

RETHINKING STATE RESPONSIBILITY: THE CASE OF *DRC V UGANDA (REPARATIONS)*

Musana Joshua Malcolm

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**RETHINKING STATE RESPONSIBILITY: THE CASE OF *DRC V UGANDA*
(REPARATIONS)**

Musana Joshua Malcolm*

Abstract

The International Court of Justice, in a recent decision, resolved to award USD 325 million to the DRC as compensation for Uganda's actions in its territory. This sum was awarded on the basis of Uganda's culpability for violations of International Law and its obligations under the established norms of state responsibility. In its ruling, the Court reached this amount on reference to the concept of a 'global sum'. This article seeks to appraise the Court's decision while making a case for the reform of some of the current rules governing state responsibility.

1.0 INTRODUCTION

State Responsibility has been defined as the fundamental principle of international law arising out of the nature of the international legal system. It is premised on the doctrines of state sovereignty and equality of states, which provides that whenever one state commits an internationally unlawful act against another state, international responsibility is established between the two, and a breach of an international obligation gives rise to a requirement for reparation.¹

It has been stated that all rights of an international character entail international responsibility and such responsibility obliges a state to make reparation if the obligation in question is not met.² Every internationally

* LLB IV Student, Makerere University School of Law and is fascinated by International Law. He can be reached on josh.musana@gmail.com for more discussion on these matters. Gratitude to the Editorial Board of the MLJ for the improvements on the article through key suggestions made.

¹ Malcolm Shaw, *International Law*, (8th Edition Cambridge University Press 2017), p. 801

² This point was explained by Judge Huber in the British Claims in the *Spanish Zone of Morocco* (1924) 2 R.I.A.A. 615, p. 639-650

wrongful act of a state results in responsibility,³ and there exists an internationally wrongful act of state when conduct consisting of an action or omission is attributable to the state under international law and constitutes a breach of an international obligation of the state.⁴

From the foregoing it can be surmised that state responsibility hinges on the existence of an obligation under international law between particular states where an act or omission in which it has been violated is attributable to the state responsible and that loss has resulted from that unlawful act or omission. The consequences a state culpable of commission of wrongful acts could face include; cessation in which it is obliged to cease the act and provide assurances that it shall not continue doing so,⁵ and reparation for the injury caused by the wrongful act, of which such damage includes both the material and moral kind.⁶ It will also include satisfaction, where the damage cannot be remedied by compensation.⁷

Satisfaction has been described to include formal apologies, expressions of regret and acknowledgment of the unlawful act.⁸ The International Court of Justice decision, which shall be the subject of this article, concerned the determination of the amount of reparation Uganda was due to pay the Democratic Republic of Congo in respect of having been found in 2005 to have breached international law in its military activities in Congo territory.⁹ Such reparations were found by the Court to be compensatory in nature as restitution for the damage dealt to persons, which included loss of life and sexual violence as well as that occasioned to the natural resources of the Democratic Republic of Congo.

³ Article 1, *International Law Commission's Articles on State Responsibility* (Adopted 2001)

⁴ Article 3, *International Law Commission's Articles on State Responsibility*

⁵ Article 30, *ibid*

⁶ Article 31, *ibid*

⁷ Article 37, *ibid*

⁸ Crawford J, "*State Responsibility: The General Part*" (Cambridge University Press 2013) <<https://doi.org/10.1017/CB09781139033060>> [Accessed 25 May 2022]

⁹ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* Judgment, I.C.J. Reports 2005, p. 168, paras. 166-180

In computing the amount for reparations, the Court based on what it referred to as a 'global sum' on account of the difficulty in concisely evaluating the scale of the injury dealt on the Democratic Republic of Congo.

The import of this article is to stress that the International Court of Justice miscondacted itself in computing the 'global sum' and in so doing wishes to make a case for reform of some of the rules governing state responsibility. It is asserted that in reaching such a sum, the Court overlooked the financial capability of Uganda as a developing country of low-income status. It also did not consider the financial implications of the enforcement of its decision on the citizens of Uganda being sanctioned for the misgivings of errant Ugandan soldiers.

It shall be suggested that punitive measures such as imposing individual sanctions on the military commanders culpable would be more feasible and rhyme more with justice not only to the Democratic Republic of Congo but to the citizens of Uganda who had no say on the incursions of their armed forces.

2.0 THE MAJORITY DECISION

2.1 The Context

Prior to disclosing its findings in the majority decision, the International Court of Justice acknowledged the context of the circumstances subject in the dispute between the parties. Interestingly, the Court cited the evidential impediments that inevitably arose given the time gap between the occurrence of the wrongful actions and the submissions made on Uganda's obligations to pay reparations. It went on to find that it would contextualize its decision with this in the back of its mind and hence the entry of the 'global sum' into the stage as we shall later discuss further on and illustrate that the Court in as much as it mentioned its aliveness to the context of the case made a decision bereft of key aspects of the context of the circumstances before it.

2.2 Onus of Proof

The International Court of Justice found that Uganda was obligated, as an occupying power in the Democratic Republic of Congo territory of Ituri, to execute vigilance to avert violations of international humanitarian law

perpetrated by other actors present in the occupied territory, which extended to rebel groups.¹⁰ It reaffirmed its finding in 2005, that Uganda was obliged to establish an injury was not accorded to the Democratic Republic of Congo due to its failure to meet its responsibilities as an occupying power and as such the onus rested in it contrary to Uganda's submissions.¹¹

It was held that the onus falls on the party seeking compensation to establish a causal link between the wrongful act and the injury suffered, with compensation only being awarded where a sufficient, direct and certain causal link has been showcased.¹² Despite this, the Court was adamant that the burden rested on Uganda to establish that injury to the Democratic Republic of Congo was not caused by its failure to meet its obligations as an occupying power.¹³

This was exacerbated by the Court's reference to its finding that in certain situations where injury can be attributed to more than one actor, a single actor may be required to make full reparation for the damage resulted.¹⁴ As a result, the Court saddled Uganda which was not seeking reparation with the burden of establishing that injury was caused to the Democratic Republic of Congo while the former was an occupying power yet the Court itself was noted to find that the onus vested on the Democratic Republic of Congo as the party seeking compensation.

2.3 Nature & Amount of Reparation

The International Court of Justice stressed that reparations are compensatory in nature and are strictly not punitive referring to its finding in an earlier decision.¹⁵ In spite of this, it is asserted that on scrutinising the amount of reparation reached, one can infer that it has a punitive effect because of being

¹⁰ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda) Reparations* (2022), para. 78

¹¹ *ibid* para. 257

¹² *Ibid* para. 93

¹³ *Ibid* para. 95

¹⁴ *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v Albania)* 15 XII 49 pp. 22-23

¹⁵ *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua) Compensation, Judgment*, I.C.J. Reports 2018, p. 15, para. 31

too excessive for Uganda to pay as a low-income status country. Although the immense damage dealt to the people of Democratic Republic of Congo is acknowledged, it is averred that a better alternative would be individually punishing the soldiers responsible, rather than unfairly burdening the innocent Ugandan taxpayer.

Further acknowledged, is the difficulty faced by the Court in reaching an adequate amount beneficial to the victims of the wrongful acts and the uncertainty as to the precise degree of damage caused which the International Court of Justice noted itself.¹⁶ Following this challenge, the Court pronounced that in such circumstances, it can award a 'global sum' within the range of possibilities as indicated by the evidence and interestingly *taking account of equitable considerations* (emphasis added by the author).¹⁷

The global sum is an approximate sum of damages that a court may award by softening the rules of causation in order to protect the rights of a claimant where it is warranted by the ideal of fairness.¹⁸

More intriguingly, the International Court of Justice stated that in such proceedings, where a large number of victims are to be compensated, low standards of proof have been adopted. In turn, the levels of compensation are lowered to account for the uncertainties in applying such a standard.¹⁹ The million-dollar question thus arises; did the Court fully consider all equitable considerations while reaching its decision and did it rightly justify applying a lower standard of proof in ascertaining the reparations due to the Democratic Republic of Congo? This author asserts that it actually did not.

The International Court of Justice alarmingly glossed over Uganda's financial capacity while gauging the amount for reparations it was due to pay the Democratic Republic of Congo. In its majority decision, it stated it would later

¹⁶ *supra*, n. 14, para. 106

¹⁷ *ibid* para. 106

¹⁸ Sebastian Lukic and Lili Hanna Feher, "Awarding Damages Flexibly ... or Painting with a Broad Brush" <<https://voelkerrechtsblog.org/awarding-damages-flexibly/>> [Accessed 26th May, 2022]

¹⁹ *ibid*, para. 107

on consider this issue,²⁰ but subsequently found that it was satisfied Uganda was able to pay the hefty amount and that it needed not regard the financial burden of the reparations on Uganda.²¹

This is in spite of Uganda's submissions to the effect that there existed principles in international law that barred states from paying reparations that exceeded their financial capacity.²² The Court's finding is further made unfortunate by its reference to the Ethiopia-Eritrea Claims Commission, which once noted that the financial burden imposed on a responsible State by reparations should be considered and whether there are doubts about such a state paying such reparations without compromising its ability to meet its people's basic needs.²³

No reference was made to Uganda's budget and no effort was exhibited by the Court to determine the financial implications of the reparations. Judge Yves Daudet in his dissenting opinion noted this, and this article shall later on explore his dissenting judgement in depth.

On the dismissal of the submissions made by Uganda, the author notes that no mention was made to jurisprudence made by the International Court of Justice. To the best of the author's knowledge, in so far as the International Court of Justice is concerned, this instance was the first time the Court addressed the issue of the financial ramifications of imposing reparations on states found to have breached international obligations. This was showcased by the Court's referral to a decision of an international tribunal (the Ethiopia-Eritrea Claims Commission).

3.0 THE DISSENTING OPINION

In his dissenting opinion, Judge Yves Daudet criticised the majority's computation of the 'global sum' finding that it was too vague and much of an

²⁰ *ibid*, para. 110

²¹ *ibid* para. 407

²² *Ibid* para. 109

²³ *Final Award - Eritrea's Damages Claims between the State of Eritrea and the Federal Democratic Republic of Ethiopia*, Eritrea-Ethiopia Claims Commission, 17 August 2009, p. 522-524

estimate.²⁴ He also noted that in his view, the majority of the International Court of Justice failed to appreciate the compensatory nature of reparations.²⁵ In this regard, the author of this article is in agreement with the learned judge concerning his criticisms. However, whereas this author asserts that the amount reached by the Court was excessive, Judge Daudet was of the view that the amount was too low and inadequate to compensate the people of the Democratic Republic of Congo for the damage dealt by the activities of the armed forces of Uganda.

The learned judge noted as well that the majority said little to nothing when pronouncing itself as convinced that Uganda was financially capable of paying the reparations due to the Democratic Republic of Congo. Interestingly, he also pointed out that the majority did not bother to address the question of whether the Democratic Republic of Congo had the financial capacity to assume unpaid compensation he found it was due on account of the low-amount of reparations in his view. This was by virtue of the Democratic Republic of Congo being a developing country of low-income status.

The author of this article however comments that the learned judge ought also to have further deliberated on the financial burden imposed on Uganda, which is also a developing country of low-income status. In the dissenting opinion, it was stated that there does not exist an international law principle that precludes a responsible state from paying compensation that exceeds its financial capacity.²⁶

Nonetheless, perhaps the time is high that a principle was established in the rules governing state responsibility to the effect that a State's financial capacity is considered in computing the reparations to be paid to victim states.

²⁴ *Armed Activities in the Territory of the Democratic Republic of Congo (Democratic Republic of Congo v Uganda)* (2022), para. 26 (Judge Yves Daudet's Dissenting Opinion)

²⁵ *ibid*, para. 27

²⁶ *supra*, n. 24, para. 32

4.0 A CASE FOR REFORMING THE STATUS QUO ON REPARATIONS

Legal scholars have opined that the International Court of Justice has not established a cogent framework of remedies, and have also noted the minimal analysis of the remedies the Court has the power to grant.²⁷ That said, it can be inferred that the Court has jurisdiction to compel states to redress injuries accruing from wrongful actions done against other states from *Article 36(2)(d)* of the *International Court of Justice Statute*.

Amerasinghe avers that the aforementioned provision empowers the Court with the inherent jurisdiction to award any remedy regardless of its character.²⁸ It is on this premise that this author makes the case for the incorporation of individual sanctions in circumstances such as was exhibited in the *DRC v Uganda Reparations* decision. Although cognisance is taken of the jurisdiction of the International Court of Justice as a court that receives and resolves disputes between State parties. As such, one would question what business the Court has in declaring that individual sanctions be imposed on certain individuals.

In spite of this observation, the Court has been described to have inherent jurisdiction to grant any remedy regardless of its character.²⁹ The Court is mandated to be guided as well by general principles of law as a source of law when resolving disputes.³⁰ It has been held that the Court, based on the aforementioned provision, has freedom to consider principles of equity as part of international law.³¹

More so, the Court has on the record stated that it is bound to apply equitable principles as part of international law and to balance up the various considerations it would regard as relevant in order to produce an equitable

²⁷ Marcus Schnetter “Remedies at the International Court of Justice a New Analytical Approach,” *Bucerius Law Journal*, p. 527

²⁸ Amerasinghe Chittharanjan Felix, “*Jurisdiction of International Tribunals*” (Martinus Nijhoff Publishers, 2003), p. 422

²⁹ *ibid*, p. 422

³⁰ Article 38(1)(c), *International Court of Justice Statute*

³¹ See the decision of Judge Hudson in *Diversion of Water from the Meuse (Netherlands v Belgium)* 1937 P.C.I.J. (ser. A/B) No. 70 pp. 73-77 & pp. 444-450

result.³² Given the foregoing, surely it would not be a long stretch to suggest that the individual sanction concept would be welcomed as a remedy offered by the International Court of Justice especially in circumstances where a state's innocent population face the prospect of being burdened financially as taxpayers when being slapped with hefty reparations.

The model of individual sanctions on select individuals largely responsible for the wrongful actions committed by the state would absolve the innocent populace of responsible states from unfair punishment that would accrue from the present strict liability stance adopted in state responsibility. Individual sanctions have been quite popular in the global struggle against human rights abuses by powerful state officials with the United States Global Magnitsky Human Rights Accountability Act serving as a blueprint.

Such measures take cognisance of the fact that more times than not, wrongful acts mainly carried out on orders by select powerful individuals are ascribed to the State as a whole, thereby punishing the innocent populace yet such powerful individuals could transfer the pinch of paying reparations to the common citizenry and as such remain unfazed.³³

Such individual sanctions would include the freezing of financial assets held by the individuals who formulated the orders upon which international obligations were violated. Concerning the armed activities in the Democratic Republic of Congo, the targeted persons would be the high ranking officials in the Uganda People's Defence Forces that ordered the looting of resources and permitted other unlawful actions. Individual sanctions would also entail travel bans. These would serve as a deterrent and directly affect those culpable without burdening the innocent civilian citizenry of countries found to be in breach of international obligations.

³² Continental Shelf Case (*Tunisia/Libyan Arab Jamahiriya*) 1982 I.C.J. 18 p. 18

³³ Jon Gambrell, "Iranians Say US Sanctions Hurt People not Government" <<https://apnews.com/>> [Accessed 7 March ,2022]; Richard N Haas, "Economic Sanctions: Too Much of a Bad Thing" <<https://www.brookings.edu>> [Accessed 12 March, 2022]

By adopting individual sanctions as an option under reparations as a remedy in state responsibility, the International Court of Justice would not only be in position of reaching a more equitable result in circumstances before it such as that exhibited in the case of *DRC v Uganda Reparations* decision but also conveniently elude the challenge in computing a 'global sum'.

5.0 CONCLUSION

The International Court of Justice's decision concerning the reparations due to the Democratic Republic of Congo by Uganda in the *Armed Activities in the Territory of the Democratic Republic of Congo*, despite its flaws, presents itself as an unseen benefit. This is through highlighting the need to reform the rules of state responsibility, which as they currently stand pose the risk of subjecting innocent populace to the financial pressure of meeting the reparations cast due to actions over which they have no control.

It highlights that in a global village characterised by the existence of autocracies, insisting on the current model of strict state liability defeats the obligation placed on international courts and tribunals to resolve disputes equitably. The light at the end of tunnel is that given the International Court of Justice's jurisdiction to grant any remedy in resolving disputes, there exists no impediment barring it from considering placing individual sanctions in lieu of reparations.

Adopting such a remedy enables the Court to take cognizance of the financial status of a country as a hindrance in paying reparations while averting the likelihood of unjustly burdening the populace of low income earning developing countries. It is the writer's hope that in the near future the International Court of Justice implements its wide jurisdiction in granting remedies through adopting individual sanctions as a remedy under state responsibility and in so doing sets a global trend and precedent for international tribunals to take after.

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