REPARATION FOR VIOLATIONS OF HUMAN RIGHTS COMMITTED BY STATES: AN ANALYSIS OF THE ICJ JUDGMENT OVER THE DRC CONFLICTS

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ABSTRACT

This article looks at the issue of reparation for violations of human rights committed by States in times of war by analyzing the jurisprudence of the International Court of Justice (ICJ) in the 2005 case concerning the Armed Activities on the Territory of the Congo (DRC v. Uganda). It explores the extent to which the ICJ's 2005 ruling in DRC v. Uganda contributed to the safeguarding of the rights of victims of human rights violations to integral reparations (including restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition). The article posits that the ICJ failed to provide "full reparations" to civilian victims in the DRC v. Uganda case because the ICJ decision did not set a reasonable timeframe for the negotiations between the DRC and Uganda on the amount of compensation, thus resulting in Uganda paying no financial reparation to the DRC since 2005. As a rectification of its 2005 oversight, the ICJ appointed independent experts in 2020 to provide their opinion on the DRC's damage claims. The article further argues that the ICJ's 2005 decision, which did not request Uganda to domestically prosecute its soldiers that perpetrated human rights abuses in the DRC and did not recommend Uganda to provide an official apology for those violations, deprives the Congolese victims from the prospect of obtaining complete reparations.

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INTRODUCTION

The 2005 decision of the International Court of Justice (ICJ) in the case *Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*[1] constitutes a vital step in the ICJ's interpretation and development of international law. Among other fundamental issues, the ICJ addressed the question of reparations as a remedy for gross violations of human rights.

In June 1999, the Democratic Republic of the Congo (DRC) brought a complaint against Burundi, Rwanda, and Uganda for their armed aggression in the DRC's territory. The complaint also included the respondent parties perpetration of violations of human rights against the DRC's populations.[2] The ICJ dismissed the charges against Burundi and Rwanda as neither country recognized the ICJ's compulsory jurisdiction.[3] Pursuant to the ICJ's

[1] Armed Activities on the Territory of Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168 (Dec. 19).

[2] In January 2001, the DRC withdrew the proceedings against Burundi and Rwanda because neither of these two countries had accepted the compulsory jurisdiction of the ICJ. But the case concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda) continued. *See* Press Release, Int'l Court of Justice, Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Burundi & Dem. Rep. Congo v. Rwanda), Press Release 2001/2 (Feb. 1, 2001).

[3] Andrew Mollel, *International Adjudication and Resolution of Armed Conflicts in the Africa's Great Lakes: A Focus on the DRC Conflict*, 1 J.L. CONFLICT RESOL. 10, 18 (2009).

dismissal of the charges against Burundi and Rwanda, the DRC resubmitted a separate claim against Uganda in 2002.[4] In one of the assertions, the DRC requested the ICJ to explore the question of what reparations a State violating human rights should provide to the injured State on behalf of its civilian victims.[5]

After determining that Uganda violated numerous provisions of international human rights and humanitarian laws, along with its responsibilities under those laws,[6] the ICJ ordered Uganda to provide some forms of reparation for its breach of international law in the form of: (1) the cessation and guarantee of non-repetition of wrongful acts[7] (including the support of the peace process in the DRC and in the Great Lakes region)[8] and (2) financial compensation.[9]

However, on the issue of compensation, the ICJ instructed both parties to agree on the nature, form, and amount of the reparation.[10] The ICJ also reserved the right to intervene in future proceedings if the parties were unable to settle reparations between them.[11] Unsurprisingly, the parties failed to agree on the financial compensation, resulting in Uganda paying no financial reparation to the DRC since 2005. This situation led the ICJ to resume the proceedings and to issue an Order in September 2020 appointing independent experts, under Article 67(1) of the ICJ's Rules of the Court,[12] to provide their opinion on the DRC's damage claims.[13] Under international law and jurisprudence, the victims of human rights violations are entitled to an "effective" or "full" reparation, including: (1) guarantees of non-repetition,

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[4] Dem. Rep. Congo v. Uganda, 2005 I.C.J. at 176-77. ¶¶ 8-9.

[5] Dem. Rep. Congo v. Uganda, 2005 I.C.J. at 256-58, ¶¶ 257-261.

[6] Dem. Rep. Congo v. Uganda, 2005 I.C.J. at 251.

[7] Dem. Rep. Congo v. Uganda, 2005 I.C.J. at 256, ¶ 257.

[8] *Id*. at 245, ¶¶ 220-21.

[9] *Id*. at 257, ¶¶ 259-60. In contrast, the African Commission compelled Burundi, Rwanda and Uganda to: (1) pay adequate reparations to the DRC for and on behalf of the victims of the human rights, and (2) withdraw their troops from the DRC territory (meaning the "restitution" of the occupied territories). *See* Democratic Republic of the Congo v. Burundi, Communication 227/99, at Holding.

[10] *Id*. at 260.

[11] *Id*.

[12] Statute of the International Court of Justice, art. 67(1): "If the Court considers it necessary to arrange for an enquiry or an expert opinion, it shall, after hearing the parties, issue an order to this effect, defining the subject of the enquiry or expert opinion, stating the number and mode of appointment of the persons to hold the enquiry or of the experts, and laying down the procedure to be followed. Where appropriate, the Court shall require persons appointed to carry out an enquiry, or to give an expert opinion, to make a solemn declaration." *Id.*

[13] *See* Press Release, Int'l Court of Justice, Press Release, Int'l Court of Justice, Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), I.C.J. Press Release 2020/30 (Oct. 16, 2020).

(2) restitution, (3) compensation, (4) rehabilitation, and (5) satisfaction.[14]

The paper posits that the ICJ failed to provide "full reparation" to civilian victims in DRC v. Uganda case. This is because in 2005, the ICJ did not, for instance, request Uganda to also provide a "satisfaction" as a form of reparation. In light of Article 37 of the Draft Articles, a "satisfaction" could consist of compelling Uganda to issue an official apology for human rights violations perpetrated by its soldiers and/or to prosecute its soldiers involved in the commission of human rights violations in the DRC.[15]

It also argues that the ICJ's 2005 decision came up short concerning the pecuniary form of reparation, as the ICJ ruling did not set a reasonable timeframe for the negotiations between the DRC and Uganda on the amount of compensation, resulting in Uganda paying no financial compensation to the victims of human rights abuses in the DRC.

This paper equally contends that the ICJ's appointment of a group of independent experts in 2020 may appear to be a late maneuver aimed at rectifying its oversight fifteen years after its final decision on this case. This delayed ICJ act would have no benefits to some of the survivors of Uganda's atrocities who would have passed on. It is under this context that Judge Cançado Trindade filed a separate opinion on the ICJ's 2020 decision to obtain an expert opinion by underscoring "the need to proceed promptly to the determination of reparations for the grave breaches of the International Law of Human Rights and International Humanitarian Law. The delays by the ICJ so far are unacceptable to me."[16]

The paper will unfold in three parts. Section I will unpack the concept of reparation under the international law. Section II will explore the types of reparations ICJ should award to victims of human rights violations. Finally, Section III will assess the ICJ's remedial orders in the DRC v. Uganda case.

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[14] *See* G.A. Res. 60/147, ¶¶ 19-23, (Dec. 16, 2005) [hereinafter UN Basic Principles and Guidelines].

According to the Inter-American Court of Human Rights, reparation of harm consists in full restitution, including: restoration and indemnification (for patrimonial and non-patrimonial damages). *See also Velásquez Rodríguez*, Inter-Am. Ct. H.R. (ser. C) No. 7, ¶ 26. For the ICJ, full reparation includes: non-repetition of wrongful acts, contribution to the peace process, and/or pecuniary reparation. *See* Dem. Rep. Congo v. Uganda, 2005 I.C.J. at 245, 256-57, ¶¶ 221, 257, 259-60. For the African Commission "adequate reparation" may comprise financial payment or cessation of the violation (withdrawal of troops from the complainant's territory). Democratic Republic of the Congo v. Burundi, Communication 227/99, at Holding.

[15] *See* Dem. Rep. Congo v. Uganda, 2005 I.C.J. at 257, ¶ 260. *see* also Draft Articles on Responsibility of States for Internationally Wrongful Acts, Int'l Law Comm'n, Text Adopted at Its Fifty-Third Session, U.N. Doc. No. A/56/10, art. 37 (2001) [hereinafter ILC Draft Articles].

[16] International Court of Justice, Separate Opinion of Judge Cançado Trindade, ¶ 1, Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), https://www.icj-cij.org/public/files/case-related/116/116-20200908-ORD-01-01-EN.pdf.

I. UNDERSTANDING THE CONCEPT OF REPARATION UNDER THE INTERNATIONAL LAW

A State's violation of human rights leads to legal consequences under international law—the obligation to cease the perpetration of the violation and the duty to repair the committed violation.[17] Reparation is, therefore, a set of measures that a State violator of human rights can undertake to redress the damages caused to the victims.[18] The UN Basic Principles and Guidelines speaks of a trilogy of "adequate, effective and prompt" reparation, which consists of measures promoting justice through redressing violations of international human rights and humanitarian laws suffered by the victims.[19] The reparative measures should not only be proportional to the gravity of the violations and the harm suffered,[20] but should also eradicate all consequences of the illegal conduct and restore the *status quo ante* that prevailed before the commission of the violation.[21]

International human rights and humanitarian instruments contain provisions compelling States to provide reparations to the victims of human rights abuses.[22] For instance, the ICCPR obliges States to provide "effective remedy" to those whose rights are violated.[23] The Convention against Torture also recognizes to victims of torture the right to compensation and full rehabilitation for their suffering.[24] Likewise, the Rome Statute of the International Criminal Court requires the Court to make an order directly against a convicted perpetrator of a crime to provide appropriate reparations to the victims.[25]

Similarly, both the 1907 Hague Convention (No. IV) and the 1977

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[17] ILC Draft Articles, *supra* note 15, arts. 30, 31.

[18] *See* Stephen Peté & Max du Plessis, *Reparations for Gross Violations of Human Rights in Context*, *in* REPAIRING THE PAST?: INTERNATIONAL PERSPECTIVES ON REPARATIONS FOR GROSS HUMAN RIGHTS ABUSES 3, 11 (Max Du Plessis & Stephen Peté eds., 2007).

[19] *See* UN Basic Principles and Guidelines, *supra* note 14, ¶15.

[20] *Id*. ¶ 19.

[21] Factory at Chorzów (Ger. v. Pol.), Judgment, 1927 P.C.I.J. (ser. A) No. 17, at 47 (Sept. 13). "Reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed." ILC Draft Articles, *supra* note 15, art. 31, ¶ 2.

[22] Riccardo P. Mazzeschi, *Reparation Claims by Individuals for State Breaches of Humanitarian Law and Human Rights: An Overview*, 1 J. INT'L CRIM. JUST. 339, 340 (2003).

[23] International Covenant on Civil and Political Rights art. 2, ¶ 3, *adopted* Dec.16, 1966, S. EXEC DOC. E., 95-102, (1978), 999 U.N.T.S 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

[24] Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, art. 2, S. TREATY DOC. NO. 100-20 (1988), 1465 U.N.T.S. 85, art. 14 (entered into force June 26, 1987) [hereinafter Convention Against Torture].

[25] Rome Statute of the International Criminal Court, art. 75, ¶ 2, July 17, 1998, 2187 U.N.T.S. 90, (2002) [hereinafter Rome Statute].

Additional Protocol (No. I) to the Geneva Convention of 1949 oblige States to pay compensation for all wrongful acts perpetrated by individuals who are part of their armed forces.[26] Article 31(1) of the Draft Articles on Responsibility of State for International Wrongful Acts also provides that States should make full reparation for the damages generated by their internationally wrongful conduct.[27] At the regional level, human rights instruments such as the European Convention on Human Rights,[28] the American Convention on Human Rights,[29] and the Protocol to the African Charter on Human and People's Rights[30] equally confirm the obligation of States to provide reparations to human rights victims affected by their wrongful conducts.

Moreover, the international and regional (quasi) judicial bodies agree on the principle of the State's obligations to repair human rights violations committed by their organs.[31] In *DRC v. Uganda*, the ICJ noted that Uganda

[26] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), arts. 51, 91, ¶ 5(b), June 8, 1977, 1125 U.N.T.S. 3, (entered into force Dec. 7 1978) [hereinafter Protocol I]; *see also* The Hague Convention (IV) respecting the Laws and Customs of War on Land annex: Regulations respecting the Laws and Customs of War on Land, art. 3, Oct. 18, 1907, 36 Stat. 2277, T.S. 539 [hereinafter The 1907 Hague Convention (IV)].

[27] ILC Draft Articles, *supra* note 15, art. 31, ¶ 1.

[28] Convention for the Protection of Human Rights and Fundamental Freedoms arts. 1, 41, Council of Europe, Nov. 4, 1950, E.T.S. No. 5 (entered into force Sept. 3, 1953) [hereinafter European Convention of Human Rights]. "If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party." European Convention of Human Rights, art. 41.

[29] Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123. [hereinafter American Convention on Human Rights], art. 63, ¶ 1.

> If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.

Id.

[30] Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and Peoples' Rights, art. 27, June 10, 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III) (1998). "If the Court finds that there has been violation of a human or peoples' rights, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation." *Id.*

[31] An organ of state "includes any person or entity which has that status in accordance with the internal law of the State." *See* ILC Draft Articles, *supra* note 15, art. 4(2). This implies that the conduct of that organ of state (such as a member of the state's national army) "shall

"bears responsibility for an internationally wrongful act is under an obligation to make full reparation for the injury caused."[32] This ICJ ruling is, in fact, a replication of the position held by the Permanent Court of International Justice (PCIJ) in the *Factory at Chorzów*, where the PCIJ set for the first time the principle according to which a State's breach of its international engagement should result in its duty of making reparations in an adequate form.[33] The African Commission also followed suit by holding, in *DRC v. Burundi, Rwanda and Uganda*,[34] that the respondent States should pay "adequate reparations to the Complainant State for and on behalf of the victims of the human rights."[35]

In *Velásquez Rodríguez*,[36] the Inter-American Court of Human Rights stated that "reparation of harm brought about by the violation of an international obligation consists in full restitution (*restitutio in integrum*)."[37] In *Papamichalopoulos v. Greece*[38] and *Brumărescu v. Romania*,[39] the European Court of Human Rights also compelled Greece and Romania to grant full restitution to the victims by putting them "as far as possible in a situation equivalent to the one in which they would have been if there had not been a breach" of the human rights provisions.[40] In light of the above

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be considered an act of that State under international law. . ." ILC Draft Articles, *supra* note 15, art. 4(1).

[32] Dem. Rep. Congo v. Uganda, 2005 I.C.J. at 257, ¶ 259.

[33] Ger. v. Pol., 1927 P.C.I.J. at 21; *see also* Avena and Other Mexican Nationals (Mex. v. U.S.), Judgment, 2004 I.C.J. 12, 59, ¶ 119 (Mar. 31).

> What constitutes 'reparation in an adequate form' clearly varies depending upon the concrete circumstances surrounding each case and the precise nature and scope of the injury, since the question has to be examined from the viewpoint of what is the 'reparation in an adequate form' that corresponds to the injury. In a subsequent phase of the same case, the Permanent Court went on to elaborate on this point as follows: 'The essential principle contained in the actual notion of an illegal act . . . practice and in particular by the decisions of arbitral tribunals – is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.'

Mex. v. U.S., 2004 I.C.J. at 59, ¶ 119.

[34] Democratic Republic of the Congo v. Burundi, Communication 227/99, at Holding.

[35] *Id*.

[36] Velásquez Rodríguez v. Honduras, Compensatory Damages, Inter-Am. Ct. H.R. (ser. C) No. 7, ¶ 26 (July 21, 1989).

[37] *Id.*

[38] Papamichalopoulos v. Greece, 260 Eur. Ct. H.R. Rep. (ser. A) (1993).

[39] Brumărescu v. Romania, App. No. 28342/95, 1999-VII Eur. Ct. H.R. Rep. 201.

[40] *Papamichalopoulos*, 260 Eur. Ct. H.R., ¶ 38; *Brumărescu*, 1999-VII Eur. H.R. Rep., ¶ 22; *see* Ingrid Nifosi-Sutton, *The Power of the European Court of Human Rights to Order Specific Non-Monetary Relief: A Critical Appraisal from a Right to Health Perspective*, 23 HARV. HUM. RTS. J. 51, 56 (2010).

jurisprudence, one may wonder as to what the expressions "full reparation" or "full restitution" really imply.

II. TYPES OF REPARATIONS

Under international law and jurisprudence, there is no universally accepted catalogue of the types of reparations that should be awarded because of a State's violation of human rights.[41] The forms or natures of reparations for human rights violations may depend on the specificity of each case. Nevertheless, according to the UN Basic Principles and Guidelines, "effective reparation" has five forms, including: (1) guarantees of non-repetition, (2) restitution, (3) compensation, (4) rehabilitation, and (5) satisfaction.

A. Guarantees of Non-Repetition

The guarantees of non-repetition consist of measures to contribute to preventing the violation of international human rights from occurring again.[42] For the government of a State violator of human rights, this may imply, for example, the responsibility to reinforce the control of military and security forces, and to enforce the code of conduct for military personnel in accordance with the international standards on the protection of human rights.[43] In *DRC v. Uganda*, the DRC requested specific guarantees and assurances that Uganda would not repeat its illegal conduct, and the ICJ noted that Uganda had an international obligation not to repeat any wrongful acts based on the Tripartite Agreement on Regional Security in the Great Lakes Region that it signed.[44] Article 30 of the International Law Commission's (ILC) Draft Articles links the obligation of non-repetition with this cessation of the wrongful acts.[45] The ILC's comments on Article 30 of the Draft Articles explained that "[t]he function of cessation is to put an end to a

[41] According to the Inter-American Court of Human Rights, reparation of harm consists in full restitution, including: restoration and indemnification (for patrimonial and non-patrimonial damages). *See Velásquez Rodríguez*, Inter-Am. Ct. H.R. (ser. C) No. 7, ¶ 26. For the ICJ, full reparation includes: non-repetition of wrongful acts, contribution to the peace process, and/or pecuniary reparation. *See* Dem. Rep. Congo v. Uganda, 2005 I.C.J. at 245, 256-57, ¶¶ 221, 257, 259-60. For the African Commission "adequate reparation" may comprise financial payment or cessation of the violation (withdrawal of troops from the complainant's territory). Democratic Republic of the Congo v. Burundi, Communication 227/99, at Holding.

[42] UN Basic Principles and Guidelines, *supra* note 14, ¶ 23.

[43] *Id.*

[44] Dem. Rep. Congo v. Uganda, 2005 I.C.J. at 256, ¶ 257.

[45] "The State responsible for the internationally wrongful act is under an obligation: (a) to cease that act, if it is continuing; (b) to offer appropriate assurances and guarantees of non-repetition, if circumstances so require." ILC Draft Articles, *supra* note 15, art. 30.

violation of international law and to safeguard the continuing validity and effectiveness of the underlying primary rule."[46] In the *Rainbow Warrior Arbitration* (New Zealand v. France concerning the sinking of a vessel (*Rainbow Warrior*)), the Arbitration Tribunal observed that the requirement for cessation is imposable when a State's illegal conduct has a continuing character and that the violated rule is still operational at the time when the order is given.[47] The cessation and non-repetition of human rights violations are some of the fundamental requirements for the elimination of the negative effects of the illegal acts.[48]

B. Restitution

Restitution is the second form of reparation; it aims to re-establish the human rights victims to the *status quo ante* situation that existed before the execution of the acts violating human rights.[49] In *Velásquez*, the Inter-American Court of Human Rights spoke about the full restitution, which may comprise "the restoration of the prior situation, the reparation of the consequences of the violation, and indemnification for patrimonial and non-patrimonial damages, including emotional harm."[50] Restitution can also consist of other measures in favor of a victim of human rights, including restoration of liberty; enjoyment of human rights, family life, and citizenship; return to his/her residence; restoration of employment; and return of property.[51] Nevertheless, there are two exceptions to the obligation of restitution. The first applies when the restitution is impossible to execute,[52] for example, in the case of a killed person who cannot be brought back in life. In *Bosnia and Herzegovina v. Serbia* (concerning the application of the

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[46] *Id.*

[47] *Id.* (citing The Difference between New Zealand and France Concerning the Interpretation or Application of Two Agreements Concluded on 9 July 1986 between the Two States and which Related to the Problems Arising from the *Rainbow Warrior* Affair (N.Z. v. Fr.), 20 R.I.A.A. 215, ¶ 114 (1990)).

[48] *Id.*

[49] UN Basic Principles and Guidelines, *supra* note 14, ¶19; *see also* ILC Drafts Articles, *supra* note 15, art. 35.

> A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution: (a) is not materially impossible; (b) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.

ILC Drafts Articles, *supra* note 15, art. 35.

[50] *Velásquez Rodríguez*, Inter-Am. Ct. H.R. (ser. C) No. 7, ¶ 26.

[51] UN Basic Principles and Guidelines, *supra* note 14, ¶19.

[52] ILC Draft Articles, *supra* note 15, art. 35.

Convention on the Prevention and Punishment of the Crime of Genocide),[53] the ICJ ruled that the full restitution was impossible in the situation of genocide.[54] This was despite the ICJ's recognition that Serbia failed its international obligation to prevent the commission of genocide in Bosnia.[55] A second exception is when the restitution would have a heavier burden for the State violating human rights.[56] Nevertheless, neither the impossibility of restitution nor its heavy burden can serve as an excuse for the State violating human rights to escape from executing its obligation of repairing its wrongdoing. Indeed, in *Chorzów Factory*, the ICJ suggested compensation as an alternative type of reparation when a State may have difficulty providing restitution.[57] The ICJ held that "the impossibility, on which the Parties are agreed, of restoring the Chorzów Factory could therefore have no other effect but that of substituting payment of the value of the undertaking for restitution."[58]

C. Compensation

As a third form of reparation, compensation involves the State violator offering any economically assessable damage to the victims of human rights for the abuses suffered.[59] Compensation is required to be appropriate and proportional to the gravity of the damages, which may include physical or mental harm, lost opportunities (employment or education), moral damage (humiliation), or material damages (house lost).[60] In *Gabčíkovo-Nagymaros Project*,[61] the ICJ noted that "[i]t is a well-established rule of international law that an injured State is entitled to obtain compensation from the State

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[53] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb.), Judgment, 2007 I.C.J. 43 (Feb. 26).

[54] *Id.* at 232-33, ¶ 460; *see also* Antoine Buyse, *Lost and Regained? Restitution as a Remedy for Human Rights Violations in the Context of International Law*, 68 HEIDELBERG J. INT'L L. 129, 131 (2008).

[55] Bosn. & Herz. v. Serb., 2007 I.C.J. at 232-33, ¶ 460.

[56] ILC Draft Articles, *supra* note 15, art. 35.

[57] Ger. v. Pol., 1927 P.C.I.J. at 48.

[58] *Id.*

[59] UN Basic Principles and Guidelines, *supra* note 14, ¶ 20; *see also* ILC Draft Articles, *supra* note 15, art. 36.

> (1) The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution. (2) The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.

ILC Draft Articles, *supra* note 15, art. 36.

[60] ILC Draft Articles, *supra* note 15, art. 36.

[61] Gabčíkovo-Nagymaros Project (Hung. v. Slovk.), Judgment, 1997 I.C.J. 7, 81, ¶ 152 (Sept. 25).

which has committed an internationally wrongful act for the damage caused by it."[62] Equally, in *DRC v. Uganda*,[63] the ICJ implicitly recognized the DRC's right to compensation, but the ICJ did not adjudicate on the amount of reparation, leaving the two parties to negotiate for resolving this question.[64] Likewise, the African Commission, in its ruling in *DRC v. Burundi, Rwanda and Uganda*, took the position for financial reparations to be paid to the complainant for human rights violations committed against its populations by the respondent States.[65] The ILC recommended some elements to be taken into account while assessing the amount of compensation.[66] For instance, the case of compensation for arbitrary detention may be evaluated/awarded based on each day that the victim spent in detention; the compensation for a destroyed house can be assessed based on the fair market value of the property; and the compensation for the death of a relative can be calculated based on the assessment of losses and needs of the surviving successors of the killed person.[67]

D. Rehabilitation

Rehabilitation is the fourth type of reparation. It refers to the provision of medical and psychological care as well as legal and social services to the victims.[68] For human rights victims who suffered physical injuries such as loss of limbs and/or psychological damage, the rehabilitation may imply offering them reconstructive surgery, prosthetics, physical therapy, and counselling or other psychological services.[69] Rehabilitation can also include job and skills training for victims who lost their employment due to their injuries.[70]

E. Satisfaction

Satisfaction is the last form of reparation, which is available when the *restitutio in integrum* and/or compensation cannot be sufficient to offer full reparation to the human rights victims.[71] In light of Article 37 of the Draft

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[62] *Id.*

[63] Dem. Rep. Congo v. Uganda, 2005 I.C.J. at 257, ¶¶ 259-60.

[64] *Id.*

[65] Democratic Republic of the Congo v. Burundi, Communication 227/99, at Holding.

[66] ILC Draft Articles, *supra* note 15, art. 36.

[67] *Id.*

[68] UN Basic Principles and Guidelines, *supra* note 14, ¶ 21.

[69] Kasande S. Kihika, Head of Office, Uganda, Int'l Ctr. for Transitional Justice, Reparations for Victims of Gross Human Rights Violations in Uganda, Remarks before the International Center for Transnational Justice at 5 (transcript available at the Parliamentarians for Global Action database).

[70] *Id.*

[71] ILC Draft Articles, *supra* note 17, art. 37; *see also* Antoine Buyse, *Lost and Regained?*

Articles, satisfaction may consist of the State's acknowledgement of the gross violations of human rights, an expression of regret, or a formal apology for human rights violations.[72] Satisfaction should also consist of judicial decisions that convict the perpetrators of human rights violations in order to restore the dignity of the victims.[73] In regards to judicial actions, it should be noted that the recognition of the State's attributed responsibility for gross human rights violations committed by individuals acting on its behalf cannot, however, discharge the individual actors from also engaging their personal criminal responsibilities for their wrongful acts.[74] Illustratively, if State X is held accountable for failing to prevent acts of torture committed by its soldiers against the populations of State Y, this recognition of responsibility of State X should not serve as an excuse for the concerned soldiers of State X to escape their individual criminal responsibilities for committing acts of torture. State X should therefore initiate criminal actions at the domestic level against its own soldiers involved in the commission of torture. In *Velásquez* (concerning the Honduran government's practices of targeting forced disappearance)[75] and *Caballero-Delgado and Santana* (concerning the Colombian army's illegal detention of the complainants),[76] the Inter-American Court of Human Rights held that Honduras and Colombia should investigate the committed human rights violations, and identify the perpetrators and impose punishments against those involved so they do not escape with impunity.

Considering the above discussion, the posed question is: Can the remedial orders issued by the ICJ (in *DRC v. Uganda*) amount to "full reparation" for a Congolese human rights victim whose house was burned down and whose children were killed by Ugandan armed forces?

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[72] ILC Draft Articles, *supra* note 15, art. 37.

[73] UN Basic Principles and Guidelines, *supra* note 14, ¶ 22.

[74] *Id.* ¶¶ 4, 12, 22.

[75] *Velásquez Rodríguez*, Inter-Am. Ct. H.R. (ser. C) No. 7, ¶¶ 174, 189.

> The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.

Id. ¶ 174.

[76] Caballero-Delgado and Santana v. Colombia, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 17, ¶ 15 (Jan. 21, 1994). "Colombia must pay compensatory damages to the victims' next of kin. . . [and] continue the investigations until those responsible have been identified and punished, thereby avoiding the consummation of acts of serious impunity. . . ." *Id.*

III. REMEDIAL ORDERS IN THE CASE OF ARMED ACTIVITIES IN THE DRC

As previously stated, the principle governing the issue of reparations professes that the reparation should clean all the negative effects of the illegal act and restore the *status quo ante* that prevailed before the commission of the violation.[77] The ICJ may assess which type of reparations would restore the victims to the situation that existed before they were subjected to human rights violations.[78] Therefore, the ICJ may either order the State violator to execute some forms of reparations based on the specificity of the situations or request the combination of all types of reparations.[79]

In the context of *DRC v. Uganda*, the ICJ ordered Uganda to provide some forms of reparation for its breach of international law, such as (1) the cessation and guarantee of non-repetition of wrongful acts[80] (including the support of the peace process in the DRC and in the Great Lakes region)[81] and (2) financial compensation (of which the amount depended on the agreement between the parties).[82] One can make few observations here:

A. The ICJ's Failure to Rule on the Satisfactory Reparation

The first remark is that the ICJ chose not to opt for the satisfactory form of reparation, as the ICJ did not request Uganda to also provide an official apology for their respective human rights violations nor did the ICJ recommend the prosecution of the Ugandan soldiers involved in the commission of gross human rights violations in the DRC.[83] This means that all the State agents who perpetrated gross violations of human rights in the DRC are still unpunished, since the ICJ failed to order Uganda to identify all perpetrators of human rights violations and prosecute them before its domestic courts. Neither the ICJ was courageous enough to go beyond the request of cessation of violations and guarantee of non-repetition, (*simple*) restitution, or financial compensation on behalf of the civilian victims.

B. The ICJ's Oversight on the Pecuniary Reparations for Victims

The second observation concerns the pecuniary reparations—the fact that Uganda has not financially compensated the human rights victims in the DRC

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[77] Ger. v. Pol., 1927 P.C.I.J. at 47.

[78] *See* ILC Draft Articles, *supra* note 15, art. 36.

[79] *See id.*

[80] Dem. Rep. Congo v. Uganda, 2005 I.C.J. at 256, ¶ 257.

[81] *Id*. at 245, ¶¶ 220-21.

[82] *Id*. at 257, ¶¶ 259-60. In contrast, the African Commission compelled Burundi, Rwanda and Uganda to: (1) pay adequate reparations to the DRC for and on behalf of the victims of the human rights, and (2) withdraw their troops from the DRC territory (meaning the "restitution" of the occupied territories). *See* Democratic Republic of the Congo v. Burundi, Communication 227/99, at Holding.

[83] *See* Dem. Rep. Congo v. Uganda, 2005 I.C.J. at 257, ¶ 260.

yet. The ICJ ruled that it would only adjudicate on the financial compensation for the human rights victims if the DRC and Ugandan governments failed to agree on the amount of the reparation.[84] Fifteen years after the ICJ's decision, negotiations between the DRC and Uganda over the scope of financial remedy are still unsuccessful, and the parties should return before the ICJ accordingly.[85] Keeping this context in mind, on September 2020, the ICJ appointed four independent experts to provide their opinion "on some heads of damage claimed by the DRC, namely the loss of human life, the loss of natural resources and property damage."[86] The ICJ's appointment of those experts may appear to be a late maneuver aimed at rectifying its oversight fifteen years after its final decision on this case. From the human rights victims' perspective, there may not be a certainty as to when they will really get access to their financial reparations. In echoing the victims' concern, ICJ Judge Cançado Trindade filed a separate opinion on the ICJ's 2020 decision to obtain an expert opinion.[87] In his opinion, Judge Trindade underscored "the need to proceed promptly to the determination of reparations for the grave breaches of the International Law of Human Rights and International Humanitarian Law."[88] He concluded by emphasizing that "the delays by the ICJ so far was unacceptable."[89]

Of course, others may argue that it was a good justice for the ICJ to give the parties the possibility to negotiate and consult experts for evaluating the exact extent of the damages and determining the appropriate amount of the reparation. This argument sounds valid. However, when allowing the parties to negotiate, the ICJ could have also defined in advance a reasonable

[84] *Id* at 257-58, ¶¶ 260-61.

[85] *See* Dem. Rep. Congo v. Uganda, 2005 I.C.J. at 257, ¶ 259.

> The Hague, 13 November 2019. The International Court of Justice (ICJ), the principal judicial organ of the United Nations, has decided to postpone the public hearings on the question of reparations in the case concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), which had been due to take place between Monday 18 and Friday 22 November 2019. The Court made its decision taking into consideration the joint request submitted by the Parties by a letter dated 9 November 2019.

Press Release, Int'l Court of Justice, Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), I.C.J. Press Release 2019/48 (Nov. 13, 2019).

[86] *See* Press Release, Int'l Court of Justice, Press Release, Int'l Court of Justice, Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), I.C.J. Press Release 2020/30 (Oct. 16, 2020).

[87] International Court of Justice, Separate Opinion of Judge Cançado Trindade, Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), https://www.icj-cij.org/public/files/case-related/116/116-20200908-ORD-01-01-EN.pdf.

[88] *Id.*

[89] *Id.*

timeframe within which the negotiations between the DRC and Uganda should be conducted. This might have avoided the risk of lengthy negotiation, delaying the possibility for countless human rights victims to receive their financial remedy in a timely manner, as seems to be the case today.[90]

C. The ICJ's Ambiguity on the Criteria for Granting Integral Reparations

The third observation is that it is unclear in regard to the merits of the ICJ, as to which circumstances the ICJ should order all forms of reparation or only some of them, and whether the degree of human rights violations committed in the DRC only amounted to a partial remedy rather than full remedy. Illustratively, the ICJ noted that Uganda should "make full reparation for the injury caused"[91] to the DRC and its populations, but the ICJ did not elaborate on the actual content, meaning, extent and implications of the expression "full reparation" in the context of the DRC situation.[92]

Based on the first and second observations as well as the other points noted above, it can be posited that the extent of remedial orders that the ICJ awarded was partial rather than integral or comprehensive to restore the Congolese human rights victim to the situation existing before the destroying of his house and killing of his children by the armed forces of Uganda.[93] If the Congolese human rights victim achieved full reparation, the victim would (a) return to his village and have his destroyed house rebuilt; (b) receive financial compensation in the case of the impossibility of rebuilding the house or financial compensation for psychological injury due to the killing of his children; (c) receive psychological care for his psychological harm; (d) receive an apology from the individuals who burned his house and killed his children or an apology from their "employers," and/or receive a judicial ruling condemning his wrongdoers; and (e) obtain a guarantee that the wrongdoers would not repeat their atrocities.[94] Consequently, the reparation would not be considered as integral for this hypothetical victim if any of the components of the reparations were missing.

CONCLUSION

The principal theme of this article was to explore and analyze the issue of reparation for violation of human rights committed by States in times of war. The article examines the DRC v. Uganda case and concludes that one of the

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[90] *See* Armed Activities on the Territory of Congo (Dem. Rep. Congo v. Uganda), Order, 2005 I.C.J. 580, 581-83, ¶¶ 2, 6, 7 (July 1).

[91] Dem. Rep. Congo v. Uganda, 2005 I.C.J. at 257, ¶ 259.

[92] *Id.* at 257, 279-83, ¶¶ 259-60, 345.

[93] In the *Factory at Chorzów*, the ICJ held that restitutions should restore the injured party to *status quo ante*. *See* Ger. v. Pol., 1927 P.C.I.J. at 47.

[94] *See* Gabčíkovo-Nagymaros Project (Hung. v. Slovk.), Judgment, 1997 I.C.J. 7, 5, 81, (Sept. 25).

merits of this case is the ICJ's reiteration of the recognition of the principle of full reparations. However, despite such a recognition, the ICJ did not elaborate on the actual content, meaning, extent, and implications of the term "full reparations" in the context of the DRC's situation. In view of this, the ICJ failed to provide "full reparations" to civilian victims of human rights violations in *DRC v. Uganda* case. The ICJ chose not to opt for the satisfactory form of reparation, nor did it set a reasonable timeframe for the negotiations between the DRC and Uganda on the amount of compensation, resulting in Uganda paying no financial compensation to the victims.