Responsabilidad internacional de los estados

Desarrollo actual, perspectivas y desafíos

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The Compensation of damage as result of the State´s international responsibility: An overview

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INTRODUCTION

In 2001, the International Law Commission released the *Draft Articles on Responsibility of States for Internationally Wrongful Acts* ("The Draft Articles"). One of the major issues of the State's responsibility in case of harm and damage is which kind of reparation the victim should obtain. There are three forms of reparation for injury, as codified by article 34 of the Draft Articles, namely restitution, compensation and satisfaction, the first form being the main rule following the PCIJ's *Chorzow Factory* decision.[1] However, if restitution is not possible, compensation operates by equivalent: it takes place through the payment of damages and interest to the injured party. [2]

Article 31 of the Draft Articles foresees that a responsible State is under the obligation to make full reparation[3] for the injury caused by an internationally wrongful act. Furthermore, injury includes any damage, whether material or moral, which have to be compensated insofar as they cannot be made good by restitution (art. 36).

In regard to the question whether a party can unilaterally determine which kind of reparation it wants, it is still open. If a party requests the international jurisdiction restitution, and if the latter is not possible, there should be no objection to accord compensation. However, what if the party claims compensation and the international tribunal accords restitution?[4] It seems that from the *Rainbow warrior* case, that such a

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[1] "[…] Reparation must, as far as possible, wipe-out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. If this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear." (Merits, 1928, *PCIJ Reports*, Series A, N. 17).

[2] ICJ, *Application of the Genocide Convention (Bosnia and Herzegovina v. Serbia and Montenegro)*, 2007, # 460; ITLOS, *The MV Saiga (2) (Saint Vincent and the Grenadines v Guinea*), 1999; ECHR, *Brumarescu v Romania*, 2001, # 19; ICHR, *White Van Case*, 2001, # 76; Ad Hoc, *Texaco v Libya*, 1978, # 109; Iran-US Claims Tribunal, *Amoco*, 1987, at 246.

[3] However, the Eritrea-Ethiopia Claim Commission considered that the principle of full reparation must be balanced against a State's Human Rights obligations to provide for its people's basic needs, taking into account that both countries are the two of the world's poorest nations (Final award, *Eritrea's Damages Claims*, 2009, §21; Final award, *Ethiopia's Damages Claims,* 2009, §21).

[4] For the discussion, see: Kerbrat, Interaction between the forms of reparation, in Crawford *et alii*, *The Law of International Responsibility* (New York, Oxford, 2010), 574, at 577.

ruling would be *ultra petita* as a request for compensation has a different object than a claim for restitution.[5]

In a general manner, the PCIJ and the ICJ have awarded compensation in very few instances as sovereign interest do not lend easily to quantification.[6] Monetary claims by private parties, however, are much more common. And so are personal injury claims too, especially as human rights courts develop enhanced access to this remedy. Finally, the establishment of the Victim's Trust Fund by the ICC, permits to consider the obtaining of compensation in regard to criminal offences.[7]

MONETARY DAMAGES

Property and Business claims

In regard to property and/or business claims, the general rule is that the *damnum emergens* is based on the fair market value of the property taken. Fair market value is, following the American Society of Appraisers,

> an opinion expressed in terms of money, at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts, as of a specific date.[8]

In regard to the date of valuation it is usually the date of deprivation. However, where the value of the business has increased since taking, the amount of compensation may be fixed at the date of the award.

Concerning *the lucrum cessans*, there exist various methods to quantify future loss[9], and often are embedded inside a single valuation.[10] Most common methods are the following ones. The *market-based approach* compares the subject to similar businesses that have been sold in the market.[11] *The income-based approach* estimates the value of a business by calculating the present value of anticipated benefits, doing so by using or the capitalization

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[5] *Difference between New Zealand and France*, 1990.
[6] See, however, the *Corfu Channel* case for instance, where the loss of a ship, cost of repairs, and expenses from personal injury and death were compensated (ICJ, 1949).
[7] Ferstman, The ICC's Trust Fund for Victims: Challenges and Opportunities, *Yearbook of International Humanitarian Law* 424 (2003).
[8] http://www.appraisers.org.
[9] Kantor, *Valuation for Arbitration* (Alphen aan den Rijn: Wolters Kluwer, 2008).
[10] See e.g. *Enron Corporation v. Argentina*, 2007.
[11] Kantor, *supra note* 9, at 8.

of income method or the discount cash flow method.[12] Finally, the *asset-based approach* is based on the current market value of assets net of liabilities. All of the three approaches are based on a "fair market value", which definition by the ASA is the most commonly accepted one.[13] As Crawford has commented,

> Compensation reflecting the capital value of property taken or destroyed as a result of an internationally wrongful act is generally assessed on the basis of the "fair market value" of the property lost. The method used to assess "fair market value", however, depends on the nature of the asset concerned.[14]

Wrongful death claims

Customary international law of State responsibility holds States liable for the unlawful death of foreign citizens within their jurisdiction perpetrated by, or under the direction of a State official,[15] noting that there is no compensation for accidental death.[16]

The basic decision to quote is the *Lusitania* case[17], where the US-German Mixed Claims Commission set out the damages to be compensated in case of a wrongful death, in particular in regard to those who had an expectation of support from the deceased:

> "The amounts (a) which the decedent, had he not been killed, would probably have contributed to the claimant, add thereto (b) the pecuniary value to such claimant of the deceased's personal services in claimant's care, education, or supervision, and also add (c) reasonable compensation for such mental suffering or shock, if any, caused by the violent severing of family ties, as claimant may actually have sustained by reason of such death.[18]

Consequently, taking into account the ICHR case law, one may ascertain that the loss on income because of the victim's death has to be compensated, taking into account the victim's age, his or her professional activity, and the years remaining before he or she would have reached the age of normal national life expectancy.[19]

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[12] *Idem*.
[13] See for example: *CMS v. Argentina*, 2005; *Azurix v Argentina*, 2006.
[14] *Commentaries*, at 255.
[15] Saul, Compensation For Unlawful Death in International Law: A Focus on the Inter-American Court of Human Rights, 19 *Am.U.Int´l Rev* 523 (2004).
[16] GB v. US, *Cadenhead Case*, 6 RIAA 40 (1914).
[17] 7 *Reports of International Arbitral Awards* 32 (1923).
[18] *Gov´t Printing Off*., 1925, at 196.
[19] Saul, *supra note* 15, at 552.

However, till now no international tribunal has accepted to compensate the intrinsic value of life. As mentioned, the *Lusitania* Commission only accepted to award damages for the consequences of the wrongful death of the victim, refusing expressly to value the life taken.

MORAL DAMAGES

Victim's claim for moral damages

Typically moral damages, also called hedonic damages, are non-pecuniary losses such as pain and suffering. It is particularly in the field of human rights violations where such reliefs are sought. The ECHR compensates "anguish" and "frustration"[20]; the ICHR compensates the loss of "companionship" and the "sharing of responsibilities"[21] , as well as the loss of a "life project", which is the long-term diminished ability to enjoy life in light of altered circumstances.[22] This set of decisions is also reflected in article 31 of the Draft Articles, where moral damages include such items as individual pain and suffering, loss of loved ones or personal affront associated with an intrusion on one's home or private life".[23]

In regard to general international law, the first decision to be quoted is again the 1923 *Lusitania* award that considered that moral damages also have to be compensated, in particular, mental suffering, injury to feelings, humiliation, shame, degradation, loss of social position, as well as injury to credit and reputation. The same position has been confirmed by the ICJ in its advisory opinion in regard to the *Fasla* case.[24] In the *Desert Line Projects LLC v. The Republic of Yemen case*, the arbitrators held:

> 289. The Respondent has not questioned the possibility for the Claimant to obtain moral damages in the context of the ICSID procedure. Even if investment treaties primarily aim at protecting property and economic values, they do not exclude, as such, that a party may, in exceptional circumstances, ask for compensation for moral damages. It is generally accepted in most legal systems that moral damages may also be recovered besides pure economic damages. There are indeed no reasons to exclude them. The Arbitral Tribunal knows that it is difficult, if not impossible, to substantiate a prejudice of the kind ascertained in the present award. Still, as it was held in the *Lusitania* cases, non-material damages may be "very real, and the mere fact that they are difficult to measure or estimate by monetary standards makes them none the less real and affords no reason why the injured person should not be compensated," *U.S. v. GERMANY*,

[20] *Loizidou v. Turkey* , 1997; *Papamichalopoulos and others v. Greece*, 1995.
[21] *Velásquez Rodríguez v. Honduras*, 1987 ; *Aloeboetoe v. Suriname* , 1991.
[22] *Loayza Tamayo v. Peru*, 1998.
[23] *Commentaries*, at 92
[24] *Application for Review of Judgment no 158*, 1973.

> NOVEMBER 1923, VII RIAA 32, AT P. 42, QUOTED WITH APPROVAL IN JAMES CRAWFORD, ILC ARTICLES ON STATE RESPONSIBILITY at p. 223 *et seq.*
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> It is also generally recognized that a legal person (as opposed to a natural one) may be awarded moral damages, including loss of reputation, in specific circumstances only.

290. The Arbitral Tribunal finds that the violation of the BIT by the Respondent, in particular the physical duress exerted on the executives of the Claimant, was malicious and is therefore constitutive of a fault-based liability. Therefore, the Respondent shall be liable to reparation for the injury suffered by the Claimant, whether it be bodily, moral or material in nature. The Arbitral Tribunal agrees with the Claimant that its prejudice was substantial since it affected the physical health of the Claimant's executives and the Claimant's credit and reputation.

Nevertheless, the amount asked by the Claimant is exaggerated and cannot be allocated in its entirety. The Arbitral Tribunal considers that, based on the information at hand and the general principles, an amount of USD 1,000,000 should be granted for moral damages, including loss of reputation.

This amount is indeed more than symbolic yet modest in proportion to the vastness of the project.

In regard to the monetary evaluation of these kinds of damages, three approaches can be identified. The *conceptual approach* considers the components of a victim being to have purely objective value, which is expressed in a specific monetary amount. The major disadvantage of this extremely simple method is that it fails to take into account the victim's specific situation. The *personal approach* determines the compensation that corresponds specifically to the loss suffered by the victim. Lastly, the *functional approach* seeks to calculate the physical arrangements which can make the victim´s life more endurable. However, there is no doubt that in practice, the moral damages' quantification largely remains inherently subjective and there is no surprise that most decisions are only based on equity and fairness[25], as it can be seen in the before mentioned *Desert Line Projects* ruling.

State's claim for moral damages

In two recent cases, it has been a State that sought for moral damages against a private investor who recklessly initiated an investment arbitration. In *Europe Cement Investment & Trade S.A. v. Turkey*[26] and *Cementownia "Nowa Huta" S.A. v. Turkey*[27], the arbitral

[25] Saul, *supra note* 15, at 574.
[26] ICSID, 13/8/2009.
[27] ICSID, 17/9/2009.

tribunal declined jurisdiction over the disputes and added that the claims were fraudulent. In both proceedings, Turkey submitted counterclaims seeking compensation for moral damages. However, the two awards established that the proper remedy for moral damages suffered by a State is satisfaction and not monetary compensation.

CONSEQUENTIAL DAMAGES

Consequential damages (also called special or indirect damages) are any injury or harm that do not ensue directly and immediately from the act of a party, but only from some of the results of such act.

In the *Eritrea's Damages Claim* final award, the Eritrea Ethiopia Claims Commission considered that the concept of consequential damages was not a separate compensable category in international law. The International Law Commission seems to share the same point of view, as it treats consequential damages as a corollary of causation in article 39. Thus, the UN Compensation Commission, for example, excluded sanctions-related losses on the basis that they were not the "direct" result of the invasion of Kuwait, as required under resolution 687.[28]

However, in contradiction to its own ruling, the Eritrea Ethiopia Claims Commission accepted to compensate the consequential damages concerning loss of access to medical care. The justification given was that international humanitarian law ascribes special protection to medical facilities and personnel as well as to patients in need of medical care.[29]

PUNITIVE DAMAGES

Generally, punitive damages, which are also termed exemplary damages, are not awarded in order to compensate the plaintiff, but in order to reform or deter the defendant and similar persons from pursuing a course of action such as that which damaged the plaintiff.

Based on the *Lusitania* case, jurisprudence normally excludes any form of punitive damages. In the *Velásquez Rodriguez*, compensatory damages ruling, the Inter-American Court of Human Rights held that international law did not recognize the concept of punitive or exemplary damages.[30]

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[28] Barker, Compensation, *in*: Crawford *et alii*, *supra note* 4, at 599, 605.
[29] §202-16.
[30] Series C, No. 7 (1989). On punitive damages, see also N. Jørgensen, A reappraisal of punitive damages in international law, 68 *BYBIL* 247 (1997); Wittich, Awe of the gods and fear of the priests: punitive damages in the law of State responsibility, 3 *Austrian Review of International and European Law* 101 (1998).

This approach has also been adopted by the Eritrea Ethiopia Claims Commission. In its 2005 partial award, the Commission held Eritrea responsible for violating Article 2(4) of the UN Charter.[31] However, in its final award, the Commission considered that for *jus ad bellum* violations, damages are not to deter future violations of the UN Charter, but are to be "appropriate", excluding thus the idea of punitive damages.

However, the Eritrea Ethiopia Claims Commission did link the amount of compensation to the gravity of violation of *jus in bello* and *jus ad bellum* rules.[32] In its commentary of the quoted Ethiopia Eritrea award, Romesh Weeramantry observes that

> focusing on the degree and nature of the wrongful acts, rather than the loss occurred, appears to have resulted from the significant lack of evidence as to damage and the limited time and resources available to the Commission and the parties. The Commission's approach may thus be considered as *sui generis* rather than reflective of international law.[33]

However, we are not sure that such a statement is completely right. In effect, since the *Myrna Mack Chang* case, there are some indications that the ICHR for instance may also be moving toward the concept of "aggravated damages" for particularly important violations of human rights. In other words, one can deduct from both cases, that there is a slow crystallization of a new category of damages, which aims to replace the excluded concept of punitive damages.

INTERESTS

There are at least two reasons for awarding interests. First of all, its primary function is to fully compensate claimant. As article 38 of the Drafted Articles states:

1. Interest on any principal sum due under this chapter shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result.

2. Interest runs from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled.

And as the Commentary emphasizes,

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[31] *Jus ad Bellum* (Eth. v. Eri.), Ethiopia's Damages Claims 1-8, 19/12/2005.
[32] *Ethiopia*, § 311, 312.
[33] 104 *AJIL* 485 (2010, at 486).

> (1) Interest is not an autonomous form of reparation, nor is it a necessary part of compensation in every case. For this reason the term "principal sum" is used in article 38 rather than "compensation". Nevertheless, an award of interest may be required in some cases in order to provide full reparation for the injury caused by an internationally wrongful act, and it is normally the subject of separate treatment in claims for reparation and in the awards of tribunals.

The second function of interests is to prevent unjust enrichment of the respondent.

As interests are foreseen to insure full reparation, moratory interests are excluded as underlined by the Commentaries:

> (12) Article 38 does not deal with post-judgment or moratory interest. It is only concerned with interest that goes to make up the amount that a court or tribunal should award, i.e. compensatory interest. The power of a court or tribunal to award post-judgment interest is a matter of its procedure.

In regard to compound interests[34], it seems that there are opposite views. Awards of the Iran-United States Claims Tribunal, for instance, have stated that compound interests are to be excluded, and only simple interests are to be awarded, except if there are "special reasons" to do so.[35] US courts have gone a step further, holding that customary international law prohibits an international arbitral tribunal from awarding compound interests.[36] However, international investment arbitrators tend to award compound interest, as seen in the *Santa Elena*[37], *Metalclad*[38], *Wena*[39] and *Middle East Cement*[40] cases.

Concerning the rate of interest, there is no established percentage rate. Following Lauterpacht & Nevill,[41] rates awarded generally varied between 4 per cent and 8 per cent in the 19th and 20th century[42], however, without any justification on how the rate was fixed. Lately, various international tribunals have selected an available market interest rate that is

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[34] Brower & Sharpe, Awards of Compound Interest in International Arbitration: The Aminoil Non-Precedent, in:, Asken *et alii*, *International Law, Commerce and Dispute Resolution*, (Paris: ICC Publishing, 2005) at 155.

[35] *R.J. Reynolds Tobacco Co v. Government of Iran*, 1984.
[36] *McKesson Corp v. Islamic republic of Iran*, 116 F. Supp. 2d 13 (DDC 2000).
[37] *Compañia del Desarollo de Santa Elenea v. Costa Rica*, 2000.
[38] *Metalclad Corp v. Mexico*, 2000.
[39] *Wena Hotels Ltd v. Egypt*, 2000.
[40] *Middle East Cement Shipping and Handling Co v. Egypt*, 2002.
[41] Interests, in: Crawford *et alii, supra note* 4, at 613, 621.
[42] The aforementioned *Desert Line Project* award fixed, without justification the rate at 5% *per annum*.

relevant to the parties. Thus, the Iran-US Claims Tribunal selected the US six-month certificate of deposit rate for US claimants "as it represented a stable, low risk return on savings vehicle available in their country and for which interest rate data was available over the period of account".[43] Other examples of market rates are the treasury bill rates of the claimant's national State[44] or the LIBOR for the currency of the award.[45]

CURRENCY

Once the damages and the interests fixed, tribunals are also called upon to decide what currency is associated with.

In the S.D. Myers case[46], the arbitral tribunal awarded compensation in Canadian dollars. However, in regard to interest, the arbitrators were faced with the question of whether they should be in American dollars, because the claimant would have converted its Canadian dollars revenues immediately into American dollars in the ordinary way of its business; or, should the interests be paid in Canadian dollar, as the same currency than the awarded compensation. At the end, the tribunal opted for Canadian dollars as they were also the currency in the main compensation:

> 304. The rate of interest to be applied is closely connected with the question of the currency of account in which the award of compensation is made.
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> 305. On the one hand, the currency in which SDMI operated was US$ and no doubt all income received into SDMI's bank account in Ohio would have been converted into that currency. On the other hand, based on the bids made to potential Canadian customers (and the revenue from the seven completed contracts), the currency of account of the transactions between SDMI/MYERS Canada and their Canadian customers was (or was to be) CAN$. On balance, the Tribunal considers that the currency of account of the lost income stream is more closely connected with the loss and damage suffered by SDMI than the working currency of SDMI in Ohio. Accordingly, the Tribunal determines that the currency of the compensation awarded in this Second Partial Award should be CAN$.
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> 306. It follows that the interest rate to be applied should be related to the standard Canadian prime rates applicable from time to time during the relevant period.

[43] *Idem*, at 621.
[44] *CMS Gas Transmission Company v Argentina*, Award, 2005.
[45] *MTD v Chile*, Award, 2004.
[46] *S.D. Myers v Canada*, 2002.

The relevant period shall be the date of the Notice of Arbitration to the date of payment of the Award. Such interest shall be compounded annually.

307. The Tribunal determines that CANADA shall pay to SDMI compound interest on the sum awarded in Chapter VI above at the Canadian prime rate plus 1% over the period referred to above.

CONCLUSION

There is no doubt that today the compensation of damages is a well-established principle in International Law. However, it is the application of this principle that is cumbersome, especially in regard to moral damages. In the same way, the absence of a real "international" rate for calculating interests and a unique "international" currency does not permit to identify one single reference to a fix standard. This uncertainty is one of the major obstacles litigators, arbitrators and judges have to face when it comes to compensate the victim´s right to compensation in regard to the State's international responsibility.