that case and the present one. However, as Judge Nolte argued in his Declaration, *Legality* centred on an allegation that states engaging in the use of force were *committing* genocide through their use of force. In contrast, the claim in *Ukraine* is whether actions taken purportedly to prevent and punish genocide were lawful under the GC. Robinson explicitly linked this to the question of false claims of international law, pointing out that Ukraine has not asked the court a *general* question about Russia's force; rather, it is arguing that Russia cannot lawfully rely on a false claim to act to prevent genocide under the Convention.

The court's Order is a clear win for Ukraine, even though Russia is highly unlikely to comply. The way in which Ukraine relies on the idea of falsity to characterise its rights – the right "not to be subject to a false claim of genocide" (at [52]) and for military action not to be "launched on a pretext of genocide" (at [68]) – is perhaps the most remarkable aspect of the case. Although the court stops short of directly embracing the idea of a right not to be subject to false claims of international law, it does conclude that Ukraine has "a plausible right not to be subject to military operations by the Russian Federation for the purpose of preventing and punishing an alleged genocide in the territory of Ukraine" (at [60]). While jurisdiction is clearly based on the existence of a dispute as to whether genocide is taking place and what actions Russia may lawfully take in response, the court nevertheless signalled that Article I GC must be carried out in good faith and in a way that is compatible with general international law. At the merits stage, it may have to grapple with what this means in practice, including what it means to make "bad faith" and pre-textual claims about law and fact as opposed to making claims that are plausible but wrong. Drawing these distinctions and characterising the impact that deception has on the validity of international legal arguments is a perennial challenge for international law, as too many past examples of unilateral force have shown.

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ESTABLISHING DAMAGES FOR MASS HUMAN RIGHTS VIOLATIONS

ON 9 February 2022, the ICJ issued its much-awaited Reparations Judgment in *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, in which it awarded the Democratic Republic of the Congo (DRC) a global sum of 325 million US dollars as total compensation for damage caused by Uganda's violations of international human rights law, international humanitarian law and international law. These violations had been established by the court in the 2005 Merits Judgment (ICJ Reports 2005, p. 168) and stemmed from Uganda's military activities against

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the DRC on the latter's territory. They included the use of force on DRC's territory, including providing active military, logistic, economic and financial support to irregular forces on the territory of the DRC; acts of torture, killing and other inhumane treatment of the Congolese civilian population as well as acts of looting, plundering and exploitation of Congolese natural resources by the Ugandan armed forces; and the failure – as an occupying power in the Ituri district – to protect human rights and humanitarian law and prevent the exploitation of natural resources.

The issue of reparations had been initially left to the two parties to settle, but when negotiations with Uganda failed, the DRC in 2015 requested the court reopen proceedings to determine the appropriate level of compensation. In proceedings, the DRC claimed over 11 billion US dollars in compensation, which included claims for personal injury, damage to property and natural resources, but also claims for macroeconomic damage, non-material damage, the creation of a fund to promote reconciliation between two warring ethnic groups in Ituri, and the conduct of criminal investigations and prosecutions of individuals involved in violations of international humanitarian law and human rights law committed on Congolese territory for which Uganda was found responsible. In response, Uganda argued that the finding of a violation in the 2005 Merits Judgment "constitutes an appropriate form of satisfaction" (at [46]). Further, it insisted that the DRC was entitled to reparation in the form of compensation only if it can "demonstrate and prove the exact injury suffered as a result of specific actions of Uganda" for which it is responsible (at [46]). Given that the reparation proceedings took place 17 years after the judgment on the merits and more than 20 years since some of the events had taken place, any requirement to demonstrate exact injury would prove problematic. Ultimately, the court upheld only DRC's claim to compensation for damage to persons, property and natural resources and rejected all other claims. The total sum awarded was just a fraction of the total amount claimed by DRC against Uganda.

This note explains how the 2022 Reparations Judgment breaks new ground in determining compensatory reparations for mass violations of human rights and humanitarian law. In particular, it focuses on how the court approaches the question of evidentiary fact-finding given that so much time has passed between the Merits and the Reparations Judgments. In this context, two questions stand out: whose evidence the court will accept as persuasive and how it will estimate the damage incurred. The answers the ICJ provides to these questions will have important fact-finding consequences for recognising and estimating the appropriate compensation amounts in future mass human rights violations and inter-state cases.

The court affirmed that the standard of full reparation for injury caused by internationally wrongful acts as expressed in the *Chorzow Factory* judgment (1928, P.C.I.J., Series A, No. 17, p. 47) and Article 31 of the International Law Commission's Articles on State Responsibility was applicable and that

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such reparation should wipe out all consequences of the internationally wrongful act (at [106]). The court noted that in this context different rules regarding proof and requisite causal nexus were applicable depending on different situations that arose during the conflict (e.g. where Uganda acted as an occupying power compared to the other areas of the DRC, where Uganda had provided support for rebels) (at [118]–[119]).

Most importantly, the court underlined that as far as the assessment of damage resulting from the armed conflict and quantification of compensation was concerned, there was divergence between the parties about methodology and applicable principles, and specifically what ought to be done when there is uncertainty about the extent of the damage caused. Here, the court followed practices of the Ethiopia-Eritrea Claims Commission (Decision of 17 August 2009, RIAA, Vol. XXVI), which had shown flexibility as regards the establishment of evidence and determination of damages for large group victims in situations of armed conflict (at [107]). In a key paragraph, setting out its approach, the court said it may "on an exceptional basis, award compensation in the form of a global sum within the range of possibilities indicated by the evidence and taking into account equitable considerations. Such an approach may be called for where the evidence … does not allow a precise evaluation of the extent or scale of such injury" (at [106]).

As far as evidence was concerned, the court said it would adopt a flexible approach due to the inaccessibility and destruction of evidence over the years since the armed conflict. In practice, however, the court struggled both with the lack of documentation on the part of DRC and the reliability of the evidence provided – both in relation to the loss of life and damage to persons as well as damage to property. Ultimately, the court chose to rely on evidence submitted by United Nations organs. For example, in the context of establishing the number of civilian victims under DRC's claim for compensation for the loss of life, the court rejected the claim that reparation was due for 180,000 civilian deaths since "the victim identification forms submitted by the DRC are few in number in comparison to the number of lives lost claimed" (at [146]). The court similarly assigned little weight to the mortality surveys presented by experts and academic databases used to identify direct conflict deaths due to their "limited probative value". Instead, the court accepted the assessments of 10,000 to 15,000 victims contained in the United Nations reports and documents prepared by the UN Office of the High Commissioner for Human Rights as "sufficient evidence of reliable quality" (at [152]).

Many other claims by the DRC were rejected due to lack of evidence (the claim for compensation for the loss of 2,000 members of its armed forces, and for the recruitment of 2,500 child soldiers by Uganda and armed groups). Others were subsumed within the global sum (award of compensation for personal injuries, compensation for rape and sexual violence,

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compensation for forced displacement of populations). In the end, the court announced that it was "appropriate to award a single global sum of $225 million for the loss of life and other damage to persons" (at [226]).

As regards the damage or destruction of assets and infrastructure owned by or in possession of the DRC, the court relied again on the assessments in UN reports and assessed the damage as a global sum of $40 million. No explanation was provided on how the quantum was reached. On natural resources, the DRC's methodology in estimating damage was rejected and the court instead relied on the court-appointed expert, though "a sufficiently precise determination of the extent or valuation of the damage" was nevertheless not possible (at [364]). Thus, a global sum was awarded for looting, plundering and exploitation of natural resources in the amount of US$60 million.

The 2022 Reparations Judgment raises a number of issues for future inter-state cases involving mass human rights violations. First, the challenges of obtaining and assessing the reliability of evidence speak against the decision to split the merits and reparations proceedings. The 17-year gap between the two sets of proceedings contributed to the complex evidentiary fact-finding and to the relatively modest reparations valuation.

Second, the judgment raises serious questions about whose evidence a "world court" should give credence to, both in relation to fact-finding and valuations. The almost exclusive reliance on UN-provided reports and the expressed mistrust for many non-UN evidentiary sources is not explained; there is also no assessment of data collection methodologies, or recognition that reports by organisations closer to the ground might have probative value. Although other international courts and tribunals have shown similar preference for official reports by international bodies (the European Court of Human Rights, for example, gives a lot of credence to reports of torture and poor conditions by the European Committee for the Prevention of Torture), they have been more open to take into account valuation reports by expert witnesses hired by the parties and depart from these only in cases of serious discrepancies (*Petroiu v Romania,* Application no. 33055/09, Judgment of 25 March 2014; *Yukos v Russia* (2014) 59 E.H.R.R. SE12). The reality is that the UN's own fact-finding processes are not always reliable (e.g. Myanmar) and thus a more flexible approach – one that triangulates information from a variety of sources – may be appropriate.

Finally, the assessment of damage and the determination of quantum is very opaque. The "global sum" approach appears to be treated as allowing any valuation without providing any explanation or reasoning. It is entirely unclear how much a life is "worth" or how this compares to an injury. Although judges are not accountants (or domestic courts, which often have precise scales for assessing injury and loss of life), the lack of any explanation of the valuation is surprising. In comparison to the ICJ, the European Court of Human Rights, even when setting a global amount (e.g. in *Cyprus v Turkey* (2014) 59 E.H.R.R. 16), follows a structured

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approach and awards compensation amounts that are generally consistent with the value assigned to loss of life or injuries in other cases and multiplied by the approximate number of victims. In contrast, the only thing that the ICJ makes clear in its judgment, is that the awards should not be read as being of "a punitive character" (at [102]). Beyond this, however, we do not know whether equity, moral justice or other elements motivated the valuation. Although the ICJ is not alone in using the "global sum" approach to overcome evidentiary difficulties without providing more reasoning (*Pey Casado*, ICSID arbitration between Chile and Spain, ICSID Case no. ARB/98/2), the concern, going forward, is that the 2022 Reparations Judgment gives international courts and tribunals a *carte blanche* to provide no explanation or reasoning for assessment of damage in cases of mass international law violations.

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CITIZENSHIP, CHARGES AND COMMON LAW CONSTITUTIONAL RIGHTS

THE conundrum is as follows. Statute 1 offers the applicant a statutory right. Statute 2 allows the decision maker to create further subordinate legislation. If the subordinate legislation seeks to alter statute 1, we are possibly concerned with a Henry VIII clause. But what if the subordinate legislation stops short of altering statute 1, but only renders the statutory right under statute 1 practically difficult to exercise? This is the situation in *R. (O) v Secretary of State for the Home Department* [2022] UKSC 3, [2022] 2 W.L.R. 343. There section 1(4) of the British Nationality Act 1981 ("the 1981 Act") confers on certain individuals (including the applicant) a statutory right to apply to be registered as a British citizen. But this is subject to the payment of a registration fee. Section 68 of the Immigration Act 2014 ("the 2014 Act") empowers the Secretary of State to set the relevant level of the fee by way of subordinate legislation. This was done in the Immigration and Nationality (Fees) Regulations 2018, SI 2018/330 (the 2018 Regulations), which sets the fee for registration at £1,126 for an adult and £1,012 for a child, respectively. This fee meant that the applicant (amongst many others in a similar position) could not in practice exercise her rights under the 1981 Act. The applicant thus argued that the 2018 Regulations were *ultra vires*, for they "rendered nugatory the underlying

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