

ZOOM IN

The Question:

The ICJ's first determination of war reparations: Practical challenges and legal solutions

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On 9 February 2022, the International Court of Justice ('ICJ' or 'the Court') adopted the judgment that put an end to the *Armed Activities on the Territory of the Congo* case. The proceedings between the Democratic Republic of the Congo and Uganda had been instituted more than 20 years before. The 2022 decision is very important for many reasons. Among them, it is one of the rare decisions awarding reparations adopted by the Court.¹ Most of the time, contentious proceedings before the Court do not go beyond the establishment of the breach (or respect) of primary international law rules. In addition, that decision is the very first ruling of the Court that establishes the amount of reparations relating to international crimes committed on a very large scale and characterized by extreme cruelty. The decision of the Court has a powerful symbolic value: it adds the award of compensation to the previous judicial establishment of responsibility. Last but not least, the Court's pronouncement complements, from the standpoint of interstate litigation, a growing case law concerning the determination of reparations mainly adopted in the framework of international criminal justice.

Despite some early reactions according to which the decision was regarded as unfair, Uganda has timely complied with the reparation judgment. The first instalment of 65 million USD – of a total of 325 million

¹ For previous cases in which the ICJ had established the type and amount of reparation due, relating however to isolated breaches, see the *Corfu Channel case (United Kingdom v Albania)* ICJ Rep [1949] 244; the case of *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* ICJ Rep [2012] 324; and case concerning *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua)* ICJ Rep [2018] 15.



USD – has been paid by the respondent in September 2022, showing after all the acceptance of the balanced decision of the Court.

Indeed, the determination of the damages suffered by the RDC proved to be a challenging task. The violations had been committed many years before; the gathering of evidence was therefore extremely difficult; violations had been committed on a widespread scale which made the search for victims and witnesses a laborious task, without forgetting that the eastern part of the RDC was hardly accessible. Thus, the request of the RDC to be awarded 11 billion USD had to be treated with caution and flexibility at the same time. The final award of the Court (325 million USD) amounts to less than 3% of that sum.

On the one hand, it was undoubtful that Uganda had committed numerous breaches of the prohibition of the use of force, of international humanitarian law and human rights law. They had been the object of the 2005 judgment on the merits of the case. On the other hand, to establish the exact damage that was suffered due to those breaches proved almost impossible because of the lack of evidence. The Court had to evaluate the *contentious* extent of the damage that the crimes had *certainly* caused in face of very little proof.

Predictably, the reparation decision raised criticism both inside the Court and among commentators. The main point of contention was the quantification of damage. A number of judges, not only those who had dissented with the decision, disagreed with the reasoning and the method used by the majority to determine the amounts of compensation. International law commentators raised similar concern.

The object of controversy were the legal solutions adopted by the Court to face the practical challenges of the determination of war reparations. Among such legal solutions: the Court accepted the possibility to use estimates of damages and award global sums of compensation; the decision relied on a single (simplified?) notion of causation; the precise amount of compensation was calculated by applying equitable principles; the poor evidence provided by the RDC was complemented by the work of independent *ex curia* experts; the possibility that ‘full reparation’ – to use the wording of the International Law Commission Articles on State Responsibility (Article 34) – might have a serious impact on the financial capacity of the respondent was (at least) taken into account; the Court took the initiative to spread the total amount of reparations in annual instalments, arguably, to ensure the enforcement of the judgment; the



possibility to award forms of satisfaction that could have been more appropriate to address moral damages were ruled out.

Against this background, QIL asked four international legal scholars to inquire the main legal solutions offered by the Court in the *Congo v Uganda* reparations judgment with respect to some of the mentioned practical challenges. Alice Ollino addressed the notion of causation and its role in the determination of the compensation due by Uganda. Alessandro Bufalini investigated the role that equity may play in war reparations. The possibility that war reparations constitute a burden for the respondent State was explored in his contribution by Bernardo Mageste. The role of experts in reparation cases is the object of the inquiry carried out by Lucas Lima.