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Preliminary report on State Responsibility, Mr. Gaetano Arangio-Ruiz, Special Rapporteur

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

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INTRODUCTION

1. Following the summary outline he proposed for the draft articles on State responsibility during the concluding phase of the thirty-ninth session of the International Law Commission in 1987, the Special Rapporteur has applied himself, in anticipation of the fortieth session, to three initial aspects of his task. These are:

(a) Study, with a view to their possible improvement, of articles 6 and 7 of part 2 of the draft articles, relating to cessation of and reparation for an internationally wrongful act, submitted by the previous Special Rapporteur, Mr. Riphagen, and at present before the Drafting Committee;[1]

(b) Submission, for that purpose, of a tentative formulation of a new draft article 6 on cessation of an internationally wrongful act and of a new draft article 7 on restitution in kind *(restitutio in integrum)*;

(c) Collection of material—comments of Governments, doctrine and practice—with a view to completing and bringing up to date the preparation of the second reading of part 1 of the draft, as begun by the previous Special Rapporteur in his seventh report with respect to articles 1 to 3, 6 to 8, 10 to 15, 17, 18 and 20 to 26 of that part.[2]

2. As regards the comments of Governments on the articles of part 1 of the draft that were not included in the preliminary study by the previous Special Rapporteur in his seventh report (articles 4, 5, 9, 16, 19 and 27-35), the collection referred to above (see para. 1 (*c*)) has been completed. It is at present being pursued with a view to: (i) the addition of doctrinal comments and practice on the same articles, and (ii) completion of the material presented by the previous Special Rapporteur in 1986, with regard to any further practice and to doctrine. Considering that this work is still in progress, it is felt that the material assembled should be presented to the Commission later, at a time when a greater degree of elaboration of parts 2 and 3 of the draft would permit a fruitful second reading of part 1. In the mean time, the collected material will be kept up to date with regard to comments of Governments, doctrine and practice.

3. The study referred to above (para. 1(*a*)) of the consequences of a wrongful act, as covered by articles 6 and 7 of part 2 of the draft, has confirmed the present Special Rapporteur's belief that those articles, notwithstanding their merits, are susceptible of some improvement. From the point of view of content, they should, in the view of the Special Rapporteur, cover to a greater extent and in greater depth the rights of the injured State or States and the corresponding obligations of the State which has committed an internationally wrongful act.

4. From a methodological point of view, it is felt that some improvement could be obtained if the work were conducted more systematically. In particular, the provisions of the draft covering the parties' rights and obligations relating to cessation of the wrongful conduct and reparation *lato sensu* should be distinguished, for the purposes of analysis, reporting, debating and drafting, from the provisions dealing with the various measures by which the injured State or States may seek to secure

[1] For the text, see *Yearbook... 1985*, vol. II (Part Two), p. 20, footnote 66.

[2] See *Yearbook... 1986*, vol. II (Part One), pp. 6 *et seq.*, document A/CN.4/397 and Add. 1, sect. II.

cessation or reparation and possibly, as maintained by many, inflict punishment on the wrongdoing State. A systematic separation seems advisable, for the same purposes, between international delicts and international crimes; and separate treatment also seems desirable for provisions on implementation (*mise en oeuvre*), on the one hand, and provisions on the settlement of disputes proper, on the other. Considering that the above distinctions affect to some degree, as will be shown, the structure of parts 2 and 3 of the draft articles as they now stand, it is felt that before tackling the subject-matter covered by the present draft articles 6 and 7 an attempt should be made to revise slightly the outline of those parts.

5. As a consequence, the present report is organized in three chapters, as follows:

(a) Chapter I indicates the general lines of the modifications proposed in the outline of part 2 and part 3 of the draft articles;

(b) Chapter II presents a study of certain legal consequences of internationally wrongful acts covered by the present draft articles 6 and 7 (as referred to the Drafting Committee) with a view to some improvement of the proposed texts;

(c) Chapter III contains a tentative formulation of a new article 6 on cessation (discontinuance) of the wrongful act and a new article 7 on restitution in kind (*restitutio in integrum*).

CHAPTER I

Suggestions concerning the outline of part 2 (Content, forms and degrees of international responsibility) and part 3 (Peaceful settlement of disputes arising from an alleged internationally wrongful act) of the draft articles

6. As implied in his statement (para, 1(*a*) above) that he would begin his work with a study of the subject-matter covered by draft articles 6 and 7 of part 2 as they now stand before the Drafting Committee, the Special Rapporteur proposes to deal with the problems raised by the elaboration of parts 2 and 3 of the draft articles, beginning at the point at which the work of the Commission reached a standstill at the thirty-eighth session,[3] leaving aside articles 1 to 5 of part 2, which were adopted on first reading.[4]

7. Except for any questions concerning either the location of articles 1 to 5 of part 2 within the framework of that part, or the connection of any of the said articles with the subject-matters covered by articles 6 to 16 of part 2 or 1 to 5 of part 3 submitted by his predecessor, the Special Rapporteur will address exclusively the problems dealt with in articles 6 to 16 of part 2[5] and 1 to 5 of part 3.[6]

8. With regard to the subject-matter so defined, the Special Rapporteur proposes not only to take the fullest account of the very valuable work carried out by his predecessor and of the opinions expressed and suggestions made by the members of

[3] See *Yearbook... 1986*, vol. II (Part Two), pp. 35 *et seq.*, chap. IV, sect. B.

[4] For the text, *ibid.*, pp. 38-39, sect. C.

[5] For the text and the commentary of the previous Special Rapporteur, see *Yearbook... 1985*, vol. II (Part One), pp. 4 *et seq.*, document A/CN.4/389, sect. 1.

[6] For the text and the commentary of the previous Special Rapporteur, see *Yearbook... 1986*, vol. II (Part One), pp. 2 *et seq.*, document A/CN.4/397 and Add.l, sect. I.

the Commission, but also to maintain, in so far as possible, the order in which the subject-matter has been dealt with in articles 6 to 16 of part 2 and 1 to 5 of part 3. It seems, however, that some modifications will be necessary in the general outline of both parts, as such outline is implicit in the order in which the draft articles have been presented so far.

9. Assuming, as seems reasonable, that articles 1 to 5 of part 2 as adopted on first reading are intended to constitute a chapter I of that part, entitled, for example, "General principles", analogous to the title of chapter I of part 1, the Special Rapporteur would propose that such a chapter be followed by (*a*) a chapter II covering the legal consequences of internationally wrongful acts qualifying as delicts; (*b*) a chapter III covering the legal consequences of international crimes; and, possibly, (*c*) a chapter IV dealing with any residual general problems to be covered in the final portion of part 2. Part 3 would follow.

10. The distinction between delicts and crimes is set forth in article 19 of part 1 of the draft[7] in terms which are clearly indicative of marked differences in legal consequences. However, those differences are still far from being defined with sufficient clarity. At the time article 19 was being drafted, an opinion was expressed (on the part of a member not quite favourable to the distinction) to the effect that, while it could be agreed that special consequences might, or would have to be, attached to wrongful acts identified as crimes, the Commission should confine itself to setting out such consequences of wrongful acts as could be found to represent the "lowest common denominator" of both delicts and crimes. That point of view was not accepted by the Commission[8] for a number of reasons, the principal one being that the articles should instead be so conceived and drafted as to cover explicitly both classes of wrongful acts (namely delicts and crimes, distinctly) with respect to consequences as well as to definition, regardless of the difficulty entailed. A second reason was, if the Special Rapporteur has interpreted the records correctly, that the lowest common denominator—or a common denominator significant enough to justify a partially identical treatment of delicts and crimes—might not be easy to find.

11. The previous Special Rapporteur seemed to believe, at least by implication, that a lowest common denominator surely existed. It was presumably on such a premise that, after setting forth various consequences of wrongful acts in draft articles 6 *et seq.*, he submitted draft article 14, paragraph 1 of which provides:

> 1. An international crime entails all the legal consequences of an internationally wrongful act and, in addition, such rights and obligations as are determined by the applicable rules accepted by the international community as a whole.

He explained, in paragraph (2) of his commentary, that it was hard to imagine that "the new obligations of the author State [as set forth in preceding articles]... would not arise in the case of ... an international crime, and the same applies to the new rights of the injured States to take countermeasures", the "question" being "rather", "in other words" (from both points of view), "one of additional legal

[7] For the text of article 19 (International crimes and international delicts) and the commentary thereto, see *Yearbook... 1976*, vol. II (Part Two), pp. 95 *et seq*.

[8] *Ibid.*, pp. 117-118, para. (54) of the commentary.

consequences".[9] A number of additional consequences are indeed set forth, directly or indirectly, in paragraphs 2 to 4 of draft article 14, for crimes in general, and in draft article 15, for "an act of aggression".

12. However, the Special Rapporteur feels that the solution thus implied is premature for the following reasons:

(a) Although it is possible that all the kinds of consequences of a wrongful act very summarily set forth or implied in the present draft articles 6 and 7 are to be attached such as they are also to crimes, this is not surely so. Even less can one be sure that the measures contemplated as lawful for wrongful acts in general in the following draft articles—and the conditions of their lawfulness—are extensible as they stand from the realm of delicts to the realm of crimes.

(b) Whether such doubts prove founded or not, the prudent method would be for the time being to focus separately, at least in principle, on the consequences of delicts and the consequences of crimes. If the results were to prove that the separation could partly be dispensed with, reverting to more or less integrated texts would remain a matter of drafting.

13. A separate treatment, roughly in the order followed by the previous Special Rapporteur and accepted by the Commission, would allow the Commission to do more justice to the different degrees of gravity of crimes as compared to delicts. It would also enable it to deal more accurately with either subject, starting—as has already been done—with the part which is less problematic and more familiar, before tackling the most delicate problems of the substantive and procedural consequences of wrongful acts qualified as crimes.

14. It is also felt that the chapters of the draft articles covering delicts and crimes respectively should be so conceived as to take account of the necessary distinction between the different legal consequences of either class of wrongful acts. One should in particular distinguish between, and deal separately with, at least two sets of legal consequences: on the one hand, the rights and duties of the parties relating to the various forms of reparation and to cessation of the wrongful conduct; and, on the other, the rights—or, perhaps more precisely, the *facultés*—of the injured State or States to resort to measures aimed either at securing reparation (and cessation) or at inflicting punishment, or at both objectives at the same time.[10] In a sense, measures

[9] See footnote 5 above.

[10] The distinction is implied or explicit in: D. Anzilotti, *Teoria generate della responsibilità dello Stato nel diritto internazionale* (Florence, 1902), reprinted in *Scritti di diritto internazionale pubblico* (Padua, CEDAM, 1956), vol. I, pp. 62-82; C. Th. Eustathiades, *La responsabilité internationale de l' Etat pour les actes des organes judiciaires et le problème du déni de justice en droit international* (Paris, 1936), reprinted in *Etudes de droit international, 1929-1959* (Athens, Klissiounis, 1959), vol. I, pp. 385-431, especially p. 409; L. Reitzer, *La réparation comme conséquence de l' acte illicite en droit international* (Paris, Sirey, 1938), pp. 25-80; L. Oppenheim, *International Law: A Treatise*, 8th ed., H. Lauterpacht, ed. (London, Longmans, Green, 1955), pp. 352-355; E. Jiménez de Aréchaga, "International responsibility", *Manual of Public International Law*, M. Sørensen, ed. (London, Macmillan, 1968), pp. 564-565; K. Skubiszewski, "Use of force by States. Collective security. Law of war and neutrality", *ibid.*, p. 753; F. A. Mann, "The consequences of an international wrong in international and municipal law", *The British Year Book of International Law, 1976-1977*, vol. 48, p. 2; J. Combacau, "La responsabilité internationale" *in* H. Thierry and others, *Droit international public* (Paris, Monchrestien, 1975), pp. 665-671; I. Brownlie, *System of the Law of Nations. State Responsibility*, part I (Oxford, Clarendon Press, 1983), pp. 33-34.

are viewed, even when it is admitted that they also perform a punitive function, as essentially instrumental, as compared with the substantive role of the various forms of reparation (and of cessation).[11] Among the instrumental consequences of an internationally wrongful act are to be placed the conditions of lawfulness of the applicable measures, including such *onera* as may be incumbent upon the injured State or States with regard to representations, intimations or *sommations*, which, except in cases and circumstances to be determined, should precede resort to measures.[12]

The distinction is less decided but not dissimilar in: G. Morelli, *Nozioni di diritto internazionale*, 7th ed. (Padua, CEDAM, 1967), p. 363; and M. Giuliano, *Diritto internazionale*, vol. I, *La società internazionale e il diritto*, 2nd ed. with T. Scovazzi and T. Treves (Milan, Giuffrè, 1983), p. 598.

[11] The term "substantive" is used here—as opposed to "instrumental" or "procedural" *latissimo sensu*—in the sense in which it is used (in order to indicate the rights which the injured State acquires against the wrongdoing State as a result of an international wrong) in Mann, *loc. cit.* (footnote 10 above), pp. 2 and 5. The Special Rapporteur would not say, however, that measures such as reprisals, satisfaction and others are, as the author puts it, "esoteric". They are, in international law, an equally central part of the phenomenon and of the codification task of the Commission. They simply come "after", they may not follow any wrongful act; and they are, in any case, different. As such, they call for distinct treatment.

[12] The term "measure" is used here in its widest sense, inclusive of any conduct ("commissive" or "omissive") by which one or more injured States and/or an international institution react to an unlawful act in order either to secure cessation and/or reparation or to inflict any form or degree of punishment or sanction. While not intending to make an issue of it, the Special Rapporteur prefers for his part to abstain, at least for the time being, from using the term *contre-mesure.* With all respect for the title of article 30 of part 1 (the text of which, however, uses a different word), as well as for the arbitral tribunal and for the ICJ, which have used the neologism, he is not quite sure that that term is the most felicitous one.

One of the reasons for his reluctance to accept the term *contre-mesure* is that it might blur the notion—to be kept instead as clear as possible—that the *wrongful act itself* could not be qualified as a *measure.* Although it may well happen that the wrongdoing State may label its unlawful conduct as a measure (or even as a countermeasure) taken as a reaction to an allegedly wrongful act of the injured State or States, it seems wiser for the "legislator" not to adopt any language that might encourage the labelling of a wrongful act as anything but a wrongful act or action. Another reason for his reluctance is the sabre-rattling echo which the term *contre-mesure* conveys in view of the sense in which, as indicated by Leben, it was originally used. (C. Leben, "Les contre-mesures inter-étatiques et les réactions à 1' illicite dans la société internationale", *Annuaire français de droit international, 1982,* p. 16, footnote 24).

It is perhaps not useless to recall that, while the ICJ used the term only once in the *Case concerning United States Diplomatic and consular Staff in Tehran,* judgment of 24 May 1980 (*I.C.J. Reports 1980,* p. 27, para. 53) and reverted immediately thereafter (*ibid.,* p. 28) to the simpler term "measures", the arbitral tribunal in the *Case concerning the Air Service Agreement of 27 March 1946 between the United States of America and France* (United Nations, *Reports of International Arbitral Awards,* vol. XVIII (Sales No. E/F.80.V.7), p. 415 had used terms such as "actions" and "measures" (with reference to the Civil Aeronautics Board orders, the lawfulness of which was in question) more often, if memory serves, than the term "counlermeasures", which it is generally assumed to have so authoritatively endorsed.

In addition to Leben's work cited above, the neologism is variously discussed or used, *inter alia,* in: W. Wengler, "Public international law. Paradoxes of a legal order", *Collected Courses of The Hague Academy of International Law, 1977-V* (The Hague, Nijhoff, 1982), vol. 158, pp. 18-24; P.-M. Dupuy, "Observations sur la pratique récente des 'sanctions' de l' illicite", *Revue générale de droit international public* (Paris), vol. 87, 1983/3, pp. 526 *et seq.;* E. Zoller, *Peacetime Unilateral Remedies: An Analysis of Countermeasures* (Dobbs Ferry, N.Y., Transnational Publishers, 1984), *passim;* and "Quelques réflexions sur les contre-mesures en droit international public", *in Droits et libertés à la fin du XX' siécle. Influence des données économiques et technologiques: Etudes offertes à Claude-Albert Colliard* (Paris, Pedone, 1984), pp. 361 *et seq.;* A. de Guttry, "Le contromisure adottate nei confronti dell'Argentina da parte delle Comunità Europee e dei terzi Stati ed il problema della loro liceità

15. Although this distinction applies to both classes of internationally wrongful acts, considerable differences are likely to emerge from an analysis of the distinction between delicts and crimes with regard to the relationship between substantive and instrumental (or "procedural") legal consequences. For example, measures in the case of delicts are more likely to serve predominantly, albeit not exclusively, the purpose of securing reparation rather than that of inflicting any form or degree of sanction. In the case of crimes—as well as in the case of delicts of particular seriousness—measures may more frequently have to be resorted to initially in order to impose cessation and, at a later stage, in order to inflict punishment in addition to imposing reparation. Resort to measures in the case of crimes is very likely to be subject to less stringent conditions than in the case of delicts. While stressing the necessity of a separate analysis of the two sets of consequences for crimes as well as for delicts, these and other, obviously relative, differences enhance the necessity, advocated above, of a separate analysis for the two classes of internationally wrongful acts.

16. In order to avoid any misunderstanding, however, it is necessary to stress that the above distinctions are suggested merely as a matter of method. They are dictated essentially by the difficulty that the Commission would encounter in dealing simultaneously with the intricacies of the various issues arising in the treatment of delicts and crimes, on the one hand, and of substantive and instrumental problems, on the other. It is mainly felt necessary to point out that the methodological suggestions put forward do not imply any attempt on the part of the Special Rapporteur to take a stand on any of the practical or theoretical issues involved or at this point to call into question in any sense choices made or to be made by the Commission with respect thereto. In particular, he does not question, for the purposes of the Commission's present task, the choice made by the Commission with regard to the notion of international responsibility and to the definition of the legal relationships and situations created by an internationally wrongful act.[13]

17. After summing up, in terms that are worth recalling, the three main currents of thought on the concept of international responsibility,[14] the Commission stated that:

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internazionale", *La questione delle Falkland-Malvinas nel diritto internazionale,* L. Ronzitti, ed. (Milan, Giuffrè, 1984), p. 343; D. Alland, "International responsibility and sanctions: self-defence and countermeasures in the ILC codification of rules governing international responsibility", *United Nations Codification of State Responsibility,* M. Spinedi and B. Simma, eds. (New York, Oceana, 1987), pp. 143 *et seq.;* P. Malanczuk, "Countermeasures and self-defence as circumstances precluding wrongfulness in the International Law Com-missions's draft articles on State responsibility", *ibid.,* pp. 197 *et seq.*

[13] *Yearbook... 1973,* vol. II, pp. 175-176, document A/9010/ Rev.l, paras. (8)-(13) of the commentary to article 1.

[14] The three concepts were summed up by the Commission as follows:

... One approach which may be regarded as traditional in international law writings—it is supported by Anzilotti, Ch. de Visscher, Eagleton, and Strupp, among others—describes the legal relations deriving from an internationally wrongful act in one single form: that of a binding bilateral relationship established between the offending State and the injured State, in which the obligation of the former State to make reparation—in the broad sense of the term, of course—is set against the subjective right of the latter State to require the reparation. This view does not admit of the possibility of a sanction in the proper sense of the term—i.e. having a punitive purpose—which the injured State itself, or possibly a third party, would have the faculty to impose upon the offending State. Another view, whose most illustrious supporters are Kelsen and Guggenheim, leads to a position almost diametrically opposed to that just described. It, too, upholds, though in an entirely different way, the idea of a single legal relationship arising from the wrongful act and thus falling within the concept of responsibility. Starting from the idea that the legal order is a coercive order, this view sees the

it must be clear that by using the term "international responsibility" in article 1, the Commission intended to cover every kind of new relations which may arise, in international law, from the internationally wrongful act of a State, whether such relations are limited to the offending State and the directly injured State or extend also to other subjects of international law, and whether they are centred on the duty of the guilty State to restore the injured State in its rights and repair the damage caused, or whether they also give the injured State itself or other subjects of international law the right to impose on the offending State a sanction admitted by international law. In other words, the formulation adopted for article 1 must be broad enough to cater for all the necessary developments in the chapter which is to be devoted to the content and forms of international responsibility.[15]

18. As indicated, the methodological suggestions made above (paras. 11-13) are not meant to have any implications with regard to the Commission's choice. The suggested separate treatment, for purposes of study, reporting, debate and drafting, of delicts, on the one hand, and crimes on the other, as well as the separate treatment of questions of reparation and cessation, on the one hand, and questions of measures, on the other, are simply meant to help to tackle more effectively the delicate issues involved in the identification of the substantive and instrumental or "procedural" legal consequences of wrongful acts, both as matters *de jure gentium condito* and as matters of progressive development. Both distinctions should prove helpful, in particular, when the Commission resumes its work on the subject, starting from the subject-matter covered by articles 6 and 7 of part 2 as referred to the Drafting Committee. The only implications of the suggested distinctions are: (*a*) that there are differences of too great a magnitude between wrongful acts qualified as delicts and wrongful acts qualified as crimes for the legal consequences of the two classes to be analysed simultaneously; and (*b*) that the substantive consequences of either delicts or crimes should be analysed *per se* before moving into these instrumental (or very widely "procedural") consequences which are the various kinds of measures to which resort may be had by the injured State or States.

19. Another matter is, of course, the question of settlement of disputes, with regard to which the Special Rapporteur feels that it is premature to express any views. He would only point out for the time being that he is inclined to view the content of part 3 of the draft articles not in terms of "implementation" (*mise en oeuvre*) but rather in terms of peaceful settlement of disputes arising in the field of State

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authorization accorded to the injured Slate to apply coercion to the offending State by way of sanction precisely as the sole legal consequence flowing directly from the wrongful act. Accordingly, general international law would not regard the wrongful act as creating any binding relationship between the offending State and the injured State. The obligation to make reparation would be nothing more than a subsidiary duly which in municipal law the law itself, and in international law an agreement, interposes between the wrongful act and the application of coercion. Lastly, there is a third view, upheld by, among others, Lauterpacht, Eustathiades, Verdross, Ago and the Soviet authors of the *Kurs mezhdunarodnogo prava*, according to which the consequences of an internationally wrongful act cannot be limited simply either to 'reparation' or to a 'sanction'. In international law—as in any system of law, the wrongful act may, according to that view, give rise, not to just one type of legal relationship, but to two types of relationship, each characterized by a different legal situation of the subject involved. These legal consequences amount, according to the case, either to giving the subject of international law whose rights have been infringed... the right to claim reparation—again in the broad sense of the term—..., or to giving that same subject, or possibly a third subject, the faculty to impose a sanction on the subject which has engaged in wrongful conduct. The term 'sanction' is used here to describe a measure which, although not necessarily involving the use of force, is characterized—at least in part—by the fact that its purpose is to inflict punishment. That is not the same purpose as coercion to secure the fulfilment of the obligation, or the restoration of the right infringed, or reparation, or compensation. (*Ibid.*, pp. 174-175, para. (5) of the commentary to article 1.)

[15] *Ibid.*, pp. 175-176, para. (10) of the commentary to article 1.

responsibility. The main justification for this view, partly touched upon above (see para. 12), is that implementation of responsibility for an internationally wrongful act surely includes both measures and any *onera* incumbent upon the injured State or States as a condition of lawful resort to measures. It follows that any rules or principles concerning any such *onera* belong to part 2 of the draft, no less than do the rules or principles relating to measures. In any revised outline of the parts of the draft articles other than part 1, they belong, in the opinion of the Special Rapporteur, to those sections of the chapters covering the consequences of delicts or crimes that deal with measures aimed at securing reparation (and/ or cessation) and/or at inflicting punishment. It follows that part 3 should deal—to the extent that the Commission may deem desirable—with the peaceful settlement of disputes arising in connection with international responsibility for wrongful acts but not in particular with matters pertaining to *onera* of the injured State or States relating to resort to measures.

20. In summary, the subdivisions of the outline of work which the Special Rapporteur would tentatively propose for parts 2 and 3 of the draft articles are as follows:

Part 2. Content, forms and degrees of State responsibility
Chapter I. General principles (arts. 1-5 as adopted on first reading)
Chapter II. Legal consequences deriving from an international delict
Section 1. Substantive rights of the injured State and corresponding obligations of the "author" State
(a) Cessation
(b) Reparation in its various forms
(i) Restitution in kind
(ii) Reparation by equivalent
(iii) Satisfaction (and "punitive damages")
(c) Guarantees against repetition
Section 2. Measures to which resort may be had in order to secure cessation, reparation and guarantees against repetition
Chapter III. Legal consequences deriving from an international crime
Section 1. Rights and corresponding obligations deriving from an international crime
Section 2. Applicable measures
Chapter IV. Final provisions
PART 3. PEACEFUL SETTLEMENT OF DISPUTES ARISING FROM AN ALLEGED INTERNATIONALLY WRONGFUL ACT

CHAPTER II

Cessation of an internationally wrongful act and restitution in kind

A. Object of the present chapter

21. Viewed, as has been indicated above (para. 14), as the substantive content of international responsibility[16] and as the immediate—and possibly conclusive—

[16] "International responsibility" is, of course, to be understood, as indicated by Mr. Ago in his third report, as "all the forms of new legal relationship which may be established in international law by a State's wrongful act" (*Yearbook... 1971,* vol. II (Part One), p. 211, document A/CN.4/246 and Add. 1-3, para. 43).

consequence among the legal consequences of a wrongful act, the obligation to make reparation may be discharged, as has been almost unanimously agreed, in a number of forms or ways, each one of which is intended to perform—in isolation or in combination with one or more of the others—a certain "function". *Grosso modo,* one distinguishes first of all the three main remedial categories known as restitution in kind (*restitutio in integrum* or *in pristinum,* or *natural is restitutio*), reparation by equivalent or compensation in its various elements (or reparation in a narrow sense), and satisfaction in various forms. While restitution in kind and reparation by equivalent are generally understood—not without considerable variations—as intended to effect the reparation of material injury, satisfaction is generally considered—not, once more, without variations—to meet the more or less distinct exigency of making good the "moral" injury and the injury inherent in the mere fact of the violation of the international obligation. One must also recall the frequent inclusion, in satisfaction, of "exemplary", "vindictive" of "punitive" damages.[17] Guarantees against repetition of the wrongful act are considered to be a distinct form of reparation.

22. A different function is to be ascribed to cessation (or discontinuance) of a wrongful act having a continuing character. Often considered in more or less close connection (if not confusion) with restitution in kind or other forms of reparation, cessation seems more correctly to fall, as recognized (at least in principle) by the previous Special Rapporteur, outside the framework of reparation in a proper sense. While reparation would obviously come into play, in the form of *restitutio,* compensation or satisfaction—and possibly two or more of such remedies—for that portion of a continuing wrongful act preceding discontinuance of the illegal conduct, cessation *per se* performs a different remedial function. It would serve to prevent, by ensuring the formerly wrongdoing party's undertaking or resumed compliance with the original obligation, the very coming into play, for the portion of wrongful conduct avoided thanks to cessation, of the duty to make reparation deriving from the so-called "secondary" rule establishing responsibility. Only in a non-strict sense can cessation of wrongful conduct be included, alongside of the various forms of reparation, among the legal consequences of an internationally wrongful act (see para. 39 below). This does not make it any less worthy of attention within the framework of the topic of State responsibility (see paras. 52-61 below).

23. With regard to draft articles 6 and 7 as referred to the Drafting Committee, the Special Rapporteur believes that they do not fully achieve what should be the result of an effort of thorough codification (not to mention progressive development) of the substantive consequences of a wrongful act, namely the content of international responsibility in terms of substantive rights and duties of the injured State and of the State which committed the wrongful act.

24. Apart from any questions concerning the merits of the solutions set forth in draft articles 6 and 7, with regard to some of which important reservations have been

[17] According to Anzilolti:

"... 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: the... 'exemplary' or 'vindictive' damages of English law immediately come to mind." (D. Anzilotti, *Cours de droit international.* French trans, of 3rd Italian ed. by G. Gidel (Paris, Sirey, 1929), p. 524.)

expressed by members of the Commission, it is felt that the whole subject-matter should be covered wherever possible in greater detail and depth. For example, reparation by equivalent cannot be considered to be adequately covered by a mere reference to the payment of "a sum of money". The problems involved in this form of reparation should be considered in greater detail in the light of practice. Another example is satisfaction. Not only does this most important remedy remain neglected (except to the extent to which an element of satisfaction might be present in the reference to guarantees against repetition) but nothing is stated about "exemplary" or "punitive" damages as possible elements either of satisfaction itself or of some other form of reparation.[18] In so far as the text proposed for article 6 is concerned, there appears to be no attempt to distinguish, with regard to both reparation by equivalent and satisfaction, between compensation for material injury and compensation for so-called moral damage—two remedies which doctrine takes to be matters of compensation, or of satisfaction or both.[19]

25. Cessation itself seems to be not only partly overlapping with *restitutio* (in draft article 6, paragraph 1 (*a*)) but also inexplicably confined to the particular hypotheses of release of persons and return of objects. Restitution in kind (*restitutio in integrum*) seems to be inadequately covered in article 6 for wrongful acts other than those affecting the treatment of aliens, while for all kinds of wrongful acts too much seems to be left (in both articles 6 and 7) to a discretionary choice of the "author" State, such choice being arguably the rule in any case of wrongful injury to alien nationals. As noted above, restitution seems to be inadequately distinguished from cessation.

26. Notwithstanding the merits of some of the solutions adopted and the generally admitted difficulty of setting forth very precise rules in such a delicate area of international relations, the Special Rapporteur believes that some improvement could and should be attempted, perhaps by treating the various remedies in separate articles. The adoption of such a method, together with a more thorough and articulate codification of general rules emerging from the analysis of the practice of States and international tribunals concerning the various remedies and their possible combinations, might facilitate a reasonable measure of progressive development of such rules. One is of course aware at the same time that the greatest prudence should be exercised with regard to both codification *stricto sensu* and progressive development. It is also in view of the said exigencies—in addition to limitations of time imposed by circumstances—that the Special Rapporteur has focused his efforts in the present report on a part of the subject-matter at present covered by draft articles 6 and 7 as referred to the Drafting Committee. This part concerns cessation of the wrongful conduct and restitution in kind.

27. Section B of the present chapter is devoted to cessation of the wrongful act, namely the concept of cessation in the literature and in practice, its relation to forms

[18] Both the latter "gaps" are particularly to be regretted in that the present draft articles 6 and 7 are intended to represent what has been called the "least" (or "lowest") common denominator of the consequences of delicts and crimes.

[19] See the analogous remark made by Mr. Balanda at the thirty-fourth session of the Commission (*Yearbook... 1982*, vol. I, p. 220, 1734th meeting, para. 21). Mr. Zemanek, the representative of Austria in the Sixth Committee of the General Assembly, made a statement to similar effect in 1985 with regard to draft article 6 (*Official Records of the General Assembly, Fortieth Session, Sixth Committee*, 33rd meeting, paras. 56-57).

of reparation (particularly restitution in kind) and cessation in omissive wrongful acts. Section C deals with restitution in kind and covers: the concept of *restitutio in integrum* in doctrine and practice; the distinction generally proposed between material and juridical restitution; the question of the impossibility of restitution in kind; excessive onerousness; restitution in the area of responsibility for injury to foreign nationals; and the question of choice by the injured State between restitution and other forms of reparation.

28. The whole matter is dealt with from the standpoint of both the rights of the injured State and the obligations of the so-called author State. As any substantive right of the former corresponds obviously to an obligation of the latter, the Special Rapporteur is unable to see any difference between the two points of view.[20]

B. Cessation of an internationally wrongful act

1. DOCTRINE AND PRACTICE RELATING TO CESSATION

29. Among the remedies for violations of international law, discontinuance of the wrongful act is the most neglected, or perhaps the most often implied. Except for some valuable thoughts expressed on it by the previous Special Rapporteur in his second report,[21] this remedy has indeed rarely been the specific object of study; and when it is considered, this is often done within the framework and for the purposes of a discussion aimed at determining, obviously, the notion of *restitutio in integrum* rather than for the purpose of determining the concept of cessation *per se,* as a remedy with a role of its own.[22]

30. But there are also more subtle reasons, inherent in the very nature of discontinuance, that make this remedy the "Cinderella" of the doctrine of the consequences of internationally wrongful acts. First and foremost is the fact that, in the majority of the cases in which a part of the doctrine might be inclined to see a demand of cessation, such a claim appears not so qualified. The injured State demands instead positive behaviour on the part of the wrongdoing State, such as evacuation of a territory, liberation of persons or restitution of objects. Furthermore, such demands are put forward in the context of a broader claim of reparation for injury, rather than in terms of cessation. Secondly, whenever resort is had to a third-party settlement procedure, such procedure opens at a time when the commission of the wrongful act (whether instantaneous or more or less extended in time) has completed its cycle, so that the dispute submitted for settlement is in fact

[20] A difference in points of view may exist, of course, with regard to measures. One speaks here of *facultés* or *pouvoirs* (or, more frequently and less rigorously, of rights) of the injured State: legal situations to which obligations on the part of the wrongdoer do not strictly correspond. The wrongdoer is simply "subject" to reprisal, sanction or other kinds of measures. It is not easy to conceive of the wrongdoer as being under an obligation to submit to a measure or to do anything in order to be subjected to it—not in the same sense, surely, in which the wrongdoer is under the obligation to make reparation (or to conform to the primary rule).

[21] *Yearbook... 1981,* vol. II (Part One), pp. 82 *et seq.,* document A/CN.4/344, paras. 29-98.

[22] See C. Dominicé, "Observations sur les droits de l'Etat victime d'un fait internationalement illicite", *in Droit international 2* (Paris, Pedone, 1982), pp. 25-31; B. Graefrath, "Responsibility and damages caused: relationship between responsibility and damages", *Collected courses .... 1984-11* (The Hague, Nijhoff, 1985), vol. 185, p. 84; K. Nagy, "The problem of reparation in international law", *Questions of International Law: Hungarian Perspectives,* H. Bokor-Szegó, ed. (Budapest, Akadémiai Kiadó, 1986), vol. 3, p. 173.

circumscribed necessarily to the form or forms of reparation due. Thirdly, even where the parties appear before an international body at a time when the conduct complained of is still in progress, the claimant State will "organize" its demands not so much in terms of discontinuance of the wrongful act—wrongfulness itself being for the time being controversial—but rather in terms of provisional or conservative measures that the judge may indicate to or, possibly, impose upon the allegedly wrongdoing State.[23] A claim of cessation proper would be put forward in such a case following the competent body's determination of unlawfulness.

31. Notwithstanding the noted difficulties of perceptibility of cessation *per se*, the role and the nature of this remedy should not be difficult to determine. It should be clear in particular that, while sharing with the remedies included in the concept of reparation the feature represented by the fact that it follows a more or less advanced phase of an internationally wrongful act, cessation differs from those other remedies in that, unlike them, it pertains to the wrongful act itself rather than to legal consequences. In that sense, obviously, cessation is not one of the forms of reparation as generally understood; nor is it part of the content of international responsibility or of the substantive legal consequences of the wrongful act (as usually, and rightly, narrowly understood). Cessation is indeed to be ascribed—as an obligation and as a remedy to violation of international law—not to the operation of the "secondary" rule coming into play as an effect of the occurrence of the wrongful act but to the continued, normal operation of the "primary" rule of which the previous wrongful conduct constitutes a violation.

32. While thus falling outside the realm of reparation and of the legal consequences of a wrongful act in a narrow sense, cessation nevertheless falls among the legal consequences of a wrongful act in a broad sense. As such it should presumably find a place among the draft articles on State responsibility (see, however, paras. 59-63 below). Indeed, it serves the interest of putting an end to a violation of international law which is in progress.[24] Such an interest is not confined to the injured State or States and, considering the inorganic structure of inter-State society, it not infrequently acquires a very considerable dimension (see paras. 60-61 below). It increases, as shown by current examples, with the gravity of the delict or crime in progress. Cessation is, moreover, not irrelevant even from the point of view of the consequences of the wrongful act and of reparation *stricto sensu*. Indeed, any more or less timely discontinuance of wrongful conduct will have a bearing on the quality and quantity of reparation to be made in favour of the injured State.

33. In a factual sense, cessation is a normal stage of any wrongful act, whatever its duration. It is obvious, however, that the only hypothesis under which cessation presents an interest that goes beyond the physiological dynamics of the wrongful act is the case of a wrongful act having a continuing character. As long as the wrongful conduct lasts, on the one hand there is a chance that the wrongdoer will realize the illegality of its behaviour and the obligation to correct it; and, on the other, there is the

[23] For example, in the *Case concerning United States Diplomatic and Consular Staff in Tehran*, the United States asked the ICJ to indicate the immediate release of the hostages as a provisional measure, and the Court provided accordingly by order of 15 December 1979 (*I.C.J. Reports 1979*, p. 7).

[24] An express rule on cessation would also be useful, of course, in order to stress the lawfulness (and non-unfriendliness) of the claim of cessation.

possibility for the injured State—and, one must add, its right (or *faculté*)—to claim immediate and complete cessation. It is therefore important to reflect, however briefly, on the distinction between instantaneous wrongful acts and wrongful acts having a continuing character.

34. As is well known, the Commission considered the definition of a wrongful act having a continuing character in connection with the provisions of article 18, paragraph 3,[25] and articles 25 and 26 of part 1. Instances of a continuing wrongful act were enumerated by the then Special Rapporteur, Mr. Ago, in his fifth report, as:

> the act of maintaining in force a law which the State is internationally required to repeal, or, conversely, the act of not passing a law that is internationally required; or again, the act of improperly occupying the territory of another State, or of improperly obstructing the innocent passage of foreign ships through a strait, or of establishing an unlawful blockade of foreign coasts or ports.[26]

Mention was also made of the *De Becker* case, in which the European Commission of Human Rights held that the loss of the right to work as a journalist as a result of a judgment which had preceded the entry into force of the European Convention on Human Rights constituted a continuing violation with respect to which the claimant rightly considered himself to be the victim of a violation of his freedom of expression under article 10 of the Convention.[27] The *requête* was declared to be admissible to the extent to which the situation complained of continued to exist in the period subsequent to the entry into force of the Convention.[28] The Commission's position on the definition of an internationally wrongful act having a continuing character was not made clear at that point. There was considerable confusion, for example, in the discussion of the *Phosphates in Morocco* case (see para. 35 below), and not much help could perhaps be obtained from the study of such cases as the often cited *De Becker* case (which supports, however, the general notion of a continuing or "permanent" violation).[29] The Commission explained, in the commentary to article 18 of part 1 of the draft, that a distinction should be made between a continuing wrongful act ("a single act [which] extends over a period of time and is of a lasting nature") and an instantaneous act producing continuing effects. An example of the latter was "an

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[25] Article 18, paragraph 3, reads:

"3. If an act of the State which is not in conformity with what is required of it by an international obligation has a continuing character, there is a breach of that obligation only in respect of the period during which the act continues while the obligation is in force for that State." (*Yearbook... 1976*, vol. H (Part Two), p. 74.)

[26] *Yearbook... 1976*, vol II (Part One), p. 22, document A/CN.4/ 291 and Add.l and *2*, para. 62.

[27] *Ibid.*, para. 63 and footnote 103.

[28] Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950) (United Nations, *Treaty Series*, vol. 213, p. 221).

[29] The European Commission of Human Rights, which decided the latter case, operates really, although it is an international body, with a view to ensuring a correct and uniform application of the Convention within the legal systems ("inter-individual" legal systems) of the participating States. In such capacity it places itself ideally, notwithstanding the lack of "direct municipal effect" of its pronouncements, in a position which is comparable to that of a municipal adjudicating body (open to the direct claims of individuals) rather than that of an international tribunal. The European Commission is, ideally, concerned—and rightly so—more with the wrongful act of the State to the detriment of the individual than with the wrongful act of a State towards another State. It was therefore quite understandable in the *De Becker* case for it to consider not so much a "complex whole" representing an internationally wrongful act of a State in its (external) relations with another (allegedly injured) State, as the acts of given national authorities towards an individual within the framework of a municipal legal system adapted in principle to the Convention.

act of confiscation", in connection with which it was indicated that "the act of the State as such ends as soon as the confiscation has taken place, even if its consequences are lasting"[30]—a position which seems unacceptable (see para. 37 below).

35. The matter was taken up again in connection with article 25, paragraph 1, of part 1 of the draft,[31] adopted by the Commission at its thirtieth session on the basis of Mr. Ago's seventh report, in which he had re-examined the distinction between wrongful acts extending in time and instantaneous wrongful acts with continuing effects. On that occasion the case under discussion was the *Phosphates in Morocco* case, in which the Permanent Court of International Justice had held, against the contention of Italy, that the matter was not (for the purposes of the preliminary question) one of a continuing unlawful act.[32] According to Italy, the legislation providing for monopolization was only the initial step of the unlawful act it had alleged. Mr. Ago disagreed with the Court's dictum concerning the non-continuing character of the alleged wrongful act. This had been, in his opinion,

> a legislative situation regarded as contrary to the international obligations of the country which created it and which, while it began before the crucial date, continued to exist thereafter and to create a situation which remained both current and internationally wrongful.[33]

This was the same general sense of the separate opinion of Judge Cheng Tien-hsi, in which it was stated, *inter alia,* that the monopoly, though instituted by the dahir of 1920, is still existing today. It is an existing fact or situation. If it is wrongful, it is wrongful not merely in its creation but in its continuance... nor is it merely the consequence of an illicit act, which would mean that the wrong was completed once for all at a given moment ... for the essence of the dispute is a complaint against what the Applicant has repeatedly maintained to be [a] "continuing and permanent" state of things at variance with foreign rights, rather than the mere fact of its creation.[34]

The continuing character of the allegedly wrongful act was also recognized, it seems, by Judge van Eysinga.[35]

36. The concept of an internationally wrongful act having a continuing character had been considered by Triepel, who had confined himself, without giving a definition, to indicating the example of the wrongful non-enactment or non-abrogation of internal legislation.[36] Ago had specified, for his part, that "the basic

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[30] *Yearbook... 1976,* vol. II (Part Two), p. 93, para.(21) of the commentary to article 18.

[31] Article 25 states:

"1. The breach of an international obligation by an act of the State having a continuing character occurs at the moment when that act begins. Nevertheless, the time of commission of the breach extends over the entire period during which the act continues and remains not in conformity with the international obligation." (*Yearbook...1978,* vol. II (Part Two), pp. 89-90.)

[32] *Yearbook... 1978,* vol. II (Part One), pp. 41 *et seq.,* document A/CN.4/307 and Add.l and 2, paras. 27-32.

[33] *Ibid.,* p. 43, para. 30.

[34] *P.C.I.J., Series A/B, No. 74,* judgment of 14 June 1938, pp. 36-37.

[35] *Ibid.,* pp. 34-35.

[36] According to Triepel, "if, at a given moment, States are under an international obligation to have rules of law with a specific content, a State which already has such rules is failing in its duty if it abolishes them and does not reinstitute them, whereas a State which does not yet have such rules is failing in its duty simply by not instituting them, but both States are committing ... a *völkerrechtliches 'Dauerdelikt'".* (H. Triepel, *Völkerrecht and Landesrecht* (Leipzig, 1899), p. 289.)

element of the distinction" between instantaneous and continuing wrongful acts "lies in the instantaneous or permanent nature of the action", so that one could distinguish between "wrongful acts in which the objective element of the conduct that conflicted with one of the State's international obligations is immediate in nature ... for example, insulting the flag of a friendly nation" and "other violations of an international obligation which have a continuing character, the result being that when they become complete, with all their constituent elements realized, they do not thereby cease to exist; rather they continue in identical form and become permanent". By way of example, he added to Triepel's hypothesis "the wrongful seizure of the property of a foreigner ... the arrest of a diplomat".[37]

37. For his part, the Special Rapporteur would be inclined to favour, with regard to the concept of a continuing wrongful act, Triepel's and Ago's definitions. He is therefore unable, for example, to accept the opinion that a confiscation would not be—as maintained by the Commission, it seems, in the commentary to article 18 quoted above (see para. 34)—a wrongful act having a continuing character. He does not share the view, in particular, that the State's wrongful act terminates with the legislator's act providing for confiscation. The wrongful act lasts as long as the measure stands.

38. With regard to the timing of any claim for cessation (on the part of the injured State or States), it is obvious that no such claim could be lawfully put forward unless the wrongful conduct had begun, namely unless the threshold of unlawfulness had been crossed by an allegedly wrongdoing State's conduct. A distinction should in particular be drawn, in any case, between a State's conduct that "completes" a wrongful act (whether instantaneous or extended in time) and a State's conduct that precedes such completion and does not qualify as a wrongful act. It should also be taken into consideration, on the other hand, that, unlike wrongful acts of national law, the internationally wrongful act of a State is quite often—and probably in most cases—the result of a concatenation of a number of individual actions or omissions which, however legally distinct in terms of municipal law, constitute one compact whole, so to speak, from the point of view of international law. In particular, a legislative act the sense of whose provisions might open the way to the commission by the State of a wrongful act may not actually lead to such a result because it is not followed by the administrative or judicial action "ordered by the legislator". Conversely, a legislative act which would *per se* be in conformity with the necessity of ensuring compliance by a State with its international obligations might prove insufficient because it is not (or is wrongly) applied by administrative or judicial organs. This complexity of most internationally wrongful acts is particularly obvious in the frequently occurring cases in which the initial steps leading to the commission of a wrongful act by a State are represented by an act of a private party or an act of subordinate organs, further steps by State organs being indispensable for an internationally wrongful act to be "perfect".[38] This suggests that if it is true that a

[37] R. Ago, "Le délit international", *Recueil des cours de 1'Académie de droit international de La Haye, 1939-11* (Paris, Sirey, 1947), vol. 68, pp. 519-521, referring to the opinion of Triepel quoted in footnote 36 above.

[38] The notion of the "complexity" and "unity" of an internationally wrongful act, and more generally the notion that a unit of State conduct under international law (action, omission or act of will) is a "factually complex unit" from the point of view pf international law, was re-examined by the Special Rapporteur with respect to wrongful acts (as well as the conclusion of treaties) in an article

claim for cessation is admissible as a matter of right (or *faculté*) only from the moment at which the conduct of the author State has attained the threshold prior to which it was not and after which it became a wrongful act,[39] situations are conceivable in which an initiative of the prospectively injured State might be considered useful and not unlawful. Indeed, in the presence of conduct of another State which manifestly appears to constitute the initial phase of a course of action (or omission) likely to lead to a wrongful act, a State could, with all the necessary precaution, take appropriate steps, with due respect for the principle of non-intervention in the other party's domestic affairs, to suggest in an amicable manner an adjustment of the former State's conduct which might avert liability. This point might usefully be mentioned in the commentary to a draft article on cessation.

2. DISTINCTION BETWEEN CESSATION AND REPARATION

39. It seems important to develop the distinction already noted (see para. 31 above) between cessation and any form of reparation. Presupposing as it obviously does, and as has been observed, at least the initial phase of a wrongful act, cessation is in a sense a consequence of a wrongful act having a continuing character. On the other hand, cessation is, by its very nature and the role it plays, in no sense a part either of reparation in a broad sense or of any particular form thereof. Properly understood, reparation responds to the exigency, as defined by the PCIJ in the well-known *Chorzów Factory* case,[40] to "wipe out all the consequences" for the relations between the author State and the injured State of the factual and legal effects of a violation of an international obligation of the former *vis-à-vis* the latter—a situation that will remain a pathological one as long as reparation is not carried out in the sense indicated.

40. The rights and obligations inherent in cessation of the wrongful act are another matter. In the case of wrongful acts extending in time (to which it is applicable), cessation is not intended to cancel any legal or factual consequences of the wrongful act. The target of cessation is the wrongful conduct *per se*, namely the very source of responsibility. It consists, so to speak, in the draining of the source of responsibility to the extent to which it has not yet, as it were, operated. As such, cessation does not affect the consequences—legal or factual—of the past wrongful conduct. Of course, a claim of cessation may represent, as noted, the initial stage of the approximate delimitation of the injury suffered as a consequence of the wrongful act and thus of the definition of the rights and obligations inherent in reparation. Even in that role, cessation remains outside reparation and the legal relationships centred thereon.

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published in 1976: G. Arangio-Ruiz, "L'Etat dans le sens du droit des gens et la notion du droit international", *Österreichische Zeitschrift für öffemliches Recht* (Vienna), vol. 26, Nos. 3-4 (May 1976), pp. 311-331.

[39] In the words of the claimant in the *Phosphates in Morocco* case (*P.C.I.J.*, Series C, No. 84, p. 850), "it is only when the final result is a breach of obligations that the violation of international law is complete" and that the so-called secondary legal relationship intervenes (cited by Mr. Ushakov during the debate at the thirtieth session of the Commission (see *Yearbook... 1978*, vol. I, p. 25, 1480th meeting, para. 8)).

[40] *P.C.I.J., Series A, No.* 77, judgment of 13 September 1928, p. 47.

41. In conclusion, whatever the moment at which cessation is claimed or effected, it responds to the exigencies of fulfilment of the original legal relationship between the parties as established and maintained by the primary rule. It follows that:

(a) In any draft articles of codification of the consequences of a wrongful act, the obligation to discontinue the wrongful conduct should be the object of any provisions not covering reparation or the content of responsibility in a strict sense;

(b) The obligation of the author State to discontinue its wrongful conduct is independent—as is the obligation to comply with the primary rule—of any injunction or demand of the injured State.

3. CESSATION IN OMISSIVE WRONGFUL ACTS

42. An aspect of cessation that should not be overlooked is the question whether cessation could play a role in the case of wrongful acts consisting of omissive conduct, namely in the case of violation of obligations to do (*obligations de faire*). The Special Rapporteur is inclined to believe that omissive wrongful acts may well fall (as well as, and perhaps more frequently than, commissive wrongful acts) into the category of wrongful acts having a continuing character. As long as it is protracted beyond the date within which such an obligation is due to be performed, non-compliance with an *obligation de faire* is a wrongful act of a continuing character. It follows that a claim for (belated) compliance would be founded exclusively—without prejudice, of course, to the claim for reparation in any suitable form or forms (including restitution in kind) for the period of non-compliance—upon the primary rule. The prevailing doctrine would seem to have it otherwise. While it is recognized that it is a question of "performance of the obligation which the State failed to discharge",[41] such performance is considered to be one of the forms or contents that *restitutio in integrum* can assume.[42] It should be noted, however, that the authors who hold this view do not seem to give much attention to the question of cessation. They seem to confine themselves to qualifying omission to discharge an obligation as one of the kinds of wrongful acts which may give rise to the obligation to make good by reparation.[43]

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[41] Jiménez de Aréchaga, *loc. cit.* (footnote 10 above), p. 565.

[42] In addition to Jiménez de Aréchaga, see: K. Strupp, "Das völkerrechtliche Delikt", *Handbuch des Völkerrechts,* F. Stier-Somlo, ed. (Stuttgart, Kohlhammer, 1920), vol. III, 1st part, p. 209; J. Personnaz, *La réparation du préjudice en droit international public* (Paris, Sirey, 1939), p. 83; M. B. Alvarez de Eulate, "La *restitutio in integrum* en la práctica y en la jurisprudencia inlernacionales", *Anuario Hispano-Luso-Americano de Derecho lnternacional* (Madrid), vol. 4 (1973), p. 265; P. Weil, "Problèmes relatifs aux contrats passés entre un Etat et un particulier", *Collected Courses... 1969-III* (Leyden, Sijthoff, 1970), vol. 128, p. 225; J. G. Wetter, "Diplomatic assistance to private investment", *The University of Chicago Law Review,* vol. 29 (1961-62), p. 324—the two last-mentioned authors, however, only with regard to violations of obligations between States and foreign private parties. A similar view was also expressed by W. Wengler, *Völkerrecht* (Berlin, Springer, 1964), vol. I, p. 510.

A different view, closer to the position taken by the Special Rapporteur, was expressed by Morelli, *op. cit.* (footnote 10 above *in fine*).

[43] In the sense that "when a specific case deals with responsibility arising out of a contract, the same principles apply as with any other type of responsibility, given that, as far as reparation is concerned, international law makes no distinction based on the difference in the source of the wrongful act or omission" (A. Gómez-Robledo V., "Aspectós de la reparación en derecho internacional", *Boletín Mexicano de Derecho Comparado,* vol. 9 (1976), p. 352). A distinction between *traités-contrats* and other treaties seems to be made by K. Zemanck, "Die völkerrechtliche Verantwortlichkeit und die Sanktionen des Völkerrechts", *Osterreichisches Handbuch des Völkerrechts,* H. Neuhold, W. Hummer

43. The matter would appear to deserve some attention. In private law, *restitutio in integrum* is generally viewed as one of the forms that may be assumed by the reparation of so-called extra-contractual wrongful acts, in particular the violation of *obligations de ne pas faire* incumbent upon the generality of physical and juridical persons for the protection of absolute (*erga omnes*) rights. The violation of *obligations de faire* is generally considered to belong to the law of contracts and consists in breach of contract, a situation which calls for particular remedies such as the dissolution (*risoluzione*) of the contract or, where possible, specific performance. Civil lawyers think that, while the latter remedy would prevent the occurrence of injury, allowing the interested party to "secure judicially its 'primary' right",[44] the dissolution of contract would represent a form of reparation (of the injury caused by failure to discharge) aimed at restoring between the parties—by the elimination of the contractual relationship—the situation that existed prior to the failure to discharge.

44. One could perhaps transpose into international law, *mutatis mutandis*, a similar distinction between an obligation not to do (*obligation d'abstention* or *obligation de ne pas faire*) and an obligation to do (*obligation de faire*). The State injured by the violation of an *obligation de faire* would thus have an alternative. It could insist upon the discharge of the obligation, namely by a claim of cessation of the failure to discharge (a claim that, without prejudice to reparation, is covered by the primary rule); or it could, circumstances permitting, invoke article 60 of the 1969 Vienna Convention on the Law of Treaties[45] for "terminating the treaty or suspending its operation in whole or in part".

45. The lack of clarity of the prevailing doctrine is reflected in the practice of States. The *bases de discussion* prepared by the Preparatory Committee set up by the League of Nations for the 1930 Hague Codification Conference contemplated a point XIV (Reparation for damage caused), in which the question whether the subject should be taken up at all was followed by the question "what answers should be given on the following points: (*a*) Performance of the obligation..,".[46] Belgium, Bulgaria, Japan, the Netherlands and Czechoslovakia replied that discharge (of the obligation) should be included in the reparation.[47] Poland's reply followed the same line:

> If it is possible simply to re-establish the *status quo* violated by the State, or to fulfil the obligation which the State was endeavouring to evade, the State in question (if this is in the interest of the injured party) may be required in principle to re-establish the *status quo* or to comply with its obligation.[48]

The draft convention on the international responsibility of States for injuries to aliens prepared by the Harvard Law School in 1961 provided, in its article 27 (Form

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and C. Schreuer, eds. (Vienna, Manz, 1983), vol. 1, p. 378, for the purposes of the consequences of wrongful acts.

[44] A. De Cupis, // *danno. Teoria generate delta responsabilità civile*, 3rd ed. (Milan, Giuffrè, 1979), vol. 2, pp. 312, 314-317.

[45] United Nations, *Treaty Series*, vol. 1155, p. 331.

[46] League of Nations, document C.75.M.69.1929.V, p. 146.

[47] The Netherlands replied in the affirmative, "where performance of the obligation is still possible and where it still possesses any value for the claimant" (*ibid.*, p. 149).

[48] *Ibid.*, p. 150.

and purpose of reparation), paragraph 2 (c), for the discharge of the unfulfilled obligation.[49]

46. In the *Anglo-Iranian Oil Co.* case, the United Kingdom claimed before the ICJ full restitution of its concession rights to the Anglo-Iranian Oil Company,[50] terms which could have reflected either a claim for cessation of the wrongful conduct combined with reparation (restitution in kind and compensation) or, simply, a claim to the discharge of conventional or other obligations allegedly breached. In the *BP Exploration Company* (*Libya*) *Limited* v. *Government of Libya* case (1973, 1974), the arbitrator, Gunnar Lagergren, raised the following questions:

(ii) Are specific performance and *restitutio in integrum* remedies available to the Claimant? Can the Claimant be declared in these proceedings to be the owner of a share of the crude oil produced in the concession area before as well as after the passing of the BP Nationalisation Law, and of a share of all installations and other physical assets related to the BP Concession?

The Claimant's requested Declaration No. 4 is a claim for acknowledgement of its right to be restored to the full enjoyment of its rights under the BP Concession. The requested Declaration No. 5 amounts to a declaratory award concerning the Claimant's ownership to oil and certain assets.

It may be argued that the Claimant does not in fact ask for an order of *restitutio in integrum,* but merely for a declaratory statement as to its legal position under the BP Concession and with respect to certain property and that the issue of whether restitution in kind is an available remedy therefore is not presented. Such a distinction, subtle though it is, may be relevant for a proper understanding of the decisions of international tribunals. The Tribunal holds, however, that no such distinction should be made. If it is found that the Claimant is entitled to be restored to the full enjoyment of its rights under the BP Concession and is the owner of the oil and the assets referred to, then the Claimant is entitled to an order for specific performance or, alternatively, a declaratory award of entitlement to specific performance...[51]

In his arguments the judge distinguished performance or discharge on the one hand and *restitutio in integrum* on the other but did not seem to reach a conclusion in conformity with that distinction. Nevertheless, he concluded the study of practice and doctrine in the field of *restitutio* by stating that:

> there is no explicit support for the proposition that specific performance, and even less so *restitutio in integrum,* are remedies of public international law available at the option of a party suffering a wrongful breach by a co-contracting party.... The case analysis also demonstrates that the responsibility incurred by the defaulting party for breach of an obligation to perform a contractual undertaking is a duty to pay damages...[52]

An opposite conclusion was reached by René-Jean Dupuy, the sole arbitrator in the *Texaco and Calasiatic* v. *Government of Libya* case (1977). After considering the same practice and doctrine, he held "that *restitutio in integrum* is, both under the

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[49] Harvard Law School, *Draft Convention on the International Responsibility of States for Injuries to Aliens* (Cambridge, Mass., 1961), reproduced in the first report of Mr. Ago (*Yearbook... 1969,* vol. II, pp. 142 *et seq.*, document A/CN.4/217 and Add.l, annex VII).

[50] *I.C.J. Pleadings, Anglo-Iranian Oil Co. Case* (*United Kingdom* v. *Iran*), pp. 124-125; and *ICJ. Reports 1952,* judgment of 22 July 1952, p. 93.

[51] *International Law Reports* (Cambridge), vol. 53 (1979), p. 330.

[52] *Ibid.,* p. 347.

principles of Libyan law and under the principles of international law, the normal sanction for non-performance of contractual obligations",[53] and on this basis invited the Libyan Government "to perform specifically its own obligations",[54] thus confusing the two concepts of *restitutio* and specific performance. In the *LIAMCO* v. *Government of Libya* case (1977) the same question was dealt with only incidentally, as the claimant only required reparation in money. The arbitrator, Sobhi Mahmassani, noted that "according to these general common principles *[scilicet:* of Libyan law, international law, principles of law] obligations are to be performed, principally, in kind, if such performance is possible" and that "this general principle is also common to international law, in which *restitutio in integrum* is conditioned by the possibility of performance".[55]

47. In conclusion, doctrine and, in part, practice do not seem to have clearly defined with regard to emissive wrongful acts (*violations d'obligations de faire*) the distinction between cessation—a remedy intended to put an end to the wrongful conduct and consisting in a claim to compliance with a thus far undischarged obligation—on the one hand, and restitution in kind—surely a form of reparation itself—on the other. Notwithstanding this rather uncertain state of doctrine and practice, the Special Rapporteur would be inclined to believe that cessation is applicable in the case of both omissive and commissive wrongful acts. It would be applicable, *mutatis mutandis,* in isolation as well as in conjunction with one or more of the forms of reparation, and particularly with restitution in kind.

4. DISTINCTION BETWEEN CESSATION AND RESTITUTION IN KIND

48. For a proper understanding of the distinction between cessation and restitution in kind as different remedies against violations of international law, some instances should be examined in which both remedies may be applicable. Reference is made here to cases involving the liberation of persons, the restitution of objects or premises or the evacuation of a territory. Most authors include such measures among the examples of reparation in the form of restitution in kind.[56] In the last few years, however, a number of jurists, including the previous Special Rapporteur, have been advocating denying such actions the reparative nature of restitution in kind[57] in order

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[53] *Ibid.,* p. 507, para. 109 of the award; original French text in *Journal de droit international* (Clunet) (Paris), 104th year (1977), p. 387.

[54] *International Law Reports* (Cambridge), vol. 53 (1979), p. 509, para. 112 of the award; original French text in *Journal de droit international* (Clunet)..., p. 388.

[55] *International Law Reports* (Cambridge), vol. 62 (1982), p. 198.

[56] See, *inter alia:* Anzilotti, *Cours de droit international, op. cit.* (footnote 17 above), pp. 525-526; Alvarez de Eulate, *loc. cit.* (footnote 42 above), pp. 272 *et seq:,* Graefrath, *loc. sit.* (footnote 22 above), p. 77; Zemanek, *loc. cit.* (footnote 43 above).

[57] Mr. Riphagen observed in his second report:

"Indeed, in the numerous cases in which the liberation of persons, the restitution of ships, documents, monies, etc. was proceeded to by the author State on the instigation (protest, etc.) of the injured State, or was ordered by an international judicial body, it would seem that stopping the breach was involved, rather than reparation or *restitutio in integrum, stricto sensu." [Yearbook... 1981,* vol. II (Part One), p. 88, document A/CN.4/344, para. 76.)

A similar view is expressed by Dominicé, *loc. cit.* (footnote 22 above), pp. 15-31, at p. 27:

"It is quite obvious that if in circumstances of this kind, reference is made to the obligation of reparation (in the broad sense of the term), *restitutio in integrum,* this is not really reparation. What is demanded is the return to the attitude required by law, the cessation of the wrongful conduct. The

to assert their qualification as cases of cessation of wrongful conduct. Indeed, the situations in which actions such as those referred to have been claimed and eventually carried out belong to the category of wrongful acts having a continuing character which are still in progress at the moment at which the injured State claims one or more remedies. It follows that the actions claimed seem to respond to a problem of cessation. It should be stressed, however, that this does not exclude the possibility that the same action may at the same time also constitute a form of reparation, specifically of restitution in kind.

49. The truth seems to be that one is confronted in many instances with a combination of remedies, particularly of cessation and restitution in kind, the latter being combined, if necessary, with other forms of reparation.[58] From this the question arises as to whether cessation plays no role of its own in the injured State's claim—whether it is just a matter of *restitutio* or another form of reparation. The answer must presumably be sought in a proper understanding of restitution in kind. This remedy consists not in the mere giving back or surrender, for example, of an object illegally detained. It consists in the re-establishment of an object in the state in which it was prior to the violation, if not in the state which would exist in the absence of the violation. This entails, in the hypothesis under discussion, at least the material giving back of the object in the state and condition in which it was prior to the act that dispossessed its legitimate "owner".[59] But such a measure, surely a matter of

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victim State is not asserting a new right engendered by the wrongful act. It is calling for respect for its rights such as they existed before the wrongful act, and such as they remain."

[58] Of significance, in that respect, is the claim of Greece in the *Forests in Central Rhodopia* case. The forests having been annexed by Bulgaria, Greece claimed rights of ownership and use acquired prior to the annexation, which it considered to be as unlawful as the possession of the forests. However, the Greek claim was formulated not in terms of a return to the original lawful situation but in terms of *restitutio in integrum*, namely as a form of reparation. According to Greece, "such reparation must entail restitution as far as the property taken away from the claimants is concerned, and, failing restitution, compensatory payment equivalent to its present value". (United Nations, *Reports of International Arbitral Awards*, vol. Ill (Sales No. 1949.V.2), p. 1407.)

[59] Of possible similar significance—although within the particular framework of post-Second World War agreed settlements—is the *Société nationale des chemins de fer français* (SNCF) case, decided by the Franco-Italian Conciliation Commission (decisions of 5 and 10 March 1955) (see United Nations, *Reports of International Arbitral Awards*, vol. XIII (Sales No. 64.V.3), pp. 553 *et seq.*, especially p. 563). Even before the entry into force of the Treaty of Peace of 10 February 1947 between the Allied and Associated Powers and Italy (United Nations, *Treaty Series*, vol. 49, p. 126), Italy had already returned to France a substantial amount of railway material belonging to the SNCF. However, a considerable portion of such material had been damaged as a consequence of the war and lack of maintenance, and the Conciliation Commission imposed upon Italy, in the form of a French credit *vis-à-vis* Italian industry, the cost of repairs. The interesting aspect—although this was only a case of interpretation of a treaty rule envisaging *restitutio in integrum*—is the fact that the Conciliation Commission, in interpreting the obligation of *restitutio* deriving from article 75, paragraph 3, of the treaty ("The Italian Government shall return the property referred to in this article in good order and, in this connection, shall bear all costs in Italy relating to labour, materials and transport"), understood the obligation to return the material in good condition as an aspect of *restitutio in integrum*—which is in conformity with the concept of this remedy, as indicated earlier in the text, as an obligation to re-establish the *status quo ante* in the most perfect possible way.

An even clearer expression of this can be found in the judgment of 15 December 1933 of the PCIJ concerning the *Appeal from a judgment of the Hungaro-Czechoslovak Mixed Arbitral Tribunal* (*The Peter Pázmány University*), in which the Court decided that the Czechoslovak Government was bound to restore to the Peter Pázmány University of Budapest the immovable property which it had confiscated (*P.C.I.J., Series A/B, No. 61*, p. 249) (see para. 81 below). The "fullness" of *restitutio in integrum* is stressed, with regard to international relations, by B. A. Wortley, *Expropriation in Public International Law* (Cambridge, University Press, 1959), pp. 72-92 at p. 77.

reparation, also includes cessation of the wrongful conduct, as cessation consists exclusively, *per se,* in giving back the object.[60]

50. The presence of cessation *per se*—as a distinct remedy to a continuing violation—becomes in fact more evident in cases of wrongful detention of nationals of the injured State. Also in such cases the release of the individuals concerned is most frequently presented in State practice and international jurisprudence as a matter of *restitutio in integrum.* Further, cessation seems to be absorbed in the reparative action.[61] Nevertheless, the concomitant presence of cessation as a distinct remedy is more evident. The fact that the detained entities are human beings, injured by their unlawful treatment in their physical and psychic integrity, in their personal liberty and dignity (in addition to their mere economic, productive activities), makes their release, morally and legally, more evidently an urgent question of cessation of the violation. This exigency prevails in a sense—surely without excluding them—over *restitutio,* compensation or any other form of reparation. The prevalence of the exigency of cessation is also suggested by the consideration that injuries to persons are less likely (than damage to material objects) to be adequately remedied by *restitutio in integrum* or other forms of reparation.

51. The predominant exigency of cessation over that of restitution in kind (and other forms of reparation) in the case of wrongful apprehension, detention or imprisonment of human beings seems to emerge clearly in the *United States Diplomatic and Consular Staff in Tehran* case. The ICJ, after declaring that the conduct of Iran constituted a continued wrongful act still in progress at the time of application,[62] decided that the Government of that State:

It should be recalled, however, that restitutions effected following a state of war are not always considered to be valid precedents for the purpose of demonstrating the role of *restitutio in integrum* in international law. See, for instance, H. W. Baade, "Indonesian nationalization measures before foreign courts: A reply", *The American Journal of International Law* (Washington, D.C.), vol. 54 (1960), pp. 801 *et seq.* Baade states:

"While peace treaties, especially since World War II, have increasingly provided for the restitution of the identifiable properties of nationals of the victorious Powers affected by special war measures, such restitution is not so much a remedy as a form of preferential treatment of private reparation claims." (P. 822, footnote 134.).

On the other hand, Wortley remarks that:

"The principles governing restitution after a war are often relevant in connection with claims for losses of property caused by peacetime legislation relating to expropriation. They show that the act of a sovereign even in relation to property under his control, and even subject to the *lex situs* imposed by him, is not final and conclusive in respect of claims for restitution made in accordance with international law." (*Op. cit.,* p. 80.)

[60] The same understanding of the relationship often noticeable between the roles of cessation and *restitutio in integrum* is, it appears, proposed by Graefrath when he states that

"the claim to restitution during a continuing violation of international law to a large extent coincides with the claim to stop the violation. That is why quite often cessation of the violation can already be regarded as part of the restitution." (*Loc. cit.* (footnote 22 above), p. 84.)

[61] Examples are the "*Trent*" case (1861) and the "*Florida*" case (1864) (see J. B. Moore, *A Digest of International Law* (Washington, D.C., 1906), vol. VII, pp. 768 *et seq.* and pp. 1090-1091). The release of persons appears in these cases to have been considered by both parties as a necessary and primary form of reparation of the wrongful act and particularly as the re-establishment of the *status quo ante.* See also the *Jacob* case (1935) (*Répertoire Suisse de droit international public* (Basel), vol. II, p. 1016, and vol. Ill, p. 1775), where also Dominicé sees a case of restitutive reparation and not just cessation of the wrongful conduct (*loc. cit.* (footnote 22 above), p. 22, (footnote 44).

[62] "... the Islamic Republic of Iran, by the conduct which the court has set out in this Judgment, has violated in several respects, and is still violating, obligations owed by it to the United

must immediately take all steps to redress the situation resulting from the events of 4 November 1979 and what followed from these events, and to that end:

(a) must immediately terminate the unlawful detention of the United States Chargé d'affaires and other diplomatic and consular staff and other United States nationals now held hostage in Iran, and must immediately release each and every one and entrust them to the protecting Power (Article 45 of the 1961 Vienna Convention on Diplomatic Relations);

(b) must ensure that all the said persons have the necessary means of leaving Iranian territory, including means of transport;

(c) must immediately place in the hands of the protecting Power the premises, property, archives and documents of the United States Embassy in Tehran and of its Consulates in Iran.[63]

It will be noted not only that this dictum omits any reference in technical terms to reparation or restitution by way of reparation, but also that the language of the operative part—particularly of point (a), which concerns especially the release of persons—is aimed not so much (if at all) at the reparation (in the form of *restitutio* and/or other forms) as at that cessation of the detention of the hostages which was by far the most vital and urgent objective of the claim of the applicant and of the Court's decision.[64] This confirms that in cases of wrongful detention or holding of persons, although there may well be a question of restitution in kind—and although the distinct aspects of restitution in kind and cessation may in fact be inextricably linked in the claim of the injured State and the remedial conduct of the author State—release of the persons seems to respond, within the framework of a correctly broad definition of the consequences of wrongful acts, to the primary exigency of putting an end to the wrongful situation rather than to the exigency of restitution in kind as a form of reparation.

52. Whether the lack of clarity of doctrine and practice derives from an imprecise perception of the concept of cessation or of the concept of *restitutio*, this state of affairs does not affect the fact that the difference between the two remedies is one of nature as well as of role. They differ from the point of view of their source (primary or secondary rule) as well as from the point of view of their object (discharge of the original obligation or reparation by re-establishment of the *status quo ante* or re-establishment of the situation that would exist if the wrongful act had not occurred), and the distinction seems to manifest itself in connection with omissive as well as with commissive wrongful acts. In the context of a proper legal analysis, it seems therefore to be correct neither to absorb cessation of wrongful conduct within the concept of a wider form of restitutive reparation nor, vice versa, to absorb the remedy of *restitutio* into a case of cessation. On the contrary, it is concretely observable that

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States of America under international conventions in force between the two countries, as well as under long-established rules of general international law." (*I.C.J. Reports 1980*, p. 44, para. 95.)

[63] *Ibid.*, pp. 44-45.

[64] The Special Rapporteur speaks of the prevailing rather than the sole objective of the Court because a reparative, i.e. restitutive, objective of the decision is, as indicated by the first lines of the operative part, far from absent. The phrase "to take all steps to redress the situation resulting from" indicates in fact the intention not only to aim at the persisting wrongful conduct but also to remedy the effect, i.e. the situation caused by that conduct. The latter objective, which is properly reparative, reappears in more concrete and restitutive terms in point (c) of the operative part, where the obligation of Iran to ensure the placing in the hands of the protecting Power of immovable and movable property must surely be read as including the more specific obligation to restore that property in the condition it was in before the violation, namely as an obligation additional to the cessation of its unlawful possession.

the two remedies either are factually separate or appear in combination but are nevertheless distinct.[65]

5. PLACE OF CESSATION WITHIN THE FRAMEWORK OF THE DRAFT ARTICLES

53. The considerations set forth in the preceding paragraphs would indicate that cessation of an internationally wrongful act (delict or crime) should be the subject of an express provision in the draft articles on State responsibility. This would support the decision of the previous Special Rapporteur to mention cessation in paragraph 1 (*a*) of draft article 6 and the implied endorsement of that decision by the Commission.

54. At the same time, it seems that within the framework of the draft articles cessation should be distinguished more clearly from the provisions concerning other aspects of the consequences of violations of international law. The necessity of a clear distinction—which is lacking, in the opinion of the Special Rapporteur, in the present formulation of draft article 6, paragraph 1 (*a*)—derives from the specific nature of cessation, which has already been shown (see para. 31 above) to be not a form of reparation but rather the object of an obligation stemming from the combination of wrongful conduct in progress and the normative action of the primary rule of which the wrongful conduct is held to be in breach. Unlike the various forms of reparation—and restitution in kind in the first place—the obligation to cease the wrongful conduct is not part of the content of international responsibility deriving from the so-called secondary rule (see paras. 39-41 above). The State engaged in wrongful conduct is under the obligation to desist from that conduct by virtue of the very same rule placing upon it the original obligation of which the unlawful act constitutes a breach. This elementary observation follows from the equally elementary *constat* that the rule breached by the wrongful act is not annulled or otherwise diminished in vitality by the fact of the violation. Of course—and it would be incorrect to deny this—the violation is not without consequences for the legal relationship of which the breached obligation represents, so to speak, one of the "sides". Indeed, it is possible that the parties may have decided in advance that any infringement of that obligation would more or less automatically bring about the cessation of their legal relationship or of the rule upon which it depends. The other well-known possibility is that the injured State may be entitled in certain circumstances and under certain conditions (which need not be considered for the moment) to put an end to the original legal relationship. The fact remains that in principle, and in practice in most cases, the

[65] A case in point is the *Trail Smelter* case. Finding Canada responsible under international law, the *ad hoc* tribunal decided that:

"the Trail Smelter shall be required to refrain from causing any damage through fumes in the State of Washington; the damage herein referred to and its extent being such as would be recoverable under the decisions of the courts of the United States in suits between private individuals. The indemnity for such damage should be fixed in such manner as the Governments, acting under Article IX of the Convention, should agree upon." (United Nations, *Reports of International Arbitral Awards*, vol III, p. 1966).

Canada's obligation is formulated here in terms which emphasize discontinuance as distinct from any form of reparation (and particularly from restitution in kind). The decision aims at stopping the very source of the damage upon which hinges the question of reparation. Compliance with the decision will entail for Canada resumption of lawful conduct, namely conduct in conformity with its original obligation towards the United States.

original legal relationship and the consequent obligation of the author State survive the violation.[66]

55. The nature of cessation makes a separate provision particularly desirable also in view of the option of formulating the consequences of wrongful acts either in terms of rights of the injured State or in terms of obligations of the author State. In so far as the various forms of reparation are concerned, the preference for a formulation in terms of rights of the injured State—as expressed by the Commission and carried out by the previous Special Rapporteur in his third report[67]—is justified, as will be shown, by the fact that it is by a decision of the injured State that a secondary legal machinery is set in motion. Were the injured State not to put forward any claim for reparation, the secondary legal relationship might not emerge. The situation seems different with regard to cessation, where, although an initiative on the part of the injured State is both lawful and opportune, the obligation to discontinue the wrongful conduct should be considered not only existent but in actual operation on the mere strength of the primary rule, quite independently of any representation or claim on the part of the injured State. No accessory or secondary (or new) legal relationship is here to be started (since the portion of the wrongful act which is a *fait accompli* is evidently to be remedied within the framework of reparation). Any provision to be formulated with regard to cessation should therefore emphasize the continued, unconditional subjection of the author State to the primary obligation, no claim to respect thereof by the injured State being necessary. In other words, the provision covering cessation of the wrongful act should be formulated in such unambiguous terms as to stress that the responsible State's obligation exists not just in the case of a wrongful act which is still continuing at the time at which the injured State's claim (to cessation and reparation) is put forward but rather—and in the first place—for any continuing wrongful act *tout court,* independently of the setting into motion of the reparation process within which cessation appears to be frequently, so to speak, absorbed.

56. In addition to the specific raison d'être of cessation and of the particular terms in which a provision on cessation should be formulated, a further reason for covering discontinuance by an *ad hoc* rule (as distinct from any rule covering any form of reparation) is the relatively limited sphere of application of the remedy, which is not taken expressly into account in paragraph 1 (*a*) of draft article 6. As shown above (see para. 33), an obligation to cease the wrongful conduct is conceivable exclusively for wrongful acts characterized by duration in time, namely by the fact that they do not terminate simultaneously with or immediately after the moment at which the violation begins.[68] A provision covering cessation should therefore make it clear, however obvious this surely is, that the obligation it envisages refers only to States whose conduct constitutes precisely a wrongful act having a continuing character. To cover cessation within a general provision dealing—as does the present formulation of article 6—also with consequences of a wrongful act other than cessation (in particular

[66] Mr. Tomuschat expressed a similar view at the thirty-seventh session of the Commission (see *Yearbook... 1985,* vol. I, pp. 125-126, 1896th meeting para. 35).

[67] *Yearbook... 1982,* vol. [I (Part One), p. 22, document A/CN.4/ 354 and Add.l and 2.

[68] The instance in which this feature of cessation was particularly manifest is the *United States Diplomatic and Consular Staff in Tehran* case.

with such different and diverse consequences as the various forms of reparation) could cause confusion.[69]

57. Another reason for separating discontinuance from reparation is to avoid subjecting cessation to the limitations or exceptions applicable to forms of reparation, specifically to *restitutio in integrum* (see sect. C, below). None of the difficulties which may hinder or prevent restitution in kind is such as to affect the obligation to cease the wrongful conduct. This is an inescapable consequence of the fact that the difficulties or impossibility which may partly or totally affect *restitutio* (or any other form of reparation) concern reparative measures which can only follow the accomplished wrongful act, namely the consummated violation of the primary rule. Cessation is not and should not be subject to such supervening odds because its purpose is precisely to prevent future wrongful conduct, namely conduct that would further extend the wrongful act in time and space. Unless the primary rule itself is modified or ceases to exist and unless the wrongful conduct is condoned at some stage by supervening circumstances that exclude wrongfulness, the obligation to discontinue the wrongful conduct must stand unlimited. Any limitation of such a basic obligation would call into question the binding force of the primary rules themselves and endanger the validity, certainty and effectiveness of international legal relations.

58. A further point to be kept in mind in drafting any provision on cessation is the distinction between commissive and omissive wrongful acts. Any provision on discontinuance should cover both kinds of wrongful acts. In the case of commissive wrongful acts, cessation will consist of the (negative) obligation "to cease to do" or "to do no longer". The author State must desist from conduct not in conformity with the negative obligation deriving from the primary rule. In the case of omissive wrongful acts, cessation should cover the author State's thus far undischarged obligation "to do" or "to do in a certain way". The author State will have to "do" or "do in a given way". It must start or resume the action or behaviour dictated by the primary rule and by the original relationship with the injured State. This means, in other words, that it must start or resume discharging the original obligation (which remains nevertheless a matter of cessation of a wrongful non-discharge) (see paras. 42-47 above).

59. It could, of course, be contended that the very fact that by cessation a wrongdoing State would be merely complying with the relevant primary rule should exclude any rule setting forth an obligation of cessation from the draft articles on State responsibility. The continued existence—and normative role—of the primary rule should suffice. Considering, however, that cessation did make an appearance (albeit partly confused or combined with instances of restitution in kind) in paragraph 1 (*a*) of draft article 6, which has already been referred to the Drafting Committee, the Special Rapporteur felt it to be indispensable to submit the matter of cessation to further study. And there do indeed appear to be some considerations in favour of the inclusion in the draft of an appropriately adapted and agreed-upon provision on cessation.

[69] The representative of Thailand, Mr. Sucharitkul, expressed a similar view in the Sixth Committee of the General Assembly in 1981 (*Official Records of the General Assembly, Thirty-sixth Session, Sixth Committee,* 40th meeting, para. 33).

60. A first consideration is the greater practical relevance of a particular remedy like cessation within the international legal system than within the far better "equipped" legal systems of national societies. One should not overlook, *inter alia:*

(a) The importance of a rule on cessation of wrongful acts having a continuing character in view of the lack, in the international legal system, of institutional mechanisms of general application comparable either to the system of criminal law and procedure or to the authoritative civil procedures by resort to which any injured party within the national society is enabled to secure the enactment and enforcement of measures for the protection of any rights which may be in the process of infringement.

(b) The practical importance assumed by a specific obligation to discontinue a wrongful act or omission (and by the specific claim for cessation on the part of the injured State or States) in the case of delicts of particular gravity as well as in any case of an international crime. To confine ourselves to an adjudicated instance, the *United States Diplomatic and Consular Staff in Tehran* case (see para. 51 above) appears to be significant in that respect.

(c) The relevance that non-compliance with a claim for cessation, or with an injunction to that effect emanating from a competent international body, would present as a justification for resort to immediate—individual or institutional—measures against the wrongdoing State.

61. It could be added that, to the extent to which the practical usefulness of a rule on cessation is recognizable, the inclusion of such a rule in the draft articles should not be excluded by such considerations of a theoretical nature as might arise from the fact that an obligation of cessation does not "belong" to the legal consequences of a wrongful act strictly understood or to the normative sphere of the secondary rule or rules governing responsibility or liability. After all, the very distinction between primary and secondary rules—or any other distinction among the components of a legal system—is a relative one. It follows that a rule on cessation could well be conceived as a provision situated, so to speak, "in between" the primary rules and the secondary rules. With regard to the former, it would operate in the sense of concretizing the primary obligation, the infringement of which by the wrongdoing State is in progress. With regard to the secondary rules, it would operate in the sense of affecting—without providing directly, of course, for reparation—the quality and quantity of reparation itself and the modalities and conditions of the measures to which the injured State or States (or an international institution) may resort in order to secure reparation or inflict punishment. From either point of view, a specific rule on cessation might help to safeguard that continued vitality and effectiveness of the infringed primary rule which might suffer in the long run from the continuation of the violation.

62. In conclusion, the Special Rapporteur would express the hope that the Commission will state its views both on the tentative formulation of a new draft article on cessation and on where it should be placed. It remains indeed to be seen whether such an article would be better located within or outside the framework of the set of articles covering the various forms of reparation.

63. The tentative formulation of a draft article on cessation appears (together with the equally tentative formulation of a separate draft article on *restitutio in integrum*) in chapter III of the present report.

C. Restitution in kind

6. THE CONCEPT IN DOCTRINE AND PRACTICE

64. The widespread opinion that identifies restitution in kind as one of the specific forms of reparation *lato sensu*[70] is not accompanied by an equally high degree of uniformity with regard to the concept of the remedy. Two main tendencies emerge in the literature. According to the most common definition—hereinafter referred to as definition A—restitution in kind would consist in re-establishing the *status quo ante*, namely the situation that existed prior to the occurrence of the wrongful act, in order to bring the parties' relationship back to its original state. The other tendency—definition B—is to understand restitution in kind (to use the expression of the PCIJ in the well-known *Chorzów Factory* case) as the establishment or re-establishment of the situation that would exist, or would have existed, if the wrongful act had not been committed.

65. Those favouring definition A include the following: de Visscher, who defines *restitutio in integrum* as the "direct reparation" that occurs "when the responsible State agrees to re-establish in its original integrity the situation which existed prior to the wrongful act";[71] Bissonnette, who describes *restitutio in integrum* as the creation of a "new act aimed at re-establishing the *status quo ante*";[72] Verdross, who writes about a principle of "integral reparation", namely a reparation of such nature as to re-establish the juridical and possibly factual situation as it existed prior to the violation;[73] Zemanek, according to whom "*restitutio in integrum, stricto sensu,* means the re-establishment of the situation which existed before the violation was committed".[74] For Nagy, it is "the obligation to reestablish the original situation",[75] and for Eustathiades it is "the re-establishment of the situation which existed before the perpetration of the wrongful act",[76] while Giuliano speaks of "re-establishment of the *status quo ante*".[77] Among the writers who favour definition B are Anzilotti, according to whom *restitutio* "consists in the restoration of the factual situation which

[70] It is useful to recall, however (in view of the discussion of the present content of draft article 7 as referred lo the Drafting Committee), Mann's notation that

"Restitution in kind ... is *largely unknown** to the common law which, in principle and somewhat paradoxically, adheres to the rule of Roman law *omnis condenmatio est pecuniaria* and calls it *restitutio in integrum* (which it is not)." (*Loc. cit.* (footnote 10 above), pp. 2-3.)

Mann indicates further that "In English municipal law the expression 'restitution *in integrum*' is used lo indicate the measure of damages to which the victim is entitled" [and that) "It was in this sense that the expression was employed by Sir Hersch Lauterpacht, *Private Law Sources and Analogies* (1929), p. 147." (*Ibid.,* p. 3, footnote 1.)

[71] C. de Visscher "La responsabilité des Etats", *Bibliotheca Visseriana* (Leyden, 1924), vol. II, p. 118.

[72] P. A. Bissonnette, *La satisfaction comme mode de réparation en droit international* (thesis. University of Geneva) (Annemasse, Impr. Grandchamp, 1952), p.20.

[73] A. Verdross, *Völkerreclu,* 5th ed. (Vienna, Springer, 1964), p. 399.

[74] K. Zemanek, "La responsabilité des Etats pour fails internationaux illiciles ainsi que pour faits internationaux licites", *Responsabilité Internationale* (Paris, Pedone, 1987), p. 68.

[75] Nagy, *loc. sit.* (footnote 22 above), p. 178.

[76] Eustathiades, *op. cit.* (footnote 10 above), p. 523.

[77] Giuliano, *op. cit.* (footnote 10 above), p. 593.

would exist had the unlawful act not been committed";[78] Strupp;[79] Reitzer ("the injured party must be re-established in the same situation that would have existed if the injury had not occurred");[80] Morelli;[81] Jiménez de Aréchaga, according to whom "restitution in kind is designed to re-establish the situation which would have existed if the wrongful act or omission had not taken place";[82] and Graefrath, who similarly affirms that restitution "is aimed at restoration of the situation that would have existed without the violation".[83]

66. With regard to practice, the notion of *restitutio in integrum* as the re-establishment of the *status quo ante*, namely definition A, appears particularly in cases where the re-establishment of the original situation requires the annulment of a legal state of affairs. A case in point is the decision of the Central American Court of Justice of 9 March 1917 on the dispute between El Salvador and Nicaragua over the lawfulness of the *Bryan-Chamorro Treaty*, concluded in 1914 between Nicaragua and the United States, from the point of view of the rights of El Salvador.[84] As is well known, the Court decided that:

> the Government of Nicaragua ... is under the obligation to re-establish and maintain the legal status that existed prior to the Bryan-Chamorro Treaty between the litigant republics...[85]

Definition A is also implied in the decision of the Franco-Italian Conciliation Commission of 19 October 1953 in the *Mélanie Lachenal* case; the Commission considered that, in accordance with the provisions of the Treaty of Peace of 1947,[86] the Italian Government "is required to return the said property, after having restored it to the state it was in on 10 June 1940".[87] On the other hand, the concept of *restitutio in integrum* implied in definition B seems to underlie the decision of the PC1J of 13 September 1928 in the *Chorzów Factory* case, wherein it is stated that:

> reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.[88]

67. The two concepts cover different areas. In the first place, it is obvious that the first definition refers, for the purposes of *restitutio*, to a factual and/or juridical situation which has really existed in the past and has been altered additionally or principally as a consequence of the violation. The second definition refers instead to a theoretical legal/factual state of affairs which at no time has been a part of reality but could presumably be a part thereof if the wrongful act had not interfered in the course of events. The two definitions seem thus to differ, essentially, in the relationship they

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[78] D. Anziloltti, *Cours de droit international*, *op. cit.* (footnote 17 above), p. 526.

[79] Strupp. *loc. cit.* (footnote 42 above), p. 209.

[80] Reitzer, *op. cit.* (footnote 10 above), p. 171.

[81] Morelli, *op. cit.* (footnote 10 above), p. 359

[82] Jiménez de Aréchaga, *loc. cit.* (footnote 10 above), p. 565.

[83] Graefrath, *loc. cit.* (footnote 22 above), p. 77.

[84] *Anales de la Cone de Justicia Centroamericana* (San José, Costa Rica), vol. VI, Nos. 16-18 (December 1916-May 1917), p. 7; *The American Journal of International Law* (Washington, D.C.), vol. 11 (1917), pp. 674 *et seq*.

[85] *Anales...*, p. 71; *The American Journal...*, p. 696.

[86] Treaty of Peace of 10 February 1947 between the Allied and Associated Powers and Italy (United Nations, *Treaty Series*, vol. 49, p. 126).

[87] United Nations, *Reports of International Arbitral Awards*, vol. XIII, p. 125.

[88] *P.C.I. J., Series A, No. 17*, p. 47.

assume to exist between *restitutio in pristinum* in a narrow sense, on the one hand, and a pecuniary compensation (for any residual loss not covered by *restitutio*), on the other. Definition A views restitution in kind *stricto sensu* and *per se.* It leaves outside the concept the compensation which presumably will be due to the injured party for the loss suffered during the period elapsed during the completion of the wrongful act and thereafter until the time when the remedial action is taken. Definition B seems instead, by assigning to restitution in kind a more extended and complete remedial function, to absorb into that concept not just the re-establishment of the *status quo ante* (*restitutio in pristinum*) but also the integrative compensation. In other words, definition A separates the purely restitutive from the compensatory function of reparation, while definition B presents, so to speak, an "integrated" concept of restitution in kind within which the restitutive and compensatory elements are fused.

68. It is important to recall, with regard both to the doctrine of restitution in kind and to the distinction between *restitutio in integrum* and cessation of the wrongful act, the relationship of the duty of restitution in kind to the original, primary obligation of the author State and the corresponding original right of the injured State. According to the most widely accepted and best-known view, restitution in kind is the object of a secondary—in a sense, new—legal rule and relationship supervening between the parties as a consequence of the violation of the original, so-called primary rule or obligation. As Reuter put it, for instance:

> No doubt the implementation of responsibility does indeed give rise to a new obligation, that to make reparation, but this consists mainly in restoring the *status quo, restitutio in integrum,* in other words in ensuring the most complete fulfilment possible of the original obligation.[89]

In a similar view, after recalling that *restitutio in integrum* aims at restoration of the situation that would have existed in the absence of the violation, Graefrath specifies: "That means, indeed, an obligation to eliminate the consequences of the violation of rights";[90] and it is obviously a supervening obligation which could not exist in the absence of the said consequences.

69. The concept of *restitutio in integrum* as the object of a secondary rule and obligation would seem to be called into question, however, by the doctrine according to which the obligation of restitution in kind would be not—or not so much—one of the modes of reparation, and as such one of the facets of the new relationship coming

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[89] P. Reuter, "Principes de droit international public", *Recueil des corns... 1961-11* (Leyden, Sijthoff, 1962), vol. 103, p. 595.

[90] Graefrath, *loc. cit.* (footnote 22 above), p. 77. For a similar view, see A. Verdross and B. Simma, *Universelles Völkerrecht,* 3rd ed. (Berlin, Duncker & Humblot, 1984), pp. 873-874.

The phenomenon is explained with particular clarity by C. Čepelka, *Les conséquences juridiques du délit en droit international contemporain* (Prague, Karlova University, 1965), with reference to the traditional concept of reparation in general:

"According to traditional doctrine, the obligation to make reparation arising from responsibility for the wrong caused by the internationally wrongful act constitutes a secondary obligation which accompanies the unfulfilled original-primary obligation... the latter obligation, resulting from the fundamental legal relationship, is not extinguished. The obligation to make reparation, which is based on responsibility, thus does not replace the primary obligation resulting from the fundamental legal relationship—*this is not a case of novation*—but simply represents an addition to the original obligation, resulting from the failure to fulfil the latter, as a consequence or result of the non-fulfilment of the original obligation." (p. 18).

This surely applies also to restitution in kind.

into being as a consequence of the wrongful act, but rather a continuing "effect" of the original legal relationship. Put forward some time ago by Balladore Pallieri,[91] this view seems to have been taken up recently by Dominicé.[92] Both authors believe *restitutio in integrum* to differ from the various forms or modes generally ascribed to reparation in a wide sense; and the difference would consist in the fact that, while pecuniary compensation (*dommages-intérêts*) and satisfaction would respond to the exigencies of the new situation represented by the material or moral injury suffered by the injured State—a situation not covered by the original legal relationship affected by the wrongful act—*restitutio in integrum* would continue to respond to the original legal relationship as it existed, in terms of a right on one side and an obligation on the other, prior to the occurrence of the wrongful act, such original relationship surviving intact (without novation or alteration) the commission of the violation. According to Balladore Pallieri, the injured State claiming *restitutio in integrum* (*naturalis restitutio*) is merely exercising its own original subjective right and "raises its claim by virtue of the subjective right it previously enjoyed, not by virtue of a new and different legal relationship resulting from the violation".[93] For Dominicé, *restitutio in integrum* expresses essentially "the requirement of a return to the original obligation"; and he seems to identify "authentic *restitutio*" with "cessation of the wrongful situation".[94]

70. However, the opinions represented in the preceding paragraph do not seem likely to prevail over the majority view according to which *restitutio in integrum* is one of the forms of a secondary obligation to provide reparation in a broad sense. Their presence, while helpful in preserving the notion that the original obligation (and the rule from which it originates) survives the violation (see paras. 57 *et seq.* above), has a negative impact on the distinction between *restitutio in integrum* and cessation of the wrongful conduct (see paras. 48-52 above). From the point of view of the latter distinction—particularly of the preservation of the notion of the autonomous existence of an obligation to cease wrongful conduct extending in time—the doctrine in question should, with respect, be set aside, as logically and practically untenable. Cessation and restitution in kind should be maintained as two distinct remedies against the violation of international obligations.

[91] G. Balladore Pallieri, "Gli effetti dell'atto illecito intemazionale", *Rivista di Diritto fubblico* (Rome), Series II, 23rd year, 1st part (1931), pp. 64 *et seq.*

[92] Dominicé, *loc. cit.* (footnote 22 above), pp. 17 *et seq.*

[93] Balladore Pallieri, *loc. cit.*, p. 66.

[94] Dominicé, *loc. cit.*, p. 19. The position of the author appears to be rather uncertain in view of the fact that he adds to the above statement: "Nevertheless, from a systematic point of view, it would seem more exact to draw a distinction between the obligation to bring about the cessation of the wrongfulness and the duty to make reparation for the injury" (*ibid.*), a position which seems closer to the one the Special Rapporteur is inclined to take. Further on, however, he states that "*restitutio in integrum* has a dual nature. It can be a return to the original obligation, the cessation of the wrongfulness ... It can also be a modality of reparation *stricto sensu".* (*Ibid.*, p. 21.) This distinction is further developed by the author (pp. 21-22).

7. MATERIAL AND LEGAL (JURIDICAL) *RESTITUTION*

71. A distinction is generally made in the literature, according to the kind of injury for which reparation is due, between material *restitutio* and legal or juridical *restitutio.*[95]

72. According to Personnaz, for instance, *material* restitution occurs when the injury takes the form of material damage proper, and it consists in the material restoration of the thing to the state in which it would have been if the wrongful act had not occurred: for instance, the restitution of confiscated property or a ship that has been seized.[96]

The same author points out that another frequent example of material *restitutio* is the release of a detained individual or the handing over to a State of an individual unlawfully arrested in its territory.[97]

Graefrath explains:

> We speak of material restitution if the question is restoration of objects unlawfully obtained or the release of persons unlawfully arrested or detained, the evacuation of territory illegally occupied, etc.[98]

Alvarez de Eulate indicates as examples:

> restitution of persons ... restitution of ships ... restitution of documents ... restitution of sums of money ... restitution of many different types of properly.[99]

Verzijl indicates that, by the principle of *restitutio in integrum,* invaded territory must be evacuated. Works of art illegally removed from an invaded country by the invader must be returned in kind. A conventional customs line, illegally shifted forward, must be withdrawn ...[100]

73. The literature uses, instead, the term juridical restitution with reference to the case where implementation of restitution requires or involves the modification of a legal situation either within the legal system of the author State or within the framework of the international legal relations between the author State and one or

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[95] It is perhaps worthwhile to recall that *restitutio in integrum* was in Roman law an institution *of jus honorarium,* on the strength of which the magistrate, on the demand of a victim of violence in a legal transaction and after considering the circumstances, refused the judicial remedies which as a matter of *jus civile* could have been claimed by the author from the victim of the violence. The transaction affected by violence was thus for practical purposes annulled in favour of the victim. *Restitutio in integrum* became at one point in Roman law any decision of the magistrate annulling any substantive or procedural, unilateral or bilateral, legal act or transaction or even a judgment (Vincenzo Arangio-Ruiz, *Istituzioni di diritto romano,* 14th ed. (Naples, Jovene, 1976), pp. 105 *et seq.*, 143,145 and 148). The distinction in the text is a modern one. On the concept in Roman law, see also M. Kaser, "Zur *in integrum restitutio* besonders wegen *metus* und *dolus*", *Zeitschrift der Savigny Stiftung für Rcchtsgeschichte,* Romanistische Abteilung (Weimar), vol. 94 (1977), p. 101.

[96] Personnaz, *op. cit.* (footnote 42 above), p. 86.

[97] *Ibid.,* p. 88, footnote 28.

[98] Graefrath, *loc. cit.* (footnote 22 above), p. 77

[99] Alvarez de Eulate, *loc. cit.* (footnote 42 above), pp. 272 *et seq.*

[100] J. H. W. Verzijl, *International Law in Historical Perspective* (Leyden, Sijthoff, 1973), part VI, p. 742.

more other States. Various hypotheses of juridical *restitutio* are mentioned in the same literature. Nagy maintains that *restitutio in integrum* may mean "annulment of certain decisions, e.g. laws, the omission of which cannot be compensated by payment of money" and that it "may even consist in the nullification of a treaty".[101] Personnaz states that juridical *restitutio* may assume various forms:

> Sometimes it will lead to the revocation, annulment or amendment of the act, sometimes it will be sufficient to ensure the fulfilment of the international obligation: for example, it may entail the obligation for the State to take penal measures against the perpetrators of the offence.[102]

He adds further on that it may imply "the annulment or amendment of the judgment".[103] Giuliano includes in *restitutio in integrum:*

> The repeal of a law enacted in violation of a rule of international law ... [and] the rescinding of an administrative or judicial measure unlawfully adopted in respect of the person or property of a foreigner . . .[104]

According to Graefrath, "by legal restitution we understand, above all, the elimination of the illegal act". He adds that

> In general, however, the elimination of an internationally illegal act requires a new action, since wrongfulness according to international law does in general not entail invalidity under domestic law

and that,

> According to the kind of the violation, the claim to restitution can take very different forms. It can be directed towards enactment, repeal or modification of certain laws, administrative acts or court decisions.[105]

74. An example of material restitution of objects generally indicated in the literature is the *Temple of Preah Vihear* case.[106] In its judgment of 15 June 1962 the ICJ decided in favour of the Cambodian claim (which included restitution of certain objects that had been removed from the area and the temple by Thai authorities), finding that:

> ... Thailand is under an obligation to restore to Cambodia any objects of the kind specified in Cambodia's fifth Submission which ... have been removed from the Temple or the Temple area by the Thai authorities.[107]

Two cases occur in the Italian practice of the latter half of the nineteenth century. One of them, *the Aloisi* case (1881), originated from the seizure of the property of Italian merchants by Chilean military occupation authorities in the Peruvian city of Quilca during the conflict between Chile and Peru, and from the claim for restitution and indemnification introduced in Santiago by the Italian Chargé d'affaires. In his reply to the Chargé d'affaires, who had informed him that in an earlier case the Chilean Government had consented to restitution but had refused

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[101] Nagy, *loc. cit.* (footnote 22 above), pp. 177-178.
[102] Personnaz, *op. cit.* (footnote 42 above), p. 77.
[103] *Ibid.*, p. 81.
[104] Giuliano, *op. cit.* (footnote 10 above), p. 594.
[105] Graefrath, *loc. cit.* (footnote 22 above), p. 78.
[106] *I.C.J. Reports 1962*, p.6, at pp. 36-37
[107] *Ibid.*, p. 37.

indemnification, the Italian Minister for Foreign Affairs stated *inter alia* that the principle invoked in the earlier case by Chile (and according to which "indemnification of damage and prejudice only binds those who act in bad faith") "could only be applied in the case of destroyed property, it being obvious that in the case of seized property restitution is always due".[108] The second was the "*Giaffarieh*" case (1886), which originated in the capture in the Red Sea by the Egyptian warship *Giaffarieh* of four merchant ships from Massawa under Italian registry. In the absence of any circumstances justifying the seizure, the Foreign Minister of Italy instructed the Italian Consul General at Cairo that "the act committed by the *Giaffarieh* was an arbitrary depredation and we have the specific right to request, in addition to compensation for damages, restitution or reimbursement". The claim was satisfied with regard to both ships and crews by the Egyptian Government.[109]

Within the different framework of the Treaty of Peace of 1947, a number of cases of restitution were decided by the Franco-Italian Conciliation Commission instituted by that treaty. In the case concerning the Société foncière lyonnaise (*Hotel Métropole* case) the Commission took note of the restitution of the hotel effected by the Italian authorities.[110] In the *Ottoz* case the same Commission decided that the Italian Government was bound to make restitution of immovable property seized during the war by the prefect of Aosta.[111] In the *Hénon* case the Commission again took careful note of the restitution of immovable property seized in 1943 and again in 1945.[112] In the case concerning the SNCF mentioned above, the interesting point was that the Franco-Italian Conciliation Commission decided that Italy was still in debt to France (although the railway material had been returned some time earlier) on the basis of a broad interpretation of article 75, paragraph 3, of the Peace Treaty of 1947, which made it incumbent upon Italy to effect the restitution of the material "in good condition", the latter proviso being understood by the Conciliation Commission as an element of *restitutio in integrum.*[113] However, since those decisions were based upon conventional rules contemplating restitution of objects, it is of course doubtful whether they are applicable in determining the content of a rule of general (customary) law.

75. The "*Trent*" case (1861) and the "*Florida"* case (1864), already referred to,[114] also contain instances of so-called material restitution involving persons, with regard to which it is perhaps useful to recall what was said earlier in connection with cessation. In the former case, the British Government claimed the release of two Confederate agents taken into custody by the captain of the United States warship *San Jacinto* in the course of the visit to which it had submitted the *Trent:*

> The reason of this demand, as stated by Earl Russell, in his instructions to Lord Lyons, British minister at Washington, of November 30, 1861, was that "certain individuals" had "been forcibly taken from on board a British vessel, the ship of a neutral power, while such vessel was pursuing a lawful and

[108] See *La prassi italiana di diritto internazionale,* 1st series (Dobbs Ferry, N.Y., Oceana, 1970), vol. II, pp. 867-868.

[109] *Ibid.*, pp. 901-902.

[110] Decision No. 65 of 19 July 1950 (United Nations, *Reports of International Arbitral Awards,* vol. XIII, p. 219).

[111] Decision No. 85 of 18 September 1950 (*ibid.*, p. 240). In both this case and the *Hotel Métropole* case, legal (or juridical) *restitutio* was also involved.

[112] Decision No. 109 of 31 October 1951 (*ibid.*, p. 249).

[113] See footnote 59 above.

[114] See footnote 61 above.

innocent voyage—an act of violence which was an affront to the British flag and a violation of international law".[115]

The American Secretary of State, "Mr. Seward, in concluding his note to Lord Lyons of December 26, 1861, stated that the prisoners would be cheerfully liberated, and requested Lord Lyons to indicate a time and place for receiving them".[116] In the "*Florida*" case, a Confederate cruiser docked at the Brazilian port of Bahia had been attacked, fired upon and captured by the *Wachusett*, a Union ship, which had arrested both crew and passengers.[117] The Brazilian Government demanded satisfaction and also the release of the prisoners and the ship. Both requests were satisfied by the United States Government:

As to the captured crew of the *Florida*, it was stated that they would be set at liberty to seek refuge wherever they could find it, with the hazard of recapture when beyond the jurisdiction of the United States. With reference to the demand for the return of the *Florida* to Bahia, Mr. Seward stated that the vessel, while anchored in Hampton Roads, sank on the 28th of November, owing to a leak which could not be seasonably stopped.[118]

Also of relevance to material restitution is the fact that in 1968 Switzerland obtained, following the supposed recognition by the Algerian Government of an alleged *déni de justice*, the "restitution" of four of its nationals arrested in 1967 by the Algerian police on charges of attacking the security of the State and illegal detention and traffic of arms.[119] Another instance worth recalling, of course, is the judgment of the ICJ of 24 May 1980 in the *United States Diplomatic and Consular Staff in Tehran* case, which has already been mentioned with regard to cessation ("must immediately release each and every one and entrust them to the protecting Power") (see para. 51 above).[120]

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[115] Moore, *op. cit.* (footnote 61 above), p. 768.

[116] *Ibid.*, p.771.

[117] *Ibid.*, p. 1090.

[118] *Ibid.*, p. 1091.

[119] See *Revue générale du droit international public* (Paris), vol. 73 (1969), pp. 795-796.

[120] It is perhaps worth noting that in some cases the question of *restitutio* has arisen with regard to so fungible an object as a sum of money. In the "*Macedonian"* case (1863), King Leopold I of Belgium, who had been chosen as arbitrator, decided that "the Government of C. [Chile] shall restitute to that of the U.S. [United States] 3/5 of the 70,400 piastres or dollars seized", plus 6 per cent interest, namely the sum confiscated from a United States national by Chilean insurgents (A. de Lapradelle and N. Politis, *Recueil des arbitrages internationaux* (Paris, Pedone, 1923), vol. II, p. 182, at p. 204). In the "*Presto"* case (1864), the Italian Foreign Minister, admitting the error of Licata Customs in imposing the payment of a toll by the Norwegian ship *Presto*, provided for restitution of the unduly paid sum (*La prassi italiana ..., op. cit.* (footnote 108 above), pp. 878-879). In the *Emanuele Chiesa* case (1884), the Chilean Government returned, with interest, a sum unduly taken from an Italian national arbitrarily accused of collaboration with Peru during the conflict between Chile and Peru (*ibid.*, pp. 899-900). In the *Turnbull* and *Orinoco Company* cases the United States-Venezuela Mixed Claims Commission ordered the restitution (with interest) of sums paid by those American companies for Venezuelan concessions granted in violation of the rights of other companies (United Nations, *Reports of International Arbitral Awards*, vol. IX (Sales No. 59.V.5), pp. 261 *et seq.*). In the *Compagnie générale des asphaltes de France* case, the Venezuelan Consul at Port of Spain, Trinidad, had imposed tolls upon the ships of the company (for access to Venezuelan harbours) in violation of United Kingdom sovereignty; the United Kingdom-Venezuela Mixed Claims Commission decided for restitution of the sums, with interest *(ibid.*, pp. 389 *et seq.*). The *Palmarejo and Mexican Gold Fields* case concerned a series of claims for the losses and damage inflicted upon that company by Mexican revolutionary and counter-revolutionary forces between 1910 and 1920; one of the claims concerned the restitution of a tax unduly imposed upon the company, and the Anglo-Mexican Special Claims Commission decided for restitution (United Nations, *Reports of International Arbitral Awards*, vol. V

76. Widely known as examples of juridical restitutio are the already cited Bryan-Chamorro Treaty case,[121] the Martini case,[122] the abrogation of Article 61 (2) of the Weimar Constitution,[123] the Free Zones of Upper Savoy and the District of Gex case[124] and the Legal Status of Eastern Greenland case.[125] In the Bryan-Chamorro Treaty case, El Salvador requested that:

> the appropriate decree may issue fixing the legal situation to be maintained by the Government of Nicaragua in the matter which is the subject of this complaint, in order that the things here in litigation may be preserved in the status in which they were found before conclusion and ratification of the Bryan-Chamorro Treaty.[126]

After expressing its opinion on the juridical status of Fonseca Bay, the Central American Court of Justice decided:

> ...
>
> *Third.* That the Bryan-Chamorro Treaty of August fifth, nineteen hundred and fourteen, involving the concession of a naval base in the Gulf of Fonseca, constitutes a menace to the national security of El Salvador and violates her rights of co-ownership in the waters of said Gulf...;
>
> *Fourth.* That said treaty violates Articles II and IX of the Treaty of Peace and Amity concluded at Washington by the Central American States on the twentieth of December, nineteen hundred and seven;
>
> *Fifth.* That the Government of Nicaragua, by availing itself of measures possible under the authority of international law, is under the obligation to re-establish and maintain the legal status that existed prior to the Bryan-Chamorro Treaty between the litigant republics in so far as relates to matters considered in this action.
>
> ...[127]

In the *Martini* case,[128] between Italy and Venezuela, the arbitral tribunal decided (decision of 3 May 1930), that the Venezuelan Government was under the obligation to annul the judgment of the Venezuelan Federal and Appeals Court that had annulled the railway and mining concession granted to an Italian company. As regards the abrogation of *Article 61 (2) of the Weimar Constitution* (Constitution of

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(Sales No. 1952.V.3), pp. 298 *et seq.*). In the *Società Anonima Michelin Italiana* case, which was one of the cases brought before the Franco-Italian Conciliation Commission after the conclusion of the 1947 Treaty of Peace, the Commission ordered the restitution (and not, it seems, a simple indemnification) under article 78, para. 6, of the Treaty, of the taxes imposed on the company (decision of 7 December 1955) (United Nations, *Reports of International Arbitral Awards,* vol. XIII, p. 625). Of a similar nature was the *Wollemborg* case, decided by the Italian-United States Conciliation Commission (decision of 24 September 1956) (United Nations, *Reports of International Arbitral Awards,* vol. XIV (Sales No. 65. V.4), p. 291).

Shares have also been considered susceptible of *restitutio.* In the *Buzau-Nehoiasi Railway* case between Germany and Romania, for instance, the decision of the arbitral tribunal of 7 July 1939 provided for the restitution to a German company (Berliner Handels-Gesellschaft) of 1,196 shares of the Romanian company Buzau-Nehoiasi Railway following the German Government's claim to that effect (United Nations, *Reports of International Arbitral Awards,* vol. III, p. 1839). That case is not contradicted by the *Industrie Vicentine Elettro-Meccanische (IVEM)* case, in which the Franco-Italian Conciliation Commission decided against the restitution of shares in IVEM claimed by a French company (decision of 1 March 1952) (see para. 101 below).

[121] See footnote 84 above.

[122] See footnote 128 below

[123] See footnote 129 below.

[124] See footnote 130 below.

[125] See footnote 132 below.

[126] *Loc. cit.* (footnote 84 above), p. 683.

[127] *Ibid.*, p. 696.

[128] United Nations, *Reports of International Arbitral Awards,* vol. II (Sales No. 1949.V.1), pp. 975 *et seq.*

the Reich of 11 August 1919), which, in violation of the Treaty of Versailles of 28 June 1919, provided for the participation of Austrian delegates in the German Reichsrat, it is well known that, following French protests, the provision was annulled by Germany.[129] These cases will be re-examined later on with regard to the judicial impossibility of *restitutio.* In the *Free Zones of Upper Savoy and the District of Gex* case,[130] the PCIJ, after deciding, in accordance with article 1 of the Special Agreement between Switzerland and France, that article 435, paragraph 2, of the Treaty of Versailles "neither has abrogated nor is intended to lead to the abrogation of the provisions" of the pre-existing international instruments concerning the "customs and economic régime" of the two areas, concluded (with regard to the further question referred to it under article 2 of the Special Agreement):

In regard to the question referred to in Article 2, paragraph I, of the Special Agreement:

> That the French Government must withdraw its customs line in accordance with the provisions of the said treaties and instruments; and that this régime must continue in force so long as it has not been modified by agreement between the Parties.[131]

Although the Court did not expressly qualify its decision as purporting a French obligation of *restitutio,* the withdrawal envisaged obviously implies, in addition to the cessation of a situation not in conformity with international law, that re-establishment of the *status quo ante* which is at least the main portion of the essential content of *restitutio.* In the *Legal Status of Eastern Greenland* case,[132] Denmark asked the PCIJ

> for judgment to the effect that "the promulgation of the above-mentioned declaration of occupation and any steps taken in this respect by the Norwegian Government constitute a violation of the existing legal situation and are accordingly unlawful and invalid."[133]

The Court decided

> that the declaration of occupation promulgated by the Norwegian Government on July 10th, 1931, and any steps taken in this respect by that Government, constitute a violation of the existing legal situation and are accordingly unlawful and invalid.[134]

This declaration of unlawfulness and invalidity seems clearly to be an expression of what a number of authors qualify as juridical *restitutio.* Cessation was a distinct, albeit implied, remedy.

8. DISTINCTION BETWEEN MATERIAL AND JURIDICAL *RESTITUTION*

77. Some thought should be given to the respective nature and distinction of what the doctrine generally indicates as "material" *restitutio,* on the one hand, and

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[129] See *British and Foreign State Papers, 1919,* vol. 112, p. 1094.

[130] *P.C.I. J., Series A/B, No. 46,* judgment of 7 June 1932, p. 96.

[131] *Ibid., p.* 172. Personnaz notes that article 2 of the Special Agreement represents one of the exceptional cases where the *compromis* conferred upon the tribunal itself "the right to proceed directly to the annulment of legislative provisions" and, in the particular case, "the power to establish a régime" *(op. cit.* (footnote 42 above), p. 85).

[132] *P.C.I. J., Series A/B, No. 53,* judgment of 5 April 1933, p. 22.

[133] *Ibid.,* p. 23.

[134] *Ibid.,* p. 75.

"juridical" ("legal") *restitutio,* on the other. Some clarification is indeed necessary, particularly before dealing with the question of the total or partial impossibility of restitution in kind (see sect. 4 below).

78. For the purposes of *restitutio* in civil law, the distinction is a very simple one. It is easy to distinguish, for example, the act of the petty street thief who materially returns a stolen purse at the first scream of the victim from the legal acts necessary to restore to the legitimate owner a painting which, after having been stolen, has been sold and acquired by a private or public gallery, or the act of the landowner who removes or withdraws a fence by which he has unlawfully enclosed a portion of a neighbour's land from the legal acts necessary to return to the former owner a piece of land unlawfully expropriated by the city administration in order to construct a pipeline or a street.

79. While it is more difficult to make in other instances within a national legal system itself, the distinction becomes even more complicated and in some aspects ambiguous when transferred to the realm of international relations between a wrongdoing State and an injured State or States. It is necessary, for example, to deal separately with cases where the dichotomy between material and legal restitutive operations presents itself (in the relations, of course, between wrongdoing and injured State) within the sole framework of international law, on the one hand, or— as is more frequently the case—within the national system of the author State, on the other.

80. With regard to the distinction between legal and material *restitutio* in the municipal law of the author State, the first observation to be made is that one can hardly conceive a restitution to be effected by a State—whether of a territory, movable objects or persons—which would involve purely material operations. Within any inter-individual community living—as hopefully any national society ought to do—under the rule of law *(Stato di diritto, Rechtsstaat),* it is hardly thinkable that the Government responsible for an internationally wrongful act could accomplish any *restitutio* without something "legal" happening within its system. To return an unlawfully occupied or annexed territory, to withdraw a customs line unlawfully advanced, to restore to freedom a person unlawfully arrested and detained, or to re-establish in their homeland a group of persons unlawfully expelled and expropriated, legal provision must be made at the constitutional, legislative, judicial and/or administrative level. From that viewpoint *restitutio* will be essentially legal. Material *restitutio* will be in such cases merely an *exécution,* a translation into facts, of legal provisions. Except in rare instances, as in a trivial case of frontier guards casually and innocently trespassing on foreign territory or in a case of harassment of a diplomat by municipal policemen in the course of a traffic jam (two cases that would probably not even reach the threshold of an internationally wrongful act), it would seem rather difficult to imagine cases of purely material international *restitutio.* In practice, any international restitution in kind will be an essentially juridical *restitutio* within the legal system of the author State, accompanying or preceding material *restitutio.*

81. It would be easy to verify this supposition by examining the various cases cited in the preceding paragraphs on the basis of the generally accepted distinction between material and legal *restitutio.* One may recall, in addition, as a case in which the legal and the material elements are closely bound together, the *Peter Pázmány*

University case,[135] in which the PCIJ decided, against the contention of Czechoslovakia (that on the basis of the Treaty of Trianon of 4 June 1920 there was no title to restitution):

(*b*) that the Czechoslovak Government is bound to restore to the Royal Hungarian Peter Pázmány University of Budapest the immovable property claimed by it, freed from any measure of transfer, compulsory administration, or sequestration, and in the condition in which it was before the application of the measures in question.[136]

It is obvious that here *restitutio* would involve both legal and material actions.

82. A second observation, contrasting, in a sense, with the one made in paragraph 83 below, is the necessity of eliminating the inherent ambiguity in characterizing as "legal" the acts and transactions of municipal law (of the author State), to the extent to which they are of interest from the viewpoint of the international legal relationship between author State and injured State. From the viewpoint of international law—in conformity with the generally recognized separation between legal systems—rules of municipal law as well as administrative or judicial decisions must be viewed as mere facts. It is useful to recall what the PCIJ stated in that respect when it was confronted with the question whether and in what sense it would be appropriate for it to deal, within the framework of international adjudication, with a piece of the national legislation of a State:

It might be asked whether a difficulty does not arise from the fact that the Court would have to deal with the Polish law of July 14th, 1920. This, however, does not appear to be the case. From the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures. The Court is certainly not called upon to interpret the Polish law as such; but there is nothing to prevent the Court's giving judgment on the question whether or not, in applying that law, Poland is acting in conformity with its obligations towards Germany under the Geneva Convention.[137]

One can perhaps conclude that, in so far as the distinction between material and legal *restitutio* may be of relevance within the national legal system of the author State, it presents itself, from the viewpoint of the relations deriving from an internationally wrongful act, as a relative one. It merely stresses the different kinds of operation which the organs of the author State should carry out in order to achieve restitution in kind. One set of actions, which may be placed under the heading of material *restitutio*, are those actions of State organs which, from the point of view of national law, do not require any modifications of a legal nature. Another group would consist of such actions of legislative, administrative or judicial organs as are of legal relevance from the point of view of the municipal law of the author State and in the absence of which restitution would not be feasible. It follows that material and legal *restitutio* should be viewed not so much as different remedies but as distinct aspects of one and the same remedy. The distinction becomes very clear only in exceptional cases, where either the one or the other aspect comes into play. An example of a purely legal *restitutio*

[135] *Appeal from a judgment of the Hungaro-Czechoslovak Mixed Arbitral Tribunal (The Peter Pázmány University),* judgment of 15 December 1933, *P.C.I. J., Series A/B, No. 61,* p. 208.

[136] *Ibid.*, p. 249

[137] Case concerning *Certain German interests in Polish Upper Silesia (Merits),* judgment of 25 May 1926, *P.C.I. J., Series A. No.* 7, p. 19.

was obviously the case cited above of the abrogation by Germany of article 61 (2) of the Weimar Constitution (see para. 76 above).

83. In the hypothetical case where *restitutio* involves only international (instead of merely national) legal aspects, the distinction might appear to be of greater moment, as the necessary legal operation would entail the modification of an international legal relationship, situation or rule. One example could be a case where *restitutio* by author State A in favour of injured State B involved the annulment of a treaty relationship with State C. The *Bryan-Chamorro Treaty* case (see para. 76 above) would appear *prima facie* to be a case of this kind. By indicating that Nicaragua was to re-establish the legal status that existed prior to the Bryan-Chamorro Treaty, the Central American Court implied that the defendant State was to "wipe out", so to speak, the Bryan-Chamorro Treaty or any relevant provisions thereof. Another example would be a case where *restitutio* by State A in favour of State B involved the renunciation of a claim or the annulment or withdrawal of a unilateral act. A case of that kind could be the *Eastern Greenland* case, where *restitutio* by Norway involved—or consisted in—the nullity of the Norwegian declaration of occupation of the territory (see para. 76 above). Although in the former case it is doubtful whether and in what sense the "wiping out" by Nicaragua of the treaty (or treaty provisions) condemned by the Court could be considered to be a legal operation or simply the violation of the treaty by Nicaragua, a similar alternative would not be possible with regard to the "wiping out" of the Norwegian declaration of occupation. In either case the full achievement of restitution in kind should have purported, at least in the first instance, an operation affecting legal relationships or situations.

84. A further question to be asked is whether and in what sense—and under what conditions—a third-party decision (of a permanent or *ad hoc* international body) could bring about directly—by the modification or annulment of legal situations, acts or rules—any form of legal *restitutio* within the national law of the author State or within international law itself:

(a) With regard to national law, reference can indeed be found in the literature to "invalidities" or "nullities" to be attached to national administrative and judicial acts or to legislative or constitutional provisions on the strength of international law;[138] and it is not unusual to find learned authors who speak about such invalidities or nullities as the most typical instances of juridical restitution in kind.[139] Examples of the use of similar concepts are to be found in a few cases cited under this rubric.[140]

[138] See, for example, Mann *(op. cit.* (footnote 10 above), pp. 5-8), who adds bibliographical references supporting the doctrine according to which an international tribunal would be in a position to pronounce the nullity (on the strength of international law) of "acts of municipal law which constitute an international illegality" (p. 6).

[139] Explicitly so, *prima facie,* in. Personnaz, *op. cit.* (footnote 4- above), pp. 77-78 and 80 *et seq.;* I. Brownlie, *Principles of Public International Law,* 3rd ed. (Oxford, Clarendon Press, 1979), p. 461; Graefrath, *he. cit.* (footnote 22 above), p. 78. It must be added, however, that, especially in Personnaz and Graefrath, it seems that the term "juridical" with reference to *restitutio in integrum* is deliberately not used, in order to give a strictly technical qualification of the said acts as international legal acts in the sense in which one identifies as such the conclusion of a treaty or the recognition of certain international situations. The concept of juridical or legal *restitutio* seems to be applied by those authors to national acts in order merely to indicate that they arc judicial or legal from the viewpoint or national law, and to distinguish such internal acts from purely factual or material action.

[140] In addition to the *Eastern Greenland* case, referred to above, it is useful to recall the *Martini* case, also cited (para. 76). Supporting the assertion that the pecuniary obligations imposed

The best-known case is that of *Eastern Greenland* cited above (para. 76), in which the PCIJ decided (in conformity with the Danish demand) that the Norwegian declaration and any steps taken by the Norwegian Government in that respect were "accordingly unlawful and invalid", the steps involved presumably including national as well as international legal aspects. It is submitted that all that international law—and international bodies—are normally fit or enabled to do with regard to internal legal acts, provisions or situations is to declare them to be in violation of international obligations and as such sources of international responsibility and further to declare the duty of reparation, such reparation requiring, *le cas échéant*, invalidation or annulment of internal legal acts on the part of the author State itself.[141]

(b) Doubt remains with regard to the possibility for an international tribunal normally to go beyond a mere declaration of international unlawfulness and directly to annul international legal rules, acts, transactions or situations for the purpose of reparation in the form of restitution in kind. Such a power would be similar, *mutatis mutandis*, to the function exercised by national tribunals ever since Roman times.[142]

(c) The answer, however, does not seem likely to be an unconditionally affirmative one in view of the fact that the effects of decisions of international

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upon the Italian company by the Venezuelan judges were unlawful *vis-à-vis* Italy from the point of view of international law and "must be annulled as reparation"—a statement which seems to exclude an annulment effected directly by the international tribunal within Venezuelan law—the decision of the arbitral tribunal in that case also contains ambiguous dicta such as "In pronouncing the annulment [of the obligations], the Arbitral Tribunal emphasizes that ..." or "the Venezuelan Government shall acknowledge, as reparation, the annulment of the payment obligations imposed on Maison Martini et Cie", such terms seemingly implying the exercise by the tribunal of a direct invalidating or nullifying function (see United Nations, *Reports of International Arbitral Awards*, vol. II, p. 1002).

[141] Explicitly so—and confirming the interpretation of the Special Rapporteur (footnote 139 above)—Graefrath states as follows:

"In general, however, the elimination of an internationally illegal act requires a new action, since wrongfulness according to international law does in general not entail invalidity under domestic law." (*Loc. cit.* (footnote 22 above), p. 78.)

The only reservation the Special Rapporteur has with regard to this statement refers to the words "in general". He is afraid it is always so. An (apparent) exception seems to lie in the cases where an international body is endowed with a so-called supranational function. This is not, however, really an exception, as the direct invalidation or nullity will in fact derive from the national system's sovereign adaptation to the relevant international rules, such adaptation actually raising the international body for the purposes in question to the status of an organ of national law (possibly a "common organ" of two or more States).

The notion of invalidities or nullities decided with direct effect in the municipal law of one or more States derives, in the view of the Special Rapporteur, from optimistic interpretations of instances or "supranational" (but really just operational) functions of international bodies or from transposing into the area of arbitration between States under (public) international law situations which normally present themselves within the framework of international arbitration between private parties or otherwise within the framework of private law.

In the *Eastern Greenland* case, for example, the PCIJ was quite correct, the Special Rapporteur believes, in declaring not just unlawful but also invalid the Norwegian declaration and any other steps taken by that Government at the international legal level. It would not have expressed itself correctly to the extent to which its declaration of invalidity had been meant to cover any legislative, administrative or other steps taken by Norway within its own law. In the latter respect it could only declare international wrongfulness.

By comparison, such decisions as those taken on the *Bryan-Chamorro Treaty* and (for the essential operative part) *Martini* cases seem to be perfectly correct. In both cases the international decision was one of unlawfulness and consequential obligation of the State concerned to proceed accordingly.

The correct view of principle is also taken on the matter by Personnaz (*op. cit.* (footnote 42 above), p. 85).

[142] See footnote 95 above.

tribunals are normally confined to the parties, even where the tribunal is set up by a multilateral instrument. Any act or situation the effects of which should extend beyond the bilateral relations between the parties could not be modified or annulled except by the States themselves unless the relevant instrument or instruments provided otherwise. As noted by Personnaz, the case that seems to be rather close to an international legal restitution directly effected by judicial decision would be (as regards the part of the decision rendered on the basis of article 2, paragraph 1, of the Special Agreement) the judgment of the PCIJ in the *Free Zones of Upper Savoy and the District of Gex* case.[143]

9. QUESTION OF THE IMPOSSIBILITY OF RESTITUTION IN KIND

85. The principal limit to restitution in kind is impossibility, and in the first place factual or material impossibility. Obviously, this is particularly the case for the operations generally classified in the literature as instances of material restitution (see para. 72 above). Total or partial impossibility derives in this case from the fact that the nature of the event and of its injurious effects have rendered *restitutio* physically impossible. Such may be the case either because the object to be restored has perished, because it has irremediably deteriorated or because the relevant state of affairs has undergone a factual alteration rendering physical *restitutio* impossible. Doctrine is unanimous in noting that "there is no difficulty as to physical or material impossibility: it is evident that no *restitutio in integrum* may be granted if, for instance, an unlawfully seized vessel has been sunk";[144] or if the object is permanently lost or destroyed[145] or, as suggested by Salvioli, "if there are no others of the same kind".[146] Alvarez de Eulate speaks of "irreversible situations" and indicates some hypotheses: "dissimilarity between the original situation and the existing situation, especially because of the passage of time ... disappearance or destruction of the property".[147] Mention of material or physical impossibility is also found in practice, especially after the *Chorzów Factory* case.[148] The rule is quite obviously an inescapable consequence of *ad impossibilia nemo tenetur*.

86. Less simple is the question of so-called legal impossibility, where an essential distinction must be made between real or alleged impossibility deriving from international legal obstacles and real or alleged impossibility deriving from municipal law obstacles. In general terms, equally valid for *restitutio* within private law, one may qualify as juridical or legal any obstacle to *restitutio in integrum* deriving from written or unwritten rules of law. Within the framework of international *restitutio*, this definition appears, however, to be rather problematic, precisely in view of the fact that municipal law is not part of international law and its rules are not really relevant as legal rules. This difficulty extends, in a reduced but not negligible measure, to the

[143] See footnote 131 above.

[144] Jiménez de Aréchaga, *loc. cit.* (footnote 10 above), p. 566.

[145] Balladore Pallieri, *op. cit.* (footnote 91 above), p. 72.

[146] G. Salvioli, "La responsabilité des Etats et la fixation des dommages-intérêts par les tribunaux internationaux", *Recueil des cours ... 1929-111* (Paris, Hachette, 1930), vol. 28, p. 237.

[147] Alvarez de Eulate, *loc. cit.* (footnote 42 above), pp. 268-269. For similar views, see: D. P. O'Connell, *International Law*, 2nd ed. (London, Stevens, 1970), vol. II, p. 1115; G. Schwarzenberger, *International Law*, 3rd ed. (London, Stevens, 1957), pp. 655 and 658.

[148] See footnote 40 above.

relationship between the various norms of international law themselves *inter sese,* in that the high degree of relativity characterizing in particular the international rules created by treaty may in certain cases exclude the possibility for the State claiming *restitutio* to oppose a rule of international law (as a source of legal impossibility).

87. In principle, no logical difficulty would seem to arise with regard to the juridical impossibility of *restitutio in integrum* deriving from international law itself. One could theoretically conceive of a situation in which *restitutio* encountered an obstacle in the Charter of the United Nations (Article 103) or in other prevailing norms of written or unwritten law. *Restitutio* would in such cases encounter an obstacle comparable, *mutatis mutandis,* to the difficulty that might arise within any national legal system from the fact that *restitutio* in a civil law case was incompatible with constitutional or otherwise prevailing norms. Another example could be the obstacle represented by that contemporary doctrine which denies the right to *restitutio* in the case of nationalization (a point that will be considered in para. 106 below).[149] The question would in principle be less easy to settle where an obligation to provide *restitutio* in favour of injured State B was in conflict with a coexisting treaty obligation of author State A towards a third State C. In such a case—a typical example of the relativity normally characterizing conventional rules (and obligations) in international law[150]—the impossibility evoked therein (unlike those considered above) would not be opposable by State A—at least as a legal obstacle to *restitutio*—to injured State B. It would be for A to choose whether to wrong B or C, the choice to refuse *restitutio* in favour of injured State B (in order to comply with the obligation towards C) being obviously a factual rather than a legal obstacle.

88. With regard to the real or alleged legal impossibility of *restitutio* deriving from international law, in his second report the previous Special Rapporteur raised the question (already mentioned in his first report) of the relationship between the general rule which puts the author State under the obligation to provide *restitutio in integrum* and the other general rule of international law which, in his opinion, protects every State from the violation of its domestic jurisdiction by claims of other States.[151] It would be notably the latter rule that, by prevailing over the rule which envisages *restitutio,* would allow the author State to replace *restitutio in integrum* by pecuniary compensation. Of course, he added, this would not apply in every case. The setting aside of *restitutio* would be lawful, according to Mr. Riphagen, only where the situation was incontestably one of domestic jurisdiction. *Restitutio* would be inescapable, for example (notwithstanding the contrast with domestic jurisdiction), when "a State wrongfully occupied part of the territory of another State" (because

[149] It will be recalled that, according to some authors, *restitutio* would not be due in the case of nationalization of certain kinds of foreign private property and in the case of revocation of concessions granted to aliens for the exploitation of natural resources. Sec, for example, Graefrath, *loc. cit.* (footnote 22 above), pp. 80-81 and the references cited.

[150] As Anziloltti puts it, "the impossibility may be juridical if restitution cannot be made without violating a norm of international law applicable to the State which seeks restitution" *op. cit.* (footnote 17 above), p. 526

[151] Sec Mr. Riphagcn's second report. While, in fact, he only contemplated, in draft article 4 (which later became draft article 6), material impossibility as a cause of total or partial replacement of *restitutio* by pecuniary compensation, he speaks decidedly of juridical impossibilities. He distinguishes in particular "a legal impossibility, under the national legal system of the author State" and a "legal impossibility under a rule of international law" (*Yearbook ...1981,* vol. II (Part One), pp. 99-100, document A/CN.4/344, paras. 156-157).

"not only should the occupation be ended, but also objects taken away from the occupied zone should be returned.").[152] Nor would the principle of domestic jurisdiction be in conflict, according to Mr. Riphagen, with decisions of international tribunals declaring the nullity of the measures taken by a State with respect to a territory under the sovereignty of another State.[153] Domestic jurisdiction would instead have a negative impact where *restitutio* implied an obligation for the author State in the sphere in which it was not international law but only the municipal law (of the author State) that would be competent to perform a normative function. And it is in that sphere that those situations of municipal law which involve foreign physical or juridical persons would seem to fall.

89. The present Special Rapporteur is unable to share the view that any argument against the generality of the obligation of the author State to provide *restitutio in integrum* could be drawn from the concept of domestic jurisdiction. The concept could not and should not call into question any international obligation to provide restitution in kind, for the same reason that it could not put into question any other (primary or secondary) obligation deriving from international law. The very existence of an international obligation excludes that a claim to compliance therewith by any State could constitute an attempt against the domestic jurisdiction of that State. As regards in particular the domestic law of the author State, it should be kept in mind that there is hardly an international rule compliance with which does not imply some repercussion on the municipal law of the State which is bound by the rule. The belief that domestic jurisdiction, and the principle of non-intervention therein, may interfere in any sense with the obligation to provide restitution in kind or any other form of reparation or, for that matter, mere cessation or discontinuance of wrongful conduct derives from confusion of the right of the injured State to obtain *restitutio* (or any form of redress other than *restitutio*) as a matter of substantive law, on the one hand, with the right of a wrongfully "unsatisfied" injured State to take measures aimed at securing cessation and/or reparation, on the other. As will be seen in due course, unlike the substantive rights to cessation or reparation, such measures must be subject, except in the case of crimes to be determined, to the limit of domestic jurisdiction. Respect for domestic jurisdiction, in other words, is a condition of the lawfulness of an action by a State or by an international body. It is not and obviously could not be, *per la contradizion che nol consente*,[154] a condition of lawfulness of an international legal rule or obligation. The necessity of avoiding any confusion of this nature is another good reason to maintain some separation, amongst the consequences of a wrongful act, between matters pertaining to the substantive (primary or secondary) rights and obligations deriving from a wrongful act, on the one hand, and the rights (*facultés*) and obligations or subjections relating to the measures applicable by the injured State or States in order to secure reparation, obtain satisfaction or inflict punishment, on the other (see paras. 14-15 above).

90. A more serious difficulty arises, however, from a different aspect of the matter, namely the "juridical impossibility" (of *restitutio*) deriving from the municipal

[152] *Ibid.*, p. 95, para. 125. Mr. Riphagen refers expressly to the *Preah Vihear Temple* case, one of the few cases where he sees an incontrovertible application of the principle of *restitutio in integrum, stricto sensu.*

[153] Mr. Riphagen refers to the *Legal Status of Eastern Greenland* case (*ibid.*, para. 126).

[154] "Nor to repent, and will, at once consist, by contradiction absolute forbid" (Dante, *Inferno*, XXVII, 119-120 (trans. H. F. Cary, 1910).

law of the author State. One is clearly confronted here with a problem of conflict between two incompatible exigencies: (*a*) the principle that a State cannot escape its international obligations by invoking rules of its own legal system (article 4 of part 1 of the draft articles); and (*b*) the factual difficulty which the Government of the author State faces when confronted with an obstacle in the rules of the internal legal system under which, as noted, any organ of a *Rechtsstaat* is bound to operate. Considering the above-mentioned principle, it should be for the Government of the author State to extricate itself from the impasse. It would, however, seem reasonable, before attempting any conclusion, to consider the opinions expressed so far in the literature and by the previous Special Rapporteurs.

91. It is useful to recall, in the first place, the opinion of two of the previous Special Rapporteurs, Mr. García Amador and Mr. Riphagen. Although there are some differences, which are reflected in the respective draft articles proposed, their points of view seem to be similar. They both seem to believe that the functioning of *restitutio in integrum* as a remedy (notably the so-called juridical *restitutio)* would be limited by important principles of municipal law, and especially of constitutional law. In particular, the injured State would not be entitled to claim *restitutio* where the application of such remedy would entail the annulment or the non-application of legislative provisions, of administrative acts or definitive judgments within the legal system of the author State. It seems that in such cases it would be inevitable, according to the cited jurists, either (*a*) for *restitutio in integrum* to be replaced *ipso facto* by reparation by equivalent, or (*b*) for the author State to have an uncontestable choice between effecting *restitutio* notwithstanding the legal obstacle, on the one hand, and providing for reparation by equivalent, on the other.

92. The bases of Mr. Riphagen's position with regard to the so-called juridical impossibility resulting from municipal law are not quite clear. It would seem that, according to him, in certain circumstances concerning the qualitative and quantitative gravity of the violation (and, supposedly, of the injury), the author State could be exempted from an obligation to provide *restitutio in integrum* whenever its internal legal system is such as not to permit the discharge of that obligation;[155] and since this would be the case of those "rights belonging to the injured State through its nationals" (and also of "rights belonging to the injured State through the ships or aircraft flying its flag"),[156] he would conclude that "the reparation in such a case should be the equivalent, in pecuniary terms, of the application of internal law ... to the direct victim of the wrongful act, national of the injured State".[157] He does not fail to admit at this point that the solution he thus suggests meets a serious "doctrinal difficulty".[158] He recognizes in fact that,

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[155] Owing, as Mr. Riphagen says, to "the possibly 'substandard' state of the national legal system, both as regards the procedure and as regards the content of the 'remedies' provided by it" (*Yearbook ... 1981*, vol. 11 (Part One), pp. 99-100, para. 156).

[156] The violation of these rights coming into being, according to Mr. Riphagen, as a consequence of conduct falling within "the normal exercise of national jurisdiction, incidentally infringing an international obligation" or as a consequence of the "application of national rules and procedures falling short of international standards" (*ibid., p.* 97, para. 138).

[157] *Ibid.*, p. 90, para. 91.

[158] *Ibid.*, p. 90, para. 93; but, more than a "doctrinal difficulty", this is a structural difficulty, represented by the very nature of the State from the point of view of international law, namely that of an independent, sovereign Power, able to mould and modify its internal legal system as much as may be necessary in order to be able fully to discharge its international obligations.

Strictly speaking, the sovereignty of the author State, comprising its internal legislative power to change, even with retroactive effect and even for a particular case, its internal legal system, seems to exclude the acceptance, on the international plane, of such [juridical impossibility deriving from internal law].[159]

He nevertheless overcomes the "doctrinal difficulty" by asserting that such an impossibility is in fact taken into account by peaceful settlement treaties, in which provision is usually made, in case the administrative action does not achieve the desired result, for a pecuniary compensation or other form of equitable satisfaction. It must be stressed, however, that in his subsequent reports, and particularly in the sixth one, Mr. Riphagen expresses himself more guardedly with regard to the so-called legal impossibility from municipal law. He confines himself to stating that the *ex tunc* measures of *restitutio in integrum* may often raise "problems of fact and of (domestic) law, since the effect of that act may be both factual and legal". But he adds immediately, with considerable clarity, that

On the legal plane, re-establishment of the legal situation with retroactive effect is, on the contrary, always materially possible, though its translation into fact—i.e. the enjoyment and the exercise of the legal situation—raises the same problem. Nevertheless, in so far as its legal consequences are concerned, again the retroactive re-establishment of the legal situation is not materially impossible.[160]

It is obvious here that reference is no longer made to a legal impossibility of *restitutio* deriving from national law, but rather only to a possible factual difficulty in the enjoyment (by the victims of the violation) of the legal situation created by the author State's internationally wrongful action or omission.

93. The positions summarized in the preceding paragraph favouring a restrictive view of *restitutio in integrum* are generally not shared by prevailing doctrine.

(a) According to this doctrine, the difficulties which a State may encounter within its own legal system in discharging an international obligation in its relations with one or more other States are (at least per se) not decisive as a legal justification for failure to discharge such obligation. This general principle, universally accepted with regard to international obligations deriving from the primary rules, would be equally applicable with regard to international obligations deriving from the secondary rules. The same principle should therefore apply with regard to restitutio in integrum as a mode of reparation whenever it encounters a legal obstacle of municipal law. Strict adherence to this principle, at least as a general rule, is to be found for example in Anzilotti,[161] de Visscher,[162] Personnaz,[163] Morelli,[164] and, more synthetically,

[159] *Ibid.*

[160] Mr. Riphagen continues:

"For example, the taking of property, including a transfer of that property (in contradistinction to its physical destruction) may have given rise to legal transactions in relation to that property (or its 'product') which, as such, can be nullified retroactively." (*Yearbook ... 1985*, vol. II (Part One), p. 9, document A/CN.4/389, para. (9) of the commentary to draft article 6.)

[161] According to Anzilotti,

"... one cannot admit an impossibility which stems from the municipal law of the author State unless the opposite conclusion is reached as a result of a correct interpretation of international norms" (*Cours de droit ..., op. cit.* (footnote 17 above), p. 526).

[162] C. de Visscher, "Le déni de justice en droit international", *Recueil des cours ... 1935-11* (Paris, Sirey, 1936), vol. 52, pp. 436-437.

[163] According to Personnaz,

Oeser,[165] Ténékidès,[166] Strupp,[167] Wengler[168] and Berber.[169] Graefrath's more recent position is in principle the same.[170]

(b) Alvarez de Eulate seems to take an explicitly opposite position, close to those of Mr. García Amador and Mr. Riphagen, presumably in agreement with those authors who do not discuss the question of principle and confine themselves to noting that States in fact fail to effect restitutio in integrum because of difficulties inherent in their legal systems. Dealing with impossibility among the causes preventing restitutio, he expressly mentions: "Juridical impossibility; especially because of constitutional obstacles standing in the way of restitutio in integrum".[171]

(c) Other authors tend instead to distinguish among the various legal situations or acts of the author State. They recognize, for example, that the particular difficulty for the State in annulling a definitive judgment—a course which involves constitutional difficulties—would seem to set a limit to the validity of a claim to restitutio in integrum.[172]

94. The opinions summarized in subparagraphs (*b*) and (*c*) above do not seem to be in conformity with general international law. Apart from the majority views presented in subparagraph (*a*), this is also evidenced by the fact that States have recourse to conventional law in order to exclude, modify or restrict the functioning of *restitutio in integrum* in the cases in which such a remedy might give rise to difficulties of a certain magnitude for the author State. Of particular significance in this respect is article 32 of the General Act (Pacific Settlement of International Disputes) of 26 September 1928:[173]

"States will often raise objections relating to their constitutional legislation, the independence of the judicial authorities or treaties they have concluded with other States in order to avoid such a measure [*restitutio in integrum*]",

and, citing Anzilotti, he adds: "the theoretical solution would be to reject such an exception" (*op. cit.* (footnote 42 above), p. 83).

[164] Morelli states:

"An impossibility which stems from the municipal law of the State which has committed the unlawful act is not in that respect relevant under general international law." (*Op. cit.* (footnote 10 above), p. 359.)

[165] E. Oeser, "Völkerrechtsverletzungen und völkerrechtliche Verantwortlichkeit", *Völkerrecht: Grundriss*, E. Oeser and W. Poegel, eds. (Berlin, Staatsverlag der DDR, 1983), p. 245.

[166] G. Ténékidès, "Responsabilité internationale", in Dalloz, *Répertoire de droit international* (Paris, 1969), vol. II, p. 790.

[167] Strupp, *op. cit.* (footnote 42 above), pp. 209-210.

[168] W. Wengler, *op. cit.* (footnote 42 above), p. 511.

[169] F. Berber, *Lehrbuch des Völkerrechts* (Munich, C. H. Beck, 1977), vol. Ill, 2nd rev. ed., p. 25.

[170] Graefrath states:

"As a rule it is left to the State obliged to make restitution to decide in which way according to its legal order it would fulfil this obligation. It is its duty to find out a way."

He adds, quoting Wengler: "Impediments set against such a bringing-up or restitution by national law could in general be left unnoticed under international law". (*Loc. cit.* (footnote 22 above), p. 78.)

Along the same lines, see B. Graefrath, E. Oeser and P. A. Steiniger, *Völkerrechtliche Verantwortlichkeit der Staaten* (Berlin, Staatsverlag der DDR, 1977), p. 174.

[171] Alvarez de Eulate, *loc. cit.* (footnote 42 above), p. 269.

[172] See Zemanek, "Die völkerrechtliche Verantwortlichkeit ...", *loc. cit.* (footnote 43 above), p. 378; and, in particular, H. Urbanek, "Die Unrechtsvolgen bei einem völkerrechtsverletzenden nationalen Urteil; seine Behandlung durch internationale Gerichte", *Österreichische Zeitschrift für öffentliches Recht* (Vienna), vol. 11, No. 1 (1961), pp. 70 *et seq.*

[173] League of Nations, *Treaty Series*, vol. XC1II, p. 343.

Article 32

If, in a judicial sentence or arbitral award, it is declared that a judgment, or a measure enjoined by a court of law or other authority of one of the parties to the dispute, is wholly or in part contrary to international law, and if the constitutional law of that party does not permit or only partially permits the consequences of the judgment or measure in question to be annulled, the parties agree that the judicial sentence or arbitral award shall grant the injured party equitable satisfaction.

Prior to the General Act of 1928, States had drafted such a provision in article 7 of the 1907 draft convention relative to the creation of an international prize court;[174] another example was article 10 of the 1921 Treaty of Arbitration and Conciliation between Germany and Switzerland.[175]More recently, the same restrictive clause was introduced in article 50 of the 1950 European Convention on Human Rights:[176]

Article 50

If the court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the present Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the court shall, if necessary, afford just satisfaction to the injured party.

and in the 1957 European Convention for the Peaceful Settlement of Disputes.[177] It has been noted that, in conventional instruments providing for recourse to third-party settlement procedures, provisions such as these are adopted in order to prevent or to reduce the difficulties which might arise in the course of the reparative process from the internal legal system of the author State. Such instruments permit the contracting States "to reject a claim for reparation if it conflicts with their constitutional law, or limit claims for reparation to those which can be satisfied through the administrative channel";[178] such provisions being "clearly intended to protect the internal legal system from outside interference"[179] (i.e., in the Special Rapporteur's view, interference by other States or international bodies).

95. However, the very fact that States deem it necessary expressly to agree in order to prevent restitutive measures from gravely affecting fundamental principles of municipal law seems to indicate that they believe that at the level of general international law a correct discharge of the author State's obligations—including *restitutio in integrum*—must prevail over internal legal obstacles. Such a conclusion finds support in the practice of States and international decisions. An example of this is the dispute between Japan and the United States (1906) over the discriminatory policies of the Administration of California with regard to the availability of education institutions for children of Asiatic origin, a dispute that was settled in favour of the Japanese claim by the revision of the California legislation.[180] Mention has already been made (see para. 76 above) of the *Article 61 (2) of the Weimar Constitution* case concerning the participation of Austrian delegates in the Reichsrat, wherein no less than a constitutional amendment was provided for in order to ensure the full discharge of the obligation deriving from article 80 of the Treaty of Versailles.

[174] See J. B. Scott, ed., *The Hague Conventions and Declarations of 1899 and 1907* 3rd ed. (New York, Oxford University Press, 1918), p. 188.

[175] League of Nations, *Treaty Series*, vol. XII, p. 271.

[176] See footnote 28 above.

[177] United Nations, *Treaty Series*, vol. 320, p. 243.

[178] Bissonnette, *op. cit.* (footnote 72 above), p. 20.

[179] Graefrath, *loc. cit.* (footnote 22 above), p. 78.

[180] See R. L. Buell, "The Development of the anti-Japanese agitation in the United States", *Political Science Quarterly* (New York), vol. 37(1922), pp. 620 *et seq.*

Another instance is the *Crenner-Erkens* case (1961), in which two Belgian diplomats were arrested and detained by the Katanga police and later expelled. The orders of expulsion were annulled following representations from the vice-dean of the diplomatic corps at Léopoldville.[181] Leaving aside, in view of their special character (although they are not without interest), treaties providing for the annulment of measures taken by belligerent States against United Nations nationals,[182] one very well-known proceeding is the *Martini* case, already mentioned, between Italy and Venezuela, in which the arbitral tribunal decided that, by way of reparation, the payment obligations imposed on the Maison Martini should be annulled: "In annulling them, the Arbitral Tribunal emphasizes that a wrongful act has been committed and applies the principle that the consequences of the wrongful act must be wiped out".[183] Also of relevance are the *Peter Pázmány University* and *Legal Status of Eastern Greenland* cases. In the former, the PCIJ specified that the property to be returned should be "freed from any measure of transfer, compulsory administration, or sequestration" (see para. 81 above). In the latter case it was decided, as noted above (para. 76 *in fine),* that the declaration of occupation promulgated by the Norwegian Government on 10 July 1931, and any steps taken in that respect by the Norwegian Government, constituted a violation of the existing legal situation and were accordingly unlawful and invalid.

96. The matter has been covered, although without particular reference to *restitutio,* by some draft articles codifying the rules governing international responsibility prepared by international legal organizations or conferences. For instance, article 5 of the draft code of international law prepared in 1926 by the Japanese branch of the International Law Association[184] provides:

Article 5

A State cannot evade the responsibility established by the present Rules for reasons of its own constitutional law or practice.

Similarly, article 2 of the draft convention on responsibility of States for damage done in their territory to the person or property of foreigners, prepared by Harvard Law School in 1929,[185] provides:

Article 2

The responsibility of a State is determined by international law or treaty, anything in its national law, in the decisions of its national courts, or in its agreements with aliens, to the contrary notwithstanding.

Article 5 of the draft articles on the responsibility of States for damage caused in their territory to the person or property of foreigners adopted in first reading by the Third Committee of the Conference for the Codification of International Law (The Hague, 1930)[186] reads:

Article 5

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[181] *Revue générale de droit international public* (Paris), vol. 65 (1961), p. 813.

[182] See art. 78, para 2, of the 1947 Treaty of Peace (see footnote 86 above). See also, e.g., chap. V (External restitution), art. 3, para. 1, of the Convention on the Settlement of Matters Arising out of the War and the Occupation, of 26 May 1952 (as amended by Schedule IV to the Protocol on the Termination of the Occupation Régime in the Federal Republic of Germany, of 23 October 1954) (United Nations, *Treaty Series,* vol. 332, p. 219).

[183] United Nations, *Reports of International Arbitral Awards,* vol. II, p. 1002.

[184] Reproduced in *Yearbook... 1969,* vol. II, p. 141, document A/ CN.4/217 and Add.l, annex II.

[185] Reproduced in *Yearbook... 1956,* vol. II, p. 229, document A/ CN.4/96, annex 9.

[186] League of Nations, doc. C.351(*c*)M.145(*c*).1930.V; reproduced in *Yearbook ... 1956,* vol. II, p. 225, document A/CN.4/96, annex 3.

A State cannot avoid international responsibility by invoking (the state of) its municipal law.
...

More explicitly, paragraph 2 of article 9 of the draft convention on the responsibility of States for injuries caused in their territory to the person or property of aliens, prepared in 1930 by the Deutsche Gesellschaft für Völkerrecht,[187] provides:

2. Difficulties in effecting such re-establishment, and in particular the necessity of expropriating and compensating third-party assignees, do not preclude the right to demand such re-establishment.

97. It must be noted, nevertheless, that difficulties arising from municipal law have been taken into account, in connection with the possibility of *restitutio,* on a number of occasions. In the *Junghans* case,[188] the arbitral tribunal held, in its award of 7 July 1939, that the Lunca-Sprie forest had been unlawfully expropriated from the German national Junghans by the Romanian Government and that the latter was to proceed to *restitutio* in favour of the German heirs of Junghans. It added, however, though not in very clear terms, that if *restitutio* was not effected within two months, the Romanian Government would be liable to reparation by equivalent. The award of 2 May 1929 in the *Walter Fletcher Smith* case[189] was less ambiguous. While maintaining that the restitution of the immovable property expropriated by the Cuban Government should not be considered inappropriate, the arbitrator pronounced himself, in "the best interests of the parties and of the public" for compensation. Similarly, in the *Greek Telephone Company* case (1935)[190] the arbitral tribunal ordered the *restitutio* of the telephone line to the concessionaire; it asserted, however, that the author State could provide instead for a pecuniary compensation for important State reasons.[191] Indemnification was also accepted, in lieu of the *restitutio* originally decided (see para. 66 above), in the *Mélanie Lachenal* case,[192] the Franco-Italian Conciliation Commission having agreed that *restitutio* would require difficult internal legal procedures. More recently, the parties in the *Aminoil* case agreed in the arbitration agreement of 23 June 1979 that restoration of the *status quo ante* following the annulment of the concession by Kuwaiti decree would be impracticable in any event; they agreed also to submit to arbitration the question (*an* and *quantum*) of compensation.[193]

98. In conclusion, it is undeniable that the legal system of a State, which is bound up in close interaction with the political, economic and social régime of the nation, may frequently be of relevance to the effective application of the remedy of restitution in kind. As Anzilotti put it, one could not reasonably disagree "that there may be obstacles of an internal nature which the States are prepared to take into account to

[187] Reproduced in *Yearbook... 1969*, vol. II, p. 150, document A/ CN.4/217 and Add.l, annex VIII.

[188] United Nations, *Reports of International Arbitral Awards,* vol. Ill, p. 1856.

[189] *Ibid.*, vol. II, p. 918.

[190] See J. G. Wetter and S. M. Schwebel, "Some little known cases on concessions", *The British Year Book of International Law, 1964,* vol. 40, p. 216, at p. 221; cited as a precedent in the *BP* v. *Government of Libya* case (*loc. cit.* (footnote 51 above), p. 344).

[191] The reason of impossibility, however, was not very clearly indicated.

[192] Decision No. 172 of the Conciliation Commission of 7 July 1954 (United Nations, *Reports of International Arbitral Awards,* vol. XIII, pp. 130-131).

[193] Arbitration between Kuwait and the American Independent Oil Company (Aminoil); see *International Legal Materials* (Washington, D.C.), vol. 21 (1982), p. 976, at p. 979.

replace restitution in kind by compensation".[194] Nevertheless, this should not be taken to mean that general international law acknowledges a juridical impossibility in a proper sense in any obstacle qualifying as a juridical difficulty or impossibility under the municipal law of the author State. In other words, the obligation to provide *restitutio* is not, as a matter of general international law, a form of reparation subject to the municipal legal system of the author State and to the exigencies that such a system is intended to satisfy. Any State which is well aware of its international obligations—secondary as well as primary—is bound to see to it that its legal system, not being opposable to the application of international legal rules, is adapted or adaptable to any exigencies deriving from such rules also to the extent necessary for it to fulfil an obligation to "make good" by *restitutio.* Of course, a State is entitled to preserve its political, economic or social system from any unlawful attempt against its sovereignty or domestic jurisdiction on the part of other States. Nevertheless, it cannot feel also entitled to oppose its *interna corporis* as legal obstacles (in a narrow sense) to the fulfilment of an international obligation to provide *restitutio.* The juridical obstacles of municipal law are, strictly speaking, factual obstacles from the point of view of international law. Hence, they should not be treated as strictly legal obstacles in the same sense as obstacles deriving from international legal rules would have to be treated as such (see sect. 5 below).

10. EXCESSIVE ONEROUSNESS

99. A circumstance which differs from legal or factual impossibility, although not unrelated thereto, is the incidence of excessive onerousness of restitutive measures on the obligation of the author State to provide *restitutio in integrum.* A number of writers assert in fact that, even if the re-establishment of the *status quo ante* or of the situation that would have existed if the wrongful act had not occurred would be physically and/or juridically possible, the injured State would not be entitled to refuse the substitution of pecuniary compensation for *restitutio* whenever the latter proved excessively onerous for the State which had committed the wrongful act. Verzijl, for example, citing Verdross in support, contends that:

> ... it would be unreasonable to allow a claim for restitution *in integrum* if this mode of reparation would impose a disproportionate burden upon the guilty State and if the delinquency can also be atoned by a pecuniary indemnification.[195]

A similar position is taken by Personnaz,[196] Nagy, [197]Čepelka,[198] Berber,[199] and Mann.[200]

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[194] Anzilotti, *Cours de droit international*, *op. cit.* (footnote 17 above), p. 526.

[195] Verzijl, *op. cit.* (footnote 100 above), p. 744.

[196] According to Personnaz, "the author of the harmful act should not be required to make too great an effort, out of proportion with the gravity of his delinquency". (*Op. cit.* (footnote 42 above), pp. 89-90.)

[197] Nagy, *loc. cit.* (footnote 22 above), p. 177.

[198] Čepelka states:

"... it is the duty of the injured State to accept the subsidiary indemnification (even though *restitutio in integrum* would be possible), if such restitution would entail costs out of proportion with the damage caused. Therefore the attitude of the State which persists in demanding restitution in such a case, although offered corresponding indemnification, should be characterized as an abuse of right." (*Op. cit.* (footnote 90 above), p. 28.)

[199] Berber, *op. cit.* (footnote 169 above), p. 25.

100. The subject has been taken up in earlier draft articles of codification. Article 7 of the draft treaty concerning the responsibility of a State for internationally illegal acts, prepared in 1927 by Karl Strupp,[201] provides:

Article 7

An injured State is not unlimited in its election of remedies. Such remedies may not be uncommensurate in severity with the original injury or by their nature be humiliating.

and according to paragraph 3 of article 9 of the draft convention of the Deutsche Gesellschaft für Völkerrecht, mentioned above (see para. 96 *in fine*):

3. Re-establishment may not be demanded if such a demand is unreasonable, and in particular if the difficulties of re-establishment are disproportionate to the advantages for the injured person.

101. Arbitral jurisprudence offers examples in which it was held that *restitutio in integrum* was not practicable. One such instance is the *Forests in Central Rhodopia* case (see para. 111 below), wherein the judge, while admitting in principle a preference for *restitutio*, considered it to be less practicable than indemnification, notwithstanding the difficulties the latter would also entail. It is not quite certain, however, that the bases for his choice included excessive onerousness.[202] Two decisions of the Franco-Italian Conciliation Commission are also worth recalling. In the *Industrie Vicentine Elettro-Meccaniche (IVEM)* case it was held that, although in principle the dispossessed French company would be entitled to obtain restitution of 20,075 IVEM shares,

The restitution of the 20,075 shares, as a "corpus", is certainly possible, but shares represent participation in net worth. Now, the net worth of IVEM is no longer what it was in 1942, and not only because of the incessant fluctuation to which the elements of the assets and liabilities of an industrial enterprise are necessarily subject. We are dealing here with something different.[203]

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[200] Mann, *loc. cit.* (footnote 10 above), pp. 4-5.

[201] Reproduced in *Yearbook ... 1969,* vol. II, p. 151, document A/ CN.4/217 and Add.l, annex IX.

[202] According to the award:

"It was suggested during the proceedings that if the claim was approved in whole or in part, the Respondent should be obliged to restore the forests to the claimants. The Claimant nevertheless left it to the discretion of the Arbitrator to determine the appropriateness of such restitution.

"The Arbitrator considers that the Respondent should not be placed under the obligation to restore the forests to the claimants. A number of reasons militate in favour of this attitude. The claimants, whose claim, submitted by the Greek Government, has been considered receivable, are partners in a commercial firm in which others are likewise partners. It would therefore be inadmissable to oblige Bulgaria to make integral restitution of the forests in dispute. Furthermore, it is highly unlikely that the forests are in the same state as they were in 1918. Since most of the rights over forests consist in rights to fell a fixed amount of timber, which is to be taken during a specific period, an award calling for restitution would be conditional upon consideration of the question whether it is currently possible to obtain the quantity ceded. Such an award would also require the consideration and settlement of rights benefiting other persons which might have arisen in the mean time and might, or might not, be consistent with the rights of the claimants.

"The only practical solution to the dispute therefore consists in imposing on the Respondent the obligation to pay an indemnity. However, this too involves great difficulties, owing to the special circumstances of the present dispute." (United Nations, *Reports of International Arbitral Awards,* vol. Ill, p. 1432.)

[203] Decision No. 125 of the Conciliation Commission of 1 March 1952 (*ibid.,* vol. XIII, p. 349).

In the *Bonnet-Tessitura Serica Piemontese* case, the claim of a French company to *restitutio* was not met by the Conciliation Commission, which, "considering that the proposed indemnity was applied in place of restitution that was legally possible but not expedient in practice", concluded that Italy was only bound to pay compensation.[204]

102. It seems, therefore, not unfounded to believe that an excessive *onus* to be sustained by the author State in order to provide *restitutio*—presumably to be understood as an *onus* not proportional to the wrongfulness of the act and the injury caused—does represent a limit to the author State's obligation to effect *restitutio in integrum.* It may be added that excessive onerousness could well be understood as a general kind of obstacle to *restitutio.* As such, it would embrace not only the kind of obstacles which are generally classified as material or factual but also those so-called legal obstacles of municipal law which, unlike any obstacles deriving from international law, are, strictly speaking, factual obstacles. It is hardly necessary to recall once again the famous dictum of the PCIJ according to which the rules of the municipal law of a State are "facts" from the point of view of international law.[205] Whatever the comprehensiveness of the concept, any plea of excessive onerousness on the part of an author State in order to escape a claim to *restitutio* should presumably be the object of evaluation, on the basis of equity and reasonableness. Any attempt at codification or progressive development of international law in the matter could therefore only consist of a general rule indicating elements, factors or circumstances on the basis of which States or international tribunals should attain an equitable balance between the conflicting interests present in each case.

103. It is important to stress at this stage that, since the raison d' être of the limit of excessive onerousness resides in the principle of proportionality between the seriousness of the violation and injury, on the one hand, and the quality and quantity of reparation, on the other, the limit in question (dealt with in paras. 99-102 above) seems bound to assume a different weight according to the qualitative and quantitative dimension of the wrongful act for which reparation is sought. The limit should thus operate in a different way according to the kind of violation and according to whether one is dealing with a delict or a crime. While likely to reduce its impact in the case of the most serious among the wrongful acts classified as delicts, excessive onerousness should have an even lower impact in the case of crimes, with any impact probably vanishing altogether in the case of such crimes as aggression or genocide. Indeed, in the case of wrongful acts of such nature, from the point of view of both degree of unlawfulness and extent of injury, it would be inequitable for the effort of reparation incumbent upon the author State—including specifically the fullest restitution in kind—to be considered excessive in proportion to the violation committed by that State. This is a point to be explored in depth by the Commission when it applies itself *ex professo* to the analysis of the legal consequences of international crimes.

[204] Decision No. 120 of the Conciliation Commission of 3 March 1952 (*ibid.*, p. 87).

[205] See, in para. 82 above, an extract from the judgment of the PCIJ of 25 May 1926 in the case concerning *Certain German interests in Polish Upper Silesia* (*Merits*) (*P.C.I.J., Series A, No.* 7). See also Anzilotti, *Cours de droit international*, *op. cit.* (footnote 17 above), p. 527.

11. *RESTITUTIO* AND THE TREATMENT OF ALIENS

104. Although the Commission long ago rightly abandoned the notion that the codification of international responsibility could be confined to State responsibility for injury to aliens, the problem of *restitutio* does call for a few considerations concerning this particular area. For his part, the previous Special Rapporteur devoted to the subject the special provision of draft article 7, which is discussed below (see paras. 120-122). It is first necessary to examine the matter from the standpoint of the literature, the practice of States and jurisprudence.

105. Although a considerable number of the earlier authors often focused, not without reason, on international responsibility for violations of the rules concerning the treatment of aliens, contemporary doctrine does not seem to hold that this field should in principle be covered by a special régime. While favoured by a few, the concept of a distinct régime envisaged by Mr. Riphagen in draft article 7 has been the object of criticism not only on the part of members of the Commission[206] but from other quarters as well. For example, while Zemanek[207] seems to take a favourable attitude, Graefrath[208] is decidedly critical. The practice discussed above (see paras. 76 *et seq.)* does not seem to justify the identification of special rules concerning the treatment of aliens except in the "neutral" sense of showing a merely numerical prevalence of cases concerning the treatment of aliens over cases concerning other areas of State responsibility. Although favourable to the "specialty" of the subject, Zemanek himself does not seem to mention any significant practice in support of a diversity of *régime.*[209] He only quotes in support of Mr. Riphagen's draft article 7 the case of *Religious Property* expropriated by Portugal and the *compromis* concluded by that country with France, the United Kingdom and Spain. Of course, that case was not settled by *restitutio in integrum;* but this was because the tribunal declared the claims

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[206] See footnote 247 below.

[207] According to Zemanek:

"A free choice nevertheless exists when the internationally wrongful act constitutes a breach of an international obligation concerning the treatment of aliens ... e.g. by a confiscation of foreign property. The formula proposed by the Special Rapporteur is in conformity with the tenor of the majority of judicial decisions and published works of legal authors". ("La responsabilité des Etats ...", *loc. cit.* (footnote 74 above), p. 70.)

[208] Graefrath states:

"... contrary to Riphagen, I would not assume that a general rule or practice can be proved that in cases in which the infringed right belongs to a Slate, through 'its nationals restitution generally cannot be required'. It seems to me that in such cases, too, we have to start from a duty of restitution that, however, can be refused by the State concerned if it would interfere in the competencies of its legal order. In so far, to my mind, Article 32 of the General Act for the Pacific Settlement of International Disputes seems to give the right orientation. Today, it is even of more importance than 50 years ago, because today we have to deal in many cases with States of very different social systems." (*Loc. cit.* (footnote 22 above), p. 82.)

A rejection of the "special régime" proposed by Mr. Riphagen for the consequences of wrongful acts affecting foreign nationals is perhaps implied in the generally critical view expressed by Simma on the concepts of "subsystem" or "special régime" proposed by the previous Special Rapporteur (B. Simma, "Self-contained régimes", *Netherlands Yearbook of International Law, 1985,* vol. 16, pp. Ill *et seq.,* and "Grundfragen der Staatenverantwortlichkeit in der Arbeit der International Law Commission", *Archiv des Völkerrechts* (Tübingen), vol. 24, No. 4 (1986), pp. 385 *et seq.*).

[209] See footnote 207 above.

to be inadmissible as the claimants had not succeeded in demonstrating that they were nationals of the States involved.[210] Therefore the case does not seem to be relevant.

106. It should rather be stressed that provisions such as that of the present draft article 7 are presumably dictated by the intent of putting the author State in a more favourable situation, not so much in the field of treatment of aliens in general as in the particular area of foreign investment. It is well known that in this particular area international law has been undergoing—also under the influence of a number of very important resolutions of the General Assembly[211]—a rather marked evolution stressing the lawfulness of nationalization. One of the consequences seems to have been the shifting of the main object of dispute from the question whether an indemnification is necessary for a nationalization measure to be lawful to the quantitative determination of the compensation and to the issue whether there is an international standard in that respect. In so far as the problem is of interest for our present purposes—and with no intention of treating such important issues lightly—it is perhaps worth noting that any provision concerning indemnification has really to do with the content of the so-called primary rule on the lawfulness of expropriation and the conditions thereof rather than the content of the secondary rule on reparation. On such a basis it should be possible to differentiate nationalization measures according to whether they are carried out lawfully, i.e. with indemnification, or wrongfully, i.e. without indemnification (setting aside the question of *quantum*). However, it is still a matter of controversy whether in the latter case the injured State is entitled to *restitutio.* To recall just a few of the numerous writers who have dealt with the question, Kronfol favours separating the content of the primary rule from the question of reparation, and consequently admitting the obligation to provide *restitutio.*[212] The opposite view is held by Baade.[213] As regards judicial practice, it is useful to recall the discordant decisions rendered in the cases involving Libya and foreign oil companies discussed above (see para. 46). It must be stressed here that the protection of the freedom of States to proceed to any internal reform—which is clearly the main concern of those who tend to restrict the admissibility of claims to *restitutio*—might well be adequately secured by having recourse to the limit of excessive onerousness. It was noted earlier that excessive onerousness should cover hypotheses of profound, radical reforms of the political, economic, social and legal system of a State—reforms the preservation of which would justify (assuming they involve a wrongful act to the detriment of another State) the substitution of pecuniary compensation for *restitutio.*

107. If the Special Rapporteur has read correctly the earlier reports and records, one of the main factors which led his predecessor to envisage a special régime for wrongful acts affecting the treatment of nationals of a foreign State was the wish to

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[210] Decision of 4 September 1920 (United Nations, *Reports of International Arbitral Awards*, vol. 1 (Sales No. 1948.V.2), pp. 7 *et seq.*).

[211] It is hardly necessary to recall such General Assembly resolutions as resolutions 1803 (XVII) of 14 December 1962 and 3171 (XXVIII) of 17 December 1973 on permanent sovereignty over natural resources; the Declaration on the Establishment of a New International Economic Order (resolution 3201 (S-VI) or 1 May 1974); and the Charter of Economic Rights and Duties of States (resolution 3281 (XXIX) of 12 December 1974). On the principle of self-determination and permanent sovereignty over natural resources as related to the issue of nationalizations in international law, see R. Bystricky, "Notes on certain international legal problems relating to socialist nationlizalion", *VIth Congress of the International Association of Democratic Lawyers* (*Brussels, 22-25 May 1956*) (Brussels, [n.d.]), p.15.

[212] Z. Kronfol, *Protection of Foreign Investment* (Leyden, Sijthoff, 1972), pp. *95 et seq.*

[213] Baade, *loc. cit.* (footnote 59 above), pp. 801 *et seq.*

differentiate internationally wrongful acts according to whether they affected another State "directly" or "indirectly". The latter case would precisely be, according to Mr. Riphagen, that of wrongful acts affecting the nationals (or even the ships or aircraft) of another State.[214] If the Special Rapporteur's understanding is correct, Mr. Riphagen established a distinction between wrongful acts violating a right belonging "directly" to a foreign State and wrongful acts violating a right appertaining to a foreign State "indirectly", namely through its nationals (or its ships or aircraft) abroad.[215] For the purpose of *restitutio,* the impact of this distinction would be, in his view, that while an obligation to provide restitution in kind exists as the primary form of reparation for wrongful acts injuring a foreign State directly, it would not exist— in the sense that the author State itself would have a choice between *restitutio* and reparation by equivalent—in the case of wrongful acts injuring a State indirectly. The reason why the doctrine of State responsibility would not be aware (or would be insufficiently aware) of the "specialty" of the régime of *restitutio in integrum* in the case of injury to aliens (namely of alleged indirect injury to their State) would be that the measures taken by the author State in such cases (release of persons, restitution of ships or of documents or moneys) would be wrongly classified as measures of restitution in kind. They would be in reality, he felt, cases of cessation of the wrongful conduct.[216] The fact that in practice such measures have been resorted to by States or by international tribunals would thus not prove that in cases of injury to foreign nationals the remedy of restitution in kind was applied. It would merely prove cessation of the wrongful conduct and belief in the existence of an obligation to that effect.

108. In the opinion of the Special Rapporteur, there is no justification either for a distinction between direct and indirect injury to a State or for the said interpretation of the measures resorted to (by the author State) in cases of wrongful detention of persons or objects. As regards the distinction, he is unable to see in what sense the injury caused to another State by the wrongful detention of persons or objects appertaining to such State is, under international law, a less direct injury to the State in question than the injury brought about otherwise, for example by a violation of that State's frontier, embassy, ambassador or diplomatic bag. In either case there may be different degrees of gravity of the wrongful act and of the injury, depending on the number of persons detained, the extension of territory violated, the kind of objects involved and the kind of actions or omissions for which in each case the author State is responsible. In either case, however, from the international point of view, there is an internationally wrongful act (of a State) infringing an international right (of a State) and inflicting an internationally wrongful injury to the international person of a State. As regards the interpretation of the measures resorted to— such as the release of persons or the return of objects or goods, including ships or aircraft—it does not seem that it would be correct to understand them merely as cases of cessation of the wrongful act or conduct. They seem surely to be meant as—and in any case to consist of—cessation, on the one hand, and restitution in kind, on the other, at the same time.

[214] A second reason would seem to lie in Mr. Riphagen's understanding of the impact of domestic jurisdiction in the field of international responsibility. Although the Special Rapporteur is not sure he understands Mr. Riphagen correctly on that point, it is discussed above (see paras. 88-89) in connection with the problem of impossibility of *restitutio in integrum.*

[215] This distinction was maintained by Mr. Riphagen from the time he first formulated it, in his second report (*Yearbook ...1981,* vol. II (Part One), pp. 90-91, document A/CN.4/344, para. 96), up to the presentation of draft article 7 in his sixth report (*Yearbook ... 1985,* vol. II (Part One), p. 10, document A/CN.4/389, sect. I).

[216] See footnote 57 above.

Restitution in kind will be thus absorbed, so to speak, into cessation and vice versa, further reparative measures being of course not excluded (see paras. 48-52 above). Neither the allegedly indirect injury involved nor the interpretation of the relevant practice would therefore justify a special treatment, for the purposes of *restitutio in integrum,* of wrongful acts affecting persons or objects other than the State to which they belong.

12. THE QUESTION OF CHOICE BY THE INJURED STATE

109. One last problem is the admissibility of a *faculté de choix* of the injured State between *restitutio* and pecuniary compensation. A substantial part of doctrine favours a right of choice; this includes such authors as Decencière-Ferrandière,[217] Personnaz,[218] Alvarez de Eulate,[219] Mann,[220] Nagy,[221] O'Connell,[222] Wengler[223] and, with a certain caution, Graefrath.[224] Others do not pronounce themselves expressly but they seem to imply it.[225]

110. As for practice, elements supporting the doctrine seem to be present in the *Chorzów Factory* case. Germany had started with a claim to *restitutio* but later claimed pecuniary compensation on the strength of the consideration that "the Chorzów factory, in its present condition, no longer corresponded to the factory as it was before the taking over in 1922".[226] *Restitutio* would thus have been of no interest to the claimant.

111. In arbitral practice, mention should be made of the *Forests in Central Rhodopia* case, wherein the arbitrator, while deciding in favour of pecuniary compensation rather than *restitutio,* noted (implying perhaps a right of choice by the injured State) that "the claimant nevertheless left it to the discretion of the Arbitrator to determine the appropriateness of such restitution".[227] In a sense, the claimant had left to the judge the task of exercising its *faculté de choix.* The *Zuzich* case (1954), which was settled by the Foreign Claims Settlement Commission of the United States,[228] seems to be more clearly reflective of the right of choice by the injured State. According to that Commission,

> ... once it is established that the Yugoslav Government took the property within the period covered by the Agreement, it is not warranted in taking unilateral action to compensate claimants in some degree

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[217] A. Decencière-Ferrandière, *La responsabilité internationale des Etats à raison des dommages subis par des étrangers* (Paris, Rousseau, 1925) (thesis), pp. 245 *et seq.*

[218] Personnaz, *op. cit.* (footnote 42 above), p. 91.

[219] Alvarez de Eulate, *loc. cit.* (footnote 42 above), p. 270.

[220] Mann, *loc. cit.* (footnote 10 above), p. 4.

[221] Nagy, *loc. cit.* (footnote 22 above), p. 176.

[222] O'Connell, *op. cit.* (footnote 147 above), pp. 1114 *et seq.*

[223] Wengler, *op. cit.* (footnote 42 above), p. 510.

[224] Graefrath, *toe. cit.* (footnote 22 above), p. 82.

[225] Čepelka, *op. cit.* (footnote 90 above), p. 28; Gomez-Robledo, *loc. cit.* (footnote 43 above), p. 355.

[226] *P.C.I.J., Series A, No. 9,* p. 17.

[227] United Nations, *Reports of International Arbitral Awards,* vol. III, p. 1432.

[228] Under the agreement of 19 July 1948 between the United States of America and Yugoslavia regarding pecuniary claims of the United Slates and its nationals (United Nations, *Treaty Series,* vol. 89, p. 43).

by restoring their property unless they waive dollar compensation by this Commission and accept restitution. The fact that claimants have filed a claim for compensation of course militates against the notion that they are willing to accept restitution. Moreover, since the settlement of this claim was effected by an Agreement with Yugoslavia, it would not appear that the Yugoslav Government could thereafter elect to settle it by restitution unless such method of settlement is acceptable to the claimant and to the Government of the United States. We hold, therefore, that claimants are eligible to receive compensation under the Agreement, and the only remaining question is the value of the property.[229]

As examples of a right of choice, Mann[230] cites the *Barcelona Traction* case,[231] where Spain did not question Belgium's choice to claim compensation, rather than *restitutio;* and the *Interhandel* case,[232] where Switzerland claimed *restitutio* by the United States of America of the assets of a Swiss company.

112. Authors at times appear reluctant to admit a right of choice for the injured State for fear that this might lead to abuse.[233] Such a misgiving, which is not without justification, could perhaps be lessened by the consideration that the *faculté de choix* should be set aside where *restitutio* would be excessively onerous for the wrongdoing State (see sect. 5 above). Indeed, the opposite could also occur, with the injured State claiming pecuniary compensation even where *restitutio in integrum* was immediately possible with no particular difficulty. It is not easy to take a stand on the issue, although in one instance—the *Zuzich* case—the tribunal decided in favour of a right of choice (at least by the affected nationals of the injured State). No other pertinent cases have been found. It is necessary to point out, however, that (*a*) it was the author State that altered the normal course of its legal relationship with the injured State and it seems inevitable that it should bear any negative consequences of its behaviour; and (*b*) pecuniary compensation is always possible and the problem of its excessive onerousness may arise only in connection with *quantum,* a point to be determined according to rules that should be considered in due course with all the necessary prudence in order to avoid abuse. In the light of the foregoing, it does not seem that the author State would be inequitably exposed to abuses by the admission of a right of choice on the part of the injured State. It goes without saying that option for *restitutio* on the part of the injured State does not exclude resort to compensation whenever restitution is partially impossible. The two remedies are obviously susceptible of combined application. But this matter could be taken up only in connection with compensation by equivalent.

113. It must be stressed further that the right of choice on the part of the injured State should not be unlimited. Whenever *restitutio* is due by the author State for a violation of an imperative rule[234] or, more generally, of a rule setting forth an *erga omnes* obligation, it cannot be renounced (in favour of pecuniary compensation) by the directly injured State or States. In such a situation the only proper response of the

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[229] See M. M. Whiteman, *Digest of International Law* (Washington, D.C.), vol. 8 [1967], p. 1201.

[230] Mann, *loc. cit.* (footnote 10 above), pp. 4-5.

[231] *Barcelona Traction, Light and Power Company, Limited,* judgment of 5 February 1970, *I.C.J. Reports 1970,* p.3.

[232] *I.C.J. Reports 1959,* judgment of 21 March 1959, p. 6.

[233] See Graefrath, *loc. cit.* (footnote 22 above), p. 82; C. Eagleton, *The Responsibility of States in International Law* (New York, University Press, 1928), pp. 182-183; definition of the term *Wiedergutmachung* in K. Strupp, *Wörterbuch des Völkerrechts,* 2nd ed., rev. by H. J. Schlochauer (Berlin, Walter de Gruyter, 1962), vol. Ill, pp. 843-844; Berber, *op. cit.* (footnote 169 above), p. 25.

[234] Graefrath, *loc. cit.*, pp. 81-82

law would be to place upon the author State the obligation to provide full restitution in kind. In conformity with the outline of work tentatively submitted in chapter I, this matter should be developed within the framework of the chapter devoted to the particular legal consequences of crimes.

13. CONCLUDING CONSIDERATIONS ON THE ROLE OF RESTITUTION IN KIND

14. Once it is properly distinguished from cessation, restitution in kind appears clearly to be one of the forms of reparation in a broad sense to which the injured State or States are entitled. Of such forms of reparation, restitution in kind conforms most closely to the general principle of the law of responsibility according to which the author State is bound to "wipe out" all the legal and material consequences of its wrongful act by re-establishing the situation that would exist if the wrongful act had not been committed.[235] Directly flowing from this principle is the specific international rule which obliges the author State to adopt or carry out all the operations—material or juridical—that may be necessary to remedy in a "natural", "direct" and "integral" manner the injury suffered by the injured State or States. As the form of reparation which is closest to the above general principle and its raison d'être, restitution in kind comes foremost, before any other form of reparation *lato sensu,* and particularly before reparation by equivalent.

15. Of the vast majority of definitions which are in conformity with this concept,[236] suffice it to recall but a few. As Personnaz lucidly puts it:

> It is, indeed, this mode which is likely to give the victim satisfaction in the best conditions, and, if it does not restore the victim to the state in which it would have been had the wrongful act not occurred, at least restore it to that state as closely as possible.

and he adds, quoting Mazeaud:

> To make reparation is above all to wipe out the injury; there is no more perfect reparation than that which goes to the source of the injury.[237]

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[235] One is reminded once again of the judgment of 13 September 1928 delivered by the PC1J in the *Chorzów Factory* case:

"The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that reparation must, as far as possible, wipe out all the consequences of the illegal act and *re-establish the situation which would, in all probability, have existed if that act had not been committed."** (*P.C.I.J., Series A, No. 17,* p. 47.)

Mention must be made, however, of a different jurisprudential tendency which denied any primacy or priority to *naturalis* reparation. Reference is made to the decision of the Permanent Court of Arbitration of 11 November 1912 in the *Russian Indemnity* case, in which the Court, as Jiménez de Aréchaga put it, "attempted to limit redress for breaches of international law to monetary compensation" (*loc. cit.* (footnote 10 above), p. 566), stating that

"all State responsibility, whatever be its origin, is finally valued in money and transformed into an obligation to pay: it all ends or can end, in the last analysis, in a money debt." (United Nations, *Reports of International Arbitral Awards,* vol. XI (Sales No. 61.V.4), p. 440.)

As it pre-dates the *Chorzów Factory* case, this dictum could be considered as set aside by the PCIJ by the latter decision.

[236] Baade, on the other hand, states:

"Even where an expropriation is illegal, in the absence of specific treaty obligations to the contrary, the only remedy available to the government of the aliens affected is a claim for pecuniary compensation, not for restitution." (*Loc. cit.* (footnote 59 above), p. 830.)

According to Reuter,

it is clear that the concept of *restitutio in integrum* will always lead to a preference for restitution in kind rather than restitution by equivalent, and hence to the wiping out of the wrongful act; in that way, it can play a role comparable to nullification.[238]

And Ténékidès stresses that

It is a general principle of law recognized by civilized nations that any violation of a right imposes, first of all, on the responsible party the obligation to re-establish the *status quo ante.*[239]

Nagy, for his part, affirms:

In international law, *in integrum restitutio* is really understood to mean restitution *in kind* and, according to the view widely held in relevant literature, is expressive of the primary consequence of a wrong, namely *the wrongdoer is obliged to make restitution in kind before anything else and is required to pay damages only if the former is not possible.*[240]

16. The logical and temporal primacy of restitution in kind over the other forms of reparation, particularly over reparation by equivalent, is confirmed first of all by practice, not only by the application of the rule by the PCIJ in the *Chorzów Factory* case[241] but also in the cases in which States or arbitral bodies have moved to reparation by equivalent only after the more or less explicit *constat* that for one reason or another *restitutio* could not be effected.[242] Secondly, and most important, the primacy of restitution in kind is confirmed by the attitudes of the parties. However conscious of the difficulties restitution in kind may encounter, and at times of the

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[237] Personnaz, *op. cit.* (footnote 42 above), p. 75. The quotation is taken from H. and L. Mazeaud, *Traité théorique et pratique de la responsabilité civile délictuelle et contractuelle* (Paris, Sirey, 1931), vol. If, p. 637.

[238] Reuter, *loc. cit.* (footnote 89 above), p. 596.

[239] Ténékidès, *loc. cit.* (footnote 166 above), p. 790, para. 82.

[240] Nagy, *loc. cit.* (footnote 22 above), p. 176. However, for the primacy of *restitutio,* see also: H. Lauterpacht, according to whom "the rule [is] that in international law, as in private law, *restitutio in integrum* is regarded as the object of redress" (*Private Law Sources and Analogies of International Law* (London, Longmans, Green, 1927), p. 149); Bissonnette: "it is logical that in theory *restitutio in integrum* is the mode of reparation *par excellence*" (*op. cit.* (footnote 72 above), p. 19); Schwarzenberger, (*op. cit.* (footnote 147 above), pp. 656-657; Jiménez de Aréchaga, *loc. cit.* (footnote 10 above) p. 567; Verzijl, *op. cit.* (footnote 100 above), pp. 742 *et seq.;* Graefrath, *loc. cit.* (footnote 22 above), p. 77; Alvarez de Eulate, *loc. cit.* (footnote 42 above), p. 283; G. Dahm, *Völkerrecht* (Stuttgart, Kohlhammer, 1961), vol. Ill, p. 233.

[241] With regard to this factory, the Court decided that the author State was under "the obligation to restore the undertaking and, if this be not possible, to pay its value at the time of the indemnification, which value is designed to take the place of restitution which has become impossible", and that "the impossibility, on which the Parties are agreed, of restoring the Chorzów factory could therefore have no other effect but that of substituting payment of the value of the undertaking for restitution" (*P.C.I. J., Series A, No. 17,* p. 48).

[242] See in this regard the following cases: *British claims in the Spanish zone of Morocco,* decision of 1 May 1925 (United Nations, *Reports of International Arbitral Awards,* vol. II, pp. 621-625 and 651 -742); *Religious Property* expropriated by Portugal (see footnote 210 above); *Walter Fletcher Smith* (see footnote 189 above); *IVEM* (see footnote 203 above); *Heirs of Lebas de Courmont,* decision No. 213 of 21 June 1957 of the Franco-Italian Conciliation Commission (United Nations, *Reports ...,* vol. XIII, p. 764).

improbability of obtaining reparation in such form, they have often insisted upon claiming it as a matter of preference over reparation by equivalent.[243]

17. At the same time, the relevant literature and practice indicate that, notwithstanding the above-mentioned primacy of principle, restitution in kind does not always constitute necessarily, *in concreto*, the adequate, complete and self-sufficient form of reparation of an internationally wrongful act.[244] This may follow either from a different choice agreed to by the parties or from a different choice of an injured State that has lost interest in *restitutio* (or even in the original relationship affected by the violation). It is therefore a rather frequent occurrence that either reparation by equivalent or other forms of reparation take the place, totally or in part, of restitution in kind. In view of this, while acknowledging and maintaining its logical and chronological primacy, it would be theoretically and practically inaccurate to define *restitutio in integrum* as the unconditionally or invariably "ideal" or "most suitable" form of reparation, to be resorted to, so to speak, in any case and under any circumstances. Every concretely occurring or theoretically imaginable wrongful act should be followed by the remedy or remedies which appear to be the most suitable in the light of the general principles recalled above (paras. 114-115) and the ratio thereof. Such remedy or remedies could be identifiable *a priori* neither in restitution in kind, nor in reparation by equivalent, nor in satisfaction, nor in any given combination of two or more of such remedies. The suitable remedy or remedies can only be determined in each instance on the basis of the said ratio with a view to achieving the most complete possible satisfaction of the injured State's interest in the "wiping out" of all the injurious consequences of the wrongful act, in the full respect, of course, of the rights of the author State unaffected by its wrongful conduct.

18. It must be emphasized, however, that the flexibility with which restitution in kind must be envisaged in its relationship with the other forms of reparation is in no sense in contrast with the primacy that befits this remedy as a consequence of its most direct or immediate derivation from the fundamental principle recalled above (paras. 114-115). There is indeed no contradiction between acknowledging that reparation by equivalent is the most frequent form of reparation, on the one hand, and

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[243] One may recall the initial claim of Germany in the *Chorzów Factory* case (*P.C.I. J., Series A, No. 9*, judgment of 26 July 1927); the claim of Greece in the *Forests in Central Rhodopia* case (United Nations, *Reports ...*, vol. III, p. 1407); the United Kingdom claim in the *Mexican Oil Expropriation* case (see B. A. Wortley, "The Mexican oil dispute 1938-1946", *The Grotius Society: Transactions for the Year 1957* (London), vol. 43, p. 27); the United Kingdom request, in the *Anglo-Iranian Oil Co.* case, for annulment of the nationalization of the company and for its restoration "to the position as it existed prior to the ... Oil Nationalization Act" of 1 May 1951 (*I.C.J. Pleadings, Anglo-Iranian Oil Co. Case,* p. 124); the claim of Belgium in the *Barcelona Traction* case, to the effect that the author State should be bound, "in principle and in the first instance, to wipe out the consequences of the unlawful activities of its authorities by restoring the *status quo ante (restitutio in integrum)" (I.C. J. Pleadings, Barcelona Traction, Light and Power Company, Limited (New application: 1962),* vol. I, p. 183, para. 373).

Also of significance, although they did not emanate from States, are the claims against the Government or Libya on the part of nationalized foreign companies for the annulment of nationalization measures and the re-establishment of the pre-existing situation (see para. 46 above).

[244] There are perhaps different nuances in the opinions of Jiménez de Aréchaga, according to whom, "although restitution in kind remains the basic form of reparation, in practice, and in the great majority of cases, monetary compensation takes its place" (*loc. cit.* (footnote 10 above), p. 567), and Graefrath, who states that "the claim to restitution is often designated as the main contents of the claim to reparation, although in practice mostly it is displaced by the claim to indemnity in terms of money which is easier to realize" (*loc. cit.* (footnote 22 above), p. 77).

acknowledging at the same time that restitution in kind, rightly indicated as *naturalis restitutio,* is the very first remedy to be sought with a view to re-establishing the original situation or the situation that would exist if the violation had not intervened.

14. NECESSITY OF AN *AD HOC* DRAFT ARTICLE ON RESTITUTION IN KIND

19. In conformity with a decision already made by the Commission and embodied in the 1983 proposals of the previous Special Rapporteur, restitution in kind would, unlike cessation, be better covered in terms of an obligation of the author State. It would be rather difficult to envisage that at least the discharge of such a secondary obligation could be imposed upon the author State independently from, or prior to, a corresponding claim on the part of the injured State. True for any form of reparation, this condition—perhaps not of the existence of the author State's obligation as of its discharge—seems to be particularly indicated for restitution in kind, in view of the specific nature of the remedy.

20. A major, albeit implied, feature of an article concerning restitution in kind should in the Special Rapporteur's view be the generality of scope of that remedy and of the relevant author State's obligation. What is meant here is the "unity" that with respect to *restitutio* (as in other areas) should characterize, as pointed out repeatedly by a considerable number of the members of the Commission and not a few representatives in the Sixth Committee of the General Assembly, the codification of international responsibility.[245] It should clearly emerge from the article, in other words, that restitution in kind is a remedy applicable in principle as a consequence of any kind of wrongful act, and that the obstacles which may annul or attenuate the obligation to provide restitution in kind are not directly dependent upon the nature of the breached obligation or upon the kind of rights or interests of the injured State which are thereby protected. The obstacles that may affect—totally or in part—the obligation to make restitution depend only upon the nature of the injury and upon the circumstances thereof. Exceptions could of course be the object of agreement.

21. In conformity with the sources cited above in the analysis of doctrine and practice (see paras. 105-106 above) and in essential agreement with the views prevailing among the members of the Commission,[246] it seems necessary to avoid any formulation envisaging "special régimes" for any particular category of wrongful act. This applies in particular to the primary obligations relating to the treatment of aliens, to violations of which Mr. Riphagen proposed to apply the special provision contained in draft article 7 as referred to the Drafting Committee, on the basis of concepts and distinctions which the Special Rapporteur feels, at least for the time being and subject to correction by the Commission, unable to share (see paras. 89 and 108 above). Practice does not justify such a special régime. Even if it were correct to assume that *restitutio in integrum* has been applied less frequently in the area of wrongful acts committed to the detriment of foreign nationals (but still, in his view, by a wrongful act internationally injurious to their State), such a peculiarity does not

[245] In addition to the debates in the Commission and in the Sixth Committee and Mr. Riphagen's reports, see the comments of the Brazilian representative, Mr. Calero Rodrigues, in the Sixth Committee in 1981 (*Official Records of the General Assembly, Thirty-sixth Session, Sixth Committee*, 43rd meeting, paras. 27-31).

[246] See footnote 245 above and footnotes 247 and 248 below.

warrant the conclusion that such wrongful acts are subject, *de lege lata*, to the special treatment envisaged in the cited draft article 7. Setting aside the obvious and not negligible possibility that some decisions or agreed solutions may simply be questionable as not in conformity with general rules, one should consider that the cases where the remedy in question has not functioned (with regard to injurious conduct affecting foreign nationals) fall really within hypotheses in which the obligation to provide *restitutio in integrum* was excluded, totally or in part, not by any "specialty" of the primary rules involved but simply by those kinds of obstacle inherent in the concrete situation brought about by the wrongful act, and the circumstances thereof, in which everybody recognizes or should recognize lawful causes for setting aside *restitutio.* The Special Rapporteur refers here to impossibility, excessive onerousness *et similia.*

22. In addition to being unjustified *per se*, a provision such as draft article 7 would call into question, within the framework of the secondary legal relationships pertaining to the content, forms and degrees of international responsibility, primary rules—most notably, rules relating to the protection of individuals—that should be left absolutely unprejudiced by the codification of the topic. It must be stressed in the strongest terms that the values involved in the protection of foreign nationals are not just of an economic nature; they concern civil, social and cultural rights as well, the violation of which should in no way be underestimated for the purposes of the responsibility of wrong-doing States.[247] In conclusion, draft article 7 should be suppressed.[248]

23. The next crucial point concerns the true exceptions to the obligation of the author State to provide *restitutio in integrum.* As noted above (paras. 85 *et seq.),* the relevant authors speak of material obstacles and legal obstacles, and among the latter they distinguish international legal obstacles and legal obstacles deriving from national law. No difficulty should arise in formulating a provision covering the physical or material impossibility of *restitutio.* This is perhaps the only hypothesis in which doctrine, international tribunals and the practice of States are totally concordant in holding that restitution in kind must be set aside and replaced by other remedies, notably reparation by equivalent.

24. As regards the juridical or legal obstacles to *restitutio,* one faces less simple issues, particularly with regard to obstacles deriving, or allegedly deriving, from municipal law. With international legal obstacles, two theoretical possibilities may be envisaged *prima facie.* One, as noted (see para. 87 above), is that restitution in kind could meet an obstacle in an international obligation of the author State deriving from a rule of international law which prevails over the rule on the basis of which

[247] Similar views were expressed in the Commission at the thirty-fourth session by Mr. Balanda (*Yearbook ... 1982,* vol. I, p. 220, 1734th meeting, para. 22) and at the thirty-seventh session by Mr. Calero Rodrigues (*Yearbook ... 1985,* vol. I, p. 100, 1892nd meeting, para. 35), Mr. Flitan (*ibid.*, p. 103, para. 56), Mr. Thiam (*ibid.*, p. 107, 1893rd meeting, para. 28), Mr. Ogiso (*ibid.*, p. 123, 1896th meeting, para. 11), Mr. Barboza (*ibid.*, p. 130, 1897th meeting, para. 27), Mr. Díaz González (*ibid.*, p. 133, para. 45), Mr. Razafindralambo (*ibid.*, p. 136,1898th meeting, para. 15) and Mr. Yankov (*ibid.*, p. 146, 1899th meeting, para. 38). The same attitude was taken by various representatives in the debates on this point in the Sixth Committee.

[248] This was also the position of the Italian representative, Mr. Treves, in the Sixth Committee in 1984 (see *Official Records of the General Assembly, Thirty-ninth Session, Sixth Committee,* 40th meeting, para. 40).

restitution in kind would be due. In such a case, *restitutio in integrum*, which is legally barred either totally or in part, should be totally or partly replaced by pecuniary compensation and/or other forms of reparation. The other possibility, as also noted (*ibid.*) is that the measures which the author State should take in order to provide restitution in kind could be in contrast with an international obligation deriving for that State from a treaty in force with a State other than the injured State. In such a case the injured State would still be entitled to claim *restitutio* and it would be up to the author State to resolve its own difficulty with the third State.

25. As regards the so-called national legal obstacles, it is felt that any draft article on restitution in kind should exclude—for the reasons given above—the possibility that any such obstacles could, *per se* and as such (namely on the strength of any legislative, constitutional or administrative provisions of its own legal system invoked by the author State), be considered a valid excuse for the author State to evade either totally or in part its obligation to provide restitution in kind. As has been demonstrated (paras. 85 *et seq.* above),[249] doctrine and practice support such a position. Any indications to the contrary which may seem to exist do not really contradict the principle. They can be easily explained as the result of agreements between the parties which, while recognizing in a given case that obstacles deriving from the legal system of the author State are good reasons "to convert restitution in kind into pecuniary compensation",[250] do not contradict the general principle that *restitutio* should be provided. On the contrary, failure to recognize and to codify this general principle would jeopardize, together with the secondary obligation and the rule it derives from, the primary obligations and rules themselves, thus weakening the very function of international responsibility. Another matter is of course the possibility that the injured State might renounce restitution in kind in order to accept reparation by equivalent or to accept referral of the decision to a third party.

26. Another obstacle to *restitutio in integrum* is represented, as noted, by excessive onerousness of the implementation of the remedy. This limitation, which is undoubtedly to be taken into account in the formulation of an article, is a corollary of the principle of proportionality between injury and reparation. The right of the injured State to obtain *restitutio* is restricted by excessive onerousness in the sense that that State would not be entitled to refuse reparation by equivalent whenever the effort and the difficulties which the author State would have to undergo in order to provide *restitutio* would be disproportionate to the gravity of the violation or the injury caused. Although practice is not sufficiently indicative, the principle is not without support in the literature (see paras. 99 *et seq.* above). Considering, however, that the appreciation of the degree of onerousness is strictly dependent upon the merits and circumstances of each particular case, the corresponding rule should obviously be formulated in general terms (see para. 103 above).

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[249] One may recall in addition the position taken in that respect at the thirty-third session of the Commission by Mr. Ushakov. According to him, it would have been absurd to foresee the hypothesis that the internal law of a State could prevent that State's discharge of international obligations incumbent upon it as a consequence of responsibility for an internationally wrongful act. According to Mr. Ushakov,

"In fact, the State itself created its own internal organization, and it was for the State to change its system if the one it had established prevented it from respecting certain of its obligations." (*Yearbook ... 1981,* vol. I, p. 135, 1668th meeting, para. 30 *in fine.*)

[250] Anzilotti, *Cours de droit international, op. cit.* (footnote 17 above), p. 526.

27. One of the main instances—if not the main instance—of excessive onerousness should be that in which the effectuation of restitution in kind would be incompatible with the political, economic and social system of the author State or the new choices made by that State with regard thereto. Indeed, where the effectuation of *restitutio in integrum* requires internal legal measures of such gravity and complexity as to involve fundamental elements or features of its political, economic and social system, it could be held that *restitutio in integrum* would represent an excessive burden for the author State. It should be clear, however, that such an obstacle would not really be so much a question of legal or juridical impossibility (much as the legal system of a State was involved) as one of a factually excessive burden for the author State to bear as compared to the sacrifice which the substitution of reparation by equivalent for *restitutio* might represent for the injured State.[251]

28. In conclusion, *restitutio in integrum* does not seem to encounter any limitations other than material impossibility, international legal impossibility and excessive onerousness. If other modes or forms of reparation—for example reparation by equivalent—happen to take the place of *restitutio* in the absence of any such obstacles, this will be a consequence not of other exceptions to be eventually included as such within the formulation of an article but rather of the attitudes actually taken by the parties in each particular case. Such attitudes may manifest themselves either in such modes and terms as to constitute an agreement between injured and author State or simply as the exercise of a right or *faculté* of choice on the part of the injured State. What matters in either case seems to be the right or *faculté* of choice on the part of the injured State. Of course, the author State may well offer reparation by equivalent as a substitute for *restitutio in integrum* even in a case where the latter is neither impossible nor excessively onerous, and the substitution should be fully admissible, provided it is accepted by the injured State. It is submitted, however, that the reverse would not be true, in the sense that if the injured State finds *restitutio* not satisfactory—in that it has no interest in the re-establishment of a situation which, owing to the fault of the author State and through no fault of its own, has been altered by the wrongful conduct of the author State—it is entitled to obtain reparation by equivalent and/or other remedy or remedies. The author State would not be at liberty to reject the choice of the injured State and force upon the latter an unwanted and subjectively disadvantageous *restitutio.* The author State would only be entitled to question the nature of the substitutive remedy or remedies and the qualitative and quantitative aspects thereof (see paras. 109 *et seq.* above). This is without prejudice to any obstacle to substitution (of *restitutio*) which may derive from any imperative or otherwise "superior" rules. This hypothesis—in which substitution should presumably be denied—is to be considered at a later stage in connection with the particular consequences of internationally wrongful acts qualifying as crimes.

29. Although this is self-evident, it remains to be said that the limitations of impossibility and excessive onerousness may prevent *restitutio* either *in toto* or in part. In fact, a partial exclusion of *restitutio* is in practice more frequent than a total one. Since the re-establishment of the *status quo ante* or of the situation that would exist if the wrongful act had not been committed is feasible only in part, the portion of injury or damage not covered by *naturalis restitutio* will have to be remedied by one

[251] It is hardly necessary to stress the relationship between the question dealt with here and the alleged impact of domestic jurisdiction.

or more other forms of reparation, and in particular by pecuniary compensation. The frequency of such situations suggests that any draft article on restitution in kind should not fail to provide expressly for the right of an injured State which has been satisfied only in part by *restitutio* to obtain reparation by equivalent for any injury exceeding the part thereof covered by *restitutio.*

30. A final summary of the objective reasons—apart from mutually agreed derogation by the parties—permitting total or partial substitution of pecuniary or other compensation for *restitutio in integrum* would be as follows:

(a) A right/obligation of restitution in kind does not exist where *restitutio* is physically impossible, internationally unlawful or excessively onerous, as has been explained, for the author State. Resort must here be had to one or more substitutive forms of reparation.

(b) Restitutive steps are likely to be frequently inadequate, in that they achieve only a partial *restitutio* of the injury caused by the delict. Restitutive steps will be accompanied in such cases by other forms of reparation.

(c) The injured State is entitled to obtain, whenever it has an interest in doing so and the breached primary rule does not exclude it, total or partial substitution of one or more other forms of reparation, notably pecuniary compensation. A conceivable and valid *exceptio* on the part of the author State to any such substitution, apart from internationally juridical impossibility, might perhaps be excessive onerousness of reparation by equivalent as compared with *restitutio in integrum*. This, however, seems to be a very theoretical possibility.

31. This recapitulation seems to represent the exact scope of *restitutio in integrum* as reflected in the doctrine and practice of the responsibility of States for internationally wrongful acts. Subparagraphs (*a*), (*b*) and (*c*) above would seem to reflect in particular the purely statistical prevalence of reparation by equivalent (total or partial)[252] coupled with the logical primacy of restitution in kind (total or partial) and the greater proximity to that ideal result which is the (qualitatively and quantitatively) perfect cancellation of the injurious consequences of the delict and the re-establishment of the situation that would have existed if the wrongful act had not been committed.

CHAPTER III

Draft articles

32. The following are the draft articles proposed by the Special Rapporteur:

[252] Possibly combined with other forms of reparation, such as satisfaction (inclusive of moral damages and "punitive" damages) and guarantees of non-repetition.

A. Cessation[253]

Article 6. Cessation of an internationally wrongful act of a continuing character

A State whose action or omission constitutes an internationally wrongful act [having] [of] a continuing character remains, without prejudice to the responsibility it has already incurred, under the obligation to cease such action or omission.

[253] In his second report, submitted to the Commission at its thirty-third session, in 1981, Mr. Riphagen introduced draft article 4, which contained the following provision on cessation:

"Article 4

"Without prejudice to the provisions of article 5,

"1. A State which has committed an internationally wrongful act shall:

"(*a*) discontinue the act, release and return the persons and objects held through such act, and prevent continuing effects of such act;

"..."

(*Yearbook ... 1981*, vol. II (Part One), p. 101, document A/CN.4/ 344, para. 164.)

In his fifth report, submitted to the Commission at its thirty-sixth session, in 1984, Mr. Riphagen introduced a revised text of the article (which had become draft article 6), which provided:

"Article 6

"1. The injured State may require the State which has committed an internationally wrongful act to:

"(*a*) discontinue the act, release and return the persons and objects held through such act, and prevent continuing effects of such act;

"..."

(*Yearbook ... 1984*, vol. II (Part One), p. 3, document A/CN.4/380, sect. II.) At the same session, the Commission referred this article to the Drafting Committee (see *Yearbook ... 1984*, vol. II (Part Two), p. 104, para. 380).

B. Restitution in kind[254]

Article 7. Restitution in kind

1. The injured State has the right to claim from the State which has committed an internationally wrongful act restitution in kind for any injuries it suffered therefrom, provided and to the extent that such restitution:

(a) **is not materially impossible;**

(b) **would not involve a breach of an obligation arising from a peremptory norm of general international law;**

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[254] In his second report, Mr. Riphagen introduced the following provisions on restitution:

"Article 4

"Without prejudice to the provisions of article 5,

"1. A State which has committed an international wrongful act shall:

"...

"(*b*) subject to article 22 of part 1 of the present articles, apply such remedies as are provided for in, or admitted under, its internal law; and

"(*c*) re-establish the situation as it existed before the breach.

"2. To the extent that it is materially impossible for the State to act in conformity with the provisions of paragraph 1 of the present article, it shall pay a sum of money to the injured State, corresponding to the value which a fulfilment of those obligations would bear.

"..."

"Article 5

"1. If the internationally wrongful act is a breach of an international obligation concerning the treatment to be accorded by a State [within its jurisdiction] to aliens, whether natural or juridical persons, the State which has committed the breach has the option either to fulfil the obligation mentioned in article 4, paragraph 1, under (*c*), or to act in accordance with article 4, paragraph 2.

"2. However, if, in the case mentioned in paragraph I of the present article,

"(*a*) the wrongful act was committed with the intent to cause direct damage to the injured State, or

"(*b*) the remedies, referred to in article 4, paragraph 1, under (*b*), are not in conformity with an international obligation of the State to provide effective remedies, and the State concerned exercises the option to act in conformity with article 4, paragraph 2, paragraph 3 of that article shall apply."

(*Yearbook ... 1981*, vol. II (Part One), p. 101, document A/CN.4/344, para. 164.)

The revised texts, submitted in the fifth report (draft articles 4 and 5 having become draft articles 6 and 7 respectively), read as follows:

"Article 6

"1. The injured State may require the State which has committed an internationally wrongful act to:

"(*b*) apply such remedies as are provided for in its internal law; and

"(*c*) subject to article 7, re-establish the situation as it existed before the act; and

"2. To the extent that it is materially impossible to act in conformity with paragraph 1 (*c*), the injured State may require the State which has committed the internationally wrongful act to pay to it a sum of money corresponding to the value which a re-establishment of the situation as it existed before the breach would bear."

"Article 7

"If the internationally wrongful act is a breach of an international obligation concerning the treatment to be accorded by a State, within its jurisdiction, to aliens, whether natural or juridical persons, and the State which has committed the internationally wrongful act does not re-establish the situation as it existed before the breach, the injured State may require that State to pay to it a sum of money corresponding to the value which a re-establishment of the situation as it existed before the breach would bear."

(*Yearbook ... 1984*, vol. II (Part One), p. 3, document A/CN.4/380, sect. II.) The Commission referred draft article 6 to the Drafting Committee at its thirty-sixth session (see footnote 253 above) and draft article 7 at its thirty-seventh session (see *Yearbook ... 1985*, vol. II (Part Two), p. 24, para. 162).

_(c)_ would not be excessively onerous for the State which has committed the internationally wrongful act.

2. Restitution in kind shall not be deemed to be excessively onerous unless it would:

_(a)_ represent a burden out of proportion with the injury caused by the wrongful act;

_(b)_ seriously jeopardize the political, economic or social system of the State which committed the internationally wrongful act.

3. Without prejudice to paragraph 1 (*c*) of the present article, no obstacle deriving from the internal law of the State which committed the internationally wrongful act may preclude by itself the injured State's right to restitution in kind.

4. The injured State may, in a timely manner, claim [reparation by equivalent] [pecuniary compensation] to substitute totally or in part for restitution in kind, provided that such a choice would not result in an unjust advantage to the detriment of the State which committed the internationally wrongful act, or involve a breach of an obligation arising from a peremptory norm of general international law.