Establishing the Link Between Illegal Conduct and Damage Worth Compensation: Reflections on the Reparations Judgement of Congo v. Uganda

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The International Court of Justice ("ICJ") gave its ruling on the reparations issue in the matter of military activity on the territory of Congo on February 9, 2022. **(*Congo v. Uganda*)**. The ruling follows the substantive judgement handed down by the same Court in 2005, which established Uganda's responsibility for a series of internationally wrongful activities committed on the territory of the Democratic Republic of the Congo ("DRC") between 1998 and 2003.

It is for the first time that the ICJ has been asked to decide on the complicated issue of compensation for losses resulting from a war that happened more than two decades ago. The ruling raises a number of legal questions and is expected to generate much debate. Among the issues with which the Court had to deal were that of reparation and all its various "items" (compensation, satisfaction, etc.), as well as the problem of the "*subjects who are entitled to benefit"* from the implementation of the consequences of the obligation to repair; the problem of the burden and standard of proof that States are required to provide over an extended period of time; the question of the role and weight played by the experts and the methodology employed by the ICJ to ascertain the facts relevant to the ruling.

Without claiming to be exhaustive, this piece will limit itself to providing some reflections on the problem of reparations by way of compensation for the unlawful acts committed by Uganda, and in particular on how the Court has addressed the problem of the causal link between Uganda's unlawful conduct and the compensable damage.

Summarising the Story

In 2005, the ICJ found that Uganda was responsible for a series of violations of international law committed between 1998 and 2003 on the territory of the DRC, including the prohibition on the use of force, the prohibition on interfering in the internal affairs of another state, and the obligation to respect human rights and prevent violations of human rights and international humanitarian law (pp. 280-281 of the decision on the merits). In the sentencing, it was declared that Uganda was obligated to reimburse the DRC for the losses caused by the wrongdoing and that the parties needed to establish a conciliatory path and agree on the amount of restitution owed (p. 281). However, negotiations failed, and in 2015 the DRC asked the court to reopen the case so it could decide on the restorative issue (para. 11 of the decision on reparation).

Reflections on the Arduous Journey to Reach a Criteria for Compensation

a. *Amount of Compensation*

The first general consideration is that the Court awarded Uganda $330 million in total compensation, which is less than 3% of what the DRC asked. In the pleadings submitted by the applicant State, the ICJ was requested to grant more than $4 billion in compensation for personal injury, approximately $200 million for property damage, approximately $1 billion for damage to natural resources, more than $5 billion for macroeconomic damages, and more than $1 billion for non-material damages, for a total of more than $11 billion.

On the one hand, the amount indicated by the DRC raises questions regarding the legitimacy of claims for damages that have the potential to "paralyze" the state obligated to compensate. On the other hand, it is also true that the number determined by the Court is much lower than what would have been anticipated from a ruling about the reparation of damages resulting from one of the deadliest battles in recent history.

Two of the many possible explanations for the substantial gap between what was asked and what the Court actually established are worthy of attention. First, the time passed between the date of the determination by the court and the historical facts at issue, as well as the large temporal gap between the ruling on reparations and the judgement on the merits, which the Court issued seventeen years earlier. This element has likely prompted the Court to adopt a more "conservative" stance since it has made the issue of study and assessment of evidence very complicated. Second, the intricacy of the underlying circumstances rendered the evaluation of the causal connection that the Court had to make in order to identify whether losses were to be deemed as a result of the illegal events in Uganda and were compensable, exceedingly difficult.

On this last point, if it is true that the enormous complexity of the subject matter puts a certain degree of leniency on the Court, we feel that the portion of the judgement addressing the causal connection issue lends itself to some criticism. Those who awaited the ruling hoping for clarification on a series of questions still subject to debate in jurisprudence and doctrine will be sorely disappointed. Furthermore, some passages of the decision raise more than one critical issue and confirm the difficulty the ICJ continues to face in addressing the problem of causality in international offences.

b. *Sufficiently Direct and Causal Link*

Beginning with the issue of determining the causation criteria applicable for purposes of compensation, the DRC claimed in its petitions to the Court that any losses that are the direct result of the illegal conduct or have been produced "by an uninterrupted chain of events" are compensable (para. 86 of the reparations decision). Moreover, for the DRC, the criteria used to define the compensable losses would be "predictability," a criterion that would also enable Uganda to be ascribed those costs that result from the illegal behaviour (as predictable) but have been validated for the existence of other causes (para. 87).

The Court rejected this approach and opted for a different standard, reinforcing its prior case law and adopting the principle of "sufficiently direct and causal link" (para. 84, 93, 145, 148, 154, 214). This is a causal criterion previously adopted by the ICJ in the *Ahmadou Sadio Diallo compensation* judgement (***Republic of Guinea v. the Democratic Republic of the Congo***) and used more recently in the decision on reparation by way of compensation in *Certain activities carried out by Nicaragua in the border area* (***Costa Rica v. Nicaragua***). In particular, the Court maintained that only those losses that are a direct and definite result of the illegal conduct perpetrated by the responsible State are compensable. Clearly, this is a causative requirement that severely limits the breadth of compensable harm, particularly in the case of damage coming from an armed conflict, whose humanitarian, economic, and environmental implications are typically the result of a multiplicity of concurrent causes. In this context, it should be emphasised that neither Articles 31 and 36 of the Proposed Articles on the Responsibility of States for Internationally Wrongful Acts ("ARSIWA") nor their accompanying commentaries establish the causation requirement relevant to damage compensation. In contrast, Article 31 merely affirms that the offending state is "obligated to make full reparation for the injury caused by the internationally wrongful act," and the comment on this provision merely excludes that damages considered "too remote" or consequential "to be the subject of reparation" are compensable, recognizing the possibility of having recourse to a variety of different principles (p. 93).

Nonetheless, the Court's sole reliance on the criteria of a causal link is susceptible to criticism, primarily for another reason. The approach, which we believe to be correct, reflects the position of the International Law Commission ("ILC") in the adoption of the ARSIWA (p. 93) and is explained explicitly by the inability of the ILC, during its work, to identify in practice a single causality criterion that can be used during reparations (on this point, *see Crawford*, Third Report on State Responsibility, pp. 18 et seq.). However, the Court's comment that the causal relationship may vary based on the principal duty breached and the nature of the harm is only a declaration of purpose and not an application of a general principle to the present instance. In actuality, the ICJ not only never disputes the idea of a definite and direct causal relationship but also uses the facts relating to Uganda's possession of a portion of the DRC's territory as the single differentiating factor in assessing causation. In other words, if a difference emerges in the way in which the Court finds itself examining the link between the wrongdoing and the damage, it does not concern the type, nature, or content of the primary obligation violated, but rather the circumstance regarding whether or not the violation took place in the territory occupiedby Uganda at the time of the occurrence. Where the offences are committed in the part of the occupied territory, the Court considers that, unless proven otherwise, all the damages that have occurred in that territory are presumed to be causally attributable to Uganda (para.78, 95, 118, 149, 155, 161, 226, 241, 257). If, however, the illegal actions occurred beyond the occupied area, the DRC must demonstrate that the challenged injury is a sufficiently definite and direct result of these circumstances (paragraphs 84, 94, 95).

This approach creates a number of important concerns. First of all, starting precisely from the distinction that the Court makes between offences committed in the occupied territory of Ituri and offences committed outside this territory, it was stated in the judgement on the merits that Uganda is responsible for acts of its military violating international law and failure to prevent violations of human rights and humanitarian law (para. 178-179).

The Court, therefore, affirms that, on the territory of Ituri, Uganda is responsible for a variety of offences not only from the standpoint of material law but also from the standpoint of typology, making it liable both for violations of negative obligations, which occurred as a "result of" their actions and positive due diligence obligations.

Now, in the decision on reparation, the Court does not point out the difference between these two types of obligations. This was because it avoids answering the age-old question of whether the violation of the negative obligations and, more generally, of all the obligations of due diligence that the State to "supervise" the activities of private individuals on its territory or in spaces under its jurisdiction or control would require the responsible State to pay compensation or only the part relating to its own omission. On the contrary, in the decision on reparation, the Court seems to opt for completely opposite reasoning, stating:

"*As an occupying power*, Uganda had a duty of vigilance in preventing violations of human rights and international humanitarian law by other actors present in the occupied territory (…) Taking into account this conclusion, *it is for Uganda to establish*, in this phase of the proceedings, *that a particular injury alleged by the DRC in Ituri was not caused by Uganda's failure to meet its obligations* as an occupying power. In the absence of evidence to that effect, it may be concluded that Uganda owes reparation in relation to such injury." (para. 78, Italics Added).

This approach, which leverages Uganda's position as an occupying power, inverts the burden of evidence by establishing that this state must demonstrate that the harm asserted by the DRC was not the result of its own actions. As Judge Yusuf pointed out in his separate opinion, this inversion requires Uganda to establish a **double negative**, namely: (a) that the harm asserted by the DRC did not exist; and (b) that if it did occur, it was in no way due to the State's violations (para. 8 et seq.). However, beyond the probative question, the Court's affirmation is problematic because, at least in the restorative judgement, it ends up transforming the responsibility "for negligence" (i.e. that which derives from the violation of *due diligence obligations*) into an **objective responsibility** for which any damage is in principle and unless proven otherwise attributable to the State and compensable by the latter for the sole fact of having occurred within the territory of the State itself or in an area occupied by it.The author believes that a more "faithful" interpretation of the nature of the commitments broken by the Ugandan state would have been to hold that any losses that the DRC establishes to be the "foreseeable" outcome of Uganda's failures are compensable.

c. *Would Damages Arise from a Negative Obligation?*

The next passage that undermines the Court's assertion that the causal relationship may vary depending on the principal responsibility relates to evaluating the harm caused by Uganda's breach of the prohibition of the use of force in the non-occupied territory. Here, too, the problem relates to two distinct types of offences: '

1. Uganda's violation of the prohibition on the use of force by violating the territorial integrity of the DRC with its troops (para. 145);
2. Uganda's violation of the obligation not to have provided military support to rebel groups engaged in armed activities against the DRC (paras. 80-84).

With regard to the breach of the obligation not to provide support or assistance, in compensation claims, the DRC stated that all damages caused by the actions of rebel groups supported militarily by Uganda should be covered, as such damages would not have occurred if Uganda had not illegally entered the territory of the DRC and supported rebel activity (para. 80). Uganda, for its part, maintained that compensation was needed solely for the repercussions resulting from financial assistance and not for those resulting from rebel groups' activities. Leaving aside for a moment the question of the "but-for-test" or conditional criterion of causality invoked by the DRC, the Court could have used the opportunity to clarify whether there is a difference, for the purposes of compensation for damage, between the fact of having violated the prohibition of the use of force through the active conduct of its own organs, and the fact of having "merely" provided support or assistance to rebel groups engaged in armed activities against another state.

In contrast, the Court handles the topic with considerable difficulty. On the one hand, it accepts that simple military assistance constitutes an international violation deserving of compensation, and it underlines that the many sources of the harm (the conduct of military support and the actions of the rebels) do not exclude the obligation of reparations (para. 97). On the other hand, the Court avoids truly addressing the issue, and in the different damage compensation items, there is no indication of how to quantify the harm inflicted by Uganda-supported rebel groups. The sole mention of "multiplicity of causes" is when the Court discusses the harm caused by displacement and property destruction as a result of the violent engagements between Ugandan and Rwandan forces (para. 221 and para. 253). In this case, the Court limited itself to maintaining that, even though the harm is the result of two concurrent causes, each State is liable for compensating the damage caused by its own wrongful conduct. The situation in which a State is required to compensate for damage concurrently caused by its own action and the actions of private individuals is, however, utterly distinct from that in which a State is required to compensate for damage caused by a combination of its own action and the actions of private individuals.

d. Natural Causality and Legal Causality

This leads us to a final, and important, reflection. From the reading of the judgement, a certain confusion emerges on several occasions that the Court – and also the parties themselves (paras.77, 80, 91) – make between causality in fact(or **natural causality**) and **legal causality**. The distinction has also been appropriately endorsed by the ARSIWA (comment on Art.31, para.10), after being for the first time already stated during

the work of the ILC by the Special Rapporteur Arangio-Ruiz (Second Report on State Responsibility, p. 12 et seq.). In essence, using the words of the ILC, "The allocation of injury or loss to a wrongful act is, in principle, a *legal* and not only historical or causal process" (p. 92). On the one hand, in order for damage to be compensable, a preliminary historical-reconstructive evaluation is certainly necessary, aimed at researching the scientific, statistical or probabilistic laws, which allow us to say that that damage is the consequence of a certain event (*natural causality*). Once this has been done, an essentially judicial assessment will then be required, aimed at ascertaining whether that damage should be considered the consequence of a certain event not only in fact but also legally – for example, recognizing as a cause only certain and direct damages (legal causality). When it comes to international offence, there is no doubt that the ascertainment of natural causality is in many cases, part of the process that leads to ascertaining *the existence* of the illicit fact, and therefore, of the violation. Therefore, it is above all, legal causality that plays an essential role in the reparations phase, as it is here that the judge accompanies, to the above factual assessments, normative considerations on what should be considered compensable damage or not.

In the reparations judgement of ***Congo v. Uganda***, there are several passages (for example, para.78, 149, 250, 382) in which the Court seems to confuse these two different levels (natural causality [in fact] and legal causality) and seems to overlap, at times, the problem of causality at purposes of attributing the offence with the *different* problem of causality for the purposes of reparation. An example of this confusion can be seen at the beginning of the decision when the Court is called upon to express itself on the general principles that should regulate the causal link between unlawful conduct and damage. The Court, responding to the defence of Uganda, according which, in relation to the violations of the obligations to *prevent* violations of human rights and humanitarian law, the conditional criterion (but-for-test) would be applied, according to which only the damages that they would not have occurred if Uganda had properly intervened (para. 77, 92). Uganda invokes the conditional criterion since it was precisely the ICJ that applied this principle in the *Genocide Case (**Bosnia Herzegovina v. Serbia**)*, establishing that the damage resulting from the genocide was not attributable to Serbia since it could not be established with certainty that, if Serbia had intervened in compliance with the obligation of prevention, the genocide would not have occurred (para. 462).

Conclusion

In *Congo v. Uganda*, the Court could have overcome the impasseit had incurred in 2007 and rejected the conditional criterion as the latter belongs to the problem of causality in factand does not concern the issue of causality in the reparations phase. Moreover, it is evident that the factual causal link between Uganda's omission and violations of human and humanitarian rights had already been – at least implicitly – recognized by the Court at the very moment it had determined the violation of the prevention obligations relating to human rights and humanitarian law in the territory of Ituri (these being illegal events). Instead, the Court rejects the conditional criteria for an entirely different reason, holding that no comparisons are available with the ***Genocide Case (Bosnia Herzegovina v. Serbia)***since the Court in that decision restricted itself to determine the precise extent of

the responsibility to prohibit under the Genocide Convention. In summary, the Court, which ultimately seems to adhere to the idea that the determination of causation in reparation rests on the type and scope of the primary rule, confuses the two stages of the causal process.

Ultimately, the verdict on reparations in ***Congo v. Uganda*** does not seem to give any insight into the complicated issue of causality in compensation and, more broadly, in international crimes. Some parts of the ruling turn out to be obscure and the reader is often called upon to make an effort of interpretation to be able to grasp the various logical passages underlying some of the Court's statements. However, given the exceptional nature with which the Court is called upon to rule on compensation for damages of this type, the sentence is certainly historic and probably destined to act as a precedent for any future cases.

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