

ROMANIAN JOURNAL OF INTERNATIONAL LAW

ISSN 2559 – 3846

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RJIL No. 18/2017

Pages 29-38

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**Recent Developments regarding Compensation before the
International Court of Justice: The Case Concerning Certain
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between Costa Rica and Nicaragua
(Part I)**

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Abstract:

This article studies the manner in which compensation is interpreted and how it currently applies before the International Court of Justice through the perspective of the Case Concerning Certain Activities Carried out by Nicaragua in the Border Area.

Key-words: *State Responsibility, Remedies, Compensation.*

1. Introduction

The Permanent Court of International Justice and the International Court of Justice have issued various judgments interpreting and clarifying compensation as a remedy. The right of a state to claim compensation is established and has never been contested in the Courts' recent practice. The Gabcikovo Nagymaros Case was one case² in which the right to claim

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² The Court issued judgments through which compensation were granted in other cases as well, such as: *Corfu Channel Case (Great Britain v Albania)* (Merits) [1949] ICJ Rep 4.

compensation was contested. The Court therein further confirmed that receiving compensation is a principle of international law, by stating that:

*“It is a well-established rule of international law that an injured State is entitled to obtain compensation from the State which has committed an internationally wrongful act for the damage caused by it.”*¹

The details that are most relevant with respect to this remedy, such as the burden of proof, the qualification of damages as being material or moral, or issues with respect to the principles that apply to the quantification of compensation, have all been raised both before the Permanent Court and before the International Court. The practice of the International Court of Justice is of paramount importance for determining the manner in which compensation is interpreted and applied by the judicial organ.

The doctrine is not necessarily coherent in determining the relevance of compensation before the International Court of Justice. While some authors conclude that compensation is the most frequent form of reparation,² other authors have concluded that compensation represents an exceptional remedy, as follows:

*“Perhaps surprisingly the Permanent Court and the International Court have very rarely awarded compensation. It has been suggested that this is because [m]any sovereign interests do not lend themselves to quantification, but this is neither here nor there.”*³

This latter conclusion supports the argument that compensation is rather exceptional. The Permanent Court has granted compensation in one case: The S.S. Wimbledon. Furthermore, the International Court of Justice has granted this remedy in two cases, namely in the Corfu Channel Case⁴ and the Diallo Case,⁵ the latter being the only case in the history of the Court in which compensation for moral damages was granted. It could, thus, be considered that compensation is not necessarily the most frequent form of reparation and that an opposite conclusion would artificially detach practice from theory.

Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Compensation, Judgment, I.C.J. Reports 2012, p. 324.

¹ *Gabcikovo-Nagymaros Project (Hungary/Slovakia)* (Judgment) [1997] ICJ Rep 7.81.

² Alina Kaczorowska, *Public International Law* (Routledge 2010) 483, 483.

³ James Crawford, *State Responsibility: The General Part* (CUP 2013), 506-536, 518.

⁴ *Corfu Channel Case (Great Britain v Albania)* (Compensation) [1949] ICJ Rep 244.

⁵ *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)* (n 1).

However, even though the case-law where compensation was granted is scarce, the International Court of Justice has recently issued its judgment in the Case Concerning Certain Activities carried out by Nicaragua in the Border Area between Costa Rica and Nicaragua¹ on the 2nd of February 2018. This judgment is the first in the history of the Court in which compensation was granted for environmental damage. Various issues stemming from the methodology for assessing compensation for environmental damage to punitive damages were analysed by the Court through its landmark judgment.

These issues will be critically assessed in this article. Firstly, the requests of Costa Rica submitted through its Application instituting proceedings shall be critically analysed (Part I) and, secondly, the judgment of the International Court of Justice shall also be assessed (Part II). The reason for this approach is the interaction between the state parties and the Court regarding the remedies that are available for a particular dispute, is essential for their interpretation and clarification; analysing the remedies strictly from one perspective would constitute an isolated approach that would fail to contribute to the systemic analysis of the issues at stake.

2. The Requests of Costa Rica

2.1. The Application Instituting Proceedings

On the 19th of November 2010 the Republic of Costa Rica commenced proceedings against the Republic of Nicaragua before the International Court of Justice; the dispute originated from two factual circumstances:

- i) An alleged incursion, occupation and use of Costa Rican territory by the military of Nicaragua

and

- ii) The alleged breaches of Nicaragua's obligations towards Costa Rica under certain international treaties and conventions.

¹ *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment, I.C.J. Reports 2015, p. 665.

As such, through an Application submitted before the International Court of Justice,¹ Costa Rica concluded that Nicaragua illegally occupied its territory and illegally commenced the construction of a canal across Costa Rican territory. The Applicant further argued that the Responding State unlawfully commenced a series of related dredging works on the San Juan River. As such, Costa Rica submitted that “*the ongoing and planned dredging and the construction of the canal will seriously affect the flow of water to the Colorado River of Costa Rica, and will cause further damage to Costa Rican territory, including the wetlands and national wildlife protected areas located in the region*”.² Even if not referred to as such, the application of Costa Rica implied that its requests before the Court regarded environmental damage, *inter alia*. This conclusion is supported by the fact that the applicant expressly referred to the damages caused to the flow of water, wetlands and national protected wildlife. Further, the Application contained a rather detailed description of the damages caused to the territory of Costa Rica, as such:

“In particular, the following damage has been caused to Costa Rican territory by Nicaragua’s dredging and the activities related to the construction of the canal:

(g) the deposit of sediments from the San Juan River on Costa Rican territory;

(h) the felling and destruction of primary forest in Costa Rican territory, specifically in a national wildlife protected area of rainforests and wetlands;

(i) the digging and removal of soil in Costa Rican territory, with the purpose of building an artificial channel to divert the San Juan River;

*(j) the infliction of damage to wetlands in Costa Rican territory, as a result of digging and removal of soil in a national wildlife protected area.”*³

¹ *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Application instituting Proceedings.

² *Ibid.* p. 6.

³ *Ibid.* p. 24.

This submission indicates that the Application considered that compensation was the applicable remedy for the alleged breaches of international law. However, it must be noted that, at this juncture, the Application contained no express reference to compensation as a remedy. As such, the Applicant generally concluded as follows with respect to the remedies sought:

“Costa Rica requests the Court to adjudge and declare that Nicaragua is in breach of its international obligations as referred to in paragraph 1 of this Application as regards the incursion into and occupation of Costa Rican territory, the serious damage inflicted to its protected rainforests and wetlands, and the damage intended to the Colorado River, wetlands and protected ecosystems, as well as the dredging and canalization activities being carried out by Nicaragua on the San Juan River.”¹

Further, confirming a rather general approach towards the applicable remedies, the Applicant State specifically requested the International Court of Justice to declare that Nicaragua has breached the following:

- (a) the territory of the Republic of Costa Rica, as agreed and delimited by the 1858 Treaty of Limits, the Cleveland Award and the first and second Alexander Awards;*
- (b) the fundamental principles of territorial integrity and the prohibition of use of force under the Charter of the United Nations and the Charter of the Organization of American States;*
- (c) the obligation imposed upon Nicaragua by Article IX of the 1858 Treaty of Limits not to use the San Juan River to carry out hostile acts;*
- (d) the obligation not to damage Costa Rican territory;*
- (e) the obligation not to artificially channel the San Juan River away from its natural watercourse without the consent of Costa Rica;*

¹ *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Application instituting Proceedings, p. 26.

(f) the obligation not to prohibit the navigation on the San Juan River by Costa Rican nationals;

(g) the obligation not to dredge the San Juan River if this causes damage to Costa Rican territory (including the Colorado River), in accordance with the 1888 Cleveland Award;

(h) the obligations under the Ramsar Convention on Wetlands;

(i) the obligation not to aggravate and extend the dispute by adopting measures against Costa Rica, including the expansion of the invaded and occupied Costa Rican territory or by adopting any further measure or carrying out any further actions“¹

The only particular remedy sought through the Application was the declaratory judgment with respect to the above-mentioned breaches of international law. This approach is a confirmation of the approach that States have before the International Court of Justice, the Application often being more general in its framework related to remedies, while the Memorial contains more specific requests. It is true the declaratory judgment is often considered as the most common type of remedy sought before the International Court of Justice and further rendered in its decisions.² Even so, it must be noted that Costa Rica also sought “*reparation*”, generally, from the judicial body, as such:

“The Court is also requested to determine the reparation which must be made by Nicaragua, in particular in relation to any measures of the kind referred to in paragraph 41 above.”³

This last submission with respect to reparation indicates the intention of the Applicant to further contextualize its request for remedies in its subsequent pleadings. As it will be provided below, the Memorial submitted by Costa

¹ *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Application instituting Proceedings, p. 26.

² Christine Gray, *Judicial Remedies in International Law* (Clarendon Press 1990), 59-119, p. 96.

³ *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment, I.C.J. Reports 2015, p. 665, p. 26.

Rica in this respect contained a variety of requested remedies, pecuniary compensation being among them.

2.2. The Memorial

The above-mentioned rather general request for remedies, submitted before the Court through the Application, was further amended and contextualized through the Memorial, within which the Applicant State requested the following remedies from the Court:

- “ - *a declaration of the extent of Nicaragua’s breaches of its obligations;*
- *the cessation of any internationally wrongful acts that continue to be committed by Nicaragua;*
- *reparation by Nicaragua for damage caused as a result of those breaches, and*
- *appropriate guarantees of non-repetition by Nicaragua of its wrongful conduct.”¹*

It can be observed that there are similarities between the Memorial and the Application Instituting Proceedings. In this respect, the declaratory judgment sought from the International Court of Justice is present in both written pleadings. However, it can be concluded that, if Costa Rica requested a declaration of wrongfulness and reparation through the Application, it was in the Memorial that it requested four different remedies: i) a declaration of wrongfulness; ii) cessation; iii) compensation and iv) guarantees of non-repetition.

With respect to the nature of the claims submitted before the International Court of Justice, Costa Rica argued that:

¹ *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Memorial of Costa Rica, p. 297.

“This is not a boundary dispute in which the parties have advanced their claims and elaborated them at length over time. This is not a case in which the parties realised that part of their boundary has not been delimited.”¹

a) The Interaction between “reparation for damage” and “compensation”

Even if the Application instituting proceedings did not contain any reference towards compensation, the Memorials’ first reference to this remedy is as “reparation for damage” and not as “compensation”. The Applicant contextualised its request, by referring to the finding of the Permanent Court in the Chorzow Factory Case² and by concluding that “reparation must be determined by reference to the damage suffered by Costa Rica.”³ This request can be assimilated to compensation if read in conjunction with the following paragraph, in which Costa Rica expressly requested compensation from the International Court of Justice, as such:

“Costa Rica seeks pecuniary compensation from Nicaragua for all damages caused by the unlawful acts that have been committed or may yet be committed, these damages to include moral damages for insult to the Costa Rican flag, and to be assessed in a separate phase of the proceedings.”⁴

The request submitted by Costa Rica with respect to compensation exhausts a variety of categories that could be granted by the International Court of Justice regarding compensation. Thus, firstly, the Applicant requested the pecuniary compensation is granted by the Court, limiting the scope of the

¹ *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Memorial of Costa Rica, p. 195.

² *Factory at Chorzow*, Jurisdiction, P.C.I.J., Series A, No. 9 (1926), p. 21: “[i]t is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself.”, as mentioned within Memorial, p. 300.

³ *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Memorial of Costa Rica, p. 300.

⁴ *Ibid.*

remedy in this respect. It could be argued that non-pecuniary compensation was excluded from its request. However, no further clarifications were submitted by the Applicant with respect to a potential difference between pecuniary and non-pecuniary compensation. At first glance, it could be concluded that the Applicant intended to exclude satisfaction as a remedy, it being similar in substance with non-pecuniary compensation. Thus, The notion of “*moral damages*” is also referred to as non-material damages,¹ in the sense that it does not affect property or other interests of the state or its nationals. However, this conclusion is infirmed by the Applicant, which also requested satisfaction through the Memorial, as such:

*“The Court is also requested to determine, in a separate phase, the reparation and satisfaction to be made by Nicaragua.”*²

It can, therefore, be concluded that the Applicant did not, in fact, intend to exclude satisfaction from the requested remedies by referring to pecuniary compensation as such. Thus, five concepts were included in the armoury of remedies requested by the Applicant. It is also relevant to note that Costa Rica requested compensation for the acts that were committed and, more interestingly, for the acts that “*may yet be committed*”. This approach is rather exceptional before the International Court of Justice as, generally, the damages sought as compensation are directed towards injuries already caused, which regarding the past and not the future.

Finally, the Applicant also requested moral compensation. The International Court of Justice has granted this typology of compensation in the Diallo Case.³

b) Bifurcation of Proceedings

As mentioned, without any further clarifications, at this stage of the proceedings, the Applicant requested the Court “*to determine, in a separate phase, the reparation and satisfaction to be made by Nicaragua.*”⁴ This

¹ James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (CUP 2002) 223.

² *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Memorial of Costa Rica, p. 305.

³ *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Compensation, Judgment, I.C.J. Reports 2012, p. 324.

⁴ *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Memorial of Costa Rica, 305.

approach towards compensation is not singular in the practice of the International Court of Justice. As such, the judgment of the Corfu Channel case is relevant to compensation as a remedy from a procedural standpoint from this perspective. In this case, the Court, after deciding that compensation is the appropriate remedy that should be granted to the Applicant, decided to bifurcate the proceedings and hold a separate phase with respect to the determination of the quantum of compensation.¹ Furthermore, in the Diallo Case,² the International Court of Justice pursued the same approach. The submission of the applicant in this respect is therefore unsurprising.

It can therefore be concluded that the bifurcation of proceedings before the International Court of Justice is currently the usual procedural mechanism through which the Court resolves the disputes: it first delivers a judgment regarding the merits of the case and, subject to further clarifications provided either by the parties or by designated experts, it delivers a judgment regarding the quantum of compensation.

3. Conclusion

The scope of this Part was to establish and analyse the request of Costa Rica with respect to compensation as a remedy. Issues such as i) categories of compensation; ii) methodology of assessing quantum and iii) assessing moral compensation for injuries caused to a state were submitted before the International Court of Justice by the Applicant.

Part II shall assess the manner in which the International Court of Justice interpreted and clarified the submissions of the parties, through its judgments.

¹ *Corfu Channel Case (Great Britain v Albania)* (Merits) [1949] ICJ Rep 4, 36.

² *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)* (Merits) [2010] Judgment, I.C.J. Rep., p. 639, 58.