

Just Satisfaction for Individuals When States Sue Each Other for Treaty Breaches

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By: James Hendry

In the recent Case of Georgia v. Russia (Georgia, 2019), the Grand Chamber of the European Court of Human Rights held that Russia had to pay to Georgia 10 million euros in respect of non-pecuniary damage suffered by a group of at least 1500 Georgians expelled from Russia contrary to the terms of the European Convention on Human Rights and Protocols(Convention), to be distributed to the individual victims, in the context of an inter-State case. In this note, I will look at how a regional international court decided that it could allocate damages for individual victims who suffered the actual fallout in a dispute between sovereign States.The Court earlier held in the Case of Georgia v. Russia (Georgia, 2014) on the merits, that the Russian Federation had enforced an administrative practice of arresting, detaining and expelling Georgian nationals in the fall of 2006 as a result of political tensions, breaching:

- Article 4 of Protocol No. 4 of the Convention prohibiting the collective expulsion of aliens
- Articles 5 (1) and (4) because the arrests and detentions of Georgian nationals contravened both their right to liberty and proper legal procedure for a deprivation and their Article 5(4) right to challenge such arrests, detentions and expulsion orders
- Article 3 because some of the arrests and detentions subjected them to torture, inhuman or degrading treatment or punishment
- Article 13 because many had no right to a Russian remedy in respect of breaches of these rights (except Article 5(4) which provides for a specific remedy for the liberty right).

At the time of its decision on liability in 2014, the Court held that the issue of reparations in Article 41 was not ready for examination. It provides:

If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.

After the decision on the merits, the Court awaited a settlement, and when one was not forthcoming, invited Georgia to provide details of Georgian victims pursuant to Rule 60(2) of the Rules of Court (Rules) which provide that the applicant shall provide itemized particulars of all of its claims with supporting documents. Gathering the information about the victims was obviously difficult. Georgia initially provided a list of 345 victims with annexes, and then a final list at the Court's request, with 1795 victims (including the original 345) with annexes. The Court invited Russia to respond with all relevant information including expulsion orders and court decisions concerning the listed victims and reminded Russia of its duty to cooperate in the Court's process as provided for in the Rules. Georgia later filed a third list of 21 victims which the Court ruled out of time. Russia filed comments and annexes.

The Court determined that Article 41 applied drawing on the basic principles of international law recently applied in Case of Cyprus v. Turkey (Cyprus) in 2014. Cyprus was only the second time it dealt with just satisfaction in an inter-State case (Cyprus, para. 39). There, the Court referred to the basic principle of international law requiring a State to make reparations for an international wrong devised by the International Court of Justice in the Gab?íkovo-Nagymaros Project (Hungary/Slovakia,1997) case, para. 152. The Court in Cyprus held that it was well-established that an international court or tribunal with jurisdiction over the dispute between States also has jurisdiction to award compensation for damage suffered. Even though Article 41 was *lex specialis* in relation to general international law, the Court in Cyprus did not feel that it could narrowly interpret it as not applying in inter-State proceedings. Further, the textual reference to "just satisfaction to the injured party" had to refer to a party to an action while Rule 60, though not as authoritative as a provision of the Convention, reflected the practice that awards made by the Court under Article 41 have been made to individual applicants. Just satisfaction had to be determined on a case by case basis considering the goal of the proceedings: an application aiming to correct the administrative practice in another Contracting Party might not properly require just satisfaction for individuals, but a case

brought by a State on behalf of its nationals similar to an application under Article 34 by individuals claiming a breach by another State of their basic human rights might deserve just satisfaction for each victim. The Court in Cyprus emphasized that under the Convention, it is the individual who is injured, and just satisfaction is accorded to that individual. The Court summarized by stating that it had held in Cyprus that there were three criteria for establishing that just satisfaction was justified in an inter-State case: (a) whether the complaint brought by the applicant government concerned the violation of the basic human rights of its nationals (b) whether the victims could be identified and (c) the main purpose of the application (Georgia, 2019, para. 22).

Georgia's application was clearly for the benefit of individual victims and not the State, met the three criteria and so it was entitled to submit a claim under Article 41.

The question then was whether Georgia's claim was for "a sufficiently precise and objectively identifiable" group of people. The Court in deciding liability in Georgia 2014 had "assumed" that more than 4600 expulsion orders had been made against Georgians with 2380 of them detained and forcibly expelled (Georgia, 2014, para. 135). The Court in 2019 explained that the Court had made this assumption in 2014 based on the proven existence of the practice of expulsion, the lack of information from Russia undermining the Georgian alleged numbers of victims, even in the face of the lack of the required proof beyond a reasonable doubt of specific numbers (Georgia, 2019, para. 52). The Court in 2014 had relied on an approximate number of expulsion and detention orders when it determined there was an administrative practice, which the Court in 2019 held to be very different from its duty to establish the identity of individual victims (Georgia, 2019, para. 53). It concluded in 2019 that there had to be a distinction between using these figures to establish liability and figures required to establish just satisfaction. It reasoned that the just satisfaction rule derived from the logic of public international law that required a right-infringing State to cease the act and to make full reparation for the injury caused. This was reflected in Article 41 that requires identification of individual victims (Georgia 2019, paras. 53-55).

The Court resolved this problem by considering the operation of the judicial process, the balance of proof and the duty of both parties to produce relevant information. In a just satisfaction case based on human rights breaches in an administrative process that produced individual administrative decisions, the duty of both States party to cooperate meant that, in this case, when Georgia filed the information it had, Russia had a duty to produce relevant information such as individual expulsion orders, appeals, detentions and arrests as prompted by the Court. The Court emphasized that it was not a fact-gathering court of first instance and that it was not appropriate for it to inquire into a large number of individual cases and calculate specific awards of satisfaction, which should be done in domestic courts. (It stated earlier that it did not rule on individual cases but treated them as evidence of a practice (Georgia 2014, paras. 128 and 171). The Court held that this was particularly true of inter-State cases, distinguishing it from the Cyprus case, which was a military operation and not a series of specific court decisions establishing the rights-breaching practice in this case, all of which should have been recorded and producible based on the duty to cooperate.

When it reached the assessment of just satisfaction, the Court proceeded on the assumption that the people on Georgia's list were victims because Georgia said they were, and the numbers accorded with the numbers of victims of human rights breaches for which Russia was found liable by the Court in Georgia 2014. The Court held that the burden of proof shifted to Russia to convincingly show that these individuals were not victims because the Court had found Russia liable for individual breaches of the Convention on its territory in the Georgia 2014 decision. If Russia failed to do this, the individuals would be considered part of the group entitled to a total amount as just satisfaction. Russia's acknowledgement that there were "some" victims was taken by the Court as support for the numbers put forward by Georgia (Georgia 2019, para. 70). However, the Court determined that some 290 individuals, including those who had brought personal applications against Russia, were not victims for various reasons. The Court concluded that there were at least 1500 Georgian nationals who were victims of Russia's administrative practice contrary to Article 4 of Protocol 4.

The Court also had to deal with cases of a breach of the liberty and freedom from inhuman and degrading conditions of detention rights under Articles 5(1) and 3. Noting that the Convention does not expressly provide for non-pecuniary damages for human rights breaches, it distinguished the situation of a systemic breach of the Convention which could be remedied by a judgment correcting the practice, from the one before it where it could make an award where it impinged "significantly on the moral well-being" of an individual, and caused physical and mental trauma. The Court emphasized that it would not act as a domestic court dealing with an apportioning of fault and compensatory damages as domestic courts do in tort cases. It would be guided by equity, doing what is just in the circumstances, taking into account that it was making an award for a breach of a Convention right and considering the severity of the damage (Georgia 2019, para. 73).

The Court started from the premise that at least 1500 Georgians were victims of Article 4 of Protocol 4 while some had also been victims of breaches of Articles 3 and 5, all of whom suffered trauma during the fall of 2006 as a result of the Russian administrative practice for which it had been found liable. Using the discretion it had in determining what was equitable and in light of the imponderables such as the passage of time, the Court awarded 10 million euros to Georgia for non-pecuniary damages for this group of 1500 individuals. It went on to order that Georgia must distribute 2000 euros to each victim of Article 4 alone, with amounts from 10000 and 15000 euros to those who were also victims of breaches of liberty and who suffered inhuman treatment. The only criteria it identified for the distribution was the length of detention. The Court reiterated that it does not award punitive or exemplary damages. The Court also reminded Russia of its duty to satisfy its legal obligations under Article 46 of the Convention in accordance with the judgment and specific measures taken by the Committee of Ministers of the Council of Europe in execution of it. The Court held that Georgia had to set up a mechanism to distribute the amounts ordered to each victim under the supervision of the Committee and within eighteen months of the payment of the assessed amount by Russia. The Court set a default interest rate as well. Interestingly, four of the seventeen judges concurred in the reasoning, but thought that the numbers of victims should be those found by the 2014 Court, namely 4600 expulsion orders and 2380 detentions, stating that Russia had failed to provide all of the

expulsion and detention orders, which would have established an exact number (Georgia 2014, para. 135, Georgia 2019, paras. 7 and 8). A single dissenting judge thought that the amounts awarded should be distributed by Russia.

Conclusion

The award of individual amounts for those injured by the breach of a State of its treaty obligations by a respected regional international court adds weight to the international principle of compensating the victims of international human rights abuses for their losses. This is a logical development of the increase of important treaties recognizing the rights of individuals of all States parties since the Second World War. The case also shows a court willing to remedy such breaches where the information about specific victims is sparser than it might be before a domestic court. The Court here was willing to make an award based on the existence of a breach of rights, the claim by the State on behalf of its injured nationals and the lack of cooperation and information by the perpetrator State to the contrary. The Court recognized the baseline injury of a rights breach, while using a broad discretion to deal with more egregious breaches. The reasons for judgment do not tell how the Court arrived at the number of victims it compensated (except that 1500 was a “sufficiently precise and objectively identifiable group”, but see the dissent on this point), the figure for damages nor how Georgia should distribute damages for the more severe breaches, other than equity. But the end result is that the principle of reparations for a State’s breach of international obligations has been strengthened in this case.

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