

SPEECH OF H.E. JUDGE ABDULQAWI A. YUSUF, PRESIDENT OF THE INTERNATIONAL COURT OF JUSTICE AT THE “DIALOGUE WITH LEGAL PRACTITIONERS”, ORGANIZED BY THE ASIAN-AFRICAN LEGAL CONSULTATIVE ORGANIZATION

Mr. Chairman/Ms Chairwoman,
Ladies and gentlemen,

1. It is an honour to address you at this Dialogue with Legal Practitioners organized by AALCO, and particularly by its Permanent Observer to the United Nations, Professor Roy Lee. My first participation in the activities of the AALCO goes back to 1974 when I attended a meeting of AALCO in Tehran, Iran, mainly devoted to the law of the sea as a young delegate from Somalia. I would like to take this opportunity to thank the AALCO for continuing to play an important role as a forum to discuss practical issues of international law.

2. The subject on which I will speak this morning is the contribution of the recent case law of the International Court of Justice to the legal regime applicable to compensation for environmental damage.

3. International environmental law has undergone a remarkable development in the past decades, in the wake of the growing awareness of the importance of the protection of the environment for humankind. In its advisory opinion on *the Legality of the Threat or Use of Nuclear Weapons*, the Court observed that

“[...] the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn.”

4. Consequently, a set of international legal obligations have been developed to protect the environment through numerous treaties. However, remedies for breaches of these obligations have remained to a certain extent unexplored. In its 2018 decision on *Costa Rica v. Nicaragua*, the International Court of Justice rendered a landmark decision on the compensability of environmental damage and the methods for assessing such damages. It was the first time that the Court was adjudicating a claim for compensation for environmental damage.

5. As you may know, there have been several cases involving Costa Rica and Nicaragua before the Court. The case that I will discuss today concerns the joined cases of *Certain Activities carried out by Nicaragua in the Border Area*, and of *Construction of a Road in Costa Rica along the San Juan River*. In its judgement dated 16 December 2015 on the merits, the Court found that Costa Rica had sovereignty over the disputed territory of Isla Portillos and that by excavating three caños, or small channels, Nicaragua had violated the territorial sovereignty of Costa Rica and had the obligation to compensate Costa Rica for material damages caused by Nicaragua’s unlawful activities on Costa Rican territory. With regard to this compensation, the Court decided that the two parties should try to agree on such compensation, but that failing agreement between them within 12 months from the date of the judgment, the issue would be settled by the Court at the request of either Party. In view of the lack of agreement between the parties and following a request made by Costa Rica, the Court had to determine the amount of compensation to be awarded to Costa Rica for the material damage caused by Nicaragua to an area of wetland, protected under the RAMSAR convention, belonging to Costa Rica. The Court therefore had to lay down, in the first instance, the basic principles applicable to such compensation.

6. To this end, the Court went back to general international law in order to ground the principles of governing compensability for environmental damage. It thus recalled that

compensation may be an appropriate form of reparation particularly in those cases where restitution is materially impossible or unduly burdensome.

7. The first principle which the Court enunciated was that, and (I quote):

“damage to the environment and the consequent impairment or loss of the ability of the environment to provide good and services, is compensable under international law”.

Secondly, the Court stated that such compensation may include two types of reparation: (1) indemnification for the impairment or loss of environmental goods and services in the period prior to recovery; and (2) payment for the restoration of the damaged environment.

8. With respect to this second category of compensation, the Court explained that since natural recovery may not always suffice to return an environment to the state in which it was before the damage occurred, active recovery measures may be required in order to return the environment to its prior condition, as far as that is possible.

9. With regard to the methods for the valuation of environmental damage, the Court observed, first of all, that international law does not prescribe any specific method of valuation for the purposes of compensation for environmental damage.

10. Thus, with respect to compensability of environmental damage, the Court underlined that it is consistent with the principles governing the consequences of internationally wrongful acts, including the principle of full reparation, that compensation is due for damage caused to the environment, in and of itself, in addition to the expenses incurred by an injured State as a consequence of such damage.

11. This means that, as far as compensability itself was concerned, the Court was of the view that it should be grounded on the existing principles of international law governing internationally wrongful acts, including the principle of full reparation. However, with regard to the methods for the valuation of such damage, the Court clearly preferred to ground them on the specificities of the case at hand, in this case, *Costa Rica v. Nicaragua*.

12. Secondly, the Court recalled that in order to award compensation, it would have to ascertain whether and to what extent each of the various heads of damage claimed by Costa Rica can be established and whether these heads of damage were the consequence of wrongful conduct attributable to Nicaragua. In other words, to award compensation, the Court would have to establish, with respect to each head of damage claimed by Costa Rica, that there was sufficiently direct and certain causal nexus between the wrongful act and the injury suffered by Costa Rica. The Court was therefore applying the basic rules of the law of State responsibility.

13. However, the Court was not oblivious of the particular features that compensation for environmental damage may take. One such feature is that the causal link between the wrongful act and the damage may often be uncertain in environmental cases due to the fact that the damage may come from several concurrent causes or that there may be uncertainty for lack of scientific evidence. Nonetheless, the Court recalled that the absence of adequate evidence on the extent of the material damage will not automatically preclude an award on damages. As the Court had already held in *Ahmadou Sadio Diallo* (a human rights case), when the nature of an injury is such that

assessing damages with certainty is impossible, compensation can be determined based on equitable considerations or just and reasonable inferences.

14. Thirdly, the Court decided not to follow the valuation methods proposed by the Parties, but to take an approach to the valuation of environmental damage “from the perspective of the ecosystem as a whole”, which should include an “overall assessment of the impairment or loss of environmental goods and services prior to recovery, rather than attributing values to specific categories of environmental goods and services and estimating recovery periods for each of them.”

15. In its overall valuation, the Court took four categories of environmental goods and services into account: trees felled by Nicaragua in the process of digging the caños, other raw materials removed as part of the clearance of the channels, gas regulation and air quality services lost as a result of such removal, and biodiversity impaired or lost due to the felling of the trees, the clearing of the area and the removal of other raw materials. In order to compensate for the damage to the environment, the Court fixed a first amount that it considered “to reflect approximately the value of the impairment or loss of environmental goods and services” until recovery. Additionally, the Court granted a second sum for the restoration costs claimed by the Republic of Costa Rica in respect of the internationally protected wetland.

16. Fifthly, the Court distinguished between the damage to the environment *per se*, and the costs incurred by the State in relation to such damage. Thus, in addition to the damage to the environment itself, the Court held that costs and expenses incurred by Costa Rica could be reimbursed if a sufficiently direct and certain causal nexus was established between the internationally wrongful conduct and the heads of expenses for which compensation is sought. The Court identified specific categories of costs to be considered, such as remediation expenses and monitoring costs.

17. The Court confirmed that Costa Rica was entitled to compensation in three different categories: *First*, compensation for expenses arising out of Nicaragua’s presence and unlawful activities in the disputed territory. *Secondly*, compensation for expenses to monitor the territory to which the damage was caused, which includes costs for overflights, satellite images, and of a report for the technical evaluation of the damage. And *thirdly*, compensation for the costs incurred in preventing irreparable prejudice to the environment arising from the actions of Nicaragua. All those types of expenses were admitted as necessary and therefore Costa Rica was entitled to being refunded for such expenses.

18. However, the Court dismissed Costa Rica’s request that Nicaragua reimburses the salaries that it paid to its state officials participating in these activities. For the Court, a State cannot recover salaries for government officials that it would have paid regardless of any unlawful activity committed on its territory by another State.

Conclusion

19. With this judgement, the Court laid down a solid framework for reparation for environmental damage in interstate disputes. It has given a concrete expression to the principle of compensation for damage to the environment *per se* and has also established a clear approach to the valuation of environmental damage from the perspective of the ecosystem as a whole which included an overall assessment of impairment or loss of environmental goods and services until full recovery can be attained.

20. The Court has taken a first step in clarifying some of the basic principles applicable to compensation for environmental damage and the method to be used for its valuation. First and foremost, it confirmed that the general principles of international law governing internationally wrongful acts are applicable to compensation for damage to the environment. Secondly, the Court held that such compensation is due for damage to the environment in and of itself. Thirdly, with regard to valuation, it clearly established the necessity of adopting an approach based on the specific circumstances of each case.

21. Of course, much remains to be done in this area. The Court will increasingly face cases in which it will be required to quantify various environmental damages. A number of questions are yet to be resolved, since the calculation of the damages and costs were here tailored to the specificities of this case. Similarly, the Court may have to address in the future, remedies for violating procedural obligations where a State's failure to respect procedural obligations may have consequences as serious as those arising from breaches of substantive obligations. The valuation of environmental damage may also raise questions regarding the Court's use of its power under Article 50 of its Statute to appoint experts.

22. However, in light of the Court's reasoning in *Costa Rica v. Nicaragua*, I am of the view that the Court is prepared to shed light on these questions and to further articulate an appropriate regime for compensation of environmental damage in interstate disputes and the standards on which it should be based. If the environment, as expressed in the Court's own words in the *Nuclear Weapons* case, is not an abstraction, compensation for damage to it should certainly not be treated as an abstraction either.

23. I thank you for your attention.
