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Now You See Them, Now You Don't: International Court-Appointed Experts, Wartime Reparations, and the DRC v. Uganda Case

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I. Introduction

This special issue of the *Journal of International Humanitarian Legal Studies* is focused on the intersection between scholarship and practice in international humanitarian law. One place such intersection may be observed is in litigation concerning violations of the law of war, such as has arisen before the U.N. Compensation Commission, the Eritrea Ethiopia Claims Commission, or the International Court of Justice (ICJ). Parties appearing before such tribunals often rely upon outside scholars and other experts when seeking to prove or defend against claims. Less common, the tribunal *itself* might retain such experts (*ex curia* experts).

An interesting example in this regard is observable in the recent ICJ decision in a case that the Democratic Republic of the Congo (DRC) brought against the Republic of Uganda (Uganda) for war-related claims. In the reparations phase of the case, the Court decided—at a relatively late stage in the proceedings—not to rely solely on the submissions of the Parties, but to task certain scholars and other experts to answer evidentiary questions. As such, these experts became a central feature of the final stage of the litigation.

Yet when the Court's judgment was issued in February 2022, the role of these experts turned out to be almost negligible, with one significant exception. The problem that experts were being used to resolve—a lack of convincing evidence from a claimant—ultimately could not be overcome by outsourcing the task to others. The overall lesson learned may be that, while the work of scholars in many instances may be highly important for claims practice relating to international humanitarian law, it does have its limits, such as when proving and quantifying mass civil injury resulting from a lengthy and complex armed conflict. In short, experts alone cannot cure extremely difficult evidentiary problems.

II. The ICJ's Prior Use of Court-Appointed Experts

Under Article 50 of the Statute of the Court, the Court "may, at any time, entrust any individual, body, bureau, commission, or other organization that it may select, with the task of carrying out an enquiry or giving an expert opinion."[3] If the Court considers it necessary to arrange

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[3] See also Article 62 of Rules of Court ("1. The Court may at any time call upon the parties to produce such evidence or to give such explanations as the Court may consider to be necessary for the elucidation of any aspect of the matters in issue, *or may itself seek other information for this purpose*. 2. The Court may, if necessary, arrange for the attendance of a witness or *expert to give evidence in the proceedings*.") (emphasis added). Articles 9 and 21(2) of

for an expert opinion, Article 67(1) of Rules of Court provides that the Court "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."[4] As the Court has explained, "the purpose of the expert opinion must be to assist the Court in giving judgment upon the issues submitted to it for decision."[5]

Although the Court enjoys wide discretion to appoint experts, it has done so only in two cases.[6] In *Corfu Channel Case (U.K. v. Albania)*, the Court appointed experts in two instances. At the merits stage, the Court requested three experts to determine the means for laying a minefield in the relevant area and examine whether it was possible to place mines in Albania's territorial sea without the Albanian authorities being aware of it, considering the extent of the measures of vigilance existing in the relevant area.[7] After receiving the first expert report, the Court requested the same experts to conduct a site visit to establish additional information, which was done by conducting on-site tests, including checking visibility at night.[8] The Court gave "great weight to the opinion of the Experts" because they "examined the locality in a manner giving every guarantee of correct and impartial information," ultimately supporting the conclusion that the Albanian Government must have known about the placement of mines in Albania's territorial sea.[9] The Court's appointment of the experts in those circumstances was apparently motivated by the necessity to establish evidence objectively where only one disputing party (Albania) had access to the territory under its control.

At the reparation stage, the Court appointed two experts to examine whether the extent and valuation of the damages claimed by the United Kingdom were correct.[10] The expert report largely corroborated the damages claimed by the United Kingdom.[11] As a result, the report gave the Court a greater confidence that its decision on monetary compensation was well founded in fact and law, even though the responding party had failed to appear at that stage.

Rules of Court empower the ICJ to appoint "assessors" to consult with them on technical and scientific questions during deliberations; however, such assessors do not provide an expert opinion and therefore should be distinguished from *ex curia* experts.

[4] Pursuant to Article 67(2) of the Rules of the Court, "[e]very report or record of an enquiry and every expert opinion shall be communicated to the parties, which shall be given the opportunity of commenting upon it."

[5] *Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya) (Tunisia v Libyan Arab Jamahiriya)*, Judgment, I.C.J. Reports 1985, p. 228, para. 65.

[6] The Court's predecessor, the Permanent Court of International Justice, appointed experts only once, at the merits stage of the *Chorzow Factory* case (to assess monetary damages). *See Case concerning the Factory at Chorzow* (Order) P.C.I.J. Reports, Series A, No. 17. Although the Chamber of the ICJ appointed an expert in the *Gulf of Maine* case, this example must be set apart, as it does not reflect an exercise of discretion under Article 50 of the Statute of the Court. Rather, in appointing the expert, the Chamber acted pursuant to the Special Agreement between the United States and Canada, which required in Article II(3) the appointment of an expert. *See Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States of America)*, Judgment, I.C.J. Reports 1984, p. 253.

[7] *Corfu Channel Case (U.K. v. Albania)*, Judgment (Merits), I.C.J. Reports 1949, p. 9.

[8] Ibid., p. 21.

[9] Ibid., pp. 21-22.

[10] *Corfu Channel Case (U.K. v. Albania)*, Judgment (Compensation), I.C.J. Reports 1949, p. 247.

[11] Ibid., pp. 248-50. Notably, with respect to one category of damages, the court-appointed experts established damages in the amount greater than calculated by the United Kingdom. However, the Court awarded the United Kingdom the amount it claimed, ibid., p. 249—a tacit application of the principle of *non ultra petita*.

Another case where the Court appointed experts is *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Nicaragua v. Costa Rica)*. Two independent experts were asked to collect, by conducting a site visit, all the factual elements capable of allowing for the determination of the starting-point of the maritime boundary between the disputing parties in the Caribbean Sea.[12] During two site visits, the experts collected the necessary information and received from the parties documents, photographs and video recordings.[13] Copies of the report filed by the experts were communicated to the parties, who were then given an opportunity to submit any written observations that they might wish to make on that report. The assessment made by the Court-appointed experts, which was not challenged by the Parties, "dispel[ed] all uncertainty about the present configuration of the coast," and provided the Court a basis to determine both the starting-point of the maritime boundary and sovereignty over the territory disputed by the parties.[14] Thus, those determinations became possible because of the evidence collected by the experts during their site visits.

It is beyond the scope of this article to address the question of why the Court did not appoint experts in other cases involving complex technical and scientific evidence.[15] However, the Court's decision not to do so could be understood by the absence of difficulties similar to those in the two cases discussed above, where the Court deemed helpful to appoint its experts.

III. Basics of the *DRC v Uganda* Case

From August 1998 until July 2003, an intense armed conflict occurred in the Great Lakes area of Africa, sometimes referred to as "The Second Congo War" or "The Great War of Africa." Numerous States and non-State actors were involved in the conflict, leading to several million deaths (principally through disease and starvation), likely making it the deadliest armed conflict since the Second World War.[16]

Believing it was the subject of violations of international law by its neighbors, the DRC sued Burundi, Rwanda and Uganda at the ICJ in 1999. The cases against Burundi and Rwanda were discontinued in 2001, after which the case against Rwanda was resumed but failed due to a lack of jurisdiction.[17] But the case against Uganda took root, as both the DRC and Uganda had previously filed declarations accepting the Court's compulsory jurisdiction.[18]

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[12] *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Nicaragua v. Costa Rica),* Judgment, I.C.J. Reports 2018, pp. 147-48, paras. 10-20.
[13] Ibid., pp. 148-49, paras. 21, 31.
[14] Ibid., pp. 167-68, paras. 71-72.
[15] See, e.g., *Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)*, Judgment (Merits), I.C.J. Reports (2010).
[16] For general accounts, see Gerard Prunier, *From Genocide to Continental War: The "Congolese" Conflict and the Crisis of Contemporary Africa* (C. Hurst & Co, 2009); Thomas Turner, *The Congo Wars: Conflict, Myth, and Reality* (Zed Books, 2007).
[17] Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006, p. 6.
[18] Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment (Merits), I.C.J. Reports 2005, p. 175, para. 1.

The Court held a hearing on the merits in April 2005 and in its judgment, issued in December of that year ("2005 Judgment"), found that both sides had committed violations of international law.[19] With respect to Uganda, the Court found three types of violations:

> *Violation of the jus ad bellum*: "Uganda, by engaging in military activities against the Democratic Republic of the Congo on the latter's territory, by occupying Ituri and by actively extending military, logistic, economic and financial support to irregular forces having operated on the territory of the DRC, violated the principle of non-use of force in international relations and the principle of non-intervention";[20]
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> *Violation of the jus in bello*: "Uganda, by the conduct of its armed forces, which committed acts of killing, torture and other forms of inhumane treatment of the Congolese civilian population, destroyed villages and civilian buildings, failed to distinguish between civilian and military targets and to protect the civilian population in fighting with other combatants, trained child soldiers, incited ethnic conflict and failed to take measures to put an end to such conflict; as well as by its failure, as an occupying Power, to take measures to respect and ensure respect for human rights and international humanitarian law in Ituri district, violated its obligations under international human rights law and international humanitarian law";[21] and
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> *Violations relating to natural resources*: "Uganda, by acts of looting, plundering and exploitation of Congolese natural resources committed by members of the Ugandan armed forces in the territory of the Democratic Republic of the Congo and by its failure to comply with its obligations as an occupying Power in Ituri district to prevent acts of looting, plundering and exploitation of Congolese natural resources, violated obligations owed to the Democratic Republic of the Congo under international law".[22]

Since the Court also found that Uganda was under an obligation to make reparation for the injury caused by these violations, the case then moved on to a reparations phase.[23] Several years passed as the Parties sought to find their way toward a settlement, but active pleadings before the Court resumed after 2015, with the DRC's filing of a memorial on reparations in September 2016, followed by Uganda's filing of its counter-memorial in February 2018.

Establishing on the merits that Ugandan violations of international law occurred during the course of a five-year war, in the eleventh-largest country in the world, is one thing; establishing exactly what loss, damage or injury resulted from those violations is an entirely different matter. In principle, the DRC's task was to take a Ugandan violation of international law from the 2005 Judgment and then to demonstrate that such violation resulted in a specific

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[19] Uganda filed certain counter-claims, some of which were deemed admissible. The Court found that the DRC violated international law, principally in its mistreatment of Ugandan diplomats and other individuals, for which the DRC was obligated to make reparation. Ibid., pp. 259-79, paras. 266-344. Uganda, however, did not pursue reparation for those violations at the reparations phase.

[20] Ibid., p. 280, para. 345, subpara. (1) of the operative part.

[21] Ibid., p. 280, para. 345, subpara. (3) of the operative part.

[22] Ibid., pp. 280-281, para. 345, subpara. (4) of the operative part).

[23] Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment (Reparations), I.C.J. Reports 2021, para. 7 ("2021 Judgment").

harm to a person, property or resource, as well as the quantum associated with that harm. Generally speaking, it should not be sufficient simply to demonstrate that a loss, damage or injury occurred somewhere in the DRC during the war, given that there were multiple State and non-State actors (including the DRC itself) operating in the country during conflict, such that any harm was not necessarily attributable to Uganda.

Yet several factors likely made the DRC's task very difficult. Even in the best of circumstances, large-scale harm during a lengthy armed conflict is inherently difficult to analyze and catalogue. For the particular conflict, the presence of multiple actors in the DRC meant that a particular harm often could not be easily disentangled, such as when two or three belligerents shelled the same town in the same time frame, as military forces advanced and retreated. The DRC as a developing country had limited resources for undertaking such a task. Gathering such information long after the conflict is prone to error and may be especially fraught when done for the purposes of securing compensation in litigation.[24]

In any event, such difficulties resulted in the DRC relying considerably on what can only be described by the present authors as guesswork, in which it produced a database of documents that was difficult to read, that was often duplicative, incomplete, or undocumented, and that mapped poorly onto certain tables prepared by the DRC purportedly from the database. Moreover, rather than rely directly on such evidence, the DRC often simply estimated what it believed was the overall harm that occurred, using various unexplained multipliers, and then attributed a portion of that overall harm to Uganda by means of equally unexplained discounts. For its part, Uganda maintained that the DRC had failed to sustain its burden of proving loss, damage or injury resulting from Uganda's violations and further failed to prove quantum.[25] The Court would later decide, rather systematically, that the materials presented by the DRC were insufficient to support the amounts sought by the DRC for its claims.[26]

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[24] Ibid., para. 159 (the Court ""aware that detailed proof of specific events that have occurred in a devastating war, in remote areas, and almost two decades ago, is often not available""). Judge Salam also noted several such factors. Ibid., Declaration of Judge Salem, para. 11.

[25] See, e.g., ibid., para. 142 (with respect to damage to persons, "Uganda asserts that the DRC has thus failed to meet its burden of proof as to the exact injury that was suffered as a result of specific actions of Uganda" and the "DRC's request for compensation should therefore be rejected.").

[26] See, e.g., ibid. para. 162 (insufficient DRC evidence to determine the number of civilian deaths); ibid., para. 163 (no convincing DRC evidence on average amount awarded in DRC courts for loss of life); ibid., para. 174 (insufficient DRC evidence for approximating the number of civilians injured); ibid., para. 189 (DRC victim identification forms for rape and sexual violence are of "little probative value"; rejection of "unsubstantiated multipliers"); ibid., para. 200 (limited DRC evidence regarding the number of child soldiers); ibid., para. 205 (failure of DRC to provide evidence of sums awarded by DRC courts with respect to child soldiers); ibid., para. 223 (DRC evidence does not establish a sufficiently certain number of displaced persons); ibid., para. 242 (more evidence could have been collected by the DRC to support damage to property, especially in relation to assets and infrastructure owned by the DRC); ibid., para. 246 (DRC evidence does not allow approximation of the extent of property damage in Ituri); ibid., para. 251 (same for property damage outside Ituri); ibid., para. 255 (failure of DRC to prove harm to national electricity company); ibid., para. 256 (failure of DRC to prove harm to military property); ibid., para. 294 (rejecting DRC methodology and figures relation to unlawful exploitation of gold); ibid., para. 307 (same for diamonds); ibid., para. 319 (DCR evidence on unlawful exploitation of coltan not convincing); ibid., para. 327 (dismissing DRC claims for unlawful exploitation of tin and tungsten due to limited evidence); ibid., para. 340 (DRC evidence and methodology for unlawful exploitation of timber does not support amount claimed); ibid., para. 350 (no basis for assessing damage to the environment, including biodiversity, through deforestation); ibid., para. 358 (DRC evidence does not support amount

Indeed, the Court apparently had trouble understanding the DRC's evidence, as it concluded that it needed further clarification. Consequently, in June 2018, the Court posed a list of questions to the Parties (most of which were directed at the DRC's evidence), to which the Parties responded in November of that year. Because of continuing problems with annexes that had been submitted by the DRC, it submitted a further version of its responses, after which the Parties commented on each other's responses.[27]

At this point, the case was ready for hearing and a hearing was in fact scheduled for March 2019. After the DRC sought a postponement, the hearing was rescheduled for November 2019.[28] As that date approached, both Parties requested a postponement to allow for an amicable settlement, which the Court granted.[29] Thereafter, a settlement not having been reached by April 2020, the Court informed the Parties that the hearing would be held during the first trimester of 2021.[30]

Consequently, it was somewhat to the surprise of the Parties when the Court announced in July 2020 that—rather than proceed with a hearing based on the written pleadings of the Parties as had been planned as far back as early 2019—the Court had decided to seek "an expert opinion" with respect to three heads of damages: loss of human life; property damage; and loss related to natural resources.[31] Uganda "strongly object[ed] to the proposal" saying that it "amounts to relieving the DRC of the primary responsibility to prove her claim (or any particular heads of claim), and assigning that responsibility to third parties, to the prejudice of Uganda and in violation of the relevant principles of international law."[32] Given that it felt the DRC had not proven its case, Uganda maintained that "there is no evidence for the experts to assess or opine on…."[33] By contrast, the DRC supported the idea,[34] and after considering the Parties' positions, the Court proceeded with the appointment of multiple experts.

IV. Now You See Them: Introduction of Court-Appointed Experts

After consulting with the Parties, and despite Uganda's objections to three of the experts, the four experts appointed by the Court were: Debarati Guha-Sapir, Professor of Public Health at the University of Louvain; Henrik Urdal, Research Professor and Director of the Peace Research Institute Oslo; Geoffrey Senogles, Partner at Senogles and Company, Switzerland; Michael Nest, Environmental Governance Advisor for the European Union's Accountability, Rule of Law and Anti-corruption Programme in Ghana, and a conflict minerals analyst for, inter alia, the U.S. Agency for International Development.[35]

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claimed for harm to fauna); ibid., para. 381 (no DRC evidence showing link between Uganda's actions and macroeconomic damage).

[27] Ibid., para. 17.
[28] Ibid. para. 18.
[29] Ibid., para. 19.
[30] Ibid., para. 20.
[31] Ibid., para. 21. The Court did this based on Article 67, para. 1, of the Rules of Court.
[32] Ibid., para. 22.
[33] Ibid., para. 24.
[34] Ibid., para. 23.
[35] Ibid., paras. 26, 30-31.

The experts were asked a series of questions by the Court about the loss of human life, property damage, and loss related to natural resources, in each instance asking the experts to provide their testimony "[b]ased on the evidence available in the case file and documents publicly available, particularly the United Nations Reports mentioned in the 2005 Judgment."[36] Thereafter, the experts submitted a four-part, 131-page, report to the Court, which was transmitted to the Parties in December 2020.[37] Both Parties filed written observations on the report in February 2021, which were then communicated to and commented upon in writing by the experts.[38]

The hearing was held in April 2021 and both Parties presented first round oral submissions to the Court.[39] After that, two sessions of the hearing were devoted to questioning of the experts by the Parties, with each expert first making a declaration to tell the truth and then each side having approximately 30 minutes to question the expert. In addition, Members of the Court put questions to two of the experts.[40] Thereafter, the Parties presented second round oral submissions, during which they addressed the experts' oral testimony.[41]

V. Now You Don't See Them: The Court's Judgment

Given the introduction of the experts as an apparent corrective to the DRC's pleadings, it might have been expected that their contributions would feature significantly in the Court's judgment. As it happens, with one exception, the experts work was largely set aside, and appears not to have especially influenced the Court's decision.[42] The experts' contribution to each heading of damage is considered in turn.

A. Loss of Life

Three experts were requested to assist the Court by providing testimony on two issues concerning the loss of life: (1) estimating the lives lost among the DRC civilian population "due to the armed conflict" and "by manner of death"; and (2) according to "the prevailing practice" in the DRC, identifying "the scale of compensation due for the loss of an individual life."[43] Two of those experts testimony were set aside entirely, while a third expert's testimony was partially used by the Court.

The first expert, Professor Guha-Sapir, used data from 38 mortality surveys in the public domain to estimate the "excess civilian deaths" due to the conflict in the DRC between 1998 and

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[36] Ibid., para. 25.
[37] Ibid. para. 33; see *Experts Report on Reparations for The International Court of Justice* (Dec. 19, 2020) ("Experts' Report"), https://www.icj-cij.org/public/files/case-related/116/116-20201219-OTH-01-00-EN.pdf.
[38] 2021 Judgment, *supra* note 23, para. 37.
[39] Ibid., para. 41. The DRC's opening round was held April 20, 2021. Uganda's opening round was held April 22.
[40] Ibid., para. 43. The two sessions with the experts were held April 23 (questioning of Henrik Urdal and Debarati Guha-Sapir) and April 26 (questioning of Geoffrey Senogles and Michael Nest).
[41] The DRC's second round was held April 28. Uganda's second round was held April 30.
[42] See ibid., Dissenting Opinion of *Ad hoc* Judge Daudet, para. 5 ("Avec l'aide d'experts dont les prestations ont été d'un inégal secours…") (author trans.: "With the assistance of experts whose services have been of unequal help,…").
[43] 2021 Judgment, *supra* note 23, para. 25.

2003 to be 4,958,775. Dividing this number by ten and applying a 0.45 multiplier put forward by the DRC for the purpose of identifying the percentage of deaths caused by Uganda, Professor Guha-Sapir arrived at an estimate of 224,449 "excess civilian deaths" attributable to Uganda.[44] Uganda, however, pointed out that the data Professor Guha-Sapir used was outdated; more recent data for the period 1998-2003 published by the U.N. Population Division indicated that no detectable "excess deaths" in the DRC during this time period. Uganda also maintained that Professor Guha-Sapir's reliance on the DRC's multiplier was inappropriate, given that it was arbitrary and failed to consider adequately the role of other actors.[45]

A second expert, Professor Urdal, also provided testimony as to the number of deaths, relying principally on data collected by the Uppsala Conflict Data Program ("UCDP") housed at Uppsala University, an academic database that sought to identify "direct conflict deaths" based on individual incidents.[46] His numbers, however, were far lower than those put forward by Professor Guha-Sapir—Professor Urdal arrived at an estimate of 14,663 direct civilian deaths—thus creating a conflict in the two experts' testimony.[47]

A third expert, Mr. Senogles, addressed the issue of the amount of compensation that should be due for the loss of life. Both the DRC and Uganda pointed out that Mr. Senogles did not analyze the "prevailing practice" in the DRC for compensation of loss of life, such as in cases before Congolese courts, as stipulated in the Court's question. Instead, he determined that each death should be compensated in the amount of US$30,000 based on the practice of the U.N. Compensation Commission ("UNCC").[48] Uganda argued that the valuation practice of the UNCC—a mass claims process involving filing of forms by identified claimants, sampling of those forms, and regression analysis—should not be transposed to inter-State judicial proceedings, and further that Mr. Senogles has misapplied the UNCC's methodology.[49]

With respect to the number of conflict-related deaths, the Court concluded that "the reports provided by the Court-appointed experts" did not "contain sufficient evidence to determine a precise or even an approximate number of civilian deaths for which Uganda owes reparation."[50] Professor Guha-Sapir's testimony appears to have been set aside entirely. According to the Court, the scientific studies she relied on to calculate the number of "excess civilian deaths" were not intended to, and do not, identify the number of deaths that have a sufficiently direct and certain causal nexus to the unlawful acts of Uganda.[51] In her report, Professor Guha-Sapir estimated "with 95% confidence that a minimum of 3.2 million excess deaths may have resulted in this period due to armed conflict", but the Court was not convinced by her explanation for this estimate.[52] On cross-examination during the hearing, Professor Guha-Sapir acknowledged that it was impossible to attribute the "excess civilian deaths" identified in

[44] Ibid., para. 136.
[45] Ibid., para. 141.
[46] Ibid., para. 149.
[47] Ibid., para. 149; see also ibid., para. 142.
[48] Ibid., para. 139.
[49] Ibid., para. 144.
[50] Ibid., para. 162.
[51] Ibid., para. 148.
[52] Ibid., para. 148.

her report to a single cause.[53] Consequently, the Court decided that the mortality surveys used in her report "cannot contribute to the determination of the number of lives lost that are attributable to Uganda.[54]

With respect to Professor Urdal's testimony, the Court stated that it "cannot base its assessment of the number of lives lost solely on the report of Mr. Urdal and the UCDP database."[55] First, the Court found the UCDP database "less helpful" with respect to lives lost outside Ugandan-occupied Ituri province, because the database was "not designed to determine the legal attribution of deaths" and thus provided no guidance as to which actor was directly responsible for the deaths.[56] Second, the Court noted the "inherent limitations" of the UCDP database as evidence in a judicial proceeding because it is "based mainly on press reports and reports by non-governmental organizations," and the Court "accords to such documents, if they are submitted directly in its proceedings, only limited probative value when they are not corroborated by other forms of evidence."[57] Third, the Court found that the numbers from the UCDP database represented "very conservative estimates" and, "in all likelihood, undercount the overall number of direct civilian deaths."[58] This point was confirmed by Mr. Urdal himself on cross-examination, when he stated that the UCDP database figure of 14,663 civilian deaths in the DRC from August 1998 until June 2003 was "almost certainly an underestimate" and that it would be impossible to determine the "margin of error".[59]

Although the Court decided that it could not base its assessment of the number of lives lost "solely on the report of Mr. Urdal and the UCDP database," it referred to the information supplied by Mr. Urdal as "an indication of an approximate number of direct civilian victims"[60] and considered it with additional forms of evidence. For example, the Court paid some attention to Professor Urdal's report, especially with respect to direct conflict deaths occurring in the province of Ituri (identifying 5,769 direct conflict deaths), because "as an occupying Power, Uganda owes reparation for the loss of life resulting from the conflict in Ituri, irrespective of whether those deaths resulted from clashes involving Ugandan troops."[61] In other words, while the UCDP database did not identify which actors caused the deaths, that requirement was less important in an area occupied by Uganda, where Uganda was presumed to be responsible for

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[53] Ibid., para. 148.
[54] Ibid., para. 148.
[55] Ibid., para. 151.
[56] Ibid., para. 149.
[57] Ibid., para. 150.
[58] Ibid., para. 150.
[59] Ibid., para. 150.
[60] Ibid., para. 151.
[61] Ibid., para. 149. Indeed, as a general matter the Court invoked Uganda's status as an Occupying Power to reverse the evidentiary burden for proving attribution in Ituri. According to the Court, the burden rested with Uganda at the reparations phase to establish "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." Ibid., para. 78. Judge Yusuf disagreed with this "radical reversal of the burden of proof," saying that it imposed on Uganda a burden to prove both that a particular alleged injury did not occur and that any such injury was not causally linked to Uganda's failure to comply with its obligations in Ituri. Ibid., Separate Opinion of Judge Yusuf, paras. 1, 8. By contrast, Judge Salam maintained that since "it was the occupying Power in Ituri when many of the events that needed to be established occurred, Uganda is undoubtedly in a better position to [establish certain elements of the case] than the DRC." Separate Opinion of Judge Salam, para. 16.

those deaths as an occupying power unless it could prove otherwise.[62] Moreover, while the database figures for conflict-related deaths outside of Ituri (identifying 8,894 direct conflict deaths) did not distinguish which actor caused the death, this, too, appears to have partially contributed to the Court's analysis.[63] Ultimately, combining evidence from certain U.N. reports[64] with information from Professor Urdal's database, the Court concluded that "the evidence presented to it suggests that the number of deaths for which Uganda owes reparation falls in the range of 10,000 to 15,000 persons."[65]

With respect to valuation for each loss of life, the Court found Mr. Senogles estimate not to be "suitable."[66] Specifically, the Court noted that:

> The expert derives these rates from the practice of the UNCC but does not provide a satisfactory rationale for applying those rates in the present case. The rate he suggests for loss of life is based on the UNCC's Category C claims, which allowed individuals to claim actual losses up to US$100,000 on condition that they were documented by appropriate evidence of the circumstances and of the valuation of the claimed loss. The Court notes that, under the UNCC's Category B claims, claimants could seek fixed amounts, ranging from US$2,500 per individual who suffered serious personal injury or whose spouse, child or parent died, to US$10,000 per family of a victim, in an expedited process where the standard of proof was lower.[67]

Instead, the Court made a very general reference to "various methodologies proposed to determine the amount of compensation for a human life lost, as well as its jurisprudence and the pronouncements of other international bodies" (by the International Criminal Court, by the UNCC, by the Eritrea Ethiopia Claims Commission, and by the Court itself), so as to "award compensation for the loss of civilian lives as part of a global sum for all damage to persons."[68] Because that global sum for "all damage to persons" comprised deaths, injuries, rape and sexual violence, recruitment of child soldiers, and displacement of persons, it is not possible to

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[62] Ibid., para. 149.

[63] Ibid., para. 161 ("The Court considers that the analysis by Mr. Urdal, taken together with reports of various United Nations bodies, provides a more substantiated basis for assessing the number of lives lost for which Uganda owes reparation").

[64] See ibid., paras. 152-56. A particularly influential U.N. report appears to be Office of the High Commissioner for Human Rights, Report of the Mapping Exercise Documenting the Most Serious Violations of Human Rights and International Humanitarian Law Committed Within the Territory of the Democratic Republic of the Congo between March 1993 and June 2003 (2010) (the "Mapping Report"), https://www.ohchr.org/sites/default/files/Documents/Countries/CD/DRC_MAPPING_REPORT_FINAL_EN.pdf.

[65] Ibid., para. 162.

[66] Ibid. para. 163.

[67] Ibid. Although only asked to address harm to persons in the form of loss of life, Mr. Senogles analyzed and made recommendations with respect to other types of harms to persons. The Court appears to have set aside these recommendations as well. For example, the Court set aside Mr. Senogles' suggestion that the valuation of the injury suffered by child soldiers be based on an analogy with the UNCC Category E claims, saying that "this category pertained to individuals who had been taken as hostages or were illegally detained, and did not, therefore, reflect the material injury and psychological trauma sustained by child soldiers in the DRC." Ibid., para. 205.

[68] Ibid., para. 166 (cross-references in parentheticals omitted).

calculate, even approximately, the amount awarded by the Court for the estimated 10-15,000 deaths attributable to Uganda.[69]

Overall, the DRC sought US$4.35 billion for all damage to persons in the DRC during the armed conflict that was caused by Uganda,[70] but the Court awarded only US$225 million.[71]

B. Loss of Property

One expert, Mr. Senogles, was tasked with providing testimony on two issues concerning the loss of property: (1) the approximate number and type of property damaged or destroyed by Ugandan armed forces in Ituri and in June 2000 in Kisangani; and (2) the approximate cost of rebuilding the schools, hospitals and private dwellings in those areas.[72]

In his report, Mr. Senogles based "his factual assessments exclusively on the claims and allegations made in the Memorial of the DRC, without considering additional sources of information, such as United Nations reports."[73] Further, for private dwellings in Ituri, Mr. Senogles "simply adopts[ed]the number of luxury, medium-quality and basic dwellings set out in one of the aggregate tables presented by the DRC, and multiplie[ed] those figures by the unitary values put forward by the DRC itself."[74] Finally, for other property claims, he "applie[d] 'evidentiary discount factors' to certain aspects of the claim in order 'to take account of the inherent uncertainty in the way [the] claim has been put forward.'"[75]

The Court appears to have had little patience with the expert's approach of taking the DRC's "not evidenced" claims and then simply manipulating them with unexplained "evidentiary discount factors." Rather, with respect to the loss of property in Ituri, the Court determined that the "evidence presented by the DRC does not permit the Court to even approximate the extent of the damage, and the report of the Court-appointed expert does not provide any relevant additional information."[76] Instead, the Court looked elsewhere to determine the types and scale of property loss, making its own assessment based on U.N. reports.[77]

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[69] The Court's decision to award "global" sums that combined various headings of damage was lamented by some of the judges. Judge Yusuf stated that "the impression to the reader is that the Court has arrived at these figures by way of *ex aequo et bono*, not on the basis of law and evidence." Ibid., Judge Yusuf Separate Opinion, para. 26. Judge Robinson noted that the "use by the Court of the concept of a global sum is unprecedented in its work," and further that, "absent an award for each category of injury, the global sum is difficult to comprehend and appears to be snatched from thin air. Ibid., Separate Opinion of Judge Robinson, paras. 4, 15. In considering the Court's repeated reference to its ability to "award compensation in the form of a global sum, within the range of possibilities indicated by the evidence and taking into account equitable considerations," Judge Tomka said that this "incantation hardly satisfies the requirement of providing the reasons for the Court's Judgment." Ibid., Declaration of Judge Tomka, para. 9.

[70] See Experts' Report, *supra* note 37, at p. 43, para. 81.

[71] 2021 Judgment, *supra* note 23, paras. 226, 409(1)(a).

[72] Ibid., para. 25.

[73] Ibid., para. 239.

[74] Ibid.

[75] Ibid.

[76] Ibid., para. 246.

[77] Ibid., paras. 246-47.

As for the valuation of the property loss in Ituri, the Court relied to a slight degree on Mr. Senogles' view that the DRC's claims for property, such as for the valuation of dwellings in Ituri, were "not evidenced and not explained".[78] Yet the Court observed that Mr. Senogles himself "nevertheless recommends that the Court adopt the figures proposed by the DRC with regard to private dwellings, based on their "reasonableness."[79] Further, for valuation of other types of property damage, the Court noted that Mr. Senogles took the DRC's figures and applied "unexplained 'evidentiary discount factor[s]', i.e. 25 per cent for public buildings and 50 per cent for looting in Ituri."[80] The Court rejected that approach, saying that it did not "consider that the expert has sufficiently substantiated the variable 'evidentiary discount factors' he proposes to apply."[81] Instead, the Court found more compelling information on valuation arising from proceedings before the ICC relating to the same conflict.[82]

A similar outcome occurred with respect to property loss outside Ituri, where again the Court found that the DRC's evidence "does not permit the Court to assess the extent of the damage even approximately, and the report of the Court-appointed expert does not provide any relevant additional information."[83] Here, too, the Court noted that "Mr. Senogles simply applies unexplained 'discount factors' of 25 per cent to the DRC's claims with respect to Beni, Butembo and Gemena, and 40 per cent to the claim relating to Kisangani."[84] Once again, the Court turned instead to U.N. reports to determine the types and scale of property loss in these areas.[85] For the DRC's claims with respect to its national electric company, the Court set aside Mr. Senogles recommendation as "unhelpful," in that it "merely applies an unexplained 40 per cent 'discount factor'" to the DRC's claim.[86] The Court dismissed that claim in its entirety as having no basis in evidence.[87]

Overall, the DRC sought US$234 million for all damage to property caused by Uganda in the DRC during the armed conflict,[88] and Mr. Senogles recommended an amount of US$140 million,[89] but the Court awarded only US$40 million.[90]

C. Loss of Natural Resources

One expert, Mr. Nest, was tasked with providing testimony on two issues concerning the loss of natural resources during the armed conflict: (1) the approximate quantity and valuation of natural resources unlawfully exploited during the Ugandan occupation of the district of Ituri; and (2) the approximate quantity and valuation of natural resources plundered and exploited by Uganda in other places of the DRC.

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[78] Ibid., paras. 238, 248.
[79] Ibid., para. 248.
[80] Ibid.
[81] Ibid.
[82] Ibid., para. 249.
[83] Ibid., para. 251.
[84] Ibid.
[85] Ibid., paras. 252-53.
[86] Ibid., para. 254.
[87] Ibid.
[88] See Experts' Report, *supra* note 37, at p. 56, para. 141.
[89] Ibid., p. 61, para. 165, p. 67, para. 190.
[90] 2021 Judgment, *supra* note 23, paras. 258, 409(1)(b).

The Nest report comprised almost half of the total report provided to the Court by the four experts. In it, Mr. Nest generally engaged in an eight-step analysis for each of the types of resources that he analyzed.[91] First, he assessed the quantity of gold and diamonds produced in what he called "the Ugandan area of influence", based on national production data combined with information about the location of the resources. Second, where such data was not available or was deemed unreliable (for coltan, coffee, timber, tin and tungsten), Mr. Nest used export/import data for the DRC's and Uganda's trading partners as a proxy for DRC production. Third, he estimated the distribution of such resources within the Ugandan area of influence, notably as between Ituri and other places. Fourth, Mr. Nest calculated the average price for each resource and for each year of the conflict, by: (1) taking the base annual average of prices for such resources in the period of 1998-2003; and (2) applying a discount of 35 per cent, which was intended to reflect the approximate prices of the resources in the relevant areas, based on information obtained from various sources (e.g., reports of international organizations, relevant databases, and academic publications). Fifth, he adjusted the resulting prices so as to be in 2020 U.S. dollars. Sixth, Mr. Nest calculated the base value of each resource by multiplying the estimated amount of each resource produced in the Ugandan area of influence by its price during the relevant period. Seventh, he used various sources to establish "proxy taxes," meaning a likely percentage of costs incurred from extraction (not just genuine taxes, but also fees, cost of licenses, and even theft), that would diminish the value of the extracted resource. Finally, Mr. Nest calculated the value for each exploited resource by multiplying the base value of each natural resource by the "proxy taxes."[92] Ultimately, Mr. Nest estimated that the total value of exploitation activities by persons in the "Ugandan area of influence" amounted to US$59 million, consisting of US$41 million for resources extracted in Ituri and US$18 million for resources extracted elsewhere.[93]

In contrast with its treatment of the other expert reports, the Court said that the methodological approach taken by Mr. Nest "is convincing overall."[94] Among other things, the Court seemed attracted to his: (1) use of "reliable economic data, scientific publications and the case file"; (2) recognition of differences among types of natural resources; (3) recognition of differences in the reliability of data; (4) use of a "plausible discount to the international market price"; (5) use of proxy taxes in the understandable absence (during wartime and in respect of unlawful exploitation) of documentation; (6) consideration of possible explanations other than Ugandan unlawful exploitation; and (7) transparency about the limitations of the analysis.[95]

At the same time, the Court exercised its own judgment. Indeed, the Court found that "the report by the Court-appointed expert" was not "sufficient to prove the precise extent of the looting, plundering and exploitation for which Uganda is liable" and did "not permit the Court to reach a sufficiently precise determination of the extent or the valuation of the damage."[96] Rather, the Court generally considered the Nest report alongside other reports, most notably

[91] For Mr. Nest's analysis specific to particular resources and the Court's endorsement of that analysis, see ibid., paras. 292, 295 (gold), paras. 305, 309 (diamonds), paras. 318-19, 321 (coltan), 325-27 (tin and tungsten).
[92] Ibid., para. 271.
[93] Ibid., para. 268.
[94] Ibid., para. 277.
[95] Ibid.
[96] Ibid., para. 364.

reports by the Ugandan-appointed Porter Commission[97] and by a U.N. panel of experts established to look into exploitation of natural resources on the DRC.[98] Further, the Court assessed whether certain evidence relied upon by Mr. Nest was sufficient and, if not, did not accept the expert's recommendation. For example, the Court did not award compensation for coffee at the same level as recommended by Mr. Nest, finding that the evidence relied upon by him was anecdotal or uncorroborated.[99] Likewise, the Court did not award compensation for timber at the same level as recommended, since Mr. Nest's calculations "are based on less precise information and rougher estimates than" the evidence for other resources.[100]

Overall, in its final submission the DRC sought from Uganda US$1 billion for damage related to natural resources in the DRC during the armed conflict.[101] Mr. Nest, however, estimated that the total value of exploitation activities by persons the "Ugandan area of influence" amounted to US$59 million, consisting of US$41 million for resources extracted in Ituri and US$18 million for resources extracted elsewhere.[102] Mr. Nest's analysis did not cover the DRC's claims for damage to fauna, where the Court found that some compensation was also warranted.[103] Ultimately, the Court awarded a total of US$60 million for damage related to natural resources in the DRC during the armed conflict that was attributable to Uganda.[104]

VI. Lessons Learned

What lessons might be extracted from the Court's use of outside scholars and other experts in the *DRC v. Uganda* case to address reparation for loss, damage or injury resulting violations of international humanitarian and other law?

First, the sudden introduction of outside scholars or other experts at the late stage of an international proceeding probably sends a signal that there is a problem with the evidence before the international tribunal. The tribunal could, of course, simply deny the claims before it, but that may be difficult to do when broad findings have been made on the merits of a case, such that the existence of *some* harm is established, just not its exact scope and quantum.[105]

Second, it may be that the ICJ could benefit from a greater use of Court-appointed experts, but doing so at the end of the proceedings in a case is not the most optimal way of approaching the issue. The Court would be better served by studying the practices of other international tribunals in this regard, such as the World Trade Organization, the Court of Justice

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[97] Final Report of the Judicial Commission of Inquiry into Allegations into Illegal Exploitation of Natural Resources and Other Forms of Wealth in the Democratic Republic of Congo 2001 (Nov. 2002) ("Porter Commission Report").
[98] Various reports were issued by the U.N. Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo ("UNPE"). See, e.g., Final UNPE Report, U.N. Doc. S/2002/1146 (Oct. 16, 2002).
[99] 2021 Judgment, *supra* note 23, paras. 332.
[100] Ibid., para. 344.
[101] Ibid., para. 260.
[102] Ibid., para. 268.
[103] Ibid., paras. 351-63.
[104] 2021 Judgment, *supra* note 23, paras. 366, 409(1)(b).
[105] See Separate Opinion of Judge Yusuf, para. 5 (in referring to the Court's use of evidence other than presented by the DRC, "[t]he Court could not have done otherwise under the present circumstances in order to fulfil its judicial function.").

of the European Union, or the U.N. Compensation Commission, which have experience in using such experts.[106] In the context of compensation for widespread atrocities, studying the use of experts by bodies such as the International Criminal Court might be especially fruitful.[107] Such a study might lead the Court to develop a standardized mechanism for engaging outside expertise, perhaps through arrangements that result in reliance on experts located at international organizations that are specialists in a particular field.[108] For example, given that the Court may be confronted again with cases requiring compensation for widespread civil injury, a standardized mechanism for receiving, cataloguing, and perhaps sampling evidence might be developed for the Court by former UNCC experts in mass claims procedures, thereby providing guidance to parties in future cases as to the Court's expectations and guidance for the Court itself.[109]

Third, having said that, the experiences of other international tribunals with court-appointed experts may not translate well to the ICJ, which is a unique body that faces particular institutional and political dynamics, with cases that span a wide range of subject matter areas. For example, the WTO dispute settlement system operates within a particular substantive and procedural system (to include an appellate tribunal, when it is functioning) that stands quite apart from that of the ICJ. As such, the WTO's experience with *ex curia* experts may not translate well, if at all, to the ICJ.[110] In any event, the Court must avoid delegating—or being perceived as delegating—its judicial function to others, while at the same time it must find a way to address, in a convincing manner, the technically and factually complex cases that come before it.

Fourth, using outside experts in a transparent way, whereby the parties may comment upon and question the experts, has advantages over "invisible experts" (*experts fantômes*).[111] The experts' views may contain errors or gaps, which the parties can point out to the tribunal so as to avoid it being misled and an injustice being done to one or both of the parties.

Fifth, great care should be taken when considering what an outside expert can feasibly do, especially if given limited time. Outside experts often cannot fix flaws in an evidentiary record, at least in the context of adjudicating reparation for a large-scale war lasting several

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[106] For a survey of the limited use of court-appointed experts by other tribunals, see Daniel Peat, "The Use of Court-Appointed Experts by the International Court of Justice," 84 *British Yearbook of International Law* 271 (2014).

[107] Rule 97(2) of the ICC's Rules of Procedure and Evidence provides that "the Court may appoint appropriate experts to assist it in determining the scope, extent of any damage, loss and injury to, or in respect of victims and to suggest various options concerning the appropriate types and modalities of reparations." For the use of such court-appointed experts by the ICC, see, e.g., *Prosecutor v. Bosco Ntaganda, Judgment on the Appeals against the Decision of Trial Chamber VI of 8 March 2021 entitled "Reparations Order,"* ICC-01/04-02/06-2782, paras. 168-70 (Sept. 12, 2022) (discussing the estimates provided by appointed experts but the trial chamber's failure to expressly rule upon them when reaching its decision).

[108] See Peat, *supra* note 106.

[109] The Eritrea Ethiopia Claims Commission attempted to develop such procedures in its Rules of Procedure, but they were never pursued by the Parties. See Sean D. Murphy et al., *Litigating War: Arbitration of Civil Injury by the Eritrea-Ethiopia Claims Commission* 60-62 (Oxford, 2013).

[110] See Andrea Hamann, "The Use of Ex Curia Experts in International Litigation: Why the WTO Dispute Settlement Cannot Serve to Improve ICJ Practice," in *International Law and Litigation: A Look Into Procedure* 107 (Hélène Ruiz Fabri, ed.) (Nomos, 2019).

[111] Pulp Mills on the River Uruguay (Arg. v. Uru.), Joint Dissenting Opinion of Judges Al-Khasawneh and Simma, 2010 I.C.J. 108, ¶ 14 (Apr. 20).

years.[112] In such a context, any given professor, law firm partner, or other expert simply does not have the capacity to gather up new evidence on any scale of value to the tribunal. At best, he or she can bring to the tribunal's attention macro-economic or other data that may have missed the parties' attention (or that, for whatever reason, the parties chose not to advance). At worst, the expert may simply provide a variation of the flawed methodology of the claimant, riddled with random multipliers and discounts. Of course (and in fairness), when doing so the expert may be pulling aside the curtain on the tribunal's own deliberative process, in which behind-the-scenes guesstimates lead to the awarding of global sums.[113]

Sixth, if retained, outside experts should strive to provide sophisticated analyses that consider a wide range of information and international practice, yet with close attention to the particular circumstances at issue in the case. Thus, it is not obvious why an expert opining on compensation methodology for wartime losses would rely solely on the practice of a claims commission that addressed wrongful acts in Kuwait in 1990-91 when there is a far broader range of practice to be considered, most notably that of a claims commission (the EECC) that addressed wrongful acts on the same continent and in the same time frame as the *DRC v. Uganda* case.

Ultimately, and as suggested in the introduction, the overall lesson learned from the use of outside scholars and other experts in the *DRC v. Uganda* case is that such assistance for applying international humanitarian law may have its limits. While often the work of scholars is extremely important for understanding the rules of such law and gathering up prior practice in relation to it, it may be asking too much for any single scholar or practitioner to be able to resolve certain types of issues, including the very thorny issues that arise in proving and quantifying mass civil injury resulting from an armed conflict.

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[112] See ibid., Dissenting Opinion of Ad hoc Judge Daudet, para. 20 ("à ma connaissance, les experts n'ont interrogé personne et sont restés dans leurs bureaux.") (author trans.: "to my knowledge, the experts have not interviewed anyone and remained in their offices.").

[113] See ibid., Declaration of Judge Tomka, para. 9 ("in the end the Court itself does not indicate any precise methodology by which it has arrived at the amount of compensation it has awarded"); ibid., Separate Opinion of Judge Salam, para. 18 (the Court does not "clearly set out its method of calculating the compensation to be granted, apart from mentioning rather vague and general considerations…").