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CHAPTER IV

STATE RESPONSIBILITY

Addendum

GE.93-61642 (E)

Article 7

Restitution in kind

The injured State is entitled to obtain from the State which has committed an internationally wrongful act restitution in kind, that is, the re-establishment of the situation that existed before the wrongful act was committed, provided and to the extent that restitution in kind:

(a) is not materially impossible;

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

(c) would not involve a burden out of all proportion to the benefit which the injured State would gain from obtaining restitution in kind instead of compensation; or

(d) would not seriously jeopardize the political independence or economic stability of the State which has committed the internationally wrongful act, whereas the injured State would not be similarly affected if it did not obtain restitution in kind.

Commentary

(1) Restitution in kind is the first of the methods of reparation available to a State injured by an internationally wrongful act.

(2) The concept is not uniformly defined. According to one definition, 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. 1/ Under another definition, restitution in kind is the establishment or re-establishment of the situation that would exist, or would have existed if

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1/ Authors favouring this definition include C. de Visscher, "La responsabilité des Etats", Biblioteca Visseriana (Leyden, 1924), vol. II, p. 118; P.A. Bissonnette, La satisfaction comme mode de réparation en droit international (thesis, University of Geneva) (Annemasse, Impr. Grandchamp, 1952), p. 20; A. Verdross, Völkerrecht, 5th ed. (Vienna, Springer, 1964), p. 399; K. Zemanek, "La responsabilité des Etats pour faits internationaux illicites ainsi que pour faits internationaux licites", Responsabilité internationale (Paris, Pedone, 1987), p. 68; and K. Nagy, "The problem of reparation in international law", Questions of International Law: Hungarian Perspectives, H. Bokor-Szego ed. (Budapest, Akadémiai Kiadó, 1986), vol. 3, p. 178.

the wrongful act had not been committed. 2/ The former definition views restitution in kind stricto sensu and per se and leaves outside the concept of the compensation which may 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. The latter definition, on the other hand, absorbs into the concept of restitution in kind not just the re-establishment of the status quo ante (restitutio in pristinum), but also the integrative compensation. As appears from the definition in the opening paragraph of article 7, the Commission has opted for the purely restitutive concept of restitution in kind which, aside from being the most widely accepted in doctrine, has the advantage of being confined to the assessment of a factual situation involving no theoretical reconstruction of what the situation would have been if the wrongful act had not been committed. It has done so bearing in mind that, under paragraph 1 of article 6 bis, the injured State is in any event entitled to "full reparation" for the injury sustained as a result of an internationally wrongful act and that, as made clear by the phrase "either singly or in combination" in paragraph 1 of the same article, restitution in kind and compensation are susceptible of combined application. In other words, the Commission considers that restitution should be limited to restoration of the status quo ante (which can be clearly determined), without prejudice to possible compensation of lucrum cessans.

(3) Restitution in kind is the form of reparation which most closely conforms 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 that act had not been committed; as such it comes foremost before any other form of

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2/ This definition is endorsed by, inter alia, D. Anzilotti, Cours de droit international, French trans. of 3rd Italian ed. by G. Gidel (Paris, Sirey, 1929), p. 524; Jimenez de Arechaga, "International Responsibility" in Manual of Public International Law, Max Sorensen ed. (London and Basingstoke, The Macmillan Press Ltd., 1968), p. 565 and B. Graefrath, "Responsibility and damages caused: responsibility and damages", Collected courses ..., 1984-II, vol. 185, p. 77.

reparation lato sensu and particularly before reparation by equivalent. 3/ The logical and temporal primacy of restitution in kind is confirmed first of all by practice, not only by the application of the rule by the PCIJ in the Chorzów Factory case 4/ 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

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3/ Along those lines, see J. Personnaz, La réparation du préjudice en droit international public (Paris, Sirey, 1939), p. 83; P. Reuter, "Principes de droit international public", Recueil des cours ... 1961-II (Leyden, Sijthoff, 1962), p. 596; G. Ténékidés, "Responsabilité internationale", in Dalloz, Répertoire de droit international (Paris, 1969), vol. II, p. 790, para. 82; K. Nagy, loc. cit. (footnote 1 above), p. 173; H. Lauterpacht, Private Law Sources and Analogies of International Law (London, Longmans, Green, 1927), p. 149; P.A. Bissonnette, loc. cit. (footnote 1 above), p. 19; G. Schwarzenberger, International Law, 3rd ed. (London, Stevens, 1957) pp. 656 and 657; E. Jimenez de Arechaga, loc. cit. (footnote 2 above), p. 567; B. Graefrath, loc. cit. (footnote 2 above), p. 77; M.B. Alvarez de Eulate, "La restitutio in integrum en la práctica y en la jurisprudencia internacionales", Anuario Hispano-Luso Americano de Derecho Internacional (Madrid), vol. 4 (1973), p. 283; G. Dahm, Völkerrecht (Stuttgart, Kohlhammer, 1961), vol. III, p. 233.

4/ 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 Chorzow factory could therefore have no other effect but that of substituting payment of the value of the undertaking for restitution" (PCIJ., Series A, No. 17, p. 48).

Mention must be made, however, of a different jurisprudential tendency which denies 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 Jimenez de Arechaga puts it, "attempted to limit redress for breaches of international law to monetary compensation" (loc. cit. (footnote 2 above), p. 566), stating that:

> "all State responsibility whatever its origin is finally valued in money and transferred 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, p. 441).

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

effected. 5/ Secondly and most importantly, 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 improbability of obtaining reparation in such form, they have often insisted upon claiming it as a matter of preference over reparation by equivalent. 6/ This being said, it would be theoretically and practically inaccurate to define restitution in kind as the unconditionally or invariably ideal or most suitable form of reparation to be resorted to in any case and under any circumstances. The most suitable remedy can only be determined in each instance 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 full respect, of course, of the rights of the author State. It is a rather frequent occurrence that the parties agree, or the injured State chooses, to substitute compensation, totally or in part, for restitution in kind. There is however no contradiction between

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5/ 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, decision of 4 September 1920 (ibid., vol. I, pp. 7 et seq.; Walter Fletcher Smith (ibid., vol. II, p. 918); Heirs of Lebas de Courmont, decision No 213 of 21 June 1957 of the Franco-Italian Conciliation Commission (ibid., vol. XIII, p. 764).

6/ One may recall the initial claim of Germany in the Chorzów Factory case (PCIJ., Series A, No. 9, judgment of 26 July 1927); the claim of Greece in the Forests in Central Rhodopia case (United Nations, Reports of International Arbitral Awards, 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 (ICJ Pleadings, Anglo-Iranian Oil Co. Case, p. 124); and 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)" (ICJ 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 of Libya on the part of nationalized foreign companies for the annulment of nationalization measures and the re-establishment of the pre-existing situation.

acknowledging that reparation by equivalent is the most frequent form of reparation, on the one hand, and recognizing 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. 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.

(4) Concern for flexibility underlies the formulation of the opening paragraph of article 7 which is couched in terms of an entitlement of the injured State and makes the discharge of the duty of restitution in kind conditional upon a corresponding claim on the part of the injured State.

(5) The relationship of this duty to the original, primary obligation of the author State and the corresponding original right of the injured State is a matter of some controversy. According to one doctrine, the obligation of restitution in kind would not so much be one of the modes of reparation - and as such one of the facets of the new relationship coming into being as a consequence of a wrongful act - as a continuing "effect" of the original legal relationship. 7/ The majority view, 8/ which the Commission shares, is

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7/ Put forward originally by G. Balladore Pallieri (Gli effecti dell'atto illecito internazionale, Rivista di Diritto Publico (Rome), Series II, 23rd year, 1st part (1931), pp. 64 et seq.), this view seems to have been taken up recently by Dominicé ("Observations sur les droits de l'Etat victime d'un fait internationalement illicite" in Droit international 2 (Paris, Pedone, 1982), pp. 25-31). 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.

8/ Upheld for instance by P. Reuter (loc. cit. (footnote 3 above), p. 595) in the following terms:

> "No doubt the implementation of responsibility does indeed give rise to a new obligation, that to make reparation, but this consists mainly in

however that restitution in kind is one of the forms of a secondary obligation to provide reparation in a broad sense - an obligation which, in the words of one writer, "does not replace the primary obligation resulting from the fundamental legal relationship ... 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". 9/ This approach, which preserves the notion that the original obligation survives the violation, is consistent with the Commission's position that cessation and restitution in kind are two distinct remedies against the violation of international obligations.

(6) 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. Examples of material restitution include the release of a detained individual or the handing over to a State of an individual arrested in its territory, 10/ the restitution of ships 11/ or other

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restoring the status quo, restitutio in integrum, in other words in ensuring the most complete fulfilment possible of the original obligation."

Along those lines, Graefrath (loc. cit. (footnote 2 above), p. 77), after recalling that restitutio in integrum aims at restoration of the situation that would have existed in the absence of the violation, specifies:

"That means, indeed, an obligation to eliminate the consequences of the violation of rights."

9/ C. Cepelka, Les conséquences juridiques du délit en droit international contemporain (Prague, Karlova University, 1965), p. 18. (ICJ Reports, 1980, pp. 44-45).

10/ Instances of material restitution involving persons include the "Trent" case (1861) and the "Florida" case (1864), both involving the arrest of individuals on board ships (J.B. Moore, A Digest of International Law (Washington, D.C., 1906), vol. VII, pp. 768 et seq. and pp. 1090 and 1091) and the United States Diplomatic and Consular Staff in Tehran case in which the ICJ ordered the Government of Iran to immediately release each and every [United States national] held hostage in Iran (ICJ Reports, 1980, pp. 44-45).

11/ An example is 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. The Foreign Ministry 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

types of property 12/ including documents, works of art or even sums of money. 13/ The term "juridical restitution" is used with reference to the

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reimbursement" (La prassi italiana di diritto internazionale, 1st series (Dobbs Ferry, N.Y., Oceana, 1970), vol. II, pp. 901-902).

12/ An example of material restitution of objects is the Temple of Preah Vihear case: in its judgment of 15 June 1962 (ICJ Reports, 1962, p. 6, at pp. 36-37), 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. Reference is also made to the Aloisi case (1881), originating in 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 (see La prassi italiana ..., (op. cit. (footnote 11 above), pp. 867-868). Mention may furthermore be made of a number of cases of restitution which were decided by the Franco-Italian Conciliation Commission instituted by the Treaty of Peace of 1947 including the Hôtel Métropole case (Decision No. 65 of 19 July 1950 (United Nations, Reports of International Arbitral Awards, vol. XIII, p. 219)), the Ottoz case (Decision No. 85 of 18 September 1950 (ibid., p. 240)) and the Hénon case (Decision No. 109 of 31 October 1951 (ibid. p. 249)). 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.

13/ Examples include the "Macedonian" case (1863), in which 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); the "Presto" case (1864), in which 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 11 above), pp. 878-879); and the Emanuele Chiesa case (1884), in which 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). Many other examples are to be found in the practice of Mixed Claims Commissions: see, among others, the Turnbull and Orinoco Company cases (United Nations, Reports of International Arbitral Awards, vol. IX, pp. 26 et seq., the Compagnie générale des asphaltes de France case (ibid, pp. 389 et seq.), the Palmarejo and Mexico Gold Fields case (ibid., vol. V (pp. 298 et seq.); the Societá Anonima Michelin Italiana case (ibid., vol. XIII, p. 625) and the Wollenberg case, (ibid., vol. XIV, 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 Handelsgesellschaft) of 1,196 shares of 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 more author States. Hypotheses of juridical restitution include the revocation, annulment or amendment of a constitutional or legislative provision enacted in violation of a rule of international law, 14/ the rescinding of an administrative or judicial measure unlawfully adopted in respect of the person or property of a foreigner 15/ or the nullification of a treaty. 16/

Romanian company Buzau-Nehoiasi Railway following the German Government's claim to that effect (ibid., vol. III, p. 1839).

14/ Mention may be made in this context of the abrogation of Article 61 (2) of the Weimar Constitution (Constitution of 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; following French protests, the provision was annulled by Germany (See British and Foreign State Papers, 1919, vol. 112, p. 1094).

15/ An example is the Martini case in which the arbitral tribunal decided (decision of 3 May 1930) that the Venezuelan Government was under an 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 (United Nations, Reports of International Arbitral Awards, vol. II, pp. 973 et seq.

16/ In the Bryan Chamorro Treaty case, El Salvador requested that:

> "the appropriate decree be issued 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.

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

> "...
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> 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;

(7) The Commission has not seen any need to reflect in the text of article 7 the doctrinal distinction between material and juridical restitutio which it considers, from the viewpoint of the relations deriving from an internationally wrongful act, as a relative one. In the first place, one can hardly conceive a restitution to be effected by a State - whether of territory, persons or movable objects - which would involve purely material operations. 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 merely be in such cases 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

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> 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 ...". (Anales de la Corte 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., at p. 683 and 696).

Another example is the Legal Status of Eastern Greenland case, in which 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."

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."

(PCIJ., Series A/B, No. 53, judgment of 5 April 1933, p. 22 at p. 23 and 75).

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. 17/ In the second place, it should be borne in mind that 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 14 July 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." 18/

(8) The Commission concludes 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 merely stresses the different kinds of

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17/ An example of a case in which the legal and the material elements are closely bound together is the Peter Pázmány University case 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".

(Appeal from a judgment of the Hungaro-Czechoslovak Mixed Arbitral Tribunal (The Peter Pázmány University), judgment of 15 December 1933, PCIJ, Series A/B, No 61, p. 208, at p. 249). It is obvious that here restitutio would involve both legal and material actions.

18/ Case concerning Certain German interests in Polish Upper Silesia (Merits), judgment of 25 May 1926, PCIJ, Series A, No 7, p. 19.

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, as a rule, material and legal restitutio should be viewed not so much as different remedies but as distinct aspects of one and the same remedy.

(9) 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. 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. In this context, the question arises whether, 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. 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 legislation or constitutional provisions on the strength of international law. 19/ In practice, the Legal Status of Eastern Greenland case 20/ provides the best known example of the use of similar concepts. The Commission is of the view 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

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19/ See for example 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, pp. 5-8.

20/ Cited in footnote 16 above.

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, as the case may be, invalidation or annulment of internal legal acts on the part of the author State itself. 21/ As regards the question whether it is possible for an international tribunal to directly annul international legal rules, acts, transactions or situations, for the purpose of reparation in the form of restitution in kind, 22/ the Commission is inclined to answer it in the affirmative but observes that since the effects of decisions of international tribunals are normally confined to the parties, any act or situation the effects of which extend beyond the bilateral relations between the parties could not be modified or annulled except by the States themselves, unless the relevant instruments provided otherwise.

21/ Along those lines, Graefrath (loc. cit. (footnote 2 above), p. 78) 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."

22/ A case that seems to be rather close to an international legal restitution directly effected by judicial decision is that of the Free Zones of Upper Savoy and the District of Gex in which 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 regime" 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 1, of the Special Agreement:
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> That the French Government must withdraw its customs line in accordance with the provisions of the said treaties and instruments: and that this regime must continue in force so long as it has not been modified by agreement between the Parties"

(PCIJ, Series A/B, No 46, judgment of 7 June 1932, p. 96).

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.

(10) The injured State's entitlement to restitution in kind is not unlimited. It is subjected to the exceptions listed in subparagraphs (a) to (d). The phrase "provided and to the extent that" which precedes the listing of exceptions makes it clear that if restitution in kind is only partially excluded under any one of the exceptions, then that part of it which it is possible to provide is due.

(11) The first exception to restitution in kind is impossibility and in the first place factual or material impossibility which is dealt with in subparagraph (a). In the case of material restitution, total or partial impossibility derives from the fact that the nature of the event and of its injurious effects have rendered restitutio physically impossible. 23/ 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. The rule is quite obviously an unavoidable consequence of ad impossibilia nemo tenetur.

(12) A second exception, dealt with in subparagraph (b), concerns the case where restitution in kind encounters an obstacle in a peremptory norm of international law. As has already been noted, the general question of legal impossibility to make restitution encompasses impossibility deriving from international legal obstacles and impossibility deriving from municipal law

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23/ 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"; (Jimenez de Arachega, loc.cit. (footnote 2 above), p. 566) or if the object is permanently lost or destroyed (Balladore Pallieri, loc. cit. (footnote 7 above) p. 720) or, as suggested by Salvioli, "if there are no others of the same kind". (G. Salvioli, "La responsabilité des Etats et la fixation des dommages-intérêts par les tribunaux internationaux, Recueil de Cours..., 1929-III (Paris, Hachette, 1930) vol. 28, p. 237). 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". (Alvarez de Eulate, loc. cit. (footnote 3 above), pp. 268-269). For similar views, see: D.P. O'Connell, International Law, 2nd ed. (London, Stevens, 1970), vol. II, p. 1115 and G. Schwarzenberger, op. cit., footnote 3 above, pp. 655 and 658). Mention of material or physical impossibility is also found in practice, especially after the Chorzów Factory case.

obstacles. The latter aspect has been dealt with in article 6 bis 24/ since, as indicated in paragraph (7) of the commentary to that article, it may arise in connection with any form of reparation, even though, in practice, it has usually come up in relation to restitution in kind. As regards impossibility deriving from international legal obstacles, subparagraph (b) of the present article gives it a narrow scope, limited to the case where making restitution in kind would violate a peremptory norm of international law. In the other instances of so-called legal impossibility "deriving from international law", it is not really a matter of an "impossibility" affecting the legal obligations to provide restitution in kind. The impossibility derives more precisely from the relativity of international legal situations. Clearly, if the State which should provide restitutio could only do so by infringing one of its international obligations towards a "third" State, this does not really affect the responsibility relationship between the wrongdoing State and the injured State entitled to claim restitutio to the injured State on the one hand and the "third" State on the other hand.

(13) In this context, the Commission has examined the question of the relationship between the general rule which puts the author State under the obligation to provide restitutio in integrum and the concept of domestic jurisdiction. It has come to the conclusion that this concept cannot and should 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 a confusion between, on the one hand, the right of the State to obtain restitutio (or any form of redress other than restitutio), as a matter of

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24/ Under paragraph 3 of article 6 bis, the wrongdoing State may not invoke the provisions of its internal law as justification for the failure to provide full reparation.

substantive law, and on the other hand, the right of an "unsatisfied" injured State to take measures aimed at securing cessation and/or reparation. 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, a condition of lawfulness of an international legal rule or obligation.

(14) The third exception to which the right to obtain restitutio is subjected, dealt with in subparagraph (c), is based on equity and reasonableness and seeks to achieve an equitable balance between the onus to be sustained by the author State in order to provide restitution in kind and the benefit which the injured State would gain from obtaining reparation in that specific form rather than compensation. It finds support both in doctrine and in practice. 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, it would be, in the words of one of them "unreasonable to allow a claim from restitutio 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". 25/ A similar approach is reflected in paragraph 3 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, 26/ which reads as follows:

> "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."

Subparagraph (c) is similarly based on a comparison between the situation of the wrongdoing State and that of the injured State. The Commission is aware that, for some writers, the comparison should be between the burden for the

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25/ J.H.W. Verzijl, International Law in Historical Perspective (Leyden, Sijthoff, 1973), part VI, p. 744. A similar position is taken by Personnaz (loc.cit. (footnote 3 above) pp. 89-90; and Nagy, loc. cit. (footnote 1 above) p. 177).

26/ Reproduced in Yearbook... 1969, vol. II, pp. 155 et seq, document A/CN.4/217 and Add.1, annex VIII.

wrongdoing State and the gravity of the wrongful act. 27/ Viewed in this perspective, the limit of excessive onerousness would assume a different weight according to the qualitative and quantitative dimension of the wrongful act for which reparation is sought. Indeed in the case of the most serious wrongful acts such as aggression or genocide, 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 the Commission will explore in depth when it undertakes the analysis of the legal consequences of international crimes.

(15) The exception as formulated in subparagraph (c) may be considered to underlie a number of arbitral decisions including in particular those referred to in paragraph (12) of the commentary to article 6 bis. Mention should also be made in this context of the Forests in Central Rhodopia case, in which 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. 28/

(16) The phrase "out of all proportion" makes it clear that the wrongdoing State is relieved of its obligation to make restitution only if there is a grave disproportionality between the burden which this mode of reparation would impose on that State and the benefit which the injured State would derive therefrom. The Commission is aware that, in practice, it may prove difficult to, on the one hand, compare the burden imposed on the wrongdoing State by restitution in kind and the benefit accruing to the injured State in

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27/ According to Personnaz, for instance, "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 3 above) pp. 89-90). Along the same lines, article 7 of the draft treaty concerning the responsibility of a State for internationally illegal acts, prepared in 1927 by Karl Strupp provides:

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

(see Yearbook ... 1969, vol. II, p. 157, document A/CN.4/217 and Add.1, annex IX).

28/ United Nations, Reports of International Arbitral Awards, vol. III, p. 1432.

obtaining restitution instead of compensation and, on the other hand, weigh the benefit which the injured State would derive from restitution in kind against the benefit it will derive from compensation. In practice however, the States concerned will normally come to an agreement on the issue, which will then be solved consensually. If third party settlement had ultimately to be resorted to, an equitable balance between the conflicting interests at stake would have to be attained on the basis of facts.

(17) Subparagraph (d) provides that restitution in kind is not mandatory for the wrongdoing State if it would seriously jeopardize its political independence and economic stability whereas failure to obtain restitution in kind would not have a comparable impact on the injured State. The text implies that if the terms of the comparison are equal, then the interest of the injured State would prevail and restitution in kind would have to be provided. The Commission realizes that subparagraph (d) refers to very exceptional situations and may be of more retrospective than current relevance. This is due in large measure to the rise in importance of bilateral investment agreements. The area of foreign investment, to which it principally refers, has been undergoing - also under the influence of a number of resolutions of the General Assembly 29/ - a rather marked evolution. The Commission submits that any provision concerning indemnification has really to do with the content of the primary rule and the conditions thereof rather than the content of the secondary rule on reparation. In the measure, however, in which the matter is of relevance for the purposes of the so-called "secondary" rules, the Commission believes that the quality and quantity of reparation depend, in the first place, on whether the nationalization was a lawful or an unlawful one. Lawful are the nationalizations conforming to the

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29/ 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) of 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 nationalization", VIth Congress of the International Association of Democratic Lawyers (Brussels, 22-25 May 1956) (Brussels, [n.d.]), p. 15.

two basic requirements of public interest and non-discrimination. Unlawful are the nationalizations which do not meet both requirements. Unlike unlawful nationalization, which calls for full reparation (namely, restitution in kind and compensation), lawful nationalization would call for adequate compensation. Failure to meet such obligations would of course be, by itself, an internationally wrongful act.
