THE ENVIRONMENTAL ASPECTS OF THE 2016 *PHILIPPINES V. CHINA* AWARD, THE PHILIPPINES' PROSPECTS FOR REPARATIONS, AND THE PROMISES AND PITFALLS OF GLOBAL DAMAGES[*]

Steffi Eunice S. Ramos[**]

ABSTRACT

In 2016, the arbitral tribunal adjudicating the Philippines' case against China ruled overwhelmingly in favor of the Philippines. A key finding is that China had caused severe harm to the environment of the West Philippine Sea. However, the *Philippines v. China* arbitration, precisely because of its nature, could not and did not include a question on reparations. Almost a decade since the Award, China continues to refuse to recognize it and persists in its encroachment of the West Philippine Sea.

This Paper uses the case of the Philippines to explore changing tides in the use of equity in awarding reparations in international law. First, the paper discusses the existing legal landscape on reparations, particularly on the general framework in the International Law Commission's Articles of State Responsibility for Internationally Wrongful Acts. The paper focuses on *Costa Rica v. Nicaragua* and *DRC v. Uganda,* two recent cases decided by the ICJ which adopted a novel approach in the award of compensation. Thereafter, this paper applies these concepts and principles in analyzing—in general terms—the prospects of the Philippines for a reparations case against China by looking into the promises and pitfalls brought about by these new developments in international environmental litigation.

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[**] Associate, Cruz Marcelo & Tenefrancia. J.D., *magna cum laude* and valedictorian (2024), and B.A. in Broadcast Communication, *summa cum laude* and valedictorian (2020), University of the Philippines. Editor, Vol. 95, PHILIPPINE LAW JOURNAL.

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I. INTRODUCTION

In January 2013, in what is rightly described as an outmatched and outgunned David challenging a Goliath, the Republic of the Philippines initiated a case against the People's Republic of China under Annex VII to the United Nations Convention on the Law of the Sea ("UNCLOS"). Despite China's rejection of and non-participation in the arbitration, on July 12, 2016, the Arbitral Tribunal issued its *Philippines v. China* Award, one that is largely in favor of the Philippines.

The dispute between the Philippines and China is largely rooted in disagreements over maritime entitlements and China's problematic unilateral activities in what is now referred to as the West Philippine Sea[1]—a portion of the South China Sea that falls within the exclusive economic zone ("EEZ") of the Philippines. While a good portion of the Award delved into aspects relating to island and maritime zone entitlements, the Award also made "novel, significant, and very progressive" pronouncements and findings on the obligations under the UNCLOS on the protection and preservation of the

[1] Adm. Order No. 29 (2012). Naming the West Philippine Sea of the Republic of the Philippines, and For Other Purposes.

marine environment.[2] In fact, around 150 pages of the almost 500-page Award focused on fisheries and environmental protection issues.[3]

In September 2023—over seven years since the Arbitral ruling—the Philippine government released videos showing that underwater surveys of the seabed revealed that there had been deliberate activities that had caused destruction to the marine environment in features within the EEZ of the Philippines. This is despite the pronouncements in the Philippines' 2016 legal victory of the Philippines as to breaches by China of their environmental obligations under the UNCLOS.

This Note explores the 2016 Arbitral Award's environmental aspects and the Philippines' prospects for reparations in light of developments in the concept and application of equity in international law. First, the Note discusses the obligations breached by China as held by the 2016 Arbitral tribunal. Second, it explores the concept of state responsibility and reparations in international law, drawing primarily from the concepts and principles under the International Law Commission's ("ILC") Articles on Responsibility of States for Internationally Wrongful Acts ("ARSIWA").[4] Third, it explores the recent cases on reparations decided by international tribunals, with a particular focus on two cases that have used a rather novel approach in the award of reparations, that is, an award in the form of "global sum," with particular leniency on valuation methodologies and evidentiary requirements. Drawing from the lessons and analyses from these cases, this Note finally explores the possible case of the Philippines for reparations.

This Note does not attempt to provide a full blow-by-blow strategy on how the Philippines should approach its claim for reparations should it decide to. Neither is it prepared to advocate for the filing of another case. Instead, it tackles the possibility of reparation on general terms, focusing only on opportunities and pitfalls.

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[2] Zoe Scanlon & Robert Beckman, *Assessing Environmental Impact and the Duty to Cooperate: Environmental Aspects of the Philippines v China Award*, 3 ASIA-PAC. J. OCEAN L. POL'Y 5, 6 (2018).

[3] Tim Stephens, *The Collateral Damage from China's 'Great Wall of Sand': The Environmental Dimensions of the South China Sea Case*, 34 AUSTL. Y.B. INT'L L. 41, 52 (2017).

[4] Technically, this is the Draft Articles on State Responsibility. In the recent *DRC v. Uganda* case, the ICJ dropped the usage of the word "Draft."

A. The Environmental Aspects of the *Philippines v. China* Award

The Philippines, in its Memorial, cited the following as among the reasons for the institution of the arbitral proceedings: (1) the dislodging of Filipino fishermen from the Scarborough Shoal and thereafter the construction of a physical barrier to prevent Philippine vessels from freely navigating;[5] (2) the obstruction of Philippine oil and gas exploration activities in areas within the Philippines' EEZ and continental shelf;[6] and (3) other violations of sovereign rights and jurisdiction of the Philippines, with acts resulting to despoiling the Philippine marine environment.[7]

Particularly, in relation to the environment, the arguments of the Philippines before the Tribunal can be summarized as: China had violated its obligations under the UNCLOS (1) by tolerating, encouraging, and failing to prevent environmentally "destructive fishing practices" from its nationals at specific shoals and reefs in the South China Sea,[8] and (2) its occupation and construction activities on various reefs, which resulted to "catastrophic" damage.[9] In its Memorial, the Philippines cited certain environmentally harmful practices routinely conducted by Chinese government vessels. These include using cyanide to fish, blasting rare corals with dynamite, and harvesting endangered or threatened marine species, including giant claims and sea turtles.[10] Further, the Philippines asserted that China's illegal construction of artificial islands and other installations had resulted in inevitable harm to a very fragile ecosystem, significantly damaging the habitats of vulnerable species.[11]

The Philippines argued that China, through these activities, had breached several UNCLOS provisions, including Article 123 on the cooperation of States bordering enclosed or semi-enclosed areas in the management, conservation, protection, preservation, exploration, and exploitation of the marine environment and its living resources;[12] Article 192

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[5] South China Sea Arbitration (Phil. v. China), Memorial of the Philippines [hereinafter "*Philippine Memorial*"], PCA Case No. 2013-19, 1 PCA Case Repository 8, ¶ 1.30 (Mar. 30, 2014).

[6] *Id.* at 8–9, ¶ 1.31.

[7] *Id.* at 5–6, ¶ 1.20.

[8] South China Sea Arbitration (Phil. v. China), Merits [hereinafter "*Arbitral Award*"], PCA Case No. 2013-19, 2016 PCA Case Repository 365, ¶ 894 (July 12).

[9] *Id.* at 358, ¶ 901.

[10] *Philippine Memorial*, 1 PCA Case Repository at 174–84, ¶ 6.48–6.62.

[11] *Id.* at 184–93, ¶ 6.63–6.89.

[12] United Nations Convention on the Law of the Sea [hereinafter "UNCLOS"] art 123, Dec. 10, 1982, 1833 U.N.T.S. 397.

on the general obligation to protect and preserve the marine environment;[13] Article 194 on the obligation to prevent, reduce, and control pollution of the marine environment from any source and the protection and preservation of rare or fragile ecosystems and the habitats of depleted, threatened, or endangered marine organisms;[14] and Article 206 on the conduct of assessment of potential significant and harmful changes to the environment and the communication and publication of assessment reports.[15] Of these, the primary provisions invoked by the Philippines are Articles 192 and 194, both found under Part XII of the UNCLOS.

Agreeing with the Philippines' assertion, the Arbitral Tribunal categorically stated that China's island building activities constituted a breach of Articles 192 and 194(1) of the UNCLOS:

> 983. Based on the compelling evidence, expert reports, and critical assessment of Chinese claims described above, *the Tribunal has no doubt that China's artificial island-building activities on the seven reefs in the Spratly Islands have caused devastating and long-lasting damage to the marine environment*. The Tribunal accordingly finds that through its construction activities, China has breached its obligation under Article 192 to protect and preserve the marine environment, has conducted dredging in such a way as to pollute the marine environment with sediment in breach of Article 194(1), and has violated its duty under Article 194(5) to take measures necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life.[16]

Article 192 of the UNCLOS lays down the general obligation to "protect and preserve the marine environment."[17] While the provision itself is couched in general terms, the Arbitral Award clarifies that the positive obligation is not only to preserve the status quo, but is also forward-looking. To highlight the importance of this pronouncement by the tribunal, the finding is reproduced in full:

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[13] Art. 192. "General obligation. States have the obligation to protect and preserve the marine environment."

[14] Art. 194. "Measures to prevent, reduce and control pollution of the marine environment."

[15] Art. 206. "Assessment of potential effects of activities."

[16] *Arbitral Award*, 2016 PCA Case Repository at 394, ¶ 983. (Emphasis supplied.)

[17] UNCLOS art. 192.

> 984. Article 192 of the Convention provides that "States have the obligation to protect and preserve the marine environment." Although phrased in general terms, the Tribunal considers it well established that Article 192 does impose a duty on States Parties, the content of which is informed by the other provisions of Part XII and other applicable rules of international law. *This "general obligation" extends both to "protection" of the marine environment from future damage and "preservation" in the sense of maintaining or improving its present condition. Article 192 thus entails the positive obligation to take active measures to protect and preserve the marine environment, and by logical implication, entails the negative obligation not to degrade the marine environment*. The corpus of international law relating to the environment, which informs the content of the general obligation in Article 192, requires that States "ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control." Thus States have a positive "duty to prevent, or at least mitigate' significant harm to the environment when pursuing large-scale construction activities." The Tribunal considers this duty informs the scope of the general obligation in Article 192.[18]

The construction activities, in light of the protest not only of the Philippines but also of other ASEAN countries, were also held to be in violation of Articles 197 and 123 of the UNCLOS which require States to cooperate to formulate standards to protect and preserve the environment.[19] The Arbitral Tribunal also highlighted that an Environmental Impact Assessment ("EIA") should have been undertaken by China and its results communicated, in accordance with the requirement set forth in Article 206 of the UNCLOS, since the scale and impact of the island-building activities necessitate the conduct of such an assessment. Note, however, that while the Tribunal did not and could not make a categorical finding that China did not conduct the required EIA, the fact that no communication as to the results of an EIA was given to the Philippines was sufficient to find China in breach of Article 206 of the UNCLOS.

Aside from the island-building activities, the Tribunal also sided with the Philippines as regards the illegal harvesting of living resources of the sea. The Tribunal, echoing the International Tribunal for the Law of the Sea ("ITLOS") decision in the *Southern Blue Fin* case, emphasized that "the conservation of living resources of the sea is an element in the protection of

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[18] *Arbitral Award*, 2016 PCA Case Repository at 394, ¶ 984. (Emphasis supplied).
[19] *Id.*

the marine environment."[20] Reading Articles 192 and 194(5) alongside the Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES Convention"), the Tribunal emphasized that there exists a due diligence obligation to prevent the harvesting of critically endangered marine species, including giant clams, sea turtles, and other species cited in Appendix I to the CITES Convention.[21] This due diligence obligation is two-fold: (1) the prevention of direct harvesting, and (2) the prevention of harms that would affect depleted, threatened, or endangered species indirectly through the destruction of their habitat.[22]

As regards the harvesting of living resources, the Tribunal held that China had breached its obligation under Articles 192 and 194(5) of the UNCLOS for not taking the necessary measures to prevent the harvesting of endangered species from the fragile ecosystems at the Scarborough and Second Thomas Shoals[23] and tolerating the practice of harvesting of giant clams by propeller chopping method.[24] The Tribunal also acknowledged that the use of cyanide and explosives in the catching of fish would constitute a breach of Articles 194(2) and 194(5) of the UNCLOS.[25] However, due to insufficiency of evidence, it did not make a categorical pronouncement as to the Philippines' submission that China had tolerated the use of such explosives nor on Philippine complaints about its use.[26]

In sum, the Arbitral Tribunal made clear and categorical findings that China breached its obligations under UNCLOS as regards its island-building activities at seven features in the Spratly Islands and illegal harvesting of the living resources of the sea. Taken altogether, the Tribunal ruled that China had caused severe harm to the coral reef environment. In the process, it had also violated its obligation to preserve and protect fragile ecosystems and the habitat of depleted, threatened, or endangered species.

The 2016 Arbitral Award is a landmark legal victory for the Philippines. It is of note, however, that because of the nature of the proceedings before the Arbitral Tribunal, the *Philippines v. China* arbitration could not and did not include a question on reparations. It is a fundamental legal concept, both in domestic and international law, that when an obligation

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[20] *Id.* at 375–76, ¶ 944.
[21] *Id.* at 380–81, ¶ 956.
[22] *Id.* at 381–82, ¶ 959.
[23] *Id.* at 383–84, ¶ 964.
[24] *Id.* at 384, ¶¶ 965–66.
[25] *Id.* at 386, ¶ 970.
[26] *Id.* at 388, ¶ 975.

is breached, there arises the case for damages or reparation. Thus, it is but logical that the next question should be one focused on reparations.

II. LEGAL FRAMEWORK ON STATE RESPONSIBILITY AND REPARATIONS

Reparations is a fundamental concept, both in international and domestic law. Simply, a breach entails responsibility. Similarly, state responsibility is a fundamental concept in international law, precisely because of the fundamental concept of equality of States. When one State commits a wrongful act against the other, international responsibility is established between the two.[27]

These interrelated concepts of state responsibility and reparations have been emphasized as early as 1923 by the Permanent Court of International Justice ("PCIJ") in its very first case, the *S.S. Wimbledon (Britain v. Germany)*.[28] In this case, it was held that a State has a responsibility to compensate for the wrongful acts occasioned by it, with the PCIJ even using the word *must,* to highlight that reparation is not a mere *bonus* but a necessity.[29]

Expanding this further, the PCIJ highlighted in the *Chorzow Factory* case that "an international delict generates an obligation of reparation, and that reparation must insofar as possible eradicate the consequences of the illegal act."[30] The PCIJ highlighted that "any breach of an engagement involves an obligation to make reparation."[31] Up to this day, the *Chorzow Factory* standard remains the cornerstone of international claims for reparations,[32] as the case set forth both the essence and the extent of what reparations *should* be. It stated that "reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed."[33]

The preceding discussion laid down the breach of international obligations committed by China as held by the Arbitral Tribunal. While

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[27] JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 588 (2019).

[28] S.S. Wimbledon (Gr. Brit. v. Ger.) 1923 P.C.I.J (ser. A) No. 1 (Aug. 17).

[29] *Id.* at 30. (Emphasis supplied.)

[30] Dinah Shelton, *Righting Wrongs: Reparations in the Articles on State Responsibility*, 96 AM. J. INT'L L. 833, 835 n.14 (2002), *citing* Factory at Chorzow (Ger. v. Pol.), Indemnity, 1928 PCIJ (ser. A) No. 17, 29 (Sept. 13) [hereinafter "*Chorzow Factory, Indemnity*"].

[31] *Id.*

[32] *Id.* at 836.

[33] *Chorzow Factory, Indemnity*, 1928 PCIJ (ser. A) No. 17, 47 ¶125.

categorical pronouncements on breach were made in the Arbitral Award, reparations could not be had at that point because of the nature of the proceedings. This does not mean, however, that the pronouncements made by the Arbitral Tribunal on breach committed by China are mere empty statements. The existing legal framework on reparations is explored and discussed in this Chapter to lay down the groundwork on a possible recourse for reparations available to the Philippines.

A. ARSIWA

As a preliminary discussion, there are two major categories of rules and laws that regulate the conduct of States: (1) primary rules, and (2) secondary rules. Primary rules lay down obligations under the sources of international law, which may either be (a) in the form of a treaty or (b) considered customary international law. These primary rules form the basis of what the exact obligations breached are. In this paper, for example, the primary source of primary rules is the UNCLOS, given that the focus is on the 2016 Arbitral Award which, at its core, is an interpretation of UNCLOS provisions. Meanwhile, secondary rules are those that define the consequences of a State's breach of its obligations defined by the primary rules.[34] These secondary rules are products of customary international law,[35] which are now mostly codified in the ARSIWA. It is of note that while domestic law usually distinguishes liability depending on the source of the obligation breached (i.e., contract, tort, or delict), there is no such distinction in international law, as any breach, regardless of origin, gives rise to state responsibility.[36]

The ILC adopted the ARSIWA in 2001. This codification took 40 years and several shifts in focus before it was formally adopted. The ARSIWA originally focused on diplomatic and consular protection and "civil" responsibility but has since evolved to encompass other fields, including human rights, disarmament, environmental protection, and law of the sea.[37]

The ARSIWA is largely informed by the *Chorzow Factory* decision of the International Court of Justice (ICJ). To invoke state responsibility and to claim reparations under the ARSIWA, three things must first be established: (1) an international obligation, (2) a breach of this international obligation,

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[34] ANTONIO CASSESE, INTERNATIONAL LAW 244 (2nd ed. 2005).

[35] G.A. Res. 56/831, at 1 (Jan. 28, 2002).

[36] Rainbow Warrior (N.Z. v. Fr.) 20 R.I.A.A. 215, 251 (Apr. 30, 1990). (Emphasis supplied.)

[37] JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES 1–4 (2002).

and (3) state attribution. This is embodied in the ARSIWA's definition of an internationally wrongful act:

> *Article 2. Elements of an internationally wrongful act of a State*
>
> There is an internationally wrongful act of a State when conduct consisting of an action or omission:
> (a) is attributable to the State under international law; and
> (b) constitutes a breach of an international obligation of the State.

There are two consequences of breach—or as Crawford aptly puts it, the "automatic substantive corollaries of responsibility"[38]—under the ARSIWA: (1) cessation and non-repetition under Article 30, and (2) reparations under Article 31.

Cessation and non-repetition as the first consequence of a breach of international obligation is a result of the "fundamental concern for compliance and for the integrity of the legal order."[39] The ILC's Commentaries to the ARSIWA explain that cessation aims to put a stop to the violation, not only to protect the State injured, but more so to maintain the integrity of the primary rule, and on a bigger scale, promote and preserve the rule of law.[40]

On the other hand, the second consequence of breach is embodied in Article 31, which provides for the obligation of a responsible State to make full reparation for any injury caused. The ARSIWA also codified the three forms of reparation already recognized in international law: (1) restitution under Article 35, (2) compensation under Article 36, and (3) satisfaction under Article 37.

It is important to understand the framing of the concept of reparations under the ARSIWA. Reparations is not simply the right of an injured State; more importantly, it is an obligation on the part of the erring State. Crawford explains:

> In the Draft Articles, reparation was expressed to be a right of an injured state. It was stated that the "injured State is entitled to obtain from the State which has committed an

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[38] JAMES CRAWFORD, STATE RESPONSIBILITY: THE GENERAL PART 94 (2013).

[39] Shelton, *supra* note 30, at 840.

[40] *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* [hereinafter "*ARSIWA Commentaries*"], [2001] 2 Y.B. Int'l L. Comm'n 89, U.N. Doc. A/56/10.

> internationally wrongful act full reparation." On second reading, *the article was reformulated as an obligation of the responsible state*. One reason was to account for cases in which there is a plurality of injured states. Second, and more fundamentally, the change was necessary to *reflect the fact that the obligation of reparation arises automatically on the commission of the internationally wrongful act, rather than being contingent on a demand or protest by any injured state*. While the individual articles dealing with restitution, compensation and satisfaction are expressed as obligations (for example, a responsible state is "under an obligation to make restitution"), the commentary explains that the "forms of reparation ... represent ways of giving effect to the underlying obligation of reparation set out in article 31." There are not, as it were, separate secondary obligations of restitution, compensation and satisfaction.[41]

At first glance, the wording of the Articles makes it appear as if there is a hierarchy in the forms of reparation—i.e., compensation is "insofar as such damage is not made good by restitution," or that satisfaction is to the extent as "it cannot be made good by restitution or compensation." Crawford, the Special Rapporteur on State Responsibility responsible for the production of the current iteration of the ARSIWA, however, explained that this "apparent hierarchy is not unqualified."[42] This is because of an implicit right of election of the form of reparation in light of Article 43(2)(b) of the ARSIWA which provides that the injured state, in its notice of claim, may specify what form of reparation it should be entitled to. There are cases when compensation is preferred by the State over restitution,[43] and as in the case of *Diallo,* the Court in fact ruled that the circumstances of the case warrant compensation.[44]

Restitution as a form of reparation is inherently limited, and this is reflected by the wording of the Articles, "provided and to the extent that restitution: (a) is not materially impossible[.]" The material impossibility of restitution is often discussed in human rights cases. For example, the *Bosnian Genocide* case, where the ICJ noted that the very nature of the case precludes

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[41] CRAWFORD, *supra* note 38, at 507. (Emphasis supplied.)

[42] *Id.* at 508.

[43] *See, e.g., Chorzow Factory* where Germany elected compensation over return of the factory.

[44] Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo), Merits, Judgment, 2010 I.C.J. Rep. 639, 691, ¶ 161 (June 19).

restitution as a form of reparation.[45] The impossibility of restitution is also exemplified in environmental cases. For example, in the *Forest of Central Rhodope* case involving the wrongful taking of forests in Greece by Bulgaria, it was held that restitution by physical return of the forests is inappropriate since the property had already been transformed or is no longer in the same condition at the time of taking.[46] Thus, it was held that compensation was the proper form of reparation.[47]

Meanwhile, compensation as a form of reparation has been awarded across a wide range of issues by different tribunals, such as damage to ships and aircraft,[48] attacks on diplomatic premises,[49] environmental damage,[50] and damage to nationals of the State.[51] In recent years, however, it has been noted that ICJ "very rarely" awards compensation. Crawford attributes this "averment" to awarding compensation to the fact that only finally assessable damage give rise to compensation, but many sovereign interests are not easily quantifiable, if they even are.[52] This is why the 2018 *Costa Rica v. Nicaragua* decision by the ICJ is considered a landmark development, as it was the first time that the it had granted compensation as a remedy for violations of international environmental law. This landmark ruling is the focus of discussion in *Part III,* but it is worth noting now that while compensation is very rarely awarded by the ICJ, it is not a totally unheard of award.

Further, while the ICJ has been reluctant to award compensation, other international bodies and tribunals have developed substantial case law that informs the possibility of the award of compensation. For example, the ITLOS in the *M/V Saiga Case* had awarded compensation in the total amount of USD 2,123,357 representing different quantified claims.[53]

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[45] CRAWFORD, *supra* note 38, at 513, *citing* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 43 (Feb. 26).

[46] *Id. citing* Forest of Central Rhodope (Greece v. Bulg.), 3 R.I.A.A. 1389 (Mar. 29, 1993).

[47] *Id.*

[48] *See* Corfu Channel (U.K. v. Alb.), Judgment, 1949 I.C.J. Rep. 4 (Apr. 9); M/V Saiga (No. 2) (St. Vincent v. Guinea), Case No. 2, Judgment of July 1, 1999, 2 ITLOS Rep. 7.

[49] *See, e.g.*, Sean Murphy, *Contemporary Practice of the United States Relating to International Law*, 94 AM. J. INT'L L. 127–130 (2000). The United States-China agreement providing for an *ex gratia* payment of 4.5 million dollars, to be given to the families of those killed and to those injured in the bombing of the Chinese Embassy in Belgrade on May 7, 1999.

[50] Trail Smelter Arbitration (U.S. v. Can.), 3 R.I.A.A. 1905 (1938 and 1941).

[51] Opinion in the Lusitania Cases, 7 R.I.A.A. 32 (1923).

[52] CRAWFORD, *supra* note 38.

[53] St. Vincent v. Guinea, 2 ITLOS Rep. at 66.

The ARSIWA is clear that compensation is limited to "financially assessable" damages and its award limited to actual damages alone. In the current conception of state responsibility, the common law concept of punitive damages in circumstances where a party had acted with recklessness, malice, deceit, or otherwise acted reprehensibly, is not within the purview of the award of compensation.[54] While the award of punitive or exemplary damages was initially considered in the drafting of the ARSIWA, this did not materialize.

The ILC, however, in accord with the comments of governments, chose not to introduce punitive damages in the field of state responsibility. Thus, compensation, as it stands today, is still limited to actual damages.

The third form of reparations is satisfaction, which covers injuries that are not financially assessable. The Commentaries provide that satisfaction is "rather exceptional,"[55] one that is available for "non-material injury" that "amount to an affront to the State."[56] These are injuries of "symbolic character, arising from the very fact of the breach of the obligation, irrespective of its material consequences for the State concerned."[57] Satisfaction comes in many forms, and is not limited to the forms enumerated in paragraph 2 of Article 37. Other forms of satisfaction include the creation of a trust fund to manage compensation, penal action against specific individuals, and assurances or guarantees of non-repetition.[58]

The Commentaries on the ARSIWA also allow for satisfaction in the form of monetary payment.[59] This was exemplified in the *Rainbow Warrior* case where the UN Secretary-General ordered France to set up a trust fund for New Zealand, with the initial contribution amounting to 2 million dollars.[60] Another example would be the case of *S.S. I'm Alone,* where the arbitrators did not award compensation for the loss of ship and the cargo, but awarded monetary satisfaction as a "material amend in respect of the wrong of the United States."[61]

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[54] CRAWFORD, *supra* note 38, at 523.

[55] *ARSIWA Commentaries*, *supra* note 40, at 105.

[56] *Id.* at 106.

[57] *Id.*

[58] *Id.*

[59] *Id.* at 99.

[60] Rainbow Warrior (N.Z. v. Fr.), 1990 20 R.I.A.A. at 274.

[61] S.S. "I'm Alone" (Can. v. U.S.), 3 R.I.A.A. 1609, 1618 (June 30, 1933 & Jan. 5, 1935).

The ARSIWA provides a useful framework in viewing the question of China's obligation for reparations in favor of the Philippines, after the Arbitral Tribunal made categorical findings that China had breached its obligations under UNCLOS and that the Philippines had suffered damage. While the ARSIWA is not a treaty, it provides a comprehensive summary of the general framework on state responsibility and comprehensively lays down the options for reparations available for injured States.

B. Quantum of Compensation and the Role of Equity

Through its case law, the ICJ has laid down a three-step approach for determining the reparations owed. These three elements are: (1) that the State had suffered an injury, (2) there is a direct causal link between the unlawful act of the responsible State and the injury of the injured state, and (3) the quantum of compensation.[62] Among the three forms of reparations discussed in the preceding section, compensation is always expressed in monetary terms. This Section focuses on the question of determining the quantum of compensation.

Generally, where property rights are damaged, the monetary recompense is calculated in reference to three things: (1) compensation of capital value, (2) compensation for loss of profits, and (3) compensation for incidental expenses.[63] The doctrine that compensation under international law is only for actual damages proved is a challenge to environmental cases.[64] This challenge, however, is mitigated by leniency exercised by some courts and tribunals. In the case of *Lusitania (US v. Germany),* for example, the United States-Germany Mixed Claims Commission acknowledged that there are harms caused that are difficult to quantify, but should be compensated nonetheless, stating that "*the mere fact that they are difficult to measure or estimate by money standards makes them none the less real and affords no reason why the injured person should not be compensated therefore as compensatory damages*, but not as a penalty."[65]

Specifically for the environment, the ILC's Commentaries on the ARSIWA provides:

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[62] JASON RUDALL, COMPENSATION FOR ENVIRONMENTAL DAMAGE UNDER INTERNATIONAL LAW 13 (2020).

[63] *Id.* at 17.

[64] *Id.* at 18.

[65] Lusitania (U.S. v. Ger.), Mixed Claims Comm'n, 7 R.I.A.A. 1, 40 (Nov. 1, 1923). (Emphasis supplied.)

> However, *environmental damage will often extend beyond that which can be readily quantified in terms of clean-up costs or property devaluation*. Damage to such environmental values (biodiversity, amenity, etc.—sometimes referred to as "nonuse values") is, as a matter of principle, *no less real and compensable than damage to property, though it may be difficult to quantify*.[66]

While case law has provided that compensation or any monetary restitution is reserved for actual damages suffered, numerous international courts and tribunals have highlighted the role of equity in awarding monetary recompense. As early as 1992, in the *Norwegian Shipowner's Claims* case, the Permanent Court of Arbitration (PCA) already intimated that equity may play a role in determining the compensation due. In this case, the PCA ruled that because it is difficult to fix the real market value of some of the shipbuilding contracts involved, the value must be assessed *ex aequo et bono*.[67] Similarly, in the *Diallo* case, the second case where the ICJ granted compensation, it remarked that compensation for non-material injury should not disregard equity, as flexibility must be afforded to determine what is just, fair, and reasonable given the overall context of the case.[68] Meanwhile, in *Al-Jedda v. United Kingdom,* the European Court of Human Rights likewise held that a certain level of flexibility must be extended in order to "reflect in broadest terms the severity of the damage."[69]

While the current legal framework on reparations appears to be strict in its requirement of proof and substantiation in its award of damages, international courts and tribunals have shown willingness to exercise equity as a measure to ensure that reparation is still afforded, even when the circumstances do not allow for an exacting computation. This exercise of equity by international courts and tribunals is critical, especially given the reality of an unlevel playing field in international relations. While international law is in theory grounded on the concept of sovereign equality, it is of no doubt that some States are in a better position than others. The exercise of equity of international courts and tribunals, then, is but one level of defense that an otherwise weaker State has in its arsenal. This, however, is entirely dependent on the court or tribunal, and the injured State could only hope that

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[66] *ARSIWA Commentaries*, *supra* note 40, at 101. (Emphasis supplied.)

[67] Norwegian Shipowners' Claims (Nor. V. U.S.), 1 R.I.A.A. 307, 339 (Perm. Ct. Arb. 1922). (Emphasis supplied.)

[68] Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo), Compensation Judgment, 2012 I.C.J. Rep. 324, 335, ¶ 24 (June 19). (Emphasis supplied.)

[69] Al-Jedda v. The United Kingdom, App. No. 27021/08, Eur. Ct H.R. ¶ 114 (July 7, 2011). (Emphasis supplied.)

equity enters the picture. In the next chapter, I discuss two very recent cases decided by the ICJ where equity was clearly at the core of its consideration on the proper amount of compensation.

III. RECENT DEVELOPMENTS ON REPARATIONS IN INTERNATIONAL LAW AND THE METHODOLOGICAL QUESTION

The exercise of equity has developed in the past five years, especially given the ICJ's compensation awards in two recent cases: *Costa Rica v. Nicaragua* in 2018 and *DRC v. Uganda* in 2022. This chapter is dedicated to these two cases and their impact on how equity figures in the award of reparations.

A. Costa Rica v. Nicaragua

The ICJ's decision on compensation in *Costa Rica v. Nicaragua* in 2018 is significant not only for being the third case where it awarded compensation, but more so for being the first time that it adjudicated compensation for environmental damage.[70]

The case was initiated by Costa Rica in 2010, alleging incursion, occupation, and use of its territory by Nicaragua, specifically as regards protected rainforests and wetlands in the northern part of Isla Portillas. Costa Rica alleged environmental damage in the protected area,[71] caused by the unlawful activities of excavating three channels, the removal of 300 trees, and the adverse impacts on 6.19 hectares of vegetation.[72]

Costa Rica claimed compensation for two categories of damage: (a) for quantifiable environmental damage caused by Nicaragua's excavations of *caños* and (b) for costs and expenses incurred as the result of Nicaragua's unlawful activities, including expenses incurred to monitor or remedy the environmental damage caused.[73] In its 2015 Judgment on the Merits, the ICJ found that Nicaragua had the obligation to compensate Costa Rica for

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[70] RUDALL, *supra* note 62, at 25.

[71] Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicar.) and Construction of a Road in Costa Rica along the San Juan River (Nicar. v. Costa Rica) [hereinafter "*2015 Costa Rica Judgment*"], Judgment, 2015 I.C.J. Rep. 665, 684.

[72] *See* Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicar.), Compensation [hereinafter "*2018 Costa Rica Compensation Judgment*"], Judgment, 2018 I.C.J. Rep. 15, 36, ¶ 75.

[73] *2015 Costa Rica Judgment*, 2015 I.C.J. at 684–85, ¶ 49.

material damages caused by Nicaragua's unlawful activities.[74] The 2015 Judgment gave the parties the opportunity to agree on the amount and terms of compensation.[75] Absent such an agreement, it would be the Court who will settle the particularities of the compensation. By 2017, the ICJ was informed that the parties had not reached an agreement, and thus, the government of Costa Rica requested the ICJ to settle the question of compensation.[76]

In the 2015 *Costa Rica* judgment, the ICJ acknowledged that environmental preservation is the subject of several international agreements and is covered by customary international law.[77] However, it also highlighted that specifically, the damaged area is protected by the Ramsar Convention on Wetlands of International Importance.[78] In the primary-secondary rule dichotomy discussed in the previous chapter, it is the Ramsar Convention that is the primary rule, and yet the ICJ determined the appropriate reparation by using general rules on state responsibility—the secondary rules.[79]

The *Costa Rica* case is historic, not only because it is the first time the ICJ granted compensation for expenses incurred by the injured State as a consequence of damage caused to the environment, but for its pronouncement that compensation is due for the damage caused to the environment, *in and of itself*.[80]

This is an acknowledgment by the ICJ that damage to the environment includes not just damage to physical goods, such as minerals and other natural resources which are traded in the market, but also to the "services" that they provide to other natural resources, for example as a habitat, and more broadly to society at large.[81]

1. Methodological Approaches on Valuation

As acknowledged by Costa Rica, there is no settled and single method of valuation for environmental damage.[82] Thus, the Parties have proposed their own methods of valuation.

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[74] *Id.* at 740, ¶ 229(5)(a).
[75] *Id.* at 741, ¶ 229(b).
[76] *2018 Costa Rica Compensation Judgment*, 2018 I.C.J. Rep. 15, at 21, ¶ 11.
[77] *2015 Costa Rica Judgment*, 2015 I.C.J. Rep. at 706–07, ¶ 104.
[78] *Id.* at 708–09, ¶ 109.
[79] Monaliza Da Silva, *Compensation Awards in International Environmental Law: Two Recent Developments,* 50 N.Y.U. J. INT'L L. & POL. 1417, 1425 (2018).
[80] *2018 Costa Rica Compensation Judgment*, 2018 I.C.J. Rep. at 28, ¶ 41.
[81] *See id.* at 29–30, ¶ 47.
[82] *Id.* at 29, ¶ 44.

a. Costa Rica's Ecosystem Services Approach

In its submission to the Court, Costa Rica proposed the "ecosystem services approach," which values the environment in reference to the goods and services that comprise it. There is a distinction between goods and services with "direct value" or those that may be traded on the market, such as timber, and those that cannot be traded on the market but have an "indirect use value," such as those for flood prevention. Given these two values of environmental goods and services, Costa Rica further proposed a value transfer approach, where the damage caused is assigned a monetary value by reference to a value drawn by valuing an ecosystem that has similar conditions to the ecosystem concerned.[83]

While Costa Rica identified 22 categories of lost ecosystem goods and services,[84] it claimed entitlement to compensation only as regards six types of environmental goods and services: (a) standing timber, (b) other raw materials, (c) gas regulation, (d) natural hazards mitigation, (e) soil formation and erosion control, and (f) biodiversity, in terms of habitat and nursery.[85] The loss was then calculated over a period of 50 years, which represents the time required for the affected area to recover, with a discount rate of 4% to account for peculiarities, such as the age of the trees cut down.[86] With this method, Costa Rica arrived at a total compensation for lost goods and services in the amount of USD 2,880,745.

In addition to the compensation for the lost goods and services, Costa Rica also claimed compensation for expenses incurred in relation to Nicaragua's presence and unlawful activities on Costa Rican Territory,[87] expenses incurred in monitoring the disputed territory,[88] and expenses incurred in the implementation of the ICJ's 2013 Order, insofar as concerns works necessary to avoid irreparable prejudice to the environment of the disputed territory.[89] In total, Costa Rica requested the ICJ to order Nicaragua to pay a total of USD 6,708,776.96 principal amount and USD 522,733.19 in

[83] *Id.* at 30, ¶ 47.

[84] Memorial of Costa Rica on Compensation, Certain Activities Carried Out By Nicaragua in the Border Area (Costa Rica v. Nicar.) [hereinafter "*Costa Rica Memorial*"], 1 I.C.J. Pleadings 26–36, ¶¶ 3.9–3.20 (Apr. 3, 2017).

[85] *Id.* at 32–33, ¶ 3.16.

[86] *Id.* at 33–34, ¶ 3.18.

[87] *Id.* at 37–43, ¶¶ 3.22–3.25.

[88] *Id.* at 43–57, ¶¶ 3.26–3.29.

[89] *Id.* at 57–70, ¶¶ 3.30–3.43.

pre-judgment interest, with post-judgment interest at an annual rate of 6% per annum.[90]

Nicaragua, for the sake of argument but without admission, presented its own calculation based on this approach proposed by Costa Rica but made adjustments. In what it called the "corrected analysis," Nicaragua computed only four (compared to Costa Rica's six) categories of goods and services and with adjustments in values, arrived at a total of USD 84,296 only.

b. Nicaragua's Ecosystem Service Replacement Costs Approach

For its part, Nicaragua primarily proposed the adoption of the ecosystem service replacement costs approach. This entails considering the price that would have to be paid to preserve an equivalent area until the services provided by the impacted area have fully recovered. Nicaragua cites the adoption of this method in the United Nations Compensation Commission's ("UNCC") environmental claims panel with regard to the damage to Saudi Arabia's coastal environment due to oil spills, the largest environmental damages claim that the UNCC was called to adjudicate. [91]

Using this method, Nicaragua asserted that Costa Rica is entitled to USD 309 per affected hectare per year.[92] This valuation represents the amount Costa Rica pays landowners and communities by way of incentive to protect and manage the habitat and to provide ecosystem services.[93] Nicaragua used this as its base figure in a calculation over a period 20 to 30 years, which is the reasonable length of time for recovery of the areas. Similarly applying a 4% discounted rate, Nicaragua asserted that the maximum amount of compensation Costa Rica is entitled to is only USD 38,987, representing the replacement costs.[94] This is about 1/100 or 1% of the claim of Costa Rica.

Nicaragua also acknowledged that Costa Rica is entitled to compensation for other expenses incurred but rejected some claims and only accounted for a total of no more than USD 153,517. Thus, Nicaragua asserted that the total compensable amount (replacement cost plus expenses) in favor of Costa Rica is only USD 188,504 maximum.[95]

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[90] *Id.* at 71–72, ¶ 3.45.

[91] Counter-Memorial of the Republic of Nicaragua on Compensation, Certain Activities Carried Out By Nicaragua in the Border Area (Costa Rica v. Nicar.), 1 I.C.J. Pleadings 60–61, ¶ 4.41 (June 2, 2017).

[92] *Id.* at 61, ¶ 4.43.

[93] *Id.* at 61, ¶ 4.42.

[94] *Id.* at 62, ¶ 4.44.

[95] *Id.* at 62, ¶ 4.46.

c. Court's Method: The Overall Valuation Approach

Instead of adopting either of the parties' methods of valuation, the ICJ valued the environmental damage based on its "overall valuation approach." Under this method, compensation for environmental damage is based not on calculating specific value per category; instead, focus is given on an overall evaluation of the impairment or loss of goods and services. The ICJ also noted that wherever certain elements of the proposed method of each party are deemed to be appropriate, it will nonetheless take them into account.

Worth noting in the ICJ's decision is its justification in adopting this overall valuation approach. Citing the *Trail Smelter* case, which in turn references a US Supreme Court decision, the ICJ noted:

> Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a *perversion of fundamental principles of justice to deny all relief to the injured person' and that, as such 'it will be enough if the evidence show the extent of damages as a matter of just and reasonable interference, although the result be only approximate.*[96]

The Court also cited the *Diallo* case, which made a pronouncement on the role of equity in determining the proper amount of compensation.[97]

The Court explained that an overall valuation approach is necessitated by the nature of the goods and services involved. For example, given that the removal of trees was the most significant damage to the area, it is through an overall valuation approach that the correlation between the removal of the trees and the harm caused to other environmental goods and services can be accounted for.[98] The area being a wetland further necessitates an overall valuation, since wetlands are "among the most diverse and productive ecosystems in the world."[99] Lastly, the Court explained that the use of an overall valuation approach would consider the capacity of the damaged area for natural regeneration.[100]

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[96] *2018 Costa Rica Compensation Judgment*, 2018 I.C.J. at 27, ¶ 35, *citing* Trail Smelter (U.S. v. Can.), 3 R.I.A.A. 1905 (Apr. 16, 1938 & Mar. 11, 1941).

[97] *Id.* at 26, ¶ 30.

[98] *Id.* at 37, ¶ 78.

[99] *Id.* at 37, ¶ 80.

[100] *Id.* at 38, ¶ 81.

With all these factors considered, the ICJ ultimately awarded Costa Rica the sum of USD 120,000 for the impairment or loss of the environmental goods and services of the impacted area in the period prior to recovery.[101] As to the costs and expenses allegedly incurred by Costa Rica, the Court only appreciated a total of USD 238,740.55, [102] with pre-judgment interest at the rate of 4% per annum of the principal sum, computed from December 2015 until February 2018.[103]

2. Analyses

While the case of *Costa Rica* is often lauded for being the first environmental compensation award from the ICJ, the amount awarded by the tribunal is a measly 5% of the claim made by Costa Rica. While the Court adopted an "overall valuation approach," how exactly this is operationalized is opaque at best. This "rather less than clinical" approach is also described as a "relatively narrow (even anthropocentric perspective) on reparation"[104] and has failed to even discuss what is involved in what the ICJ deemed an overall assessment.[105] It laid down the claims it rejected, but the determination of the amount awarded to Costa Rica remains vague.[106]

Despite the criticism on the ICJ methodology on compensation in *Costa Rica,* the ICJ's approach provides a marked deviation from previous practice in reparations in international law. For example, most discussions on the award of reparations focus on the *Chorzow Factory* standard, which provides that reparations place the injured party back in their position before the wrongful act or breach of obligation took place, or simply, a return to status *quo ante*. It is thus curious as to why the Court omitted entirely any baseline environmental assessment prior to Nicaragua causing the damage. The ICJ also did not estimate a recovery period, nor did it consider possible mitigating factors during such recovery period.

Another interesting pronouncement by the Court in *Costa Rica* is its determination on who bears the burden of proof. It acknowledged that the rule has always been that the burden of proof generally rests with the party alleging a particular fact. It, however, was more lenient on proving the causal

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[101] *Id.* at 39, ¶ 86.

[102] *Id.* at 56–57, ¶ 147.

[103] *Id.* at 59–60, ¶ 157.

[104] Kevine Kindji & Michael Faure, *Assessing reparation of environmental damage by the ICJ: A lost opportunity?,* 57 QUESTIONS OF INT'L L. 5, 7 (2019).

[105] *Id.* at 26.

[106] RUDALL, *supra* note 62, at 30.

nexus under the special circumstances, such as when it is the respondent that is placed in a better position to discharge the burden on the basis of evidence.[107] Specific to the environment, the Court in *Costa Rica* highlighted the leeway for judicial discretion:

> In cases of alleged environmental damage, particular issues may arise with respect to the existence of damage and causation. The damage may be due to several concurrent causes, or the state of science regarding the causal link between the wrongful act and the damage may be uncertain. These are difficulties that must be addressed as and when they arise in light of the facts of the case at hand and the evidence presented to the Court. *Ultimately, it is for the Court to decide whether there is a sufficient causal nexus between the wrongful act and the injury suffered.*[108]

Ultimately, despite the practical difficulties in its application, this approach accords fully with the central tenets of ecosystem-based management and the sustainable delivery of goods and services, a central aspect of good marine environmental stewardship.[109]

B. Democratic Republic of Congo v. Uganda

Another recent case that presents interesting pronouncements on compensation as a form of reparations is the 2022 ICJ Judgment on Reparations in the *Armed Activities on the Territory of Congo (Democratic Republic of Congo v. Uganda)*. This case is over two decades in the making. It started in 1999 when the Democratic Republic of Congo (DRC) instituted proceedings against Uganda for "acts of armed aggression perpetrated by Uganda on the territory of the [DRC]."[110] In its 2005 Judgment, the ICJ found that from August 1998, Uganda had maintained a military presence in DRC territory without the latter's consent. Because of this occupation, the ICJ also found credible and persuasive evidence to conclude that Ugandan forces had been involved in the looting, plundering, and exploitation of DRC's natural resources. These injuries caused gave rise to Uganda's obligation to make reparations to the DRC, with the ICJ giving the parties time to reach an

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[107] *2018 Costa Rica Compensation Judgment*, 2018 I.C.J. Rep. at 26, ¶ 33.

[108] *Id.* at 26, ¶ 34. (Emphasis supplied.)

[109] Ronán Long, *Restoring Marine Environmental Damage: Can the Costa Rica v Nicaragua Compensation Case Influence the BBNJ Negotiations?,* 28 REV. EUR. COMP. INT'L ENVTL. L. 244, 253 (2019).

[110] Armed Activities on the Territory of Congo (Dem. Rep. Congo v. Uganda), Reparations, Judgment, 2022 I.C.J. Rep. 13, 24–25, ¶ 1 (Feb. 9).

agreement as to the amount and terms of reparations. The two States did not reach an agreement despite years of negotiation. Thus, the DRC sought the reopening of the proceedings for the Court to determine the amount of reparation owed.[111] The ICJ decided to appoint four independent experts to help in the assessment of valuation.[112]

In its Submission to the Court, the DRC claimed damages under four classifications: (1) USD 4,350,421,800 for personal injury, (2) USD 239,971,970 for damage to property; (3) USD 1,043,563,908 for damage to natural resources, and (4) USD 5,714,000,775 for macroeconomic damage. In total, the DRC claimed over 11 billion dollars as the principal sum of compensation subject to compensatory interest of 4%. In addition, the DRC also claimed another form of reparation—satisfaction—in the amount of 125 million dollars, 25 million dollars with which to create a trust fund to promote reconciliation between two ethnic groups and 100 million dollars for the non-material harm suffered by the Congolese State.

The ICJ required Uganda to pay a total of 325 million dollars, consisting of 225 million dollars for all damages to persons, 40 million dollars for damages to public and private property, and 60 million dollars for the exploitation of natural resources.[113]

In what can be interpreted as a general exercise of equity, the ICJ highlighted the importance of the case's context in determining the proper amount of reparations. This case involves a complex armed conflict, one that is a violation of "some of the most fundamental principles and rules of international law."[114] It also highlighted the decades between the injury and the resolution of the case, giving rise to evidentiary struggles:

> 66. The Court observes that the time that has elapsed between the current phase of the proceedings and the unfolding of the conflict, namely some 20 years, makes the task of establishing the course of events and their legal characterization even more difficult. The Court notes, however, that the Parties have been aware since the 2005 Judgment that they could be called upon to provide evidence in reparation proceedings.

[111] *Id.* at 27–33, ¶¶ 11–42.
[112] *Id.* at 21, ¶ 26.
[113] *Id.* at 137, ¶ 405.
[114] *Id.* at 41, ¶ 65.

> 67. The Court is mindful of the fact that evidentiary difficulties arise, to a certain extent, in most situations of international armed conflict. However, questions of reparation are often resolved through negotiations between the parties concerned. The Court can only regret the failure, in this case, of the negotiations through which the Parties were to "seek in good faith an agreed solution" based on the findings of the 2005 Judgment (*I.C.J. Reports 2005*, p. 257, para. 261).[115]

With this, the Court adopted a contextual view in its assessment of reparations due.

1. Evidentiary Struggles and the Award of Compensation in the Form of Global Sum

The groundbreaking pronouncement of the Court in this case is its award of a "global sum." Citing the *Costa Rica v. Nicaragua* 2018 Judgment, the ICJ highlighted that the absence of adequate evidence is not a bar to compensation. Extending the *Costa Rica* pronouncement further, the Court ruled that an award in the form of a global sum is warranted if precise evaluation is difficult, if not impossible*:*

> While the Court recognizes that there is some uncertainty about the exact extent of the damage caused, this does not preclude it from determining the amount of compensation. *The Court 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 account of equitable considerations.* Such an approach may be called for where the evidence leaves no doubt that an internationally wrongful act has caused a substantiated injury, but does not allow a precise evaluation of the extent or scale of such injury[.][116]

In determining the award of the compensation, given the wartime factual backdrop of the case, the Court ruled that it is not necessary for the DRC to prove every instance of injury to both person and property in each location at a given time to warrant reparation.[117]

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[115] *Id.* at 42, ¶¶ 66–67.
[116] *Id.* at 52, ¶ 106. (Emphasis supplied.)
[117] *Id.* at 53–54, ¶ 114.

Furthermore, the Court found that a less rigorous proof for the purposes of quantification is warranted,[118] especially if large amounts of evidence had already been destroyed or rendered inaccessible over the years. Flexibility in terms of evidentiary threshold is then possible, if not warranted, in certain circumstances. This flexibility in evidentiary appreciation is even applied as regards the types of evidence to be considered and the methods by which reasonable estimates are reached. The Court held that for so long as a particular finding of fact is supported by more than one source of evidence or "a number of concordant indications"—may that be from the Parties' submission or reports of Court-appointed experts or of other international bodies—reasonable estimates for the compensable damage may be had.[119]

2. Damage to Property and Natural Resources

The Court determined three categories of compensable damage in this case, all awarded as global sum: (a) 225 million dollars for the loss of life and other damage to persons, (b) 40 million dollars for damage to property, and (c) 60 million dollars for damage to natural resources.

To facilitate discussion, focus is given to the global sum award for damage to (1) property and (2) natural resources, since the conceptual framework behind the treatment of the categories in the global sum award is relatively the same.

a. Damage to Property

For damage to property, the DRC claimed the payment of USD 239,971,970,[120] composed of damage to private dwellings, civilian infrastructure such as schools, health facilities, and administrative buildings, and damage due to looting.[121] Contrary to the assertion of Uganda, the Court held that the DRC should not be expected to provide a highly particular itemization of all the property that had been destroyed:

> 242. The Court emphasizes that, *given the extraordinary character of the conflict and the ensuing difficulty of gathering detailed evidence for most forms of property damage, the DRC cannot be expected to provide specific documentation* for each individual building destroyed or seriously damaged during the five years of Uganda's unlawful military involvement in the DRC (see paragraph 114 above).

[118] *Id.* at 56, ¶ 123.
[119] *Id.* at 57, ¶ 126.
[120] *Id.* at 90, ¶ 229.
[121] *Id.* at 90, ¶¶ 230–31.

> At the same time, the Court considers that, notwithstanding the difficult situation in which the DRC found itself, more evidence could be expected to have been collected by the DRC since the Court delivered its 2005 Judgment, particularly in relation to assets and infrastructure owned by the DRC itself and of which it was in possession and control. The Court will bear these considerations in mind when assessing the evidence tendered by the DRC. [122]

In discussing the grant of the award for damage to property, the Court pointed out the many things lacking in the DRC's submission. For example, the Court made the finding that the evidence presented by the DRC to substantiate its claims of destroyed private dwellings was not helpful at all in identifying the scale of damage.[123] The Court also found the evidence as to the number of schools[124] and number of administrative buildings and health facilities[125] to be lacking. In summary, the Court ruled that the evidence presented by the DRC "does not permit the Court to even approximate the damage."[126] Despite this, the Court ruled that UN reports can be appreciated to determine the amount of compensation damages to be awarded.[127]

With these, even the DRC's own failure to substantiate its claims did not bar the award of compensation for damage to property. Once again invoking the global sum principle, the Court in this case awarded compensation for damage to property in the global sum of 40 million dollars, which is just 16% of the almost 250 million dollar claim of the DRC for this type of compensable damage.

b. Damage to Natural Resources

The claim for damage to natural resources, much like in the *Costa Rica v. Nicaragua* case, entails a question on valuation of the natural resources that had been lost. To substantiate its USD 1,043,563,908 claim for compensation for damage to Congolese natural resources, the DRC adopted different methodologies, depending on the type of resource involved:

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[122] *Id.* at 93, ¶ 242. (Emphasis supplied.)
[123] *Id.* at 93, ¶ 243.
[124] *Id.* at 93, ¶ 244.
[125] *Id.* at 93–94, ¶ 245.
[126] *Id.* at 94, ¶ 246.
[127] *Id.* at 94, ¶¶ 246–47. (Emphasis supplied.)

> 262. It applies a surplus methodology for its claims regarding gold, diamonds and coltan.
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> * * *
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> With respect to timber, the DRC calculates the damage based on the commercial value of exports and taxes of a specific timber company, DARA-Forest, from 1998 to 2003. The DRC's claims relating to damage to fauna are mainly based on an assessment prepared by the Congolese Institute for Nature Conservation (hereinafter the "ICCN"), the public body in the DRC responsible for managing national parks. The DRC further refers to the reports of the United Nations Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo (hereinafter "UNPE"), the Porter Commission Report, the Mapping Report and reports by non-governmental organizations to establish the causal nexus between the damage and internationally wrongful acts attributable to Uganda and to prove the alleged extent of the damage.
>
> 263. Regarding its claims for exploitation of coffee, tin and tungsten, the DRC adopts the figures set out in the report by the Court-appointed expert Mr. Nest. With respect to the methodology adopted by the expert to determine the extent of exploitation, notably of gold, diamonds and coltan, however, the DRC expresses doubts about the "proxy tax rate" approach adopted by the expert to calculate the damage in question. As for the valuation of the exploited resources, the DRC considers it inappropriate for the expert to apply a discount of 35 per cent (see paragraph 271 below) systematically without any regard for the specific value of each resource. The DRC also contends that the expert relied on the market conditions in the DRC as a "spoliation economy" caused by Uganda's breach of international obligations, and concludes that the Court should not adopt these very low base prices. In addition, the DRC maintains that the expert excluded the exploitation of natural resources by civilians in Ituri and thus inappropriately limited the scope of his analysis. Finally, the DRC argues that the expert should have included damage to fauna and flora through deforestation in the scope of his analysis.[128]

[128] *Id.* at 99–100, ¶¶ 262–63.

In deciding the amount of compensation due, the Court gave credence to the methodological approach adopted by its expert.[129] Importantly, the Court also did not agree with Uganda's assertion that the DRC had to prove the "specific time, place, and damage relating to each incident of exploitation."[130] As regards the types of evidence to be appreciated, the Court also ruled that UN reports alongside reports of non-government organizations and domestic institutions should be given weight, especially when it is corroborated by the expert's report.[131]

In the case of natural resources, the Court once again awarded compensation as part of global sum, notwithstanding its finding that the DRC was not able to prove its violation "based on a convincing methodological approach."[132] It found the evidence adequate to conclude Uganda's responsibility for the damage to these specific natural resources, as it awarded a global sum rather than relying on an itemized valuation. Thus, taking into account the extraordinary circumstances and all the available evidence, the Court awarded compensation worth 60 million dollars for the looting, plundering, and exploitation of natural resources in the form of global sum.[133]

The Court's wording in its concluding paragraphs in the sub-section on natural resources provides a good summary of how it treated evidentiary and methodological challenges in this case:

> *5. Conclusion*
>
> 364. The Court observes that the evidence presented to it and the expert report by Mr. Nest demonstrate that a large quantity of natural resources was looted, plundered and exploited in the DRC between 1998 and 2003. In respect of Ituri, Uganda is liable to make reparation for all such acts. As to areas outside of Ituri, a significant amount of natural resources looted, plundered and exploited is attributable to Uganda. *However, neither the report by the Court-appointed expert nor the evidence presented by the DRC or set out in reports by the Porter Commission, United Nations bodies and non-governmental organizations is sufficient to prove the precise extent of the looting, plundering and exploitation for which Uganda is liable*. The expert report by Mr. Nest provides a methodologically solid and persuasive estimate on the basis of the available evidence.

[129] *Id.* at 105, ¶ 277.
[130] *Id.*
[131] *Id.* at 106, ¶ 280.
[132] *Id.* at 113, ¶ 310.
[133] *Id.* at 127, ¶ 366.

> This expert report is particularly helpful regarding the valuation of the different natural resources it covers (minerals, coffee and timber). However, while the expert report by Mr. Nest, and, with respect to fauna, the reports by specialized United Nations bodies, may offer the best possible estimate of the scale of the exploitation of natural resources under the circumstances, they do not permit the Court to reach a sufficiently precise determination of the extent or the valuation of the damage.
>
> 365. As it did with respect to damage to persons and to property, *the Court must take account of the extraordinary circumstances of the present case, which have restricted the ability of the DRC and of the expert to present evidence with greater probative value* (see paragraphs 120-126 above). The Court recalls that it may, under the exceptional circumstances of the present case, award compensation in the form of a global sum, within the range of possibilities indicated by the evidence and taking into account equitable considerations (see paragraph 106 above).
>
> 366. Taking into account all the available evidence (see paragraphs 260-363 above, specifically 298, 310, 322, 332, 344 and 363), in particular the findings and estimates contained in the report by the Court-appointed expert Mr. Nest, as well as its jurisprudence and the pronouncements of other international bodies (see paragraphs 69-126 above), the Court will award compensation for the looting, plundering and exploitation of natural resources in the form of global sum of US$60,000,000.[134]

With the passages reproduced above, it is clear that the *DRC v. Uganda* case takes the *Costa Rica* conceptualization further. Unlike in *Costa Rica,* the Court in *DRC* was careful to outline the competing views and evidence for each head and sub-head of damage, and to reach conclusions as to the quality and nature of that evidence. The *DRC v. Uganda* decision, then, attempts to provide a clearer starting framework on determining compensation on an aggregated basis in light of the evidential difficulties that often attach to assessing loss. The approach, however, appears incomplete, as the Court in *DRC* still failed to adequately explain the basis of the final figures it awarded. While the Court in *DRC* laid down evidentiary struggles and its steps to correct these, it never provided clarity as to how it reached its final award,

[134] *Id.* at 126–27, ¶¶ 364–66. (Emphasis supplied.)

leaving the criticism still that these figures were assigned by snatching them from thin air.[135]

C. Synthesis

These recent cases of *Costa Rica v. Nicaragua* and *DRC v. Uganda* show the ICJ's recent leniency on the methodological approaches in valuation, burden of proof, and evidentiary standards. This is a double-edged sword. On the one hand, this leniency allows for the award of compensation even if the "standard" or the required evidentiary threshold is not met because of circumstances beyond the injured state's control or because of the very nature of the case. On the other hand, it is also worth noting that the sum thus awarded in the form of what the Court called a "global sum" is a very small sum compared to what had been originally claimed by the injured state—in the case of *Costa Rica v. Nicaragua*, the award granted in the form of global damages is only around 5% of Costa Rica's original claim; in the case of *DRC v. Uganda*, the compensation granted is a measly 3% of the original 11 billion dollars originally prayed for by the DRC. Thus, much like the award of compensation in the form of a global sum is dependent on the circumstances, the question of whether this global sum methodology is a welcome development also depends on the surrounding circumstances. In some cases, the award of something is better than no award at all. However, the award of such a small amount given the uncertainties of the case may be problematic in some cases since the expectation in reparation is the return, as much as possible, to status quo ante, and not merely almsgiving.

IV. THE PHILIPPINES' CASE FOR REPARATIONS AND THE PROMISES AND PITFALLS OF REPARATIONS IN GLOBAL SUM

The ICJ's decision in *Costa Rica v. Nicaragua* and *DRC v. Uganda,* alongside the concepts and doctrines on state responsibility, informs the case-building of the Philippines, should it decide to pursue the findings of breach in the 2016 Arbitral Award further. Drawing from lessons and analyses from these two cases, I explore the possible case of the Philippines for reparation.

To be clear, this Note is not prepared to advocate for the filing of a reparations case in whatever court or tribunal; neither does it attempt to provide a full blow-by-blow strategy on how the Philippines should approach its claim for reparations, should it decide to. Instead, this Note tackles the

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[135] Armed Activities on the Territory of Congo (Dem. Rep. Congo v. Uganda), Reparations, 2022 I.C.J. Rep. 165, 171, ¶ 15 (Feb. 9) (Robinson, *J.*, *separate*).

possibility of reparation in general terms, focusing only on opportunities and pitfalls. The succeeding discussion follows the three elements that need to be proven in a case for reparations: (1) injury, (2) direct link between the unlawful act of the responsible State and the injury of the injured State, and (3) the quantum of compensation.

As a preliminary discussion, while it is true that there is no concept of *stare decisis* in international law, the cases decided by the ICJ—from which this Note anchored much of its arguments—can provide a good insight as to the changing tides in the exercise of equity in international law. Likewise, it provides a good starting point on the emerging framework involving the interplay between the strict conceptualization of reparations and the more lenient approach involving equity.

Like any court—domestic or international—the ICJ is "Janus-faced:" it cannot legislate, but its pronouncements can contribute and has, in fact, contributed to the development of law.[136] It is true that judicial pronouncements are not an autonomous source of law precisely because they are not binding outside the specific dispute, the value of ICJ judgments lie in their persuasive value, or what has been described as being persuasive precedents.[137]

A. Elements 1 and 2: Injury and Direct Link

I discuss the first two elements for a claim of compensation together, since these two elements can be easily established through the 2016 Arbitral Award. As mentioned above, while there is no *stare decisis* in international law, the key findings in the 2016 Arbitral Award inform much of the case-building of the Philippines, as it had been proven by the Philippines as early as 2016 that environmental damage to the marine ecosystem of the West Philippine Sea had been caused by China. Continued Chinese activities within the Philippines' EEZ after the 2016 Arbitral Award and the Philippines' subsequent actions and protests also contribute to the Philippines' case-building.

In particular, the 2016 Arbitral Award noted multiple instances in which Chinese-owned or China-allied vessels caused damage to the marine ecosystem. The Tribunal, citing memoranda from the Armed Forces of the

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[136] Christian Tams, *The Development of International Law by the International Court of Justice,* 2 GAETANO MORELLI LECTURES SERIES 63, 65 (2018).

[137] *Id.* at 70, *citing* MOHAMED SHAHABUDEEN, PRECEDENT IN THE WORLD COURT xiv (1996).

Philippines (AFP), reports from the Philippines' Department of Foreign Affairs (DFA), and even domestic cases decided by Regional Trial Courts (RTC) in the Philippines, enumerated at least nine instances in which it was "satisfied that Chinese fishing vessels had been involved in harvesting of threatened or endangered species" in the Scarborough Shoal.[138] Citing news reports and photographs from the Armed Forces of the Philippines, the Tribunal further ruled that there had been large-scale harvesting and gathering of corals in the area.[139] In addition to official memoranda from the Philippines, the Tribunal also appreciated in evidence "satellite imagery, photographic and video evidence, contemporaneous press reports, scientific studies," and materials from its appointed experts.[140]

Again, what needs to be established is two-fold: (a) injury, and (b) a direct link between the unlawful act of the responsible State and the injury of the injured State. With the second element comes the requirement that there be an obligation that had been breached—thus, causing the act to be "unlawful." The 2016 Arbitral Award is once again clear on this point. It did not only interpret the general UNCLOS provisions on the environment, but also acknowledged that these general statements should be read in light of the "corpus of international law relating to the environment"[141] and "other applicable international law."[142] For example, the Tribunal made an explicit reference to the CITES Convention:

> 956. All of the sea turtles (*Cheloniidae*) found on board Chinese fishing vessels are listed under Appendix I to the CITES Convention as species threatened with extinction and subject to the strictest level of international controls on trade. CITES is the subject of nearly universal adherence, including by the Philippines and China, and in the Tribunal's view forms part of the general corpus of international law that informs the content of Article 192 and 194(5) of the Convention. "[T]he conservation of the living resources of the sea is an element in the protection and preservation of the marine environment," and the Tribunal considers that the general obligation to "protect and preserve the marine environment" in Article 192 includes a due diligence obligation to prevent the harvesting of species that are recognised internationally as being at risk of extinction and requiring international protection.

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[138] *Arbitral Award*, 2016 PCA Case Repository at 378–79, ¶ 950.
[139] *Id.* at 379–80, ¶¶ 951–52.
[140] *Id.* at 380, ¶ 953.
[141] *Id.* at 373–74, ¶ 941.
[142] *Id.* at 381–82, ¶ 959.

> 957. The Tribunal is particularly troubled by the evidence with respect to giant clams, tons of which were harvested by Chinese fishing vessels from Scarborough Shoal, and in recent years, elsewhere in the Spratly Islands. Giant clams (*Tridacnidae*) and many of the corals found in the Spratly Islands are listed in Appendix II to CITES and are unequivocally threatened, even if they are not subject to the same level of international controls as Appendix I species. Equally important, however, giant clams play a significant role in the overall growth and maintenance of the reef structure.[143]

Furthermore, the "direct link" requirement entails that China should have had a hand or at least was aware of the illegal acts. The Tribunal made it clear that evidence is sufficient to establish this direct link between China and the acts that caused the injury. As regards the harvesting of endangered species, the Tribunal took note that the Philippine government sent multiple notes verbale to China, protesting the presence and actions of Chinese vessels, to which it turned a blind eye. These paragraphs are reproduced in full below to show that both the injury and direct link requirements have been established in the 2016 arbitral award:

> 961. The vessels involved in the incidents described above *were all Chinese flag vessels, under the jurisdiction and control of China. In the Tribunal's view, where a State is aware that vessels flying its flag are engaged in the harvest of species recognised internationally as being threatened with extinction or are inflicting significant damage on rare or fragile ecosystems or the habitat of depleted, threatened, or endangered species*, its obligations under the Convention include a duty to adopt rules and measures to prevent such acts and to maintain a level of vigilance in enforcing those rules and measures.
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> 962. On the question of awareness, it is clear from the record that the *Philippines had brought its concerns about poaching of endangered species to the attention of China as early as January 2000*, when it stated to the Chinese Embassy that unlawful harvesting "disturbed the tranquility of the ecosystem and habitat of important species of marine life and [. . .] caused irreparable damage to the marine environment of the area." The Philippines also recalled that the gathering and trade of corals violates the provisions of three international conventions to which China is a signatory, including the CBD

[143] *Id.* at 380–81, ¶¶ 956–57.

and CITES. In 2001, China assured the Philippines that it "attaches great importance to environmental protection and violators are dealt with in accordance with Chinese laws and regulations." After finding 16 tons of clams and corals aboard Chinese fishing vessels in 2005, the Philippines expressed its grave concern to China over the "rampant trading of endangered corals and marine species in the South China Sea."

963. *China was therefore, certainly by 2005, on notice of poaching practices of Chinese fishing vessels in Scarborough Shoal and aware of the Philippines' concerns*. The poaching, however, has persisted, despite (a) China's earlier statements that it would deal with violators, (b) China being party to CITES since 1981, and (c) China having enacted in 1989 a Law of the Protection of Wildlife, which prohibits the catching or killing of two classes of special state protected wildlife, and specifically lists among them sea turtles and giant clams.

964. As the Tribunal has noted above, adopting appropriate rules and measures to prohibit a harmful practice is only one component of the due diligence required by States pursuant to the general obligation of Article 192, read in the context of Article 194(5) and the international law applicable to endangered species. *There is no evidence in the record that would indicate that China has taken any steps to enforce those rules and measures against fishermen engaged in poaching of endangered species*. Indeed, at least with respect to the April 2012 incidents, the evidence points directly to the contrary. *China was aware of the harvesting of giant clams*. It did not merely turn a blind eye to this practice. Rather, it provided armed government vessels to protect the fishing boats. The Chinese Ministry of Foreign Affairs Spokesperson confirmed on 12 April 2012 that it had "dispatched administrative vessels [. . .] to protect the safety and legitimate fishing activities of Chinese fishermen and fishing vessels." Despite the reference to "legitimate fishing activities," the photographic evidence of endangered species, including giant clams and sharks, on board the vessels in question indicates China must have known of, and deliberately tolerated, and protected the harmful acts. Similarly, with respect to the May 2013 incident in the vicinity of Second Thomas Shoal, the Tribunal accepts, on the basis of the photographic and contemporaneous documentary evidence, that Chinese naval and CMS vessels were escorting Chinese fishing vessels in gathering clams. The Tribunal therefore has no hesitation in finding that China breached its obligations under Articles 192 and 194(5) of the Convention,

> to take necessary measures to protect and preserve the marine environment, with respect to the harvesting of endangered species from the fragile ecosystems at Scarborough Shoal and Second Thomas Shoal.[144]

Similar findings were made as regards the environmental damage (thus, the first element of injury) caused by China's illegal construction activities on seven reefs in the Spratly Islands (thus, the second element of direct link).[145]

While the Philippines' legal victory in the 2016 Arbitral Award will not automatically be transposed into a winning reparations case since *stare decisis* does not apply in international law, the Philippines' existing evidence from the 2016 Arbitration, fortified by the post-Arbitral Award developments, provides a solid foundation in building a reparations case, especially since the building blocks from the 2016 Arbitral Award already comprise two of three elements needed in building a case for reparations.

B. Element 3: The Quantum and Amount of Compensation

The current legal landscape on reparations in international law is clear: compensation is awarded on the basis of the submissions of the parties. In the *Fisheries Jurisdiction (Germany v. Iceland)* case, it was discussed that precise grounds and detailed evidence are warranted before compensation may be granted:

> In order to award compensation the Court can only act with reference to a *concrete submission as to the existence and the amount of each head of damage*. Such an award must be based on *precise grounds and detailed evidence concerning those acts which have been committed, taking into account all relevant facts of each incident and their consequences in the circumstances of the case*. It is only after receiving evidence on these matters that the Court can satisfy itself that each concrete claim is well founded in fact and in law.[146]

Thus, despite more recent developments in the role of equity in awarding compensation, the requirement that the injured state submit

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[144] *Id.* at 382–84, ¶¶ 961–64. (Emphasis supplied.)

[145] *See id.* at 388–94, ¶¶ 976–83.

[146] Fisheries Jurisdiction (Ger. v. Ice.), Merits, Judgment, 1974 I.C.J. Rep. 175, 204 ¶ 76 (25 July).

evidence on "existence and the amount of each head of damage" remains a challenge, particularly in cases involving harm to the marine environment, where accurate valuation would require offshore fact-finding missions by reputable marine scientists.[147] While the Philippines is not short on talent to make these fact-finding missions and valuation assessments possible, this would entail additional monetary and time costs for the Philippines.

A major criticism against the *Costa Rica* decision is its failure to adequately explain its "overall assessment method." Not only did the Court fail to provide an elaboration as to the baselines for computation, the Court also did not attribute its findings to any scientific or technical expert report. In their critique of the Court's decision, Kindji and Faure wrote:

> First, what does an overall assessment involve? Besides the fact that the ecosystem would be treated as a whole, there were no further explanations provided to define the outlines of the overall valuation. Likewise, the Court no longer needed to assess the necessity of inquiring its own independent expertise to help determine the quantum of compensation.
>
> Secondly, what are the bases of such an overall valuation? The Court *failed to mention whether such a method is supported by scientific evidence or expertise* as would be required for a wetland 'of high value', as qualified by the Secretariat of the Ramsar Convention. The judgment *made no mention of an attempt by the Court to use experts in support of its 'overall valuation', making the burden of proof entirely a responsibility of Costa Rica***.**
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> * * *
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> Fourthly, how is the compensation due calculated? The Court did provide an analysis on the head of damages it considered compensable. The rejected claims were also clearly highlighted. However, the judgment remained rather vague on how the Court reached the amount of US$ 120.000 awarded to Costa Rica. The compensation awarded by the Court is insufficiently supported by evidence and prejudiced by the lack of clarity in the approach of the Court.[148]

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[147] Bella Cariaso, *UP marine experts to assess damage to WPS corals,* PHIL. STAR, Sept. 22, 2023, *at* https://www.philstar.com/headlines/2023/09/22/2298040/marine-experts-assess-damage-wps-corals.

[148] Kindji & Faure, *supra* note 104, at 26. (Emphasis supplied.)

The *Costa Rica* decision is unclear as regards its final valuation method, but it is clear that it rejected the valuation method of both countries. The lesson here is one of precaution: while the ultimate outcome is not entirely limited to submissions on valuations alone, international courts and tribunals still require that each head of damage be based on precise grounds and detailed evidence, as far as practicable, as the *Costa Rica* decision would show.

Contrary to the failure of the ICJ in *Costa Rica* to appoint experts in determining its "overall valuation," the Tribunal in the 2016 *Philippines v. China* arbitration commissioned a number of independent experts to conduct fact-finding on issues that require scientific or technical expertise. This noted difference in approach may be explained by the express provision under Article 289 of the UNCLOS that allows the appointment of experts—at the request of a party or motu proprio—in disputes involving scientific or technical matters. In fact, in its discussion on the damage to the marine environment, the 2016 Arbitral Award relied heavily on the report made by Dr. Sebastian Ferse ("Ferse Report"):

> The Ferse Report states:
>
> > The effects of these impacts on the reefs, together with altered hydrodynamics and released nutrients, are likely to have wide-ranging and long-lasting ecological consequences for the affected reefs and the wider ecosystem of the Spratly Islands, and possibly beyond. Reefs subjected to direct land reclamation have disappeared entirely. Reefs subjected to dredging in order to create landfill will have lost their complex structure that was built over centuries to millennia. This structure will take decades to centuries to recover. Reefs that did not experience dredging directly but were impacted by the associated sedimentation and nutrient release will likely have experienced severe coral mortality and recovery will take place more slowly than in natural settings, likely taking decades. The capacity for ongoing . . . carbonate production is severely diminished on several of the reefs, and their capacity to keep up with increasing sea level rise is impaired.
>
> The Tribunal accepts the conclusion in the Ferse Report that "China's recent construction activities have and will cause environmental harm to coral reefs at Cuarteron Reef, Fiery Cross Reef, Gaven Reef, Johnson Reef, Hughes Reef, Mischief Reef, and Subi Reef; beyond the pre-existing

> damage to reefs that resulted from destructive fishing and the collection of corals and clams, storm damage, Crown-of-Thorns starfish, and the human presence on small garrisons on the reefs." The Ferse Report also arrives at the following conclusions as to the extent and likely duration of the harm.[149]

The succeeding paragraphs in the Arbitral Award would also show that the Tribunal has largely adopted the findings of its experts in refuting one by one China's contrary claims that there had been no environmental damage.[150]

This difference in approach in arriving at conclusions in the 2016 Arbitral Award can temper the criticisms on the global sum approach's lack of clarity. To reiterate, the UNCLOS has an express provision on the appointment of experts on scientific or technical matters, either at the request of a party or motu proprio. This is important in a case of reparations for the Philippines, one rooted in the UNCLOS and in furtherance of the 2016 Arbitral Award. It is worth noting, however, that the appointment by the court or tribunal of its own expert may not even be sufficient to absolutely determine the extent of damage. This was exemplified in the case of *DRC v. Uganda,* where the Court held that although the report of the Court-appointed expert offers the best possible estimate, such report is inadequate to reach a "sufficiently precise" determination of the extent or valuation of damage. This thus opens another opening for the Court to apply equity *infra legem,* running the risk again—as it did in *DRC*—of appearing to have arbitrarily assigned numbers.

The third element in the claim for compensation is arguably the most challenging for the Philippines in its current state. It bears stressing that the Philippines, as the injured State seeking reparations, holds the burden to prove its case. Thus, it is more than necessary for the Philippines to lay down the groundwork, conduct its own fact-finding missions, and to appoint its own experts. This initiatory burden on the State seeking reparations is not altogether removed by the recent pronouncements in *Costa Rica v. Nicaragua* and *DRC v. Uganda.* After all, the traditional conception of reparations remains to be the traditional *Chorzow Factory* approach. Be that as it may, the Court's leniency in *Costa Rica v. Nicaragua* and *DRC v. Uganda,* when mixed with the Tribunal's meticulous approach in the 2016 Arbitral Award in the appointment of and reliance on independent expert opinion, presents an

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[149] *Arbitral Award*, 2016 PCA Case Repository at 389–90, ¶ 979.
[150] *Id.* at 389–94, ¶ 978–83.

opportunity for a Philippine claim on reparations. The appointment of experts by the court or tribunal exercising jurisdiction on UNCLOS matters provides the necessary antidote to the criticism that the leniency exhibited in *Costa Rica v. Nicaragua* and *DRC v. Uganda* creates ambiguity and allows Judges to simply assign numbers "snatched from thin air."[151]

Thus, the Philippines, as the State seeking reparations may approach the matter with two bullets: (1) establish its case with the *Chorzow Factory* standard as the guiding point, while having the option of (2) requesting the court or tribunal to still appoint its own experts, in line with Article 289 of the UNCLOS. This two-pronged approach opens the possibility for a court or tribunal to apply equity *infra legem,* i.e., equity within the traditional framework of international rules, while still possibly reaching conclusions—as it did in *DRC*—that expert reports are inadequate and that the Court needs to exercise equity *praeter legem,* or equity as a gap-filler. The initiatory burden of proof and evidence on the part of the Philippines will never vanish because of developments in the award of compensation in international law, but these developments provide *creative* possibilities for the Philippines during and after the course of trial. These two ICJ cases and even the 2016 Arbitral Award itself show (a) judicial fact-finding initiatives,[152] (b) judicial leniency in terms of evidentiary standards, and (c) judicial flexibility in terms of assigning numerical values when it is difficult, if not impossible, to ascertain an exact figure.

V. CONCLUSION

The Philippines, as the injured State seeking reparations, generally holds the burden of proving its case. While the recent developments provide more flexibility when it comes to the evidence that could be presented, the methodological approach in reaching a valuation, and even the shifting of the burden of proof, the lack of clarity in these newer cases also limits the Philippines' case-building to still the traditional *Chorzow Factory* approach. While the leniency afforded in these more recent cases offers a promising direction for more equitable and flexible standards for reparations in the future, the more prudent approach for the Philippines is to still stick with the

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[151] Armed Activities on the Territory of Congo (Dem. Rep. Congo v. Uganda), Reparations, 2022 I.C.J. Rep. 165, 171, ¶ 15 (Feb. 9) (Robinson, *J.*, *separate*).

[152] For a discussion on judicial fact-finding initiatives in the 2016 Arbitral Award, *see* Jacqueline Joyce Espenilla, *Judicial Fact-Finding Initiatives in the South China Sea Arbitration,* 9 ASIAN J. INT'L L. 1 (2018).

time-tested and traditional approach: a submission as to the extent and valuation of each head of damage.[153]

Thus, while the Court's more flexible approach in *Costa Rica v. Nicaragua* and *DRC v. Uganda*, along with their introduction of "damages in the form of a global sum," signals a promising development for reparations in international law, many aspects remain unsettled—leaving this promise as yet only an exciting but vague prospect lacking clear direction. For one, while Costa Rica and the Democratic Republic of Congo were awarded considerable amounts of compensation, these amounts were much less than what was originally prayed for. Thus, the global sum principle, and if such flexibility is also applied in the case of reparations for the Philippines, offers both promises and pitfalls: while the flexibility offers more wiggle room when it comes to evidence appreciation and actual damage valuation methods, the flexibility also carries the possibility that the Court would award compensation in an amount considerably lower than what is both prayed for by the injured State and commensurate to the gravity of the damage suffered.

Any development in public international law that allows for more flexibility both on the part of the States and the part of the judges of the tribunals is a welcome development, since there is no one-size-fits-all approach. However, such promising flexibility should also come with clarity. At the risk of being repetitive, it is important to highlight that these recent developments in international law offer flexibility, but there is very little guidance as to how this level of flexibility is to be operationalized and how these new developments can be applied in future cases, such as a possible case of reparations for the Philippines.

This is not to say that these developments in international law are empty decisions. The flaws of these two decisions notwithstanding, they offer two important lessons for the Philippines: (1) flexibility in terms of forms of evidence and evidentiary standards, and (2) the grand promise of equity in international law. These two recent decisions in the ICJ embodies what Judge Weeramantry noted in the *Maritime Delimitation in the Area Between Greenland and Jan Mayen:*

> *To expect greater precision is to ignore the very nature of equity***.** One is reminded here of the Aristotelian aphorism that only so much precision can be achieved as the subject-matter will allow. The factual material which equity deals with is in most cases rarely assessable in quantifiable terms. *Equity has no fine balances at its*

[153] RUDALL, *supra* note 62.

> *command to weigh human conduct, no graded units of value with which to measure the particular mix of varied factors a given case may present*. It makes in most cases an overall assessment on the basis of legal principle and human experience and will not be able, in mathematical fashion, to produce a result precisely calibrated to match the circumstances, if, indeed, such a result were at all possible, having regard to the nature of the subject-matter.[154]

While imperfect, time and again, international law has proven that a smaller country like the Philippines is not helpless in the face of a bully's might. As it stands today, there are exciting and promising developments in international law—such as the award of damages in the form of a global sum—that the Philippines could find strength in as it explores its case against China yet again. However, as intimated in much of this paper, these developments, although promising, are still yet incomplete to be the basis of a case against China. Thus, the prudent approach for the Philippines is to take the three elements—(1) injury, (2) direct link, and (3) quantum of compensation—in its traditional conception.

These exciting developments in international law as presented in *Costa Rica* and *DRC* should be seen as an encouraging development for the Philippines, should it decide to pursue a reparations case. Ultimately, crass and vague as it may sound, what the cases of *Costa Rica* and *DRC* show now—albeit with lack of clarity—is that when traditional evidentiary and valuation approaches fail, equity can serve as a safety net. Clearly, the Philippines was wronged—injury and direct link, as discussed, are easily established. The Philippines should not be afraid to pursue a case simply because of the rigors of evidence to prove compensation, the third element. After all, the exercise of equity of international courts and tribunals is both a weapon and a cushion that can be relied upon in international law. In the end, then, the difficulties in ascertaining the different heads of damage should never be a bar for a State asserting its rights, including its right to reparation for wrongful actions of another—usually bigger, more powerful—State.

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[154] Maritime Delimitation in the Area between Greenland and Jan Mayen (Den. v. Nor.), 1993 I.C.J. Rep. 38, ¶ 46 (July 14) (Weeramantry, *J.*, *separate*). (Emphasis supplied.)