

THE INTERNATIONAL COURT OF JUSTICE AND COMPENSATION FOR ENVIRONMENTAL HARM: A MISSED OPPORTUNITY?

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I. INTRODUCTION

THE INTERNATIONAL COURT OF JUSTICE (ICJ) has for the first time considered a compensation claim for environmental harm in its 2018 judgment *Costa Rica v Nicaragua*.¹ The judgment is significant in its application of the law of State responsibility to environmental harms, the Court showing flexibility in regard to the issues of causation and quantification of damages which arise in relation to this particular context. Two criticisms of the Court's judgment are put forward. First, the ICJ's use of an "overall assessment" to quantify compensation leaves much to be desired in terms of clarity—the assessment's application is not explained.

Second, the judgment took an undesirably conservative line in flatly ruling out the imposition of punitive damages for environmental harm, and focusing narrowly on monetary compensation. Both matters were considered by members of the Court in separate opinions. The Court could legitimately have taken a more progressive approach in line with the growing concern of States for a suitable international legal framework to address environmental protection.

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¹ *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua)* (Compensation) 2018 <<http://www.icj-cij.org/files/case-related/150/150-20180202-JUD-01-00-EN.pdf>> accessed 9 February 2018.

II. BACKGROUND

The case centred around a territorial dispute between Costa Rica and Nicaragua over a three square kilometre area of land around the San Juan river towards the north of the Isla Portillos on the border between both Parties. Costa Rica initiated proceedings on 18 November, 2010, for Nicaragua's alleged unlawful 'incursion into and occupation' of Costa Rican territory, as well as for its construction of a channel (*caño*) and dredging works leading to the degradation of the San Juan river wetland and rainforest environment.² The ICJ issued an order for provisional measures on 8 March, 2011 (hereinafter, "the 2011 Order").³

Further provisional measures were ordered on 22 November, 2013 (hereinafter, "the 2013 Order"). The Court found that Nicaragua had constructed two additional *caños* and established a military presence in the disputed area since the 2011 Order was issued,⁴ acts which Nicaragua acknowledged were in breach of its obligations under the 2011 Order.⁵ The 2013 Order prescribed that Nicaragua should cease excavation activities and remove its personnel from the disputed area.⁶

In its 2015 merits judgment, the ICJ found in favour of Costa Rican sovereignty over the disputed area. Nicaragua was therefore held to be obliged 'to compensate Costa Rica for material damages caused by Nicaragua's unlawful activities on Costa Rican territory', from its initial violation of Costa Rican sovereignty and the breaches of its obligations under the 2011 Order.⁷ The ICJ handed down the 2018 compensation judgment as a result of Costa Rica and Nicaragua's inability to reach agreement on the quantum of compensation in the twelve month period set by the Court at the merits stage.⁸

III. THE COURT'S AWARD

Costa Rica claimed compensation for 'quantifiable environmental damage caused by Nicaragua's excavation of the 2010 *caño* and the 2013 eastern *caño*', and 'costs and expenses incurred as the result of Nicaragua's unlawful activities, including expenses incurred to monitor or remedy the

² *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua)* (Application Instituting Proceedings) 2010 26 <<https://www.icj-cij.org/files/case-related/150/16279.pdf>> accessed 9 February 2018.

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)* (Merits) [2015] ICJ Rep 665, 673.

⁴ *Border Area and Construction of a Road* (Merits) (ibid); *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica)*, *Provisional Measures, Order of 22 November 2013* [2013] ICJ Rep 354 [45]-[46].

⁵ *Border Area and Construction of a Road* (Merits) (n 3) [25].

⁶ ibid; *Construction of a Road, Provisional Measures* (n 4) [59].

⁷ *Border Area and Construction of a Road* (Merits) (n 3) [229].

⁸ *Border Area* (Compensation) (n 1) [21].

environmental damage caused.⁹ In respect of the first category of damage, the Court in a 15-1 decision awarded US\$120,000 for the ‘impairment or loss of environmental goods and services’, and US\$2,708.39 for the costs incurred in wetland restoration. Judge *ad hoc* Dugard and Judge Donoghue voted against each of these two awards respectively.¹⁰ In respect of the second category of damage, the ICJ unanimously awarded US\$236,032.16 to Costa Rica for directly consequent costs and expenses, with an additional sum of US\$20,150.04 added as interest.¹¹

III. THE APPROACH OF THE COURT

A. COSTS AND EXPENSES INCURRED BY COSTA RICA

The Court’s approach to the ‘costs and expenses’ category of damage was relatively straightforward, and will be dealt with briefly. The Court engaged in an interrogation of whether Costa Rica was able to satisfy a ‘sufficiently direct and certain causal nexus’ between Nicaragua’s internationally wrongful conduct and the expenses incurred.¹²

It was found that Costa Rica was entitled to partial compensation for ‘fuel and maintenance services for police aircraft’ used to reach and overfly the disputed area,¹³ the Court deducting expenses relating to cargo transportation, press flights, and flights to other destinations.¹⁴ Full compensation was awarded for the cost of obtaining a UN Institute for Training and Research (UNITAR) Operational Satellite Applications Programme report to ‘detect and assess the environmental impact of Nicaragua’s presence’.¹⁵ No compensation was awarded for the salaries of the Costa Rican personnel allegedly involved in monitoring operations. The Court deeming there to be insufficient evidence that any ‘extraordinary expenses’ were incurred.¹⁶ Also, no compensation was awarded for costs incurred from procuring allegedly relevant satellite images from a private company as no evidence was provided on the area covered by these images.¹⁷

⁹ *ibid* [36].

¹⁰ *ibid* 42.

¹¹ *ibid*

¹² *ibid* [89].

¹³ *ibid* [95]

¹⁴ *ibid* [96].

¹⁵ *ibid* [98].

¹⁶ *ibid* [102].

¹⁷ *ibid* [105].

B. QUANTIFIABLE ENVIRONMENTAL DAMAGE

The ICJ's approach to compensation for quantifiable environmental damage is of greater interest. It began by definitively affirming that environmental damage 'and the consequent impairment or loss of the ability of the environment to provide goods and services'¹⁸ is compensable under general international law. This includes payment for 'active restoration measures'¹⁹ which a State may need to take to rectify damage on its territory. The Court's subsequent analysis dealt with the issues of determining the causation and value of the environmental damage caused by Nicaragua's internationally wrongful acts.

(i) *Quantifiable Environmental Damage: Causation*

On causation, the Court was aware of the difficulties in establishing a causal link between environmental damage and internationally wrongful conduct, whether on account of scientific uncertainty or the existence of multiple contributory factors.²⁰ Citing its decision in *Ahmadou Sadio Diallo*,²¹ as well as that of the *Trail Smelter*²² arbitral tribunal, the ICJ avoided taking an unduly rigid approach to the evidential burden.²³ The Court found that Costa Rica had adduced sufficient evidence to establish Nicaraguan causation of damage to 'trees, other raw materials, gas regulation and air quality services, and biodiversity'.²⁴ It is encouraging that the Court was receptive to scientific studies²⁵ which allowed the application of existing principles of law to reach a satisfactory result; the greater uncertainty inherent in quantifying losses to biodiversity as compared to say, trees, did not frustrate an analysis of causation, enabling the award of compensation. The causal assessment undertaken does have sensible limits, demonstrated in the Court's finding of an insufficient nexus between Nicaraguan *caño* construction and soil degradation, because natural processes had minimised the damage to a marginal difference in soil quality.²⁶

¹⁸ *ibid* [42].

¹⁹ *ibid* [43].

²⁰ *ibid* [34].

²¹ *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo) (Compensation)* [2012] ICJ Rep 324.

²² *Trail Smelter case (United States v Canada)* (1938 and 1941) 3 RIAA 1920.

²³ *Border Area (Compensation)* (n 1) [35].

²⁴ *ibid* [75].

²⁵ *ibid* [70].

²⁶ *ibid* [74].

(ii) Quantifiable Environmental Damage: Valuation

The Court then went on to consider the alternative methodologies suggested by Costa Rica and Nicaragua to determine the valuation of compensation, eventually deciding that neither was appropriate.²⁷ Both were deemed too simplistic. Costa Rica's suggested method (the "ecosystem services approach")²⁸ was premised on 50 years being the time period required for the environment to recover to its original state naturally. An annual value of damage to 'ecosystem goods and services' was ascertained, and multiplied by the 50 year period, with a deduction made of 4% per year to take into account natural recovery reducing the annual value of damage.²⁹ This was rejected by the Court, which considered that there was inadequate evidence of the disputed area's original environmental state.³⁰ Moreover, the Court thought it to be far too broad-brush to amalgamate the range of distinct forms of environmental damage caused by Nicaragua into a single category with a set rate of recovery.³¹

Continuing its focus on the avoidance of unsuitable generalisations in valuation, the Court went on to reject Nicaragua's suggested methodology (focused on compensating "replacement costs"),³² which calculated a value for each hectare of land affected based on the money paid by Costa Rica to incentivise local landowners to participate in conservation activities—"the prices paid... are designed to offset the opportunity cost of preserving the environment for those individuals and groups" as opposed to representing 'the value of the goods and services provided by the ecosystem'.³³ The ICJ perceptively rejected a "corrected analysis" alternatively put forward by Nicaragua, which employed Costa Rica's suggested methodology with key alterations. The Court placed weight on how the corrected analysis failed to account for the long-lasting impact of environmental damage on fragile wetland ecosystems themselves, as well as upon their capacity to remove carbon dioxide (carbon sequestration) from the surrounding atmosphere.³⁴

The ICJ instead employed its own methodology, engaging in an overall assessment of environmental damage and its impacts on goods and services "from the perspective of the ecosystem as a whole".³⁵ Three reasons were offered for doing so: (1) the removal of trees by

²⁷ *ibid* [76].

²⁸ *ibid* [45].

²⁹ *ibid* [56].

³⁰ *ibid* [76].

³¹ *ibid*.

³² *ibid* [49].

³³ *ibid* [77].

³⁴ *ibid* [85].

³⁵ *ibid* [78].

Nicaragua has knock-on impacts affecting other forms of environmental harm claimed for,³⁶ (2) the goods and services of the wetland ecosystem in question are by their nature “closely interlinked”,³⁷ and (3) an overall valuation enables natural regeneration to be factored into a valuation.³⁸

IV. EVALUATING THE OVERALL ASSESSMENT APPROACH

It is important to evaluate the ICJ’s overall assessment approach to the valuation of quantifiable environmental damage because the approach may inform how the Court adjudicates future environmental compensation claims. Although the Court in this case was clearly influenced by the San Juan River wetland’s great ecological complexity and special protection from the Ramsar Convention, all ecosystems consist of interconnected elements, and natural regeneration likewise will surely always need to be taken into consideration. Furthermore, as the negative effects of climate change and other forms of environmental degradation make themselves increasingly felt, it appears probable that future disputes similar to that in *Costa Rica v Nicaragua* will find their way to the ICJ or other international tribunals.³⁹

The problem evident in the overall assessment approach is that it may well be charged with the same fault the Court implicitly identified in rejecting the methodologies suggested by Costa Rica and Nicaragua: drawing overly simplistic generalisations in valuation. In its judgment, the Court does not detail how the approach is actually applied. The only guidance given as to this matter of application is a statement of the relevant environmental goods and services examined (that is, those established as affected by Nicaragua’s wrongful acts), that the overall assessment will deduct from the compensation awarded a sum to account for the causal uncertainties present, and whatever can be gleaned from the Court’s reasons for adopting the approach. These pieces of information aside, the Court essentially goes straight from declaring that it will undertake an overall assessment to announcing the monetary sum of compensation to be awarded.

³⁶ *ibid* [79].

³⁷ *ibid* [80].

³⁸ *ibid* [81].

³⁹ See Philippe Sands, ‘Climate Change and the Rule of Law: Adjudicating the Future in International Law’ (2016) 28 *EJIL* 19, 32.

A. WHY THE ICJ NEEDS CLARITY IN ITS METHODOLOGY

This criticism may be challenged as unfounded on the ground that the ICJ did not need to provide guidance on how it applied its overall assessment. After all, the compensation judgment presently considered only arose because Costa Rica and Nicaragua were unable to agree on the quantum of compensation between themselves—so long as the sum awarded was not excessively high or excessively low, the methodology employed by the Court could be argued to be of relatively limited significance to either Party. In light of the absence of international adjudicative bodies of compulsory jurisdiction however, such an argument cannot stand. The role of judicial “style[s]” of judgment in municipal systems as reflections of how courts attempt to “persuade [their relevant] legal audience” of the soundness of their decisions has been thoroughly explored by commentators.⁴⁰

This burden of persuasion must weigh even more heavily on international tribunals, which rely on the consent of States to their jurisdiction in order to fulfil their role in the international system. The ICJ should hence be more forthright in its application of the legal methodology it has apparently formulated under the label of an overall assessment to the facts of future environmental compensation claims. In the context of the ICJ’s apparent use of “assertion” rather than thorough evaluations of State practice to determine customary international law, Talmon has cautioned that “[i]f the Court’s assertions do not convince its clients, States may simply stay away from the Court”.⁴¹ The same may be said in the realm of environmental adjudication of the use of an uncertain overall assessment to determine compensation, which as presently set out conceals more than it clarifies.

B. THE ICJ’S ASSESSMENT LACKS PRINCIPLED, NORMATIVE DIRECTION

A second ground on which this criticism may be challenged is that the ICJ cannot be expected to expound in detail how it reached the sum owed by Nicaragua. Doing so would be contrary to its reasons for employing the overall assessment approach in the first place—environmental damage is not readily amenable to precise quantification. But consider the Separate Opinion of Judge Bhandari, where he highlights the approach of the ICJ to non-material injury to the person in *Diallo*. Precise quantification was also rendered difficult by the nature of the harm

⁴⁰ John Bell, ‘Comparing Precedent’ (1997) 82 Cornell Law Review 1243, 1250.

⁴¹ Stefan Talmon, ‘Determining Customary International Law’ (2015) 26 EJIL 417, 442.

there, but the ICJ was clear that “[q]uantification of compensation for non-material injury necessarily rests on equitable considerations”.⁴²

It may be said that recourse to the legal concept of equitable considerations provides no more clarity on quantification in isolation than undertaking an overall assessment; the former concept only has practical meaning to the extent an examination of international treaties or jurisprudence elucidates. Indeed, such an examination was carried out by the ICJ in *Diallo*.⁴³ Notwithstanding, the reliance on equitable considerations undoubtedly engages normative principles, and provides a starting point as to how the Court approaches compensation claims. As the concept’s application in *Diallo* shows, the fundamental importance of redressing the abuses suffered by Mr Diallo as an individual meant that compensation should not be prevented by niceties of causation or quantification—the “benefit of the doubt” should be given. In other words, the principle demanding just compensation for human rights abuses provides at least a tentative indication that the quantum to be awarded will be generous as compared to the position in a claim under a different head of damage equally afflicted by imperfect evidence of a direct causal nexus.

By contrast, the ICJ’s overall assessment approach in *Costa Rica v Nicaragua* does not provide a comparable normative starting point. True, the ICJ does acknowledge the interconnected nature of ecological systems, but when calculating compensation for quantifiable damage, this does no more than amount to an assertion that *all circumstances*, as extremely wide ranging as they are, will be taken into account. Recognising this issue, Judge Bhandari seemingly distanced himself from the label of an overall assessment, preferring instead that the injured State be straightforwardly awarded “a lump sum amount of compensation based on equitable considerations”.⁴⁴ Judge Bhandari’s suggestion has much to commend it, but care should be taken in the environmental context to ensure equitable considerations are not used to mask judicial discretion untethered to any attempt at objective quantification of damage. The concept should serve to frame the Court’s approach, directing it and providing a means to overcome uncertainties arising within the quantification process.

⁴² *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo (Compensation))* [2012] ICJ Rep 324 [24].

⁴³ *ibid.*

⁴⁴ *Border Area (Compensation)* (n 1), Separate Opinion of Judge Bhandari [11] <<https://www.icj-cij.org/files/case-related/150/150-20180202-JUD-01-03-EN.pdf>> accessed 9 February 2018.

V. THE QUESTION OF PUNITIVE DAMAGES FOR ENVIRONMENTAL HARM

Judge Bhandari's Separate Opinion is also of note for its endorsement of the award of punitive damages for serious environmental harm caused by the wrongful conduct of States,⁴⁵ a prospect which the Court rejected in its judgment.⁴⁶ Judge Bhandari draws upon the ever closer link which has been observed elsewhere between international environmental law and themes of world public order⁴⁷. Matters of no lesser significance than the "survival of mankind"⁴⁸ are said to warrant the imposition of punitive damage by international tribunals so as to deter State behaviour harmful to the environment. Judge Bhandari's reasoning is normatively attractive, and its implementation in practice would move international law closer to a system prioritising the "greater interests of humanity and planetary welfare" over "individual State self-interest", as envisaged by Vice-President Weeramantry in his Separate Opinion to the *Gabčíkovo-Nagymaros Project* judgment.⁴⁹

Additionally, as explained by Shelton in the context of remedies in international human rights law, punitive damages would "also [provide] an incentive for victims who have suffered severe dignitary harm, but little compensatory loss, to pursue wrongdoers who would otherwise go unsanctioned".⁵⁰ This rationale is applicable *mutatis mutandis* to punitive damages for environmental harm. It is certainly conceivable a State economically reliant on a larger neighbouring State may decide against pursuing claims against them, tolerating a certain degree of environmental harm out of a concern to preserve trading relations as they stand. The availability of punitive damages may serve to alter the calculus of the injured State in favour of bringing a claim to the benefit of the wider international community, due to the prospect of a greater quantum of damages than a merely compensatory sum, along with the enhanced moral sanction involved.

Existing State practice indicates that the future development of customary international law to allow the imposition of punitive damages on States which wrongfully cause environmental harm is plausible. States have increasingly demonstrated a willingness to depart from a consensualist model of international law with absolute State sovereignty at its centre, insofar as they have

⁴⁵ *ibid* [18].

⁴⁶ *Border Area (Compensation)* (n 1) [31].

⁴⁷ See Hisashi Owada, 'International Environmental Law and the International Court of Justice' (Inaugural Lecture at the Fellowship Programme on International and Comparative Environmental Law, 2006).

⁴⁸ Separate Opinion of Judge Bhandari (n 44) [17].

⁴⁹ *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* [1997] ICJ Rep 7, Separate Opinion of Vice-President Weeramantry 118.

⁵⁰ Dinah Shelton, *Remedies in International Human Rights Law* (3rd edn, OUP 2015) 402.

accepted legal constraints prohibiting environmentally harmful conduct. The evolution of the law of State responsibility to allow punitive damages in the environmental context would conform to the trend.

Take for example the practice of the 10 States of the Association of South East Asian Nations (ASEAN) in response to transboundary haze pollution. ASEAN has been characterised as the regional grouping “wariest about embracing [international legal] rules and structures”.⁵¹ Its Member States’ “general wariness of delegating sovereignty”⁵² is encapsulated in the “ASEAN Way”, a political approach to intra-regional relations emphasising consensus and mutual non-interference.⁵³ Certain commentators have even gone so far as to argue that ASEAN State practice and *opinio juris* is so consistent as to give the ASEAN Way the status of regional custom.⁵⁴ Even so, the challenges of adequately addressing transboundary haze emanating from Indonesian forest fires have led to changes to the ASEAN Way. These changes have taken the form of the adoption of hard-law instruments such as the ASEAN Agreement on Transboundary Haze Pollution 2002.⁵⁵ The 2002 Agreement enshrined the “no harm principle”, that States are obliged to refrain from conduct within their territories which lead to environmental harm in other States.⁵⁶ A prevalent regional adherence to Westphalian conceptions of sovereignty⁵⁷ was therefore altered “so that it is more compatible with the evolving principles of international environmental law”.⁵⁸ ASEAN States have “[accepted] that a state’s sovereignty is limited by the principles governing transboundary pollution”.⁵⁹ If these changes are possible within ASEAN, it seems reasonable to assert that a wider evolution of customary international law to deter environmental harm with punitive damages is not entirely unforeseeable.

⁵¹ Simon Chesterman, ‘Asia’s Ambivalence about International Law and Institutions: Past, Present and Futures’ (2016) 27 *EJIL* 945.

⁵² *ibid* 946.

⁵³ TI Nischalke, ‘Insights from ASEAN’s Foreign Policy Co-operation: The “ASEAN Way”, a Real Spirit or a Phantom?’ (2000) 1 *Contemporary Southeast Asia* 89, 90.

⁵⁴ Koh Kheng-Lian, Nicholas A. Robinson and Lye Lin-Heng, *ASEAN Environmental Legal Integration: Sustainable Goals?* (CUP 2016) 24.

⁵⁵ Laely Nurhidayah, Shawkat Alam and Zada Lipman, ‘The Influence of International Law upon ASEAN Approaches in Addressing Transboundary Haze Pollution in Southeast Asia’ (2015) 37 *Contemporary Southeast Asia* 183, 191.

⁵⁶ *ibid*.

⁵⁷ See generally, Simon Chesterman (n 51).

⁵⁸ Nurhidayah, Alam and Lipman (n 55) 203.

⁵⁹ *ibid*.

It is nevertheless worth reiterating that punitive damages do not presently form part of customary international law, as Judge Bhandari acknowledges.⁶⁰ As a matter of policy they remain highly controversial,⁶¹ and the Separate Opinions in *Costa Rica v Nicaragua* underscore the disagreement between members of the ICJ on the issue. Warning against their introduction through the overall assessment approach, Judge Gevorgian argues that to do so would risk “the peaceful settlement of environmental disputes [being] jeopardised”.⁶² Judge Gevorgian’s concerns appear to relate to how States may reject international adjudication for environmental dispute settlement if the ICJ or other tribunals impose punitive damages upon them by judicial fiat. No doubt, the basic requirement of “a settled practice”⁶³ of States for customary international law formation would render any arbitrary award of punitive damages illegitimate, regardless of the policy justifications behind them.⁶⁴ Insofar as Judge Bhandari’s call for the “progressive development”⁶⁵ of customary international law envisages precisely such an award, the restraint on the ICJ’s part is prudent. That being said, the issues raised in his Separate Opinion remain pertinent grounds on which to criticise the Court’s refusal to discuss the desirability of punitive damages, and thereby encourage their renewed consideration by States.

VI. *ERGA OMNES* OBLIGATIONS AND INTERNATIONAL ENVIRONMENTAL PROTECTION THROUGH GUARANTEES OF NON-REPETITION

Regrettably, the ICJ’s judgment makes no mention of the relationship between *erga omnes* obligations, “the obligations of a State towards the international community as a whole”,⁶⁶ and compensation for environmental harm caused by internationally wrongful conduct. The issue is however directly addressed in the Dissenting Opinion of Judge *ad hoc* Dugard. He posits that the quantum of compensation awarded to Costa Rica for Nicaragua’s destruction of trees in the

⁶⁰ Separate Opinion of Judge Bhandari (n 44) [16].

⁶¹ Not least due to their association with the concept of “crime of State”; also see Dinah Shelton, *Remedies in International Human Rights Law* (3rd edn, OUP 2015) 416.

⁶² *Border Area* (Compensation) (n 1), Declaration of Judge Gevorgian [9] <<https://www.icj-cij.org/files/case-related/150/150-20180202-JUD-01-04-EN.pdf>> accessed 9 February 2018.

⁶³ *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)* [1969] ICJ Rep 44 [77].

⁶⁴ Article 38(1)(b) of the ICJ Statute would also preclude the ICJ applying purportedly customary rules or principles not derived from “general practice accepted as law”.

⁶⁵ Separate Opinion of Judge Bhandari (n 44) [18].

⁶⁶ *Barcelona Traction, Light and Power Company, Limited* [1970] ICJ Rep 3, [33].

disputed area was insufficient, because “the obligation not to engage in wrongful deforestation that results in the release of carbon into the atmosphere and the loss of gas sequestration services is certainly an obligation *erga omnes*”.⁶⁷ As such, Costa Rica’s compensation should have been inflated to reflect the breach of an obligation owed both to itself, along with the international community as a whole.⁶⁸

Accepting Judge *ad hoc* Dugard’s categorisation of an obligation against wrongful deforestation as an *erga omnes* obligation, it is difficult to see why simply because Costa Rica is ‘the State most immediately affected’ and “the most likely to assert [the connected rights]”,⁶⁹ it should receive increased compensation to vindicate rights owed to all States across the globe. If part of the sum of compensation awarded to Costa Rica reflects compensation for a breach of an obligation owed to the international community, it follows naturally that Costa Rica would be bound to use that proportion of its award to mitigate the environmental harm caused by the breach to the wider world. That is clearly unsupported by State practice at present. Costa Rica has a complete discretion as to how it should use the monetary compensation it is awarded.⁷⁰ The international community would thus receive nothing in the way of material redress, but one of its members receives a windfall on its behalf.⁷¹

The categorising some of the obligations breached by Nicaragua as *erga omnes* lends itself more readily to measures such as guarantees of non-repetition, adding force to the suggestions within the Separate Opinion of Judge Cançado Trindade. He correctly viewed the ICJ’s judgment as too narrowly restricted to monetary compensation, failing to consider different forms of reparations better suited to environmental harm, including said guarantees.⁷² The interests of the international community in redressing a breach of obligations owed to it would be materially served

⁶⁷ *Border Area (Compensation)* (n 1), Dissenting Opinion of Judge *ad hoc* Dugard [35] <<https://www.icj-cij.org/files/case-related/150/150-20180202-JUD-01-06-EN.pdf>> accessed 9 February 2018.

⁶⁸ *ibid.*

⁶⁹ *ibid.*

⁷⁰ Also see Article 19, International Law Commission Draft Articles on Diplomatic Protection (2006).

⁷¹ A windfall of this type would be distinct from Costa Rica receiving a greater quantum of compensation awarded as punitive damages. While both Judge *ad hoc* Dugard’s *erga omnes* approach and punitive damages would see a State receive a greater quantum of compensation, an award of punitive damages does not suffer from the aforementioned logical difficulty of compensating a State for a breach of an obligation not owed to it, but to the international community. The rationale for an award of punitive damages is based on a policy choice: if States consider the protection of the environment to be sufficiently important to world public order, punitive damages should be seen as a means to enforce this norm and *deter conduct* seriously deleterious to States’ common interest, rather than as compensating the international community in monetary terms.

⁷² *Border Area (Compensation)* (n 1), Separate Opinion of Judge Cançado Trindade [54] <<https://www.icj-cij.org/files/case-related/150/150-20180202-JUD-01-01-EN.pdf>> accessed 9 February 2018.

by a Costa Rican claim preventing future breaches and the consequent environmental harm. The possible expansion of *erga omnes* obligations associated with international environmental protection should encourage the ICJ to diversify the future reparations it orders in disputes involving environmental harm.

VII. CONCLUSION

Despite the above objections to Judge *ad hoc* Dugard's reasoning on *erga omnes* obligations, his overall sentiment that the ICJ's compensation judgment in *Costa Rica v Nicaragua* represents a missed opportunity is apt.⁷³ In its first adjudication of a claim for compensation for environmental harm, the ICJ has shown that it is capable of determining a practically unobjectionable award despite the hurdles of evidential uncertainty inherent in such claims. The Court's causation and quantification analyses successfully incorporated the flexibility necessary to do so.

However, the judgment's approach is undermined by its failure to provide clarity on how an overall assessment to quantify compensation for environmental harm is carried out, as well as the reluctance of the Court to moot punitive damages and guarantees of non-repetition as appropriate remedies. The Separate and Dissenting Opinions issued by certain members of the Court help illustrate that persuasive arguments do exist for these specific developments. These faults compromise the judgment's capacity to lead the advancement of international law's protection of the environment, a matter which engages issues of existential importance to humankind. These high-stakes circumstances demand a degree of judicial ingenuity on the part of the World Court.

⁷³ See Dissenting Opinion of Judge *ad hoc* Dugard (n 67) [36].