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Second report on State responsibility, by Mr. Gaetano Arangio-Ruiz, Special Rapporteur

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Second report on State responsibility, by Mr. Gaetano Arangio-Ruiz, Special Rapporteur

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ABBREVIATIONS

AJIL	*American Journal of International Law*
Annual Digest	*Annual Digest of Public International Law Cases*
BFSP	*British and Foreign State Papers*
Chronique, see RGDIP	
Collected Courses ...	*Collected Courses of The Hague Academy of International Law*
ILM	*International Legal Materials*
ILR	*International Law Reports*
Kiss, *Répertoire*	A.-C. Kiss, *Répertoire de la pratique française en matière de droit international public*
Lapradelle-Politis	A. de Lapradelle and N. Politis, *Recueil des arbitrages internationaux*

Martens, *Nouveau Recueil*, 2nd series	G. F. de Martens, *Nouveau Recueil général de Traités*, 2nd series
Moore	J. B. Moore, *History and Digest of the International Arbitrations to which the United States has been Party*
Moore, *Digest*	J. B. Moore, *A Digest of International Law*
Österr. Z. öff. Recht	*Österreichische Zeitschrift für öffentliches Recht*
Prassi italiana	S.I.O.I., *La prassi italiana di diritto internazionale*
Ralston	J. H. Ralston, *Venezuelan Arbitrations of 1903*
Recueil des cours ...	*Recueil des cours de l'Académie de droit international de La Haye*
RGDIP	*Revue générale de droit international public*
"Chronique"	"Chronique des faits internationaux", edited since 1958 by C. Rousseau
UNRIAA	United Nations, *Reports of International Arbitral Awards*
Whiteman, *Damages*	M. M. Whiteman, *Damages in International Law*
Whiteman, *Digest*	M. M. Whiteman, *Digest of International Law*

Introduction

1. In accordance with the plan of work set forth in the preliminary report,[1] the present report deals with the substantive consequences of an internationally unlawful act, other than cessation and restitution in kind.[2]

2. The first consequence thus to be considered is reparation by equivalent. For the reasons explained in the preliminary report, reparation by equivalent, or pecuniary compensation, is the main and central remedy resorted to following an internationally wrongful act.[3] But the study of the doctrine and practice of the law of State responsibility indicates that two further sets of consequences, functionally distinct from *restitutio* and compensation and both quite typical of international relations, must be taken into account. These consequences are the forms of reparation generally grouped under the concept of "satisfaction and guarantees of non-repetition", or under the single concept of "satisfaction". The term "satisfaction" is, of course, used here in a technical, "international" legal sense as distinguished from the broader non-technical sense in which it is obviously used as a synonym of full compensation or full reparation (see paras. 18-19 and 106-145 below).

3. Although rather widely recognized, the distinction between satisfaction and pecuniary compensation is not without problems. A minor difficulty is of course the confusion caused by the occasional use of the term "satisfaction" in the broad, non-technical sense referred to above. Another difficulty, which is considerable, not negligible, derives from the ambiguity of the two adjectives generally used to characterize the kinds of injury, damage, loss or *préjudice* respectively covered by pecuniary compensation and satisfaction: "material" and "moral".[4]

4. Compensation is generally described—in a sense quite rightly (see paras. 52 *et seq.* below)—as covering all the "material" injury "directly" or "indirectly" suffered by the offended State. Satisfaction is generally indicated as covering instead the "moral" injury sustained by the offended State in its honour, dignity and prestige and perhaps (according to some authorities) in its legal sphere (see paras. 13-16 below). The two adjectives, however, fail to give an exact picture of the areas of injury covered respectively by compensation and satisfaction. On the one hand, pecuniary compensation, allegedly covering material damage, is intended also to compensate for moral damage suffered by the persons of private nationals or agents of the offended State. Satisfaction, in its turn, is normally understood to cover not such

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[1] *Yearbook ... 1988*, vol. II (Part One), p. 6, document A/CN.4/416 and Add.1, paras. 6-20.

[2] These two subjects were dealt with in the preliminary report (*ibid.*, paras. 21-63 and 64-131, respectively).

[3] *Ibid.*, especially paras. 117-118.

[4] The number and variety of adjectives used in the literature and the practice to describe the relevant damage (see below, paras. 7 *et seq.* and 52 *et seq.*) are such that it is deemed advisable not to embark on a long discussion of the noun. While most frequently understood in a very general sense, inclusive of any kind of negative consequence of an internationally wrongful act, the term "damage" is not infrequently used, especially in the less recent literature, in the narrower sense of physical or material damage. "Injury" and "loss" are perhaps more often used, as is the French *préjudice*, in the broadest sense implied in article 5 of part 2 of the draft as adopted by the Commission on first reading (*Yearbook ... 1986*, vol. II (Part Two), p. 39). It seems, nevertheless, that the four terms are often if not mostly used as synonyms. Unless otherwise indicated, the words injury, damage, loss and *préjudice* will be so used by the Special Rapporteur, always in the broadest sense.

moral damage suffered by nationals or agents but only moral damage to the State. A brief explanation, with some support from practice and literature, should therefore precede the separate treatment of reparation by equivalent, on the one hand, and satisfaction (with guarantees of non-repetition), on the other.

5. A further problem to be tackled in the present report is the impact of fault (in a broad sense) on the forms and degrees of reparation which are being considered, particularly on reparation by equivalent, satisfaction and guarantees of non-repetition. Whatever the merits of the theory of fault followed so far by the Commission with regard to the minimum requisites of an internationally wrongful act (see paras. 162-163 below), it seems indeed reasonable to assume that any degree of fault found eventually to characterize an internationally wrongful act may have an impact on the forms and degrees of reparation due from the offending State. Apart from the fact that delicts themselves may present different degrees of gravity from the point of view of fault, one should not forget that the draft articles cover crimes in addition to delicts: and crimes normally involve the highest degrees of fault.

6. The present report is thus divided into five chapters. Chapter I deals, for the reasons explained above (paras. 3-4), with the areas of injury covered respectively by compensation and satisfaction. Chapter II deals with reparation by equivalent or pecuniary compensation in its various elements, chapter III with satisfaction, and chapter IV with guarantees of non-repetition. Chapter V contains a few tentative considerations on the impact of fault upon the forms of reparation considered in the previous chapters, more notably on satisfaction and guarantees of non-repetition. Chapter VI presents the proposed new draft articles covering the remedies dealt with in chapters I-V. The new draft articles are meant to follow, within the framework of part 2 of the draft, articles 6 (Cessation) and 7 (Restitution in kind) as set forth in the preliminary report.[5]

CHAPTER I

I. MORAL INJURY TO THE STATE AND THE DISTINCTION BETWEEN SATISFACTION AND COMPENSATION

A. Introduction

7. One reads frequently that the specific function of reparation by equivalent—as one of the forms of reparation in a broad sense—is essentially, if not exclusively, to compensate for material damage. Correct in a sense, statements such as these—an example of which is to be found in the preliminary report[6]—are ambiguous and call for important qualifications. It is true, indeed, that reparation by equivalent does not ordinarily cover the moral (or non-material) damage to the injured State. It is not true, however, that it does not cover moral damage to the persons of nationals or agents of the injured State.

8. The ambiguity is due to the fact that moral damage to the injured State and moral damage to the injured State's nationals or agents receive different treatment

[5] Document A/CN.4/416 and Add.1 (see footnote 1 above), para. 132.
[6] *Ibid.*, para. 21

from the point of view of international law. A few remarks in that respect seem to be indispensable.

B. "Moral damage" to the persons of a State's nationals or agents

9. The most frequent among internationally wrongful acts are those which inflict damage upon natural or juridical persons connected with the State, either as mere nationals or as agents. This damage, which internationally affects the State directly even though the injury affects nationals or agents in their private capacity, is not always an exclusively material one. On the contrary, it is frequently also, or even exclusively, moral damage—and a moral damage which, no less than material damage, is susceptible of a valid claim for compensation. Notwithstanding the considerable lack of uniformity among national legal systems with regard to moral damage, the practice and literature of international law show that moral (or non-patrimonial) losses caused to private parties by an internationally wrongful act are to be compensated as an integral part of the principal damage suffered by the injured State.

10. One of the leading cases in that sense is the "*Lusitania*" case, decided by the United States-German Mixed Claims Commission in 1923. The case dealt with the consequences of the sinking of the British liner by a German submarine.[7] In regard to the measure of the damages to be applied to each one of the claims originating from the American losses in the event, the umpire, Edwin B. Parker, stated that both the civil and the common law recognized injury caused by "invasion of private right" and provided remedies for it. The umpire was of the opinion that every injury should be measured by pecuniary standards and referred to Grotius's statement that "money is the common measure of valuable things".[8] Dealing in particular with the death of a person, he held that the preoccupation of the tribunal should be to estimate 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**. The sum of these estimates reduced to its present cash value, will generally represent the loss sustained by claimant.[9]

Now, apart from the umpire's considerations regarding the damages under points (*a*) and (*b*), which are relevant with regard to the broader concept of "personal injury", it is of interest to note what he stated with regard to the injuries described under point (*c*). According to him, international law provided compensation for mental suffering, injury to one's feelings, humiliation, shame, degradation, loss of social position or injury to one's credit and reputation. Such injuries, the umpire stated, are very real, and the mere fact that they are difficult to measure or estimate by

[7] Decision of 1 November 1923 (UNRIAA, vol. VII, pp. 32 *et seq.*).
[8] *Ibid.*, p. 35.
[9] *Ibid.*, p. 35.

money standards makes them none the less real and affords no reason why the injured person should not be compensated ...[10]

These kinds of damages, the umpire added, were not penalty".

11. The "*Lusitania*" case should not be considered as an exception. Although such cases have not occurred very frequently, international tribunals have always granted pecuniary compensation, whenever they deemed it necessary, for moral injury to private parties. Examples of this are the *Chevreau* case,[11] the *Gage* case,[12] and the *Di Caro* case.[13] In the latter instance, which concerned the killing of an Italian shopkeeper in Venezuela, the Italian-Venezuelan Mixed Claims Commission took account not only of the financial deprivation suffered by the widow of the deceased, but also of the shock suffered by her and of the deprivation of affection, devotion and companionship that her husband could have provided her with.[14]

12. Another clear example of pecuniary compensation of moral damage suffered by a private party is the *Heirs of Jean Maninat* case.[15] Rejecting the claim for compensation of the material-economic damage, which he deemed to be insufficiently proved, the umpire awarded to the sister of Jean Maninat (victim of an aggression) a sum of money by way of pecuniary compensation for the death of her brother.[16] Mention should also be made of the *Grimm* case decided by the Iran-United States Claims Tribunal, but only to that part of the tribunal's decision in which moral

[10] *Ibid*., p. 40.

[11] Decision of 9 June 1931 (France v. United Kingdom) (UNRIAA, vol. II, pp. 1113 *et seq*.). English trans. in AJIL, vol. 27 (1933), pp. 153 *et seq.*

[12] Decision handed down in 1903 by the United States-Venezuelan Mixed Claims Commission (UNRIAA, vol. IX, pp. 226 *et seq.*).

[13] Decision handed down in 1903 by the Italian-Venezuelan Mixed Claims Commission (UNRIAA, vol. X, pp. 597-598).

[14] The relevant language of the award read:

"But while in establishing the extent of the loss to a wife resultant upon the death of a husband it is fair and proper to estimate his earning power, his expectation of life, and, as suggested, also to bear in mind his station in life with a view of determining the extent of comforts and amenities of which the wife has been the loser, we would, in the umpire's opinion, seriously err if we ignored the deprivation of personal companionship and cherished associations consequent upon the loss of a husband or a wife unexpectedly taken away. Nor can we overlook the strain and shock incident to such violent severing of old relations. For all this no human standard of measurement exists, since affection, devotion, and companionship may not be translated into any certain or ascertainable number of bolivars or pounds sterling. Bearing in mind, however, the elements admitted by the honourable Commissioners as entering into the calculation and the additional elements adverted to, considering the distressing experiences immediately preceding this tragedy, and not ignoring the precedents of other tribunals and of international settlements for violent deaths, it seems to the umpire that an award of 50,000 bolivars would be just." (*Ibid.*, p. 598.)

[15] Decision of 31 July 1905 of the Franco-Venezuelan Mixed Claims Commission (UNRIAA, vol. X, pp. 55 *et seq*.).

[16] The umpire stated *inter alia*:

"In this case, unlike that of Jules Brun, there are other considerations than the loss which Justina de Cossé has suffered through the death of her brother Juan. There is no evidence that she was ever dependent upon him for care or support, or that he ever rendered either, or that she was so circumstanced as to need either, or that he was of ability or disposition to accord either. Therefore it is difficult to measure her exact pecuniary loss. There exists only the ordinary presumptions attending the facts of a widowed sister and a brother of ordinary ability and affection. Some pecuniary loss may well be predicated on such conditions. For this she may have recompense ..." (*Ibid*., p. 81.)

damages seemed to be referred to and in principle to be considered as a possible object of pecuniary compensation.[17]

C. "Moral damage" to the State as a distinct kind of injury in international law

13. The moral injuries to human beings considered above should be distinguished, notwithstanding the somewhat confusing terminology generally used, from that other category of non-material damage which the offended State sustains more directly as an effect of an internationally wrongful act. This is the kind of injury which a number of authorities characterize as the moral injury suffered by the offended State in its honour, dignity and prestige[18] and which is considered, at times, to be a consequence of any wrongful act regardless of material injury and independent thereof. According to some authors, one of the main aspects of this kind of injury would be actually that infringement of the State's *right* in which any wrongful act consists, regardless of any more specific damage. According to Anzilotti, for example:

> ... The essential element in inter-State relations is not the economic element, although the latter is, in the final analysis, the substratum; rather, it is an *ideal element**: honour, dignity, the ethical value of subjects. The result is that, when a State sees that *one of its rights** is ignored by another State, *that mere fact involves injury** that it is not required to tolerate, *even if material consequences do not ensue**; in no part of human life is the truth of the well-known saying "Wer sich Wurm macht er muss getreten werden" so apparent ...[19]

Less frequently, but perhaps significantly, the kind of injury in question is also indicated as "political damage", this expression being used, preferably in conjunction with "moral damage", in the above-mentioned sense of injury to the dignity, honour, prestige and/or legal sphere of the State affected by an internationally wrongful act. The expression used is notably "moral and political damage": a language in which it seems difficult to separate the "political" from the "moral" qualification.[20] The term "political" is probably intended to stress the "public" nature acquired by moral damage when it affects more immediately the State in its sovereign quality (and equality) and international personality. In that sense the adjective may be useful in order better to discriminate between the "moral" damage to the State (which is exclusive of inter-State relations) from the "moral" damage more frequently referred to (at national as well as international level) in order to designate the non-material or

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[17] Decision of 18 February 1983 (ILR, vol. 71, pp. 650 *et seq.*, at p. 653). As it is of no interest for present purposes, the question whether the tribunal had jurisdiction under the Iran-United States Claims Settlement Declaration of 1981 is left aside. In other words, the Special Rapporteur takes no stand on the issue which in the *Grimm* case divided the tribunal's majority, on the one hand, and Judge Holtzmann (in his dissenting opinion), on the other hand.

[18] In this sense the expression "moral damage" is used, *inter alia*, by J. C. Bluntschli, *Das moderne Völkerrecht der civilisirten Staten als Rechtsbuch dargestellt*, 3rd ed. (Nördlingen, 1878); French trans. By C. Lardy, *Le droit international codifié*, 5th rev. ed. (Paris, 1895), p. 264; D. Anzilotti, *Corso di diritto internazionale*, 4th ed. (Padua, CEDAM, 1955), vol. I; French trans. by G. Gidel of 3rd Italian ed., *Cours de droit international* (Paris, 1929), p. 524; C. de Visscher, "La responsabilité des Etats", *Bibliotheca Visseriana* (Leyden, 1924), vol. II, p. 119; C. Rousseau, *Droit international public*, vol. V, *Les rapports conflictuels* (Paris, Sirey, 1983), p. 13; G. Morelli, *Nozioni di diritto internazionale*, 7th ed. (Padua, CEDAM, 1967), p. 358.

[19] Anzilotti, *Cours*, pp. 493-494.

[20] See the sixth report of F. V. García Amador on State responsibility, *Yearbook ... 1961*, vol. II, pp. 8 and 24, document A/CN.4/134 and Add.1, paras. 31 and 92; and F. Przetacznik, "La responsabilité internationale de l'Etat à raison des préjudices de caractère moral et politique causés à un autre Etat", RGDIP, vol. 78 (1974), p. 936.

moral damage to the persons of private parties or agents which affects the State, so to speak—and without accepting any distinction between "direct" and "indirect" damage[21]—less immediately at the level of its external relations.

14. In the Special Rapporteur's view, considering in particular the jurisprudential and diplomatic practice (especially the latter) set forth in chapter III below, the "moral" damage to the State so described is in fact distinct both from the material damage to the State and, in particular, from the "private" moral damage to nationals or agents of the State. This "moral damage to the State" notably consists, on the one hand, in the infringement of the State's right *per se* and, on the other, in the injury to the State's dignity, honour or prestige:

(a) The first kind of injury can be described as "legal" or "juridical" damage, such damage being an effect of any infringement of an international obligation (and of the corresponding right). Indeed, as Mr. Ago said, "every breach of an engagement *vis-à-vis* another State and every impairment of a subjective right of that State in itself constitutes a damage, material or moral, to that State".[22] This is a kind of injury which differs from any other effect of the internationally unlawful act; and an injury that exists in any case, regardless of the presence of any material and/or moral damage. As noted by Reuter, "any breach of an international obligation includes moral damage"; in that sense one can say, according to the same author, that "damage is not, therefore, a *distinct* condition for international responsibility".[23]

(b) As regards the further components of the moral damage to the State, Personnaz has rightly noted that "the honour and dignity of States are an integral part of their personality".[24] It may be added, emphasizing Anzilotti's thought, that since such elements often "prevail by far over [the State's] material interests",[25] their infringement *per se* is very frequently invoked by States injured by an internationally wrongful act.[26]

Although conceptually distinct, components (*a*) and (*b*) of the moral damage to the State tend of course to be fused into a single "injurious" effect. Indeed, the juridical injury—namely, the mere infringement of the injured State's right—is felt by that State as an offence to its dignity, honour or prestige. Paraphrasing Anzilotti again, in not a few cases the damage coincides with—and gets to consist essentially of—the very infringement of the injured State's right. A State, indeed, cannot tolerate a breach of its right without finding itself diminished in the consideration it enjoys—namely, in one of its most precious and politically most highly valued assets.[27]

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[21] See document A/CN.4/416 and Add.1 (footnote 1 above), paras. 107-108.

[22] See Mr. Ago's second report on State responsibility, *Yearbook ... 1970*, vol. II, p. 195, document A/CN.4/233, para. 54.

[23] P. Reuter, "Le dommage comme condition de la responsabilité internationale", *Estudios de Derecho Internacional: Homenaje al Profesor Miaja de la Muela* (Madrid, Tecnos, 1979), vol. II, p. 844.

[24] J. Personnaz, *La réparation du préjudice en droit international public* (Paris, 1939), p. 277.

[25] Anzilotti, *Corso*, p. 425.

[26] See, *inter alia*, the "*Carthage*" and "*Manouba*" cases, decisions of 6 May 1913 (France v. Italy), UNRIAA, vol. XI, pp. 449 *et seq.* and 463 *et seq.* respectively; the *Corfu Channel* case, Merits, judgment of 9 April 1949 (*I.C.J. Reports 1949*, p. 4); and the "*Rainbow Warrior*" case (see footnote 344 below). See also chap. III below.

[27] Anzilotti, *Corso*, p. 425.

15. It seems evident that the kind of injury now under consideration is a distinct one:

First, because it is not moral damage in the sense in which this term is used within inter-individual legal systems; it is moral damage in the specific sense of an injury to the State's dignity and juridical sphere;

Second, because it is one of the consequences of any internationally wrongful act, regardless of whether the latter caused a material, moral or other non-material damage to the injured State's nationals or agents;

Third, because in view of its distinct, unique nature, it finds remedy, as will be amply shown in chapter III, not in pecuniary compensation *per se* but in one or more of those special forms of reparation which are generally classified under the concept of "satisfaction" in the technical, narrow sense of the term.

16. The considerations contained in the two preceding paragraphs, which will find more adequate justification below (paras. 106 *et seq.*), may seem to be contradicted by the fact that the reparation for the offended State's moral injury (in the sense just specified) appears at times to be absorbed, in practice, into the sum awarded by way of pecuniary compensation. The award of a remedy for the moral damage in question seems thus hardly perceptible at first sight. More numerous cases are found, however, in international jurisprudence (paras. 111 *et seq.*) as well as diplomatic practice—but most especially in the latter (paras. 119 *et seq.*)—where the injured State's moral prejudice is manifestly covered by the specific kinds of remedies which are classified as "satisfaction". These remedies, which present themselves in a variety of forms, fall into a category of reparation clearly distinct from pecuniary compensation. It is accordingly proposed to deal with them in chapter III under the title of satisfaction.

17. It should nevertheless be noted, for the sake of completeness, that situations are not infrequent in international jurisprudence concerning moral damage to human beings where the arbitrators have expressly qualified the award of a sum covering such damage as "satisfaction" rather than pecuniary compensation. In the well known *Janes* case,[28] for example, the Mexico-United States General Claims Commission thought that "giving careful consideration to all elements involved ... an amount of ..., without interest, is not excessive as *satisfaction** for the personal damage caused the claimants by the nonapprehension and nonpunishment of the murderer of Janes".[29] In the *Francisco Mallén* case, the same Commission, while awarding "compensatory damages" for the "*physical** injuries inflicted upon Mallén", decided that "an amount should be added as *satisfaction for indignity suffered, for lack of protection and for denial of justice*"*.[30] The same Commission made an identical point in the *Stephens*

[28] Decision of 16 November 1925 (UNRIAA, vol. IV, pp. 82 *et seq.*).

[29] Para. 26 of the decision (*ibid.*, p. 90). The Commission criticized the tendency to equate the amount of compensation due for the failure to meet an obligation to show due diligence in pursuing the responsible persons with compensation for economically assessable injury. Its criticism was based on several motivations:

"... If the murdered man had been poor or if, in a material sense, his death had meant little to his relatives, the satisfaction given these relatives should be confined to a small sum, though the grief and the indignity suffered may have been great. On the other hand, if the old theory is sustained and adhered to, it would, in cases like the present one, be to the pecuniary benefit of a widow and her children if a Government did *not* measure up to its international duty of providing justice, because in such a case the Government would repair the pecuniary damage caused by the killing, whereas she practically never would have obtained such reparation if the State had succeeded in apprehending and punishing the culprit." (*Ibid.*, p. 87, para. 20 *in fine*.)

[30] Decision of 27 April 1927 (UNRIAA, vol. IV, p. 173 *et seq.*, at pp. 179-180).

Brothers case.[31] The tendency to use the concept of "satisfaction" with regard to situations such as these is clearly present also in the literature. According to Personnaz:

> ... It is true here, as indeed in most cases, that it is impossible to restore things to their previous state; but the meaning of the term reparation has to be understood. It should not be interpreted in the narrowest sense, namely, redoing what has been destroyed, wiping out the past. It simply affords the victim the opportunity to obtain *satisfaction** equivalent to what he has lost: the real role of damages is one of satisfaction rather than compensation.[32]

And Christine D. Gray notes more recently, with regard to the same situations:

> ... Apparently the amount [of damages] depends on the gravity of the injury involved, and this suggests that the award is intended as *pecuniary satisfaction** for the injury rather than as *compensation** for the pecuniary losses resulting from it ....[33]

D. The distinct role of satisfaction

18. The practice and the literature referred to in the preceding paragraph do not seem really to contradict the distinction between moral damage to persons, susceptible of pecuniary compensation, on the one hand, and moral damage to the State as an inherent consequence of any internationally wrongful act and a possible object of the specific remedy of satisfaction in a technical sense, on the other hand. As used in some of the cases and literature cited in that paragraph, the term "satisfaction" is to be understood, in the opinion of the Special Rapporteur:

(a) either in the very general, *non-technical* sense in which that term is used as a synonym of reparation in the broadest sense (reparation's function being to "satisfy", or to "give satisfaction to", the injured party, whether an individual or a State);

(b) or in a sense closer to the *technical* meaning of the term and in a context within which the moral damage to an *individual* is absorbed into, and thus identified

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[31] Decision of 15 July 1927 (UNRIAA, vol. IV, pp. 265 *et seq.*). In this case, which concerned the murder of a United States national by a patrol of the Mexican *defensa social* (qualified by the Commission as a part of the Mexican armed forces)—an event which had caused only remote and rather slight material damages—the Commission stated:

"... when international tribunals thus far allowed *satisfaction* for indignity suffered, grief sustained or other similar wrongs, it usually was done *in addition to* reparation (compensation) for material losses. Several times awards have been granted for indignity and grief not combined with direct material losses; but then in cases in which the indignity or grief was suffered by the claimant himself, as in the *Davy* and *Maal* cases (J. H. Ralston, *Venezuelan Arbitrations of 1903*, 412, 916). The decision by the American-German Mixed Claims Commission in the *Vance* case (*Consolidated edition, 1925*, 528) seems not to take account of damages of this type sustained by a brother whose material losses were 'too remote in legal contemplation to form the basis of an award'.... The same Commission, however, in the *Vergne* case, awarded damages to a mother of a bachelor son ... though 'the evidence of pecuniary losses suffered by this claimant cognizable under the law is somewhat meagre and unsatisfactory' (*Consolidated edition, 1926*, at 653). It would seem, therefore, that, if in the present case injustice for which Mexico is liable is proven, the claimants shall be entitled to an award in the character of *satisfaction**, even when the direct pecuniary damages suffered by them are not proven or are too remote to form a basis for allowing damages *in the character of reparation** (compensation)." (*Ibid.*, p. 266.)

[32] Personnaz, *op. cit.*, pp. 197-198.

[33] C. D. Gray, *Judicial Remedies in International Law* (Oxford, Clarendon Press, 1987), pp. 33-34.

with, the moral damage to the *State* as the international person to which the individual "belongs".

19. However one interprets the particular segments of practice and literature considered in paragraph 17 above, the said segments represent in any case a minority of both the relevant practice and the literature. They do not affect, in the Special Rapporteur's view, the distinction between the moral injury to the persons of nationals or agents, on the one hand, and the moral injury that any wrongful act causes to the State, on the other hand. Both are, of course, damage to the State as an international person. But the first is indemnifiable, in so far as restitution in kind does not suffice, *by pecuniary compensation alone.* The moral damage to the State, which is more exclusively typical of international relations, is a matter for satisfaction in a technical sense, dealt with as such in chapter III. This will be amply confirmed by the sections of that chapter devoted respectively to the literature (paras. 106 *et seq.*), the jurisprudence (paras. 1ll *et seq*.) and, especially, the diplomatic practice concerning satisfaction (paras. 119 *et seq.*).

CHAPTER II

II. REPARATION BY EQUIVALENT

A. General concept, problems involved and method

1. CONCEPT AND GOVERNING PRINCIPLES

20. In general terms, reparation by equivalent consists of the payment of a sum of money compensating the injured State for prejudice not remedied by restitution in kind and not covered by other forms of reparation in a broad sense. Notwithstanding the "primacy" of restitution in kind as a matter of equity and legal principle, reparation by equivalent is the most frequent and quantitatively the most important among the forms of reparation. This is the consequence of the fact that restitution in kind is very frequently inapt to ensure a complete reparation.[34]

21. Of course, reparation by equivalent is governed, as is any other form of reparation, by the well known principle that the result of reparation in a broad sense—namely of any of the forms of reparation or a combination thereof—should be the "wiping out", to use the dictum of the *Chorzów Factory* case (Merits), of "all the consequences of the illegal act" in such a manner and measure as to establish or re-establish, in favour of the injured party, "the situation which would, in all probability, have existed if that act had not been committed".[35] Considering the major role of compensation, it is especially with regard to that remedy that the so-called Chorzów principle is to exercise its function in the regulation of the consequences of an internationally wrongful act. Considering in particular the incompleteness frequently characterizing restitution in kind, it is obviously through pecuniary compensation that the Chorzów principle can eventually be given effective application. It is indeed by virtue of that principle that pecuniary compensation fills in, so to speak, any gaps,

[34] See the preliminary report, document A/CN.4/416 and Add.1 (footnote 1 above), paras. 114-118.

[35] *P.C.I.J., Series A. No. 17*, judgment of 13 September 1928, p. 47.

large, small or minimal, which may be left in full reparation by the noted frequent inadequacy of *restitutio in integrum.*

22. It is equally obvious that even such a sweeping principle of full or integral compensation is not by itself sufficient to settle all the issues involved in reparation by equivalent.[36] These issues include:

(1) The compensatory function of reparation by equivalent and the question of "punitive damages";
(2) The question whether "moral" damage is to be compensated as well as "material" damage;
(3) The problem of indemnification of "indirect" as well as "direct" damage;
(4) "Causal link", "causation" and multiplicity of causes;
(5) The relevance of the injured State's conduct;
(6) The question of *lucrum cessans* as distinguished from *damnum emergens;*
(7) The relevance of the gravity of the wrongful act and of the degree of fault of the offending State;
(8) The obligation to pay interest and the rate thereof;
(9) The determination of *dies a quo* and *dies ad quem* in the calculation of interest;
(10) The alternative: compound versus simple interest.

2. FUNCTION AND NATURE OF REPARATION BY EQUIVALENT

23. Consisting as it does in the payment of a sum of money substituting for or integrating restitution in kind, reparation by equivalent is qualified by three features distinguishing it from other forms of reparation. The first feature is its aptitude to compensate for injuries which are susceptible of being evaluated in economic terms. Compensation by equivalent is thus intended to substitute, for the injured State, for the property, the use, the enjoyment, the fruits and the profits of any object, material or non-material, of which the injured party was totally or partly deprived as a consequence of the internationally wrongful act. Pecuniary compensation thus comes into play, even when the object of the infringed obligation was not a previous undertaking to pay a sum of money, in a "residual" or "substitutive" function. The second feature is that, although a measure of retribution is present in any form of reparation, reparation by equivalent performs by nature an essentially compensatory function. The afflictive-punitive function is typical of other forms of reparation, most notably of satisfaction and guarantees of non-repetition. The third feature is that the object of reparation by equivalent is to compensate for all the economically assessable injuries caused by the internationally wrongful act, but only for such injuries.

24. The essentially compensatory function of reparation by equivalent is generally recognized and frequently emphasized in the relevant literature. One may recall

[36] As noted, for example, by L. Reitzer, *La réparation comme conséquence de l'acte illicite en droit international* (Paris, 1938):

"The assertion that the *full* damage should be compensated is certainly not likely to provide a satisfactory method of assessment. If it means that international tribunals have normally endeavoured to award reparation *for the actual material damage caused*, then it is true. But such a proposition, while denoting a general tendency, is far too vague to contain precise indications. So it remains to be determined whether there are any methods an international judge or arbitrator can use to proceed to estimate the harm that he wants the amount of the reparation to match as closely as possible." (P. 175.)

Eagleton,[37] Jiménez de Aréchaga,[38] Brownlie[39] and Graefrath.[40] Explicit indications in the same sense are less frequent but none the less clear in jurisprudence. In the "*Lusitania"* case, for example, the umpire, Edwin P. Parker, expressed himself clearly (notwithstanding the use of the term "satisfaction" in a very broad, non-technical sense) when he stated:

> ... the words exemplary, vindictive, or punitive as applied to *damages* are misnomers. The fundamental concept of "damages" is satisfaction, reparation for a *loss* suffered; a judicially ascertained *compensation* for wrong. The remedy should be commensurate with the loss, so that the injured party may be made whole. The superimposing of a penalty in addition to full compensation and naming it damages, with the qualifying word exemplary, vindictive, or punitive, is a hopeless confusion of terms, inevitably leading to confusion of thought ....[41]

25. A sharp distinction between payment of moneys by way of compensation and payment of moneys for punitive purposes—with a decided exclusion of the latter from the notion of reparation by equivalent—manifested itself in the case concerning the *Responsibility of Germany for acts committed after 31 July 1914 and before Portugal entered the war*, in which the arbitral tribunal unambiguously separated compensatory and punitive consequences of the German conduct and declared its total lack of competence on the consequences of the second kind.[42]

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[37] C. Eagleton, *The Responsibility of States in International Law* (New York, 1928):

"The usual standard of reparation, where restoration of the original status is impossible or insufficient, is pecuniary payment ... It has usually been said that the damages assessed *should be for the purpose only of paying the loss suffered**, and that they are thus *compensatory rather than punitive in character** ...." (P. 189.)

[38] E. Jiménez de Aréchaga, "International responsibility", *Manual of Public International Law*. M. Sørensen, ed. (London, Macmillan, 1968):

"... *punitive or exemplary damages**, inspired by disapproval of the unlawful act and as a measure of deterrence or reform of the offender, *are incompatible with the basic idea underlying the duty of reparation** ...." (P. 571.)

[39] I. Brownlie, *System of the Law of Nations: State Responsibility*, part I (Oxford, Clarendon Press, 1983):

"In the case of token payments for breaches of sovereignty by intrusions or other non-material loss, the role of payment is more or less that of providing 'pecuniary satisfaction'. However, it is unhelpful to describe such assessments in terms of 'penal damages'. *The purpose of the award of compensation is to provide what is by custom recognized as a recompense** ...." (P. 223.)

[40] B. Graefrath, "Responsibility and damages caused: relationship between responsibility and damages". *Collected Courses of The Hague Academy of International Law, 1984-II* (The Hague, Nijhoff, 1985), vol. 185:

"... Imposing penalties on sovereign States or nations is not only a political, but also a legal question in our days. Imposing penalties on another State is clearly incompatible with the principle of sovereign equality of States as interpreted by the Declaration on Principles of Friendly Relations ...

"We therefore cannot agree that under international law, today, the purpose of damages is 'to punish or at least to reprove a State for its conduct—either explicitly or implicitly, and thereby to try to prevent a repetition of such acts in the future'. Such a conception can only serve to justify excessive claims for indemnification as a fine or penalty. It would lead to the abuse of international responsibility as an instrument for the humiliation of weaker States as it was shown by the imperialist past." (P. 101.)

[41] UNRIAA, vol. VII, p. 39. See also para. 114 below.

[42] Decision of 30 June 1930 (Portugal v. Germany) (UNRIAA, vol. II, pp. 1035 *et seq.*). The tribunal stated:

"In addition to reparation for actual damage caused by the acts committed by Germany during the period of neutrality, Portugal claims an indemnity of 2,000 million gold marks because of 'all the offences against its sovereignty and for the violations of international law'. It makes this claim on the grounds that the indemnity under this heading 'will demonstrate the gravity of the acts in terms of international law and the rights of peoples' and 'it will help ... to show that such acts cannot continue to

3. EXISTING RULES: THEIR DETERMINATION AND PROGRESSIVE DEVELOPMENT

26. Notwithstanding the relative abundance of jurisprudence and State practice covering most of the issues listed above (para. 22), most authors are inclined not to recognize the existence of any rules of general international law more specific than the Chorzów formulation. They are mostly sceptical even about the possibility of drawing from the practice reliable (uniform) standards of indemnification. Eagleton stated, for example, that "international law provides no precise methods of measurement for the award of pecuniary damages".[43] Reitzer developed the point further,[44] and similar ideas are expressed by Verzijl.[45] Graefrath, for his part, observes

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be performed with impunity. Apart from the sanction of disapproval by conscience and by international public opinion, they would be matched by material sanctions ...'.

"It is therefore very clear that it is not in reality an indemnity, or reparation for material or even moral damage, but rather sanctions, a penalty inflicted on the guilty State and based, like penalties in general, on ideas of recompense, warning and intimidation. Yet it is obvious that, by assigning an arbitrator the task of determining the amount of the claims for the acts committed during the period of neutrality, the High Contracting Parties did not intend to vest him with powers of repression. Not only is paragraph 4, under which he is held competent, contained in Part X of the Treaty, entitled 'Economic clauses', whereas it is Part VII that deals with 'Sanctions', but it would be contrary to the clearly expressed intentions of the Allied Powers to say that they contemplated imposing pecuniary *penalties* on Germany for the acts it committed, since article 232, paragraph 1, expressly recognizes that even simple reparation of the actual losses it had caused would exceed its financial capacity. The sanction claimed by Portugal therefore lies outside the competence of the arbitrators and the context of the Treaty." (*Ibid*., pp. 1076-1077.)

[43] Eagleton, *op. cit*., p. 191.

[44] According to Reitzer:

"... Clearly, an arbitrator is driven to a solution that consists in determining the reparation on the basis of his own wisdom and personal sense of justice. There is a *parallelism* between general international law and arbitral and judicial international law. On the one side, the assessment by the injured party, on the other, the assessment by the judge. *In submitting a case to arbitration, the parties replace the unilateral will of the injured State—itself an interested party—with the will and the discretion of a disinterested third party*.

"This phenomenon of the freedom of the judge in determining the extent of the reparation could not go unnoticed by the science of international law. Many writers emphasize the notable part played by the personal views of the judge or the arbitrator, without always realizing the full significance of this proposition.

"This freedom is also found in countless arbitration agreements and *compromis*, in which the arbitrator is authorized to decide on the reparation *ex aequo et bono* or 'according to justice and equity', or has the widest powers conferred on him, sometimes to the express exclusion of strict law.

"Still more significant, however, is that even when such a clause was not inserted in the instrument vesting him with jurisdiction, the arbitrator considered he was able to decide by equity. This was true more especially of the mixed claims commissions, which regarded themselves as veritable courts of equity. But statements in this sense are not lacking in arbitral awards themselves.

"... The impressive number of *compromis* giving the judge full discretion would suffice to show that States have no fears regarding such discretion. The Hague Codification Conference can, however, also be cited in support of the opposite view. The replies by many States to point XIV of the Preparatory Committee show that they were well aware of the uncertainty, indeed the non-existence, of customary rules on the measurement of reparation that could be a useful guide for the arbitrator. It is also apparent that those States intended to give the greatest possible discretion to the arbitrator deciding these matters." (*Op. cit.*, pp. 160-162.)

[45] J. H. W. Verzijl, *International Law in Historical Perspective* (Leyden, Sijthoff, 1973), part VI:

"The standards of indemnification are so varied according to the specific cases and kinds of damage that it is hardly feasible to formulate general rules on the subject. It would only be possible to draw up a long list of reparation awards, in addition to the few Court decisions surveyed above, to indicate the lines along which claims commissions or arbitral tribunals have reached their verdicts relating to the estimation of damages suffered. There is indeed an endless variety of possible injuries:

that "it seems that the unlimited variety of cases and specific circumstances do not allow for more than guidelines as far as these issues are concerned". He finds this to be particularly true "when we are dealing with material damage, and all the more so, when we have to determine an indemnification for *immaterial damage**, i.e., unlawful detention, bodily harm or death, violation of rights without causing material damage".[46] Gray expresses similar doubts.[47]

27. In the opinion of the Special Rapporteur, the lack of international rules more specific than the Chorzów principle is probably not so radical as a considerable part of the doctrine seems to believe. He finds comfort in so thinking in the fact that even in the less recent literature one finds indications that the field is not so lacking in regulation. Verzijl admits, for example, that "lines" can be identified "along which claims commissions or arbitral tribunals have reached their verdicts relating to the estimation of damages suffered".[48] This contradicts, in a sense, Eagleton's statement that international law "provides no precise methods of measurement for the award of pecuniary damages" (see para. 26 above). A relatively more positive view is also expressed by Anzilotti. After noting the evident similarity of international dicta with the rules of the law of tort in municipal legal systems and the natural tendency of tribunals and commissions to have recourse to rules of private law, particularly of Roman law, he specified that in so doing international tribunals do not apply national law as such. More persuasively they apply international legal principles modelled on municipal principles or rules. Anzilotti speaks notably of such rules as being materially identical with, albeit formally different from, municipal rules, obviously in the sense that they have become rules of international law by virtue of an international law-making process.[49] The influence, albeit relative, of rules of private law, notably of Roman law, is also acknowledged by other writers, such as Nagy[50] and Čepelka.[51]

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homicides, mutilations, the infliction of wounds; incarcerations, tortures, detentions, unjust punishments; expulsions; destructions, seizures, theft; denial of justice; lack of government protection, or failure to apprehend or punish the offenders, etc. It goes without saying that the methods of reaching an adequate measure of compensation must necessarily differ widely. The victim may be dead and others may claim as his successors in title. The reparation may follow a long time after the delict. The damage may have consisted of personal injury, loss of property, deprivation of a concession, confiscation, loss of a profession or a bread-winner, the staining of a reputation, insult, moral grief, etc." (Pp. 746-747.)

[46] Graefrath, *loc. cit.*, p. 94.

[47] According to Gray:

"... The basic principle of full reparation that can be derived from the various municipal legal systems—in civil law and communist countries expressed in terms of *damnum emergens* and *lucrum cessans*, in common law countries in terms of putting the claimant in the position he would have been in if there had been no injury to him —represents very little advance on the determination that an obligation to make reparation has arisen. Clearly this basic principle cannot be a practical guide to the assessment of damages, as can be seen from the fact that although legal systems share this aim, their methods of assessment and the results arrived at vary considerably. Moreover, the basic principle is subject to important qualifications and exceptions in every legal system." (*Op. cit*., p. 8.)

[48] See footnote 45 above.

[49] Anzilotti is not unaware, on the other hand, that not all municipal rules have acquired the force of international rules or principles. An example, according to Anzilotti, would have been the non-transposition into international law of the municipal rule under which moral damages were not indemnifiable in some national legal systems (*Corso,* pp. 429 *et seq.*).

[50] K. Nagy, "The problem of reparation in international law", *Questions of International Law: Hungarian Perspectives,* H. Bokor-Szegö, ed. (Budapest, Akadémiai Kiadó, 1986), vol. 3, pp. 178-179.

[51] Č. Čepelka, *Les conséquences juridiques du délit en droit international contemporain* (Prague, Karlova University, 1965):

Reitzer himself, who seemed to deny altogether the existence of any international rules or principles in the field,[52] acknowledges the existence of different views, according to which:

> ... States which submit a case to an impartial body definitely do so with the *conviction* that there are well-established rules on the quantum of the reparation, rules that the judge is compelled to follow. The slightest loss of such a conviction means that States would hesitate to hand over their disputes to an arbitrator whose decision could well lead to disagreeable surprises.

And he adds:

> It has even been claimed that, in the absence of applicable rules of international law, and unless the *compromis* authorizes him to rule *ex aequo et bono*, the arbitrator should refuse to make a decision.[53]

But Reitzer rejects these views as unfounded and recognizes that arbitrators have recourse largely to general principles of municipal law.[54] After citing the *Delagoa Bay Railway* case,[55] Reitzer concluded that

> Without, therefore, forming part of general international law, the general principles of private law have exerted considerable influence on international arbitrators and judges using discretionary powers in their decisions ....[56]

In this passage by Reitzer the difference from Anzilotti concerns only the status of the general principles referred to.

28. The noted admissions (and contradictions) of a part of the doctrine suggest that a less pessimistic and more balanced view would probably be justified with regard both to the existence of rules or principles governing compensation in international relations and to the usefulness of an attempt at their progressive development on the part of the Commission. On the one hand, the number and variety of concrete cases is so high that it is natural that the study of jurisprudence and diplomatic practice should lead one to exclude the very possibility of finding or even conceiving very detailed rules applying mechanically and indiscriminately to any cases or groups of cases. This excludes not only the actual existence (*de lege lata*) of

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"... international practice has—over approximately the last 180 years—worked out at least some *subsidiary criteria* for determining the extent of the damage caused by the offence and the amount of the indemnity to be paid. The criteria in question are based essentially on the general principles of law. Naturally, this in no sense means bringing these principles of municipal law into international law, for the general principles of law do not form part of general international law; that does not rule out the fact that straightforward subsidiary criteria will, by international custom, in the subsequent evolution of international practice, become stable rules of ordinary international law." (P. 29.)

[52] See footnote 44 above.

[53] Reitzer, *op. cit.*, pp. 161-162.

[54] According to Reitzer: "A scrutiny of arbitral awards unquestionably reveals that arbitrators have quite often referred to these general principles [recognized in municipal law]. They are also to be found in the *compromis.* This phenomenon cannot be passed over in silence." And although he contends that the general principles so described do not constitute "compulsory norms of the general law of nations", he admits that it is natural, given the existence of a "very old and highly developed system of legal norms" (namely Roman law and civil law), that the international judge "has not failed to draw on this source". The more so, he adds, as "the two *de facto* situations reveal undeniable similarities". (*Ibid.*, p. 163.)

[55] See footnote 96 below.

[56] Reitzer, *op. cit.*, p. 165.

very detailed rules but also the advisability of producing any such rules as a matter of progressive development. It does not exclude, nevertheless, either the existence of more articulate rules than the Chorzów principle or the possibility of reasonably developing any such rules and obtaining their adoption.

29. As regards the existing law, the large number of cases that have occurred have given rise to so many arbitral or judicial decisions and agreed settlements on most of the specific issues arising in the area that it seems reasonable that whenever relatively uniform solutions on any given issue can be identified, a corresponding relatively specific rule or standard can be assumed to exist. As noted by Anzilotti and Reitzer, the rules and standards applied by international judicial bodies are often very similar to, if not identical with, the corresponding rules and standards of municipal law (Roman law, civil law or common law). This means, in the opinion of the Special Rapporteur, not so much an application of municipal legal rules by mere *renvoi*; it means rather that, through the work of international judicial bodies and the agreed settlements achieved directly between themselves, States have gradually worked out and accepted rules and standards on compensation. Even where such rules and standards were originally modelled partly on municipal law, they may well be found to be now in existence as part of general international law. There seems thus to be enough to justify an attempt on the part of the Commission at both the determination and the codification of such rules or principles.

30. Of course, one should not expect the discovery of absolute rules to result in their being applied automatically and mechanically in every case and under any circumstances. It is common knowledge that in no field of the law, whether national or international, can rules or principles be applied mechanically: and it is especially so when the matter involved is one of the quantification of losses—often non-material—to be compensated in each particular case. Any rule which is not conceived for just a single case needs some measure of adaptation—by judges, arbitrators or interested parties themselves—to the features and circumstances of each one of the innumerable concrete cases to which it applies. It is perhaps just because of the great variety of the kinds of wrongful acts and of their circumstances, particularly the variety of the kinds of damage caused, that so many doubts are raised with regard to the existence of international legal rules on pecuniary compensation.

31. In particular, the fact that the rules are bound to be relatively general and flexible does not imply that they are mere "guiding principles" or "guidelines" and not susceptible of codification in a narrow sense. These are rules setting forth the rights of the injured State and the corresponding obligations of the offending State.

32. It should be further considered that, in the field of international responsibility more than in any other, the Commission is not entrusted only with a task of strict codification. According to the letter of the relevant provision of the Charter of the United Nations, the part of the Commission's task that comes foremost is progressive development. It follows, in the Special Rapporteur's view, that whenever the study of the doctrine and practice of pecuniary compensation indicates a lack of clarity, uncertainty or, so to speak, a "gap" in existing law, it should not be inevitable for the Commission to declare a *non liquet.* An effort could and should be made to examine the issue *de lege ferenda* in order to see whether, in what direction and to what extent the uncertainty could be removed or reduced or the "gap" filled in as a matter of development. This should be done, of course, in the light of a realistic appraisal of the

needs of the international community, of available private law sources and analogies, and under the guidance of realism and common sense.

33. Within the said reasonable limits, the incorporation of elements of progressive development into the draft articles seems to be particularly indicated by the nature of the subject-matter of State responsibility in general and pecuniary compensation in particular. As often stressed by members of the Commission as well as by scholars at large, the Commission's draft on State responsibility deals mainly, unlike other drafts, with so-called "secondary" legal situations. The Commission is dealing, precisely, with the prospective situations or conflicts that may derive from future wrongful acts in any areas of international law: situations and conflicts with regard to which any State can find itself with an equal degree of probability either in the position of offending, "responsible" State or in the position of an "injured" State. Normally one is thus not confronted—as is the case when one deals mainly or exclusively with the codification and development of the so-called "primary" rules—with given actual or foreseeable conflicting interests and positions, such as those that inevitably emerge when one deals (*de lege lata* or *ferenda*) with the régime of international watercourses, the régime of the sea, the régime of international economic relations or the law of the environment.[57] Of course, even in the regulation of an area such as State responsibility, there are issues with regard to which similar potential contrasts of interests may manifest themselves: for instance, between States poor and rich, large and small, strong and weak, on issues such as those concerning the measures admissible to secure reparation and the pre-conditions and conditions of the lawfulness thereof. In so far, however, as the purely substantive consequences of a wrongful act are concerned, and particularly with regard to the rules that obtain or should obtain in the field of pecuniary compensation, all States would seem roughly to share the same "prospective" or "hypothetical" interests. All States should therefore share a high degree of common interest with regard to leniency or generosity *vis-à-vis* the offending or the injured State respectively.[58] This consideration might perhaps help to assess better the possibility of incorporating elements of progressive development in the draft articles concerning reparation in general and reparation by equivalent in particular. This also applies, in the Special Rapporteur's view, to satisfaction.

B. "Direct" and "indirect" damage; causal link and multiplicity of causes

1. "DIRECT" AND "INDIRECT" DAMAGE

34. Once agreed that all the injuries and only the injuries caused by the wrongful act must be indemnified,[59] the effort of doctrine and practice has always been to distinguish the consequences that may be considered to have been caused by a

[57] In areas such as these, whatever the degree to which common interests come to bear in order to facilitate agreement on *lex lata* or *lex ferenda*, one always encounters, on every single issue, the obstacle (difficulty) represented by such contrasts as those dividing upstream States from downstream States, coastal States from land-locked States (or oceanic coastal States from closed-seas coastal States) or developing States from developed States.

[58] Whatever a State may feel it might "lose" within the framework of the legal situation envisaged in a draft article for a possible offending State would be counterbalanced by what that same State would gain from that situation whenever it found itself in the position of an injured party.

[59] This is what Personnaz defines as "the principle of equivalence in the reparation of the harm" (*op. cit.*, pp. 98-101).

wrongful act, and hence indemnifiable, from those not to be considered as such and therefore not indemnifiable.[60]

35. For some time in the past this question has been discussed in terms of a distinction between "direct" and "indirect" damage. This approach, however, has given rise to doubts because of the ambiguity and the scant utility of such a distinction.[61] Whatever may be meant by "indirect" damage in certain municipal legal systems,[62] this expression has been used in international jurisprudence to justify decisions not to award damages. No clear indication was given, however, about the kind of relationship between event and damage that would justify their qualification as "indirect".[63] As noted by Hauriou, the most striking application of the rule excluding "indirect" damages was the *Alabama* case, where the Geneva tribunal, in a spontaneous statement prior to the decision, warned the parties that claims for indirect losses could in no way be taken into account. But the principle is scrupulously observed in all international disputes and, to our knowledge, there is, apart from the United States-German Mixed Claims Commission case, not one in which the arbitrator, after qualifying damage as indirect, has awarded compensation ....[64]

Reitzer points out, however, that

> Although they have rejected it, mixed commissions and tribunals have by no means supplied a clear notion of indirect damage. Indeed, they have used the term without realizing the sense of the words used. It is not surprising, therefore, that the same injury is dismissed as being indirect in one case, yet admitted in another case, or "that the question of its nature is not raised, or that the arbitrator goes ahead and qualifies it as direct".[65]

36. Whatever the doctrine may say, practice has kept its distance from the notion of "indirect" damage for the purpose of identifying the demarcation line of

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[60] An accurate analysis of the problem is made in the substantial work by B. Bollecker-Stern, *Le préjudice dans la théorie de la responsabilité internationale* (Paris, Pedone, 1973), particularly pp. 185-223.

[61] Cf. Personnaz, *op. cit.*, p. 135; Eagleton, *op. cit.*, pp. 199-202; Morelli, *op. cit.*, p. 360; Bollecker-Stern, *op. cit.*, pp. 204-211; Gray, *op. cit.*, p. 22.

[62] According to Nagy:

"... Both the concept and the problem of indirect damage were taken over by international law from the domestic law of bourgeois States; such distinction had been unknown to Roman law. This concept was first introduced into the French legal system, which made a great impact on the development of the European legal systems, by works of the French jurists Dumoulin and Domat in 1681 and 1777 respectively. By indirect damage these authors meant a loss of pecuniary value bearing but a remote relationship to the illegal act and originating from other causes as well; whereas direct damage results solely from an act imputable to the wrongdoer. The prevalent view argued against compensation for such damage, and it came to be expressed also in article 1151 of the Code Napoléon. The domestic laws of some States make no adequately clear distinction between direct and indirect damage, many legal systems do not even make such distinction, nor is this question unambiguously answered by the science of international law ...." (*Loc. cit.*, p. 179.)

[63] In that sense, see Anzilotti, who notes that international tribunals, rather than qualifying an injury as indirect and therefore non-indemnifiable, have qualified as indirect an injury which they considered should not be indemnified (*Corso*, p. 431), but mainly A. Hauriou, whose article "Les dommages indirects dans les arbitrages internationaux" (RGDIP, vol. 31 (1924), p. 203) has undoubtedly represented an important phase in the study of the subject. According to this author, "whenever the theory of indirect damage is mentioned, the purpose is relentlessly to rule out this category of damage"; and further on, "Unfortunately, from an examination in collections of arbitral awards of the application of this rule, it is impossible not to find inconsistent decisions" (p. 209).

[64] Hauriou, *loc. cit.*, p. 209.

[65] Reitzer, *op. cit.*, p. 180.

indemnifiable injury. Worthy of mention in this connection is the following extract from administrative decision No. II of the United States-German Mixed Claims Commission dated 1 November 1923, which set down some of the basic principles to be followed in deciding the cases submitted:

> It matters not whether the loss be directly or indirectly sustained so long as there is a clear, unbroken connection between Germany's act and the loss complained of ....[66]

In the *South Porto Rico Sugar Company* case, the same Commission further stated that the term "indirect" used with regard to damage was "inapt, inaccurate and ambiguous", and that the distinction sought to be made between "direct" and "indirect" damage "is frequently illusory and fanciful and should have no place in international law".[67]

2. CONTINUOUS (UNINTERRUPTED) CAUSAL LINK

37. Rather than the "directness" of the damage, the criterion is thus indicated as the presence of a clear and unbroken causal link between the unlawful act and the injury for which damages are being claimed. Authors seem generally to agree on this point. For injury to be indemnifiable, it is necessary for it to be linked to an unlawful act by a relationship of cause and effect:[68] and an injury is so linked to an unlawful act whenever the normal and natural course of events would indicate that the injury is a logical consequence of the act or whenever the author of the unlawful act could have foreseen the damage his act would cause. As Bollecker-Stern explains, it is presumed that the causality link exists whenever the objective requirement of "normality" or the subjective requirement of "predictability" is met.[69] Indeed, these two conditions—normality and predictability—nearly always coexist (in the sense that the causing of the damage could also have been predicted if it were within the norm).[70] And although this has been denied at least by one author (who holds that only the objective

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[66] UNRIAA, vol. VII, p. 29.

[67] This was one of the *War-Risk Insurance Premium Claims* cases; decision of 1 November 1923 of the Mixed Claims Commission (UNRIAA, vol. VII, pp. 62-63).

[68] See especially Personnaz:

"... the following must be considered as consequences of the injurious act and therefore taken into consideration in determining the scope of the obligation to make reparation: all of the facts connected with the original act by a link of cause and effect, in other words, all of the facts leading back in an unbroken chain to the first act." (*Op. cit.*, p. 136.)

and Eagleton:

"... all damages which can be traced back to an injurious act as the exclusive generating cause, by a connected, though not necessarily direct, chain of causation, should be integrally compensated ..." (*Op. cit.*, pp. 202-203.)

[69] Bollecker-Stern, *op. cit.*, pp. 191-194.

[70] See, for example, G. Salvioli, "La responsabilité des Etats et la fixation des dommages et intérêts par les tribunaux internationaux", *Recueil des cours ..., 1929-III* (Paris, 1930), vol. 28:

"The criterion of 'normality' in the consequences is the criterion that international jurisprudence often uses to determine the basis for reparation of indirect damage. And this criterion, viewed from the subjective standpoint, coincides to some extent with that of 'predictability', which is also used in international jurisprudence. It is the same thing, examined from two different points of view." (P. 251.) and Reitzer:

"... This idea [namely, 'adequate causality'] is also expressed in the proposition that any damage resulting from the injurious act in the foreseeable *ordinary course* of daily life must be indemnified." (*Op. cit.*, p. 183.)

criterion of normality should be used to ascertain the damages due),[71] practice seems not to show any preference in favour of the "normality" criterion. For example, among the replies of Governments on point XIV (Reparation for the damage caused) of the questionnaire submitted to them by the Preparatory Committee of the Conference for the Codification of International Law,[72] Germany[73] and Denmark[74] expressed themselves in favour of predictability. The Netherlands[75] and the United States[76] were in favour of normality.

38. Predictability prevails in judicial practice. One clear example is the decision in the *Portuguese Colonies* case (Naulilaa incident).[77] The injuries caused to Portugal by the revolt of the indigenous population in its colonies were attributed to Germany because it was alleged that the revolt had been triggered by the German invasion. The responsible State was therefore held liable for all the damage which it could have predicted, even though the link between the unlawful act and the actual damage was not really a "direct" one. On the contrary, damages were not awarded for injuries that could not have been foreseen:

> ... it would not be equitable for the victim to bear the burden of damage which the author of the initial unlawful act foresaw and perhaps even wanted, simply under the pretext that, in the chain linking it to his act, there are intermediate links. Everybody agrees, however, that, even if one abandons the strict principle that direct damage alone is indemnifiable, one should not necessarily rule out, for fear of leading to an inadmissible extension of liability, the damage that is connected to the initial act only by an unforeseen chain of exceptional circumstances which occurred only because of a combination of causes alien to the author's will and not foreseeable on his part ....[78]

39. It does not, therefore, seem correct to exclude predictability from the requisites for determining causality for the purposes of compensation. At most it can be said that the possibility of foreseeing the damage on the part of a reasonable man in the position of the wrongdoer is an important indication for judging the "normality" or "naturalness" which seems to be an undeniable prerequisite for identifying the causality link. Administrative decision No. II of the United States-German Mixed Claims Commission, mentioned above (para. 36), once again provides a valuable

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[71] In that sense, A. P. Sereni, *Diritto internazionale,* vol. Ill, *Relazioni internazionali* (Milan, Giuffrè, 1962), states that "the injury caused by the unlawful act is indemnifiable even if it was not predictable" (p. 1551); and he cites in this respect the *Portuguese Colonies* case (Naulilaa incident) (UNRIAA, vol. II, pp. 1031-1033, 1037, 1074-1076).

[72] League of Nations, document C.75.M.69.1929.V.

[73] "Our first thought should be to examine very carefully the relationship of cause and effect. In the domain of international law particularly, quite unforeseen consequences might arise if it were possible to make a State responsible for damages caused by a concatenation of extraordinary circumstances which could not be foreseen in the normal course of events. This is a point on which the modern doctrine of international law and the practice of arbitration courts are substantially concordant ...." (*Ibid*., p. 146.)

[74] "Reparation should include, according to the decision of the Court, not only proved losses, but also losses or profits and indirect damage in so far as the latter could be foreseen at the time the wrong was done and could be avoided by any economic sacrifice on the part of the injured person." (*Ibid*., p. 147.)

[75] "... Compensation must be given for any damage which can reasonably be regarded as the consequence of the act alleged against the State ...." (*Ibid*., p. 149.)

[76] "Losses of profits, when proved with reasonable certainty and when a causal connection could be established, have been allowed." (Document C.75(a).M.69(a). 1929.V, p. 25.)

[77] Decision of 31 July 1928 (Portugal v. Germany) (UNRIAA, vol. II, pp. 1011 *et seq.*).

[78] *Ibid*., p. 1031.

example of the way in which the test of normality is applied in identifying the causality link:

... It matters not how many links there may be in the chain of causation connecting Germany's act with the loss sustained, provided there is no break in the chain and the loss can be clearly, unmistakably and definitely traced, link by link, to Germany's act ....[79]

40. The criterion for presuming causality when the conditions of normality and predictability are met requires further explanation. Both in doctrine and in judicial practice, one notes a tendency to identify the criterion in question with the principle of *proxima causa* as used in private law.[80] Brownlie, referring to the *Dix* case,[81] says that

... There is some evidence that international tribunals draw a similar distinction, and thus hold governments responsible "only for the proximate and natural consequences of their acts", denying "compensation for remote consequences, in the absence of evidence of deliberate intention to injure".[82]

Following the disintegration of the *Cosmos 954* Soviet nuclear satellite over its territory in 1978, Canada stated in its claim:

In calculating the compensation claimed, Canada has applied the relevant criteria established by general principles of international law according to which fair compensation is to be paid, by including in its claim only those costs that are reasonable, proximately caused by the intrusion of the satellite and deposit of debris and capable of being calculated with a reasonable degree of certainty.[83]

41. It seems therefore that an injudicious use of the adjective "proximate" (with reference to "cause") in order to indicate the type of relation which should exist between an unlawful act and indemnifiable injury is not without a certain degree of ambiguity. That adjective would seem utterly to exclude the indemnifiability of damage which, while linked to an unlawful act, is not close to it in time or in the causal chain.

42. To sum up, the causal link criterion should operate as follows:

[79] The Commission added:

"... Where the loss is far removed in causal sequence from the act complained of, it is not competent for this tribunal to seek to unravel a tangled network of causes and of effects, or follow, through a baffling labyrinth of confused thought, numerous disconnected and collateral chains, in order to link Germany with a particular loss. All indirect losses are covered, provided only that in legal contemplation Germany's act was the efficient and proximate cause and source from which they flowed. The simple test to be applied in all cases is: has an American national proven a loss suffered by him, susceptible of being measured with reasonable exactness by pecuniary standards, and is that loss attributable to Germany's act as a proximate cause?" (UNRIAA, vol. VII, p. 30).

[80] According to Graefrath:

"... it is a principle of private law that is applied, the principle of *proximo causa*. A loss is regarded as a normal consequence of an act, if it is attributable to the act as a proximate cause." (*Loc. cit.*, p. 95.)

[81] Decision handed down in 1903 by the United States-Venezuelan Mixed Claims Commission (UNRIAA, vol. IX, pp. 119 *et seq*., at p. 121).

[82] Brownlie, *op. cit*., p. 224.

[83] ILM, vol. XVIII (1979), p. 907, para. 23 of the claim.

(i) Damages must be *fully* paid in respect of injuries that have been caused immediately and *exclusively* by the wrongful act;[84]

(ii) Damages must be *fully* paid in respect of injuries for which the wrongful act is the *exclusive* cause, even though they may be linked to that act not by an immediate relationship but by *a series of events each exclusively linked with each other by a cause-and-effect relationship.*

43. As Bollecker-Stern algebraically puts it:

... As long as it can be definitely proved that Ai [the unlawful act] is the direct and sole cause of P_1 [the "immediate" damage], that P_1 is the sole and direct cause of P_2 etc., up to P_n, with no link missing in the natural and logical chain between the unlawful act and the final injury, the latter will then be indemnifiable ....[85]

Causation is thus to be presumed not only in the presence of a relationship of "proximate causation". It is to be presumed whenever the damage is linked to the wrongful act by a chain of events which, however long, is uninterrupted. As noted by Salvioli:

... It is argued in international jurisprudence that reparation should be made only when no extraneous fact has broken the link of causality between the cause—the act—and the consequence—the injury. This principle is in itself correct, but it should be applied with care. For example ... if the unlawful act has led to a fact, even if it is extraneous, or has exposed the injured party to its influence, it cannot be contended that the relationship of causality has been broken. Injuries in this category must be indemnified.[86]

3. CAUSAL LINK AND CONCOMITANT CAUSES

44. Consideration must be given to cases in which the injuries are not caused exclusively by an unlawful act but have been produced also by concomitant causes among which the unlawful act plays a decisive but not exclusive role. In such cases, to hold the author State liable for full compensation would be neither equitable nor in conformity with a proper application of the causal link criterion. The solution should be the payment of partial damages, in proportion to the amount of injury presumably to be attributed to the wrongful act and its effects, the amount to be awarded to be determined on the basis of the criteria of normality and predictability. Salvioli,[87] Eagleton[88] and other authors[89] explain the point well.

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[84] J. Combacau, "La responsabilité internationale", *in* H. Thierry and others, *Droit international public*, 4th ed. (Paris, Montchrestien, 1984), speaks in such a case of a "causalité au premier degré: celle qui unit sans aucun intermédiaire le fait générateur au dommage" (p. 711).

[85] Bollecker-Stern, *op. cit*., p. 211. These are what Hauriou had already classified as "remote" or "second-degree" injuries, in order to indicate "the injurious facts that occur as a repercussion of the principal injury, but the origin of which none the less lies in the initial injury caused by the State and incurring its responsibility" (*loc. cit*., p. 219). In that sense, cf. Personnaz:

"... The causality relationship is a question of fact and must be established with certainty: when it exists, reparation is due, however removed in time or space the injury may be; conversely, the obligation disappears if the relationship is broken." (*Op. cit*., p. 129.)

[86] Salvioli, *loc. cit*., p. 247.

[87] According to Salvioli,

"... Sometimes, damage *x* may be *the effect of more than one cause, each independent of the other*, but together they have combined to produce the damage or produce the damage to a particular entity. This is the classic situation of *concomitant causes* and, as such, it lies, strictly speaking, outside the scope of indirect damage. Yet when an unlawful act by a particular subject is one of these causes (natural factors or acts by a third party), part of the damage must obviously be attributed to the

45. Economic, political and natural factors and actions by third parties are just a few of the innumerable elements which may contribute to a damage as concomitant causes. One example is the *Yuille, Shortridge and Co.* case.[90] This concerned an English wine-exporting company with registered office in Portugal, which was wrongly found liable by the Portuguese courts after an irregular procedure. The main injury for which the company sought reparation was represented by the costs it had sustained in the course of the hearing. "Accessory injuries" were the fall in sales, since the company's activities had been partly paralysed. As summed up by Hauriou,

> ... the question was precisely to determine whether the hearing was the sole cause of the fall in sales or whether other causes were involved. It was obvious that extraneous circumstances had contributed to the decline in the company's profits. The arbitrators noted, for example, a crisis in wine production from 1839 to 1842, as well as losses from the bad conditions under which some wine consignments had been made.
>
> Consequently, the damage qualified as "indirect", namely the decline in the company's profits, is the result of different causes. Some relate to the denial of justice suffered by the company, but others are totally extraneous.[91]

46. It would be pointless to try to find any rigid criteria to apply to all the cases and to indicate the percentages to be applied for damages awarded against an offending State when its action has been one of the causes, decisive but not exclusive, of an injury to another State. It would be absurd to think in terms of laying down in a universally applicable formula the various hypotheses of causal relationship and to try to provide a dividing line between damage for which compensation is due from damage for which compensation is not due.[92] The application of the principles and criteria discussed above can only be made on the basis of the factual elements and circumstances of each case, where the discretionary power of arbitrators or the diplomatic abilities of negotiators will have to play a decisive role in judging the degree to which the injury is indemnifiable. This is especially true whenever the causal chain between the unlawful act and the injury is particularly long and linked to other causal factors. As Reitzer rightly describes the relevant doctrine:

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unlawful act, and it will always be possible to transform the ideal part of the damage into an *actual share of the compensation* payable by the guilty party. The difficulty in determining the part of the damage to be attributed to the unlawful act cannot allow the judge purely and simply to reject the injured party's claim ...." (*Loc. cit*., pp. 245-246.)

[88] Eagleton considers that

"... if other elements enter into the production of the harm alleged, compensation should be made in proportion to the damage actually caused by the respondent's act ...." (*Op. cit*., p. 203.)

[89] Personnaz states that

"... when the judge finds two or more links of causality between the damage and a number of factors, he will examine the one that seems the most normal and the original factor that is most likely to have caused the act. If each has played a part, each must be assigned a proportion of the responsibility." (*Op. cit*., p. 143.)

According to Gray:

"If a State is liable only for the direct consequences of its own unlawful act it should not have to pay full compensation for injuries partly caused by external factors ...." (*Op. cit*., p. 23.)

On the concomitance of factors other than the wrongful act itself in the causation of damage and the consequences thereof on the *quantum* of compensation, see the thorough analysis by Bollecker-Stern. *op. cit*., titles III and IV.

[90] Decision of 21 October 1861 (Great Britain v. Portugal) (La-pradelle-Politis, vol. II, pp. 78 *et seq.*).

[91] Hauriou, *loc. cit.*, p. 216.

[92] Anzilotti, *Corso*, p. 431.

... Causality is the chain of an infinite number of causes and effects: the injury sustained is due to a multitude of factors and phenomena. An international judge must say which of them have produced the injury, *in the normal course of things*, and which, indeed, are extraneous. He must, more particularly, decide whether, according to the criterion of *normality*, the injury is or is not attributable to the act in question. This calls for a choice, a selection, an assessment, of the facts which, in themselves, are all of equal value. In this work of selection, an arbitrator is compelled to do things according to his own lights. It is he who breaks the chain of causality, so as to include one category of acts and events and to exclude another, guided by his wisdom and his perspicacity alone. Whenever the arbitrator finds nothing useful in the precedents, his freedom of judgment *takes over*.[93]

4. THE INJURED STATE'S CONDUCT AS A CONCOMITANT CAUSE

47. A concomitant cause the presence of which may affect the amount of compensation is the lack of "due diligence" or the presence of any degree of negligence on the part of the injured State. It is widely agreed that where the injured State contributed to causing the damage, or to the aggravation thereof, compensation would be reduced in amount accordingly.[94] The relevance of the injured State's negligence has been recognized and acted upon in a number of cases.

48. In the "*Costa Rica Packet*" case, decided by arbitrator F. de Martens in 1897,[95] Great Britain obtained compensation for the unlawful detention of the ship's captain and the loss of the fishing season. The amount of compensation was, however, reduced by the arbitrator, in consideration of a number of circumstances, such as the early release of the arrested captain of the ship and the availability, during his absence, of the ship's second in command, which would have allowed the resumption of the fishing and the consequent reduction of the loss caused by the captain's arrest by Dutch authorities.[96] Similarly, in the *Delagoa Bay Railway* case[97] the arbitrators

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[93] Reitzer, *op. cit.*, pp. 184-185. Very appropriate are, *inter alia*, the remarks made by Hauriou (*loc. cit.*, p. 220), and Personnaz, according to whom

"The existence of relationships [of causality] is a question of fact and must be established by the judge; it cannot be locked in formulas, for it is a case-by-case matter." (*Op. cit.*, p. 129.)

He states further on:

"It is a question that cannot be resolved by principles, but solely in the light of the facts of the particular case, and in examining them the judge will, if there are no restrictions in the *compromis*, have full powers of appraisal." (P. 135.)

[94] Salvioli, *loc. cit.*, pp. 265-266; Čepelka, *op. cit.*, p. 31; Graefrath, *loc. cit.*, p. 95; Gray, *op. cit.*, pp. 23-24; but mainly Bollecker-Stern, *op. cit.*, pp. 265 *et seq.*, title III.

[95] Decision of 25 February 1897 (Great Britain v. Netherlands) (Moore, vol. V, pp. 4948 *et seq.*).

[96] The arbitrator stated:

"Whereas the unjustifiable detention of Captain Carpenter caused him to miss the best part of the whale-fishing season;

"Whereas, on the other hand, Mr. Carpenter, on being set free, was in a position to have returned on board the ship *Costa Rica Packet* in January 1892 at the latest, and whereas no conclusive proof has been produced by him to show that he was obliged to leave his ship until April 1892 in the port of Ternate without a master, or, still less, to sell her at a reduced price;

"Whereas the owners or the captain of the ship being under an obligation, as a precaution against the occurrence of some accident to the captain, to make provision for his being replaced, the mate of the *Costa Rica Packet* ought to have been fit to take the command and to carry on the whale-fishing industry;

"And whereas, thus, the losses sustained by the proprietors of the vessel *Costa Rica Packet*, the officers, and the crew, in consequence of the detention of Mr. Carpenter, are not entirely the necessary consequence of this precautionary detention;

"..." (Moore, vol. V, p. 4953.)

and, as noted by Gray, the arbitrator decided that "a reduced amount of damages should accordingly be allowed" (*op. cit.*, p. 23).

were asked to settle a claim in the dispute between Portugal, on the one hand, and the United Kingdom and the United States of America, on the other, over the cancellation of the franchise for the Lourenço Marques railway line, 35 years before its expiry date:

All the circumstances that can be adduced against the concessionnaire company and for the Portuguese Government mitigate the latter's liability and warrant ... a reduction in the reparation ....[98]

49. Another case of interest is the *John Cowper* case,[99] about which Salvioli says:
Considerations of the same kind (*responsibility of the injured party*) probably influenced the arbitrator in the Cowper case when he rejected the demand for compensation for lost profits (loss of harvests for *ten consecutive years* from 1815 to 1824), claimed as a consequence of the initial damage, the abduction of slaves. True, after the slaves were taken away the owner could not cultivate his land, but it is no less true that, if the owner had displayed the usual diligence of a head of family, he could have replaced the slaves by other workers.[100]

50. A different decision, which confirms the rule, seems to have been rightly taken by the PCIJ in the *S.S.* "*Wimbledon*" case.[101] This case related to reparation due from Germany for damage caused to the French charterers of the ship as a result of the refusal of the German authorities to allow the ship to pass through the Kiel Canal (in violation of article 380 of the Treaty of Versailles). This refusal having been found to be a source of liability, there remained to determine the amount of compensation. There was no doubt about the offending State's obligation to pay damages for the detour to which the ship had been forced as a consequence. A doubt, however, arose with regard to the injury represented by the fact that the ship had harboured at Kiel for 11 days, following refusal of passage, before taking an alternative course (by Skagen). Implicitly, the Court admitted that the conduct of the ship's captain in that respect had to be *considered* as a possible circumstance affecting the amount of compensation. While thus confirming the rule with its authority, the Court did not believe, however, that the captain's conduct had left anything to be desired. Indeed, the Court stated:

... As regards the number of days it appears to be clear that the vessel, in order to obtain recognition of its right, was justified in awaiting for a reasonable time the result of the diplomatic negotiations entered into on the subject, before continuing its voyage.[102]

No reduction was decided of the amount of compensation.

51. While generally accepting the essential correctness of the practice, the authors who have considered the matter rightly raise the question of the foundation of the rule on "contributory negligence". Mention is made of "*concours de fautes*", "*responsabilité du lésé*", "clean hands", etc. A more convincing explanation of the practice in question is that it is merely an application of the rule of causation and of the principle and criteria to be resorted to in any case of multiplicity of causes. It is in

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[97] Decision of 29 March 1900 (Martens, *Nouveau Recueil*, 2nd series, vol. XXX, pp. 329 *et seq.*).

[98] *Ibid.*, p. 407.

[99] United States of America v. Great Britain, convention of 13 November 1826 (Lapradelle-Politis, vol. I, pp. 348 *et seq.*).

[100] Salvioli, *loc. cit.*, p. 267.

[101] Judgment of 17 August 1923, *P.C.I.J., Series A. No. 1*.

[102] *Ibid.*, p. 31.

that sense that Bollecker-Stern,[103] Reitzer,[104] Salvioli,[105] Roth,[106] Salmon[107] and others express themselves. The Special Rapporteur would be inclined to concur.

C. The scope of reparation by equivalent

1. GENERAL

52. As outlined in the introduction (para. 4 above), pecuniary compensation is generally described as covering the "material" injury suffered by the offended State which has not already been covered and is not coverable by restitution in kind. Correct in a sense, as said in the preceding chapter, this definition has to be understood as related to the proper meaning of the expression "material injury"[108] in the sphere of international law and relations and, mainly, by way of contrast with the term "moral injury" in the "international" sense indicated above (paras. 13-16).

53. Material damage to the State would thus include both:

(i) damage caused to the State's territory in general, to its organization in a broad sense, its property at home and abroad, its military installations, diplomatic premises, ships, aircraft, spacecraft, etc. (so-called "direct" damage to the State);[109] and
(ii) damage caused to the State through the persons, physical or juridical, of its nationals or agents (so-called "indirect" damage to the State).[110]

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[103] According to Bollecker-Stern, who discusses the various theories (*op. cit.*, especially pp. 310-313):

"... This is also the solution advocated by the Spanish Government, through Mr. Weil, in the *Barcelona Traction* case. Discussing the part played by Barcelona Traction in bringing about the situation for which it claimed reparation from Spain, Mr. Weil said that 'reparation should be proportionate to the causal influence of the unlawful act, alleged to have been committed by the respondent State, in producing the damage. Reparation will therefore be ruled out completely, or reduced, as appropriate, to take account of interference by extraneous causes, and particularly the conduct of the victim itself'." (Pp. 311-312.)

[104] Reitzer, *op. cit.*, p. 198.

[105] Salvioli, *loc. cit.*, p. 266.

[106] A. Roth, *Schadenersatz für Verletzungen Privater bei völker-rechtlichen Delikten* (Berlin, 1934), p. 83.

[107] J. J. A. Salmon, "Des 'mains propres' comme condition de recevabilité des réclamations internationales", *Annuaire français de droit international, 1964* (Paris), vol. X, p. 265.

[108] Although "material damage" is the expression most frequently used to identify the scope of pecuniary compensation, it is difficult to find in the literature any definitions that are not merely tautological, such as "injury of a material interest" (Morelli, *op. cit.*, p. 359).

[109] Examples of "direct" damage to the State are found in such cases as the *Corfu Channel* case (Merits), *I.C.J. Reports, 1949*, p. 4, and the case concerning *United States Diplomatic and Consular Staff in Tehran*, *I.C.J. Reports, 1980*, p. 3. In the literature, see in particular Brownlie, *op. cit.*, pp. 236-240.

[110] That the damage suffered by the State through its nationals (and, it should be added, through its agents in their private capacity) is a "direct" damage to the State itself—notwithstanding its frequent qualification as "indirect" damage—is explained in masterly fashion by Reuter:

"... the modern State *socializes* all private assets by taxation, as it *socializes* part of private expenditures by taking over health costs or part of the risks attached to human existence. In an even more general way, the State now actually picks up all the elements of economic life. All property and all income, all debts and all expenditures, even of a private character, are set down in a system of *national accounts* and its teachings are one of the tools of the economic policy of all governments and thus under its sway.

2. PERSONAL DAMAGE

54. The second class of material damage considered (para. 53(ii)), namely the so-called "indirect" damage to the State, embraces—for the reasons explained above (paras. 9-11)—both the "patrimonial" loss sustained by private persons, physical or juridical, and the "moral" damage suffered by such parties.[111] For the same reasons, the class of so-called "indirect" damage to the State includes, *a fortiori*, the "personal" damage—other than "moral" damage—caused to the said private parties by the wrongful act. This refers, in particular, to such injuries as unjustified detention or any other restriction of freedom, torture or other physical damage to the person, death, etc.

55. Injuries of the latter kind, in so far as they are susceptible of economic assessment, are treated by international jurisprudence and State practice according to the same rules and principles as those applicable to the pecuniary compensation of material damage to the State. It is actually easy to find a clear tendency to extend to the said class of "personal" injuries the treatment afforded to strictly "patrimonial" damages.[112]

56. A typical example is that of the death of a private national of the State concerned. In awarding pecuniary compensation, jurisprudence seems to refer in such a case to the economic loss sustained, as a consequence of the death, by the persons who were somehow entitled to consider the existence of the deceased as a "source" of goods or services susceptible of economic evaluation.[113] One should recall in this respect the first two points made by the umpire in the "*Lusitania*" case (see para. 10 above). According to the umpire, the damage to be compensated in case of death should be calculated on the amount: "(*a*) which the decedent, had he not been killed, would probably have contributed to the claimant" and on "(*b*) the pecuniary value to such claimant of the deceased's personal services in claimant's care, education, or supervision".[114]

"Nowadays, therefore, it can no longer be said that the damage sustained by private individuals *is attributed to the State** by a *purely formal mechanism**; economically that is so: it is the Nation, represented by the State, that bears the burden, at least to some extent, of *the loss first suffered by a private individual**." (*Loc. cit*., pp. 841-842.)

[111] Private parties include, as well as the State's nationals, agents of the State in so far as they are privately affected by the internationally wrongful act.

[112] For such an interpretation of international jurisprudence, see, *inter alia*, Garcia Amador, document A/CN.4/134 and Add. 1, paras. 125-128; Verzijl, *op. cit.*, pp. 750-752; and, in particular, Personnaz, *op. cit.*, pp. 196 *et seq.*, according to whom "corporal" injury is usually considered, by international courts, under three distinct aspects: *pretium doloris*, namely an indemnity for physical suffering (so-called "moral damage" in a narrow sense); indemnity for medical care and assistance; and compensation for the economic loss (prejudice) derived from the physico-psychical injury. In a different sense, see Gray, who believes that

"... Apparently the amount depends [often] on the gravity of the injury involved, and this suggests that the award is intended as *pecuniary satisfaction** for the injury rather than as compensation for the pecuniary losses resulting from it ...." (*Op. cit.*, pp. 33-34.)

[113] See Personnaz, *op. cit.*, pp. 253 *et seq*. According to Bollecker-Stern, the hypothesis of the death of the original victim (of the wrongful act) represents the only significant exception to the general principle under which the "third party" would not possess an independent title to claim compensation from the offending party (*op. cit.*, pp. 258-259).

[114] See footnotes 8 and 9 above.

57. This approach to reparation was clearly followed by the ICJ in the *Corfu Channel* case (United Kingdom v. Albania).[115] The Court upheld the United Kingdom's claims in respect of the casualties and injuries sustained by the crew and awarded a sum covering "the cost of pensions and other grants made by it to victims or their dependants, and for costs of administration, medical treatment, etc.".[116]

58. The *Corfu Channel* case shows that pecuniary compensation is awarded not only in cases of death but also in cases of physical or psychological injury. After reviewing the relevant judicial practice, M. M. Whiteman states: "The most that can be said is that an effort is usually made to base the allowance of damages primarily upon the actual monetary loss shown to have been sustained."[117] Among the numerous similar cases, one which is generally considered to be a classic example of this approach to "personal" damage is the *William McNeil* case,[118] where the personal injury had consisted in a serious and long-lasting nervous breakdown caused to that British national as a result of the cruel and psychologically traumatic treatment to which he had been subjected by Mexican authorities whilst in prison. The British-Mexican Claims Commission pointed out that:

> ... It is easy to understand that this treatment caused the serious derangement of his nervous system, which has been stated by all the witnesses. It is equally obvious that considerable time must have elapsed before this breakdown was overcome to a sufficient extent to enable him to resume work, and there can be no doubt that the patient must have incurred heavy expenses in order to conquer his physical depression.[119]

Having noted that after his recovery McNeil had practised a rather lucrative profession, the Commission took the view that "the compensation to be awarded to the claimant must take into account his station in life, and be in just proportion to the extent and to the serious nature of the personal injury which he sustained".[120]

59. This type of reasoning has been used at times by courts in cases in which personal injury consisted in unlawful detention. Particularly in cases in which detention was extended for a long period of time, the courts have been able to quantify compensation on the basis of an economic assessment of the damage actually caused to the victim. One example is the "*Topaze*" case, decided by the British-Venezuelan Mixed Claims Commission. In view of the personality and the profession of the private victims, the Mixed Commission decided in that case to award a sum of $100 a day to each injured party for the whole period of their detention.[121] The same method was followed in the *Faulkner* case by the Mexico-United States General Claims Commission, except that this time the daily rate was estimated at $150 in order to take account of inflation.[122]

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[115] Judgment of 15 December 1949 (Assessment of the amount of compensation), *I.C.J. Reports 1949*, p. 244.

[116] *Ibid.*, p. 249.

[117] Whiteman, *Damages*, vol. I, p. 627.

[118] Decision of 19 May 1931 of the British-Mexican Claims Commission (UNRIAA, vol. V, pp. 164 *et seq.*).

[119] *Ibid.*, p. 168.

[120] *Ibid.*

[121] UNRIAA, vol. IX, p. 387 *et seq.*, at p. 389.

[122] Decision of 2 November 1926 (UNRIAA, vol. IV, pp. 67 *et seq.*, at p. 71).

3. PATRIMONIAL DAMAGE

60. Among the kinds of damage covered by the notion of "material damage to the State" to be remedied by pecuniary compensation, the main and most frequent one is that generally identified as "patrimonial damage".[123] This expression is used in order to designate damage involving the assets of a physical or juridical person, including possibly the State, but "external" to the person.[124]

61. It could be said, indeed, that patrimonial damage has always represented the area in which pecuniary compensation finds its most natural scope. It is in relation to such damage that the principles, norms and standards of implementation of such a remedy have been developed by jurisprudence and diplomatic practice.

62. It is mainly in connection with this kind of injury that jurisprudence and doctrine have deemed it convenient to have recourse to distinctions and categories which are typical of private (civil or common) law and to adapt them to the peculiar features of international responsibility. Authors generally agree, in particular, that compensation of patrimonial damage must make good not only *damnum emergens* but also *lucrum cessans.* It need hardly be recalled that the former term indicates the loss of property caused by the wrongful act (*quantum mihi abest*), and the latter the loss of the profits that could have been derived therefrom (*quantum lucrari potui*). Although, however, there have been hardly any difficulties with regard to reparation for *damnum emergens*,[125] compensation for *lucrum cessans* has at times given rise to problems, both in jurisprudence and in doctrine. It seems therefore indispensable to deal more specifically, in the following section, with *lucrum cessans.*

D. Issues relating to *lucrum cessans*

1. MAIN PROBLEMS

63. The main problems arising with regard to *lucrum cessans* are those connected with the aforementioned distinction between "direct" and "indirect" damages (paras. 34-36) and with the correct determination of the extent of profits to be compensated, particularly in the case of wrongful acts affecting property rights on "going concerns" of an industrial or commercial nature.

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[123] Mainly but not exclusively when the injury consists of damages suffered by private parties, expressions such as *dommages patrimoniaux* (Personnaz, *op. cit.*, pp. 156 *et seq.*), *dommages aux biens* (Garcia Amador, document A/CN.4/134 and Add.1, para. 31), *dommage économique* (Rousseau, *op. cit.*, p. 12), "properly damage" (Gray, *op. cit.*, p. 38), and "damages to property rights in their widest meaning" (G. Schwarzenberger, *International Law* (London, Stevens, 1957), vol. I, p. 664) are frequently used.

[124] Although it can certainly occur that a damage of this nature affects the State in a (so-called) "direct" or "more direct" way, this kind of damage, of course, more frequently has its foundation in an injury to a private party, namely to a national of the injured State. This would be the hypothesis considered by the PCIJ in the *Chorzów Factory* (Merits) case when it noted that, although the issue before it was one of injury to the claimant State, the private damage offered "a convenient scale for the calculation of the reparation due to the State" (*P.C.I.J. Series A, No. 17*, p. 28).

[125] In that sense, see *inter alia* Čepelka, *op. cit.*, p. 30; and Bollecker-Stern, *op. cit.*, pp. 211-214.

2. THE ROLE OF CAUSATION IN THE DETERMINATION OF *LUCRUM CESSANS*

64. In a few not very recent cases some obstacles arose, in the treatment of *lucrum cessans*, from the confusion of the concept of profit with the notion of "indirect" damage. This is what occurred in the "*Canada*" and *Lacaze* cases. In the "*Canada*" case,[126] a United States whaler had become stranded on the rocks along the Brazilian coast, and while the crew did what they could to salvage the ship, the Brazilian authorities used force to prevent them from completing their task. The whaler was lost and Brazil was found liable. However, even though Brazil was required to pay compensation for the loss of the ship, the court did not allow any damages to make up for the profits the ship would have earned in pursuing the fishing season, on the ground that such profits were uncertain and hence non-indemnifiable: "... the ship and the whole capital might have been lost early in the voyage, or the expedition might have been entirely unsuccessful and without profit".[127] In the *Lacaze* case a French trader in Argentina had been the victim of harassment by the courts and arbitrary detention. This had caused him to forfeit profits in the period during which he had been unable to carry on trade. Nevertheless, the tribunal refused to allow compensation for loss of earnings because of the "indirect" character of these damages.[128]

65. Contesting anyway the appropriateness of the notion of "indirect damage" the literature has for some time now decidedly rejected any equivalence between "indirect damage" and *lucrum cessans.*[129] It consequently declares itself in favour of the indemnifiability of *lucrum cessans* whenever there is the necessary presumption of causation. Opposing notably the dictum of the arbitral tribunal in the "*Alabama*" case,[130] whereby "prospective earnings cannot properly be made the subject of compensation, inasmuch as they depend in their nature upon future and uncertain contingencies",[131] the prevailing doctrine contends that for the purpose of indemnification it is not necessary for the judge to acquire the certainty that the damage depends on a given wrongful act. It is sufficient—also and especially for *lucrum cessans*—to be able to presume that, in the ordinary and normal course of

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[126] Decision of 11 July 1870 (United States of America v. Brazil) (Moore, vol. II, pp. 1733 *et seq.*).

[127] *Ibid*., p. 1746.

[128] Decision of 19 March 1864 (France v. Argentina) (Lapradelle-Politis, vol. II, pp. 290 *et seq*., at p. 298). Mention may also be made of the "*Alabama*" case (see footnote 130 below), with regard to which Bollecker-Stern writes:

"Thus, in the *Alabama* case, the loss of prospective earnings by the American fishing vessels and whalers confiscated by the Confederate cruisers, which, it should be noted, had been classed by the claimant as being part of the direct damage, were not taken into consideration for compensation, as the tribunal had declared that such earnings "cannot properly be made the subject of compensation, inasmuch as they depend in their nature upon future and uncertain contingencies". Nevertheless, this categorical assertion takes on its true dimension only if we remember that, alongside the claim for prospective earnings, the United States had also claimed, if the main claim was rejected, compensation equivalent to 25 per cent of the value of the destroyed vessels to offset the loss of profits, and that the tribunal accepted this claim. It is therefore difficult, bearing this in mind, to affirm that there should be no reparation for loss of prospective earnings, because of the manifest contradiction between the refusal *a priori* to make indemnification and the actual compensation that was awarded in practice." (*Op. cit*., p. 216.)

[129] See, for example, Hauriou, *loc. cit*., pp. 213 *et seq.*

[130] Decision of 14 September 1872 (United States of America v. Great Britain) (Moore, vol. I, pp. 653 *et seq.*).

[131] *Ibid*., p. 658.

events, the identified loss would not have occurred if the unlawful act had not occurred. Salvioli makes a relevant point when he states:

> ... The *certainty* of prospective profits, in other words, of something which has not yet materialized but can materialize in the future, is a *contradictio in terminis*. If the judge rejects the claim because the earning of profits—in the future—is not demonstrated, in actual fact he gives no reason for his decision. This amounts to saying: in no case do I want to award compensation for prospective profit. *Lucrum cessans* is always an eventuality; but it is essential to determine, from actual past and present circumstances, the degree of probability of the eventuality.
> ...
> This, to put it more clearly, means the duty to pay compensation for *the loss of the profits that would have been made in a normal situation*—if the wrongful act had not been committed.[132]

More specifically, Bollecker-Stern observes that the main feature of *lucrum cessans* is simply that one is dealing with a *fait eventuel*.[133] But *eventualité* in itself does not exclude the possibility that the damage—namely, the fact of preventing something of value from becoming part of someone's patrimony—may be considered to be a more or less immediate consequence of the unlawful act. The only difference between *lucrum cessans* and *damnum emergens* is that, apart from the presumption of causation—which at all events must exist between the wrongful act and the injury for the damage to be indemnifiable—in the case of *lucrum cessans* a further presumption is required: the presumption, so to speak, of existence—namely that, in the normal and foreseeable order of things, the particular profit for which damages are claimed would, if the wrongful act had not been committed, in all probability have been obtained.[134] Now, if it is evident that a negative reply in the case of either of the two presumptions would exclude the award of pecuniary compensation for *lucrum cessans*, it is wholly admissible for *lucrum cessans* to be indemnified when all the necessary conditions concur for establishing both presumptions. As Bollecker-Stern puts it:

> ... It is apparent from this analysis that *lucrum cessans* that is normal and reasonable in the ordinary course of events, as in this case, is indemnifiable damage.[135]

66. On this conclusion there seems to be a high degree of agreement in the literature;[136] and the majority of the court decisions seems to move in favour of the indemnifiability in principle of *lucrum cessans*. The decision in the "*Cape Horn Pigeon*" case[137] is a classic example. That case related to the seizure of an American whaler by a Russian cruiser. Russia accepted its responsibility, and the only thing the arbitrator had to do was establish the amount of compensation. He decided that the compensation should be sufficient to cover not only the real damage already occasioned but also the profits which the injured party had been deprived of because

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[132] Salvioli, *loc. cit*., pp. 256-257.

[133] Bollecker-Stern, *op. cit*., p. 199; in the same sense, see also Personnaz:

"... the point is to decide not on a situation that actually exists but on a case that remains a possibility. It is only possible to work on simple hypotheses." (*Op. cit*., p. 183.)

[134] Bollecker-Stern, *op. cit*., p. 200.

[135] *Ibid*., pp. 218-219.

[136] See, for example, Reitzer, *op. cit*., pp. 188-189; Eagleton, *op. cit*., pp. 197-203; Jiménez de Aréchaga, *loc. cit*., pp. 569-570; Brownlie, *op. cit*., p. 225; Gray, *op. cit*., p. 25.

[137] Decision of 29 November 1902 (United States of America v. Russia) (UNRIAA, vol. IX, pp. 63 *et seq*.).

of the seizure.[138] In the *Delagoa Bay Railway* case[139] the arbitrators held that the general principle applicable to indemnification

> ... can only be that of damages, of *id quod interest*, consisting, under the universally accepted rules of law, of *damnum emergens* and *lucrum cessans*: the injury sustained and the profits lost.[140]

This was also the conclusion reached by the judges in the "*William Lee*" and *Yuille, Shortridge and Co.* cases: a conclusion diametrically opposed to the position taken by the courts in the very similar "*Canada*" and *Lacaze* cases mentioned earlier (para. 64). In the "*William Lee*" case the United States was awarded *lucrum cessans* for the profits the unlawfully seized whaler would have been able to earn during the normal continuation of the fishing season.[141] In the *Yuille* case, the United Kingdom was awarded damages for the profits the company would have earned if its activities had not been interrupted by lengthy and irregular proceedings instituted by the Portuguese authorities.[142] The decision on the *Shufeldt* claim,[143] brought by an American citizen whose property had been expropriated by executive decree in Guatemala, placed great stress on the requisite of predictability with regard to *lucrum cessans*. The arbitrator held that:

> The *damnum emergens* is always recoverable, but the *lucrum cessans* must be the direct fruit of the contract and not too remote or *speculative**.
> ... this is essentially a case where such profits are the direct fruit of the contract and may reasonably be supposed to have been in the contemplation of both parties as the probable result of a breach of it.[144]

Lucrum cessans also played a role in the *Chorzów Factory* case (Merits). The PCIJ decided that the injured party should receive the value of the property by way of damages not as it stood at the time of expropriation but at the time of indemnification.[145] As Gray puts it, the Court "apparently ... assumed that the factory

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[138] The arbitrator stated:

"Whereas the general principle of civil law whereby damages should include compensation, not only for the injury sustained but also for the profits lost, also applies to international litigation, and, in order to apply it, the amount of the profits need not be fixed with certainty and it is sufficient to demonstrate that in the natural order of things it would have been possible to earn profits that are lost because of the act that has given rise to the claim;

"Whereas in this case it is not a question of *indirect* damage but of *direct* damage, the amount of which must be assessed;

"...

"Accordingly,

"The arbitrator holds and decides the following:

"The defendant Party shall pay the claimant Party, for the applications submitted by the rightful claimants in the *Cape Horn Pigeon* case, the sum of 38,750 United States dollars, with interest of 6 per cent per annum on that sum, from 9 September 1892 until the day of full payment." (*Ibid*., pp. 65-66.)

[139] Martens, *Nouveau Recueil*, 2nd series, vol. XXX, pp. 329 *et seq.*

[140] *Ibid*., p. 407.

[141] Decision handed down on 27 November 1867 by the Lima Mixed Commission (Moore, vol. IV, pp. 3405-3407).

[142] See footnote 90 above. Other instances of unequivocal statements in favour of the possibility of compensating *lucrum cessans* may be found in Bollecker-Stern, *op. cit*., p. 219.

[143] Decision of 24 July 1930 (United States of America v. Guatemala) (UNRIAA, vol. II, pp. 1079 *et seq.*).

[144] *Ibid*., p. 1099.

[145] *P.C.I.J., Series A, No. 17*, pp. 47-48. The Court made the following observations on this point:

would have increased in value between the date of dispossession and that of the judgment, otherwise its choice of date would not have benefited the claimant".[146]

3. "ABSTRACT" AND "CONCRETE" EVALUATION OF *LUCRUM CESSANS*

67. Once it was established that *lucrum cessans* was, under certain circumstances, indemnifiable, authors endeavoured to analyse judicial practice in order to identify the most appropriate methods for calculating damages with a view to ensuring that compensation is as close as possible to the damage actually caused. As a result, two distinct methods have emerged which are widely used to determine *lucrum cessans*: the so-called "*in abstracto*" and "*in concreto*" systems. As explained by Personnaz:

> The *in abstracto* system uses mechanical or uniform methods taken from situations analogous with the case in point and the judge takes them as the criterion to be applied automatically. Conversely, in the *in concreto* system the point of departure is reality, the basis is concrete facts, and account is taken of the technical elements of the real situation.
> ... The first system is the simplest and the quickest, since only an automatic determination is required, but it may well lead to errors of evaluation. It should be used when investigation into the real damage would involve too many difficulties and too much uncertainty, and it plays a compromise role. The second system, however, draws closer to reality and avoids the above-mentioned drawbacks, but it is difficult to apply and an accurate knowledge of the facts is needed.
>
> Accordingly, the judge sometimes finds it beneficial to combine a number of systems and so obtain a closer approximation ....[147]

68. The *in abstracto* method, which is more commonly used, consists in attributing interest on the amounts due by way of compensation for the principal damage. Indeed, this method raises typical problems, which it is advisable to analyse separately (see paras. 71 *et seq.* below). Suffice it for the moment to say that the *in abstracto* system often seems to be used as the result of a negotiated settlement between the parties, while a judge can always replace the award of the principal damages and interest by a higher lump sum taking account of the fact that the real profits accruing to the property would certainly have been greater than those calculated in terms of interest, including compound interest. A typical example is the *Fabiani* case, in which the arbitrator awarded a lump sum for *lucrum cessans* which was approximately twice the amount that would have been awarded by way of compound interest.[148]

"... Up to a certain point, therefore, any profit may be left out of account, for it will be included in the real or supposed value of the undertaking at the present moment. If, however, the reply given by the experts ... should show that after making good the deficits for the years during which the factory was working at a loss, and after due provision for the cost of upkeep and normal improvement during the following years, there remains a margin of profit, *the amount of such profit should be added to the compensation to be awarded**." (P. 53.)

[146] Gray, *op. cit.*, p. 80.

[147] Personnaz, *op. cit.*, p. 185.

[148] Decision of 30 December 1896 (France v. Venezuela) (Martens, *Nouveau Recueil*, 2nd series, vol. XXVII, pp. 663 *et seq.*). As the arbitrator explained the award:

"... The compound interest in the sum of ... francs does not, however, represent ... the full amount of which Fabiani was deprived by non-recovery of the sums in the arbitral award. If Fabiani had been able to take advantage of these sums and use them in his business, it is likely that he would have made more profit than the compound interest on the principal in the time for which he would be authorized to collect interest ...." (*Ibid.*, p. 705.)

69. Less "abstract", although usually characterized as *in abstracto* as well,[149] are other methods of assessing *lucrum cessans* which are based upon paradigms that seem to be more concrete than interest. These other methods—used in the case of business activities—are based either upon the profits earned by the same physical or juridical person in the period preceding the unlawful act, or upon the profits earned during the same period by similar business concerns.[150]

70. The so-called *in concreto* system is used when the estimate is "based on the facts of the particular case, on the profits which the injured enterprise or property would have made in the period in question".[151] One example is the *Cheek* case,[152] in which the arbitrator awarded damages explicitly in order to place the estate of the injured party as far as possible in the same position as it would have been in without the unlawful act, which involved complicated calculations and valuations "to arrive at a probable figure for lost profits".[153]

4. *LUCRUM CESSANS* IN THE PARTICULAR CASE OF UNLAWFUL TAKING OF A "GOING CONCERN"

71. The determination of *lucrum cessans* involves naturally the most problematical choices in cases where the reparation is due for the unlawful taking of foreign property consisting of the totality or a part of a going commercial or industrial concern. A proper analysis of the relevant practice should also take into account in a measure that part of international jurisprudence which has dealt with the lawful expropriation of going concerns. The necessity for the adjudicating bodies to pronounce themselves on the claim of unlawfulness advanced by the dispossessed owner has led them in fact to develop interesting considerations on the principles governing compensation—and notably compensation for lost profits—in case of unlawful taking.

72. Once again, the precedent most frequently recalled is the PCIJ's judgment in the *Chorzów Factory* case (Merits), in which the necessity of determining the consequences of the unlawful taking by Poland of the assets of German companies moved precisely from an unambiguous and sharp distinction between lawful and unlawful expropriation.[154] It was after formulating that distinction (and assuming the

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[149] Salvioli, *loc. cit*., p. 263; Gray, *op. cit*., p. 26.

[150] For instances of a valuation of the first kind, see the following cases: *Yuille, Shortridge and Co.* (footnote 90 above); "*Masonic*" (Moore, vol. II, p. 1055); "*William Lee*" (footnote 141 above); "*Cape Horn Pigeon*" (footnote 137 above). For instances of a valuation of the second kind, see the following cases: *James Hamilton Lewis* (UNRIAA, vol. IX, pp. 66 *et seq.*)*;* "*C. H. White*" (*ibid.*, pp. 71 *et seq.*); *Irene Roberts* (Ralston, p. 142).

[151] Gray, *op. cit*., p. 26; in the same sense, see Salvioli, *loc. cit*., p. 263, and Reitzer, *op. cit*., p. 189.

[152] Decision of 21 March 1898 (United States of America v. Siam) (Moore, vol. V, p. 5068).

[153] Gray, *op. cit*., p. 26.

[154] For a lawful expropriation the Court declared that the payment of fair compensation would have been sufficient, the standard of "fairness" being met whenever compensation was equivalent to the value of the concern at the time of dispossession, with the addition of interest until the time of effective payment. This would have been, according to the Court, the standard of indemnification required by international law for the nationalization of foreign property. In the second case (where the taking was unlawful), one could not assume that an unlawful act could become a lawful one, or vice

case before it to be one of unlawful expropriation) that the PCIJ set forth that famous principle of full compensation according to which the injured party was entitled to be re-established in the same situation which would, in all probability, have existed if the wrongful taking had not taken place. In brief, the Court applied a principle of full restitution in the literal and broad sense of *restitutio in integrum*, as distinguished from the technical and narrow sense in which the expression is sometimes used to indicate *naturalis restitutio.* According to the Court, full compensation could be achieved by different means. Whenever possible, one should apply *naturalis restitutio* (*restitution in kind*, *restitution en nature*) or *restitutio in integrum stricto sensu*, as described in the preliminary report. Whenever and to the extent that such a remedy did not ensure full compensation (namely *restitutio in integrum* in the broad literal sense), one should resort to pecuniary compensation in such a measure as to cover any loss not covered thereby, up to the amount necessary for such full compensation[155] (see para. 66 above).

73. It is on the same principle that the Permanent Court of Arbitration decided the *Lighthouses* case.[156] Considering the activity which was the object of the contract and the impossibility of assessing the value of the concession (at the time of expropriation) on the basis of the "residual amortization value of the buildings", the tribunal found the injured party to be entitled to compensation equivalent to the profits the company would have earned from the concession for the rest of the duration of the contract.[157] This interpretation of the principle of full compensation seems to have depended, however, on the particular circumstances of the case. It

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versa, through the payment or the refusal of an indemnity. To apply here the standard applied to lawful expropriation would have meant, according to the Court, "rendering lawful liquidation and unlawful dispossession indistinguishable in so far as their financial results are concerned". (*P.C.I.J., Series A. No. 17*, pp. 46-47.)

[155] The Court's logical scheme was: a *wrongful* act implies an obligation of *full reparation* (or *restitutio in integrum* in a broad sense), such full reparation being effected by (*a*) *naturalis restitutio* (or equivalent sum), plus (*b*) compensation for any further damage.

[156] Decision of 24/27 July 1956 (France v. Greece) (UNRIAA, vol. XII, pp. 155 *et seq.*).

The case concerned the withdrawal on the part of the Greek Government of a lighthouse administration concession 20 years in advance of the date on which the contract would have expired. The action of Greece was considered to be contrary to the provisions of the contract and as such *unlawful*, in that it had not been accompanied either by the payment of "compensation" or by the guarantee of any such payment in the future.

[157] As explained by the tribunal,

"The concessionaire firm have from this fact, therefore, the right to compensation for the redemption of the concession which ought, so far as possible, to be equal to the benefit of which they have been deprived by reason of the forcible taking over of the concession *25 years before its due expiry**. To assess the compensation, reference must be made to the [date] on which took place the wrongful act (*voie de fait*) of the Greek Government which gave rise to that right to compensation and the damage suffered by the firm can only be assessed by reference to data existing at the time when the concession was taken over. Subsequent events, which were unforeseen at that time both by the Greek Government which seized the concession and by the firm which was dispossessed of it, cannot be taken into consideration in a case of a grant of compensation which ought to have been not only determined but also put at the disposal of a concessionaire before the latter's removal. The Greek argument, which would take into account subsequent events, and which would be to the advantage of Greece, must therefore be rejected. The tribunal adopts the opinion expressed by the Franco-Italian Conciliation Commission concerning certain claims of the same concessionaire, dated 21 November 1953 (Decision No. 164), that, in an exactly comparable situation, it was not only equitable but also in conformity with the terms of the concession to put the firm in the position in which it would have been if the redemption had been effected *de facto* and formally at the moment of the taking over of the lighthouses ...." (ILR, 1956, vol. 23, pp. 300-301.)

depended notably, it seems, on the fact that the contract article contemplating the possibility of the "taking over" of the concession indicated that the indemnifiable damage should consist, in such eventuality, in "all compensation which may be determined by the parties or by arbitration in case of failure to agree".[158] Within such a contractual context, any question with regard to compensation was bound to be settled by the discretionary power of the arbitral tribunal rather than on the basis of any objective legal principle. All that can be drawn from this case, therefore, is that the tribunal awarded an amount of compensation calculated on the basis of the capitalization of future profits, such sum representing the "value of the concession in 1928" (namely, the value which the Greek Government was contractually bound to pay for it if it exercised its agreed right of redemption).

74. The same principle of full compensation was the basis of the decision handed down in 1963 in the *Sapphire International Petroleums Ltd.* v. *National Iranian Oil Company* (NIOC) case, in which the injured party obtained compensation for both the loss corresponding to the expenses incurred for the performance of the contract and the net lost profits.[159] As regards the assessment of such lost profits, the arbitrator noted, however, that that was "a question of fact to be evaluated by the arbitrator"; and after considering "all the circumstances", including "all the risks inherent in an operation in a desolate region" and "the troubles—such as wars, disturbances, economic crises or slumps in prices—which could affect the operations during the several decades during which the agreement was to last",[160] the arbitrator awarded compensation for loss of profits amounting to a sum corresponding to two fifths of the amount claimed by the company. In this case, while *lucrum cessans* was decidedly included in the compensation, the arbitrator did not indicate any preference of principle for one or the other of the possible methods of evaluation.

75. Although the *LIAMCO* v. *Government of Libya* case[161] concerned a lawful expropriation, with regard to which the arbitrator rejected the claim to *naturalis restitutio*, some considerations were made concerning "cases of wrongful taking of property". The arbitrator had no difficulty in admitting with the claimant that an internationally wrongful violation of a concession agreement "entitles Claimant in

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[158] The tribunal cited an article of the concessionary contract, according to which:

"... it remains understood that the Imperial Government still retains the right to take over the lighthouse administration however many years the concession shall still have to run, subject to the payment of all compensation which may be determined by the parties or by arbitration in case of failure to agree. In any case the Imperial Government is to pay such compensation before the lighthouse administration passes into its hands, or at least guarantee the payment thereof." (*Ibid.*, pp. 299-300.)

[159] Decision of 15 March 1963 (ILR, vol. 35 (1967), pp. 136 *et seq.*). According to the arbitrator (who referred to the study by Hauriou (*loc. cit.*, pp. 211 *et seq.*) and the various precedents cited therein):

"... the object of damages is to place the party to whom they are awarded in the same pecuniary position that they would have been in if the contract had been performed in the manner provided for by the parties at the time of its conclusion .... This rule is simply a direct deduction from the principle *pacta sunt servanda*, since its only effect is to substitute a pecuniary obligation for the obligation which was promised but not performed. It is therefore natural that the creditor should thereby be given full compensation. This compensation includes the loss suffered (*damnum emergens*), for example the expenses incurred in performing the contract, and the profit lost (*lucrum cessans*), for example the net profit which the contract would have produced. The award of compensation for the lost profit or the loss of a possible benefit has been frequently allowed by international arbitral tribunals ..." (ILR, vol. 35 (1967), pp. 185-186.)

[160] *Ibid.*, pp. 187 and 189.

[161] Decision of 12 April 1977 (ILR, vol. 62 (1982), pp. 141 *et seq.*).

lieu of specific performance to full damages including *damnum emergens* and *lucrum cessans*".[162] Again, however, nothing was specified with regard to the method by which *lucrum cessans* should, in such cases, be assessed. Something more seems to emerge from *AMINOIL* v. *Kuwait*.[163] Again, the expropriation was considered to be a lawful one. It was stated later, however, in connection with the issue of compensation for loss of profits, that the method of the Discounted Cash Flow (DCF),[164] which was unsuitable for the calculation of lost profits compensation in a case of lawful take-over, might be adequate in a case of unlawful expropriation—this in view of the fact that the application of such a method would ensure, in a case of a wrongful taking affecting decisively the assets involved, a compensation globally apt to restore the situation that would have existed if the wrongful act had not been committed. A confirmation comes from *AMCO Asia Corporation* v. *Indonesia*,[165] a case of unlawful taking. After recalling the principle of full compensation as being inclusive of *damnum emergens* and *lucrum cessans*—the latter not to exceed the "direct and foreseeable prejudice"—the tribunal evaluated the lost profits on the basis of DCF, rendering thus more explicit what had been stated only incidentally in the *AMINOIL* case: namely, that DCF should be considered one of the most appropriate methods of evaluation of a going concern unlawfully taken.[166]

76. The latter conclusion does not find confirmation, however, in the *Amoco International Finance Corporation* v. *Iran* case, partly decided by an award of 14 July 1987 by the Iran-United States Claims Tribunal,[167] part of which is devoted precisely to the effects of lawfulness or unlawfulness on the standard of compensation.[168] In evaluating the parties' contentions, the tribunal confirmed the distinction between lawful and unlawful expropriations, "since the rules applicable to the compensation to be paid by the expropriating State differ according to the legal characterization of the taking".[169] The study of that case suggests that the tribunal saw a certain discrepancy

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[162] *Ibid*., pp. 202-203.

[163] Decision of 24 March 1982 (ILM, vol. XXI (1982), pp. 976 *et seq.*).

[164] In the words of the tribunal:

"a method based on the sum total of the anticipated profits, reckoned to the natural termination of the Concession, but discounted at an annual rate of interest in order to express that total in terms of its 'present value' on the day when the indemnification is due; and without taking account of the value of the assets that would have been transferred to the concessionary Authority, 'free of cost', upon that termination.

"...

"... This calculation is based on a projection of the quantities of oil recovered, the prices, the costs of production, and the operations to be undertaken until the end of concession ...." (*Ibid*., pp. 1034-1035.)

[165] Decision of 21 November 1984 (ILM, vol. XXIV (1985), pp. 1022 *et seq.*).

[166] According to the tribunal:

"... the only prejudice to be taken into account for awarding damages is the loss of the right to operate the Kartika Plaza, that is to say the loss of a *going concern.*

"Now, while there are *several methods** of valuation of going concerns, *the most appropriate one in the present case** is to establish the *net present value* of the business, based on a reasonable projection of the foreseeable *net cash flow** during the period to be considered, said net cash flow being then *discounted** in order to take into account the assessment of the damages at the date of the prejudice, while in the normal course of events, the cash flow would have been spread on the whole period of operation of the business." (*Ibid*., p. 1037, para. 271 of the award.)

[167] ILM, vol. XXVII (1988), pp. 1314 *et seq.*

[168] *Ibid*., pp. 81 *et seq*., paras. 189-206.

[169] *Ibid*., p. 82, para. 192. The tribunal stated further:

"... The legal bases of the two concepts [reparation of the damage caused by a wrongful expropriation, and payment of compensation in case of lawful expropriation] are totally different and,

between the evaluation of *lucrum cessans* in the case of unlawful taking (such evaluation to be confined in any case to the profits lost up to the time of settlement), on the one hand, and the lost profits calculated on a DCF basis until the time originally set for the termination of the concession, on the other. The tribunal, however, does not go any further in the analysis of the discrepancy. It confines itself to the rejection of DCF as a method applicable to the case at hand.[170]

E. Interest

1. ALLOCATION OF INTEREST IN THE LITERATURE AND IN PRACTICE

(a) *The literature*

77. Notwithstanding some theoretical differences, authors seem to agree that interest on the amount of compensation for the principal damage is due under international law not less stringently than under municipal law. The view expressed by Anzilotti and other authors,[171] who denied the existence of an international rule to that effect,[172] was already opposed at the time by Lapradelle. According to the latter, there was a general presumption that the creditor could have reinvested the amounts due to him.[173] Salvioli made the same point.[174]

78. In the opinion of the Special Rapporteur, the positive view, which seems to be generally shared by contemporary authors, finds its main support in the concept of "full compensation". Once admitted that reparation must "wipe out" all the injurious consequences of a wrongful act, and once admitted that pecuniary compensation includes not only *damnum emergens* but also *lucrum cessans*, it seems correct to hold that the payment of interest, obviously a part of the latter, is the subject of an

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logically, the practical methods to be used in order to derive the amount due should also differ ...." (*Ibid*., pp. 82-83, para. 194.)

[170] "... the tribunal need not express an opinion upon the admissibility of such a projection [of future earnings] when the reparation must wipe out all the consequences of an illegal taking, but it certainly cannot accept it for the compensation due in case of a lawful expropriation." (*Ibid*., p. 105, para. 240.)

[171] Views reported by, *inter alia*, Personnaz, *op. cit*., pp. 217 *et seq*., and J.-L. Subilia, *L'allocation d'intérêts dans la jurisprudence internationale* (thesis, University of Lausanne) (Lausanne, Imprimerie Vaudoise, 1972), pp. 126 *et seq*.

[172] Anzilotti criticized the automatic (mechanical) transposal into international law of municipal rules which presuppose conditions that are absent or different in the relations between States, in his article "Sugli effetti dell'inadempienza di obbligazioni internazionali aventi per oggetto una somma di danaro", *Rivista di diritto internazionale* (Rome), vol. VII (1913), p. 61; and in his *Corso*:

"... except for a legal rate of interest that automatically applies between States as between private parties, a delay in the payment of a sum of money only warrants compensation for the harm that is actually demonstrated to have ensued, and no presumption is made in favour of the creditor State, even if the harm is then compensated by granting interest on the sum in arrears, to the extent required by the circumstances of the case." (*Corso*, p. 430.)

A position similar to this (strangely not very clear) one seems to have been taken at the time by K. Strupp, "Das völkerrechtliche Delikt", *Handbuch des Völkerrechts*, F. Stier-Somlo, ed. (Stuttgart, 1920), vol. III, 1st part, *a*, p. 212. See also P. Guggenheim, *Traité de droit international public* (Geneva, Georg, 1954), vol. II, p. 73; and Morelli, *op. cit*., pp. 360-361.

[173] Lapradelle, commentary on the *Dundonald* case (Lapradelle-Politis, vol. III, pp. 456 *et seq*.); in the same sense, see W. Wengler, *Völkerrecht* (Berlin, Springer, 1964), vol. I, p. 513.

[174] Salvioli, *loc. cit*., pp. 278-279.

international obligation.[175] This would appear to be the position of Schoen,[176] Personnaz,[177] Salvioli[178] and, more recently, Graefrath[179] and Nagy.[180] The awarding of interest seems to be the most frequently used method for compensating the type of *lucrum cessans* stemming from the temporary non-availability of capital. According to Subilia,

> ... interest, an expression of the value of the utilization of money, is nothing more than a means open to the judge for *a priori* determination of the injury sustained by a creditor from the non-availability of the principal for a given period ....[181]

79. It will be shown further on that it is on the basis of the same general principle that the contemporary literature holds that *dies a quo* must be the date on which the damage actually occurred, and *dies ad quem* the date on which monetary compensation is actually paid. But on these issues, as well as on the rate of interest, it is better to look first at the relevant jurisprudence.[182] Indeed, substantial differences emerge from the study of the practice (notwithstanding its uniform support for the principle that allocation of interest is due) with regard to *dies a quo*, *dies ad quem* and rate of interest.

(b) *Practice*

80. International practice seems to be in support of awarding interest in addition to the principal amount of compensation. Compared with dozens of decisions which, with or without express reference to international law or equity, have awarded interest,[183] the only case in which interest has been denied as a matter of principle (and not because of the circumstances of the claim) seems to have been the "*Montijo*" case.[184]

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[175] According to Rousseau,

"... It is simpler and better to award interest on arrears on the basis of the general principle that any indemnifiable damage should include the payment of appropriate compensation; and in this regard, a delay in paying a cash debt undoubtedly causes the creditor damage of that kind ...." (*Op. cit*., p. 244.)

[176] P. Schoen, "Die völkerrechtliche Haftung der Staaten aus unerlaubten Handlungen", *Zeitschrift für Völkerrecht* (Breslau), vol. 10, supplement 2 (1917), pp. 128-129.

[177] Personnaz, *op. cit*., p. 186.

[178] Salvioli, *loc. cit*., p. 261.

[179] Graefrath, *loc. cit*., p. 98.

[180] Nagy, *loc. cit*., pp. 182-183.

[181] Subilia, *op. cit*., p. 142.

[182] The various doctrinal positions on the three above-mentioned issues are well described (summed up) by Subilia, *op. cit*., pp. 120-125.

[183] Relevant judicial decisions in that sense are listed in the paragraphs concerning *dies a quo*, *dies ad quem* and interest rate (paras. 82-106 below).

[184] Decision of 26 July 1875 (United States of America v. Colombia) (Moore, vol. II, pp. 1421 *et seq*.). As reported by Subilia (*op. cit*., p. 63), the claim was brought against Colombia by the United States on account of the seizure of the steamship "*Montijo*" by Panamanian insurgents while in navigation along the coast of Panama (which formed part of the Federation of Colombia at that time). Having remained for some time in the hands of the insurgents, the ship had later been used by the Government after the failure of the revolution, and was finally returned to the owners. Dissenting from the American arbitrator's view, the umpire, Robert Bunch, motivated his decision not to award interest in the following terms:

"As regards the opinion ... that interest at the rate of 5 per cent per annum should be allowed from the 1st of January 1872 to the date of payment of the claim, the undersigned is not prepared to say that such an allowance would not be strictly justifiable. He nevertheless decides against it for the following reasons:

81. By way of examples of the prevailing jurisprudence, reference may be made to a few of the positive decisions. In *Illinois Central Railroad Co.* v. *Mexico*, decided in 1926 by the Mexico-United States General Claims Commission, the dictum was explicit. Mexico had been found in breach of a contract to purchase from an American company a locomotive for which it had not paid. The Commission held that fair compensation should comprise not only the principal amount due under the contract but also compensation, in the form of interest, for the loss of the use of that sum during the period within which payment continued to be withheld.[185] The United States Foreign Claims Settlement Commission's motivations in the *Lucas* case are also clear regarding damages for the destruction of two buildings during Italian military operations in Yugoslavia.[186] Another important example is Administrative Decision No. III of the United States-German Mixed Claims Commission, dated 11 December 1923, which considered interest to be a natural part of the damages due for loss of property.[187]

First. Because there is no settled rule as to the payment of interest on claims on countries or governments;

Secondly. Because it seems open to question whether interest should accrue during the progress of diplomatic negotiations, which are often protracted in their character;

Thirdly. That this reason applies with special force to negotiations which result in an arbitration or friendly arrangement;

Fourthly. That, whilst doing what he considers strict justice to the claimants by giving to them the full value of the use of their vessel during her detention, he desires to avoid any appearance of punishing the Colombian people at large for an act with which very few of them had anything to do, and which affected no Colombian interests beyond those of a few speculators in revolutions in Panama." (Moore, vol. II, p. 1445.)

See also Personnaz, *op. cit.*, p. 229, and Gray, *op. cit.*, p. 30.

[185] Decision of 6 December 1926 (UNRIAA, vol. IV, pp. 134 *et seq.*). According to the Commission:

"... None of the opinions rendered by tribunals ... with respect to a variety of cases appears to be at variance with the principle to which we deem it proper to give effect that interest must be regarded as a proper element of compensation. It is the purpose of the Convention of September 8, 1923, to afford the respective nationals of the High Contracting Parties, in the language of the Convention, 'just and adequate compensation for their losses or damages'. In our opinion just compensatory damages in this case would include not only the sum due, as stated in the Memorial, under the aforesaid contract, but compensation for the loss of the use of that sum during a period within which the payment thereof continues to be withheld ...." (*Ibid.*, p. 136.)

[186] Decision of 11 July 1957 (ILR, vol. 30 (1966), pp. 220 *et seq.*). According to the Commission:

"There are no definite rules governing the payment of interest in international war damage claims although the great majority of the authors express the view, which is supported by the decisions in numerous cases and by international agreements, that such payment is justified, and that a 'just and adequate compensation must include the payment of interest' ...." (*Ibid.*, p. 222.)

After recalling several cases in which international judicial practice had awarded interest, the Commission added that:

"... there is no legal or practical reason why the payment of interest in this case should in principle not be recognized. Legally, the Italian Government as the tort feasor, on the theory of culpability generally recognized in international law, is responsible for the payment of the damages with the monetary interest from the day the damage was committed until the day of payment ....

"From the practical point of view, the denial of the payment of interest could result, in the case that the total of the awards is less than the deposited sum, in an unjustified return of the remainder to the wrongdoer." (*Ibid.*, p. 223.)

[187] According to that decision:

"... the Commission holds that in all claims based on property taken and not returned to the private owner the measure of damages which will ordinarily be applied is the reasonable market value of the property as of the time and place of taking in the condition in which it then was, if it had such

2. *DIES A QUO*

82. Regarding the day from which interest should be calculated, three positions have emerged in judicial practice. One, rather frequent, is to calculate interest as from the day on which the damage occurred. This always happens when the principal damage itself consisted of the loss of, or failure to collect, a sum of money in cash and collectable—a situation usually arising in cases of breach of contract. An example is the decision of the Mexican-Venezuelan Mixed Claims Commission in the *Del Rio* case, in which the umpire ruled that interest be calculated as from the date established by the parties for the reimbursement of the loan, rejecting the submission that interest should be calculated only from the day on which the demand for payment had been made.[188] But the allocation of interest from the day of the injurious event is frequent also in cases in which the exact monetary assessment of the principal damage is only made at the time of the decision. This has often occurred in cases of expropriation. An example is the *Forests in Central Rhodopia* case,[189] in which the umpire, Östen Undén, stated that the award of interest was in response to a general principle of law, adding that:

> According to the general principles of international law, interest-damages must be determined on the basis of the value of the forests, respectively of the exploitation contracts, at the date of the actual dispossession, that is, on September 20, 1918, in addition to an equitable rate of interest estimated on that value from the date of dispossession ....[190]

In a different instance, the "*Cape Horn Pigeon*" case mentioned above (para. 66), interest was calculated from the day on which the ship was seized and applied to

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market value; if not, then the intrinsic value of the property as of such time and place. But as compensation was not made at the time of taking, the payment *now* or at a later day of the value which the property had at the time and place of taking would not make the claimant whole. He was *then* entitled to a sum equal to the value of his property. He is *now* entitled to a sum equal to the value which his property then had plus the value of the use of *such sum* for the entire period during which he is deprived of its use. Payment must be made *as of* the time of taking in order to meet the full measure of compensation. This measure will be met by fixing the value of the property taken as of the time and place of taking and adding thereto an amount equivalent to interest at 5 per cent per annum from the date of the taking to the date of payment. This rule the Commission will apply in all cases based on property taken during the period of neutrality.

"...

"... This construction yields a rule in harmony with the great weight of decisions of international arbitral tribunals in similar cases in which the terms of submission did not expressly or impliedly prohibit the awarding of interest." (UNRIAA, vol. VII, pp. 66-68.)

[188] Decision of 2 October 1903 (UNRIAA, vol. X, pp. 697 *et seq*.); the umpire stated:

"Considering finally that at the time when Colombia contracted the obligation it was a principle of justice, as it is today, according to the legislation of the most advanced nations, that the debtor is to be considered in default by the sole fact of the non-performance of his obligation, without the necessity of making demand after the day of the expiration of the term allowed him;

"By reason of the foregoing, which is proved by the evidence, it must be decided that Venezuela is obliged to make reparation to Mexico for the damages and injuries resulting from delay in the fulfilment of its obligation, by paying interest at the rate of 6 per cent per annum, upon the original capital of the debt, counting from the 7th day of October, 1827." (*Ibid*., p. 703.)

See also the cases cited by Subilia, *op. cit*., p. 76, footnote 3.

[189] Decision of 29 March 1933 (UNRIAA, vol. III, pp. 1405 *et seq*.). English trans, in AJIL, vol. 28 (1931), pp. 760 *et seq*.

[190] AJIL, p. 806. A reference to calculation of interest from the time of the taking is also present in the *Chorzów Factory* case (Merits) (*P.C.I.J*., *Series A, No. 17*, p. 47).

the sum awarded in compensation for the temporary detention of the ship, namely for loss of foreseeable profits.[191]

83. Much less frequent are decisions in which *dies a quo* is considered to be the day on which the *quantum* decision was rendered. One such ruling was made by the PCIJ in the *S.S. "Wimbledon"* case. In this case, which was described above (para. 50), the court decided that interest "should run, not from the day of the arrival of the *Wimbledon* at the entrance to the Kiel Canal, as claimed by the applicants, but from the date of the present judgment, that is to say from the moment when the amount of the sum due has been fixed and the obligation to pay has been established.[192] The date of the decision was also taken as *dies a quo* by the Franco-Mexican Claims Commission of 1924 with regard to a number of expropriations and other internationally wrongful (non-contractual) acts. According to the umpire, Jan Verzijl, in the *Pinson* case, it is only at the moment the judgment is pronounced that the international claim "turns into a right to demand a specific sum and this amount should start to bear interest".[193] The United States-German Mixed Claims Commission also made a distinction between "liquidated" and "unliquidated" claims in its Administrative Decision No. III, mentioned above (para. 81). According to that Commission, interest on an unliquidated claim should be awarded only when the exact amount of the loss has been fixed.[194]

84. A third method, often resorted to in judicial practice, is the computation of interest from the date on which the claim for damages was filed at national or international level. In its decision in *Christern and Company*,[195] the 1903 German-Venezuelan Mixed Claims Commission formulated criteria which it followed, in so far as interest was concerned, in its later decisions. The umpire was confronted with two opposing positions. On the one hand, the German commissioner considered that interest should accrue from the day on which the injurious event occurred, on the basis of a presumption of knowledge on the part of the Venezuelan authorities. The Venezuelan commissioner, on the other hand, observed that interest was to be allocated only in the case of "claims based upon contracts expressly stipulating for

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[191] Other cases where *dies a quo* has been set at the time of the loss are mentioned by Salvioli, *loc. cit*., p. 280.

[192] *P.C.I.J., Series A, No. 1*, p. 32.

[193] Decision of 19 October 1928 (UNRIAA, vol. V, pp. 327 *et seq*., at p. 452).

[194] The umpire, Edwin B. Parker, delivered the opinion of the Commission as follows:

"Under the Treaty of Berlin as construed by this Commission in that decision as supplemented by the application of article 297 of the Treaty of Versailles (carried into the Treaty of Berlin) Germany is financially obligated to pay to the United States all losses of the classes dealt with in this opinion. The amounts of such obligations must be measured and fixed by this Commission.

"There is no basis for awarding damages in the nature of interest where the loss is neither liquidated nor the amount thereof capable of being ascertained by computation merely. In claims of this class no such damages will be awarded, but when the amount of the loss shall have been fixed by this Commission the award made will bear interest from its date. To this class belong claims for losses based on personal injuries, death, maltreatment of prisoners of war, or acts injurious to health, capacity to work, or honor.

"But where the loss is either liquidated or the amount thereof capable of being ascertained with approximate accuracy through the application of established rules by computation merely, as of the time when the actual loss occurred, such amount, so ascertained, plus damages in the nature of interest from the date of the loss, will ordinarily fill a fair measure of compensation. To this class, which for the purposes of this opinion will be designated 'property losses', belong claims for property taken, damaged or destroyed". (UNRIAA, vol. VII, p. 65.)

[195] UNRIAA, vol. X, pp. 363 *et seq*.

interest" and, in any event, "no interest is to be allowed until a proper demand for payment has been made on the Republic of Venezuela". While believing in principle that the "presumption of knowledge" argument put forward by the German commissioner should be given consideration, the umpire thought that this argument should not be applied in too rigid a fashion, especially in view of the complex nature of States as persons of international law. On the other hand, the umpire considered the formal requirements indicated by Venezuela for interest to accrue to be excessive. He was of the opinion that some evidence that a claim had been filed with Venezuelan authorities would be sufficient. Whether the injured party's action was sufficient for such a purpose should be assessed, in his view, on a case-by-case basis.[196]

85. As recalled above (para. 83), the question of interest was considered at length in several of its aspects in the *Pinson* case. In particular, the umpire believed that interest should be allocated only in the case of "liquid contractual debts, for a fixed amount". As for *dies a quo*, he stated:

> ... It might be wondered what date the interest should be due—the date on which the revolutionary debt was contracted or the loan was demanded, or the date of notice (*mise en demeure*) to the debtor State. Since the French agent has chosen as the initial date the last of the dates mentioned in the above dilemma, the Commission cannot award interest from an earlier date.[197]

In the *Campbell* case, interest was awarded as of the date on which the injured private party had filed its brief with the Portuguese authorities. The amount of the principal award was established on a lump-sum basis, *ex aequo et bono*, with specific reference to the time elapsed from the moment of the injury to that of the filing of the

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[196] *Ibid.*, pp. 366-367. In the umpire's words:

"There is much force in the argument of the Commissioner for Germany that the government, as a principal, is presumed in law to have knowledge of all the aets of its officers, as its agents, and if the case was one between private parties it would be difficult to avoid the conclusions drawn by him. The umpire is of the opinion, however, that as to claims against governments it would be unjust to enforce so strict a rule of agency. Of necessity a national government must act through numerous officials, many of whom are very subordinate and quite remote from the seat of government. In the ordinary course of business a creditor under a contract, or a party injured by a tort, presents his claim to the central powers of the government and asks satisfaction thereof from some official whose special function it is to represent the government *in the premises*. It is generally presumed that governments are ready and willing to pay all just claims against them. This is a corollary to that other presumption of law which is of universal application—*omnia rite acta praesumuntur*. If such is the case in respect of individuals it must certainly be true in respect of governments. The umpire is not prepared to go the full length of the argument of the Commissioner for Venezuela as to the formality necessary to constitute a sufficient demand in all cases, but he is of the opinion that some evidence of a demand upon the government for payment of a claim is necessary to start the running of interest in all cases which the Government of Venezuela has not either stipulated for interest or given an obligation from which an agreement to pay interest can fairly be implied. The sufficiency of the demand is to be decided according to the particular facts in each case." (*Ibid.*, p. 367.)

[197] UNRIAA, vol. V, p. 451. On account of this, the umpire decided that:

"(*c*) On the compensation for contractual debts for a definite amount and for forcible loans, interest will be payable at a rate of 6 per cent per annum, as from the date on which the claim was brought to the knowledge of the Mexican Government or was the subject of an action before the National Claims Commission." (*Ibid.*, p. 453.)

Therefore, in so far as *dies a quo* was concerned, the umpire's remarks do not appear to be particularly decisive. He did not intend to solve the problem of the choice between the date of the wrongful act and the date of the *mise en demeure* (equivalent to the date of the claim) by stating that either one was more correct under international law. His main preoccupation seems to have been not to go beyond the request of the injured party.

brief.[198] The date of the claim, preferred in this decision to the time of injury, does not seem to have been chosen as being in conformity with a rule of international law. It is rather an integral part of a decision which already contemplated the lump-sum coverage of the damage up to the moment the brief had been filed.

86. The date of the claim was also the choice of the British-Venezuelan Mixed Claims Commission in the *Kelly*[199] and *Stevenson*[200] cases. As in *Christern and Company* (see para. 84 above), the possibility that the respondent Government was aware of the injured party's claim was considered relevant in the *Stevenson* case for the accruing of interest. This is what one can infer from the rather laconic statement in the award: "Interest as damages begins only after default". In the "*Macedonian*" case, King Leopold I of Belgium was required to decide, on the basis of equity, a claim by the United States of America regarding a sum of money illegally taken from United States citizens by the Chilean authorities.[201] The issue was decided in the sense that:

> Whereas, however, nothing was done by the United States Government to hasten a settlement until March 19, 1841;
>
> We are of the opinion that, in addition to the principal of [$42,240], the Government of Chile should pay that of the United States interest on this sum at the rate of 6 per cent per annum from March 19, 1841, to December 26, 1848.[202]

It thus appears that the arbitrator did not intend to suggest the existence of a norm of international law according to which interest should accrue from the time of the claim. He rather intended to take account of the fact that the injured party had not acted with diligence in putting forward its claim. It would have been unfair, according to the arbitrator, to charge the Chilean Government with an additional onus for the 20-year delay in the filing of the international claim by the injured party.[203] The Foreign Claims Settlement Commission of the United States also chose the date of the claim in two more recent cases: the *Proach* case[204] and the *American Cast Iron Pipe Company* case.[205]

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[198] Decision of 10 June 1931 (United Kingdom v. Portugal) (UNRIAA, vol. II, pp. 1145 *et seq.*, at p. 1158).

[199] UNRIAA, vol. IX, pp. 398 *et seq*.

[200] UNRIAA, vol. IX, pp. 494 *et seq*. The following explanation was given by the umpire:

"... There is no proof that the respondent Government had been informed previously of the claims of 1859 and 1865. Those of 1869 originated after the convention creating the Claims Commission. Certainly the respondent Government could make no compensation until a claim had been duly presented, and hence it could not be, until then, in default. Interest as damages begins only after default." (*Ibid*., p. 510.)

[201] Decision of 15 May 1863 (Moore, vol. II, pp. 1449 *et seq*.). More specifically, the following question was put:

"3. Does the Government of Chile owe the interest in addition to the principal; and if so, from what date and at what rate should interest be paid?" (*Ibid*., p. 1465.)

[202] *Ibid*., p. 1466.

[203] The criterion based on the date of the claim was also adopted by the United States-Venezuelan Mixed Claims Commission in the "*Alliance*" case, but no reason for this choice was given (UNRIAA, vol. IX, pp. 140 *et seq.*, at p. 144).

[204] Decision of 10 December 1962 (ILR, vol. 42, pp. 189 *et seq*.).

[205] Decision of 19 October 1966 (ILR, vol. 40, pp. 169 *et seq*.). The formula adopted in those two cases was the following:

"... there is no settled rule in universal effect as to the period during which the interest shall run. Various terminal dates have been applied by different Commissions, including the date of the original injury, the date of the notice of the claim, or the date of payment .... The Commission notes further that the date the claim arose in this case is the date of loss." (*Ibid*., pp. 173-174.)

87. In the *Cervetti* case, decided by the Italian-Venezuelan Mixed Claims Commission in 1903,[206] the Italian party claimed that fair reparation for the seizure of goods belonging to an Italian trader could not be made simply by restitution of the monetary equivalent of the seized goods, an appropriate interest being also due as from the moment of the seizure. Venezuela maintained that since the Italian claim had only been notified officially to the Venezuelan Government at the hearing before the Commission, it would be unfair to allow interest to run on amounts which the Venezuelan Government had not been aware of until that particular moment. Ralston, the umpire, awarded interest that was not, however, calculated on the basis claimed by Italy.[207] In fact, Ralston appears to have subjected the award of interest to a specific, *ad hoc*, mechanism, the prevailing purpose of which was to avoid charging the responsible State with an extra financial onus, over and above the amount of the principal damage, for a period during which it could not be presumed that that international person had been aware of its obligation to furnish compensation. Only such a "method of procedure" would ensure in international relations—according to the umpire—the *ratio* of justice which, in relations between individuals in municipal law, is ensured by the *mise en demeure.* The same reasoning was applied by the Permanent Court of Arbitration in the *Russian Indemnity* case[208] relating to compensation due to Russia under article 5 of the 1879 Constantinople Peace Treaty and paid by Turkey 20 years later than the agreed date.[209] The reasoning of the Permanent Court of Arbitration in this case appears to be similar to that followed in

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The expression "the date the claim arose" does not suggest a choice in favour of the "date of claim" as opposed to the "date of injury". It appears to indicate not the specific moment at which the claim was made—distinct from the time of injury—but rather the moment at which the injured party became entitled to compensation.

[206] UNRIAA, vol. X, pp. 492 *et seq*.

[207] Ralston stated:

"According to the general rule of the civil law, interest does not commence to run, except by virtue of an express contract, until by suitable action (notice) brought home to the defendant he has been '*mis en demeure*'. Approximately the same practice exists in appropriate cases in some jurisdictions controlled by the laws of England and the United States. If such be the rule in the case of individuals, for stronger reasons a like rule should obtain with relation to the claims against governments. For, in the absence of conventional relations suitably evidenced, governments may not be presumed to know, until a proper demand be made upon them, of the existence of claims which may have been created without the authorization of the central power, and even against its express instruction. So far is this principle carried that in the United States no interest whatever is allowed upon any claim against the Government except pursuant to express contract.

In view, however, of the conduct of past mixed commissions, the umpire believes such an extreme view should not be adopted. It has seemed fairer to make a certain allowance for interest, beginning its running, usually, at any rate, from the time of the presentation of the claim by the royal Italian legation to the Venezuelan Government or to this Commission, whichever may be first, not excluding, however, the idea that circumstances may exist in particular cases justifying the granting of interest from the time of presentation by the claimant to the Venezuelan Government. This method of procedure will, in the opinion of the umpire, offer in international affairs the degree of justice presented by the '*mise en demeure*' as to disputes between individuals." (*Ibid*., p. 497.)

[208] Decision of 11 November 1912 (Russia v. Turkey) (UNRIAA, vol. XI, pp. 421 *et seq*.).

[209] Pointing out that most European legislation required a *mise en demeure*, the tribunal concluded, with regard to interest, that:

"... there is no occasion, and it would be contrary to equity, to assume that a debtor State is subject to stricter responsibility than a private debtor in most European legislation. Equity requires, as its theory indicates and as the Imperial Russian Government itself admits, that there shall be notice, demand in due form of law addressed to the debtor, for a sum which does not bear interest. The same reasons require that the demand in due form of law shall mention expressly the interest, and combine to set aside responsibility for more than simple legal interest." (AJIL, vol. 7 (1913), pp. 194-195.)

the *Cervetti* case. In addition, there are repeated references to equity—as opposed to existing rules of international law—as a criterion for assessment.

88. This brief review of case-law calls for the following comments. Decisions tend in most cases to justify the choice of the time of claim as *dies a quo* with the exigency of not burdening the "responsible" State with the payment of interest for a period during which it had no knowledge of the existence of its obligation. Only the submission of the injured party's claim can be assumed as evidence of the other party's knowledge. Of course, there is a difference according to whether one refers to the moment of the presentation of the claim by the injured private person at municipal level or by the injured State at the international level. Considering however that the damage suffered by private parties is also damage suffered by their State, both moments are equally relevant for the purpose of the presumption of the wrongdoing State's knowledge. In either case the international equivalent of the *mise en demeure* of municipal law would be ensured. In several decisions, in support of the need for such a requirement, the fact that an analogous requirement is met in municipal law by the principle of *mise en demeure* is highlighted. Equity requires, according to the relevant dicta on the subject, that—especially if account is taken of the complex nature of the subjects of international law—the reasons underlying this similar principle of internal law be duly considered at international level.

89. It is, however, important to note that in almost all the cases considered, preference for the "date of claim" was suggested by additional considerations which were specific to each case. These considerations were:

(a) The fact that the injured party's claim only included interest as of the date of the claim, and that the arbitrator did not wish to go ultra petita (Pinson case);

(b) The fact that the injured party introduced its claim a long time after the date of injury, thus neglecting that diligence which an injured party should apply in reducing as far as possible the injurious consequences of the unlawful act. In such a case the injured party's negligence clearly and rightly works (as in the "Macedonian" case) in the sense of proportionally reducing the burden of the offending State's burden;

(c) The fact that the principal sum to be compensated had already been fixed on a lump-sum basis so as to cover the entire period from the date of the injury to the date of the claim (Campbell case).

90. The doctrine generally criticizes that part of international jurisprudence which places *dies a quo* at the time of the decision (or of the settlement). Of course, the authors who adopt this attitude do not overlook the fact that arbitrators often proceed, at the time of decision, to a global assessment of the amount due, in such a manner as to cover the whole damage caused, from the time of occurrence of the wrongful act to the time of the award. Such assessments clearly cover the whole period during which interest is of relevance prior to the decision.[210] The placing of *dies a quo* at the time of

[210] Very clear in the above sense are the dicta of the Permanent Court of Arbitration in the *Lighthouses* case (see para. 73 above):

"It remains to examine the question, fully discussed in the course of the proceedings, whether interest is payable on the sums awarded to the parties.

"The Tribunal remarks in the first place that in this field no more than in many others do there exist strict rules of law of a general nature which prescribe or forbid the award of interest. The Tribunal cannot therefore accept the arguments of the two Agents who refer to the matter, although in opposing senses. Here again, the solution depends largely on the character of each individual case.

decision is otherwise rejected. Salvioli, for instance, believes that one would accept the time of decision or settlement as *dies a quo* in so far as one considered that the right of the injured State to recover damages together with interest (*dommages-intérêts*) derived from the decision, the latter being envisaged as a "constitutive" judgment. If one considered, on the contrary, that the majority of the relevant international decisions were merely "declaratory" of the right of the injured State, the choice of the time of decision as *dies a quo* would be unjustified.[211] Brownlie, for his part, rejects the tendency to exclude or reduce interest in certain cases on the basis of a questionable distinction between "liquidated" and "unliquidated" damages.[212]

91. Doctrine does not seem to be unanimous in accepting the view that *dies a quo* should be the time of the international claim. Salvioli considered this to be an unacceptable solution.[213] A similar position is taken by Subilia.[214] Others express doubts. Personnaz, for example, suggests that:

The term "claim" should now be clarified: what act could constitute a sufficient claim to entitle the claimant to interest? The question cannot be solved properly; and mostly, international judges have had the broadest latitude in this regard.[215] Gray, for her part, criticizes the assurance of those who reject the

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"If the Tribunal had adopted the method of fixing the amount of the debts, at the time of their origin, in the currencies of origin, and consequently of allowing the effect of the devaluations of those currencies to fall on the parties, there would have been some reason to allow the latter to benefit similarly from interest ....

"... In expressing this actual past value as exactly as possible in terms of present-day currency, the Tribunal deliberately excluded all the vicissitudes of the currencies of origin. It has, so to speak, thrown a bridge across the stirring period of the years which have elapsed and placed itself consciously in the present. In these circumstances, justice as well as logic require that no interest covering the past be awarded." (1LR, 1956, vol. 23, pp. 675-676.)

[211] Salvioli, *loc. cit.*, p. 281; in the same sense, see Personnaz, *op. cit.*, p. 255.

[212] To use Brownlie's own words:

"... It is sometimes stated that in the case of personal injuries, death, and mistreatment of various kinds, interest should not be awarded in excess of the more or less arbitrary pecuniary satisfaction awarded in such cases. This formulation of the position is difficult to follow. If in principle true compensation includes interest on the compensation (as due at the time of injury or death), the fact that the sum awarded is in some sense 'unliquidated' or arbitrary is not incompatible with the payment of interest on the compensation. The fact that the 'lump sum' awarded includes interest, notionally so to speak, does not contradict the *principle* that compensation should include interest on the damages as at the time of injury." (*Op. cit.*, p. 228.)

[213] Salvioli writes:

"It is true that the international dispute commences when the State takes its national's case in hand, but it should not be inferred from this theoretically correct proposition that the phase preceding the dispute between the State and the individual is of no legal value. It is still true that the State does not replace its national and indeed asserts its own right, which is different in nature from the right of the individual, but the undeniable link that *actually* exists between the individual's claim and the claim of his State does not allow us to regard the preceding internal phase as being non-existent for the purposes of the international relationship ...." (*Loc. cit.*, pp. 283-284.)

[214] Subilia believes that to place *dies a quo* at the time of the claim "... means in effect attributing to the injured party the harm that necessarily follows from observance of the rule of exhaustion of internal remedies, a rule to which diplomatic protection is subordinated. When one realizes how long such a procedure can sometimes be, it will be seen that the system may ultimately deprive the injured party of a considerable part of the reparation." (*Op. cit.*, p. 147.)

[215] Personnaz, *op. cit.*, p. 241. Further on he writes:

"Should the requirement be for an international claim against another State, or would an internal claim submitted to the authorities of the offending State be enough? Practice proves to be quite divergent in this regard." (*Ibid.*)

He concludes as follows:

date of the claim and favour the date on which injury occurred, since it "would not always lead to a just result where the delay in settling the claim was caused by the claimant State".[216] Gray seems thus to favour, as the *dies a quo*, the day of the claim.

92. The Special Rapporteur believes that the *dies a quo* should be the date of the damage (injury). He would agree with Brownlie that:

... In the absence of special provision in the *compromis* the general principle would seem to be that, as a corollary of the concepts of compensation and *restitutio in integrum*, the *dies a quo* is the date of the commission of the wrong ....[217]

3. *DIES AD QUEM*

93. Judicial practice regarding *dies ad quem* is somewhat more uniform. Gray sums it up nicely, evidently referring to Subilia's work:

In their choice of the date until which interest is allowed tribunals again come to different conclusions. *Most common is the date of the decision or of the final award**
... This is sometimes based on the erroneous impression of the tribunal that it has no jurisdiction to make an order for the payment of interest after its functions have terminated. This was the reasoning apparently accepted by the various Venezuelan commissions of 1903, and the 1868 and 1923 United States-Mexican commissions. Interest is allowed until the date of payment of the award more often in individual arbitrations than by claims commissions. This was the date accepted in the *Portendick* claims, the *Delagoa Bay Railway Company* case, the *Rhodope Forests* case, and the *Cape Horn Pigeon.*[218]

94. Doctrine largely agrees that *dies ad quem* should be the date on which compensation is actually paid. However, Brownlie recently distanced himself from this position and said that

... There is ... a presumption based upon ordinary legal logic that the *terminus ad quem* is the date of the award, or the date of ultimate settlement of the claim, in the case of provisional awards and valuation procedures.[219]

4. INTEREST RATE

95. It has been noted, with regard to practice, that the rate is rarely commented upon, "and it is not possible to determine the reasons which led the arbitrators to

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"Is it admissible for an internal claim to be regarded as enough to bring the demand to the knowledge of the Government? From the point of view of the victim and the theoretical standpoint, the answer seems to be 'yes', for the victim has been active in submitting the demand; moreover, once the victim has entrusted its claim to its State, that State alone is qualified to put forward an international claim and is wholly in charge of it; it can, if it wishes, postpone the claim *sine die.*

"However, such a solution might be unfair for the offending State, for if, as we have seen, it cannot be presumed to have knowledge of the acts of its public officials, how would it be informed of all the claims made to one of its agents or its ministers? At what time will the claim be deemed to be of sufficiently common knowledge? Even if we reject the objection regarding the confusion between the international system and the internal system and if we bear in mind, as did the Permanent Court of International Justice in its judgment No. 2, the internal procedure that constitutes a legal fact and cannot be passed over in silence because of the possible difficulties in determining the exact date of the initial claims, it seems more practical to take the international claim as the point of departure." (*Ibid*., pp. 242-243.)

[216] Gray, *op. cit*., p. 31.

[217] Brownlie, *op. cit*., p. 229. In the same sense, amply, see Subilia, *op. cit*., pp. 144-156.

[218] Gray, *op. cit*., p. 31; Subilia, *op. cit*., pp. 88-92.

[219] Brownlie, *op. cit*., p. 229.

choose one rate rather than another".[220] In many cases, particularly in cases decided by claims commissions, interest awarded is calculated on the basis of the statutory rate adopted in the respondent State. For example, the International Claims Commission of the United States stated in the *Senser* case—a case concerning arbitrary confiscation of property in Yugoslavia belonging to United States citizens—that

> Under settled principles of international law which, by the International Claims Settlement Act of 1949, the Commission is directed to apply (sec. 4 (*a*)), interest is clearly allowable on claims for compensation for the taking of property where, in the judgment of the adjudicating authority, considerations of equity and justice render such allowance appropriate.

The Commission added:

> ... As to the rate at which [interest is] allowable, we refer again to established principles of international law which suggest the use of the rate allowable in the country concerned.[221]

The Commission accordingly applied the said principles and ruled that all claims against Yugoslavia should be calculated with interest at 6 per cent as practised in Yugoslavia.[222]

96. Decisions in isolated cases tend to vary. Some of them use the rate applied by the respondent State; others use the rate in force in the claimant State or the commercial rate or the creditor's home rate.[223] It is interesting in this regard to consider, on the one hand, the decision in the "*Lord Nelson"* case, in which it is stated that "it is a generally recognized rule of international law that interest is to be paid at the rate current in the place and at the time the principal was due",[224] and, on the other hand, the contrary decision in the *Royal Holland Lloyd* case, in which it was stated, with regard to the rate of interest, that "there was in this matter no rule of general application".[225] Mention should also be made of the decision of the PCIJ in the well known "*Wimbledon*" case, in which it was stated that

> As regards the rate of interest, the Court considers that in the present financial situation of the world and having regard to the conditions prevailing for public loans, the 6 per cent claimed is fair; ...[226]

97. Writers generally seem to hold that this is a question to be solved on a case-by-case basis with a view to ensuring "full compensation". However, there is a certain support for the criterion used in the "*Wimbledon*" case that the interest rate should be

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[220] Subilia, *op. cit*., p. 94.

[221] ILR, 1953, vol. 20, pp. 240-241.

[222] Final decision handed down on 15 June 1954 (see Whiteman, *Digest*, vol. 8. pp. 1189-1190).

[223] Gray, *op. cit*., p. 32.

[224] Decision handed down on 1 May 1914 by the 1910 Great Britain-United States Arbitral Tribunal (UNRIAA, vol. VI, pp. 32 *et seq.*, at p. 34).

[225] Judgment handed down on 7 December 1931 by the United States Court of Claims (*Annual Digest ... 1931-1932*, vol. 6, pp. 442 *et seq.*, at p. 446).

[226] *P.C.I.J., Series A, No. 1*, p. 32. As regards the moment from which the interest rate should be calculated, it has often been held that it should be the time when the amount on which interest is due should have been paid. Here again, however, the jurisprudence is not uniform. See Subilia, *op. cit*., pp. 97-98.

the one "normally carried by *loans granted to States* at the time the injury is sustained".[227] Subilia holds that it could be useful to refer to the lending rate laid down annually by IBRD, particularly in cases of damage caused directly to a State without the intervention of private individuals. He believes that when the United Nations codifies the law of State responsibility, a conventional rate (of about 6 per cent) should be adopted, accompanied by the possibility that each State may be given the opportunity to prove that the damage is greater and hence obtain a higher rate.[228] It is desirable that the Commission express itself on the solution to be preferred.

5. COMPOUND INTEREST

98. Compound interest has been considered by jurisprudence rather infrequently. In the *Norwegian Shipowners' Claims* case,[229] the arbitral tribunal considered the possibility of allocating compound interest. After noting that such interest had never yet been allocated, it found that the claimants had not advanced sufficient reasons why an award of compound interest should be made.[230]

99. Different conclusions were reached in three subsequent cases. In the *Compagnie d'électricité de Varsovie* case (Merits), the City of Warsaw was deemed to be responsible for the injury sustained by the company as a result of lack of implementation of a previous arbitral decision relating to a concession of which the company was the beneficiary. The arbitrator, D. Asser, decided that the City should pay, in addition to the main amount of compensation, "a sum in Swiss francs equivalent on the day of payment to the value of 3,532,311 gold roubles, with compound interest of 5 per cent a year from 1 January 1935 up until the day of payment".[231] Compound interest was thus allocated only as of the date up to which the injured party had calculated the amount of damage it had sustained (an amount which was considerably reduced by the arbitrator). This decision was in no way motivated by the judge or objected to by the parties. In the *Chemins de Fer Zeltweg-Wolfsberg et Unterdrauburg-Woellan* case, which concerned that railway company and the Governments of Austria and Yugoslavia, the arbitrators decided in favour of compensation for the company, which had been unlawfully injured by the modification of a concession agreement. Compound interest was awarded once more without any indications of principle. In this case also the compound interest was

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[227] Nagy, *loc. cit*., pp. 183-184. In the same sense, see A. Verdross, *Völkerrecht,* 5th ed. (Vienna, Springer, 1964), p. 404; and Brownlie, *op. cit*., p. 229.

[228] Subilia, *op. cit*., pp. 160-163.

[229] Decision of 13 October 1922 (Norway v. United States of America) (UNRIAA, vol. 1, pp. 307 *et seq.*).

[230] The tribunal stated:

"In coming to the conclusion that interest should be awarded, the Tribunal has taken into consideration the facts that the United States have had the use and profits of the claimants' property since the requisition of five years ago, and especially that the sums awarded as compensation to the claimants by the American Requisition Claim Committee have not been paid; finally that the United States have had the benefit of the progress payments made by Norwegians with reference to these ships. The Tribunal is of opinion that the claimants are entitled to special compensation in respect of interest and that some of the claimants are, in view of the circumstances of their cases, entitled to higher rates of interest than others. The claimants have asked for compound interest with half-yearly adjustments, but compound interest has not been granted in previous arbitration cases, and the Tribunal is of opinion that the claimants have not advanced sufficient reasons why an award of compound interest, in this case, should be made." (*Ibid*., p. 341.)

[231] Decision of 23 March 1936 (France v. Poland) (UNRIAA, vol. III, pp. 1689 *et seq.*, at p. 1699).

apparently considered to be a non-controversial issue.[232] In the *Fabiani* case, compound interest, albeit not allocated, seems to have been considered a means of ensuring full compensation. In the words of the arbitrator:

> ... If Fabiani had been able to take advantage of these sums and use them in his business, it is likely that he would have made more profit than the compound interest on the principal in the time for which he would be authorized to collect interest ....[233]

100. Of those three cases, the two in which compound interest was allocated are more recent, while in the *Fabiani* case, which is antecedent, compound interest was not rejected in principle, although in fact it was not awarded. In the *Norwegian Shipowners' Claims* case, too, the non-allocation of compound interest does not appear to have been based on principle; the tribunal simply did not consider that the injured party had brought forward sufficient reasons to justify a decision that would have been in contrast with the prevailing case-law.

101. An explanation on the question of compound interest is to be found in the decision of the arbitrator, Max Huber, in the *British claims in the Spanish Zone of Morocco* case.[234] Compared with that in the *Norwegian Shipowners' Claims* case, Huber's decision appears to lay down stricter requirements for the allocation of compound interest. He considers the existence of "particularly strong and quite special arguments" to be necessary in order to justify a decision in contrast with the prevailing case-law.[235]

102. In the *Portuguese Colonies* case (Naulilaa incident), Portugal filed a claim for compound interest at a rate of 30 per cent "for prospective earnings" following a loss of cattle. After noting the exorbitant amounts claimed by the injured State and the prevailingly negative attitude of jurisprudence with regard to the award of compound interest, the tribunal allocated simple interest. According to the arbitrators:

> ... It has not been proved and it is entirely unlikely that *net* profits of the order indicated could normally have been made if the parties concerned had remained in possession of the tools of work whose loss is attributable to Germany. Moreover, since the things in question were not irreplaceable, the owners, by purchasing similar ones, could have obtained the same earnings. If they receive the full value, plus the normal rate of interest from the date of the loss, they are therefore fully compensated.[236]

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[232] Decision of 12 May 1934 (UNRIAA, vol. III, pp. 1795 *et seq.*, at p. 1808).

[233] See footnote 148 above.

[234] Decision of 1 May 1925 (United Kingdom v. Spain) (UNRIAA, vol. II, pp. 615 *et seq*.).

[235] Huber stated:

"As to the choice between simple interest and compound interest, the Rapporteur must first note that arbitration case-law in regard to compensation to be awarded by one State to another for damage sustained by the latter State's nationals on the former State's territory ... is unanimous, as far as the Rapporteur is aware, in dismissing compound interest. In the circumstances, particularly strong and quite special arguments need to be advanced to accept this type of interest. Such arguments do not appear to exist, since the circumstances of the claims before the Rapporteur do not differ in principle from those of the cases that have produced the case-law in question.

"This is true, *inter alia*, of some situations in which compound interest would seem to be better suited to the nature of things than is simple interest, namely cases in which the property that the compensation awarded is intended to replace increases by geometric rather than arithmetic progression, as happens, for instance, in the case of herds of cattle." (*Ibid*., p. 650.)

[236] UNRIAA, vol. II, p. 1074.

103. The above decision appears thus to reject compound interest because this method of calculation would have resulted in a sum greatly in excess of the actual *lucrum cessans*.

104. The rejection by the German-Venezuelan Mixed Claims Commission of a claim for compound interest in the *Christern and Company* case[237] seems also to have been based essentially on the "law of precedents". A merely implied rejection of claims for compound interest, in consideration of the lack of motivation, seems also to characterize, according to Subilia,[238] the decisions in the *Deutsche Bank*[239] and *Dundonald* cases.[240]

105. Although a majority of negative decisions on compound interest may seem to emerge, international jurisprudence is, in the opinion of the Special Rapporteur, not really conclusive in the negative sense:

(a) Among the negative decisions one should distinguish:
- (i) the decision that simply adjusts an ill defined negative orientation of previous case-law (*Christern and Company*);
- (ii) decisions which, while recalling previous case-law, indicate however that in special circumstances the mechanism of compound interest could be useful in fulfilling the requirement of full compensation (*British claims in the Spanish Zone of Morocco* and *Norwegian Shipowners' Claims*);
- (iii) the decision that considers that in the specific case the compound interest mechanism would result in a sum exceeding by far the actual *lucrum cessans* (*Portuguese Colonies*);
- (iv) the decision which, on the contrary, considers that compound interest, while acceptable in principle, would lead in the specific case to insufficient compensation (*Fabiani*).

(b) As for the cases in which compound interest was awarded, the lack of motivation would seem to suggest that compound interest was considered to be an essential, non-controversial element of reparation by equivalent.

The Special Rapporteur is therefore inclined to conclude that compound interest should be awarded whenever it is proved that it is indispensable in order to ensure full compensation for the damage suffered by the injured State.

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[237] The umpire of the Commission stated:

"The decision in that case also decides the liability of Venezuela for the loan to the State of Zulia. The Commissioner for Germany, however, allows the claimants the full amount of this item of their claim, 10,459.41 bolivars, with the usual interest. This amount includes interest at 1 per cent a month, compounded with yearly rests, and increases the original amount of the item thereby 4,589.37 bolivars. The umpire is unable to concur in this finding. He does not find any warrant or authority in the proofs for compounding interest ...." (UNRIAA, vol. X, p. 424.)

[238] Subilia, *op. cit.*, p. 101.

[239] Decision of 22-23 October 1940 (Germany v. Romania) (UNRIAA, vol. III, pp. 1893 *et seq.*, at p. 1901).

[240] Decision of 6 October 1873 (Great Britain v. Brazil) (Lapradelle-Politis, vol. III, pp. 441 *et seq.*, at p. 447).

CHAPTER III

III. SATISFACTION (AND PUNITIVE DAMAGES)

A. Satisfaction in the literature

106. As stated in chapter I, satisfaction is very frequently mentioned in the literature as one of the forms of reparation for an internationally wrongful act. It was noted there that two not incompatible tendencies seem to emerge from the literature with regard to the specific function of this remedy. A considerable number of authors, only a few of whom were mentioned earlier (paras. 13 and 14 above), consider satisfaction as the specific remedy for the injury to the State's dignity, honour or prestige. Such is notably the position of Bluntschli,[241] Anzilotti,[242] Visscher,[243] Morelli,[244] Jiménez de Aréchaga[245] and others.[246] It was also noted that a number of the said authors believe that the specific function of satisfaction is performed also with regard to the juridical injury suffered by the offended State. By such injury they understand the infringement of the offended State's juridical sphere deriving from any internationally unlawful act, regardless of whether a material injury is present.[247] It

[241] According to Bluntschli:

"When an offence is committed against a State's honour or dignity, the offended State has the right to demand satisfaction." (*Op. cit.*, p. 264, art. 463.)

[242] According to Anzilotti:

"…Basic to the idea of satisfaction is the idea of non-material damage or, as the English put it, 'moral wrong', which, as already stated, may even consist merely in ignoring the right of a State. The primary goal of satisfaction is to make good the affront to dignity and honour…" (*Corso*, p. 426.)

[243] According to Visscher:

"An act against international law may, regardless of the material harm it causes, entail *moral* injury to another State that consists of an offence against its honour or its prestige…" (*Loc. cit.*, p. 115.)

[244] According to Morelli:

"In the case of an unlawful act that consists of harm or that in any way involves harm to a moral interest, such as honour or dignity (and a violation of any of a State's rights may, in given circumstances, entail harm of this kind), the form of reparation due (possibly along with reparation dependent on simultaneous injury to material interests) consists of *satisfaction*." (*Op. cit.*, p. 358.)

[245] Jiménez de Aréchaga writes with regard to satisfaction:

"This third form of reparation is appropriate for non-material damage or moral injury to the personality of the State." (*Loc. cit.*, p. 572.)

[246] P. A. Bissonnette, *La satisfaction comme mode de réparation en droit international* (thesis, University of Geneva) (Annemasse, Impr. Grandchamp, 1952), p. 161; Personnaz, *op. cit.*, p. 277; García Amador, document A/CN.4/134 and Add.l, para. 92; Sereni, *op. cit.*, p. 1552; Przetacznik, *loc. cit.*, p. 944; Rousseau, *op. cit.*, p. 218; Graef-rath, *loc. cit.*, p. 84.

[247] This role of satisfaction is particularly stressed by Anzilotti and Bluntschli. According to Anzilotti:

"…Injury is implicit in the anti-juridical character of the act. The violation of the rule in actual fact always disrupts the interest that the rule protects and, consequently, the subjective right of the person to whom the interest belongs; this is even truer in that injury, in international relations, is in principle moral injury (disregard of the worth and dignity of the State as a person under the law of nations) rather than material injury (economic or patrimonial in the true sense of the word)." ("La responsabilité internationale des Etats à raison des dommages soufferts par des étrangers", RGDIP, vol. XIII (1906), pp. 13-14.)

According to Bluntschli:

"If the breach consists of an actual violation of established rights or disturbance of the *de facto* situation in a foreign Power, that Power is entitled not only to demand cessation of the injustice and restoration of the previous *de jure* or *de facto* situation, and damages if necessary, but also satisfaction

was concluded in chapter I that, in the specific sense in which it is so widely used in the literature, the term "satisfaction" has moved away from its etymological meaning, even though it is precisely "in the first etymological meaning of the verb 'to satisfy', which is to fulfil, to settle what is owed"[248] that the term recurs at times in the practice and the literature.

107. Satisfaction is not defined only on the basis of the type of injury with regard to which it operates as a specific remedy. It is also identified by the typical forms it assumes, which differ from *restitutio in integrum* or compensation.[249] Bissonnette[250] and Przetacznik[251] mention regrets, punishment of the responsible individuals and safeguards against repetition.[252] Bissonnette adds saluting the flag and expiatory missions in the context of the expression of regrets. But the forms of satisfaction are not limited to the three referred to above.[253] Very frequent mention is also made of the payment of symbolic sums or nominal damages,[254] or of the decision of an

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by punishment of the guilty and, depending on the circumstances, further guarantees against a recurrence of the breach." (*Op. cit.*, Fr. trans., p. 265, art. 464.)

[248] Bissonnette, *op. cit.*, p. 40. He is, however, firmly against this understanding of satisfaction.

[249] According to Bissonnette:

"An examination of practice, and particularly an examination of diplomatic correspondence, none the less reveals demands for reparation that cannot be classed as either *restitutio in integrum* or damages. This is true of demands for excuses or regrets, saluting the flag, punishment of the guilty, resignation or suspension of guilty public officials, or assurances that certain acts will not be repeated…" (*Op. cit.*, p. 24.)

This aspect is also indicated in the writings of Anzilotti, *Corso*, p. 426; Visscher, *op. cit.*, p. 119; Eagleton, *op. cit.*, p. 189; Sereni, *op. cit.*, p. 1552; Morelli, *op. cit.*, p. 358; Jiménez de Aréchaga, *loc. cit.*, p. 572; Brownlie, *op. cit.*, p. 208; Rousseau, *op. cit.*, pp. 218 *et seq.*; Gray, *op. cit.*, p. 42; M. Giuliano, *Diritto internazionale*, vol. I, *La societa internazionale e il diritto*, 2nd ed. with T. Scovazzi and T. Treves (Milan, Giuffrè, 1983), p. 593.

[250] Bissonnette, *op. cit.*, pp. 85 *et seq.*

[251] Przetacznik, *loc. cit.*, pp. 945 *et seq.*

[252] These three categories were already included in article 13 of the draft convention on international responsibility of States for injuries on their territory to the person or property of foreigners, submitted by L. Strisower during the preparatory meetings for the Lausanne session (September 1927) of the Institute of International Law (*Annuaire de l'Institut de droit international, 1927*, vol. 33, part I, pp. 560-561).

[253] *Contra* C. Dominicé, "La satisfaction en droit des gens", *Mélanges Georges Perrin* (Lausanne, Payot, 1984), who denies that contemporary international law provides for an obligation to express regrets, to punish the responsible person or to give assurances against repetition (pp. 105 *et seq.*).

[254] Anzilotti states:

"…there is nothing to prevent—and there are a number of examples —satisfaction from consisting of the payment of a sum of money, not intended as compensation for actual material damage sustained, but representing a sacrifice that is a symbol of making amends for the wrong committed." (*Corso*, p. 426.)

Pecuniary satisfaction is also mentioned by Eagleton, *op. cit.*, p. 189; Sereni, *op. cit.*, p. 1552; Morelli, *op. cit.*, p. 358; Przetacznik, *loc. cit.*, pp. 968 *et seq.*; Giuliano, *op. cit.*, p. 593; Rousseau, *op. cit.*, p. 220; Gray, *op. cit.*, p. 42. Bissonnette (*op. cit.*, pp. 127 *et seq.*), who firmly believes in a reparatory (in the civil law sense) idea of satisfaction, is instead against admitting such a form of satisfaction because it would, in most cases, have a punitive character. In relation to Bissonnette's theoretical construction, Gray says:

"According to Bissonnette … the function of satisfaction is to repair moral injury to a State, but on this question as to when such injury exists Bissonnette unfortunately closes his circular argument by saying that there is a moral injury when the appropriate remedy is satisfaction…." (*Op. cit.*, pp. 41-42.)

Schwarzenberger and Dominicé are also against this idea. Schwarzenberger writes:

international tribunal declaring the unlawfulness of the offending State's conduct.[255] In addition, frequent mention is made—although not without objections—of pecuniary satisfaction.[256]

108. A crucial question is whether satisfaction is punitive or afflictive, or compensatory in nature. Satisfaction is considered to be purely reparatory (in the sense that it should have no consequence beyond what in internal law is generally provided for as a consequence of a civil tort) by Ripert,[257] Bissonnette,[258] Cheng[259] and Jiménez de Aréchaga.[260] An afflictive nature of satisfaction (together with *punitive damages*) appears to be recognized instead by Bluntschli,[261] Anzilotti,[262] Eagleton,[263] Lauterpacht,[264] Personnaz,[265] García Amador[266] and Morelli.[267] It was

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"…As international judicial practice permits monetary compensation to be awarded for other than material damage, it appears an unnecessary over-complication to distinguish it from pecuniary satisfaction. Whether symbolical or excessive, any award of damages is a form of monetary compensation…" (*Op. cit.*, p. 658.)

Dominicé, for his part, states:

"Moreover, since nowadays States do not demand pecuniary satisfaction, either in their submissions in the courts and tribunals or, apparently, in their diplomatic practice, it has to be recognized that it no longer enters into consideration." (*Loc. cit.*, p. 111.)

[255] Morelli, *op. cit.*, p. 358; Gray, *op. cit.*, p. 42.

[256] Visscher, *op. cit.*, p. 119; Personnaz, *op. cit.*, pp. 298 and 572; Brownlie, *op. cit.*, p. 209; Rousseau, *op. cit.*, p. 220; Graefrath, *op. cit.*, p. 86; Gray, *op. cit.*, p. 42.

[257] According to G. Ripert, "Les règles du droit civil applicables aux rapports internationaux", *Recueil des cours ..., 1933-11* (Paris), vol. 44:

"In private law, an action regarding liability is an action for compensation; it is not criminal in character, and civil law is not concerned with punishment of the guilty. This idea must be maintained, even in compensation for moral injury, although in this case, after the compensation, the victim's patrimony increases. Compensation for moral injury is probably somewhat confused, since the victim receives substitute satisfaction; however, it is compensation, not punishment." (P. 622.)

[258] According to Bissonnette:

"It is therefore a kind of reparation that is different from *restitutio in integrum* and damages. It can only be compensatory, since restitution is the only direct kind of reparation. Like restitution it is mostly non-pecuniary, but it differs from restitution in that it is not restitutive in character. Again, unlike damages, it never seems to take a pecuniary form. The literature and practice have always designated this kind of reparation as satisfaction." (*Op. cit.*, p. 25.)

[259] B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (London, Stevens, 1953), pp. 236-237 and footnote 14.

[260] According to Jiménez de Aréchaga:

"In some cases, under the guise of compensation, a mild form of sanction has been imposed to induce the delinquent government to improve its administration of justice (*Janes* claim (1926) [UNRIAA, vol. IV, p. 89]; *Putnam* claim (1927) [*ibid.*, p. 151]; *Massey* claim (1927) [*ibid.*, p. 155]; *Kennedy* case (1927) [*ibid.*, p. 194]). This, however, does not go beyond the ordinary concept of civil liability, or imply criminal liability.

"But punitive or exemplary damages, inspired by disapproval of the unlawful act and as a measure of deterrence or reform of the offender, are incompatible with the basic idea underlying the duty of reparation…." (*Loc. cit.*, p. 571.)

[261] According to Bluntschli:

"*Violation of the law* of a foreign State is more serious than failure to fulfil commitments entered into with that State; it may be likened to offences under criminal law. But, since there is no criminal jurisdiction under international law, each State must inevitably be allowed to determine the conditions under which it will declare that it is satisfied. International law today is at the same stage as criminal law was under the Frankish kings; the injured citizen himself determined the atonement for the guilty party if the latter wished to escape the vengeance of the victim's family." (*Op. cit.*, p. 265, commentary to article 464.)

[262] See the opinion of Anzilotti, quoted in footnote 254 above.

[263] According to Eagleton:

denied recently—together with the autonomy of the remedy—by Dominicé, who believes satisfaction to be a form of reparation indistinguishable from *restitutio in integrum* and pecuniary compensation, because the juridical wrong, as an object of satisfaction, would be inseparable, in his opinion (if the Special Rapporteur has understood him correctly), from the other consequences of an internationally wrongful act.[268]

109. Related to the idea of its afflictive or punitive nature is the idea that satisfaction should be proportioned to the seriousness of the offence or to the degree of fault of the responsible State. This point is made by Bluntschli,[269] Anzilotti,[270]

"…There seems to be no theoretical objection, granted ascertainable rules of law and judicial enforcement, to the imposition of penalties by international law. Mr. Hyde speaks of the 'value of exemplary reparation as a deterrent of conduct otherwise to be anticipated';* and, unsatisfactory as may be such procedure at present, international law is badly in need of such sanctions. It can no longer be argued that the sovereign State is above the law; and there seems to be no reason why it should not be penalized for its misconduct, under proper rules and restrictions." (*Op. cit.*, pp. 190-191.)

*C.C. Hyde, *International Law chiefly as Interpreted and Applied in the United States* (Boston, 1922). vol. I, pp. 515-516.

[264] H. Lauterpacht, "Règles générales du droit de la paix", *Recueil des cours…, 1937-IV* (Paris, 1938), vol. 62:

"…a violation of international law may be such that it needs, in the interest of justice, an expression of disapproval that goes beyond material reparation. To place limits on liability within the State to *restitutio in integrum* would be to abolish the criminal law and a major part of the law of torts. To abolish these aspects of liability as between States would be to adopt, on the grounds of sovereignty, a principle that is repugnant to justice and carries with it an encouragement to wrongfulness…." (P. 350.)

[265] According to Personnaz:

"First of all, since it is responsibility that supplements civil liability, the penal sanction will be viewed in the same way as the reparation, the difference being that it is a material, or even intentional, element. The indemnity will include not only an element of reparation, evaluated in terms of the injury sustained by the injured State—or private individual—but in addition a penal factor. Accordingly, in the case of pecuniary compensation, part of it will be reparation for the material or moral injury actually sustained by the State, and part of it will be a penalty for the particularly serious breach of international law that has necessitated it.

"Hence it is necessary to examine what, in a given case, has been the extent of the injury, and this will determine the corresponding part that consists of reparation. The remainder of the indemnity will represent the part that is the penal sanction, which will be the difference between the total indemnity and the reparation for the actual injury." (*Op. cit.*, pp. 317-318.)

[266] According to García Amador:

"…other measures of satisfaction are also accompanied by wide publicity so that they will accomplish what is in fact their twofold purpose—that of "satisfying" the honour and dignity of one State and that of "punishing" the act imputed to the other State. This second purpose reflects the last of the characteristics of satisfaction which will be emphasized here—viz., its essentially punitive nature." (Document A/CN.4/134 and Add. I, para. 76.)

[267] Morelli, *op. cit.*, p. 358.

[268] According to Dominicé:

"…The first conclusion that emerges from this study is that there is in international law no form of reparation, within the strict meaning of the term, that would amount to satisfaction and would, along with *restitutio in integrum* and payment of damages, take its place among the various forms of the obligation to make reparation. This obligation, viewed as bilateral—and that is reparation *stricto sensu*—has modalities solely of a material character.

"…We believe that the real reason is that a State's moral injury is not identifiable; it merges with the wrongful act and is elusive, unlike a moral injury sustained by an individual, which is clear to see in certain circumstances and may, one way or another, be the subject of compensation in money." (*Loc. cit.*, p. 118.)

[269] According to Bluntschli:

Personnaz,[271] Sereni[272] and Przetacznik.[273] But objections are raised by Reitzer, according to whom

> ... Leaving aside the question of whether it is very judicious to transpose the notion of psychological guilt into the field of international law, the problem of the seriousness of the fault is too elusive and it leaves a wide margin for every interpretation.[274]

110. A further question that is raised in the literature is whether the injured State has a choice with regard to the form satisfaction should take.[275] This raises the further question of what limitations should be placed on such a choice in order to prevent abuse.[276] A number of authors stress that practice shows that powerful States tend to make requests not compatible with the dignity of the wrongdoing State or with the principle of equality.[277]

"The nature and the extent of the compensation, satisfaction or punishment are determined in accordance with the nature and the seriousness of the offence. The greater the crime, the more important the consequences. There is some proportion between the penalty and the guilt. Exaggerated claims constitute a violation of the law." (*Op. cit.*, p. 268, art. 469.)

[270] According to Anzilotti:

"The choice of one or more forms of satisfaction depends on the will of the parties, which will naturally take account of the nature and the seriousness of the act; there are no fixed rules on the subject. It is simply useful to note that, in determining the kind of satisfaction, the parties cannot fail to take account of moral elements, such as the sympathy or antipathy displayed by the population to the authors of the offence, the behaviour of the press, the precedents, the propaganda made in the country, and so on. Here, negligence or wilful intent are not elements of the unlawful act; it is the extrinsic circumstances determining the political seriousness of the act, and they cannot fail to be taken into consideration if the satisfaction is to be in keeping with the intent…." (*Corso*, p. 426.)

[271] According to Personnaz:

"…The manifestly injurious or serious nature of the unlawful act would warrant aggravated responsibility and this would lead to higher compensation or special measures of satisfaction…." (*Op. cit.*, p. 302.)

[272] According to Sereni:

"Negligence or wilful intent, even though they are not constituent elements of the unlawful act, are taken into consideration for the purpose of determining any obligation regarding satisfaction and the type of satisfaction due…." (*Op. cit.*, p. 1554.)

[273] According to Przetacznik:

"Satisfaction has certain features of its own. In view of the very nature of moral and political injury, the content of which is variable and imprecise, satisfaction is evaluated in terms of the unlawful act attributable to the State and even the circumstances determining the degree of seriousness of such an act…." (*Loc. cit.*, p. 944.)

[274] Reitzer, *op. cit.*, pp. 117-118.

[275] Reitzer, *op. cit.*, p. 134 and footnote 61.

[276] According to Graefrath:

"Indeed, satisfaction has been often used by the European Powers as a pretext for intervention. Tammes, therefore, spoke of 'a mediaeval procedure which is becoming more and more obsolete' and 'devaluation of the whole concept of "satisfaction" as being a unilateral act on the part of imperialist Powers for the humiliation of the weak'.*

"The misuse of satisfaction for suppression and humiliation of whole peoples is typical for the period of imperialism. The anachronistic forms of marks of tribute towards flags and State emblems appearing in the manuals scarcely correspond to the present style of international relations. We can agree with Tammes when he writes that claims of satisfaction 'often have looked like feigned hysteria … and were calculated only to ensure enduring humiliation'.*" (*Loc. cit.*, p. 85.) Personnaz (*op. cit.*, p. 289) and García Amador (document A/CN.4/134 and Add.I, para. 75) also speak about the abuse of satisfaction.

*A. J. P. Tammes, "Means of redress in the general international law of peace", *Essays on the Development of the International Legal Order* (Alphen aan den Rijn, Sijthoff and Noordhoff, 1980), pp. 7-8.

[277] Bluntschli writes:

B. Satisfaction in international jurisprudence

111. The study of international jurisprudence concerning satisfaction should, in the Special Rapporteur's view, focus on the cases in which this remedy has been taken into consideration, in one or more of its various forms, as a specific remedy for the moral, political and/or juridical wrong suffered by the offended State. One should thus leave aside, for the reasons already explained (para. 17 above), any cases in which satisfaction was considered as a matter of pecuniary compensation (in favour of individuals or in favour of the State itself) for ordinary physical or moral damages. As noted, the term "satisfaction" is used in these cases in its merely etymological sense. As such, it is a synonym of reparation in a broad sense or of reparation by equivalent. It does not indicate the specific remedy dealt with here.

112. If one confines the study to cases in which satisfaction has been considered in its specified function, the relevant international jurisprudence (as distinguished from diplomatic practice) appears to be not very abundant. It is nevertheless substantial and more significant than it may appear at first sight.

113. Lack of competence seems to have been the main if not the exclusive reason for a negative decision on satisfaction (in the form of punitive damages) in the *Miliani*[278] *Stevenson*,[279] "*Carthage*" and "*Manouba*" cases[280] and in the case

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"A State whose honour and dignity have been insulted cannot demand anything incompatible with the dignity and the independence of the State from which it demands satisfaction." (Art. 470.)

This article is accompanied by the following commentary:

"…The greater the spread of a sense of honour in the civilized world the greater the need for consideration and tact in applying the above rule. Prudence demands it when a powerful State is involved. Exaggerated claims are easier to make against weak States. However, no State can undergo humiliation without its existence being jeopardized, for the State is the personification of a people's rights and its honour. International law, intended as it is to protect the existence and the safety of States, cannot tolerate such an affront. If a State no longer deserves to be treated as an honourable person, it is better to refuse immediately to recognize its existence." (*Op. cit.*, pp. 268-269.)

Similar requirements are included in paragraph 1 of article 27 of the revised draft on international responsibility of the State for injuries caused in its territory to the person or property of aliens, submitted by F. V. García Amador in his sixth report (see footnote 357 below). Przetacznik is of the same opinion (*loc. cit.*, pp. 672-673).

[278] In this case, which was before the Italian-Venezuelan Mixed Claims Commission, the umpire stated:

"…It is sufficient to observe that all the considerations for or against a claim which appeal to the diplomatic branch of a government have not necessarily a place before an international commission. For instance, unless specially charged, an international commission would scarcely measure in money an insult to the flag, while diplomatists might well do so…." (UNRIAA, vol. X, p. 591.)

[279] The umpire of the British-Venezuelan Mixed Claims Commission expressed the following opinion:

"To have measured in money by a third and different party the indignity put upon one's flag or brought upon one's country is something to which nations do not ordinarily consent.

"Such values are ordinarily fixed by the offending party and declared in its own sovereign voice, and are ordinarily wholly punitive in their character—not remedial, not compensatory.

"It is one of the cherished attributes of sovereignty which it will not usually or readily yield to arbitrament or award. Herein is found a reason, if not the reason, why such matters are not usually, if ever, submitted to arbitration." (UNRIAA, vol. IX, p. 506.)

[280] In the "*Manouba*" case (see footnote 26 above), the arbitral tribunal declared:

"…

"Whereas the capture could not be legitimized, either, by the regularity, relative or absolute, of these latter phases viewed separately.

concerning the *Responsibility of Germany for acts committed after 31 July 1914 and before Portugal entered the war*.[281] In the "*Carthage*" and "*Manouba*" cases, however, satisfaction was awarded, as indicated in the excerpt from the decision cited in footnote 280, in the form of the tribunal's declaration of the wrongfulness of the offending State's action.

114. More complex is the well known "*Lusitania*" case, in which the umpire, Edwin B. Parker, was mainly concerned with confining his task to the award of material and moral damages on a purely compensatory basis. To that effect he stated that

> ... The superimposing of a penalty in addition to full compensation and naming it damages, with the qualifying word exemplary, vindictive, or punitive, is a hopeless confusion of terms, inevitably leading to confusion of thought ....[282]

At the same time, far from denying the role of satisfaction as an afflictive remedy, he admitted that such a role was in the nature of satisfaction. This is the meaning that the Special Rapporteur believes should be attributed to the umpire's statement that:

> ... as between sovereign nations the question of the right and power to impose penalties, unlimited in amount, is political rather than legal in its nature, and therefore not a subject within the jurisdiction of this Commission.[283]

Of course, he qualifies the imposing of penalties as a "political" rather than a "legal" matter. However, it seems justified to presume that he used those two terms—perhaps not too precisely—in order to distinguish the direct relations between States, on the one hand, and his role as arbitrator, on the other hand. By saying that imposing

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"On the application to condemn the Royal Italian Government to pay damages:

"1. the sum of *one franc* for the affront to the French flag;

"2. the sum of one hundred thousand francs as reparation for the moral and political injury resulting from the failure to observe ordinary international law and reciprocally binding conventions for Italy and for France.

"And on the application to condemn the Government of the French Republic to pay the sum of one hundred thousand francs as a sanction and as reparation for the material and moral injury resulting from the breach of international law, notably the right of a belligerent to verify the status of individuals suspected of being enemy soldiers, found on board neutral trading vessels.

"Whereas, in cases in which a Power has allegedly failed to fulfil its obligations, whether general or specific, towards another Power, a finding to this effect, particularly in an arbitral award, already constitutes a serious sanction;

"that such sanction is made heavier, where necessary, by the payment of damages for material losses;

"…

"that ... generally speaking, the introduction of another pecuniary sanction seems to be superfluous and to go beyond the purpose of international jurisdiction;

"Whereas, in the light of the foregoing, the circumstances of the case cannot substantiate such additional sanction; that, without further consideration, there are, accordingly, no grounds for meeting the above-mentioned demands".

"..." (UNRIAA, vol. XI, p. 475.)

In the *"Carthage"* case (see footnote 26 above) an almost identical decision was made by the same tribunal (UNRIAA, vol. XI, pp. 460-461).

[281] The decision of the arbitral tribunal on the claim by Portugal for a special indemnity as punitive damages is quoted in footnote 42 above.

[282] UNRIAA, vol. VII, p. 39.

[283] *Ibid*., p. 43.

penalties upon States was a matter of a political nature, he probably meant that it was a matter for States to settle at ordinary diplomatic level. By denying the legal nature of such a function, he probably meant that it was not a matter for arbitration ("therefore not a subject within the jurisdiction of this Commission"). It is on the basis of such a distinction that he concluded that the imposition of penalties (*scilicet*: satisfaction in the form of punitive damages) would have exceeded the terms of reference of the United States-German Mixed Claims Commission. The Special Rapporteur believes that Parker's point is probably not without significance for the conclusions to be drawn from the comparative analysis of jurisprudential and diplomatic practice.[284]

115. Among the cases in which one or more forms of satisfaction were awarded, the most famous instance is that of the "*I'm Alone*" (a Canadian vessel owned by United States nationals sunk by the United States Coast Guard).[285] The Commissioners decided not to award any compensation for the loss of the vessel, but stated that

> The act of sinking the ship, however, by officers of the United States Coast Guard, was, as we have already indicated, an unlawful act; and the Commissioners consider that the United States ought formally to acknowledge its illegality, and to apologize to His Majesty's Canadian Government therefor; and, further, that as a material amend in respect of the wrong the United States should pay the sum of $25,000 to His Majesty's Canadian Government; and they recommend accordingly.[286]

Satisfaction was granted here in the dual form of excuses and pecuniary damages. Another instance is the *Moke* case, in which the United States-Mexican Mixed Claims Commission awarded punitive damages for the purpose of condemning the use of force against private parties in order to induce them to grant loans. The form chosen was the granting of an indemnity calculated to condemn the unlawful practice in question.[287] A further case is the *Arends* case, in which Venezuela was sentenced to pay a small sum in the presence of a presumed loss of small proportions. Satisfaction in this case is explicitly indicated by the umpire of the Netherlands-Venezuelan Mixed Claims Commission as consisting in the expression of regrets by the payment of $100.[288] In addition to the "*I'm Alone*" and *Arends* cases, satisfaction

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[284] See footnote 346 below.

[285] Decisions of 30 June 1933 and 5 January 1935 (Canada v. United Slates of America) (UNRIAA, vol. III, pp. 1609 *et seq.*).

[286] *Ibid*., p. 1618.

[287] Decision of 16 August 1871 (Moore, vol. IV, p. 3411). The Commission stated:

"The forced loans were illegal; the imprisonment was only for one day, and resulted in no actual damage to claimant or his property; but we wish to condemn the practice of forcing loans by the military, and think an award of $500 for 24 hours' imprisonment will be sufficient .... we can not too strongly condemn this arbitrary, illegal, and unequal way of supplying the wants of the military. If larger sums in damages, in such cases, were needed to vindicate the right of individuals to be exempt from such abuses, we would undoubtedly feel required to give them ...." (*Ibid.*)

[288] UNRIAA, vol. X, pp. 729-730. In particular, the umpire, F. Plumley, stated that:

"The damages consequent upon the detention of this vessel are necessarily small, but it is the belief of the umpire that the respondent Government is willing to recognize its responsibility for the untoward act of its officers under such circumstances and to express to the sovereign and sister State, with which it is on terms of friendship and commerce, its regret for such acts in the only way that it can now be done, which is through the action of this Commission by an award on behalf of the claimant sufficient to make full amends for the unlawful delay.

"In the opinion of the umpire this sum may be expressed in the sum of $100 in gold coin of the United States of America, or its equivalent in silver, at the current rate of exchange at the time of payment, and judgment may be entered for that amount." (*Ibid.*, p. 730.)

in the form of regrets was awarded in the *Kellett* case. This was the case of a United States Vice-Consul harassed by Siamese soldiers. The arbitral commission decided that "His Siamese Majesty's Government shall express its official regrets to the United States Government ...".[289]

116. Further instances of pecuniary satisfaction may be found in the *Brower* and *Lighthouses* cases. The *Brower* case[290] concerned a United States national who had bought six small islands of the Fiji archipelago. For not having recognized Brower's rights when it acquired sovereignty over the Fiji islands, the United Kingdom was sentenced to the payment of one shilling. The Great Britain-United States Arbitral Tribunal, referring to a report of the British Colonial Secretary according to which

> "These are six small islands of the Ringgold group. They are mere islets with a few coconut trees on them. They are situated in a remote portion of the Colony at a distance of about 180 miles from Suva. If put up to auction, I doubt if there would be a single bid for them."

decided as follows:

> In these circumstances, we consider that notwithstanding our conclusion on the principle of liability, the United States must be content with an award of nominal damages.
>
> Now therefore: The Tribunal decides that the British Government shall pay to the United States the nominal sum of one shilling.[291]

In the *Lighthouses* case,[292] the Permanent Court of Arbitration, in its decision on one of the claims of France against Greece, stated:

> The Tribunal considers the basis for this claim sufficiently proven, so that only the amount of the damage sustained by the Company needs to be established. In view of the inconsistency of the French claim, which fixed the amount of the damage at 10,000 francs Poincaré and then declared that the amount could not be set in figures, the Tribunal, while recognizing the validity of the claim, can only award a token indemnity of 1 franc.[293]

117. As noted above (para. 107), another form of satisfaction is the formal recognition of the wrongfulness of the wrongdoing State's conduct. Important examples are the already cited "*Carthage*" and "*Manouba*" cases. In the "*Manouba*" award, the arbitral tribunal considered that:

> … in cases in which a Power has allegedly failed to fulfil its obligations, whether general or specific, towards another Power, a finding to this effect, particularly in an arbitral award, already constitutes a serious sanction.[294]

Identical language was used in the *"Carthage"* case. The term "sanction" should obviously be read as an equivalent of "satisfaction", especially of those aspects of satisfaction which appear to have a punitive nature. Even more significant, in the same sense, is the judgment of the ICJ in the *Corfu Channel* case (Merits). Addressing the question

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[289] Decision of 20 September 1897 (United States of America v. Siam) (Moore, vol. II, pp. 1862 *et seq.*, at p. 1864).

[290] Decision of 14 November 1923 (UNRIAA, vol. VI, pp. 109 *et seq.*).

[291] *Ibid*., p. 112.

[292] See footnote 156 above.

[293] UNRIAA, vol. XII, p. 216.

[294] See footnote 280 above.

Has the United Kingdom under international law violated the sovereignty of the Albanian People's Republic by reason of the acts of the Royal Navy in Albanian waters on the 22nd October and on the 12th and 13th November 1946, and is there any duty to give satisfaction?[295]

the Court stated

... that by reason of the acts of the British Navy in Albanian waters in the course of the Operation of November 12th and 13th 1946, the United Kingdom violated the sovereignty of the People's Republic of Albania, and that this declaration by the Court constitutes in itself appropriate satisfaction.[296]

118. In conclusion, two kinds of decisions seem to be relevant from the point of view of the admissibility of satisfaction in one or more of its forms:

(a) Those in which satisfaction was refused by an arbitral tribunal mainly, if not exclusively, for lack of competence (paras. 113 and 114 above);

(b) Those in which satisfaction was awarded in one or more of its forms (*supra*, paras. 115, 116 and 117).

C. Satisfaction in diplomatic practice

119. Compared with jurisprudence, diplomatic practice offers more abundant material in the area of satisfaction.

For the purposes of analysis it seems useful to divide the study of this material into two periods: one from about 1850 to the Second World War; the second from 1945 to the present time.

1. Diplomatic practice before the Second World War

120. In the period preceding the Second World War, claims for satisfaction were not always made exclusively for the purpose of obtaining reparation for a moral wrong. In a number of instances, claims for satisfaction were put forward with the additional purpose of exercising political constraint against a weaker State and possibly obtaining advantages for the more powerful State. In the practice following the Second World War, claims for satisfaction seem instead not to present such "iniquitous" aspects. In addition to the cases submitted to arbitration and dealt with in the preceding section, there have often been cases in which more than one form of satisfaction has been claimed and eventually obtained.

121. The diplomatic practice prior to the Second World War includes in the first place cases of satisfaction following the violation of symbols of the State, such as the national flag.[297] A form of satisfaction which is typical of these cases consists in a

[295] *I.C.J. Reports 1949*, p. 12.

[296] *Ibid*., p. 36. On the other hand, the court, by 14 votes to 2, considered that the acts committed by the British Navy on 22 October 1946 did not violate Albanian sovereignty.

[297] In some cases it was considered that the national flag had been insulted even though no material injury to it had actually been caused. For example, in 1864 an Italian sailor was pursued aboard his ship moored in a Tunisian port and, after being ill-treated by a local official, was arrested. Following the event, the Italian Consul General in Tunis demanded satisfaction for the insult to the Italian flag (*Prassi italiana*, 1st series, vol. II, No. 1012). A similar example is that of an incident which took place in Alexandria in 1865 between sailors of the Italian Navy in uniform and the Egyptian police (*ibid.*, No. 1013).

ceremony during which the offending State salutes the flag of the offended State. Examples are the Magee case,[298] the *Petit Vaisseau* case[299] and the case that arose from the insult to the French flag in Berlin in 1920.[300]

122. Insults, ill-treatment or attacks against heads of State or Government or against diplomatic or consular representatives abroad frequently led to claims for satisfaction on the part of the offended State. Following the insult to the Italian Consul in Casablanca by a Moroccan employee in June 1865, the Italian Consul General in Tangiers informed his Foreign Minister that he had asked the Moroccan Government for a *luminosa soddis-fazione,* which seems to have been obtained.[301] Italy also made claim for satisfaction when the Italian chargé d'affaires in Caracas was physically ill-treated by an officer. The responsible officer was immediately arrested, sentenced to three years' imprisonment and downgraded. Regrets were expressed by the President of the Republic of Venezuela and by the Minister for Foreign Affairs, and a ceremony in honour of the Italian Legation was organized.[302] A

[298] "When, on April 24, 1874, John Magee, the British Vice-Consul at San Jose, Guatemala, was arrested and flogged by order of the commandant of the port of San José, and his life spared only on condition of a payment of money, the Guatemalan Government acted promptly—as soon as it was informed of the affair—to assure the arrest and punishment of the assailants. A garrison was sent to San José by the Government to effect the arrest of the persons involved, and precautions were taken to prevent their escape.

"The outrage gave rise to an active correspondence between the British Chargé d'Affaires and the Government of Guatemala, and on May 1, 1874, the Minister of Foreign Relations of Guatemala and the British Chargé d'Affaires signed a protocol of conference containing (1) a reiteration of promises to prosecute the guilty parties, which had already been ordered, and the British Chargé d'Affaires 'declared himself satisfied with this action on the part of the Government'; (2) an agreement by the Guatemalan Government to order a salute of twenty-one guns to the British flag 'as a proof of the deep pain with which it has seen the outrage'; and (3) a request for 'an indemnity for the outrage done to Vice Consul Magee of Guatemala by Commandant Gonzalez'." (Whiteman, *Damages*, vol. I, p. 64.)

[299] In 1863, customs officers in Rio de Janeiro, acting on their own initiative, hauled down the flag of the Italian ship *Petit Vaisseau*, which was under seizure. By way of reparation, the harbour-master publicly honoured the Italian flag and denounced the action of those responsible, who were severely admonished (*Prassi italiana*, 1st series, vol. II, No. 1010). An incident that took place in 1888 was provoked by a rather unmannerly occurrence concerning a letter of congratulations sent by the King of Italy to the Sultan of Zanzibar on the occasion of his accession to the throne; after lengthy negotiations, the Sultan presented written apologies and ordered that the Italian flag be saluted (*ibid.*, 2nd series, vol. Ill, No. 2564).

[300] "On July 14, 1920, the French flag, displayed on the French embassy in Berlin, was torn down by a mob. By way of reparation, Germany advertised large rewards for the apprehension of the individual guilty of tearing down the flag, and punished him according to law. In addition, apologies were formally made at the embassy, the police officials responsible were discharged, and the flag was restored with military ceremonies by a detachment of 150 soldiers. The French were dissatisfied because the troops did not appear in parade dress, and because they sang 'Deutschland über alles' as they marched away; and amends were made for this, with the explanation that it was financially impossible to afford parade dress." (Eagleton, *op. cit.*, pp. 186-187.)

[301] The satisfaction claimed by the injured State and promised by the wrongdoer involved the Moroccan employee's arrest as well as his apologies in front of all those who had witnessed the episode (*Prassi italiana*, 1st series, vol. II, No. 1014).

[302] The Italian chargé d'affaires, however, was not satisfied. He asked for the individual responsible to be publicly discharged and for other forms of satisfaction. Not having obtained this, he interrupted all official relations with the host Government. The seriousness of the situation prompted a request for advice from the legal advisers to the Foreign Ministry. That office maintained that "under the principle of international law and in diplomatic practice, the usual reparation in cases such as the present one consists of punishment of the guilty person, excuses presented by the Government to which the diplomatic agent is accredited, and guarantees for the future". The responsible official having

similar event occurred in 1896 when the Italian Consul General in Sofia was forcibly taken to a police station by two officers.[303] In 1887, following the ill-treatment of the Italian consular agent in Hodeida, Turkey, by the deputy head of the Customs of that city, the Italian Government first threatened a naval shelling and then instead agreed that the Governor of Hodeida pay an official visit to the consulate in the city in order to present apologies.[304] In 1893, after having been attacked by Brazilian soldiers while returning from a visit to an Italian warship, the Italian Vice-Consul in Rio requested and obtained satisfaction in the form of a declaration deploring the events, the punishment of the responsible individuals and an indemnity for the death of an Italian sailor killed during the incident.[305] Following the killing in 1919 of Sergeant Mannheim, a French soldier on guard at the French Embassy in Berlin, France obtained from Germany a sum of 1 million francs as satisfaction, in addition to 100,000 francs for the family of the victim.[306] In 1924, R. W. Imbrie, Vice-Consul of the United States of America in Tehran, was killed by the crowd for having tried to take photographs of a religious ceremony. The Government of Persia presented its apologies to the United States and paid a sum $US 170,000 as compensation. Failure to punish the policemen who had not defended the victim seems to have been due to the fact that they were not identified.[307]

123. As in the case of offences against State representatives, violation of the premises of embassies or consulates (as well as of the homes of members of foreign diplomatic missions) has also resulted in claims for satisfaction. For example, when, in 1851, the Spanish Consulate in New Orleans was attacked by demonstrators, the United States Secretary of State, Daniel Webster, recognized that Spain was entitled to the payment of a special indemnity.[308] Following the violation by two Turkish officials of the residence of the Italian Consul in Tripoli in 1883, the Italian demand for apologies and for punishment of the guilty parties was complied with by the Ottoman Empire.[309] In 1888, following a failed attempt by two Egyptian policemen to violate the Italian Consulate at Alexandria, Italy requested and obtained the punishment of the guilty parties and a solemn, public apology from the Governor of Alexandria.[310] A similar episode occurred in 1892 between Italy and the Ottoman Empire.[311]

124. Among the episodes preceding the Second World War, two cases appear to present a particular relevance. One was occasioned by the Boxer uprising in China in 1900. That event caused, *inter alia*, the death of the German Ambassador to China,

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subsequently been punished and the Government of Venezuela having publicly apologized, the suspension of diplomatic relations was discontinued (*Prassi italiana*, 1st series, vol. II, No. 1017).

[303] As soon as he was released, the Consul demanded the presentation of apologies and the punishment of the officers. Following a note from the Bulgarian Minister for Foreign Affairs expressing regrets and giving assurances that the responsible agents would be punished (which the Consul did not consider to be sufficient), the Bulgarian Prime Minister presented formal apologies and provided for the immediate punishment of the policemen (*Prassi italiana*, 2nd series, vol. III, No. 2563).

[304] *Prassi italiana*, 2nd series, vol. III, No. 2559.

[305] *Ibid.*, No. 2576.

[306] P. Fauchille, *Traité de droit international public* (Paris, 1922), vol. I, part 1, p. 528.

[307] Whiteman, *Damages*, vol. I, pp. 732-733.

[308] Moore, *Digest*, vol. VI, pp. 811 *et seq.*, at p. 812.

[309] *Prassi italiana*, 1st series, vol. II, No. 1018.

[310] *Ibid*., 2nd series, vol. III, No. 2558.

[311] *Ibid.*, No. 2561.

the looting of several foreign legations, the killing of the chancellor of the Japanese legation and of other foreign citizens, as well as the wounding of other foreign nationals and the profanation of foreign cemeteries. The joint note sent to the Chinese Government by the States concerned included extremely vexatious requests, such as the negotiation of new and more favourable commercial agreements.[312] The second

[312] According to the joint note presented to the Chinese Government on 22 December 1900:

"China having recognized her responsibility, expressed her regrets, and manifested her desire to see an end put to the situation created by the disturbances referred to, the powers have decided to accede to her request on the irrevocable conditions enumerated below, which they deem indispensable to expiate the crimes committed and to prevent their recurrence:

"I

"(A) Dispatch to Berlin of an extraordinary mission, headed by an Imperial Prince, to express the regrets of His Majesty the Emperor of China and of the Chinese Government, for the murder of His Excellency, the late Baron Ketteler, the German Minister;

"(B) Erection on the place where the murder was committed of a commemorative monument suitable to the rank of the deceased, bearing an inscription in the Latin, German, and Chinese languages, expressing the regrets of the Emperor of China for the murder.

"II.

"(A) The severest punishment in proportion to their crimes for the persons designated in the imperial decree of 25 September, 1900, and for those whom the representatives of the powers shall subsequently designate.

"(B) Suspension of all official examinations for five years in all the towns where foreigners have been massacred or subjected to cruel treatment.

"III.

"Honourable reparation shall be made by the Chinese Government to the Japanese Government for the murder of Mr. Sugiyama, chancellor of the Japanese legation.

"IV.

"An expiatory monument shall be erected by the Imperial Chinese Government in each of the foreign or international cemeteries which have been desecrated, and in which the graves have been destroyed.

"V.

"Maintenance, under conditions to be settled between the powers, of the prohibition of the importation of arms, as well as of material used exclusively for the manufacture of arms and ammunition.

"VI.

"Equitable indemnities for governments, societies, companies and private individuals, as well as for Chinese who have suffered during the late events in person or in property in consequence of their being in the service of foreigners. China shall adopt financial measures acceptable to the powers for the purpose of guaranteeing the payment of said indemnities and the interest and amortization of the loans.

"VII.

"Right for each power to maintain a permanent guard for its legation and to put the legation in a defensible condition. Chinese shall not have the right to reside in this quarter.

"The Taku and other forts which might impede free communication between Peking and the sea shall be razed. [This is apparently VIII.]

"IX.

"Right of military occupation of certain points, to be determined by an understanding among the powers, for keeping open communication between the capital and the sea.

"X.

"(A) The Chinese Government shall cause to be published during two years in all subprefectures an imperial decree embodying—

"Perpetual prohibition, under pain of death, of membership in anti-foreign society.

"Enumeration of the punishments which shall have been inflicted on the guilty, together with the suspension of all official examinations in the towns where foreigners have been murdered or have been subjected to cruel treatment.

"(B) An imperial decree shall be issued and published everywhere in the Empire, declaring that all governors-general, governors, and provincial or local officials shall be responsible for order in their respective jurisdictions, and that whenever fresh anti-foreign disturbances or any other treaty

case concerned the killing, in 1923, near Janina, of General Tellini, an Italian officer commissioned by the Conference of Ambassadors to assist in the delimitation of the frontier between Greece and Albania. Greece, held responsible for the murder, received particularly onerous requests from the Conference of Ambassadors. These included the payment of 50 million lire to the Italian Government.[313] In both these cases the injured States appear to have taken not little advantage, in dealing with the matter and claiming severe measures of satisfaction, of their military, political and/or economic superiority.[314]

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infractions occur, which are not forthwith suppressed and the guilty persons punished, they, the said officials, shall be immediately removed and forever prohibited from holding any office or honours.

"XI.

"The Chinese Government will undertake to negotiate the amendments to the treaties of commerce and navigation considered useful by the powers and upon other subjects connected with commercial relations, with the object of facilitating them.

"XII.

"The Chinese Government shall undertake to reform the office of foreign affairs and to modify the court ceremonial relative to the reception of foreign representatives in the manner which the powers shall indicate." (Moore, *Digest*, vol. V, pp. 515-516; reproduced in Eagleton, *op. cit.*, pp. 185-186.)

[313] The Conference of Ambassadors set the following measures of redress as due from Greece:

"(1) Apologies shall be presented by the highest Greek military authority to the diplomatic representatives at Athens of the three Allied Powers, whose delegates are members of the Delimitation Commission;

"(2) A funeral service in honour of the victims shall be celebrated in the Catholic Cathedral at Athens in the presence of all members of the Greek Government;

"(3) Vessels belonging to the fleets of the three Allied Powers, the Italian naval division leading, will arrive in the roadstead of Phaleron after eight o'clock in the morning of the funeral services;

"After the vessels of the three Powers have anchored in the roadstead of Phaleron the Greek fleet will salute the Italian, British and French flags, with a salute of twenty-one guns for each flag;

"The Salute will be returned gun by gun by the Allied vessels immediately after the funeral services, during which the flags of the Greek fleet and of the three Allied Powers will be flown at half-mast;

"(4) Military honours will be rendered by a Greek unit carrying its colours when the bodies of the victims are embarked at Prevesa;

"(5) The Greek Government will give an undertaking to ensure the discovery and exemplary punishment of the guilty parties at the earliest possible moment;

"(6) A special commission consisting of delegates of France, Great Britain, Italy and Japan, and presided over by the Japanese delegate, will supervise the preliminary investigation and enquiry undertaken by the Greek Government; this work must be carried out not later than September 27, 1923;

"The Commission appointed by the Conference of Ambassadors will have full powers to take part in the execution of these measures and to require the Greek authorities to take all requisite steps for the preliminary investigation, examination of the accused, and enquiry.

"The Greek Government will guarantee the safety of the commission in Greek territory. It will afford it all facilities in carrying out its work and will defray the expenditures thereby incurred.

"The Conference of Ambassadors is forthwith inviting the Albanian Government to take all necessary measures ....

"(7) The Greek Government will undertake to pay to the Italian Government in respect to the murder of its delegate, an indemnity, of which the total amount will be determined by the Permanent Court of International Justice at The Hague, acting by summary procedure ...."

Eagleton added:

"For the payment of this indemnity, the Greek Government was required to deposit 50,000,000 Italian lire as security. On the basis of a preliminary report, not decisive in character, and without waiting for a final report, the Conference of Ambassadors 'decides that as a penalty under this head [neglect in pursuing criminals], the Greek Government shall pay to the Italian Government a sum of 50,000,000 Italian lire'." (Eagleton, *op. cit.*, pp. 187-188.)

[314] According to Graefrath:

125. Claims for satisfaction have also been put forward in cases where the victims of an internationally wrongful act were private citizens of a foreign State. In 1883, as a result of the ill-treatment of an Italian worker by a Serbian police officer and the subsequent Italian protests, the Serbian Minister for Foreign Affairs expressed regrets and assured the injured State that the responsible officer had been discharged.[315] A well known case concerns the lynching in 1891 of eleven Italians who had been imprisoned following the murder of the chief of police of New Orleans and three of whom had already been acquitted. The United States deplored the occurrence and awarded Italy a sum of 125,000 lire, to be distributed by the Italian Government to the families of the victims.[316] In the case regarding the murder in 1904 of the Reverend Labaree, a United States missionary, the Persian Government paid a sum of $30,000 and punished the Kurds who were responsible for the murder.[317] In the case concerning the killing of a Frenchman near Tangiers in 1906, the French Government considered the local authorities responsible in the first place (and the Government of Morocco in the second place) for having allowed the Tangiers region to fall into complete anarchy. After examining the circumstances of the murder, the French Government formulated a long list of requests aimed at obtaining satisfaction.[318] In 1912, three American teachers in China were attacked by a group of Chinese; one of them, B. R. Hicks, was killed and the other two, A. N. Sheldon and P. Hofmann, were seriously injured. The United States Ambassador in Peking requested and obtained $50,000 from the Chinese Government as punitive damages.[319] Severe measures were obtained in 1922 by the United States from the Chinese Government following the murder of C. Coltman, a United States merchant, by Chinese soldiers.[320]

126. Two more cases seem to be of importance in the period under review. The first concerns a military action carried out in Bulgarian territory by Greece in 1925. The Council of the League of Nations, after finding Greece responsible, decided that Greece should pay an indemnity exceeding the value of the material damage suffered

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"The classic example of how, under the mask of satisfaction, colonial suppression and humiliation were practised, was the mode of satisfaction that was enforced on China after the Boxer Rebellion. Another example of excessive satisfaction claims, whose implementation was imposed by force, was the Italian demands to Greece on the occasion of the murder of General Tellini in 1923." (*Loc. cit.*, p. 85.)

[315] *Prassi italiana*, 1st series, vol. II, No. 1020.

[316] *Ibid.*, 2nd series, vol. III, No. 2571.

[317] Whiteman, *Damages*, vol. I, pp. 725 *et seq.*

[318] Kiss, *Repertoire*, vol. III, No. 982.

[319] G. H. Hackworth, *Digest of International Law* (Washington, D.C.), vol. V (1943), p. 725.

[320] "On January 2, 1923, vigorous representations were made to the Chinese Government by the American diplomatic officers, who demanded: (1) an apology for the affront to the American Government and the utter disregard of the rights and persons of American citizens in China; (2) an apology from the military governor to the American Consul; (3) the summary dismissal from the Chinese Army of certain officers, including the third officer who was present at the guard station, and proper punishment of those guilty of the unjustifiable killing of Coltman; (4) damages for the family of Coltman; (5) removal of the prohibition on transportation of currency by American merchants, as authorized by treaty; and (6) acknowledgment of the right to present claims for damages on account of the prohibition.

"On February 11, 1923, the Chinese Ministry of Foreign Affairs replied (1) that the military governor of Chahar would apologize to the American Minister; (2) that the Chinese Government would examine the affair thoroughly and would punish the officers involved according to law as a warning for the future; (3) that the Government would pay an indemnity to the family of Coltman out of pity and regard; (4) that it would give permission for American merchants to carry specie out of the district for their own use; and (5) that the Chinese Government was not responsible for losses of American merchants on account of the prohibition." (Whiteman, *Damages*, vol. 1, pp. 702-703.)

by Bulgaria, in order to provide reparation for the moral wrong suffered as well.[321] The second—the *Panay* incident between Japan and the United States—is a case in which all the forms of satisfaction were cumulatively resorted to in conjunction with reparation by equivalent. In a note dated 14 December 1937, concerning the sinking of that American gunboat and three other United States vessels by Japanese aircraft in the course of hostilities in China, Japan expressed her profound regret for the incident, presented sincere apologies, promised indemnification for all losses, and undertook "to deal appropriately" with those responsible for the incident and to issue instructions with a view to preventing similar incidents in the future.[322]

2. DIPLOMATIC PRACTICE FROM 1945 TO THE PRESENT DAY

127. More recent diplomatic practice includes, to begin with, a number of cases in which apologies were made or regrets expressed.[323] In March 1949, a sailor in the United States Navy who was on leave in Havana climbed on to the statue of José Martí, a hero of Cuban independence. He did so with the encouragement of his comrades. Following the Cuban Government's protest, the United States Ambassador placed a wreath of flowers at the foot of the statue and read a declaration of regrets.[324] Apologies were also presented by France to the USSR in 1961 following that country's protest at the attack carried out against a Soviet aircraft carrying President Breznev by French fighter planes over the international waters of the Mediterranean.[325] Apologies and expressions of regret also followed demonstrations in front of the French Embassy in Belgrade in 1961[326] and the fires in the libraries of the United States Information Service in Cairo in 1964[327] and in Karachi in 1965.[328] Similar actions were taken following the incidents that took place during a visit of President Georges Pompidou of France to the United States in 1970,[329] the searching of the luggage of President Soleiman Frangie of Lebanon at New York airport in 1974[330] and a great number of similar episodes.[331] Finally, apologies, together with a promise of compensation, were presented by the Cuban Government following the sinking of a Bahamian ship in 1980 by a Cuban aircraft.[332]

128. Forms of satisfaction such as the salute to the flag or expiatory missions seem to have disappeared in recent practice. Conversely, forms of publicity—concerning in particular the request for apologies or the offer thereof —seem to have increased in

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[321] League of Nations, *Official Journal*, 7th Year, No. 2 (February 1926), pp. 172 *et seq.*

[322] L. Oppenheim, *International Law: A Treatise*, 8th ed., H. Lauterpacht, ed. (London, Longmans, Green and Co., 1955), p. 354, note 2.

[323] Apologies or expressions of regret are also present in cases in which States have not acknowledged their responsibility. For example, in the case of the accident of 27 July 1955 in which an Israeli airliner was shot down by Bulgarian military aircraft, Bulgaria expressed its regrets for what had happened but denied that it had violated the right to freedom of air navigation (Whiteman, *Digest*, vol. 8, pp. 781 *et seq.*).

[324] Bissonnette, *op. cit.*, pp. 67 and 88.

[325] "Chronique", RGDIP, vol. 65 (1961), pp. 603 *et seq.*

[326] *Ibid.*, p. 610.

[327] *Ibid.*, vol. 69 (1965), pp. 130-131.

[328] *Ibid.*, vol. 70 (1966), pp. 165-166.

[329] *Ibid.*, vol. 75 (1971), pp. 177 *et seq.*, at p. 181.

[330] *Ibid.*, vol. 79 (1975), pp. 810-811. It was, it seems, a matter of an inspection by "sniffer dogs".

[331] See Przetacznik, *loc cit.*, pp. 951 *et seq.*

[332] "Chronique", RGDIP, vol. 84 (1980), pp. 1078-1079.

importance and frequency. Following the looting of the French Embassy in Saigon by Vietnamese students in 1964, the Government of Viet Nam issued a communiqué to the local press presenting apologies and suggesting that the damage suffered by persons and property be assessed in order to allow the payment of compensation.[333] When, in 1967, attempts were made to blow up the Yugoslav Embassy in Washington, D.C., and the Yugoslav Consulates in New York, Chicago and San Francisco, the United States Secretary of State presented his country's apologies to the Yugoslav Ambassador by means of a press statement.[334] The Chinese Government requested public excuses from the Indonesian Government for the looting in 1966 of the Chinese Consulates at Jakarta, Macassar and Medan during anticommunist riots.[335] The same Government requested and obtained public excuses following incidents at Ulan Bator railway station, where Chinese diplomats and nationals were ill-treated by the local police.[336]

129. It should be stressed that the resonance effect of public apologies can be achieved in the kind of cases considered in the preceding paragraph not only by involving the press or other mass media. It can be pursued even more effectively by the choice of the level of the wrongdoing State's organization from which the apologies emanate. For example, following the attempt on the life and the physical injury of the United States Ambassador in Tokyo in 1964, the Prime Minister and the Foreign Minister of Japan presented apologies to the United States Ambassador and the Minister of the Interior resigned from office. In addition, Emperor Hirohito sent a delegate of his own to join the members of the Government in the presentation of apologies.[337]

130. The disavowal (*désaveu*) of the action of its agent by the wrongdoer State, the setting up of a commission of inquiry and the punishment of the responsible individuals are frequently requested and granted in postwar diplomatic practice.

131. A case of *désaveu*[338] involved Bolivia and the United States. Following the publication in the American magazine *Time* in March 1959 of an article attributing to the spokesman of the United States Embassy in La Paz remarks which were considered to be offensive to Bolivia, the United States Department of State immediately corrected those statements.[339]

132. Two cases concerning the punishment of responsible individuals are well known. The first concerns the killing in 1948, in Palestine, of Count Bernadotte while he was acting in the service of the United Nations. The United Nations requested from Israel the punishment of the responsible individuals, the presentation of apologies and the payment of an indemnity.[340] The second case concerns the kidnapping in Argentina and the deportation to Israel of Adolf Eichmann, charged with crimes

[333] *Ibid.*, vol. 68 (1964), p. 944.
[334] *Ibid.*, vol. 71 (1967), p. 775.
[335] *Ibid.*, vol. 70 (1966), pp. 1013 *et seq.*
[336] *Ibid.*, vol. 71 (1967), pp. 1067-1068.
[337] *Ibid.*, vol. 68 (1964), p. 736.
[338] For cases of *desaveu* during the period from 1850 to 1939, see Bissonnette, *op. cit.*, pp. 104 *et seq.*
[339] Whiteman, *Digest*, vol. 5, pp. 169-170.
[340] *Ibid.*, vol. 8, pp. 742-743. An indemnity was also claimed by the United Nations for the murder of Colonel Sérot (*ibid.*, p. 744).

against humanity. Although the Argentine Government's requests were not met by Israel, the nature of such requests was not insignificant from the point of view of the practice of satisfaction in international relations.[341] Punishment of the guilty individuals was requested in the cases concerning the bombing of the United States Information Service library in Athens.[342] In the case of the killing of two United States officers in Tehran, the responsible parties were executed.[343]

133. The diplomatic practice of recent years includes at least two cases that are worthy of mention: the "*Rainbow Warrior*" and the "*Stark*" cases.

134. As is widely known, the *Rainbow Warrior* was sunk in Auckland harbour in 1985 by agents of the French security services who had used false Swiss passports to enter New Zealand; and a Netherlands citizen aboard the ship was killed. New Zealand demanded that France present a formal apology and pay $US 10.million—a sum which exceeded by far the value of the material loss sustained. France acknowledged responsibility but refused to pay the considerable amount claimed by New Zealand by way of indemnification. The case was finally submitted to the Secretary-General of the United Nations, who decided that France should present formal apologies and pay a sum of $US 7 million to New Zealand; in addition, the Secretary-General decided that the two French agents should be handed over to France and later be restricted to the island of Hao for at least three years.[344]

135. Following the damaging of the *Stark* by an Iraqi missile in 1987, the President of Iraq immediately wrote to the President of the United States explaining the attack as an accident and expressing his "heartfelt condolences" for the death of the United States sailors who had been killed, and adding that "sorrow and regrets are not enough".[345]

D. Satisfaction (and punitive damages) as a consequence of an internationally wrongful act and its relationship with other forms of reparation

136. The analysis of the literature, jurisprudence and—especially—diplomatic practice indicates with certainty the existence of various forms of satisfaction as a mode of reparation in international law. It confirms, in particular, the position of the prevailing doctrine, according to which the remedy for the moral, political or juridical wrong suffered by the injured State is satisfaction, namely a form of reparation which tends to be of an afflictive nature—distinct from compensatory forms of reparation such as *restitutio* and pecuniary compensation. Of course, the distinction between

[341] "... The Argentine Government, in presenting to Israel its most explicit protest against the act committed in the face of one of the fundamental rights of the Argentine State, hopes that Israel will make the only appropriate reparation for this act, namely, by returning Eichmann within the current week and punishing the persons guilty of violating our national territory ..." (Whiteman, *Digest*, vol. 5, p. 210).

[342] *Ibid.*, vol. 8, p. 816.

[343] "Chronique", RGDIP, vol. 80 (1976), p. 257.

[344] Ruling of 6 July 1986 by the Secretary-General (UNRIAA, vol. XIX, pp. 197 *et seq.*). See also G. Apollis, "Le règlement de l'affaire du *'Rainbow Warrior'*", RGDIP, vol. 91 (1987), pp. 9 *et seq.*

[345] In 1989, Iraq agreed to pay the United States a sum of $US 27.3 million to compensate the families of the 37 sailors killed on board the *Stark*. In so far as the indemnity for the damage to ship and crew are concerned, negotiations were continuing at that time. (*The New York Times*, 28 March 1989, p. A5.)

compensatory and afflictive or punitive forms of reparation, notably between pecuniary compensation and the various forms of satisfaction, is not an absolute one. Even such a remedy as reparation by equivalent (not to mention restitution in kind) performs, in the relations between States as well as in inter-individual relations, a role that cannot be deemed to be purely compensatory. Though its role is certainly not a punitive one, it does perform the very general function of dissuasion from, and prevention of, the commission of wrongful acts. The predominantly afflictive and not compensatory role of satisfaction is nevertheless widely recognized and indisputably emphasized by long-standing diplomatic practice.[346]

137. This functional distinction between satisfaction, on the one hand, and *restitutio* and pecuniary compensation, on the other, does not exclude the possibility that two of those forms, or all three, may come into play together in order to ensure a combined, complete reparation of the material as well as the moral/political/juridical injury. It has, in fact, been observed that, both in jurisprudence and in diplomatic practice, satisfaction is frequently accompanied by pecuniary compensation.

138. The autonomous nature of satisfaction does not, on the other hand, prevent it from often appearing to be absorbed into, or even confused with, the more rigorously compensatory remedies. It may have been so, for example, in the "*Rainbow Warrior*" case, where both the sum claimed by New Zealand and the sum awarded by the Secretary-General of the United Nations exceeded by far the value of the material loss (see para. 134 above). Other examples include the case concerning the lynching of 11 Italians in New Orleans (see para. 125 above) and the Labaree case (*ibid.*). In such

[346] Dominicé, as already noted (para. 108 above), maintains an opposite view; his brilliant essay concludes as follows: "In fact, satisfaction is not a form of reparation—it is reparation that is one of the forms of satisfaction" (*loc. cit.*, p. 121). The clear tendency of this author to absorb, if not dissolve, the various forms of satisfaction into reparation in a broad sense—a tendency which is emphasized by the use of the term satisfaction as a mere synonym of reparation—is presumably due to a different evaluation of the practice of States (notably of diplomatic practice). This leads him to underestimate the specific, autonomous function of international satisfaction in a narrow sense. That very practice, which the Special Rapporteur has perhaps analysed more thoroughly, leads instead to an opposite conclusion, which might be of considerable importance as a matter of both codification and progressive development in the field. From the viewpoint of progressive development, in particular, the various forms of satisfaction appear to be the most suitable to meet the necessity of adjusting the consequences of delicts to the degree of fault and of tackling the problem of the special, even more severe, consequences that should be attached to international crimes. The Special Rapporteur's evaluation of the diplomatic practice (as compared in particular with jurisprudence) finds some comfort—in addition to his own reading of the umpire's dictum in the "*Lusilania*" case (see para. 114 above)—in the following thoughts put forward by Reitzer in his often cited work:

"The conclusion from the foregoing analysis is not difficult to draw: there is necessarily a divergence between diplomatic practice, on the one hand, and arbitration and judicial jurisprudence, on the other. In other words, the legal rules governing the extent of the reparation differ, depending on whether only two States are involved or whether a third impartial and disinterested body enters the scene. There is nothing surprising in this proposition. All jurists are aware that a basic difference in the rules of *procedure* almost invariably entails a difference in the *material* rules of law. The fact that this cardinal distinction is ignored and that an attempt has been made *to extend arbitration rules to situations in which two States stand in opposition to each other* is, in our opinion, the chief mistake of the present doctrine and the source of a large part of the misunderstandings and ambiguities in this whole matter. In other words, the root of these ambiguities lay in the frequent assertion that the rules on material injury that are drawn—rightly or wrongly—from arbitration jurisprudence are part of *customary international law*. The proper line of demarcation lies *not between injury caused to a State's citizens and other injuries, but between diplomatic practice and international jurisprudence."* (*Op. cit.*, pp. 131-132.)

instances one may doubt, at first sight, whether they involved satisfaction *stricto sensu*. The element of satisfaction is, however, equally perceptible, either because one or more forms of satisfaction had been requested and obtained by the offended State or because the amount of the pecuniary compensation exceeded to a greater or lesser degree the extent of the material loss. And there are instances where the presence of satisfaction in some form is suggested by admissions made by the offending State.

139. As clearly revealed by jurisprudence and diplomatic practice (and indicated by doctrine), satisfaction takes on forms which are all typical of and, in a sense, specific to international relations. These are, in particular: apologies, with the implicit admission of responsibility and the disapproval of and regret for what has occurred; punishment of the responsible individuals; a statement of the unlawfulness of the act by an international body, either political or judicial; assurances or safeguards against repetition of the wrongful act; payment of a sum of money not in proportion to the size of the material loss. This latter form of satisfaction is obviously equivalent, in the opinion of the Special Rapporteur, to the payment to the offended State of what a part of the doctrine, using a well known common-law concept, refers to as "punitive damages".

140. Satisfaction in the form of punitive damages, or in any other form of an afflictive nature, may be by its form or circumstances incompatible in given cases with the principle of equality among States. Such has been the case of measures claimed as satisfaction—especially prior to the Second World War—by offended States which took advantage of the situation to make excessive or humiliating demands upon weaker States, in contempt of their dignity and sovereignty. Examples include the case of the Boxer uprising and the case of the Tellini murder (see para. 124 above). It should be added, however, that there are cases in which decidedly afflictive forms of satisfaction have been granted to injured States by powerful offending States; instances are the *Panay* case (see para. 126 above) and the "*Rainbow Warrior*" case (see para. 134 above).

141. The afflictive nature of satisfaction might appear at first sight—and does in fact appear to some contemporary writers—as not compatible either with the composition or with the structure of a "society of States". It may notably be contended:

(a) that punishment or penalty does not "become" persons other than human beings, and notably not the majesty of sovereign States; and

(b) that the imposition of punishment or penalty within a legal system presupposes the existence of institutions impersonating, as in national societies, the whole community, no such institutions being available or likely to come into being soon—if ever—in the "society of States".

142. Although arguments such as these are not without force, they do not seem to the Special Rapporteur to constitute valid reasons for not accepting satisfaction among the forms of reparation. There seem to be, on the contrary, good reasons positively to emphasize the role of satisfaction.

143. In the first place, the very absence, in the "society of States", of institutions capable of performing such "authoritative" functions as the prosecution, trial and punishment of criminal offences makes even more necessary the resort to remedies

susceptible of reducing, albeit in a very small measure, the gap represented by the absence of the said institutions. To confine the consequences of any international delict (let alone an international crime) to restitution in kind and pecuniary compensation would mean to overlook the necessity of providing some specific remedy—having a preventive as well as a punitive function—for the moral, political and juridical wrong suffered by the offended State or States in addition to, or instead of, any amount of material damage.[347] To overlook such a function would in turn encourage States—especially the richest among them— inopportunely and dangerously to assume that any injury they may cause to one or more other States can easily be made good by merely pecuniary compensation. One must conclude that, far from being incompatible with the lack of institutionalization of the "society of States", an afflictive or relatively more afflictive/punitive form of reparation like satisfaction in its various forms would help to reduce the gap represented by the absence of adequate institutions. The inspiration of the passage from Sir Hersch Lauterpacht's article quoted above,[348] though not identical, is surely similar.

144. The punitive or afflictive nature of satisfaction is not in contrast with the sovereign equality of the States involved. Whatever its form, the satisfaction claimed by the injured State never consists, as shown by the abundant practice analysed, in any action or measure taken directly by the injured State itself against the offender. At a later stage, the question may, of course, arise of a sanction to be inflicted upon the offending State by a direct conduct of the injured State—and obviously it is reprisals that come to mind. This will be the stage at which, demands for reparation and/or satisfaction having been put forward unsuccessfully, the situation will move from the substantive or immediate consequences of the wrongful act to those consequences which are represented by the reaction of the injured State to non-compliance by the offending State with its so-called "secondary" obligation to make reparation. Prior to that more crucial, critical stage, satisfaction does not involve any direct measures of the kind. Although the demand for satisfaction will normally come—unless felicitously preceded by the offending State's own initiative—from the injured State, the satisfaction to be given consists of actions to be taken by the offender itself. There is no need to fear, therefore, that satisfaction will entail the notion of a sanction applied by one State against another, and thus constitute a serious encroachment upon the offending State's sovereign equality.[349] In the measure, surely relative, in which one can speak of a sanction, it is not so much a question of a sanction inflicted upon the offending State. It is rather a matter of atonement, of a "self-inflicted" sanction, intended to cancel, by deeds of the offender itself, the moral, political and/or juridical injury suffered by the offended State. The opinion of the eminent jurist Morelli is enlightening in this respect:

> Satisfaction is in some ways analogous to a penalty, which also fulfils a function of atonement. Again, satisfaction, like a penalty, is afflictive in character in that it pursues an aim in such a way that the subject responsible undergoes harm. The difference is that, while a penalty is harm inflicted by another subject, in satisfaction the harm consists of a particular kind of conduct by the subject who is

[347] The reference here is to the material damage suffered by the injured State as inclusive of any patrimonial, personal and/or moral damage suffered by (inflicted upon) its nationals.

[348] See footnote 264 above.

[349] The confusion between the two stages is of course inevitable whenever one disregards the distinction—for the Special Rapporteur indispensable—between the immediate (or substantive) and the mediate (or instrumental) consequences of an internationally wrongful act.

responsible—conduct which constitutes, as in other forms of reparation, the content of the subject's obligation.[350]

145. While neither of the possible objections to satisfaction seems thus to hold, there is, on the contrary, good cause to believe that such a remedy performs a positive function in the relations among States. In addition to the reasons emerging from the preceding discussion, it must be stressed that it is precisely by resorting to one or more of the various forms of satisfaction (as qualitatively distinct from purely compensatory remedies) that the consequences of the offending State's wrongful conduct can be adapted to the gravity of the wrongful act. The Special Rapporteur refers in particular to the degree of fault in a broad sense, namely to the various conceivable *nuances* of *dolus* and *culpa* which, even in an internationally wrongful act, are bound, after all, to become relevant at some point. Indeed, while aware that the Commission has rightly or wrongly chosen not to mention fault among the conditions of international responsibility, the Special Rapporteur finds it difficult to believe that fault in any degree could not be deemed to be—*de lege lata* or *ferenda*—of some relevance in the determination of the consequences of an internationally wrongful act. The question of the impact of fault is to be addressed in chapter V. It will be shown there that it is especially in cases where claims to satisfaction were successfully put forward that fault was of relevance (see paras. 183 *et seq.* below). And it is also probable that it will be precisely in such cases, namely in the case of delicts of particular gravity (not to mention crimes for the time being), that a refusal of the offender to provide adequate satisfaction may justify resort to more severe measures on the part of the injured State.

146. To the extent that the above conclusions are acceptable, part 2 of the draft articles on State responsibility should, in the opinion of the Special Rapporteur, not fail to include a provision contemplating satisfaction as a distinct, specific form of reparation. He actually believes such a provision to be indispensable as a matter of strict codification as well as progressive development of the law of international responsibility. Such a provision will therefore be submitted in chapter VI.

147. On the other hand, a positive norm on satisfaction should be accompanied by an indication of the limits within which a claim to satisfaction in one or more of its possible forms should be met by an offending State. As noted, the diplomatic practice of satisfaction shows that abuses on the part of injured or allegedly injured States are not rare. Powerful States have often managed to impose excessive or humiliating forms of satisfaction on weaker offenders. An express provision against such abuses would be an indispensable complement of a positive rule.

CHAPTER IV

IV. GUARANTEES OF NON-REPETITION OF THE WRONGFUL ACT

148. The study of practice and the literature shows that the consequences of an internationally wrongful act also include safeguards against its repetition. This remedy, however, is generally dealt with only marginally and within the framework of other consequences, notably of satisfaction.[351] Guarantees against repetition are

[350] Morelli, *op. cit.*, p. 358.

[351] Bissonnette, for example, maintains that safeguards against repetition of a wrongful act

also seen in other forms of reparation, including "punitive damages" and pecuniary compensation. Personnaz, for example, sees such a preventive function in indemnification;[352] Garcia Amador, for his part, stresses the preventive function of "punitive damages".[353]

149. Even though most authors consider safeguards against repetition to be a form of satisfaction, it is undeniable that such safeguards include aspects, often insufficiently clarified, that distinguish them from other forms of satisfaction. In the first place, the safeguards in question are not among the consequences of any wrongful act. They manifest themselves only with respect to wrongful acts which appear more likely to be repeated. It is of course also true that all measures—whether afflictive or compensatory—are themselves more or less directly useful in avoiding the repetition of a wrongful act. For example, there is no doubt that

> ... the best way for the State to prevent a repetition of wrongful acts against its nationals and, therefore, to protect them, is to demand that the guilty be punished by the judicial apparatus of the country on whose territory the wrongful act has been committed.[354]

A request for safeguards against repetition suggests that the injured State is seeking to obtain from the offender something additional to and different from mere

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"... differ also from *restitutio in integrum* by the absence of intent to restore the situation disrupted by the wrongful act.

"Again, although a demand for security for the future differs from a demand for punishment of the guilty because it contains no punitive element, it is nevertheless similar because it seeks to prevent the repetition of wrongful acts. For these reasons, it must be considered as one of the forms of satisfaction." (*Op. cit.*, p. 121.)

Graefrath observes that:

"Reaffirmation of the obligation breached, in order to safeguard the violated right against further new violations, is the real sense of a formal apology, of the prosecution and punishment of culprits, or the enactment of corresponding legal or administrative measures to prevent such violations in future. The State dissociates itself from the violation either because the act was unintentional or because it, in any case, will take care in future that such a violation would not be repeated. It affirms guarantees for the future observance of the obligation. In this sense, satisfaction by all means has practical importance ....

"In all cases where continuation or repetition of a violation may be feared and particularly if violations of obligations are concerned which are arising from *jus cogens* norms, the claim for satisfaction is directed to measures to be taken that would forestall continuation or repetition of the wrongful conduct that would prevent such a disturbance of peaceful international co-operation in future ...." (*Loc. cit.*, p. 87.)

According to Brownlie, the "objects" of satisfaction are three and are often cumulative. These are

"...apologies or other acknowledgment of wrongdoing by means of a salute to the flag or payment of an indemnity; the punishment of the individuals concerned; and the taking of measures to prevent a recurrence of the harm". (*Op. cit.*, p. 208.)

See also Przetacznik, *loc. cit.*, pp. 966-967; and F. V. García Amador, *Principios de derecho internacional que rigen la responsabilidad: Análisis critico de la conception tradicional* (Madrid, 1963), pp. 447-453.

[352] According to Personnaz:

"...the effect of pecuniary indemnification may be to encourage States to take the necessary measures in future to avoid a return to such a situation .... The implicit intention of such indemnification, which may or may not be compensatory, may include the idea that, by means of such penalties, the delinquent government may be induced to improve its administration of justice and give the claimant the assurance that such breaches and injustice in regard to its citizens will be avoided in the future." (*Op. cit.*, p. 325.)

[353] García Amador, document A/CN.4/134 and Add.l, para. 145.

[354] Bissonnette, *op. cit.*, p. 72.

reparation, the re-establishment of the pre-existing situation being considered insufficient. For example, following demonstrations against the United States Embassy in Moscow in February 1965 (less than three months after those of November 1964), the President of the United States affirmed that

> ... The U.S. Government must insist that its diplomatic establishments and personnel be given the protection which is required by international law and custom and which is necessary for the conduct of diplomatic relations between States. Expressions of regret and compensation are no substitute for adequate protection.[355]

In other words, the injured State demands guarantees against repetition because it feels that the mere restoration of the normal, pre-existing situation does not protect it satisfactorily.

150. The main issues arising in connection with the practice and theory of guarantees of non-repetition are: (*a*) the source of the offending State's obligation to provide such guarantees; (*b*) the question whether an explicit request by the offended State is necessary; (*c*) the question whether the choice of the specific guarantees to be provided belongs to the offending or to the offended State; and (*d*) the question whether the offending State may refuse to provide given safeguards. The study of previous attempts at codification offers a few interesting indications.

151. Article 13 of the draft convention on international responsibility of States for injuries on their territory to the person or property of foreigners, submitted by L. Strisower during the preparatory meetings for the Lausanne session of the Institute of International Law, in 1927, read as follows:

Article 13

> The responsibility of the State for injuries caused to foreigners includes ... a satisfaction to be given to the State which has been injured in the person of its nationals, by way of more or less formal apologies and, in appropriate cases, punishment of the guilty, either disciplinary or otherwise, as well as the necessary guarantees against a repetition of the offending act.[356]

On the other hand, the revised draft on international responsibility of the State for injuries caused in its territory to the person or property of aliens, submitted by F. V. García Amador in his sixth report, provides in article 27 (significantly entitled "Measures to prevent the repetition of the injurious act"), paragraph 2, as follows:

> 2. ...the State of nationality shall have the right, without prejudice to the reparation due in respect of the injury sustained by the alien, to demand that the respondent State take the necessary steps to prevent the repetition of events of the nature of those imputed to that State.[357]

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[355] Reproduced in ILM, vol. IV (1965), p. 698. Italy, too, following the lynching of Italian citizens in the United States in the period from 1890 to 1895, did not consider the payment of an indemnity by the Government of that country to be sufficient and requested that the laws of the United States be modified in order to avoid the repetition of such episodes.

[356] See footnote 252 above.

[357] Paragraph I of article 27 reads as follows:

"1. Even in the case of an act or omission the consequences of which extend beyond the injury caused to the alien, a fact constituting an aggravating circumstance, the reparation shall not take a form of "satisfaction" to the State of nationality, which would be offensive to the honour and dignity of the respondent State." (Document A/CN.4/134 and Add.l, addendum.)

The role assigned to safeguards against repetition by the previous Special Rapporteur, Mr. Willem Riphagen, appears to be still different. Article 4 of part 2 of the draft articles on State responsibility, which he submitted in his second report, provides in subparagraph 3:

3. In the case mentioned in paragraph 2 of the present article, the State shall, in addition, provide satisfaction to the injured State in the form of an apology and of appropriate guarantees against repetition of the breach.[358]

Article 6 of part 2 of those draft articles, submitted by Mr. Riphagen in his sixth report, which provides that:

1. The injured State may require the State which has committed an internationally wrongful act to:

(*d*) provide appropriate guarantees against repetition of the act.[359]

seems to add some emphasis to the provision. Omitting as it does any reference to satisfaction, the latter formulation seems to assign a more distinct role to safeguards against repetition. The expression "appropriate guarantees", however, has prompted a great deal of discussion. Unaccompanied as it was by any specification, it has been viewed as a possible source of abuse on the part of the injured State.[360]

152. Previous codification drafts seem thus to show:

(a) a certain tendency to give guarantees an autonomous position in relation to other remedies, including satisfaction itself;

(b) the existence of an offending State's obligation, under circumstances to be determined, to provide guarantees against repetition subject to a demand from the injured State;

(c) that the choice of guarantees rests in principle with the injured State;

(d) no indications concerning either the kind of guarantees to be offered or the limits in the choice thereof.

153. While confirming the conclusions drawn from the study of the above-mentioned drafts, State practice appears to be more complex and nuanced. In particular, as the offended State's right to demand safeguards against repetition has never been questioned, one would seem to have to conclude that safeguards are generally considered to be among the consequences of an internationally wrongful act. The same practice suggests that the corresponding obligation of the offending State must be fulfilled only on the injured State's demand.

154. With regard to the kinds of guarantees that may be requested, international practice is not univocal. In most cases the injured State demands either

(a) safeguards against the repetition of the wrongful act without any specification; or

(b) where the wrongful act affects its nationals, that a better protection of the persons and property of the latter be ensured.

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[358] *Yearbook ... 1981*, vol. II (Part One), pp. 100-101, document A/CN.4/342 and Add. 1-4, para. 164.

[359] *Yearbook ... 1985*, vol. II (Part One), p. 8, document A/CN.4/ 389.

[360] See especially Mr. Calero Rodriguez's statement at the thirty-seventh session of the Commission, *Yearbook ... 1985*, vol. I, p. 100, 1892nd meeting, para. 34.

155. Examples of hypothesis (*a*) include: the Dogger Bank incident between the United Kingdom and Russia in 1904, in which the United Kingdom requested, among other things, "security against the recurrence of such intolerable incidents";[361] the four cases in 1880 concerning the "visitation and search of American merchant vessels by armed cruisers of Spain on the high seas off the eastern coast of Cuba", following which the United States declared that it expected from Spain "a prompt and ready apology for their occurrence, a distinct assurance against their repetition";[362] the exchange of notes between China and Indonesia following the attack in March 1966 against the Chinese Consulate General at Jakarta; the Chinese Deputy Minister for Foreign Affairs requested, among other measures, a guarantee that such incidents would not be repeated in the future;[363] and the attack on an Israeli civil aircraft carried out in Zurich on 18 February 1969 by four members of the Popular Front for the Liberation of Palestine, following which the Swiss Government delivered formal notes of protest to the Governments of Jordan, Syria and Lebanon condemning the attack and urging the three Governments to take steps "to prevent any new violations of Swiss territory".[364]

156. Examples of hypothesis (*b*) are: the exchange of notes between the United States and Spain concerning American missionaries and, in particular, the Doane case in 1886, in which Mr. E. T. Doane, an American missionary in the Philippines, who had protested against the seizure by the Spanish authorities of certain lands belonging to the mission, was arrested and deported to Manila; following the protest by the United States Government, "the Spanish Government endeavoured in a measure to repair the wrong it had done by restoring Mr. Doane to the scene of his labours and by repeating its assurances with reference to the protection of the missionaries and their property";[365] the Wilson case, concerning the murder in 1894 of an American citizen in Nicaragua, in which the United States demanded, *inter alia*, that "the Government of Nicaragua ... adopt such measures as to leave no doubt as to its purpose and ability to protect the lives and interests of citizens of the United States dwelling in the reservation, and to punish crimes committed against them";[366] the Vracaritch case, concerning the arrest in Munich on 2 November 1961 of Lazo Vracaritch, a former captain in the Yugoslav resistance forces, charged with the "cowardly assassination of German soldiers during the occupation of Yugoslavia in 1941"; the Minister of Justice of the Federal Republic of Germany, in a statement issued to the press on 8 November, declared, *inter alia*, that "the arrest of the Yugoslav citizen Lazo Vracaritch is a regrettable, isolated case and the competent authorities have taken the necessary measures to ensure that such a case does not occur again";[367] the exchange of notes between the United States and the Soviet Union following the violation of the personal immunity of American military attaches by the Soviet authorities (29 September 1964) and their expulsion (14 December 1964), in which the United States demanded a formal assurance from the Soviet Government that no further violations of diplomatic immunity would take place;[368] the incident between China and the

[361] Martens, *Nouveau Recueil*, 2nd series, vol. XXXIII, p. 642.
[362] Moore, *Digest*, vol. II, pp. 903 *et seq.*, at pp. 903 and 907.
[363] "Chronique", RGDIP, vol. 70 (1966), p. 1013.
[364] R. A. Falk, "The Beirut raid and the international law of retaliation", AJIL, vol. 63 (1969), p. 419.
[365] Moore, *Digest*, vol. VI, pp. 345-346.
[366] *Ibid*., pp. 745-746.
[367] "Chronique", RGDIP. vol. 66 (1962), pp. 376-377.
[368] *Ibid*., vol. 69 (1965), pp. 156-157.

United Kingdom in which, following an attack against the British Consulate in Shanghai on 16 May 1967, the British Government demanded guarantees for the security of its diplomats and of other British subjects in China.[369]

157. In both the hypotheses considered, the offending State would seem to be placed under an *obligation of result.* In the face of the injured State's demand for guarantees, the choice of the measures most apt to achieve the aim of preventing repetition remained, it seems, with the offending State.

158. On other occasions—generally less recent—the injured State has asked that the offending State adopt specific measures or act in certain ways considered to be apt to avoid repetition. In such instances the offending State would seem to find itself under an *obligation of conduct.* Three possibilities seem to emerge here:

(a) In one set of cases the request for guarantees takes the form of a demand for formal assurances from the offending State that it will in future respect given rights of the offended State or that it will recognize the existence of a given situation in favour of the offended State. Examples include: the 1893 controversy between France and Siam in which France demanded that Siam recognize its territorial claims on the left bank of the Mekong;[370] the 1901 case of the Ottoman post offices, in which the Western Powers demanded that Turkey make reparation and present apologies for the violation of the mail on 5 May 1901 and recognize officially and unconditionally the foreign postal services that were then in operation in Constantinople and in various towns of the Ottoman Empire; Turkey apologized for the events of 5 May and gave a formal assurance that the British, Austrian and French postal services would thenceforth operate freely in Turkey;[371] the "Constitution" case, in 1907,[372] in which Uruguay requested that the Government of Argentina condemn the *Huracán* incident and make a declaration to the effect that it had had no intention of offending the dignity of the República Oriental or of ignoring the jurisdiction which it had, as a neighbouring and bordering country, over the Rio de la Plata;[373] the case of the "*Arménie*", a French packet-boat illegally detained in 1894 by the Turkish authorities, in which, following French protests, Turkey granted an indemnity of 18,000 francs to the Compagnie Paquet, the owners of the ship, and promised that in future the treaty provisions guaranteeing the inviolability of the person and of the domicile of French nationals in the Orient would be better respected.[374]

(b) On other occasions the injured State has asked the offending State to give specific instructions to its agents. Examples include: the case of the *Alliança,* a United States mail steamship fired on by a Spanish gunboat off the coast of Cuba in 1895, in which the United States affirmed that it "will expect prompt disavowal of the unauthorized act and due expression of regret on the part of Spain, and it must insist that immediate and positive orders be given to Spanish naval commanders not to interfere with legitimate American commerce passing through that channel, and prohibiting all acts wantonly imperilling life and property lawfully under the flag of

[369] *Ibid*., vol. 71 (1967), p. 1064.

[370] Martens, *Nouveau Recueil,* 2nd series, vol. XX, pp. 160 *et seq.*

[371] "Chronique", RGDIP, vol. 8 (1901), pp. 777 *et seq.*, in particular pp. 788 and 792.

[372] A Uruguayan steamship which had been wrecked opposite the Argentinian island of Martín García in the Uruguay River was assisted by another Uruguayan ship, the *Huracán.* The authorities of Martín García thereupon captured the *Huracán* and took the crews of both ships prisoner.

[373] "Chronique", RGDIP, vol. 15 (1908), p. 318.

[374] *Ibid.*, vol. 2 (1895), pp. 623-624.

the United States";[375] the case of the *Herzog* and the *Bundesrath*, two German ships seized by the British Navy in December 1899 and January 1900, during the Boer War, in which Germany drew the attention of Great Britain to "the necessity for issuing instructions to the British Naval Commanders to molest no German merchantmen in places not in the vicinity of the seat of war";[376] the Jova case, concerning the pillage of the estate of an American citizen by Spanish troops in 1896, in which the United States indicated that "The circumstances narrated seem, therefore, to call for the most searching inquiry and rigorous punishment of the offenders, with reparation to the injured party, as well as stringent orders to prevent the recurrence of such acts of theft and spoliation".[377]

(c) In a third set of instances the injured State asked the offending State to adopt a certain conduct considered to be apt to prevent the creation of the conditions which had allowed the wrongful act to take place. The most interesting examples are: the above-mentioned Boxer case, in which a number of the measures demanded from China were clearly intended for the specific purpose of preventing future occurrences of the same kind (para. 124 above); the case of the killing of 11 French sailors and the wounding of five others in Sakai, Japan, in 1868, on orders given by the Mikado's Government, by retainers of the Daimio of Tosa, whose troops were occupying the town. On that occasion France demanded that the troops of this Daimio should not be permitted to pass through or be stationed in the ports opened to foreigners.[378] Specific guarantees against repetition were also indicated by the arbitral tribunal in the *Trail Smelter* case.

In deciding on question No. 3, contained in article III of the Convention of 15 April 1935 between the United States of America and Canada[379] and reading as follows:

(3) In the light of the answer to the preceding question, what measures or régime, if any, should be adopted or maintained by the Trail Smelter?

that tribunal mentioned specifically a series of measures (at first provisional and later definitive) apt to "prevent future significant fumigations in the United States".[380]

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[375] Moore, *Digest*, vol. II, pp. 908-909.

[376] Martens, *Nouveau Recueil*, 2nd series, vol. XXIX, pp. 456 *et seq*., at p. 486.

[377] Moore, *Digest*, vol. VI, p. 910.

[378] Whiteman, *Damages*, vol. I, pp. 722-723. See also *Archives diplomaliques, 1869* (Paris), 9th year, vol. 2 (April-June 1869), pp. 601 *et seq.* A specific safeguard was also claimed by France because of the serious prejudice suffered by French citizens in Mexico in the early days of that country's independence and of the Mexican Government's disregard of its protests. France presented its conditions in the form of an ultimatum in 1838, demanding *inter alia:*

"…

"2. an undertaking by the Mexican Government not to place difficulties in the way of regular and punctual payment of recognized debts which it owes to French citizens;

"…

"4. a specific and solemn undertaking by the Mexican Government, under conditions of reciprocity;

"…

"(*b*) not to impose on those subjects, in any case, any kind of war contribution or forcible loan, for any purpose whatsoever.

(Lapradelle-Politis, vol. I, pp. 545 *et seq*., at p. 547.)

[379] League of Nations, *Treaty Series*, vol. CLXII, p. 75.

[380] UNRIAA, vol. Ill, pp. 1934 *et seq.*

159. On a number of occasions the request for guarantees went so far as to include the adoption or abrogation by the offending State of specific legislative provisions. Examples include: the Boxer case, already mentioned;[381] the correspondence exchanged in 1838 between Great Britain and Persia, in which Great Britain set forth its requests concerning the protection of British subjects, among which was the request that a firman be issued for that purpose;[382] the Mathéof case, which led to the adoption by the British Parliament of the Diplomatic Privileges Act (Act of Anne) of 21 April 1709;[383] the case between France and Belgium following an attempt on the life of Emperor Napoleon III carried out in 1854 by a French citizen who took refuge in Belgium and whose extradition was refused as his crime was considered by Belgium to be a political one, for which he was not extraditable under Belgian law; in order to avoid such occurrences in the future, the Belgian Parliament adopted the law of 22 March 1856;[384] the 1886 Cutting case between the United States and Mexico following the prosecution and conviction in Mexico of an American national for having published in the United States an article considered to be defamatory of a Mexican citizen; as that prosecution was in conformity with the Mexican legislation then in effect, the United States, with a view to preventing a repetition of such cases, demanded that the article in question of the Mexican Penal Code be modified, which was subsequently done;[385] the lynching of Italian nationals in Erwin, Mississippi, in 1901, in which Italy asked the United States to modify the law which did not recognize the jurisdiction of federal courts in certain cases, thus in practice preventing the punishment of the authors of crimes against foreigners;[386] the "*Alabama*" case, in which the United States protests had led Great Britain to modify the 1819 Act by the Act of 9 August 1870, which made it a statutory offence to build in its territory any ship intended for a belligerent; authorized the detention of any suspect ship; and required any ship that had infringed British neutrality to hand over any prizes of war which it had brought into a British port.[387]

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[381] See condition X of the joint note presented to the Chinese Government on 22 December 1900 (footnote 312 above).

[382] BFSP, 1838-1839, vol. XXVII, p. 93.

[383] J. Dumas, "La responsabilite des Etats a raison des crimes et delits commis sur leur territoire au prejudice d'etrangers", *Recueil des cours ..., 1931-II*, vol. 36, gives the following account:

"... Thus, in the reign of Queen Anne, Ambassador Matheof, who represented Russia at the Court of St. James, could be arrested by his creditors on the public highway because English law did not protect aliens from imprisonment for debts. After being manhandled, he was placed under guard by an officer of the law. Despite the excuses he received from the government and the proceedings against his assailants, Matheof left England in great annoyance, without presenting his letters of recall, and did not accept the farewell gift from the Queen. It was admitted that the fault of those who had arrested him was a result of lacunae in the law itself and, in 1707, an Act of Parliament was adopted to supplement the law in force and to prevent a recurrence of a physical attack at the expense of a foreign ambassador...." (P. 188.)

[384] According to this law, the murder or attempted murder of the head of a foreign Government or of a member of his family was not deemed to be a political crime (*ibid.*, p. 189).

[385] Article 186 of the criminal code of Mexico, under which the condemnation had been pronounced, provided for the prosecution and punishment of crimes committed by foreigners abroad against Mexican citizens (*ibid.*, pp. 189-190).

[386] Moore, *Digest*, vol. VI, pp. 848-849.

[387] N. Politis, *La justice internationale* (Paris, 1924), p. 41. The following statement in the United States case in this arbitration is particularly significant: "... a belligerent has the right ... to ask to have the powers conferred upon the neutral by law increased if found insufficient [to assure the preservation of its neutrality]" (Moore, vol. I, p. 578).

160. In the case of abrogation, the request for guarantees is absorbed into the request for reparation *(restitutio in integrum)* which, therefore, acquires the additional function of protecting the offended State against possible future wrongful acts of the same kind. In the case of emission of a legislative act, the request—according to some authors[388]—has an essentially preventive function, which is typical of guarantees of non-repetition.

161. It must be noted, however, that more recent practice does not record explicit demands to modify or issue legislation. Similar requests are however made by international bodies. For example, it is frequent that *ad hoc* international bodies request States responsible for violations of human rights to adapt their legislation in order to prevent the repetition of violations. These requests include those by the Human Rights Committee in its decisions on individual complaints. In the *Torres Ramírez* case, for instance, the Committee, after ascertaining that Uruguayan law was not in conformity with the International Covenant on Civil and Political Rights, stated that

> The Committee, accordingly, is of the view that the State party is under an obligation to provide the victim with effective remedies, including compensation, for the violations which he has suffered and to take steps to ensure that similar violations do not occur in the future.[389]

162. A difficult question is whether and in what circumstances the offending State may reasonably refuse guarantees of non-repetition. It seems open to question, for example, whether and to what extent the offending State could invoke the existence of "juridical obstacles of municipal law". To be sure, such obstacles would be, from the point of view of international law, "factual obstacles" and not "strictly legal obstacles".[390] However, the claims of Italy in the Erwin case (see para. 159 above) and the successful claim of the United States in the "*Alabama*" case[391] are significant in this respect. A similar issue is whether an offending State may lawfully refuse to provide safeguards that are allegedly too onerous in nature. It was noted in dealing with satisfaction that the forms of this remedy should be commensurate to the gravity of the offence. Although State practice does not contain explicit statements to that effect, the same principle should perhaps apply with regard to safeguards against repetition.

163. The analysis of doctrine and practice seems to justify the conclusion that guarantees against repetition constitute a form of satisfaction performing a relatively distinct and autonomous remedial function. It would therefore seem justified to include in the article of part 2 of the draft that deals with satisfaction an explicit mention of assurances and guarantees against repetition. This remedy would obviously be subject to the limiting clause applying to any form of satisfaction.

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[388] See Bissonnette, *op. cit*., pp. 124-125.

[389] Decision of 23 July 1980, para. 19 (*Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 40* (A/35/40), p. 126); other examples include the *Lanza* case, decision of 3 April 1980, para. 17 (*ibid*., p. 119), and the *Dermit Barbato* case, decision of 21 October 1982, para. 11 (*ibid., Thirty-eighth Session, Supplement No. 40* (A/38/40), p. 133). A complete analysis of the practice of the Human Rights Committee and a study of the jurisprudence of the European Commission and Court of Human Rights have not been possible for lack of time.

[390] See the preliminary report of the Special Rapporteur, document A/CN.4/416 and Add.1 (footnote 1 above), para. 98 *in fine.*

[391] See footnote 387 above.

CHAPTER V

V. THE FORMS AND DEGREES OF REPARATION AND THE IMPACT OF FAULT: TENTATIVE REMARKS

A. Introduction

164. An issue that the Commission will have to face in the course of the elaboration of part 2 of the draft articles on State responsibility is the question of fault as a factor in the qualitative and quantitative determination of reparation or any form thereof. The Special Rapporteur refers of course to fault in the broadest sense, inclusive of wilful intent (*dolus*) or negligence in its various degrees (*culpa lata*, *levis*, *levissima*). This is not rendered any easier by the fact that an explicit treatment of the question of fault seems to have been set aside so far by the Commission. An express treatment of fault is to be found neither in the articles in part 1 of the draft that deal with the definition of an internationally wrongful act, which were adopted on first reading,[392] nor in the draft articles of part 2 submitted by the previous Special Rapporteur, Mr. Riphagen, which were discussed by the Commission at the thirty-seventh session and referred to the Drafting Committee.[393] An important exception seems to be, of course, the implied reference to fault contained in article 31 of part 1 of the draft, according to which, if a State could prove successfully that no fault was attributable to it, no wrongful act or liability could be imputed.[394] Some references to fault were made in Mr. Ago's reports and proposals[395] and in some comments by Governments.[396]

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[392] *Yearbook ... 1980*, vol. II (Part Two), pp. 30 *et seq.*

[393] *Yearbook ... 1985*, vol. II (Part Two), p. 22, paras. 117-163.

[394] Article 31 reads as follows:

"*Article 31*. Force majeure *and fortuitous event*

"1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act was due to an irresistible force or to an unforeseen external event beyond its control which made it materially impossible for the State to act in conformity with that obligation or to know that its conduct was not in conformity with that obligation.

"2. Paragraph 1 shall not apply if the State in question has contributed to the occurrence of the situation of material impossibility."

For the commentary to this article, see *Yearbook ... 1979*, vol. II (Part Two), pp. 122 *et seq.*

[395] Indeed, the only document of the Commission in which "fault" is explicitly and rather extensively treated is the study prepared by the Secretariat entitled "'*Force majeure*' and 'fortuitous event' as circumstances precluding wrongfulness: survey of State practice, international judicial decisions and doctrine" (*Yearbook ... 1978*, vol. II (Part One), p. 61, document A/CN.4/315). In that document, section 1 (*a*) of chapter III, "Doctrine", is devoted to "Introductory considerations to the problem: the 'fault theory' and the 'objective theory'" (paras. 489-511).

[396] See in particular the general remarks by Austria on chapters I, II and III of part 1 of the draft articles (*Yearbook ... 1980*, vol. II (Part One), pp. 88 *et seq*., document A/CN.4/328 and Add.1-4) that are devoted to the issue of "fault" (paras. 14-18). "Surprise" is expressed therein for the absence of any explanation, on the part of the Special Rapporteur or of the Commission, of the exclusion of fault and for the striking contrast between that exclusion and the premises set forth by the Sub-Committee on State Responsibility, presided over by Mr. Ago, in whose report "fault" had been referred to as the "subjective element" of a wrongful act within the framework of the question: "Must there be fault on the part of the organ whose conduct is the subject of a complaint? Objective responsibility and responsibility related to fault *lato sensu.* Problems of the degree of fault" (*Yearbook ... 1963*, vol. II, p. 228, document A/CN.4/152, para. 6). The Austrian comment on this issue concluded as follows:

"18. One thing, however, needs to be stated clearly: even if one adheres to the view of the Special Rapporteur which the Commission endorsed—'that the topic of the international responsibility of States was one of those in which progressive development could be particularly important", such progressive development would still require a convincing reasoning in each instance to become acceptable. Passing over a problem in silence cannot be counted as such."

Occasional references to fault were also made by members of the Commission during the debates on other topics. One should add, of course, the references to the problem of fault contained in Mr. Riphagen's seventh report.[397]

165. Although, in a comment recalled above, it seems to be assumed that the Commission has, in part 1 of the draft articles, "excluded" fault from the constitutive elements of an internationally wrongful act, the Special Rapporteur is inclined to believe that such was not really the case. According to his understanding, particularly in view of the presence of article 31 and of the commentary thereto,[398] the Commission seemed rather to believe that fault was a condition *sine qua non* of wrongfulness and responsibility.

166. But whether or not that is the correct interpretation of the Commission's position, and whether or not there are cases in which responsibility is attributed regardless of the absence of any degree of fault, there is no doubt, in the Special Rapporteur's opinion, about the relevance of fault with regard to the specific determination of the consequences of an internationally wrongful act. It is one thing to say that the presence of fault is not essential for an act to cross the threshold separating the lawful from the unlawful; it is another thing to say that the legal consequences of an act which has passed that threshold are the same whether or not any fault (*dolus* included) is present in any degree. Whatever position the Commission took in part 1 of the draft articles, the Special Rapporteur believes that it could not take any further significant steps into part 2 without exploring the impact of fault on the forms and degree of reparation,[399] particularly if one considers that part 2 is to cover not just the consequences of delicts (not all of which, anyway, could reasonably be placed on the same level of wrongfulness and degree of responsibility) but also the consequences of crimes.

B. The problem of attribution of a fault to a State

167. Originally, fault was considered to be a "natural" element of tort in the relations between sovereigns as it was, and partly still is, considered to be a "natural" element of a civil tort or of a criminal offence within a national legal system. The Roman notion of *culpa* was extended by Gentilis and Grotius to the actions and omissions of sovereigns and States. Difficulties emerged rather late, notably in the works of Anzilotti and Kelsen. It is not just by chance that the difficulties came about when the subject was considered by these two authors, who have perhaps had the most to say about the relationship between international law and municipal law. The reasoning by which Anzilotti and Kelsen were led to present international responsibility as an objective responsibility based upon mere causation and independent from any wilful intent (*dolus*) or negligence (*culpa*) is strikingly

[397] *Yearbook ... 1986*, vol. II (Part One), p. 1, document A/CN.4/397 and Add.1.

[398] See footnote 394 above.

[399] It should not be overlooked that wrongfulness of the act (together with responsibility itself) is not really distinguishable, in the last resort, from the legal consequences of the act. The characterization of an act as unlawful is but one side of the coin, the other side of which consists precisely of the consequences, in terms of responsibility and forms and degrees of reparation, attached to the act by the law. In the measure in which fault is relevant for the purpose of the forms and degrees of reparation, it would thus also be relevant for the purpose of the characterization of the act. The distinction between part 1 and part 2, surely indispensable for the purpose of codification of the relevant provisions, does not affect the essential unity of the legal phenomenon involved.

significant of the connection with the problem of the relationship between international law and municipal law.

168. Considering that fault is an attitude of an individual human being, the problem was, according to Anzilotti, whether the attribution of international responsibility to a State for an action or omission infringing an international legal obligation was conditional upon the fault (*dolus* or *culpa*) of the individual organ whose action or omission was involved. Considering further, according to the same author, that, in so far as the internal law of a State so provided, the will or action of an individual could be considered as the will or action of a State, two hypotheses, A and B, could arise. In hypothesis A, the individual agent's act (or omission) was in violation of both international law and the relevant national law; in hypothesis B, the agent's conduct was in violation of international law but not in violation of municipal law.[400] In the case of A, the very condemnation of such an act by the agent under national law excluded the possibility that that same law could attribute the agent's act to the State. In the words of Anzilotti:

> ... Hence, the logical effect of the fault of the agent acting contrary to the law should be that acts performed by him cannot be regarded as acts of the State ...[401]

It followed that if international law nevertheless considered the State responsible, it did so, according to Anzilotti, on an objective basis. The author's explanation was that the State's liability was based (rather than on any fault of the agent or of the State) on a kind of guarantee to which any State would be held for any injury caused by its organization. In case B, the agent's conduct having been held in conformity with national law (namely, within the limits of the agent's competence and in compliance with existing legislation), no fault could be attributed to the agent notwithstanding the fact that his conduct was contrary to international law:

> ... [the agents] were required to observe the laws of their State, and they behaved as they had to. Fault should therefore lie with the authors of the law which permitted or ordered ... acts contrary to the State's international duties; and perhaps also with the authors of the State's Constitution itself, which vested some agents with powers incompatible with the fulfilment of those duties. But it would be difficult to determine fault—indeed, often impossible and almost always extraneous to the facts, which, in a given case, entail the State's international responsibility: a defect can occur in the laws regardless of great vigilance or foresight. In addition, since doubts cannot be entertained about ... the State's responsibility, whatever the defect in its legislation or its organization and whatever the root cause, establishing or ruling out fault would in short have no effect on the responsibility. In this case, one could speak of *culpa qui inest in re ipsa*, of fault based on the fact that there is no internal organization to ensure fulfilment of the State's international duties in all instances, in other words, fault which in reality is not fault. But these are abstractions that have nothing to do with the facts. Here too, we have to admit that responsibility has *a purely objective basis**; the State is answerable for the injurious act *for the reason that the act stems** from its activity.[402]

So, if the State was internationally responsible it was not, according to Anzilotti, in consideration of any fault (of its own or of the agent's). International

[400] Hypothesis B would materialize where the agent's action or omission was merely lawful (not prohibited) or when it was obligatory under municipal law. The result indicated in the latter part of the paragraph would be the same, the only difference being that if the agent's action or omission was obligatory his fault would have been even less attributable to the State than in the case of a merely lawful, permissible conduct.

[401] D. Anzilotti, "La responsabilité internationalé ...", RGDIP, vol. XIII (1906), p. 289.

[402] *Ibid.*, p. 290.

responsibility would have had again a purely objective basis. Hans Kelsen had a similar position.[403]

169. Ago reached a different conclusion by rejecting Anzilotti's and Kelsen's notion that the attribution of the agent's act or omission was a matter left to national law.[404] According to Ago, it was erroneous to believe that international law depended, so to speak, on national law for the attribution to the State of the agent's conduct. He agreed with Anzilotti and Kelsen that such an attribution could only be the work of legal rules in the sense that only by legal rules could the conduct of one or more individuals be "imputed" to the State—a point on which the Special Rapporteur disagrees (see paras. 170-172 below). But Ago took a different position with regard to the source of the legal rules effecting the allegedly legal operation. The rules in question, according to Ago (as according to others), could only be the rules of the same legal system within which the State was an international person, namely international law itself.[405] It naturally followed that if a State agent acted as such, the attribution to the State of his conduct, and of any element of his conduct such as *dolus* or *culpa*, would not find any obstacle in the fact that the same conduct was not "imputable" to the agent or to the State under municipal law. Ago also shared the view, common to widely accepted theories of juridical persons of municipal law, according to which the organ and the State (as *personne morale*) were one and the same entity.[406] It followed that when international law qualified the agent's conduct by considering it (through "imputation") as a conduct of the State, it did so on the basis of its own rules, not by virtue of national rules which from its viewpoint had a merely factual value.[407] The agent's conduct in violation of an international legal obligation was thus an internationally wrongful act if international law so provided, even though that conduct was a perfectly correct one from the point of view of

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[403] Kelsen, it will be recalled, spoke in terms of international sanction and in terms of *zentrale Zurechnung* and *periphere Zurechnung*. *Zentrale Zurechnung* was the attribution ("imputation") of the agent's conduct to the State on the part of the *national law* of the State. *Periphere Zurechnung* was the attribution ("imputation") of the consequent sanction (what the Commission calls the legal consequences or the duty of reparation) to the State, which was the task of international law. Kelsen reached thus the same conclusion as Anzilotti with regard to fault. As in no case would the national legal order attribute ("impute") fault to the State (*zentrale Zurechnung*), international law attributed liability on a purely objective, causal basis. (H. Kelsen, "Unrecht und Unrechtsfolge im Völkerrecht", *Zeitschrift für öffentliches Recht* (Vienna), vol. XII (1932), pp. 481 *et seq.*)

[404] R. Ago, "La colpa nell'illecito internazionale", *Scritti giuridici in onore di Santi Romano* (Padua, CEDAM, 1940), vol. III; reprinted in R. Ago, *Scritti sulla responsabilità internazionale degli Stati* (Naples, Jovene, 1978), vol. I, pp. 271 *et seq.*

[405] In his study "La colpa nell'illecito ..." (*loc. cit.*, p. 290), Ago quoted T. Perassi, *Lezioni di diritto internazionale*, part I (Roma, 1937):

"... when a declaration of will or an action comes into consideration for the effects attributed to it by a legal system *it is for such a legal system to determine**, by rules of its own, the conditions under which that will or action is attributable to a given person. *Imputation of a will or an action to a person** and determination of the *effects** it produces for the person to whom it is imputable, are *legal operations** which logically depend upon (one and) the same legal system." (P. 94; trans. by the Special Rapporteur.)

A very similar position is taken by Morelli, *op. cit.*, pp. 185 *et seq.* and 342 *et seq.* For the reasons explained below (paras. 170 *et seq.*), the Special Rapporteur believes that the only imputation effected by legal rules is the imputation of the legal consequences of the conduct. The origin of the legally relevant conduct and the attribution of such conduct to a person is normally, and at least with regard to factual entities, a question of fact.

[406] A point which, in the Special Rapporteur's view, contradicts the necessity of a legal imputation of the organ's conduct to the State (see footnote 405 above and paras. 170-172 below).

[407] Ago, "La colpa nell'illecito ...", *loc. cit.*, p. 290.

municipal law. Consequently, international law could consider such a conduct as affected by *dolus* or *culpa* regardless of whether that conduct was considered not so affected but perfectly lawful, or even due, under municipal law. Ago thus rejected any theories according to which the responsibility of States in international law would be bound to be "totally or in a major part a purely objective responsibility".[408] He concluded instead that the question of fault could only be decided on the basis of the international rules whose violation was at issue.

170. In the opinion of the Special Rapporteur, Anzilotti's and Kelsen's position, according to which fault was practically not attributable to States as international persons, is untenable. Great merit goes therefore to Ago for having, by his masterly critique of "attribution" under national law, removed an obstacle to the admission of a role of fault in the area of international responsibility. At the same time, Ago's criticism of the then current objective theory seems to fall short of a thorough clarification of the issue of attribution. In particular, the Special Rapporteur is not convinced by the theory according to which attribution of an act to a State as an international person (any degree of fault included) would be a legal operation of international law distinct from the attribution to the State of the legal consequences of the act. It would of course be presumptuous to attempt to deal adequately with such a problem in the present context.[409] Considering, however, the importance of the issue, the Special Rapporteur feels unable to avoid expressing at least his doubts. It seems to him essential, in particular, to verify the premiss which Ago left untouched in his study published in 1940[410] and the non-disposal of which is the cause, in the Special Rapporteur's view, of the incompleteness of the revision. Indeed, the main difficulty with Anzilotti's and Kelsen's theory resided in the analogy generally assumed to exist between States as international persons, on the one hand, and juridical persons of national law, on the other.[411] This analogy led both authors to try to fit the attribution to a State of the conduct of its organs into the same pattern to which most lawyers rightly or wrongly resort in order to explain the attribution to a juridical person of the conduct of its organs. But the analogy, generally taken for granted, is highly questionable.

171. According to the analogy, just as the conduct of agents was "imputed", for purposes of national law, to a juridical person through the action of the rules of the entity's by-laws or statutes governing the structure and competence of its organs,[412] the conduct of the organs of a State as an international person would have been

[408] *Ibid*., pp. 292-293.

[409] The Special Rapporteur dealt with it long ago within the framework of a general theory of the State as an international person (*Staat im Sinne des Völkerrechts*) in *Gli enti soggetti dell'ordinamento internazionale* (Milan, Giuffrè, 1951), pp. 128 *et seq.* and 335 *et seq*., especially pp. 343-346 and 360-371. He returned to the problem in 1971 in "Stati e altri enti (Soggettività internazionale)", *Novissimo digesto italiano* (Turin), vol. XVIII (1971), pp. 150 *et seq*., paras. 27-30; and in "L'Etat dans le sens du droit des gens et la notion du droit international", *Österr. Z. öff. Recht*, vol. 26 (1975-1976), pp. 311-331, especially pp. 324 *et seq.*

[410] See footnote 404 above.

[411] Very widely assumed, the analogy extends to the subdivisions of a unitary or federal state within a national system—in particular to such territorial subdivisions as provinces, cities, cantons, *Länder*, regions, or member states of a federation. Even where they are not personified under national law, these entities are indeed very similar to juridical persons from the viewpoint of the relationship of their respective legal orders with the national legal order within which they operate as legal subdivisions of the State.

[412] See the study by the Special Rapporteur, *Gli enti soggetti ...*, pp. 121 *et seq.* and 335 *et seq.*

"imputed" to the State, for the purposes of international legal relations, on the basis of the rules of the national legal order defining that State's organs and their competence.[413] Combined with the general notion of national law according to which the State as *personne morale* "can do no wrong"—particularly no intentional or negligent wrongful acts[414]—the analogy led to the conclusion that the infringement by a State of an international obligation could only bring about a responsibility based on the merely objective causal link between the infringement and its injurious consequences. Any wilful intent or *culpa* remained with the agent or agents of whose conduct the infringement of the obligation had consisted.

172. This analogy does not seem to be justified.[415] States as international persons are, to be sure, collective entities, resembling as such the *substratum* of juridical persons. Nevertheless, they do not possess, from the viewpoint of international law, any of the most essential features characterizing juridical persons from the viewpoint of the law of a national society. The juridical persons of national law are legal instruments within the legal order of a society the primary members—and legal subjects—of which are individual human beings; and they exist and operate not as "given" entities but as *legal* instrumentalities of *legal* relations among individuals.[416] In this sense, juridical persons are "secondary" persons as compared to physical persons.[417] On the contrary, sovereign States as international persons are the primary persons within a unique, *sui generis* legal system which presupposes States just as national law presupposes human beings.[418] The fallacy of the analogy is demonstrated by a host of data, two of which need to be stressed here. The first is that, unlike public and private juridical persons, set up by the law even when their creation is prompted by the initiative of private parties, States come into being, as international persons, on the merely factual basis of their existence as independent political units. So, while *personnes morales* are legal entities created by the law and penetrated thereby, States are just a product of historical events. In no way are they penetrated by the "law of

[413] This would have been precisely, in Kelsen's terminology, the *zentrale Zurechnung* (see footnote 403 above).

[414] Wilful intent or negligence remaining a feature of the agent's conduct (and the State as *personne morale* being only subject eventually to an indirect, purely civil liability).

[415] It is thoroughly contested by the Special Rapporteur in his study *Gli enti soggetti* ..., especially pp. 16-39 and 373-410. (This work is discussed by J. Kunz in AJIL, vol. 47 (1953), pp. 512-513, and in *Österr. Z. öff. Recht*, vol. VI (1953), pp. 105 *et seq*.) The Special Rapporteur summarized his critique of the analogy in "The concept of international law and the theory of international organization", *Collected Courses ... 1972-III*, pp. 646-653, and in *The United Nations Declaration on Friendly Relations and the System of International Law* (Alphen aan den Rijn, Sijthoff & Noordhoff, 1979), pp. 216-223. His critical position with regard to this analogy (and the factual concept of the State as an international person) is shared by L. Ferrari Bravo, *Diritto internazionale e diritto interno nella stipulazione dei trattati* (Pompei, Morano, 1964), pp. 154 *et seq.* and *passim*; M. L. Forlati Picchio, *La sanzione nel diritto internazionale* (Padua, CEDAM, 1974), p. 322; G. Battaglini, "Il riconoscimento internazionale dei principi generali del diritto", in *International Law at the Time of its Codification: Essays in Honour of Roberto Ago* (Milan, Giuffrè, 1987), vol. I, p. 103, and in the other works of the same author referred to in footnote 424 below; and F. Lattanzi, *Garanzie dei diritti dell'uomo nel diritto internazionale generale* (Milan, Giuffrè, 1983), p. 117.

[416] See the Special Rapporteur's study *La persona giuridica come soggetto strumentale* (Milan, Giuffrè, 1952) (reprint of chapter I, revised, of *Gli enti soggetti* ...).

[417] *Ibid.*, pp. 61-63; and *Gli enti soggetti* ..., pp. 95-98.

[418] States could become legal instruments of inter-individual *legal* relations only within a highly problematic (and at present not perceptible) public law of mankind. Within such a framework they would indeed be legal subdivisions: legal subdivisions of a "world legal order" and, of course, of a "world State". See the studies by the Special Rapporteur, "The concept of international law ...", *loc. cit.*, pp. 651-653, and *The United Nations Declaration* ..., pp. 221-223.

nations" in the sense in which juridical persons are so penetrated (and "conditioned" from within) by national law.[419] The second datum—and the one that matters directly in the present context—is that, unlike juridical persons and subdivisions, organized by their national law and only able to act within that law through their legitimate organs—the latter validly operating only within the sphere of their respective *legal* competence—States as international persons are not organized by international law.[420] The organization of a State for the purposes of its international legal relations is, from the viewpoint of international law, a merely *factual* structure of which national law itself, from the viewpoint of international law, is just another factual element.[421]

173. Once the *idolum* represented by the fallacious "legal corporate body" model is set aside, one should be in a better position to perceive the true nature of the attribution of acts to a State as an international person. Attribution does not really seem to be an operation carried out by legal rules, notably by national or international law—or not in the same sense, surely, in which the qualification of an act as wrongful and the "imputation" of responsibility are legal operations. The attribution of an act to a State for the purposes of any legal consequence is, more realistically, an operation carried out by the interpreter of the law—foreign ministry lawyer or international judge—in order to determine that the fact constituting a violation of an international obligation emanates in fact from a given State for the legal purposes of determination of wrongfulness and imputation of responsibility. Although it is after all a fiction to speak of acts of juridical persons, the concept of a *legal* attribution to such persons of the acts of their organs has at least a legal foundation. Its foundation resides in the above-noted relevance of the legal organization of juridical persons for the national legal system within which they exist.

174. The relevance of the legal organization of a juridical person is indeed so decisive that the circumstance that an individual has acted under the dual legal condition that he was a statutory agent of the *personne morale* and operated within his statutory competence is necessary and sufficient for the relevant national law (of which the juridical person's statutes are an integral part) to consider the act in question as attributable to the *personne morale.* Such is not the case, however, of a wrongful act of a State under international law and for the purposes thereof. First, international law being normally not active with regard to the creation and organization of the State,[422] the rules of internal law providing for the title and the competence of the State's organs are not complements of international law in the sense in which the statutes of *personnes morales* are legal complements of national law (see para. 172 above). From that viewpoint the national rules in question are

[419] It is not by chance that States, while they consider themselves institutions from the viewpoint of the society over which they rule, prefer to be called, for international purposes (not necessarily in a military sense), "powers". In that sense States are independent and not just "autonomous". Autonomy is a feature of subdivisions, namely of essentially dependent entities such as those referred to in footnote 411 above.

[420] Although the second datum may appear to be just a consequence of the first, both are just two of the innumerable consequences of the fundamental one: namely, that international law is not, and does not seem to be close to becoming, an inter-individual public law of mankind. (*The United Nations Declaration ...*, pp. 221-223.)

[421] On marginal or "apparent" exceptions, see "Stati e altri enti ...", *loc. cit.*, p. 166, para. 42, footnote 1; and *The United Nations Declaration ...*, pp. 218-219.

[422] *Gli enti soggetti ...*, pp. 320 *et seq.*

merely indicative of the factual organization of the State.[423] Secondly, the attribution to the State of the act of an organ is conditional neither upon the organ's legitimacy nor upon its competence under national law. This is confirmed by articles 1 to 15 of part 1 of the draft articles (see para. 176 above). Rather than a matter of legal attribution of acts to the State by international law, one should speak, therefore, of a factual relationship between the act and the State's organization, namely of a factual attachment of the act to the State as an international person, the existence of such relationship to be determined by the interpreter.[424]

175. If in the case of juridical persons of national law a legal attribution or imputation of will or acts is a practical terminological expedient, in the case of States as international persons a legal attribution seems actually to be an error and a redundancy. It is an error because—as explained—it has no real legal basis from the viewpoint of international law. It is a redundancy because it presents as a distinct legal phenomenon an operation which is but a duplication of determination of wrongfulness and imputation of responsibility. The best that can be said in favour of the notion of attribution of acts to States as a *legal* operation is that it is just another way of saying that it is a *logical* operation carried out by the interpreter for the purpose of a possible imputation of legal responsibility.

176. This does not mean, of course, that attribution could be effected arbitrarily. The foreign ministry legal adviser or the arbitrator called to make the finding must surely resort to criteria, standards and principles, including, in addition to common sense, national and international rules. He must also take account, however, of factual elements, some of which prevail over legal provisions, as is clearly indicated by articles 1 to 15 of part 1 of the draft. In principle, those articles (for example, articles 5, 6 and 7) indicate, as a criterion for attribution, the internal law of the State, which is surely not a part of international law.[425] In the same set of articles, however, there are provisions that refer unambiguously to absolutely non-normative elements. According to article 8, an act that would not be attributable to a State under the latter's internal law may be attributable to that State under international law if it was committed by persons acting in fact on behalf of the State. And under article 10, to evoke just one more example, an act equally non-attributable to a State under the internal law of that State can be attributed to it under international law if the act was committed by an organ acting in the exercise of governmental authority but outside its competence under national law or in contravention of its instructions. In such cases, surely, there is not even a national law attribution. The provisions of national law under which the act would not be attributable are set aside if any non-organ acted *in fact* as an organ or

[423] On this point the Special Rapporteur's position is the same as that of Ago; and the view is widely shared, since the time of Triepel and Anzilotti, especially in the German and Italian schools of international law.

[424] *Gli enti soggetti ...*, pp. 343-349; "L'Etat dans le sens du droit des gens ...", *loc. cit.*, pp. 313-314 and 327. A clear comparison between the doctrine of legal imputation (*rechtliche Zurechnung*) and the position of the Special Rapporteur can be found in I. Feustel, *Die Kompetenz-Kompetenz zum Abschluss völkerrechtlicher Verträge in der italienischen Lehre* (Berlin, Duncker & Humblot, 1977), pp. 74-82. The Special Rapporteur's view seems to be shared by Ferrari Bravo, *Diritto internazionale ...*, pp. 154 *et seq.*, 178 and 216; and by Battaglini, "Amministrazione e sovranità nell'ex-Territorio libero di Trieste", *Studi in onore di Manlio Udina* (Milan, Giuffrè, 1975), vol. I, p. 128 (particularly with respect to the attribution of the psychological attitude of the organ); and "Convenzione europea, misure d'emergenza e controllo del giudice", *Giurisprudenza costituzionale* (Milan), 1982, part 1, p. 423.

[425] See footnote 423 above.

if a non-competent organ acted *in fact* as if it were competent. As regards international law, it could, of course, be assumed that a legal imputation to the State is effected by the very rules set forth in articles 1 to 15 of part 1 of the draft articles or by any rules of general international law of which those draft articles were to represent a codification. It seems evident, however, that these rules do not really affect the State's structure, namely the legitimation of the State's organs or their competence. They merely accept or "register", so to speak, the existing factual structure. More than legal rules, they only represent factual standards or criteria to be followed in determining the factual connecting link of the acting individuals—and of their acts and attitudes—with the factual organization of the State as an international person.[426] The "operation" that international law really carries out with regard to the conduct in question is the imputation to a State (the same State or one or more other States) of the *legal consequences* of the conduct. International law, in other words, has only to decide whether the act is of legal relevance, for whom and with what consequences. The only imputation operated by international law is thus what Kelsen called *periphere Zurechnung.* The act (the conduct) "belongs" to a given State as a matter of fact. Whether or not it has occurred and which person has done it are indeed questions which the interpreter (government legal adviser, arbitrator or court) resolves as *quaestio facti*, namely as a condition for the solution of the *quaestio iuris* represented by the determination of the legal consequences and the "imputation" thereof (*periphere Zurechnung*).[427]

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[426] One should of course not overlook a certain similarity between the rules contained in the cited articles 1 to 15 of part 1 of the draft and the rules set forth in article 7 of the 1969 Vienna Convention on the Law of Treaties, notwithstanding the difference represented by the fact that the latter rules do at least seem to indicate certain organs as "competent". The difficulty of the problem makes the Special Rapporteur reluctant to express an opinion even on the said difference. He would venture tentatively to say, nevertheless, that the impact of article 7 of the 1969 Vienna Convention on the attitude of international law (conventional and general) with regard to the organization of States (an impact which in his view remains still to be adequately determined) is not necessarily such as to modify significantly the situation set forth here (and in his study "L'Etat dans le sens du droit des gens ..."), namely that there is an essentially factual connection between the State and the acts of its organs. The problem is briefly touched upon (with regard to article 7 of the 1969 Vienna Convention) by Ferrari Bravo, "Alcune riflessioni sui rapporti fra diritto costituzionale e diritto internazionale in tema di stipulazione di trattati", *International Law at the Time of its Codification ..., op. cit.*, pp. 273 *et seq.*; and by L. Condorelli, "L'imputation à l'Etat d'un fait internationalement illicite: solutions classiques et nouvelles tendances", *Collected Courses ... I984-VI*, vol. 189, pp. 34-35.

[427] A very stimulating (and in many ways intriguing) treatment of problems of "imputation", or problems related thereto, is to be found in the course given in 1984 at the Hague Academy by Condorelli (see footnote 426 above *in fine*). Subject to a more accurate study of the essay, the Special Rapporteur has the impression that, while in certain respects the *interventionisme* of international law in the organization of States is perhaps overestimated, "imputation" of the act—viewed also by Condorelli, it seems, as a (legal) operation of international law—appears in more than one case to be understood so broadly as to become hardly distinguishable, at least for the Special Rapporteur, from what he rightly or wrongly deems to be, on the basis of a rejection of the juridical person analogy, the only real "imputation" that the law of nations effects to a State as an international person, namely the attribution of the *legal consequences* of the act. The Special Rapporteur fails to see, in particular, in what sense the extension of State responsibility to certain facts or acts could or should imply, in addition to liability, the attribution to the State of acts or facts which have not been committed by individuals occupying any position, even a factual one, within the State's organization. He refers, for example, to the case of State responsibility envisaged by article 139, paragraph 1, of the 1982 United Nations Convention on the Law of the Sea. Does that provision imply the elevation of the acting individuals (as in other cases evoked by Condorelli) to the (legal?) quality or capacity of organs of the State? The Special Rapporteur finds that difficult to believe; and he has the impression that the difficulty derives mainly from the fact that he conceives differently from Condorelli what the latter calls "*la norme*" or "*le classique*", which should be, together with the so-called "*droit de s'auto-*

177. The discarding of the analogy with the juridical persons of national law—or at least the redimensioning of the current analogy—would permit the elimination *in radice* of any difficulties which have arisen in the past and may still be raised with regard to the admissibility of attribution of fault to a State. The factual nature of the person excludes the possibility that the question of the attribution of wilful intent or negligence to a State as an international person could be one of legal "imputation" of the fault either by national law (Anzilotti and Kelsen) or by international law (Perassi, Ago, Morelli and others). The choice between national law and international law discussed by the cited authorities is a moot question altogether. It is a moot question because the so-called *zentrale Zurechnung* of an act to a State is not an operation effected by the legal rules themselves but merely a logical operation carried out by the parties or by a judge on the basis of the positive and negative data indicating whether that conduct is or is not a conduct of that State's organization in a broad sense. There is thus no place, in the process of attribution, for a legal sifting of given elements of the conduct or for any one or more of such elements to be "left out", so to speak, of the attribution. The so-called "subjective" or "psychological" element of conduct—whether fault, error or bad faith—is just as attributable to the State as any other one of the conduct's objective elements, no rule of national or international law being susceptible of altering the consequent factual rinding. So, the infringement by a State of one of its international obligations can be committed with or without fault; and if there is fault it can be committed either with wilful intent or with any degree of negligence (*culpa lata, levis, levissima*). The question whether wilful intent or any degree of *culpa* is present in a given instance is a question of fact, just as the very existence of an act of a State is a question of fact.

178. In maintaining that attribution of fault to the State is essentially a question of fact, as is the determination of the presence of fault in the conduct of an individual (for the purposes of the law of tort within a national system), the Special Rapporteur is very far from intimating that it is not a much more difficult operation. Apart from the greater difficulty of the basic legal problem of finding out in which cases the so-called "subjective element" is relevant (see paras. 179 *et seq.* below) and with what consequences (paras. 183 *et seq.*), the very factual determination of whether or not a wilful intent or any degree of negligence of a State exists is surely far more arduous than the corresponding problem of private law. If the international person is in a sense as factual as a physical person, it is at least as tremendously complex as the *substratum* of such a colossal *personne morale* as the State as a person of national law. It is actually more complex than that, precisely because (as indicated also by the

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organiser" of States and other "*notions élémentaires*" used by the said author, the starting-point of any discussion of "*nouvelles tendances*". But it is the whole problem of the State in the sense of international law which is involved here and particularly the juridical person analogy. The Special Rapporteur finds similar difficulties with the equally interesting course given at The Hague Academy the same year by P.-M. Dupuy, "Le fait générateur de la responsabilité internationale des Etats", *Collected Courses ... 1984-V*, vol. 188, pp. 9 *et seq.* "Imputation" seems to the Special Rapporteur to be used too indifferently—and even more frequently—in that study to indicate either the attribution of the act or the imputation of responsibility or both; and while the juridical person analogy (which for the Special Rapporteur is very questionable) is evoked continuously, one finds in the study the intriguing thought that

"... On the one hand, the State, which has remained a juridical person, becomes virtually disembodied by the objectivation of the wrongful act; on the other, mechanical imputation means that all the injurious consequences of wrongful activities carried out within its jurisdiction are attributed to that disembodied juridical person!" (*Ibid*., p. 85.)

The analogy becomes here, to say the least, very problematic indeed.

cited articles 1 to 15 of part 1 of the draft) the organization of the State reaches beyond the boundaries of the "legal" organization provided for by national law. The consequence of complexity (combined with factuality) is that an act of a State as an international person is mostly if not always composed of a plurality of acts and attitudes emanating from different organs situated frequently at different levels in the hierarchy of the State's organization.[428] Now, just as the external or objective conduct of one or more low-ranking officers may or may not *per se* materialize in fact a conduct of the State as an international person, the so-called psychological attitudes (possibly different) of such officers may or may not constitute in fact a fault of the State as an international person. Considering therefore the far greater difficulty which any determination of intention or motivation presents as compared with the determination of the so-called "objective" conduct, attribution of any degree of fault may frequently be more problematic than attribution of "objective" conduct. And the fact that one cannot rely exclusively and directly upon legal rules (as would be the case with the juridical person of national law) probably explains in part the doubts which have afflicted and still afflict the issue of fault in the area of international responsibility.

179. Whatever may be the difficulties of factual attribution, the question whether fault is relevant, and in what sense and in what measure, is of course a question of law—a question clearly to be decided on the basis of the content of the international rule in violation of which the wrongful act has been committed. It will thus depend on that rule whether or not fault or any degree thereof is a condition of responsibility (see paras. 165-166 above).

180. Another matter, however, is the relevance of fault with respect to the legal consequences of an internationally wrongful act. In that respect, it seems both logical and rational, as recognized by a number of authorities, that the presence or absence of fault, and, if there is fault, the degree of wilful intent or negligence, play some role in the determination of the degree of responsibility and therefore of the forms and degrees of the reparation due. The main authorities in that sense are Oppenheim and Ago.

181. According to Oppenheim:

> … A great difference would naturally be made between acts of reparation for international delinquencies deliberately and maliciously committed, and for delinquencies which arise merely from culpable negligence.[429]

The Special Rapporteur submits that, *a fortiori*, a "great difference" will exist between an act in the absence of any fault and an act which is accompanied by fault (a wilful act).

182. According to Ago:

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[428] This is what the Special Rapporteur would describe as "the material (social, so to speak) complexity of an act of a person of the law of nations, as opposed to the 'unicity' of an act of an individual;" ("L'Etat dans le sens du droit des gens ...", *loc. cit.*, p. 315). The point is discussed in that study (pp. 315 *et seq.*).

[429] Oppenheim, *op. cit*., p. 354.

... the problem of the various gradations and nuances of fault in internationally wrongful acts seems to be of importance chiefly in regard to another question, on which it undoubtedly has a notable impact, namely, the nature and the extent of the reparation to be made by the State responsible ....[430]

C. The impact of fault on the forms and degrees of reparation

1. FAULT AND PECUNIARY COMPENSATION

183. The study of jurisprudence shows that the impact on pecuniary compensation of the so-called "subjective" element of an internationally wrongful act is rather infrequently taken explicitly into consideration by judges. *Prima facie*, the quantum of reparation by equivalent due by the offending State seems to be determined solely on the basis of the nature and extent of the damage caused, the absence, presence or degree of fault being for that purpose not relevant.[431] There are, however, a few cases where an opposite tendency is manifest; and it remains to be seen:

(i) whether the documentation which the Special Rapporteur has managed to collect is really complete; and

(ii) whether the lack of express mention of the so-called "subjective" element may conceal more or less frequently an implied—and at times perhaps inadvertent—consideration of the element in question by the arbitrator.

184. As regards the cases in which an express mention of the matter has been made, three seem to be very significant:

(a) The "*Alabama*" case, in which the British Commissioner expressed the following opinion:

... the reparation claimed should never exceed the amount of the loss which can be clearly shown to have been actually caused by the alleged injury; and ... it should bear some reasonable proportion, not only to the loss consequent on the act or omission, but to the gravity of the act or omission itself. A slight default may have in some way contributed to a very great injury; but it is by no means true that, in such a case, the greatness of the loss is to be regarded as furnishing the just measure of reparation, without regard to *the venial character of the default** ....[432]

(b) The *Fabiani* case, in which a degree of explicit consideration of the seriousness *of culpa* is also evident in the decision. As Subilia explains:

[Fabiani] had suffered repeated denials of justice by the Venezuelan authorities, which had more particularly obstructed the execution of an arbitral award rendered in his favour in Marseilles on 15 December 1880. According to the French Government, the damage exceeded mere loss of use of the sum arbitrated, for Fabiani was later declared bankrupt for default in paying sums lower than those

[430] Ago, "La colpa nell'illecito ...", *loc. cit.*, p. 302. Similar positions are taken by, *inter alia:* Giuliano, Scovazzi and Treves, *op. cit.*, p. 581; Brownlie, *op. cit.*, p. 46; and B. Simma, "Reflections on article 60 of the Vienna Convention on the Law of Treaties and its background in general international law", *Ödsterr. Z. öff. Recht*, vol. 20 (1970), pp. 11-12.

[431] This opinion is expressed by, for example, Personnaz, *op. cit.*, p. 106, and, more recently, Gray, who affirms:

"... Strictly, if the aim of the award is to compensate the loss of the injured alien then the fault of the respondent State should be irrelevant ...." (*Op. cit.*, p. 24.)

[432] "Counter-case presented on the part of the Government of Her Britannic Majesty to the Tribunal of Arbitration" (s.l.n.d.) (Archives de l'Etat de Genève), p. 131.

which the arbitral award should have enabled him to recover. This bankrupty had caused Fabiani considerable material and moral injury, for which reparation was also demanded.[433]

According to the arbitrator,

> ... [the injured party] would have made a profit if the unlawful act had not occurred, and the proof is subject to less stringent conditions *in the event of gross fault or wilful intent**; the judge retains full discretion[434]

(c) The *Dix* case, in which Commissioner Bainbridge, speaking on behalf of the United States-Venezuelan Mixed Claims Commission, said that

> ... International as well as municipal law denies compensation for remote consequences, in the *absence** of evidence of *deliberate intention to injure** ....[435]

185. Despite these cases, the doctrine is perhaps right in upholding the view that the absence, the presence and the degree of the so-called "intentional element" should in no way affect the computation of compensation. And if the purpose of monetary reparation is, as the Special Rapporteur has tried to show, to place the injured party in the situation which would have obtained if the wrongful act had not been committed—namely to provide a sum of money compensating the injured party for *all* the damages caused by the wrongful act but *only* for such damages; in other words, if the amount of reparation by equivalent in a narrow sense depends exclusively on the nature and dimension of the injury caused—it is difficult to see what relationship it could have to the presence or absence of any degree of fault on the part of the offending State.

186. The Special Rapporteur is inclined to think, however, that this interpretation might not be as correct as it may appear to be on the basis of *prime facie* logic, the more so if one considers that the various forms of reparation do not operate *in concreto* as separately from one another as their distinction in principle would suggest. It has already been noted in particular that:

(i) The compensatory and the afflictive functions are in a sense always present in any one of the forms of reparation, the distinction being essentially, however well marked at a given stage, one of degree (see para. 136 above);

(ii) The punitive function, deemed to be most typical of satisfaction (and guarantees of non-repetition), may find in some cases an invisible ersatz, so to speak, in the award, or in the more or less spontaneous grant, of a higher amount of pecuniary compensation (see para. 138 above). Some remarks by Salvioli, for example, seem to suggest that the matter would require a deeper and more extended study.[436]

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[433] Subilia, *op. cit*., pp. 59-60, footnote 141.

[434] Martens, *Nouveau Recueil*, 2nd series, vol. XXVII, p. 699.

[435] UNRIAA, vol. IX, p. 121.

[436] Salvioli writes:

"... In my opinion, the point concerning the *subjective conduct of the guilty party** is not necessarily bound up with the extent of the further consequences of the wrongful act, which, as we have already seen, come under the principle of 'normality' and 'predictability', and so on .... In the case of *wilful intent**, the aim of the author was, let us suppose, to cause damage y, but in order to accuse the guilty party of further damage y^1 it has to be shown that

2. FAULT AND SATISFACTION (AND GUARANTEES OF NON-REPETITION)

187. Whatever the impact of fault may be on the amount of pecuniary compensation, it seems manifest that the element in question has played an important role with respect to the forms and degrees of satisfaction in the repeatedly stressed technical sense. Once more, the authority of Oppenheim can be invoked.[437]

188. Considering the dimensions which the present report has assumed, the Special Rapporteur suggests that the members of the Commission themselves take a good look at the practice referred to in the relevant sections (paras. 106 *et seq.*), and particularly, but not exclusively, at the abundant diplomatic practice (paras. 119 *et seq.*).[438] In both jurisprudence and diplomatic practice the Special Rapporteur has the impression that the so-called "subjective" element represented by fault in a minor or major degree has played a significant role with regard to both:

(i) the coming into play of satisfaction in lieu of, or as a significant complement to, pecuniary compensation; and
(ii) the quality and number of the forms of satisfaction claimed and in most cases obtained.

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such damage was normal, that it was predictable; that does not necessarily stem from the fact of the original purpose, which was perhaps to inflict only damage *y."*

But further on he says:

"Nevertheless, I consider that, on the basis of a quite different consideration, it is possible to justify the tendency to be *more demanding towards the author of an act of wilful intent** than towards someone who has acted *through fault**, and *even in regard to the determination of further damage* for which reparation is to be made. The attribution of ... extrinsic injury to someone who has acted with *wilful intent** is a special form of sanction, a measure of punishment in view of the greater seriousness of harm to the international legal system, when the harm has been committed with *wilful intent* ....*" (*Op. cit.*, pp. 269-270.)

[437] According to Oppenheim:

"*... international tribunals** have in numerous cases awarded damages which must, upon analysis, be regarded as *penal*.* Such punitive damages have been awarded, in particular, for the failure of States to apprehend or effectively to punish persons guilty of criminal acts against aliens. The practice of States and tribunals shows other instances of reparation, indistinguishable from punishment, in the form of pecuniary redress *unrelated to the damage** actually inflicted." (*Op. cit.*, p. 355.)

Read in conjunction with paragraph 178 above, this dictum represents an explicit recognition of the impact of the presence and degree of wilful intent or *culpa* upon satisfaction, particularly in the form of "punitive damages".

[438] On the particular relevance that fault assumed in cases where reparation took the form of satisfaction, see, for example, the interesting remarks by R. Luzzatto, "Responsabilità e colpa in diritto internazionale", *Rivista di diritto internazionale* (Milan), vol. LI (1968), p. 63. Incidentally, Luzzatto's reference (*ibid.*, p. 58, footnote 13) to the manual of R. Quadri, *Diritto internazionale pubblico*, 4th ed. (Palermo, Priulla, 1963), and to the study of the Special Rapporteur, *Gli enti soggetti ...*, in connection with the problem of "imputation" should be corrected; Quadri's position on imputation—as on other matters—had become quite different in 1963 from what it had been until 1949, when the first edition of his manual appeared. The position of the Special Rapporteur with respect to that of Quadri is specified in "Stati e altri enti ...", *loc. cit.*, pp. 141 *et seq.*, para. 11 and footnote 8, paras. 27-28 and footnotes, and para. 30 and footnotes; and in "L'Etat dans le sens du droit des gens ...", *loc. cit.*, pp. 297 *et seq.*, 325-326, 345 and 358 (footnotes 305 and 306).

While the first of the above data emerges from all the cases without exception, the second emerges in a fairly high number of instances.

189. In the less recent practice, particularly significant are, in the Special Rapporteur's view, the case concerning the *Responsibility of Germany for acts committed after 31 July 1914 and before Portugal entered the war*, the *Moke* and *Arends* cases, the Boxer revolt and the Tellini case, all of which have been referred to above.[439] Other cases that are probably significant, subject to further study, are those of the violation of the Bulgarian frontier by Greece in 1925 (see para. 126 above), the *Panay* incident of 1937 between Japan and the United States (*ibid.*) and most of the post-1945 diplomatic practice cases briefly reviewed above (paras. 127-135). In both sets of cases some degree of fault was presumably admitted by the offending State, in consideration either of the fact that the injury had been inflicted on foreign nationals or agents by public (police or military) officials, or by the fact that the objects of injury were persons or premises with regard to which the injured State was entitled to a special protection.

190. Of course, the question may well arise in a number of the said cases whether and to what extent the fault on the part of an "acting" or "omitting" low-ranking State agent was in fact a fault of the offending State, or whether the latter's responsibility was predicated on a merely objective basis ("State risk"). A deeper and more extended analysis of jurisprudence would, however, be necessary in order to answer such a question.[440] Subject, however, to the results of further study (and in the light of comments from the members of the Commission), the Special Rapporteur would be inclined to believe that a State cannot be considered to be exempt from fault when it does not provide the members of its organization—particularly the members of the police and the armed forces—with adequate instructions concerning the positive and negative duties incumbent upon them with regard to the treatment of foreign nationals and agents.

[439] The Special Rapporteur refers in particular to those motivations of satisfactory remedies which emphasize, together with a punitive or afflictive function which is also present in numerous other instances, the intentional nature of the offence. In the *Responsibility of Germany* case, the tribunal spoke of "a penalty inflicted on the guilty State and based, like penalties in general, on ideas of recompense, warning and intimidation" (see footnote 42 above). In the *Moke* case, punitive damages were awarded for the purpose of condemning the unlawful use of force (see the extract from the decision cited in footnote 287 above). In the *Arends* case, the umpire said: "the respondent Government is willing to recognize its responsibility for the untoward act of its officers" (see footnote 288 above). Although in the Tellini case the fascist Italian Government's demands were no doubt arrogantly out of proportion, those which were formulated by the Conference of Ambassadors were presented in terms which seemed to imply a significant degree of negligence on the part of Greece.

[440] G. Palmisano is currently preparing a study of this problem, "Colpa dell'organo e colpa dello Stato nella responsabilità internazionale: spunti critici di teoria e prassi", which is to appear in *Communicazioni e Studi* (Milan), vol. XIX (1991).

CHAPTER VI

VI. DRAFT ARTICLES ON REPARATION BY EQUIVALENT, SATISFACTION AND GUARANTEES OF NON-REPETITION

191. The following are the draft articles proposed by the Special Rapporteur:

Article 8. Reparation by equivalent

1 (ALTERNATIVE A). The injured State is entitled to claim from the State which has committed an internationally wrongful act pecuniary compensation for any damage not covered by restitution in kind, in the measure necessary to re-establish the situation that would exist if the wrongful act had not been committed.

1 (ALTERNATIVE B). If and in the measure in which the situation that would exist if the internationally wrongful act had not been committed is not re-established by restitution in kind in accordance with the provisions of Article 7, the injured State has the right to claim from the State which has committed the wrongful act pecuniary compensation in the measure necessary to make good any damage not covered by restitution in kind.

2. Pecuniary compensation under the present article shall cover any economically assessable damage to the injured State deriving from the wrongful act, including any moral damage sustained by the injured State's nationals.

3. Compensation under the present article includes any profits the loss of which derives from the internationally wrongful act.

4. For the purposes of the present article, damage deriving from an internationally wrongful act is any loss connected with such act by an uninterrupted causal link.

5. Whenever the damage in question is partly due to causes other than the internationally wrongful act, including possibly the contributory negligence of the injured State, the compensation shall be reduced accordingly.

Article 9. Interest

1. Where compensation due for loss of profits consists of interest on a sum of money, such interest:

(*a*) shall run from the first day not considered, for the purposes of compensation, in the calculation of the amount awarded as principal;

(*b*) shall run until the day of effective payment.

2. Compound interest shall be awarded whenever necessary in order to ensure full compensation, and the interest rate shall be the one most suitable to achieve that result.

Article 10. Satisfaction and guarantees of non-repetition

1. In the measure in which an internationally wrongful act has caused to the injured State a moral or legal injury not susceptible of remedy by restitution in kind or pecuniary compensation, the State which has committed the wrongful

act is under an obligation to provide the injured State with adequate satisfaction in the form of apologies, nominal or punitive damages, punishment of the responsible individuals or assurances or safeguards against repetition, or any combination thereof.

2. The choice of the form or forms of satisfaction shall be made taking into account the importance of the obligation breached and the existence and degree of wilful intent or negligence of the State which has committed the wrongful act.

3. A declaration of the wrongfulness of the act by a competent international tribunal may constitute in itself an appropriate form of satisfaction.

4. In no case shall a claim for satisfaction include humiliating demands on the State which has committed the wrongful act or a violation of that State's sovereign equality or domestic jurisdiction.

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