Recent case-law of the ICJ and its significance for International Law

OC - (ILA-14156) - REPAIRING ENVIRONMENTAL DAMAGE: THE ICJ'S CONTRIBUTION FOR THE IDENTIFICATION OF PRINCIPLES OF REPARATION OF ENVIRONMENT DAMAGE

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Abstract

In recent years, the International Court of Justice has made important contributions to the consolidation of rules and principles of International Environmental Law. Among those contributions, it has often stated principles regarding its reparation. However, it was only in 2018 that the Court has issued its first judgement applying them.
It is a cardinal principle of International Law that States must make full reparation for damages resulted of international wrongful acts committed by them. This principle was already stated by the Permanent Court of International Justice (PCIJ) in the *case concerning the Factory at Chorzów* of 1928. Concerning the international responsibility for violations of rules and principles of International Environmental Law the Court has stated the principles to be applied first in the *Gabčikovo-Nagymaros Project case* of 1997 (para. 150) and, more recently, in the *Pulp Mills on the River Uruguay* case.
In those cases of violation of obligations of environmental law, the standard regime of State responsibility is applied (Sands, 2003, pp. 874-876; Boyle, 2002, pp. 17-26). Regarding the consequence of the responsibility, the reparation, the PCIJ in 1928 stated that "the essential principle contained in the actual notion of an illegal act – a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals – is 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" (*Factory at Chorzów*, 1928, p. 47), principle reaffirmed by the ICJ (*Gabčikovo-Nagymaros Project case*, 1997, para. 149). One exemple of application of those principles to environmental damage by the International Court of Justice is the case of Costa Rica v. Nicaragua (para. 41-42). Moreover, the ICJ has stated that the adequate reparation due "clearly varies depending upon the concrete circumstances surrounding each case and the precise nature and scope of the injury" (*Avena and Other Mexican Nationals*, 2004, para. 119), in this sense, a study to define "environmental damage" is fundamental do understand how we can repair it.

Environmental damage

According to Philippe Sands, two main issues can be observed while defining 'environmental damage': "what constitute environmental damage? And what level of environmental damage might give rise to liability?" (Sands, 2003, p. 876) In the present paper, only the first question will be analyzed.
The definition of environmental damage varies considerably, according to Philippe Sands it can be defined as "damage to natural resources alone [or even] […] damage to natural resources and property which forms part of cultural heritage […] [and it can also include damage to] landscape and environmental amenity" (Sands, 2003, p. 876). For Doro Gueye, environmental damage has an anthropological view, i.e. "an injury to humans and their property through the natural environment in which they live" (Gueye, 2016, p. 67) and an 'ecocentric' one, i.e. "the harm directly to the environment itself" (ibid.).
In the recent ICJ case, Costa Rica claimed reparation for two types of damages: "quantifiable environmental damage cause by Nicaragua's excavation of the 2010 eastern *caño*" and "costs and expenses incurred as the result of Nicaragua's unlawful activities, including expenses incurred to monitor or remedy the environmental damage" (*Certain Activities carried out by Nicaragua in the Border Area,* 2018, p. 13). For the Court, compensation is due to "damage to the environment, and the consequent impairment or loss of the ability of the environment to provide goods and services" (*Certain Activities carried out by Nicaragua in the Border Area,* 2018, para. 42).

Reparation of environmental damage

Three types of reparation are recognized by International Law: restitution, compensation/indemnity and satisfaction. The PCIJ stated in the case *Factory at Chorzów* that restitution in kind should be the priority type of reparation, and "if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear" (*Factory at Chorzow*, 1928, p. 47). In the recent case of the ICJ, compensation was the type of reparation agreed by the Parties to repair environmental damages. For the evaluation of this compensation, the Court assessed "the value to be assigned to the restoration of the damaged environment as well as to the impairment or loss of environmental goods and services prior to the recovery" (*Certain Activities carried out by Nicaragua in the Border Area,* 2018, para. 53). In this sense, the present paper proposes to analyze the ICJ case *Certain Activities carried out by Nicaragua in the Border Area* of 2018 as an important example of how environmental damage can be evaluated and repaired and if the reparation awarded is the most adequate to erase all effects of the international wrongful act.

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Palavras-chave : International Environmental Law, Reparation, ICJ