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The International Court of Justice and the Question of Reparations

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The Peace Palace, Home of the International Court of Justice

By Carla Ferstman

Director, REDRESS

On 1 July 2015, the International Court of Justice (ICJ) [decided to resume the proceedings in the case of *Armed Activities on the Territory of the Congo \(Democratic Republic of the Congo v. Uganda\)*](#), with regard to the question of reparations. The case concerns Uganda’s role in the protracted and devastating conflict in eastern Democratic Republic of Congo (DRC), which has caused unimaginable suffering to the civilian population.

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In its [December 2005 decision on the merits](#), the ICJ found in the DRC's favour, holding that Uganda had violated the principles of non-use of force and non-intervention, as well as its obligations under international human rights law, international humanitarian law, and the other obligations incumbent upon it under international law. In particular, it held that Uganda's responsibility was engaged in respect of the wrongful acts of the Ugandan military as well as for any lack of vigilance in preventing violations of human rights and international humanitarian law by other actors present in the territory that Uganda occupied, including by rebel groups acting on their own account. This responsibility was engaged regardless of whether Ugandan military personnel acted contrary to the instructions they were given or exceeded their authority.

In relation to a counter-claim brought by Uganda, the ICJ rejected Uganda's contention relating to the DRC's use of force, but determined that the DRC had breached the 1961 Vienna Convention on Diplomatic Relations in a variety of ways, including when its military attacked the Ugandan Embassy in Kinshasa and maltreated Ugandan diplomats and others on the embassy premises and the international airport.

The Court recognised the obligation on both parties to make reparation for the internationally wrongful acts for which they had been found responsible, given that those acts resulted in injury to the states and to persons on their territory. The Court decided that, failing agreement between the parties, it would settle the question of reparation due to each of them,

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and reserved for that purpose the subsequent procedure in the case.

In the ensuing decade there have been several negotiations to settle the question of reparations; however these did not result in any agreement between the parties. This has now led the DRC to revert to the ICJ to decide the matter. Both parties now have until 6 January 2016 to file their submissions on the reparations which they consider to be owed to them by the other party.

This is an important development for a variety of reasons.

First, it is a rare occasion for the ICJ to determine reparations owed to the parties. Usually, aside from setting out general principles, the specifics are resolved between the parties at the end of the merits proceedings. It is only very rarely that the parties fail to agree the quantum and quality of reparations on their own. This laissez-faire approach has meant that the ICJ's jurisprudence on quantum and quality of reparations is limited, which in many ways mirrors the limited and haphazard jurisprudence of other national and international courts and related bodies in this area. This case thus affords an important opportunity to the ICJ to provide guidance on what constitutes adequate reparations for wide-scale violations of human rights and humanitarian law.

The ICJ found a wide range of violations affecting masses of victims. Given the scale of the harm and the large number of victims, determining what is appropriate in the circumstances of the case will be a challenge.

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Many courts, claims commissions, and other bodies have struggled, and arguably many have failed, in the task of determining adequate reparations in the context of massive violations. Presumably, as it has done in several other cases,^[1] the ICJ will ground its approach to reparations in that articulated in the International Law Commission's *Articles on the Responsibility of States for Internationally Wrongful Acts*, which require States to make full reparation for the injury caused by their internationally wrongful acts.^[2] This approach stems from the jurisprudence of the Permanent Court of International Justice, the court preceding the ICJ, which determined that reparation must, so far as possible, wipe out all the consequences of the illegal act and re-establish the situation that would, in all probability, have existed if the act had not been committed.^[3]

But, what might "full" reparations look like in respect of the acts for which Uganda's responsibility has been engaged? The merits judgment makes clear that Uganda is responsible both for its acts and omissions, which casts the net of responsibility appropriately wide. However, the resulting reparations may well depend on the scale of the acts for which Uganda is directly responsible and for which the causal link to injury is clearly proved (as opposed to those acts that it failed to prevent). If the ICJ follows the approach it took in the *Bosnia Genocide Case*, it may well frame reparations for the failure to prevent in decidedly narrow terms. In that case, the ICJ awarded satisfaction but struggled to apportion causation to omissions, failing to order compensation or other forms of reparation. It

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held: “*Since the Court cannot therefore regard as proven a causal nexus between the Respondent’s violation of its obligation of prevention and the damage resulting from the genocide at Srebrenica, financial compensation is not the appropriate form of reparation for the breach of the obligation to prevent genocide*” [para. 462].

Second, it will be interesting to see whether, and if so how, the ICJ takes into account the ongoing reparations proceedings in relation to the first two convictions at the International Criminal Court (ICC) – *Lubanga* and *Katanga*. Both of these two cases concern crimes that took place in the district of Ituri, the same part of the DRC where the ICJ determined that Uganda’s international responsibility was engaged. While the ICC cases concern the individual responsibility of DRC rebel leaders and their concomitant obligations to afford reparations for injuries resulting from their crimes, this will be the first time that both courts (the ICJ and the ICC) may have the opportunity to take into account each others’ processes in determining their respective approaches to reparations. It is possible to argue that these two courts’ processes are entirely distinct, given that one focuses on state responsibility and the other on the responsibility of individual actors. However, at the least, it may be necessary for whichever Court determines last to take into account whether individuals have already benefited under a separate process.

Third, in his [declaration Judge Cançado Trindade](#) has taken note of the fact that ten years have passed since the ICJ issued its merits decision and the DRC’s subsequent request to the Court to decide the matter of reparations. He notes that this lapse of time “ha[s] already

far exceeded a reasonable time, bearing in mind the situation of the victims, still waiting for justice" [para. 3]. Given the Court's acknowledgement in the merits judgment of the great suffering of the local population, he argues that the judgment should have been accompanied by the determination of a reasonable time limit for the provision of reparations for damages inflicted upon the victims. Judge Cançado Trindade's vision of such a "victim-centred outlook" can only be achieved if the ICJ incorporates such procedures into its vision. He says: "[t]he Court now knows that it is necessary to bridge the regrettable gap between the time of human justice and the time of human beings" [para. 6] and to bear "in mind not State susceptibilities, but rather the suffering of human beings, – the surviving victims, and their close relatives, – prolonged in time, and the need to alleviate it" [para. 7].

The suggestion that the Court incorporates into its procedures measures to ensure the timeliness of reparations awards is welcome. The ICJ is not the only international court with the need to better reflect these goals. But Cançado Trindade's comments suggest a need for much broader changes; in effect, a re-positioning of the ICJ's purpose. The ICJ should not only aim to resolve disputes between States, but should, through its judgments, foster the alleviation of human suffering that is the unhappy consequence of those disputes.

Under classical international law, reparations are owed for internationally wrongful acts perpetrated by one state against another. Even when it has been recognised in ICJ proceedings (as it increasingly has been) that individual victims have suffered as a result of an

internationally wrongful act, an order of reparations is still generally understood to be for the benefit of the state and concerns its own injuries (including the injury to its nationals).




There is perhaps a growing understanding—if not an expectation—that reparations are to be earmarked for the benefit of individuals, but currently there is no framework in place to ensure that those individuals will benefit in any concrete way from reparations awarded in a state-to-state process. Cançado Trindade’s call for a “victim-centred outlook” is thus not only about shortening timeframes; it must also be taken to its logical conclusion. That is, the ICJ should develop the means by which to ensure that those who suffer benefit from the reparations awards they make.

^[1] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) (Merits)* 26 February 2007; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, (Advisory Opinion)* I.C.J. Reports (2004) 136.

^[2] Article 31, Articles on the Responsibility of States, annexed to General Assembly Resolution 56/83, 22 January 2002, A/Res/56/83.

^[3] *Factory at Chorzów, (Merits)*, 1928, PCIJ Series A, No. 17, 47.

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