

ARMENIA'S INTERNATIONAL RESPONSIBILITY FROM THE PERSPECTIVE OF THE CONGO CASE

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Abstract

The present article analyses Congo v. Uganda case from the perspective of compensation from Armenia for the damage caused to Azerbaijan for international wrongful acts in Karabakh and surrounding regions. In particular, the article looks at the type of damage, amount of compensation, evidences of the parties, position of various international and regional courts, concept of 'continuing violation', and possible scenarios of claiming damage from Armenia. The article also discusses the application of 'res judicata' principle by ICJ, obligations of an occupying state to prevent human rights violations and humanitarian law, obligations of the parties as to submission of evidences, examples of setting a compensation amount per the violation, importance of environmental damage, etc. The article contains a number of conclusions, including non-exclusion of the responsibility of the state when natural persons are found guilty for the acts committed; responsibility of the state occupying the territories and keeping them under its effective control for the actions of the persons included in its armed forces in those territories; responsibility for the damage caused as a result of the actions of groups and individuals not subject to it; importance of addressing compensation issues in a peace agreement between the parties, etc.

Keywords: *compensation, international wrongful acts, Congo case, responsibility of states, 'continuing violation', human rights, ICJ.*

It is indisputable that the international wrongful acts committed by Armenia against Azerbaijan lead to international responsibility. There are theoretical chances for establishing an ad hoc tribunal or any other international mechanism for Karabakh and from this perspective it deems important to study the experience of similar cases. One of them is the case of the International Court of Justice titled "Democratic Republic of the Congo v. Uganda" [2].

On February 9, 2022, the International Court of Justice ended a 23-year dispute in the Congo case with a final judgment ordering Uganda to pay US\$225 million for personal injury, US\$40 million for property damage and US\$60 million for natural resource damage [5]. At the same time, the Court rejected the request due to the macroeconomic consequences of the invasion of Congo by Uganda.

Considering that the decision on this case is useful in terms of clarifying a number of issues related to evidence and proof, as well as referring to the legal positions of the International Court of Justice expressed in that decision, we consider it necessary to dwell on some points reflected in the judgment. [10]

The court noted in paragraph 71 of the judgment that at the stage of determining the damages, none of the parties can question the "res judicata" nature of the 2005 Decision on the merits of that case. [9] The essence of the principle of res judicata is related to the principle of legal certainty. Legal certainty, being one of the most important principles of the rule of law, implies, among other things, that the final decisions of the court should not raise questions. [8]

Although the principle of res judicata is not directly related to proof and evidence, the essence is that what the Court determined in the 2005 Decision in that case is final for the parties, the parties cannot re-dispute what was determined by that Decision and they should not provide evidence that affect the determination of the facts in that decision.

With regard to the requirement and submission of evidence of damages, the Democratic Republic of Congo's (DRC) position was that Uganda could not require the DRC to provide precise and detailed evidence of damages. Because being the occupying

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state in that circle, it initiated the situation that led to the disappearance of the intended evidence.

This aspect was also manifested in the Armenian-Azerbaijani conflict. Thus, after occupying 20 percent of the territories of Azerbaijan, Armenia turned them into ruins, destroyed all buildings and cultural monuments, and ended the existence of material evidence during the 30-year occupation period.

Uganda, for its part, argued that the DRC must demonstrate a causal relationship between Uganda's failure to comply with its obligations as an occupying power and the harm inflicted on the DRC by individuals or groups, whether supported or not by the defendant in that context (i.e., the DRC - the fact that the damage was inflicted precisely as a result of the support of those forces by Uganda) must be proved by the facts. Referring to the decision of the International Court of Justice on the case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*) [1], the respondent argued that it must be demonstrated with sufficient degree of certainty that the damage caused by third parties, whose conduct is not attributable to it, would not have occurred had it duly discharged its obligations as an occupying Power (paragraph 77).

Referring to the 2005 Decision, the Court considers that the status of the district of Ituri as an occupied territory has a direct bearing on questions of proof and the requisite causal nexus. As an occupying Power, Uganda had a duty of vigilance in preventing violations of human rights and international humanitarian law by other actors present in the occupied territory, including rebel groups acting on their own account. Given this duty of vigilance, the Court concluded that the Respondent's responsibility was engaged "by its failure... to take measures to... ensure respect for human rights and international humanitarian law in Ituri district" (paragraph 78).

Armenia, as an occupying state, was obliged to prevent the violation of human rights and international humanitarian law by any subject in the occupied territories of Azerbaijan, including the separatist Armenian forces in Karabakh, and is responsible for the wrongful acts committed by them.

Uganda's further argument regarding the determination of damages was that the compensation sought from it should be limited to damages caused by its armed forces and that the burden of proof in this regard should be on the claimant. If the claimant proves that the damage was done precisely as a result of its support, it can demand the damage from them. It is not enough to assert in abstracto that the injury attributable to the rebel groups would not have occurred without Uganda's support (paragraph 81).

The case "*Democratic Republic of the Congo v. Uganda*" is also characteristic in that the DRC, as a party applying to the court, requests the Court to reduce the burden of proof regarding the damage required in advance, and in relation to its request, the Ugandan side, referring to various normative documents and judicial experience, demanded that this motion be rejected, and that KDR fulfil all its obligations regarding proof. Therefore, the Court discussed and evaluated the motion of the KDR in relation to each specific case. For example, the DRC asked the Court to take into account the context of the case when evaluating the evidence for each issue of harm, i.e. the time since the events occurred, the DRC's lack of resources, the ongoing conflict in its territory, the high number of victims suffering injuries, the low level of education in the country, etc. (paragraph 62).

Regarding the motion of the DRC, Uganda claimed that the DRC cannot refer to the existing difficulties in gathering evidence and put the burden of proof on Uganda. Claims about the difficulty of determining damage caused during an armed conflict are unfounded. The Ugandan side pointed to Iraq's occupation of Kuwait and Eritrea's occupation of its northern part by entering Ethiopia as examples, noting that the existence of the fact of occupation in those territories did not prevent the occupied states from presenting evidence (paragraph 63).

In paragraph 114 of the decision, the Court expressed its attitude to that issue and did not consider it necessary to mention the name of each victim or property of the DRC, to indicate where and when they were harmed, as claimed by Uganda, in order to pay compensation to the DRC. It agreed that in cases where the damage is massive, as in the present case, the information should be made public.

Referring to the evidentiary requirements applicable to mass claims, KDR stated that the Court's practice does not require a precise assessment of damages in such cases. In the context of mass casualties, international law does not require the determination of a specific amount of damages for each victim or group in order to calculate compensation. [3] The DRC thus argues that it will be necessary to mitigate the effects of the general rule that it is for the party that alleges a fact to prove its existence, in order to take account of situations where the respondent is in a better position to provide evidence of the facts at issue. In this regard, the claimant referred to the experience of the European Court on Human Rights (ECtHR) and the Commission on the claims of Eritrea and Ethiopia (paragraph 104).

In contrast to that position, Uganda argued that the Court must demonstrate a high degree of certainty in order to determine damages. KDR must show the affected people and property at a certain place and at a certain time for each claim related to damage. In addition, the occupation of Ituri should not exempt the DRC from the obligation to provide certain evidence.

Regarding the damage caused to the DRC in Ituri district, the Court, taking into account the occupation regime, reminded that Uganda must prove that the damage caused to the DRC in that area was not due to its failure to fulfil its obligations as an occupying state (paragraph 118).

However, as regards damage that occurred on Congolese territory outside Ituri, and although the existence of armed conflict may make it more difficult to establish the facts, the Court is of the view that “[u]ltimately . . . it is the litigant seeking to establish a fact who bears the burden of proving it; and in cases where evidence may not be forthcoming, a submission may in the judgment be rejected as unproved” (para. 119).

The court noted that the evidence presented to it by the DRC was insufficient to determine the amount of compensation to be paid in most cases. However, taking into account the context of the armed conflict in that case, the court considered various other elements related to the research in the case, including reports at the UN.

The Court confirmed that the loss of life as a result of internationally wrongful acts creates an obligation for Uganda to pay full damages. Before proceeding to compensation, the Court must determine the importance and extent of the damage suffered by the claimant, as well as ensure that there is a sufficient direct and definite causal link between it and the internationally wrongful act.

According to the court's opinion, neither the documents submitted by the DRC, nor the reports submitted by the appointed experts, prepared by the UN agencies, can provide accurate or approximate information about the number of dead for which Uganda must pay compensation. The Court considers that the evidence presented to it suggests that the number of deaths for which Uganda owes reparation falls in the range of 10,000 to 15,000 persons (paragraph 162).

The Court did not approve the payment of damages in the amount of 34,000 US dollars for each civilian killed during the armed conflict in the DRC and noted that the amount was excessive (paragraph 163).

Although the court required the plaintiff to provide evidence for the determination of material damage, it did not condition the payment of moral damage with the provision of evidence. Thus, in most cases, moral damage is related to suffering, moral shocks suffered by people as a result of committing an act against international law. Examples of such cases are the shocks suffered by the close relatives of those who died during the armed conflict, and those who became disabled. In most cases, it is impossible to prove these cases with any evidence. The established facts themselves give the court a reason to make a decision on the existence of circumstances requiring payment of moral damages. The court determines moral damage, as a rule, as a result of the gravity of the internationally wrongful act committed and based on its considerations of fairness.

The experience of compensation for damages related to the looting and illegal exploitation of natural resources is important for determining Armenia's responsibility within the framework of the Armenia-Azerbaijan conflict. The peculiarity here is that Armenia exploited the natural resources in the occupied territories of Azerbaijan with the participation of companies from other countries. Exploitation of resources from the territory belonging to Azerbaijan by foreign companies without the consent of Azerbaijan also creates a basis for the responsibility of those companies.

Regarding environmental damage due to deforestation, the court noted that demanding environmental damage is consistent with international law governing the consequences of an internationally wrongful act and the principles of full compensation. Since the DRC did not provide the Court with any evidence of environmental damage, it determined a total of 60,000,000 USD in compensation for the plunder and exploitation of natural resources. And in a 2005 Decision, the Court explained that there was no need to rule on every alleged incident related to the DRC's natural resource claims.

Conclusion

In international law the responsibility issue can be that of a state or individuals. For state's responsibility the ICJ has to look at the case, whereas for individual's responsibility the ICC's jurisdiction is required (with the differences in eligible crimes in mind).

The most realistic compensation mechanism for Armenia's international wrongful acts against Azerbaijan would be ad hoc tribunal within UN or any mechanism to be established as part of the upcoming peace agreement. The evidencing elements as well as criteria for calculation of damage studied in the present article would then be applicable.

Recent ratification of ICC Statute by Armenia does not promise much for Azerbaijan because the latter has not yet ratified this instrument and its jurisdiction (*ratione temporis*) applies only to crimes committed after the entry into force of the Statute (and can only sue individuals). ICC does not so far recognize the "continuing violation doctrine" which exists in international law and is applied by other regional courts (for example, in

Moiwana Village v. Suriname [4], the Inter-American Court of Human Rights used it to assert jurisdiction over a massacre that took place before Suriname became a party to the American Convention on Human Rights. Similarly, ECtHR recognized this principle in *De Becker v. Belgium* [3] and since then broadly applied particularly in property rights related cases [6]).

Alternatively, the Security Council may refer a case to ICC but it has to determine that there does indeed exist a threat to the peace, breach of the peace, or act of aggression in accordance with article 39 of the UN Charter and all SC members have to vote for it [7]. At present, this does not seem to be realistic in light of the composition of the Security Council and their attitude to the conflict at question.

Nevertheless, the analysis of Congo case leads to the following conclusions:

1. The Armenian state is responsible for the violation of jus cogens norms of international law, erga omnes obligations, including human rights and international humanitarian law norms during the occupation of Azerbaijani territories and keeping them under occupation for 30 years.

2. The state that commits an internationally illegal act must ensure adequate compensation for the damage caused as a result of that act.

3. The criminal liability of individual natural persons for the acts committed does not exclude the responsibility of the state for those acts.

4. The state occupying the territories and keeping them under its effective control bears responsibility for the actions of the persons included in its armed forces in those territories, as well as for the damage caused as a result of the actions of groups and individuals not subject to it.

5. The burden of proving the absence of a causal relationship between the damage caused as a result of an international illegal act and its consequences in the occupied territories rests with the occupying state. Considering the nature and duration of the dispute, it is possible to place the burden of proof on the defendant.

7. The claimant state bears the burden of proof regarding damage and determining its amount as a result of violation of human rights and international humanitarian law norms that occurred in non-occupied territories. In accordance with the principle of "Res judicata", the evidence related to the confirmation of the international wrongful acts of the responsible state should be presented before the case is considered on its merits.

8. The claimant state must provide valid and relevant evidence related to the determination of the number of people killed and injured as a result of the conflict, the amount of the related damage, as well as the damage caused to the citizens and the property of the state. In cases where the violations are of a mass nature, determining the damage in a general manner may be considered permissible.

9. Plundering and illegal exploitation of natural resources in the occupied territories, damage to ecology and economy, confirmed by authoritative international expertise and substantiating documents can create a guarantee for compensation of damage.

10. The most efficient way to compensate for the damage caused to Azerbaijan during the Armenia-Azerbaijan conflict is for the parties to conclude a peace agreement related to the conflict, to resolve the issues related to the damage caused within the framework of that agreement.

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