NON-REIMBURSABLE FOREIGN AID AS A FACTOR REDUCING WAR REPARATIONS IN INTER-STATE ADJUDICATION

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The International Court of Justice (ICJ) dealt with the issue of reparations in international armed conflict in its judgment in *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*.[1] It was its first ever decision of this kind, and the ICJ relied conceptually on the work on the subject-matter by the Eritrea-Ethiopia Claims Commission (EECC).[2] This close connection could also revitalize other EECC statements on compensation.[3] One of them is the use of non-reimbursable foreign aid as a factor that reduces compensation to be paid by the responsible State. This article challenges this approach for lack of support in the International Law Commission's Articles on State Responsibility for Wrongful Acts, identifies potential counterarguments, such as the existence of punitive damages or double recovery if non-reimbursable foreign aid is not discounted and responds to them. As the EECC and ICJ recognized, war compensations remedy only a fraction of the injury so this article seeks to avoid a further erosion of an already low war reparation.

The article is divided into six substantive parts. The first part briefly presents some of contours of war reparations in inter-State adjudication. The second part highlights the ICJ's reliance in *Reparations. RDC v Uganda* on the EECC's awards. Such reliance shows the relevance of the

[1] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Reparations) (Judgment) [2022] ICJ Rep 1 (9 February 2022). See also Jaemin Lee, 'Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)' (2023) 117 *American Journal of International Law* 113; Veronika Fikfak, 'Establishing Damages for Mass Human Rights Violations' (2022) 82 *Cambridge Law Journal* 221; Francisco Jimenez Garcia, 'Reparaciones de Guerra: La Humanización e Individualización de la Reclamación. Algunas Aproximaciones Judiciales Alternativas' (2022) 74 *Revista Española de Derecho Internacional* 271, 294; Manuel J Ventura, 'Introductory Note to Armed Activities on the Territory of the Congo (Dem Rep Congo v Uganda) (Reparations Judgment) (ICJ)' (2023) 62 *International Legal Materials* 399; Yang Liu, 'Compensation in the Jurisprudence of the International Court of Justice: Towards an Equitable Approach' (2023) *Journal of International Dispute Settlement* (online); Juan Pablo Pérez-León-Acevedo, 'Compensation in Cases of Mass Atrocities at the International Court of the International Criminal Court' (2023) 22 *The Law and Practice of International Courts and Tribunals* 30.

[2] Eritrea-Ethiopia Claims Commission, *Final Award, Ethiopia's Damages Claims* (17 August 2009) ('Ethiopia Award') https://legal.un.org/riaa/cases/vol_XXVI/631-770.pdf; and Eritrea-Ethiopia Claims Commission, *Final Award, Eritrea's Damages Claims* (17 August 2009) ('Eritrea Award') https://legal.un.org/riaa/cases/vol_XXVI/505-630.pdf. Sean D Murphy, Won Kidane and Thomas R Snider, *Litigating War: Mass Civil Injury and the Eritrea-Ethiopia Claims Commission* (Oxford University Press 2013); Pierre D'Argent, 'La Commission des Réclamations Erythrée/Ethiopie: Suite et Fin' (2009) 55 *Annuaire Français de Droit International* 279; Michael J Matheson, 'The Damage Awards of the Eritrea-Ethiopia Claims Commission' (2010) 9 *The Law and Practice of International Courts and Tribunals* 1; Michael J Matheson, 'Introductory Note to Eritrea's and Ethiopia's Damage Claims' (2010) 49 *International Legal Materials* 101; Romesh Weeramantry, 'Eritrea's Damages Claims (Eritrea v Ethiopia); Ethiopia's Damages Claims (Ethiopia v Eritrea)' (2010) 104 *American Journal of International Law* 480.

[3] See Ventura (n 1) 401.

EECC's decisions today. The third part illustrates how the EECC discounted international non-reimbursable aid by multilateral institutions and non-governmental organizations from the compensation owed to the injured State. This was after the existence of the injury had been proved and its quantum determined. The impact of this approach, for instance, on Ukraine and Palestine could be meaningful.[4] The fourth section criticises such an approach for a lack of legal basis in some of the customary rules reflected in the International Law Commission's Articles on State Responsibility.[5] The fifth part of the article identifies and responds to several counter-arguments: i.e. punitive compensation or double recovery. The sixth part agrees with the EECC on an aspect of the interactions between non-reimbursable foreign aid and war reparation; not allowing foreign aid to be used as a *proxi* for evidence of the existence of the damage and its quantum. The seventh part concludes.

I War Reparations in Inter-State Adjudication: Some Conceptual Boundaries

As the ICJ stated in *Reparations for Injuries Suffered in the Service of the United Nations* and in *RDC v. Uganda*, the starting point is the principle of full reparation for the moral or material injury caused by an international wrongful act.[6] Consistent with its previous jurisprudence, the ICJ reiterated that there must be a causal nexus between the act and the injury that is sufficiently direct and certain.[7] Damages resulting from armed conflict will not be compensable if they are too remote from the internationally wrongful act.

However, the principle of full reparation has certain limits. One such limit is that macroeconomic damages caused by war are generally excluded from compensation in inter-State adjudication. The origin of this exclusion dates back to the Alabama arbitration. In its dispute against Great Britain, the United States included the so-called "indirect claims" before the Alabama Commission, one of which was the claim for "The prolongation of the war and the addition of a large sum to the cost of the war".[8] The claims were withdrawn before the Commission rendered its award, but the Commission nonetheless stated:

> the " indirect claims " did not constitute, upon the principles of International Law applicable to such cases, good grounds for an award of damages between nations, and, upon such principles, the Tribunal, even if there were no disagreement between the two litigant governments as to the competency of the Court to decide thereon, would exclude them altogether in making its award.[9]

[4] *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem* (Advisory Opinion) (International Court of Justice, 19 July 2024) para 271.
[5] International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Acts* (2001) UN Doc A/CN.4/SER.A/2001/Add.1 (Part 2) 26 ('ILC's Articles').
[6] *RDC v Uganda (Reparations)* (n 1) paras 69–70.
[7] Ibid para 93.
[8] Thomas Willing Balch, *The Alabama Arbitration* (1900) 123, quoting *Papers Relating to the Treaty of Washington, Volume I: Geneva Arbitration* (US Government Printing Office, Washington) 185; *Papers Relating to the Treaty of Washington* vol IV, 4–5.
[9] Ibid 125.

The Treaty of Versailles also looms large if compensation for macroeconomic damages is not kept within check. As Churchill expressed on the Treaty:

> The economic clauses of the Treaty were malignant and silly to an extent that made them obviously futile … no defeated nation or community can ever pay tribute on a scale which would meet the cost of modern war.[10]

Nonetheless, the RDC claimed compensation for macroeconomic damages before the ICJ. It argued that although the economy was already in decline in 1988, the war further exacerbated the situation, and recovery only began after the war ended. [11]The Court stated that it did not need to determine whether macroeconomic damage resulting from violations of the prohibition on the use of force was compensable. This was because the RDC had not established a direct causal link between Uganda's unlawful use of force and the alleged macroeconomic loss.[12] However, the ICJ adopted a sceptical tone in response to the specific facts of the case and affirmed that "A violation of the prohibition of the use of force does not give rise to an obligation to make reparation for all that comes afterwards ...."[13]

The third dimension of reparations in armed conflict worth mentioning, consistent with the exclusion of macroeconomic damage, concerns whether and when compensation should be capped. Eritrea and Ethiopia are among the poorest States in the world, and the value of the claims was exorbitant relative to the size of their economies.[14] As a result, the EECC stated that the magnitude of the compensation to be paid by each party should consider the potential impact on their populations. The EECC invoked the International Covenant on Civil and Political Rights and the International Covenant on Cultural, Economic, and Social Rights and said that "Both Covenants provide in Article I (2) that "[i]n no case may a people be deprived of its own means of subsistence.""[15] The EECC went on and pointed out:

> [H]uge awards of compensation by their nature would require large diversions of national resources from the paying country – and its citizens needing health care, education and other public services – to the recipient country. In this regard, the prevailing practice of States in the years since the Treaty of Versailles has been to give

[10] Winston Churchill, *The Second World War and an Epilogue on the Years 1945 to 1957* (Cassell, London) 5. Edward Luce, 'Biden, Putin and the Danger of Versailles', *Financial Times* (31 March 2022) https://www.ft.com/content/afce4687-08f8-4018-a2d4-3c8940eaa19a.
[11] *RDC v Uganda (Reparations)* (n 1) para 372.
[12] Ibid para 381.
[13] Ibid para 282. However, Judge Robinson disagreed indicating that macroeconomic damage was compensable, for the principle of full compensation does not exclude such losses. See *RDC v Uganda (Reparations)*, Separate Opinion of Judge Robinson, para 45.
[14] The EECC deal separately with Ethiopia's and Eritrea's damages claims, so the concern applied to both parties.
[15] *Ethiopia Award* (n 2) para 19.

> very significant weight to the needs of the affected population in determining amounts sought as post-war reparations.[16]

The ILC discussed avoiding excessively onerous reparations to protect the means of existence of injuring States' populations during the first phase of preparing the drafts of the Articles on State Responsibility for Wrongful Acts.[17] However, the issue was ultimately discarded due to concerns about its potential for abuse. The ILC focused instead on the principle of full reparation, which international courts and tribunals have followed since. In contrast, the EECC suggested a slightly different approach for war reparations.

II. The EECC in the ICJ's judgment in *Reparations. RDC v Uganda*

The EECC dealt with a conflict that lasted from 1998 to 2000 and found violations of the *jus ad bellum* and *jus in bello*.[18] The EECC recognized the difficulties that both Eritrea and Ethiopia faced in order to prove the extent of damages in a conflict which had occurred more than ten years before judicial proceedings.[19] The supporting evidence was no longer available or had been destroyed.

When determining the principles of international law that would guide its determination on reparations in such circumstances, the EECC highlighted two: (i) the standard of proof of the *existence* of damages; and (ii) the criterion to assess the *extent* of the damage. For the standard of proof, the EECC established the benchmark of clear and convincing evidence. For the criterion, the EECC created the concept of "range of possibilities". More explicitly, the EECC stated:

> [T]he Commission must determine, insofar as possible, the appropriate compensation for each such violation ... As discussed below … the evidence regarding such matters as the egregiousness or seriousness of the unlawful action, the numbers of persons injured or property destroyed or damaged by that action, and the financial consequences of such injury, destruction or damage, is often uncertain or ambiguous. In such circumstances, the Commission has made the best estimates possible based on the available evidence. … [I]t has recognized that when obligated to determine appropriate compensation, it must do so even if the process involves estimation, or even guesswork, within the range of possibilities indicated by the evidence.[20]

[16] *Ethiopia Award* (n 2) para 21. Based on the facts, however, the EECC did not make a decision on capping the reparation. *Ethiopia Award* (n 2) para 23. The ICJ did not make any explicit reference to these treaties in *RDC v Uganda (Reparations)*, nor did it discuss the issue of capping war reparations.

[17] Martins Paparinskis, 'Crippling Compensation in the International Law Commission and Investor–State Arbitration' (2022) 37 *ICSID Review* 289, 295–99.

[18] *Ethiopia Award* (n 2) para 47 and *Eritrea Award* (n 2) para 47.

[19] Ibid para 34.

[20] Ibid para 37 (footnotes omitted).

The EECC highlighted that this approach came at a cost for injured States: "As a trade-off, compensation levels have been reduced, balancing the uncertainties flowing from the lower standard of proof".[21]

The ICJ also dealt with the foregoing two issues in *Reparations. RDC v Uganda*. As to proof of the damages or loss, the ICJ likewise applied the clear and convincing evidence standard.[22] As to quantum, and in a key finding, the ICJ referred to cases involving many victims resulting from armed conflict. It declared that uncertainty regarding the extent of the damage did not necessarily prevent making an estimation of the compensation, when there was no doubt that the wrongful act was the cause of the injury.[23] Elaborating, and following the EECC, the Court stated that it "may, on an exceptional basis, award compensation in the form of a global sum, within the range of possibilities indicated by the evidence and taking account of equitable considerations."[24]

To note the importance of this finding, it is worth highlighting that this was the first time in its history that the ICJ used the term "global sum within the range of possibilities" when determining a compensation.[25] On this basis, the Court awarded the RDC separate global sums for damage to persons (US$225,000,000); damage to property (US$40,000,000); and damage to natural resources (US60,000,000).[26]

The ICJ's reliance on the EECC raises the question, whether other dimensions of the latter's awards will gain persuasiveness in future litigation on war reparations in inter-State disputes?

III Role of Foreign Aid in the Determination of Reparations According to the EECC

What role does foreign aid play in the determination of compensation for massive violations of international law? The ICJ did not deal with this issue in *Reparations. RDC v Uganda*, but the EECC did. It is important to assess whether the latter's approach can be relevant in the future. In the present author's view, it should not.

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[21] *Ethiopia Award* (n 2) para 38.
[22] *RDC v Uganda (Reparations)* (n 1) para 106.
[23] Ibid.
[24] Ibid.
[25] *RDC v Uganda (Reparations*), Separate Opinion of Judge Robinson, para 4.
[26] *RDC v Uganda (Reparations)* (n 1) para 409.1. This is the largest monetary reparation the ICJ has ever awarded. See Ventura (n 1) 401.

When measuring damages regarding specific violations of international law, the EECC deducted non-reimbursable foreign aid received by Eritrea and Ethiopia respectively from the compensation to be paid for the given losses. The amounts deducted were not significant by any measure, but it is the general approach the one that deserve full exploration. First, foreign aid provided by multilateral institutions, such as the United Nations Development Program, the United Nations Mission in Ethiopia and Eritrea, and UNICEF, was discounted from the estimation of the compensation that had already been made. The EECC expressed:

> [T]he Commission includes compensation for the claims for the Water Supply and Generator House facilities only in the amounts directly attributable to looting (looted pipes and pumps, and electricity poles and wire, respectively) and not donated by UNICEF and [United Nations Mission in Ethiopia and Eritrea] in post-war reconstruction projects, apparently on a non-reimbursable basis. As for the destroyed marketplace, the United Nations Development Program ("UNDP") provided a substantial rehabilitation grant; absent any indication that Eritrea had to reimburse the UNDP, the Commission limits compensation to 75% of the amount carried by the Sub-Zoba [an Eritrean local government entity]. …
>
> A modest number of Eritrea's Barentu Building Claims were well-supported. To offer a few examples, the Commission awards US$135,000 (converted at the 2002 exchange rate) for Eritrea's claims for damages caused by the breaking, entering and looting of Barentu schools, which were sufficiently documented both as to looting and quantum of damages. (The Commission did deduct the ERN 1,574,587 contributed by UNICEF for reconstruction of Nugus Bazen Elementary School.[27]

Private foreign aid was also discounted by the EECC. It stated:

> [A]s for Eritrea's claim for ERN 1,374,327 for 70% of the costs for rehabilitation and replacement of furniture for the Mai Terra Elementary School, the Commission reduces compensation by the ERN 790,436 donated by the Lutheran World Federation, apparently without any requirement of repayment[28]

This issue has mostly been lost in the complexity of the damages litigation and has not received the attention it deserves. Murphy et. al., briefly mention the EECC's findings. Their only comment is that payments by third parties do remedy the injury. Furthermore, they state that "requiring that a [responsible] party pay even more compensation would be punitive and not remedial in nature…."[29]

[27] *Ethiopia Award* (n 2) paras 108 and 183.
[28] Ibid para 111.
[29] Murphy et al. (n 2) 226–27.

The question that the EECC's conclusion raises is, as a matter of law, whether the same or a similar analysis would apply to large international armed conflicts with significant amounts of foreign aid?

IV. A Critique to the EECC's approach on Non-Reimbursable Foreign Aid and War Reparations

The EECC's approach on non-reimbursable foreign aid can be criticized on different grounds: lack of legal basis, undesirable effects, and questionable policy outcomes.

First, the International Law Commission (ILC) has not identified third party actions i.e., those of a multilateral donor or other States, as a factor that influences compensation. Indeed, Article 39 of the ILC's Articles indicates that the only factor that reduces compensation in the event of proven damages is "wilful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought".[30] Moreover, the ILC does not address in its Commentaries, the role of third-party actions in compensations. [31]

Second, it is worth noting that according to the customary rule embodied in Article 31.1 of the ILC Articles, the reparation is for "the *injury caused* by the internationally wrongful act".[32] In this sense, and for present purposes, when there is evidence that the material *injury* was *caused* by the wrongful act, the next step for international courts and tribunals (IC&Ts) is to determine the extent of the material damage. The reparation will be for the quantum of the injury. This is the end of the matter, unless Article 39 applies. Whatever happens afterwards between the injured State and third States, or other third parties, to alleviate the material damage is inconsequential to the determination of the *extent of the injury caused by the wrongful act*.

There is a third dimension worth highlighting regarding aid to the injured State by third States. The effect of the application of the EECC's approach in this circumstance is a transfer of wealth from the third State(s) or entities to the responsible State. Indeed, the donors will not get the aid reimbursed. The responsible State will be the one making the savings by having to pay a lower reparation that does not correspond to the proven injury it caused to the injured State. There is certainly not justification for such a transfer.

It can be said that third party donations are only transfers of wealth from the donor to the injured State or its civilian victims and that donations can never involve a transfer of wealth

[30] ILC's Articles (n 5) 29.
[31] Ibid 109 – 10.
[32] Ibid 28. *Italics added*.

from the donor to the injuring State. It is true that when a donation is made, the first effect occurs. However, if later, an IC&T discounts non-reimbursable general or specific foreign aid, the beneficiary is the injuring State up to the amount of the aid discounted. This is an amount that will not have to be paid by the injuring State, and in this sense discounting the said foreign aid creates wealth for the latter State.[33]

Fourth, the EECC approach has an additional undesired effect: donors might refrain from earmarking funds for specific projects or reduce the amount of projected foreign aid because the funds could end up "subsidizing" the injuring state. This outcome has a related negative consequence: foreign aid is often critical to preventing further material harm and should not be held against the receiving state.[34]

Also, there is an asymmetry of evidence in reparation proceedings that plays against the injured State. Full proof of the loss and its quantum may be difficult for the injured State due to the length of time that has passed between the armed conflict and the reparations proceedings or due to the circumstances of the conflict. On the contrary, evidence of the donation or foreign aid might be readily available to the responsible State when the donor is an international organization, a State or even a private entity, whose actions will likely be communicated to the public.[35]

This asymmetry of evidence creates an unfairness to the injured State and resembles the one the ICC grappled with in its order for reparation in *Situation in the Democratic Republic of the Congo in the Case of The Prosecutor v. Germain Katanga*.[36] There the ICC was measuring harm to property caused by the crimes committed by Katanga. The ICC decided to award damages to victims on a basis of a per capita criterion given the general difficulty in proving the injury. However, there were some victims who offered detailed evidence of their losses but whose value was below the per capita yardstick. The ICC decided, nonetheless, to award victims

[33] An analogy with the concept of direct transfers of funds as a subsidy under art 1.1(a)(1)(i) of the Agreement on Subsidies and Countervailing Measures of the World Trade Organization (WTO) could be made. According to this provision, as interpreted by WTO panels, the term includes not only direct transfer of money but also debt forgiveness. *Korea — Measures Affecting Trade in Commercial Vessels* (Panel Report, WT/DS273/R, 7 March 2005) para 7.413.

The EECC's approach does not involve debt forgiveness for the injuring State in the traditional sense, but the application of the approach has a resemblance: the injuring State is forgiven the obligation to pay for damages that it caused to the injured State by virtue of the application of the approach. There is then a transfer or creation of wealth to the injuring State.

[34] The author is grateful to a peer reviewer for highlighting this dimension.

[35] To be sure, while information on foreign aid may be in the public domain, IC&Ts following the EECC should not make reductions on war reparations on their initiative. This information should come as evidence provided by responsible States. However, by not making foreign aid relevant to the quantum of war reparations, the approach suggested in this article makes any discussion on the burden of proof unnecessary.

[36] *Prosecutor v Germain Katanga* (Order for Reparations) (International Criminal Court, Trial Chamber II, ICC-01/04-01/07, 24 March 2017) ('Katanga Reparations') https://www.icc-cpi.int/court-record/icc-01/04-01/07-3728-teng.

compensation equal to the per capita benchmark. The rationale was to avoid unfairness to the latter victims.[37]

A similar concern for unfairness to the injured State exists here for the purpose of the estimation of losses in the event of foreign aid. The violation of international law and the injury have been proven, but the quantum is uncertain for reasons beyond the injured State's control. It is unfair to the latter State to allow the higher certainty of the size of the foreign aid to become an obstacle for a proper reparation.

A. A Critique to the EECC based on the EECC Itself

As a closing argument, it can be said that the approach suggested here has some parallels with the argument the EECC itself adduced when it rejected Ethiopia's US$1.694 billion claim for compensation for the loss of foreign investment caused by Eritrea's violation of the *jus ad belum*.[38] Although the EECC rejected the claim for lack of evidence on the causal nexus between the violation and the loss of foreign investment, the EECC explicitly indicated that "any reduction of development assistance to Ethiopia resulted from decisions taken by international financial institutions and foreign governments for their own reasons."[39] The same argument applies here: international donors decide to protect States affected by armed conflict for their reasons and what these donors decide to do should not have an impact on the quantum of war compensations.

V. Counter-Arguments

There are a number of counter-arguments that can be made to the proposal suggested here. They are not, in this author's view, strong enough to question its premises.

First, it could be said that not reducing the reparation and allowing the injured State to keep all the foreign aid received means the injured State would be in a better position than it would if the wrongful act had not occurred. This is certainly not the case in the event of mass atrocities when the starting point is the recognition by the international tribunal that the reparation may not truly reflect the actual loss and damages suffered by the injured State. As the EECC expressed, in a statement quoted by the ICJ in *Reparations. DRC v Uganda*, the compensations awarded "probably do not reflect the totality of damages that either Party suffered in violation of international law".[40]

A similar argument but expressed in a different way, is that the approach suggested here permits the injured State to get double recovery for the same injury. What the rule against double-recovery seeks is to prevent unjust enrichment by the injured party. Nothing of this kind exist in the event of mass violations of international law, and any evidence of unjust

[37] Ibid para 105.
[38] *Ethiopia Award* (n 2) para 462.
[39] Ibid para 465.
[40] *Eritrea Award* (n 2) para 2. See also *Reparations. RDC v Uganda (Reparations)* (n 1) para 107.

enrichment totally evaporates once the reality that the reparation will not reflect the injury becomes evident.

Third, as Murphy et al. suggested, not discounting non-reimbursable payments by third parties in specific injuries could be regarded as punitive. There is nothing of this nature when the measure of the loss initially made adequately reflects the injury *caused* by the wrongful act. If this compensation is not punitive, not reducing it by the amount of non-reimbursable foreign aid cannot transform the compensation in a punitive way.

There is a different kind of counter-argument. It could be argued that the EECC's approach applies only to specific non-reimbursable foreign aid. This is namely associated with specific injuries, as in the EECC awards, and not to general foreign aid, aimed at the general operation of the injured State. In other words, aid to pay pensions, or the salaries of public servants, or the war effort will fall outside the EECC's approach. Thus, there is no risk that the approach will be relevant to any reparation in the context of Russia's invasion of Ukraine, for instance. It is true that part of non-reimbursable foreign aid will never be discounted from the quantum of the war reparation owed by the injuring State. However, the EECC's approach could still be applied by IC&Ts regarding non-reimbursable aid allocated generally to the reconstruction of infrastructure, health or education systems, when it subsequently becomes evident that certain specific assets were rebuilt or became operative again thanks to foreign aid. In other words, sometimes the difference between general and specific non-reimbursable aid may not be clear-cut, or general foreign aid may transform into specific foreign aid during reparations proceedings. For instance, the public entity in the injured State that receives general non-reimbursable foreign aid is the same that makes decisions on its allocation. The double recovery argument could still be made in this context in support of the EECC's approach and should be rejected for the same reasons already mentioned. Third actors' decisions should not have any impact on the quantum of war-reparations, after the loss has been proved and measured.

Finally, it could be suggested that there is no need to criticize the EECC's approach if there are parallel claims for reparation by the parties to the armed conflict. The argument would be that there would be no unfairness because the approach would be applied to both parties. This could be the case only when both parties received similar levels of foreign aid. The approach loses its appeal when there is a large asymmetry of the foreign aid received by the parties.

A. Foreign Aid that Exceeds the Cost for the Injured State

The EECC recognized that the Eritrea- Ethiopia conflict affected areas with difficult economic conditions in which the victims had low incomes and limited property. The EECC stated that

"Compensation determined in accordance with international law cannot remedy the world's economic disparities.[41]

This is true, but what happens as a matter of international law when international donors offer assistance in the context of armed conflict that significantly improves pre-existing public assets? Namely, a hospital or school in poor condition is destroyed by the injuring State and it is replaced by a much better facility thanks in part to non-reimbursable foreign aid. This could be an example of foreign aid that, intuitively, seems to go against the proposition made here.

The above-mentioned arguments made still apply. The foreign donor decided freely how to allocate its resources and the injuring State has nothing to do with this outcome. Moreover, to claim that there is a clear double-recovery, even in this exceptional scenario is to take an unreal view of the facts on the ground. Basically, the argument of double recovery in this event assumes that the injury and the donation took place close in time. But this is far from being the reality in armed conflicts with mass violations of international law. For example, the damage to property, i.e., the destruction of a school or hospital, occurs at one point in time and the effects of the donation means the building is open to the public, months or years later. Prior to this the destroyed school or hospital did not operate or partially operate for quite some time. In this hypothetical example, closely mirroring reality, it is difficult to argue the construction of the improved school or hospital will always fully repair the injury to persons, that the absence of the facility created. There will not be double recovery in such circumstances.

In sum, the point here is just to challenge the double recovery arguments on the facts. As a matter of principle, a large specific donation will not create any unjust enrichment for the injured State in the event of mass violations of international law. Finally, as a matter of law, there is no basis for including this generous third party's action as a factor that reduces the quantum of the compensation.

VI. Non-Reimbursable Foreign Aid as a proxy for the Existence and Quantum of the Claimed Damages

Despite the critical view this article presents on the interactions between war reparations and non-reimbursable foreign aid, there is a dimension of the topic for which the EECC does not deserve objection: disallowing the injured State to rely on the amount of foreign aid to prove the injury and its quantum.

The EECC determined that

> The Commission holds above that Eritrea bears *jus ad bellum* liability for damages on account of the internal displacement of many thousands of Ethiopians during the war. … Displaced people must have sustenance and support … Ethiopia is entitled to damages reflecting demonstrated expenses reasonably incurred by Ethiopia, or by

[41] *Eritrea Award* (n 2) para 26.

Ethiopian public or private entities, to assist and support IDPs displaced on account of Eritrea's *jus ad bellum* violation.[42]

Ethiopia claimed that it incurred costs associated with the work of the Relief Society of Tigray for assisting persons displaced by the conflict.[43] Ethiopia then claimed the amount of aid provided by foreign donors.[44] The EECC rejected this issue, and the present author agrees. The EECC's conclusion is consistent with how the claim was made. Ethiopia did not claim compensation for the material damages caused by the displacement, but for the costs assistance the said public agencies had incurred. However, they did not incur any cost and the EECC was right in not awarding compensation.[45] It said:

> The Commission does not regard the value of commodities donated by foreign aid donors, without any indication that repayment was required or expected, as constituting an element of damage to Ethiopia. Absent any evidence indicating that any of the food commodities involved in the REST claim involved some cost to Ethiopia (and with convincing evidence in the DPPC report that they did not), the approximately four hundred million birr portion of the REST claim relating to food commodities and the value of other donated goods is disallowed.[46]

Implicit in this statement is that foreign aid cannot serve as proxy for evidence of the existence and quantum of the injury. There is nothing to disagree with on this matter.

VII. Conclusion

This article has shown the connections between the ICJ's judgment in *Reparations. RDC v Uganda* and the EECC's awards on important matters for the purpose of determining reparations in the event of massive violations of international law. The article explores whether other EECC's approaches can be persuasive to future IC&Ts. The article focuses on the EECC's decision to take foreign aid as a factor that reduces compensation owed to the injuring State. The article argues that the EECC's approach to foreign aid lacks textual support in Article 31 of the ILC's Articles and brings about unjustifiable transfers of wealth from donors to responsible States. The present author identifies potential counter-arguments, such as the existence of punitive damages or double recovery if foreign aid is not discounted and

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[42] *Ethiopia Award* (n 2) para 471.
[43] Ibid para 470.
[44] Ibid para 476.
[45] A different outcome could be expected had Ethiopia claimed compensation for the material damages caused to its nationals due to the displacement. This is what the RDC did in *Reparations RDV v Uganda*. Instead of claiming compensation for the costs of assistance to displaced populations, it claimed compensation for the material damaged caused to them. The RDC provided evidence of the number of displaced persons, the number of days of displacement and a figure for the daily cost of living. (*RDC v Uganda (Reparations)* (n 1) para 210). The ICJ awarded compensation for damages to displaced people, as part of the global sum for all damage to persons. (See *RDC v Uganda (Reparations)* (n 1) para 225).
[46] *Ethiopia Award* (n 2) para 477.

responds to them. The result of revisiting the EECC's approach to foreign aid is that the reparation injured States are awarded better reflects the injury caused by responsible States' wrongful acts.