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136 [153].

93 Pierre D'Argent, 'Compliance, Cessation, Reparation and Restitution in the Wall Advisory Opinion' in P-M Dupuy and ors (eds), *Common Values in International Law—Essays in Honour of Christian Tomuschat* (Engel 2006) 463, 475.

94 Commentary to Art 33 ARSIWA [3].

protection over its nationals, it 'do[es] so in its own right or that of its national—or both'.[95] As a result, reparation for the injury suffered by the individual should be made for the benefit of the injured individual.[96] The Court essentially alludes to these antecedents in the CO Reparations Judgment when it states 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'.[97]

What remains an open question is how reparation can benefit the injured individuals as a practical matter. In this respect, the ICJ in an *obiter dictum* did not accept 'a rule requiring the payment of full compensation to each and every individual victim as a rule accepted by the international community of States as a whole as one from which no derogation is permitted'.[98] Also, the ICJ in the same case has indicated that if the state uses these funds to rebuild its economy or infrastructure instead of distributing them to the individual victims, these individuals do not have a claim against the state responsible for the internationally wrongful act.[99] Importantly, the Court left open the possibility that individual victims may have a claim against the receiving state. Notably, the European Court of Human Rights has found in two cases involving multiple violations of human rights that the applicant government exercising diplomatic protection has an international obligation to distribute the amount awarded to individual victims.[100] In the CO Reparations Judgment, the Court stopped short from recognising this development. Rather, it 't[ook] full cognizance of, and welcome[d], the undertaking given by the Agent of the DRC during the oral proceedings regarding the fund that

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95 ILC, 'Draft Articles on Diplomatic Protection with commentaries' (2006) II(2) YbILC 26 (DADP), Commentary to Art 1 [5].

96 *Diallo* Compensation (n8) [57]; Art 19(c) DADP; Giorgio Gaja, 'Quel préjudice pour un état qui exerce la protection diplomatique?' in D Alland and ors (eds), Unity and Diversity—Essays in Honour of Professor Pierre-Marie Dupuy (Brill 2014) 487, 489; Alain Pellet, 'The Second Death of Euripide Mavrommatis? Notes on the International Law Commission's Draft Articles on Diplomatic Protection' (2008) 7 LPICT 33, 56-57.

97 CO Reparations [408].

98 *Jurisdictional Immunities* (n90) [94]; similarly, Andrea Gattini, *Le riparazioni di guerra nel diritto internazionale* (CEDAM 2003) 668; Shuichi Furuya, 'Waiver or Limitation of Possible Reparation Claims of Victims' (2018) 78 ZaöRV 591, 594.

99 *Jurisdictional Immunities* (n90) [102].

100 *Cyprus v Turkey* (Just Satisfaction) [GC] App no 25781/94 (ECtHR, 12 May 2014) [58] citing *Diallo* Compensations (n) 344[57]; *Georgia v Russia* (Just Satisfaction) [GC] App no 13255/07 (ECtHR, 31 January 2019) [77]-[79]; see also Governing Council of the UNCC, 'Distribution of Payments and Transparency' (24 March 1994) S/AC.26/Dec.18.

has been established by the Government of the DRC, according to which the compensation to be paid by Uganda will be fairly and effectively distributed to victims of the harm'.[101]

V. Economic Conditions and Modalities of Payment

One issue that arose in the proceedings related to the economic implications for Uganda of an award in the amount claimed by the DRC which totalled over 11 billion US dollars.[102] Uganda's economic situation as a developing state brought to the fore the issue whether a state's capacity to pay without compromising its ability to meet its people's basic needs is a valid consideration in the assessment of damages.[103] Whilst the Court explicitly denied to take this issue into account at any stage of its analysis, the CO Reparations Judgment introduces a certain degree of novelty with regards to the modalities of payment.[104]

In particular, the Court ordered that the total sum will be paid in five annual instalments of US$65,000,000 from 2022 to 2026.[105] The Court provided no reasons for this finding, whereas there is no antecedent for such a modality in the decisions of the ICJ or its predecessor institution, the Permanent Court of International Justice. It is true that, back in 1928, the PCIJ stated that 'it may well determine to whom the payment shall be made, in what place and at what moment; in a lump sum or maybe by instalments'.[106] In the same Judgment, the Court pointed out that '[this] is…a question of applying to a particular case the general rules regarding payment'.[107] Yet, ILC's codification does not include any particular guidance as to when instalments can or must be ordered. The practice of other international courts and tribunals can also be instructive as to the considerations that underlie such a finding. In *Al-Mahdi*, a Trial Chamber of the ICC decided that the indigence of the accused has no bearing on the liability to make reparation, but rather can be taken into account in enforcing a reparations order 'by affording an option to make reasonable payments in

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101 CO Reparations [408].

102 See Desierto (n).

103 See, eg, Martins Paparinskis, 'A Case Against Crippling Compensation in International Law of State Responsibility' (2020) 83 MLR 1246*ff.*

104 CO Reparations [101] and [407].

105 ibid [406].

106 *Factory at Chorzów* (n83) 61.

107 ibid.

instalments'.[108] Along these lines, it is possible to argue that Uganda's economic ability to pay the award had a limited and implicit impact on the issue of payment.

The provision for payment of the total sum in annual instalments was not, however, the only novelty of the decision. What was truly unique was the Court's finding that 'post-judgment interest at an annual rate of 6 per cent on each instalment will accrue on any overdue amount from the day which follows the day on which the instalment was due'.[109] Indeed, this author has been unable to find a case in which a decision on payment by instalments was not accompanied by an award of interest incremented on the balance still due.[110] As Judge Tomka observed '[t]his decision…does not take into account that, with the passage of time, the real value of the compensation awarded and still remaining to be paid in instalments, will diminish…by up to US$39,000,000'.[111] In this respect, it is somewhat odd that the economic capacities of the individual victims had no bearing on the findings of the Court.

VI. Conclusion

The *Armed Activities (DRC v Uganda)* case exposed and tested the practical and logistical restrictions that the ICJ faces as an institution with limited resources, notwithstanding its unparalleled standing within the legal profession. The ICJ resorted to a nebulous 'global sums' approach which left 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. Along similar lines, the Court's findings with respect to payment call for further reflection upon this understudied aspect of the law of international responsibility.

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108 *Al-Mahdi* (n27) [114].

109 CO Reparations [406].

110 eg *Velásquez Rodríguez Case (Compensatory Damages)* Ser C No 7 (IACtHR, 21 July 1989) [57]; also Commentary to Art 38 ARSIWA [5].

111 CO Reparations (Tomka) [10].