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SECOND REPORT ON STATE RESPONSIBILITY

by

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INTRODUCTION

1. In accordance with the plan of work set forth in the Preliminary Report 1/ the present document deals with the substantive consequences of an internationally unlawful act, other than cessation 2/ and restitution in kind. 3/

2. The first consequence thus to be considered is reparation by equivalent. For the reasons explained in the Preliminary Report, reparation by equivalent or pecuniary compensation is the main and central remedy resorted to following an internationally wrongful act. 4/ But the study of the doctrine and practice of the law of State responsibility indicates that two further sets of consequences, functionally distinct from restitutio and compensation and both quite typical of international relations, must be taken into account. These consequences are the forms of reparation generally grouped under the concept of "satisfaction and guarantees of non-repetition", or under the single concept of "satisfaction". We refer of course to satisfaction in a technical, "international" legal sense as distinguished from that "satisfaction" in that broadest non-technical sense in which it is obviously used as a synonym of full compensation or full reparation. 5/

3. Although rather widely recognized, the distinction of satisfaction from pecuniary compensation is not without problem. An only minor difficulty is of course the confusion caused by the occasional use of the term "satisfaction" in the broad, non-technical sense, just recalled. 6/ A considerable, not negligible difficulty derives instead from the ambiguity of the two adjectives generally used to characterize the kinds of injury, damage, loss or

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1/ A/CN.4/416, paras. 6-20.

2/ Ibid., paras. 21-63.

3/ A/CN.4/416/Add.1, paras. 64-131.

4/ Ibid., see especially paras. 117-118.

5/ Infra, paras. 18-19 and 106. ff.

6/ Supra note 5/.

préjudice 7/ respectively covered by pecuniary compensation and satisfaction: "material" and "moral".

4. Compensation is generally described - in a sense quite rightly 8/ - as covering all the "material" injury "directly" or "indirectly" suffered by the offended State. Satisfaction is generally indicated as covering instead the "moral" injury sustained by the offended State in its honour, dignity, prestige and perhaps (according to some authorities) in its legal sphere. 9/ The two adjectives, however, fail to give an exact picture of the areas of injury respectively covered by compensation and satisfaction. On the one hand pecuniary compensation allegedly covering material damage, is intended also to compensate the moral damages suffered by the persons of private nationals or agents of the offended State. Satisfaction, in its turn, is normally understood to cover not such moral damage of nationals or agents but only the State's moral damage. A brief explanation, with some support of practice and literature should therefore precede the separate treatment of reparation by equivalent on one side and satisfaction (with guarantees of non-repetition) on the other side. 10/

5. A further problem to be tackled in the present report is the impact of fault (in a broad sense) on the forms and degrees of reparation which are being considered, particularly on reparation by equivalent, satisfaction and guarantees of non repetition. Whatever the merits of the "negative" theory of fault followed so far by the Commission with regard to the minimum requisites of an internationally wrongful act, it seems indeed reasonable to assume that any degree of fault found eventually to characterize an internationally

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7/ The number and variety of adjectives used in the literature and the practice to describe the relevant damages (infra, Chapter One, paras. 7 ff. and Chapter Two, paras. 52 ff.) are such that we deem it advisable not to embark in a long discussion of the noun. While most frequently understood in a very general sense, inclusive of any kind of negative consequence of an internationally wrongful act, the term damage is not infrequently used, especially in the less recent literature, in the narrower sense of physical or material damage. Injury and loss are perhaps more often used, as well as the French "préjudice", in the broadest sense implied in Article 5 as adopted by the Commission on first reading. It seems, nevertheless, that the four terms are often if not mostly used as synonyms. Unless otherwise indicated we shall so use injury, damage, loss and préjudice, always in the broadest sense.

8/ Infra, paras. 52 ff.

9/ Infra, paras. 13-16.

10/ Infra, paras. 7 ff.

wrongful act may have an impact upon the forms and degrees of reparation due by the offending State. Apart from the fact that delicts themselves may present different degrees of gravity from the point of view of fault, one should not forget that the project covers crimes in addition to delicts: and crimes do involve normally the highest degrees of fault.

6. The present report is thus divided into five chapters. Chapter One deals for the reasons explained in paragraphs 3 and 4 with the areas of injury respectively covered by compensation and satisfaction. Chapter Two deals with reparation by equivalent or pecuniary compensation in its various elements. Chapter Three deals with satisfaction. Chapter Four with guarantees of non-repetition. Chapter Five contains a few, tentative considerations on the impact of fault upon the forms of reparation considered in the previous Chapters, more notably on satisfaction and guarantees of non-repetition. Chapter Six presents the proposed new draft articles covering the remedies dealt with in Chapters One to Five. The new draft articles are meant to follow, within the framework of Part Two of the Articles on State Responsibility, draft Articles 6 (Cessation) and 7 (Restitution in kind) as set forth in the Preliminary Report. 11/

11/ A/CN.4/416/Add.1, para. 132.

CHAPTER ONE - MORAL INJURY TO THE DATE AND THE DISTINCTION OF SATISFACTION FROM COMPENSATION

Section 1. Introduction

7. One reads frequently that the specific function of reparation by equivalent - as one of the forms of reparation in a broad sense - is essentially, if not exclusively, to compensate for the material damage. Correct in a sense, statements such as these - an example of which is to be found in our Preliminary Report 12/ - are ambiguous and call for important qualifications. It is true, indeed, that reparation by equivalent covers ordinarily not the moral (or non-material) damage to the injured State. It is not true, however, that it does not cover moral damage to the persons of nationals or agents of the injured State.

8. The ambiguity is due to the fact that moral damage to the injured State and moral damage to the injured State's nationals or agents receive a different treatment for the point of view of international law. A few precisions in that respect seem to be indispensable.

Section 2. "Moral damage" to the Persons of a State's Nationals or Agents

9. The most frequent among internationally wrongful acts are those which inflict damage upon natural or juristic persons connected with the State, either as mere nationals or as agents. This damage, which internationally affects the State directly even though the lamented injury affects nationals or agents in their private capacity, is not always an exclusively material one. On the contrary, it is frequently also or even exclusively moral damage: and a moral damage which is susceptible of a valid claim to compensation not less than material damage. Notwithstanding the considerable lack of uniformity among national legal systems with regard to moral damages, the practice and literature of international law show that moral (or non-patrimonial) losses caused to private parties by an internationally wrongful are to be compensated as an integral part of the principal damage suffered by the injured State.

10. One of the leading cases in that sense is the Lusitania, decided by a US-German Claim Commission in 1923. The case dealt with the consequences of the sinking of that British liner by a German U-Boot. In regard to the measure of the damages to be applied to each one of the claims originating

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12/ Doc. A/CN.4/416, para. 21.

from the American losses in the event, the arbitrator stated that both the civil and the common law recognize injuries caused by "invasion of private rights" and provide remedies for it. The umpire was of the opinion that every injury should be measured by pecuniary standards and referred to Grotius's statement that "money is the common measure of valuable things". 13/ Dealing in particular with the death of a person, he held that the preoccupation of the Tribunal should be to estimate the amount for the following injuries: "(a) Which the decedent, had he not been killed, would probably have contributed to the claimant, add thereto; (b) the pecuniary value to such claimant of the deceased's personal services in claimant's care, education, or supervision, and also add; (c) reasonable compensation for such mental suffering or shock, if any, caused by violent severing of family ties, as claimant may actually have sustained by reason of such death. The sum of these estimates reduced to its present cash value, will generally represent the loss sustained by the claimant. 14/ Now, apart from the judge's considerations regarding the damages under points (a) and (b), which are relevant with regard to the broader concept of "personal injuries", we find interest here in what he stated with regard to the injuries described under (c). According to him international law provided compensation for mental suffering, injury to one's feelings, humiliation, shame, degradation, loss of social position or injury to one's credit and reputation. Such injuries, the umpire stated, were real and "the mere fact that they ... [were] difficult to measure or estimate by money standards [did not make] them [any less] real and [afforded] no reason why the injured person should not be compensated". 15/ These kinds of damages, the umpire added, were not "penalty". 16/

11. The Lusitania affair should not be considered as an exception. Although it did not occur very frequently, international tribunals have always granted pecuniary compensation, whenever they deemed it necessary, for moral injury

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13/ UNRIAA, vol. 7, p. 35.

14/ Ibid., p. 35. Emphasis added.

15/ Ibid., p. 40.

16/ Ibid., p. 38.

to private parties. Examples of this are the Chevreau case, 17/ the Gage case, 18/ and the Di Caro case. In the latter instance, the Italy-Venezuela Mixed Claims Commission took account not only of the financial deprivation suffered by the widow of the deceased, but also of the shock suffered by her and of the deprivation of affection, devotion and companionship that her husband could have provided her with. 19/

12. Another clear example of pecuniary compensation of moral damage suffered by a private party is the Maninat case. Rejecting the claim for compensation of the material-economic damage which he deemed to be not sufficiently proved, the arbitrator awarded, in favour of Maninat's (the victim) sister, a sum of money by way of pecuniary compensation for the death of her brother. 20/

17/ UNRIAA, vol. II, p. 1139.

18/ UNRIAA, vol. IX, pp. 226-229.

19/ The relevant language of the award read: "but while in establishing the extent of the loss to a wife resultant upon the death of a husband, it is fair and proper to estimate his earning power, his expectations of life, and, as suggested, also to bear in mind his station in life with a view of determining the extent of comforts and amenities of which the wife has been the loser, we would, in the Umpire's opinion, seriously err if we ignored the deprivation of personal companionship and cherished associations consequent upon the loss of a husband or a wife unexpectedly taken away. Nor can we overlook the strain and shock incident to such violent severing of all relations. For all this no human standard of measurement exists, since affection, devotion, and companionship may not be translated into any certain or ascertainable number of bolivars or pounds sterling. Bearing in mind, however, the elements admitted by the honorable Commissioners as entering into the calculation and the additional elements adverted to, considering the distressing experiences immediately preceding this tragedy, and not ignoring the precedents of other tribunals and of international settlements for violent deaths, it seems to the umpire that an award of 50,000 bolivars would be just" (UNRIAA, vol. 10, p. 598).

20/ "In this case, unlike that of Jules Brun, there are other considerations than the loss which Justina de Cossé has suffered through the death of her brother Juan. There is no evidence that she was ever dependent upon him for care or support, or that he ever rendered either, or that she was so circumstanced as to need either, or that he was of ability or disposition to accord either. Therefore it is difficult to measure her exact pecuniary loss. There exists only the ordinary presumptions attending the facts of a widowed sister and a brother of ordinary ability and affection. Some pecuniary loss may well be predicated on such conditions. For this she may have recompense" (UNRIAA, vol. X, p. 55).

Mention should also be made of the Grimm case decided by the Iran-US Tribunal. We refer, however, only to that part of that Tribunal's decision in which moral damages seemed to be referred to and in principle to be considered as a possible object of pecuniary compensation. 21/

Section 3. "Moral Damage" to the State as a Distinct Kind of Injury in International Law

13. The moral injuries to human beings considered in the preceding paragraphs should be distinguished, notwithstanding the somewhat confusing terminology generally used, from that other category of non-material damage which the offended State sustains more directly as an effect of an internationally wrongful act. We refer to the kind of injury which a number of authorities characterize as the moral injury suffered by the offended State in its honour, dignity and prestige 22/ and which is considered, at times, to be a consequence of any wrongful act regardless of material injury and independent therefrom. According to some authors, one of the main aspects of this kind of injury would be actually that infringement of the State's right in which any wrongful act consists regardless of any more specific damage. According to Anzilotti, for example:

> "L'élément essentiel des rapports entre les Etats n'est pas l'élément économique, bien que celui-ci en constitue en dernière analyse le substratum; c'est plutôt un élément idéal: l'honneur, la dignité, la valeur éthique des sujets. Il en résulte que le seul fait qu'un Etat voit un de ses droits méconnus par un autre Etat, implique un dommage que celui-ci ne peut pas être tenu de supporter, quand même n'en devraient pas dériver des conséquences matérielles: dans aucune partie de la vie humaine on ne ressent comme dans celle-ci la vérité des mots "Wer sich Wurm macht er muss getreten werden". 23/

21/ We leave aside, as of no interest for our present purposes, the question whether that Tribunal had jurisdiction under the Claims Settlement Declaration (CSD). In other words, we do not take a stand on the issue which in the Grimm case divided the Tribunal's majority on the one hand, and Judge Holtzmann (in his dissenting opinion) on the other hand.

22/ In this sense the expression "moral damage" is used, inter alia, by Blutschli (Droit International Codifié, Paris 1874, p. 247, Anzilotti (op.cit., p. 426), De Visscher (La Responsabilité des Etats, in Bibl. Visseriana II, p. 119), Rousseau (Droit International Public V, Paris 1983, p. 13); Morelli, op.cit., p. 358.

23/ Cours de Droit international (trad. Gidel), Paris 1929, pp. 493-494. Emphasis added.

Less frequently, but perhaps significantly, the kind of injury in question is also indicated as "political damage", this expression being used, preferably in conjunction with "moral damage", in the above-mentioned sense of injury to the dignity, honour, prestige and/or legal sphere of the State affected by an internationally wrongful act. The expression used is notably "moral and political damage": a language in which it seems difficult to separate the "political" from the "moral" qualification. 24/ The term "political" is probably intended to stress the "public" nature acquired by moral damage when it affects more immediately the State in its sovereign quality (and equality) and international personality. In that sense the adjective may be useful in order better to discriminate between the "moral" damage to the State (which is exclusive of inter-State relations) from the "moral" damage more frequently referred to (at national as well as international level) in order to designate the non-material or moral damage to the persons of private parties or agents which affects the State, so to speak - and without accepting any distinction between "direct" and "indirect" damage (Preliminary Report, paras. 107-108) - less immediately at the level of its external relations.

14. In our view - and considering in particular the jurisprudential and diplomatic practice (especially the latter) set forth in Chapter Three below - the "moral" damage to the State so described is in fact distinct from both the material damage to the State and in particular from the "private" moral damage to the nationals or agents of the State. This "moral damage to the State" notably consists: (a) in the infringement of the State's right per se and (b) the injury to the State's dignity, honour or prestige.

(a) The first find of injury can be described as a "legal" or "juridical damage", such damage being an effect of any infringement of an international obligation (and of the corresponding right). Indeed, "Every breach of an engagement vis-à-vis another State and every impairment of a subjective right of that State in itself constitutes a damage, material or moral, to that State" (second report on international responsibility by Ago YB ILC 1970, II, doc. A/CN.4/233, para. 54). This is a kind of injury which differs from any other effect of the internationally unlawful act; and an injury which exists in any case, regardless of the presence of any material and/or moral damages.

24/ Garcia Amador, Sixth Report, in doc. A/CN.4/134, paras. 31 and 92; Przetacznik, La Responsabilité internationale de l'Etat, in RGDIP 1974, p. 936.

As noted by Reuter, "dans toute violation d'une obligation internationale il y a inclus dans celle-ci, un dommage moral". In that sense can one say, according to the same author, that "le dommage n'est donc pas une condition distincte de la responsabilité internationale". 25/

(b) As regards instead the further components (of the State's moral damage) it has rightly been noted that "l'honneur et la dignité des Etats font partie intégrante de leur personnalité". 26/ It may be added, emphasizing Anzilotti's thoughts that since such elements often "prevail by far over (the State's) material interests", 27/ their infringement per se is very frequently invoked by States injured by an internationally wrongful act. 28/ Although conceptually distinct, components (a) and (b) of the State's moral damage tend of course to be confused into a single "injurious" effect. Indeed, the juridical injury, namely, the mere infringement of the injured State's right is felt by that State as an offense to its dignity, honour or prestige. Paraphrasing Anzilotti again, in not a few cases the damage coincides with - and gets to consist essentially of - the very infringement of the injured State's right. A State, indeed, cannot tolerate a breach of its right without finding itself diminished in the consideration it enjoys, namely, in one of its most precious and politically most highly-valued assets. 29/

25/ Le dommage, comme condition de la responsabilité internationale, in Estudios de Derecho Internacional, Homenaje al Profesor Mjaja de la Muela, Madrid 1979, p. 844. Emphasis in the original.

26/ Personnaz, op.cit., p. 277.

27/ Anzilotti, Corso, p. 425.

28/ See, inter alia, Carthage et Manouba UNRIAA, vol. XI, p. 448 ff.; Corfu Channel, ICJ Rep., 1949, p. 4 ff.; Rainbow Warrior, RGDIP, 1987. See also infra Chapter III.

29/ Anzilotti, Corso, p. 425.

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

(i) first, because it is not moral damage in the sense in which this term is used within interindividual legal systems; it is moral damage in the specific sense of an injury to the State's dignity and juridical sphere;

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

(iii) third, because in view of its distinct, unique nature, it finds remedy, as will be amply shown in due course (Chapter Three), not in pecuniary compensation per se but in one or more of those special forms of reparation which are generally classified under the concept of "satisfaction" in the technical, narrow sense of the term.

16. The considerations contained in two preceding paragraphs which will find, as stated, more adequate justification in Chapter Three, 30/ may seem to be contradicted by the fact that the reparation for the offended State's moral injury (in the sense just specified) appears at times to be absorbed, in practice, into the sum awarded by way of pecuniary compensation. The award of a remedy for the moral damage in question seems thus hardly perceptible at first sight. More numerous cases are found however, in international jurisprudence (paras. 111 ff.) as well as diplomatic practice - but most especially in the latter (paras. 119 ff.) - where the injured State's moral prejudice is manifestly covered by the specific kinds of remedies which are classified as satisfaction. These remedies, which present themselves in a variety of forms, fall under a rubric of reparation clearly distinct from pecuniary compensation. It is accordingly proposed to deal with them in Chapter Three under the title of satisfaction.

17. It should nevertheless be noted - for the sake of completeness - that situations are not infrequent in international jurisprudence concerning moral damage to human beings, where the arbitrators have expressly qualified the award of a sum covering such damage as "satisfaction" rather than pecuniary compensation. In the well-known Janes case, for example, the Claims Commission thought that "giving careful consideration to all elements

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30/ Notably in paras. 106 ff.

involved ... an amount of ... without interest is not excessive as satisfaction for the personal damage caused to the claimants by the non-apprehension and non-punishment of the murderer of Janes". 31/ In the Francisco Mallén case, the Mexico-United States General Claims Commission, while awarding "compensatory damages" for the "physical injuries inflicted upon Mallén" decided that "an amount should be added as satisfaction for indignity suffered, for lack of protection and for denial of justice". 32/ The same Commission made an identical point in the Stephen Brothers case. 33/

31/ UNRIAA, vol. 4, p. 90 (emphasis added). The court criticized the tendency to equate the amount of compensation due for the failure to meet an obligation to show due diligence in pursuing the responsible persons with compensation for economically assessable injury. Its criticism was based on several motivations: "If the murdered man had been poor or if, in a material sense, his death had meant little to his relatives, the satisfaction given these relatives should be confined to a small sum, though the grief and the indignity suffered may have been great. On the other hand, if the old theory is sustained and adhered to, it would, in cases like the present one, be to the pecuniary benefit of a widow and her children if a government did not measure up to its international duty of providing justice, because in such a case the government would repair the pecuniary damage caused by the killing, whereas she practically never would have obtained such reparation if the State had succeeded in apprehending and punishing the culprit" (UNRIAA, vol. IV, p. 87).

32/ UNRIAA, vol. 4, p. 180. Emphasis added.

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

The tendency to use the concept of "satisfaction" with regard to situations such as these is clearly present also in the literature. According to Personnaz: "Il est exact, ici comme d'ailleurs dans la plupart des cas, qu'il est impossible de remettre les choses dans l'état antérieur; mais il faut s'entendre sur le sens du mot réparer, il ne faut pas l'interpréter dans le sens le plus étroit: refaire ce qui a été détruit, effacer le passé, mais il s'agit seulement de donner à la victime la possibilité de se procurer des satisfactions équivalentes à ce qu'elle a perdu: le véritable rôle des dommages-intérêts est satisfactoire plutôt que compensatoire". 34/ And Gray notes more recently, with regard to the same situations, that: "Apparently the amount (= of damages) depends on the gravity of the injury involved, and this suggests that the award is intended as pecuniary satisfaction for the injury rather than as compensation for the pecuniary losses resulting from it". 35/

Section 4. The Distinct Role of Satisfaction

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

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

(ii) or in a sense closer to the technical meaning of the term and in a context within which the moral damage to an individual is absorbed into and thus identified with, the moral damage to the State as the international person to which the individual "belongs".

34/ Op.cit., pp. 198-199. Emphasis added.

35/ Op.cit., pp. 33-34. Emphasis added.

19. However one interprets the interpretation of the particular segments of practice and literature considered in paragraph 17 above, the said segments represent in any case a minority of both the relevant practice and the literature. They do not affect, in our view, the distinction between the moral injury to the persons of nationals or agents, on the one hand, and the moral injury that any wrongful act causes to the State, on the other hand. Both are of course damage to the State as an international person. But the first is indemnifiable, in so far as restitution in kind did not suffice, by pecuniary compensation alone. The moral damage to the State, which is more exclusively typical of international relations, is a matter for satisfaction in a technical sense, dealt with as such in Chapter Three. This will be amply confirmed by that Chapter's sections devoted respectively to the literature, the jurisprudence and especially the diplomatic practice concerning satisfaction. 36/

36/ Paras. 106 ff., 111 ff. and 119 ff. respectively. The diplomatic practice collected in the latter paragraphs appears to be even more significant than jurisprudence and literature.

CHAPTER TWO - REPARATION BY EQUIVALENT

Section 1. General Concept, Problems Involved and Method.

A. Concept and Governing Principles

20. In general terms reparation by equivalent consists of the payment of a sum of money compensating the injured State's prejudice not remedied by restitution in kind and not covered by other forms of reparation in a broad sense. Notwithstanding the "primacy" of restitution in kind as a matter of equity and legal principle, reparation by equivalent is the most frequent and quantitatively the most important among the forms of reparation. This is the consequence of the fact that restitution in kind is very frequently inapt to ensure a complete reparation. 37/

21. Of course, reparation by equivalent is governed, as well as any other form of reparation, by the well-known principle that the result of reparation in a broad sense - namely of any form of reparation or combination thereof - should be the "wiping out", to use the Chorzow Factory case dictum, of "all the legal and material consequences of [the] unlawful act" in such a manner and measure as to establish or re-establish, in favour of the injured party, "the situation that would exist if the wrongful act had not been committed". 38/ Considering the major role of compensation as described in the preceding paragraph, it is especially with regard to that remedy that the so-called Chorzow principle is to exercise its function in the regulation of the consequences of an internationally wrongful act. Considering in particular the incompleteness frequently characterizing restitution in kind, it is obviously through pecuniary compensation that the Chorzow principle can eventually be given effective application. It is indeed by virtue of that principle that pecuniary compensation fills in, so to speak, any gaps, large, small or minimal, which may be left in full reparation by the noted frequent inadequacy of restitutio in integrum.

37/ A/CN.4/416/Add.1, paras. 114-118.

38/ A/CN.4/416/Add.1, para. 114.

22. It is equally obvious that even such a sweeping principle of full or integral compensation is not by itself sufficient to settle all the issues involved in reparation by equivalent. 39/ These issues include:

1. The compensatory function of reparation by equivalent and the question of "punitive damages";
2. The question whether "moral" damage is to be compensated as well as "material" damage;
3. The problem of indemnification of "indirect" as well as "direct" damage;
4. "Causal link", "causation" and multiplicity of causes;
5. The relevance of the injured State's conduct;
6. The question of lucrum cessans as distinguished from damnum emergens;
7. The relevance of the gravity of the wrongful act and of the degree of fault of the offending State (infra, Chapter 5, paras. 178-183);
8. The obligation to pay interest and the rate thereof;
9. The determination of dies a quo and dies ad quem in the calculation of interest;
10. The alternative: compound versus simple interests.

B. Function and Nature of Reparation by Equivalent

23. Consisting as it does in the payment of a sum of money substituting or integrating restitution in kind, reparation by equivalent is qualified by three features distinguishing it from other forms of reparation. The first feature is its aptitude to compensate for injuries which are susceptible of being evaluated in economic terms. Compensation by equivalent is thus intended to substitute, for the injured State, the property, the use, the enjoyment, the fruit and the profits of any object, material or non-material, of which the injured party was totally or partly deprived as a consequence of

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39/ As noted, for example, by Reitzer, La Réparation comme conséquence de l'acte illicite en Droit International, Paris 1938, page 175:

> "L'affirmation selon laquelle le dommage entier doit être réparé n'est certainement pas de nature à fournir une méthode satisfaisante d'évaluation. Si elle signifie que les tribunaux internationaux se sont ordinairement efforcés d'assigner des réparations correspondant au dommage matériel effectif causé, elle est exacte. Mais pareille proposition, tout en marquant une tendance générale, est par trop vague pour contenir des indications précises. Il reste, dès lors, à rechercher s'il est des méthodes à l'aide desquelles l'arbitre ou le juge international procède à l'estimation des préjudices auxquels il veut que le montant de la réparation corresponde le plus possible."

the internationally wrongful act. Pecuniary compensation comes thus into play, even when the object of the infringed obligation was not a previous undertaking to pay a sum of money, in a "residual" or "substitutive" function. The second feature is that, although a measure of retribution is present in any form of reparation, reparation by equivalent performs by nature an essentially compensatory function. The afflictive-punitive function is typical of other forms of reparation, most notably of satisfaction and guarantees of non-repetition. The third feature is that the object of reparation by equivalent is to compensate for all the economically assessable injuries caused by the internationally wrongful act but only such injuries.

24. The essentially compensatory function of reparation by equivalent is generally recognized and frequently emphasized by the relevant literature. One may recall Eagleton, 40/ Jimenez de Aréchaga, 41/ Brownlie, 42/ and Graefrath. 43/ Explicit indications in the same sense are less frequent but

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40/ The responsibility of States in international law, New York 1928, p. 189. "The usual standard of reparation, where restoration of the original status is impossible or insufficient, is pecuniary payment ... It has usually been said that the damages assessed should be for the purpose only of paying the loss suffered, and that they are thus compensatory rather than punitive in character".

41/ "Punitive or exemplary damages, inspired by disapproval of the unlawful act and as a measure of deterrence or reform of the offender, are incompatible with the basic idea underlying the duty of reparation" (International Responsibility, in Manual of Public International Law (Sorensen ed.), London 1968, p. 571).

42/ "In the case of token payments for breaches of sovereignty by intrusions or other non-material loss, the role of payment is more or less than of providing 'pecuniary satisfaction'. However, it is unhelpful to describe such assessments in terms of 'penal damages'. The purpose of the award of compensation is to provide what is by custom recognized as a recompense" (System of the Law of the Nations - Part I: State responsibility, Oxford 1983, p. 223).

43/ "Imposing penalties on sovereign States or nations is not only a political, but also a legal question in our days. Imposing penalties on another State is clearly incompatible with the principle of sovereign equality of States as interpreted by the Declaration on Principles of Friendly Relations ... We therefore cannot agree that under international law, today, the purpose of damage is 'to punish or at least to reprove a State for its conduct - either explicitly or implicitly, and thereby to try to prevent a repetition of such acts in the future'. Such a conception can only serve to justify excessive claims for indemnification as a fine or penalty. It would lead to the abuse of international responsibility as an instrument for the humiliation of weaker States as it was shown by the imperialist past" (Responsibility and Damage Caused, in Hague Rec. 1984-II, p. 101).

none the less clear in jurisprudence. In the Lusitania case, for example, arbitrator Parker expressed himself clearly (notwithstanding the use of the term "satisfaction" in a very broad, non-technical sense) when he stated:

> "... The words exemplary, vindictive or punitive as applied to damages are misnomers. The fundamental concept of damages is satisfaction, reparation of a loss suffered, a judicially ascertained compensation for wrong. The remedy should be commensurate with the loss, so that the injured party may be made whole. The superimposing of a penalty in addition to full compensation and naming it damages, with the qualifying word exemplary, vindictive or punitive, is a hopeless confusion of terms, inevitably leading to confusing of thought." 44/

25. A sharp distinction between payment of moneys by way of compensation and payment of moneys for punitive purposes - with a decided exclusion of the latter from the notion of reparation by equivalent - manifested itself in the Portuguese Colonies case where the arbitral tribunal unambiguously separated compensatory and punitive consequences of the German conduct and declared its total lack of competence on the consequences of the second kind. 45/

44/ UNRIAA, vol. VII, p. 39. See also infra para. 114.

45/ In the words of the tribunal: "En sus de la réparation des dommages proprement dits, causés par les actes commis par l'Allemagne pendant la période de neutralité, le Portugal réclame une indemnité de deux milliards de marks or en raison 'de toutes les offenses à sa souveraineté et pour les attentats contre le droit international'. Il motive cette réclamation en exposant que l'indemnité qui sera accordée de ce chef 'donnera la mesure de la gravité des actes pratiqués vis-à-vis du droit international et des droits des peuples', et 'qu'elle aidera ... à faire savoir que ces actes ne pourront impunément continuer à être pratiqués. Outre la sanction de la désapprobation par les consciences et par l'opinion publique internationale, ils auraient la sanction matérielle correspondante ...' Il résulte très clairement de cela qu'il ne s'agit pas, en réalité, d'une indemnité, de la réparation d'un préjudice matériel ni même moral, mais bien d'une sanction, d'une peine infligée à l'Etat coupable et inspirée, comme les peines en général, par les idées de rétribution, d'avertissement et d'intimidation. Or, il est évident qu'en confiant à un arbitre le soin de fixer le montant des réclamations introduites pour des actes commis pendant la période de neutralité, les Hautes Parties contractantes n'ont pas entendu l'investir d'un pouvoir répressif. Non seulement le n.4 qui institute sa compétence est contenu dans la partie X du Traité, intitulée 'Clauses économiques', tandis que c'est la partie VII qui traite des 'sanctions', mais en outre il serait contraire aux intentions nettement exprimées des Puissances alliées d'admettre qu'elles ont envisagé la possibilité de frapper l'Allemagne de peines pécuniaires en raison des actes qu'elle a commis, l'article 233, al. 1, portant expressément qu'elles reconnaissent que même la simple réparation des pertes proprement dites causées par elle dépasserait sa capacité financière. La sanction réclamée par le Portugal est donc en dehors à la fois des sphères des compétences des arbitres et du cadre du Traité" (UNRIAA, vol II, pp. 1076-1077). See also infra para. 113, footnote 254.

C. Existing Rules: Their Determination and Progressive Development

26. Notwithstanding the relative abundance of jurisprudence and State practice covering most of the issues listed in paragraph 22 above, authors are mostly inclined not to recognize the existence of any rules of general international law more specific than the Chorzow formulation. They are mostly sceptical even about the possibility of drawing from the practice reliable (uniform) standards of indemnification. Eagleton stated, for example, that "international law provides no precise methods of measurement for the award of pecuniary damages". 46/ Reitzer developed the point further 47/ and similar

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46/ Op.cit., p. 191.

47/ "Manifestement, l'arbitre est acculé à la solution qui consiste à établir la réparation en s'inspirant de sa propre sagesse et de son sens de justice personnel. Il y a un parallélisme entre le droit international général et le droit international arbitral et judiciare. Là-bas, appréciation du lésé: ici, appréciation du juge. En déférant un litige à l'arbitrage, les parties substituent à la volonté unilatérale de l'Etat lésé - lui-même partie intéressée - la volonté, la discrétion d'une tierce personne désintéressée ...

Le phénomène de la liberté du juge dans la détermination de la mesure de la réparation ne pouvait pas rester inaperçu par la science du droit international. Beaucoup d'auteurs soulignent le rôle éminent que jouent les vues personnelles du juge ou de l'arbitre, sans se rendre toujours compte de toute la portée de cette proposition ...

Cette liberté se trouve aussi consignée dans d'innombrables traités et compromis d'arbitrage, soit que l'on ait autorisé l'arbitre à se prononcer sur la réparation ex aequo et bono ou 'selon la justice et l'équité', soit qu'on lui ait conféré les pouvoirs les plus étendus, parfois à l'exclusion expresse du droit strict ...

Mais ce qui est plus significatif encore, c'est que lors même qu'une telle clause ne se trouvait pas insérée dans l'instrument lui conférant sa compétence, l'arbitre a cru pouvoir décider conformément à l'équité. Ce furent notamment les commissions mixtes des réclamations qui se considéraient comme de véritables cours d'équité. Mais des déclarations dans ce sens ne font pas défaut, non plus, dans les sentences arbitrales proprement dites." Et encore "Le nombre impressionnant des compromis attribuant au juge une entière liberté d'appréciation suffirait pour démontrer que les Etats n'éprouvent aucune crainte à l'égard de cette liberté. Mais on peut, en outre, citer, à l'appui de la manière de voir opposée la Conférence de Codification de La Haye. Les réponses que de nombreux Etats ont données au point XIV du Comité préparatoire prouvent qu'ils se sont bien rendu compte de l'incertitude, voire de l'inexistence, de normes coutumières relatives à la mesure de la réparation et pouvant utilement guider l'arbitre. Il en ressort également que ces Etats ont entendu réserver à l'arbitre appelé à trancher ces questions la plus large mesure de discrétion ..." (op.cit., pp. 160-162).

ideas are expressed by Verzijl. 48/ Graefrath, for his part, observed recently that "It seems that the unlimited variety of cases and specific circumstances do not allow for more than guidelines as far as these issues are concerned." 49/ He finds this to be particular true, "when we are dealing with material damage, and all the more so, when we have to determine an indemnification for immaterial damage, i.e. unlawful detention, bodily harm or death, violation of rights without causing material damage". 50/ Gray expresses similar doubts in her recent work. 51/

48/ "The standards of indemnification are so varied according to the specific cases and kinds of damage that it is hardly feasible to formulate general rules on the subject. It would only be possible to draw up a long list of reparation awards, in addition to the few Court decisions surveyed above, to indicate the lines along which claims commissions or arbitral tribunals have reached their verdicts relating to the estimation of damages suffered. There is indeed an endless variety of possible injuries: homicides, mutilations, the infliction or wounds; incarcerations, tortures, detentions, unjust punishment; expulsions; destructions, seizures, theft; denial of justice; lack of government protection, or failure to apprehend or punish the offenders, etc. It goes without saying that the methods of reaching an adequate measure of compensation must necessarily differ widely. The victim may be dead and others may claim as his successors in title. The reparation may follow a long time after the delict. The damage may have consisted of personal injury, loss of property, deprivation of concession, confiscation, loss of a profession or a bread-winner, the staining of a reputation, insult, moral grief, etc.". Verzijl, International law in historical perspective, vol. VI, Leyden 1973, pp. 746-747.

49/ Responsibility and damage caused, Hague Rec., 1984-II, p. 94.

50/ Ibid.

51/ "The basic principle of full reparation than can be derived from the various municipal legal systems - in civil law and communist countries expressed in terms of damnum emergens and lucrum cessans, in common law countries in terms of putting the claimant in the position he would have been if there had been no injury to him - represents very little advance on the determination that an obligation to make reparation has arisen. Clearly this basic principle cannot be a practical guide to the assessment of damages, as can be seen from the fact that although legal systems share this aim, their methods of assessment and the results arrived at vary considerably. Moreover, the basic principle is subject to important qualification and exceptions in every legal system" (Judicial Remedies in International Law, Oxford, 1987, p. 8).

27. In the opinion of the Special Rapporteur, the lack of international rules more specific than the Chorzow principle is probably not so radical as a considerable part of the doctrine seems to believe. We find comfort in so thinking in the fact that even in the less recent literature one finds indications that the field is not so lacking in regulation. Verzijl (as quoted above) admits, for example, that "lines" can be identified "along which claims commissions or arbitral tribunals have reached their verdicts relating to the estimation of damages suffered". This contradicts, in a sense, Eagleton's quoted statement that international law "provides no precise methods of measurement for the award of pecuniary damages". A relatively more positive view is also expressed by Anzilotti. After noting the evident similarity of international dicta with the rules of the law of tort in municipal legal systems and the natural tendency of tribunals and commissions to have recourse to rules of private law, particularly of Roman law, he specified that in so doing international tribunals do not apply national law as such. More persuasively they apply international legal principles modelled on municipal principles or rules. Anzilotti speaks notably of such rules as being materially identical albeit formally different from municipal rules, obviously in the sense that they have become rules of international law by virtue of an international law-making process. 52/ The influence, albeit relative, of rules of private law, notably of Roman law, is also acknowledged by other writers, such as Nagy and Cepelka. 53/ Reitzer himself, who seemed

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52/ Anzilotti is not unaware, on the other hand (at the same time) that not all municipal rules have acquired the force of international rules or principles. An example, according to Anzilotti, would have been the non-transposition into international law of the municipal rule under which more damages were not indemnifiable in some national legal systems (Corso di diritto internazionale, 1915, SIOI reprint, 1956, Padova, p. 129).

53/ Nagy, "The problem of reparation in International Law", in Questions of International Law, vol. VIII, 1985, pp. 178-179. Similarly, according to Cepelka, Les conséquences juridiques du délit en droit international contemporain, Prague, 1965, p. 29: "La pratique internationale a élaboré - pendant les derniers 180 ans environ - au moins certains critères auxiliaires servant à établir l'étendue du tort causé par le délit et à déterminer le montant de l'indemnité à payer. Les critères en question s'appuient essentiellement sur les principes généraux du droit. Naturellement, il ne s'agit ici aucunement d'une réception de ces principes du droit intérieur dans le droit international, car les principes généraux du droit ne font pas partie du droit international général; cela n'exclut pas que des simples critères auxiliaires ne deviennent par la voie de la coutume internationale, au cours de l'évolution ultérieure de la pratique internationale, des règles stables du droit international commun."

to deny altogether the existence of any international rules or principles in the field (supra, note 47), acknowledges the existence of different views, according to which:

> "Les Etats qui défèrent leur litige à une instance impartiale le font certainement dans la conviction que des règles bien établies existent au sujet du quantum de la réparation, règles auxquelles le juge est obligé de se conformer. Pour peu que cette conviction fût absente, les Etats hésiteraient de confier leurs controverses à un arbitre dont la décision serait susceptible de leur apporter des surprises peu désirables." Reitzer adds that "On est même allé jusqu'à prétendre que, à défaut de règles de droit international applicables en l'espèce, et à moins que le compromis ne l'autorise à juger ex aequo et bono, l'arbitre doit refuser de statuer."

But Reitzer rejects these views as unfounded; and recognizes that arbitrators have recourse largely to general principles of municipal law. 54/ After citing the Delagoa Bay Railway case 55/ Reitzer concluded that "Sans faire donc partie du droit international général, les principes généraux du droit privé ont exercé une influence considérable sur les arbitres et juges internationaux décidant d'une façon discrétionnaire". 56/ In this passage by Reitzer the difference from Anzilotti only concerns the status of the general principles referred to.

28. The noted admissions (and contradictions) of a part of the doctrine suggest that a less pessimistic and more balanced view would probably be justified with regard both to the existence of rules or principles governing compensation in international relations and the usefulness of attempting their progressive development on the part of the Commission. On the one hand, the

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54/ "Un examen des sentences arbitrales révèle le fait incontestable que les arbitres se sont assez fréquemment référés auxdits principes généraux [reconnus en droit interne]. Ces derniers se rencontrent également dans les compromis. Il ne nous est point loisible de passer ce phénomène sous silence" (op.cit., pp. 162-163). And although he contends that the general principles so described do not constitute "des normes obligatoires du droit des gens général", he admits that it is natural, given th existence of a "système de normes juridiques millénaire et hautement développé" (namely see Roman law and civil law), that the international judge "n'ait pas manqué de puiser dans cette source". The more so, he adds ... "les deux situations de fait accusent des analogies incontestables ..." (p. 163).

55/ Op.cit., pp. 164-165.

56/ Ibid., p. 165.

number and variety of concrete cases is so high that it is natural that the study of jurisprudence and diplomatic practice lead one to exclude the very possibility of finding or even conceiving very detailed rules applying mechanically and indiscriminately to any cases or groups of cases. This excludes not only the actual existence (de lege lata) of very detailed rules but also the advisability of producing any such rules as a matter of progressive development. It does not exclude, nevertheless, either the existence of more articulate rules than the Chorzow principle or the possibility or reasonably developing any such rules and obtaining their adoption.

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

30. Of course, one should not expect the discovery of absolute rules to be applied automatically and mechanically in every case and under any circumstances. It is common knowledge that in no field of the law, whether national or international, rules or principles can be applied mechanically: and it is especially so when the matter involved is one of quantification of losses - often non-material - to be compensated in each particular case. Any rule which is not conceived for just a single case needs some measure of adaptation - by judges, arbitrators or interested parties themselves - to the features and circumstances of each one of the innumerable concrete cases to which it applies. It is perhaps just because of the great variety of the

kinds of wrongful acts and of their circumstances, particularly of the variety of the kinds of damages caused, that so many doubts are raised with regard to the existence of international legal rules on pecuniary compensation.

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

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

33. Within the said reasonable limits the incorporation of elements of progressive development into the draft seems to be particularly indicated by the nature of the subject-matter of State responsibility in general and pecuniary compensation in particular. As often stressed by members of the Commission as well as by scholars at large, the Commission's project on State responsibility deals mainly, unlike other projects, with the so-called "secondary" legal situations. The Commission deals, precisely, with the prospective situations or conflicts which may derive from future wrongful acts in any areas of international law: situations and conflicts with regard to which any State can find itself with an equal degree of probability either in the position of offending, "responsible" State or in the position of an "injured" State. Normally one is thus not confronted, as is the case when one deals mainly or exclusively with the codification and development of the so-called "primary" rules, with given, actual or foreseeable conflicting interests and positions such as those inevitably emerging when one deals (de lege lata or ferenda) with the régime of international watercourses, the

régime of the sea, the régime of international economic relations or the law of the environment. 57/ Of course, even in the regulation of an area such as State responsibility there are issues with regard to which similar potential contrasts of interests may manifest themselves: for instance, between States poor and rich, large and small, strong and weak, on such issues as those concerning the measures admissible to secure reparation and the preconditions and conditions of the lawfulness thereof. In so far, however, as the purely substantive consequences of a wrongful act are concerned, and particularly with regard to the rules that obtain or should obtain in the field of pecuniary compensation, all States would seem roughly to share the same "prospective" or "hypothetical" interests. All States should therefore share a high degree of common interest with regard to both leniency or generosity vis-à-vis the offending or the injured State respectively. 58/ This consideration might perhaps help better to assess the possibility of incorporating elements of progressive development in the draft articles concerning reparation in general and reparation by equivalent in particular. This also applies, in our view, to satisfaction.

Section 2. "Direct" and "indirect" damage, Causal Link and Multiplicity of Causes

A. "Direct" and "Indirect" Damage

34. Once agreed tht all the injuries and only the injuries caused by the wrongful act must be indemnified, 59/ the effort of doctrine and practice has always been to distinguish the consequences which may be considered to have been caused by a wrongful act and hence indemnifiable from those not to be considered as such and therefore not indemnifiable. 60/

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

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

59/ This is what PERSONNAZ defines "le principe de l'équivalence de la réparation au préjudice", op.cit., pp. 98-101.

60/ An accurate analysis of the problem is in the substantial work of BOLLECKER-STERN, Le préjudice dans la théorie de la responsabilité internationale, Paris 1973, particularly pp. 185-223.

35. For sometime in the past this question has been discussed in terms of a distinction between "direct" and "indirect" damage. This approach, however, has given rise to doubts because of the ambiguity and the utility of such a distinction. 61/ Whatever may be meant by "indirect" damage in certain municipal legal systems, 62/ this expression has been used in international jurisprudence to justify decisions not to award damages. No clear indication was given, however, about the kind of relationship between event and damage that would justify their qualification as "indirect". 63/ As noted by Hauriou, the most striking application of the rule excluding "indirect" damages was "l'affaire de l'Alabama où le tribunal de Genève, par une déclaration spontanée et préalable au jugement, avertit les parties que les demandes pour pertes indirectes ne sauraient en aucun cas être prises en considération par les juges". 64/ He added: "Mais le principe est

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61/ Cfr. PERSONNAZ, op.cit., p. 135; EAGLETON, op.cit., p. 202; MORELLI, Nozioni di Diritto Internazionale, Padua 1967, p. 360; BOLLECKER-STERN, op.cit., pp. 204-211; GRAY, op.cit., p. 22.

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

63/ In that sense ANZILOTTI op.cit., p. 431, who notes that international tribunals "piuttosto che qualificare un danno come indiretto e desumerne la non risarcibilità, hanno qualificato come indiretto un danno allorché ritenevano di non doverlo risarcire"; but mainly HAURIOU, whose article "Les dommages indirects dans les arbitrages internationaux" (R.G.D.I.P. 1924) has undoubtedly represented an important phase in the study of the subject. According to this author, "toutes les fois qu'il est fait appel à la théorie des dommages indirects, c'est pour écarter impitoyablement cette catégories de dommages"; and further on "Malheureusement, si l'on examine dans les recueils des sentences arbitrales les applications de cette règle, il est impossible de ne pas relever de décisions contradictoires" (p. 209).

64/ Op.cit., p. 209.

scrupuleusement observé dans tous les litiges internationaux, et il n'y a pas, à notre connaissance, à part le cas de la Commission mixte germano-américaine, une seule affaire où l'arbitre, après avoir qualifié un dommage d'indirect, lui accorde une compensation". 65/ Reitzer points out, however, that:

> "Encore qu'ils l'aient rejeté, les commissions mixtes et les tribunaux sont loin d'avoir fourni une notion bien déterminée du dommage direct. On peut même dire qu'ils se sont servis du terme sans se rendre compte de l'acception des mots employés. Rien d'étonnant, par conséquent, si les mêmes préjudices sont écartés dans un cas comme étant indirects, tandis qu'ils sont admis dans un autre cas, soit qu'on omette de soulever la question de leur nature, soit que l'arbitre les qualifie franchement de directs." 66/

36. Be as it may of the doctrine, practice has taken its distance from the notion of "indirect" damage for the purpose of identifying the demarcation line of indemnifiable injury. Worthy of mention in this connection is the award in the War Risk Insurance Premium Claims case of 1923 between the United States of America and Germany, in which the court found that "it matters not whether the loss be directly or indirectly sustained so long as there is a clear, unbroken connection between Germany's act and the loss complained of". 67/ The same Court further stated that the term "indirect" with regard to damage in "inapt, inaccurate and ambiguous", and that "the distinction between 'direct' and 'indirect' damage is frequently illusory and fanciful and should have no place in international law". 68/

B. Continuous (uninterrupted) Causal Link

37. Rather than the "directness" of the damage the criterion is thus indicated in the presence of a "clear" and "unbroken" causal link between the unlawful act and the injury for which damages are being claimed. Authors seem generally to agree on this point. For injury to be indemnifiable, it is necessary for it to be linked to an unlawful act by a relationship of cause

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65/ Ibid., p. 209.

66/ Op.cit., p. 180.

67/ UNRIAA, vol. VII, p. 29.

68/ Ibid., pp. 62-63.

and effect: 69/ and an injury is so linked to an unlawful act whenever the normal and natural course of events would indicate that the injury is a logical consequence of the act or whenever the author of the unlawful act could have foreseen the damage his act would cause. As Bollecker-Stern explains, it is presumed that the causality link exists whenever the objective requirement of "normality" or the subjective requirement of "predictability" 70/ is met. Indeed, these two conditions - normality and predictability - nearly always coexist (in the sense that the causing of the damage could also have been predicted if it were within the norm). 71/ And although this has been denied at least by one author (who holds that only the objective criterion of normality should be used to ascertain the damages due), 72/ practice seems not to show any preference in favour of the "normality" criterion. For example, among the replies to the questionnaire submitted by the preparatory committee of the Codification of International Law Conference on the subject of "Reparation for Damage Caused", Point XIV,

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69/ See especially PERSONNAZ, op.cit., p. 136: "Doivent être considérés comme conséquence de l'acte dommageable et doivent par conséquent être pris en considération pour l'appréciation de l'étendue de l'obligation de réparer, tous les faits qui sont reliés à l'acte originaire par un lien de cause à effet, en d'autres termes, tous les faits auxquels on peut remonter jusqu'à l'acte primitif par une chaîne ne présentant aucune solution de continuité"; and EAGLETON, op.cit., p. 202: "all damages which can be traced back to an injurious act as the exclusive generating cause, by a connected, though not necessarily direct, chain of causation, should be integrally compensated".

70/ Op.cit., pp. 191-194.

71/ See, for example, SALVIOLI, La responsabilité des Etats et la fixation des dommages et intérêts pas les tribunaux internationaux, Hague Rec., 1929-III, p. 251: "Le critérium de la 'normalité' dans l'ordre des conséquences est le critérium auquel la jurisprudence internationale se réfère souvent pour déterminer le fondement de la réparation des dommages indirects. Et ce critérium, envisagé sous son aspect subjectif, coïncide dans une certaine mesure avec celui de la 'possibilité de prévision' qui est utilisé lui aussi dans la jurisprudence internationale. Il s'agit de la même chose examinée de deux points de vue différents"; REITZER, op.cit., p. 183: "On exprime cette pensée (namely, 'causalité adéquate') également par la proposition que tout préjudice résultant de l'acte dommageable dans le cours ordinaire, prévisible, de la vie quotidienne doit être réparé".

72/ In that sense SERENI, Diritto internazionale, Milan 1956-65, vol.III, p. 1551, states that "il danno derivante dall'atto illecito èrisarcibile anche se non era prevedibile". He cites in this respect the case of the Protuguese Colonies (UNRIAA, vol. II, pp. 1031-1033, 1037, 1074-1076).

Germany 73/ and Denmark 74/ expressed themselves in favour of predictability. The Netherlands 75/ and the United States were in favour of normality. 76/

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

> "... en effet, il ne serait pas équitable de laisser à la charge de la victime les dommages que l'auteur de l'acte illicite initial a prévus et peut-être même voulus, sous le seul prétexte que, dans la chaîne qui les relie à son acte, il y a des anneaux intermédiaires. Mais par contre tout le monde est d'accord que, si même on abandonne le principe rigoreux que seuls les dommages directs donnent droit à réparation, on n'en doit pas moins nécessairement exclure, sous peine d'aboutir à une extension inadmissible de la responsabilité, les dommages qui ne se rattachent à l'acte initial que par un enchaînement imprévu de circonstances exceptionnelles et qui n'ont pu se produire que grâce au concours de causes étrangères à l'auteur et échappant à toute prévision de sa part." 77/

73/ "One first thought should be to examine very carefully the relationship of cause and effect. In the domain of international law particularly, quite unforeseen consequences might arise if it were possible to make a State responsible for damages caused by a concatenation of extraordinary circumstances which could not be foreseen in the normal course of events. This is a point of which the modern doctrine of international law and the practice of arbitration courts are substantially concordant" (Série de Publications de la Société des Nations; V. Questions juridiques, 1929.V.3, p. 146).

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

75/ Ibid., p. 149: "Compensation must be given for any damage which can reasonably be regarded as the consequence of the act alleged against the State."

76/ Ibid., 1929.V.10, p. 25: "Losses of profits, when proved with reasonable certainty and when a causal connection could be established, have been allowed."

77/ UNRIAA, vol, II, pp. 1032-33.

It is also interesting to see what was stated in the decision in the Samoan Claims case: "The effect of these rules is that the damages for which a wrongdoer is liable are the damages which are both, in fact, caused by his action, and cannot be attributed to any other causes, and which a reasonable man in the position of the wrongdoer at the time would have foreseen as likely to ensue from this action." 78/

38. It seems therefore not correct to exclude predictability from the requisites necessary to determine causality for the purposes of compensation. At most it can be said that the possibility of foreseeing the damage on the part of "a reasonable man in the position of the wrongdoer at the time" is an important indication for judging the "normality" or the "naturalness" which seems to be an undeniable prerequisite for identifying the causality link. The aforementioned War Risk Insurance Premium Claims case once again provides a valuable example of the way in which the test of normality is applied in identifying the causality link: "It matters not how many links there may be in the chain of causation connecting Germany's act with the loss sustained, provided there is no break in the chain and the loss can be clearly, unmistakably and definitely traced, link by link, to Germany's act." 79/

40. The criterion for presuming causality when the conditions of normality and predictability are met requires further explanation. Both in doctrine and in judicial practice one notes a tendency to identify the criterion in question with the principle of proxima causa as used in private law. 80/

78/ Germany v. Great Britain and U.S.A., in UNRIAA, vol. IX, p. 15.

79/ According to the same Commission: "Where the loss is far removed in causal sequence from the act complained of, it is not competent for this tribunal to seek to unravel a tangled network of causes and of effects, or follow, through a baffling labyrinth of confused though, numerous disconnected and collateral chains, in order to link Germany with a particular loss. All indirect losses are covered, provided only that in legal contemplation Germany's act was the efficient and proximate cause and source from which they flowed. The simple test to be applied in all cases is: has an American national proven a loss suffered by him susceptible of being measured with reasonable exactness by pecuniary standards, and is that loss attributable to Germany's act as a proximate cause?" (UNRIAA, vol. VII, pp. 29-30).

80/ According to GRAEFRATH: "it is a principle of private law that is applied, the principle of 'proxima causa'. A loss is regarded as a normal consequence of an act, if it is attributable to the act as a proximate cause". Op.cit., p. 95.

Brownlie, referring to the Dix case, 81/ says that "There is some evidence that international tribunals draw a similar distinction. They hold governments responsible 'only for the proximate and natural consequences of their acts' and deny 'compensation for remote consequences, in the absence of evidence of deliberate intention to injure'". 82/ Recently, in the claims by Canada following the disintegration of the Cosmos 954 Soviet nuclear satellite, the Canadian claim recited: "In calculating the compensation claimed, Canada has applied the relevant criteria established by general principles of international law according to which fair compensation is to be paid, by including in its claim only those costs that are reasonable, proximately caused by the intrusion of the satellite and deposit of debris and capable of being calculated with a reasonable degree of certainty." 83/

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

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

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

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

81/ UNRIAA, vol. IX, p. 121.

82/ System, cit., p. 224.

83/ See Brownlie, System, cit., p. 226.

84/ COMBACAU, La responsabilité internationale, in "Droit international public" (Thierry, Combacau, Sur, Vallée), Paris 1984, speaks in such case of a "causalité du premier dégré: celle qui unit sans aucun intermédiaire le fait générateur au dommage" (p. 711).

43. As Bollecker-Stern algebraically puts it: "Aussi longtemps que l'on peut prouver avec certitude que Ai (= the unlawful act) est la cause directe et unique de P1 (= the 'immediate' damage) et que P1 est la cause unique et directe de P2, etc., jusqu'à Pn, sans qu'aucun maillon ne manque dans la chaîne naturelle et logique reliant l'acte illicite et le préjudice final, ce dernier sera donc indemnisable." 85/ Causation is thus to be presumed not only in the presence of a relationship of "proximate causation". It is to be presumed whenever the damage is linked to the wrongful act by a chain of events which, however long, is uninterrupted. As noted by Salvioli:

> "On fait valoir dans la jurisprudence internationale qu'une réparation ne doit être due que lorsque aucun fait étranger n'a interrompu le lien de causalité entre la cause - l'acte - et la conséquence - le dommage. Ce principe est en lui-même exact: mais il faut l'appliquer avec pondération. Ainsi ... si l'acte illicite a favorisé la naissance d'un fait, même étranger, ou bien a exposé le lésé à son influence, on ne peut pas soutenir que le rapport de causalité ait été interrompu. Les préjudices de cette catégorie doivent être indemnisés." 86/

C. Causal Link and Concomitant Causes

44. Cases must be considered where the injuries are not caused exclusively by an unlawful act, but have been also produced by concomitant causes among which the unlawful act plays a decisive but not exclusive role. In such cases, to hold the "author State" liable for full compensation would be neither equitable nor in conformity with a proper application of the causal link criterion. The solution should be the payment of partial damages, in proportion to the amount of injury presumably to be attributed to the wrongful

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85/ Op.cit., p. 211. These are what Hauriou had already classified as "dommages éloignés" or "du second dégré", in order to indicate "les faits dommageables qui se présentent comme une répercussion du dommage principal, mais dont l'origine se trouve néanmoins dans le préjudice initial causé par l'Etat et entraînant sa responsabilité" (p. 219). In that sense cfr. PERSONNAZ, op.cit., p. 129: "La relation de causalité est une question de fait et doit être établie avec certitude: dès qu'elle existe la réparation est due, quelqu'éloigné dans le temps ou dans l'espace que soit le préjudice dérivé; inversement l'obligation disparaît si elle vient se rompre".

86/ SALVIOLI, op.cit., p. 247.

act and its effects, the amount to be awarded to be determined on the basis of the criteria of normality and predictability. Salvioli, Eagleton and other authors explain the point well. 87/

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

> "justement de savoir si la baisse du chiffre d'affaires avait pour cause unique le procès, ou si d'autres causes n'étaient pas entrées en concurrence. Dans l'espèce il était manifeste que des circonstances étrangères avaient contribué à la diminution de bénéfices enregistrée par la Société. Les arbitres purent relever, par exemple, une crise dans la production vinicole, pendant les années 1839 à 1842, ainsi que des pertes provenant des mauvaises conditions dans lesquelles avaient été effectuées certaines consignations de vins. Dans cette hypothèse, par conséquent, les dommages qualifiés d'"indirects", en l'espèce la diminution des

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87/ "Il peut arriver qu'un dommage X soit l'effet de plusieurs causes indépendantes les unes des autres, mais qui, toutes ensemble, ont concouru à la production du dommage ou à la production d'un dommage d'une entité donnée. Cette situation est la situation typique d'un concours de causes: elle reste comme telle, à proprement parler, en dehors du cadre des dommages indirects. Or, lorsqu'un acte illicite d'un sujet déterminé se trouve parmi ces causes (faits naturels ou actes d'un tiers) il est évident qu'une partie du dommage doit être attribuée à l'acte illicite; et il sera toujours posible de transformer la partie idéale du dommage en une quote-part réelle de l'indemnité à la charge du coupable. La difficulté dans la discrimination de la partie du dommage à attribuer à l'acte illicite ne pourrait autoriser le juge à repousser purement et simplement la réclamation du lésé." SALVIOLI, op.cit., pp. 245-246. EAGLETON, op.cit., p. 203: "if other elements enter into production of the harm alleged, compensation should be made in proportion to the damage actually caused by the respondent's act." PERSONNAZ, op.cit., p. 143: "quand le juge se trouve en présence de deux ou plusieurs rapports de causalité entre un dommage et plusieurs faits, il examinera lequel d'entre eux paraît le plus normal et quel est celui de faits originaires qui aura eu le plus de chance de provoquer cet acte. Et si chacun d'entre eux a pu normalement y prendre part, il y aura lieu d'attribuer à chacun une part de responsabilité dans l'origine". GRAY, op.cit., p.23: "If a State is liable only for the direct consequences of its own unlawful act it should not have to pay full compensation for injuries partly caused by external factors." On the concomitance of factors other than the wrongful act itself in the causation of damage and the consequences thereof on the quantum of compensation see the thorough analysis by BOLLECKER-STERN op.cit., chapters III and IV.

> bénéfices de la Société, se présentent comme étant le résultat de causes différentes. Les unes se rattachent au déni de justice dont la Société a été victime, mais les autres lui sont totalement étrangères." 88/

46. It would be pointless trying to find any rigid criteria to apply to all the cases and to indicate the percentages to be applied for damages awarded against an offending State when its action has been one of the causes, decisive but not exclusive, of an injury to another State. It would be absurd to think in terms of laying down in a universally applicable formula the various hypothesis of causal relationship and try to provide a dividing line between damage for which compensation is due from damage for which compensation is not due. 89/ The application of the discussed principles and criteria can only be made on the basis of the factual elements and circumstances of each case, where the discretionary power of arbitrators, or the diplomatic abilities of negotiators will have to play a decisive role in jugding the degree to which the injury is indemnifiable. This is especially true whenever the causal chain between the unlawful act and the injury is particularly long and linked to other causal factors. As Reitzer rightly describes the relevant doctrine:

> "La causalité, c'est l'enchaînement d'un nombre infini de causes et d'effets: le préjudice subi est dû à la concurrence d'une multiplicité de faits et de phénomènes. Le juge international doit dire lesquels entre ces faits et phénomènes ont produit le dommage, d'après le cours ordinaire des choses, et lesquels lui sont, au contraire, étrangers. Il doit notamment décider si, selon le même critère de normalité, le dommage est ou n'est pas attribuable à l'acte incriminé. Cela nécessite un choix, une sélection, une appréciation, parmi les faits qui, pris en eux-mêmes, ont tous une valeur égale. Dans ce travail de sélection, l'arbitre est acculé à suivre ses propres lumières. C'est lui qui rompt la chaîne de causalité, afin d'y englober telle catégorie d'actes et d'événements et d'en exclure telle autre, guidé par sa seule sagesse et sa propre perspicacité. Toutes les fois, on le remarque, que l'arbitre ne trouve point d'indications utiles dans les précédents, sa liberté de jugement rebondit." 90/

88/ Op.cit., p. 216.

89/ Anzilotti, Corso cit., p. 431.

90/ Op.cit., pp.184-185. Very appropriate, inter alia, are the remarks made by HAURIOU, op.cit., p. 220; and PERSONNAZ, according to whom "L'existence des rapports (= de causalité) est une question de fait et doit être établie par le juge; il ne saurait être question de l'enfermer dans des formules, car c'est uniquement affaire d'espèces" (p. 129), and further on: "C'est là une question qui ne peut pas être résolue par des principes, mais seulement à la lumière des faits de la cause et d'après des considérations d'espèce, pour l'examen desquels le juge disposera, sauf restrictions du compromis, d'un entier pouvoir d'appréciation" (p. 135).

D. The Injured State's Conduct as a Concomitant Cause

47. A concomitant cause the presence of which may affect the amount of compensation is the lack of "due diligence", or the presence of any degree of negligence on the part of the injured State. It is widely agreed that where the injured Sate contributed to cause the damage, or to the aggravation thereof, compensation would reduce in amount accordingly. 91/ The relevance of the injured State's negligence has been recognized and acted upon in a number of cases.

48. In Costarica Packet decided by arbitrator de Martens in 1897 and reported by Hauriou, Great Britain obtained compensation for the detention of the ship's captain and the loss of the fishing season. The amount of compensation was, however, reduced by the arbitrator, in consideration of a number of circumstances, such as the early release of the arrested captain of the ship and the availability, during his absence, of the ship's second in command, which would have allowed the resumption of the fishing and the consequent reduction of the loss caused by the captain's unlawful arrest by Dutch authorities. 92/ Similarly, in the Delagoa Bay case the arbitrators were asked to settle a claim in the dispute between Portugal on the one hand, and the United Kingdom and the United States of America on the other, over the

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91/ SALVIOLI, op.cit., pp. 265-266; CEPELKA, op.cit., p. 32; GRAEFRATH, op.cit., p. 95; GRAY, op.cit., pp. 23-24; but mainly BOLLECKER-STERN, op.cit., Chapter III, pp. 265-300.

92/ Op.cit., pp. 216-217. The case is reported in MOORE, History and Digest of the International Arbitrations to which the United States has been a party, Washington 1898, pp. 4948 ff. As resumed by GRAY, op.cit., p. 23: "The Arbitrator said: 'Whereas the unjustifiable detention of Captain Carpenter caused him to miss the best part of the whale fishing season; Whereas on the other hand Mr. Carpenter, on being set free, was in a position to have returned on board the ship Costa Rica Packet in January 1892 at the latest, and whereas no conclusive proof has been produced by him to show that he was obliged to leave his ship until April 1892 in the port of Ternate without a master, or still less, to sell her at a reduced price; Whereas the owners or the captain of the ship being under an obligation, as a precaution against the occurrence of some accident to the captain, to make provision for his being replaced, the mate of the Costa Rica Packet ought to have been fit to take the command and to carry on the whale fishing industry; and wheras thus the losses sustained by the proprietors of the vessel, Costa Rica Packet, the officers, and the crew, in consequence of the detention of Mr. Carpenter, are not entirely the necessary consequences of this precautionary detention', a reduced amount of damages should accordingly be allowed."

cancellation of the franchise for a railway, 35 years before its expiry date: "Toutes les circonstances qui peuvent être alléguées à la charge de la compagnie concessionnaire et à la décharge du Gouvernement portugais atténuent la responsabilité de ce dernier, et justifient, comme il va être exposé plus bas, une réduction de la réparation allouée." 93/

49. Another case of interest is the John Cowper case, 94/ about which Salvioli says:

> "Il est probable que des considérations de même nature (responsabilité du lésé) ont dû influencer l'arbitre dans l'affaire Cowper lorsque il a repoussé la demande en réparation des profits manqués (perte consécutive des récoltes pendant dix années, de 1815 à 1824), réclamés comme conséquence du dommage initial, l'enlèvement des esclaves. En effet, s'il est vrai qu'après l'enlèvement des esclaves le propriétaire ne pouvait pas cultiver ses terres, il n'est pas moins exact que, si ce propriétaire avait fait preuve de la diligence moyenne du père de famille, il aurait pû remplacer les esclaves par d'autres travailleurs." 95/

50. A different decision which confirms the rule seems rightly to have been taken in Wimbledon case by the PCIJ. The refusal to let the ship sail through the Kiel Canal having been found to be a source of liability, there remained to determine the amount of compensation. There was no doubt about the offending State's obligation to pay damages for the détour to which the ship had been forced as a consequence. A doubt, however, arose with regard to the injury represented by the fact that the ship had harboured at Kiel for some time, following refusal of passage, before taking an alternative course (by Skagen). Implicitly, the Court admitted that the ship captain's conduct in that respect had to be considered as a possible circumstance affecting the amount of compensation. While thus confirming the rule with its authority, the Court did not believe however that the captain's conduct left anything to be desired. Indeed, the Court stated: "Pour ce qui concerne le nombre de

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93/ LA FONTAINE, Pasicrisie Internationel, Berne 1902, p. 365.

94/ LAPRADELLE and POLITIS, Recueil des arbitrages internationaux, Paris 1954-7, vol. I, p. 348.

95/ Op.cit., p. 267.

jours, il paraît certain que le navire qui désirait faire reconnaître son droit était fondé à attendre, pendant un délai raisonnable, avant de poursuivre son voyage, le résultat des négociations diplomatiques entamées à ce sujet." 96/ No reduction was decided of the amount of compensation.

51. While generally accepting the essential correctness of the practice, the authors who have considered the matter rightly raise the question of the foundation of the rule on "contributory negligence". Mention is made of "concours de fautes", "responsabilité du lésé", "clean hands", etc. A more convincing explanation of the practice in question is that it is merely an application of the rule of causation and of the principle and criteria to be resorted to in any case of multiplicity of causes. It is in that sense that according to Bollecker-Stern, 97/ Reitzer, Salvioli, Roth, Salmon and others express themselves. 98/ We would be inclined to concur.

Section 3. The Scope of Reparation by Equivalent

A. In General

52. As outlined in the Introduction (supra, para. 4), pecuniary compensation is generally described as covering the "material" injury suffered by the offended State which has not been already covered by restitution in kind. Correct in a sense, as said in the preceding Chapter, this definition has to be intended as related to the proper meaning of the term "material injury" 99/ in the sphere of international law and relations and, mainly, by way of contrast with the term "moral injury" in the "international" sense above indicated (supra, paras. 13-16).

96/ PCIJ, Series A., No. 1, p. 31.

97/ Who discusses the various theories, especially at pages 310-313 (op.cit.,).

98/ According to Bollecker-Stern (p. 311 f.) "C'est également cette solution qu'a préconisée le Gouvernement espagnol, par l'intermédiaire de M. Weil dans l'affaire de la Barcelona Traction: discutant du rôle joué par la Barcelona Traction dans la réalisation de la situation dont elle réclamait réparation à l'Espagne, M. Weil déclare en effet que: 'la réparation doit être proportionnelle à l'influence causale de l'acte illicite, relevé à la charge de l'Etat défendeur dans la production du dommage. La réparation sera donc écartée complètement ou réduite, selon le cas, pour tenir compte de l'interférence de causes étrangères et, notamment, de la conduite de la victime elle-même.

99/ Although "material damage" is the expression most frequently used to identify the scope of pecuniary compensation, it is difficult to find in the literature any more than merely tautological definitions such as "injury of [to] a material interest" (Morelli, op. cit. p. 359).

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

(i) damage caused to the State's territory in general, to its organization in a broad sense, its property at home and abroad, its military installations, diplomatic premises, ships, aircraft, spacecraft, etc. (so-called "direct" damage to the State); 100/ and

(ii) damage caused to the State through the persons, physical or juridical, of its nationals or agents (so-called "indirect" damage to the State 101/).

B. Personal Damage

54. The second class of material damage considered in the preceding subsection, namely the so-called "indirect" damage to the State embraces - for reasons explained above (supra, paras. 9-11) both the "patrimonial" loss sustained by private, physical or juridical, persons and the "moral" damage suffered by such parties. 102/ For the same reasons, the class of so-called "indirect" damage to the State includes, a fortiori, the "personal" damages - other than "moral" - caused by the wrongful act to the said private parties. We refer, in particular, to such injuries as unjustified detention or any other restriction of freedom, torture or other physical damage to the person, death, etc.

100/ The so-called "direct" damage to the State is illustrated by such cases as Corfu Channel, ICJ Rep., 1949, p. 4ff. and US Diplomatic and Consular Staff in Tehran, ICJ Rep., 1980, p. 3ff. In the literature, see particularly Brownlie, System, cit., pp. 236-240.

101/ That the damage suffered by the State through its nationals (and, we would add, to its agents in their private capacity) is a direct damage of the State itself - notwithstanding its frequent qualification as "indirect damage" - is explained in masterly fashion by Reuter, op. cit., pp. 841-842: "L'Etat moderne socialise tous les patrimoines privés par l'impôt, comme il socialise une partie des dépenses privées par la prise en charge des dépenses de santé ou d'une partie des risques attachés à l'existence humaine. D'une manière encore plus générale il y a désormais une véritable reprise par l'Etat de tous les éléments de la vie économique. Tous les biens et toutes les recettes, toutes les dettes et toutes les dépenses même d'un caractère privé sont repris en écriture dans une comptabilité nationale dont les enseignements sont un des instruments de la politique économique de tous les gouvernements et subissent ainsi son emprise. Aujourd'hui par conséquent on ne saurait plus dire que c'est par un mécanisme purement formel que les dommages subis par des particuliers sont attribués à l'Etat; économiquement il en est bien ainsi: c'est la Nation représentée par l'Etat qui subit, au moins pour une part, la charge de toute perte subie en premier lieu par un particulier". (Emphasis added).

102/ Private parties include, together with the State's nationals, the agents of the State in so far as they are privately affected by the internationally wrongful act.

55. Also the injuries of the latter kind, in the measure in which they are susceptible of economic assessment, are treated, by international jurisprudence and State practice according to the same rules and principles applicable to the pecuniary compensation of the material damage to the State. It is actually easy to find a clear tendency to extend to the said class of "personal" injuries the treatment afforded to strictly "patrimonial" damages. 103/

56. A typical example is that of the death of a private national. In awarding a pecuniary compensation, jurisprudence seems to refer in such a case to the economic loss sustained, as a consequence of the death, by the persons who were somehow entitled to consider the existence of the deceased as a "source" of goods or services susceptible of economic evaluation. 104/ One should recall in this respect the first two points made by the arbitrator in the above-mentioned Lusitania case. According to that arbitrator the damage to be compensated in case of death should be calculated on the amount: "(a) Which the decedent, had he not been killed, would probably have contributed to the claimant" and on "(b) the pecuniary value to such claimant of the deceased's personal services in claimant's care, education, or supervision". 105/

57. This approach to reparation has been clearly followed by the International Court of Justice in the Corfu Channel case between the United Kingdom and Albania. The Court upheld the United Kingdom's claims with relation to the casualties and injuries sustained by the crew and awarded a

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103/ For such an interpretation of international jurisprudence see, inter alia, Personnaz, op. cit., pp. 199 ff.; Garcia Amador, op. cit., paras. 125-128; Verzijl, op. cit., pp. 750-752. According to Personnaz, in particular, "corporal" injury is usually considered, by international courts, under three distinct aspects: pretium doloris, namely an indemnity for physical suffering (so-called "moral damage" in a narrow sense); indemnity for medical care and assistance; and compensation for the economic loss (prejudice) derived from the physico-psychical injury. In a different sense Gray, who believes that "apparently the amounts depend [often] on the gravity of the injury involved and this suggests that the award is intended as a pecuniary satisfaction for the injury rather than as a compensation for the pecuniary losses resulting from it" (op. cit., pp. 33-34).

104/ See Personnaz, op. cit., pp. 253 ff. The hypothesis of death of the original victim (of the wrongful act) represents inter alia, according to Bollecker-Stern, the only significant exception to the general principle under which the "third" party would not possess an independent title to claim compensation from the offending party (op. cit., pp. 229 ff., esp. p. 258).

105/ UNRIAA, vol. VII, p. 35.

sum covering "the cost of pensions and grants to victims and their dependents and the costs of administration and medical treatment". 106/

58. The Corfu Channel case shows that pecuniary compensation is awarded, in addition to the case of death, in the case of physical or psychogical injury. After reviewing the relevant judicial practice Whiteman states in this connection that "the most that can be said is that an effort is usually made to base the allowance of damages primarily upon the actual loss to have been sustained". 107/ Among the numerous similar cases, one which is generally considered to be a classic example of this approach to "personal" damage is the William McNeil case, where the personal injury had consisted in a serious and long-lasting nervous breakdown caused to that British national as a result of the cruel and psychologically traumatic treatment to which he had been subjected by Mexican authorities whilst in prison. The Great Britain-Mexico Claims Commission pointed out that:

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

Having noted that after his recovery McNeil had practised a rather lucrative profession, the Commission took the view that: "the compensation to be awarded to the claimant must take into account his station in life, and be in just proportion to the extent and to the serious nature of the personal injury which he sustained". 108/

59. This type of reasoning has been used at times by courts in cases in which personal injury consisted in unlawful detention. Particularly in cases in which detention was extended for a long period of time, the courts have been able to quantify compensation on the basis of an economic assessment of the damage actually caused to the victim. One example is the Topaze case, decided by the Great Britain-Venezuela Mixed Commission. In view of the personality and the profession of the private victims, the Mixed Commission decided in

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106/ ICJ Rep. 1949, pp. 244, 249-250.

107/ Damages in International Law, Washington 1937-43, vol. I, p. 627.

108/ UNRIAA, vol. V, p. 168.

that case to award a sum of 100 dollars per day for the whole period of the injured parties' detention. 109/ The same method was followed in the Faulkner case by the US-Mexico Commission, except that this time the daily rate was estimated at 150 dollars in order to take account of inflation. 110/

C. Patrimonial Damage

60. Among the damages covered by the notion of "material damage to the State" and to be remedied by pecuniary compensation, the main and most frequent ones are those generally identified as "patrimonial damages". 111/ This expression is used in order to designate damages involving the assets of a physical or juridical person, including possibly the State, but "external" to the person itself. 112/

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

62. It is mainly in connection with this kind of injuries that jurisprudence and doctrine have deemed convenient to have recourse to distinctions and categories which are typical of private (civil or common) law and to adapt them to the peculiar features of international responsibility. Authors generally agree, in particular, that compensation of patrimonial damage must

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109/ UNRIAA, IX, p. 389.

110/ UNRIAA, IV, p. 67.

111/ Mainly but not exclusively when the injury consists of damages suffered by private parties, expressions are frequently used such as "dommages patrimoniaux" (Personnaz, op. cit., p. 156 ss.), "dommages aux biens" (Garcia Amador, op. cit., para. 31), "dommage économique" (Rousseau, op. cit., p. 12), "damages to property rights in their widest meaning" (Schwarzenberger, op. cit., p. 664), "property damage" (Gray, op. cit., p. 38).

112/ Although it can surely occur that a damage of this nature affect the State in a (so-called) "direct" or more "direct" way it will be of course more frequent that this kind of damage has its foundation in an injury to a private party, namely to a national of the injured State. This would be the hypothesis considered by the PCIJ in the Chorzow case when it noted that, although the issue before it was one of injury to the claimant State, the pivate damage offered a "convenient scale for calculation of the reparation due to the State" (Chorzow Factory, PCIJ, series A, No. 17, p. 28).

make good, in addition to damnum emergens, also lucrum cessans. It need hardly be recalled that the former term indicates the loss of property caused by the wrongful act; 113/ the latter the loss of the profits that could have been derived therefrom. 114/ Although, however, there have hardly been any difficulties with regard to reparation for damnum emergens, 115/ compensation for lucrum cessans has at times given rise to problems, both in jurisprudence and in doctrine. It seems therefore indispensable to deal more specifically, in the following section, with lucrum cessans.

Section 4. Issues Relating to Lucrum Cessans

A. Main Problems

63. The main problems arising with regard to lucrum cessans are those connected with the aforementioned distinction between "direct" and "indirect" damages 116/ and with the correct determination of the extent of profits to be compensated, particularly in the case of wrongful acts affecting property rights on "going concerns" of an industrial or commercial nature.

B. The Role of Causation in the Determination of Lucrum Cessans

64. In a few not very recent cases some obstacles arose, in the treatment of lucrum cessans, from the confusion of the concept of profit with the notion of "indirect" damage. This is what occurred in the Canada and the Lacaze case. In the first instance a United States whaler had become stranded on the rocks along the Brazilian coast, and while the crew did what they could to salvage the ship, the Brazilian authorities used force to prevent them from completing their task. The whaler was lost and Brazil was found liable. However, even though Brazil was required to pay compensation for the loss of the ship, the court did not allow any damages to make up for the profits the ship would have earned in pursuing the fishing season, on the ground that such profits were uncertain and hence non-indemnifiable: "le navire et le capital de l'entreprise auraient pu promptement être perdus dans le voyage ou bien

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113/ "Quantum mihi abest".

114/ "Quantum lucrari potui".

115/ In that sense, inter alia Cepelka, op. cit., p. 30; and Bollecker-Stern, op. cit., pp. 211-214.

116/ This has been discussed supra, paras. 34-36.

l'expédition aurait pu être entièrement infructueuse et sans profit". 117/ In the Lacaze case a French trader in Argentina was the victim of harassment by the courts and arbitrary detention. This had caused him to forfeit profits in the period during which he had been unable to carry on trade. Nevertheless, the tribunal refused to allow compensation for loss of earnings because of the "indirect" character of these damages. 118/

65. Contesting anyway the appropriateness of the notion of "indirect damage" the literature has decidedly rejected for some time any equivalence between "indirect damage" and lucrum cessans. 119/ It consequently declares itself in favour of indemnifiability of lucrum cessans whenever there is the necessary presumption of causation. Opposing notably the dictum whereby "... les profits éventuels ne peuvent pas faire l'objet d'une indemnité parce qu'ils dépendent par leur nature de circonstances futures et incertaines" 120/ the prevailing doctrine contends that for the purpose of indemnification it is not necessary for the judge to acquire the certainty that the damage depends on a given wrongful act. It is sufficient - also and especially for lucrum cessans - to be able to presume that, in the ordinary and normal course of events, the identified loss would not have occurred if the unlawful act had not occurred. Salvioli makes a relevant point when he states:

117/ Lapradelle-Politis, op. cit., vol. VII, p. 635.

118/ Ibid., p. 298. Another case was the Alabama with regard to which BOLLECKER-STERN writes (op. cit., p. 216):

> "Ainsi que dans l'affaire de l'Alabama (...), les manques à gagner subis par les baleiniers et les navires de pêche américains confisqués par les croiseurs confédérés, qui, il faut le noter, avaient été classés par le demandeur parmi les dommages directs, n'ont pas été pris en considération pour l'allocation d'une indemnité, le Tribunal ayant déclaré que ces profits éventuels 'ne sauraient faire l'objet d'aucune compensation puisqu'il s'agit de choses futures et incertaines'. (...). Néanmoins cette affirmation catégorique ne peut prendre sa véritable portée que si l'on n'oublie pas qu'à côté de la réclamation pour profits éventuels, les Etats-Unis avaient réclamé à titre subsidiaire, au cas où cette réclamation principale serait rejetée, une indemnité égale à 25% de la valeur des navires détruits pour compenser la perte des profits éventuels, et que cette dernière réclamation a été retenue par le Tribunal (...). Il paraît donc difficile de retenir cette espèce pour affirmer que le profit éventuel ne doit pas être réparé, en raison de la contradiction flagrante qu'il y a entre le refus d'indemnisation, de principe et la compensation, forfaitaire accordée en pratique (...)".

119/ See, for example, HARIOU, op. cit., pp. 213 following.

120/ Alabama case in LAPRADELLE-Politis, op. cit., vol. I, p. 284.

> "La certitude pour un profit éventuel, c'est-à-dire pour une chose qui n'est pas encore réalisée, mais qui peut se réaliser dans l'avenir, est une '*contradiction in terminis*'. Si le juge repousse la demande parce que la certitude de la production des profits - dans l'avenir - n'est pas démontrée, le juge ne donne en réalité aucun motif de sa décision. Cela équivaut à dire: en aucun cas je ne veux allouer d'indemnité pour le profit éventuel. En effet, le *lucrum cessans* est toujours une éventualité; mais ce qu'il importe, c'est de déterminer - d'après les circonstances de fait, passées et présentes - le degré de probabilité de cette éventualité ... Cela revient plus clairement à l'affirmation du devoir de verser une indemnité pour la perte des profits qui ne seraient réalisés dans une situation normale - si l'acte illicite n'avait pas été commis". 121/

More specifically Bollecker-Stern observes that the main feature of *lucrum cessans* is simply that one is dealing with a "fait eventuel". 122/ But "eventualité" in itself does not exclude the possibility that the damage - namely, the fact of preventing something of value becoming part of one's patrimony - be considered to be a more or less immediate consequence of the unlawful act. The only difference between *lucrum cessans* and *damnum emergens* is that, apart from the presumption of causation which at all events must exist between the wrongful act and the injury for the damage to be indemnifiable, in the case of *lucrum cessans* a further presumption is required: the presumption, so to speak, of existence; namely, that in the normal and foreseeable order of things, the particular profit for which damages are claimed would, if the wrongful act had not been committed, in all probability have been obtained. 123/ Now, if it is evident that the negative reply to any one of the two presumptions would exclude that pecuniary compensation could be awarded for *lucrum cessans*, it is wholly admissible that *lucrum cessans* be indemnified when all the necessary conditions concur for establishing both presumptions. To put it with the cited author: "il ressort de cette analyse que tout *lucrum cessans* résultant normalement, raisonablement du cours ordinaire des choses telles qu'elles sont données en l'espèce, est un dommage susceptible d'indemnisation". 124/

121/ *Op. cit.*, pp. 256-57.

122/ In the same sense see also Personnaz, *op. cit.*, p. 183: "Il ne s'agit pas ici de se prononcer sur une situation qui s'est réalisée en fait, mais sur un cas qui est demeuré au stade d'éventualité. On est réduit à raisonner sur de simples hypothèses."

123/ BOLLECKER-STERN, *op. cit.*, pp. 199-200.

124/ *Ibid.*, pp. 218-219.

66. On this conclusion there seems to be a high degree of agreement in the literature; 125/ and the majority of the court decisions seems to move in favour of indemnifiability, in principle of lucrum cessans. The statement made in Cape Horn Pigeon is a classical example. That case related to the seizure of an American whaler by a Russian cruiser. Russia accepted its responsibility and the only thing that the arbitrator had to do was to establish the amount of compensation. He decided that the compensation should be sufficient to cover not only the real damage already occasioned but also the profits which the injured party had been deprived of because of the seizure. 126/ In the Delagoa Bay case the arbitrator held that the general principle applicable to indemnification "ne peut être que celui des dommages et intérêts, du 'id quod interest', comprenant d'après les règles de droit universellement admises, le damnum emergens et le lucrum cessans: le

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125/ See, for example, REITZER, op. cit., pp. 188-189; EAGLETON, op. cit., pp. 197-203; JIMENEZ DE ARECHAGA, op. cit., pp. 569-570; BROWNLIE, System cit., p. 225 GRAY, op. cit., p. 25.

126/ The arbitrator stated:

> "CONSIDERANT que le principe général du droit civil, d'après lequel les dommages-intérêts doivent contenir une indemnité non seulement pour le dommage dont on a souffert, mais aussi pour le gain dont on a été privé, est également applicable aux litiges internationaux et que, pour pouvoir l'appliquer, il n'est pas nécessaire que le montant du gain dont on se voit privé puisse être fixé avec certitude, mais qu'il suffit de démontrer que dans l'ordre naturel des choses on aurait pu faire un gain dont on se voit privé par le fait qui donne lieu à la réclamation; CONSIDERANT qu'il n'est pas question en ce cas d'un dommage indirect, mais d'un dommage direct, dont le montant doit faire l'object d'une évaluation;
> ... PAR CES MOTIFS
> L'ARBITRE décide et prononce ce qui suit:
> La Partie défenderesse payera à la Partie demanderesse pour le compte des réclamations présentées par les ayants droit dans l'affaire du Cape Horn Pigeon, la somme de 38.750 dollars des Etats-Unis d'Amérique, avec les intérêts de cette somme à 6% par an depuis le 9 septembre 1892 jusqu'au jour du payement intégral."
> UNRIAA, IX, p. 65.

préjudice éprouvé et le gain manqué". 127/ This was also the conclusion reached by the judges in William Lee and Yuille Shortridge and Co.: a conclusion diametrically opposed to the position taken by the courts in the very similar Canada and Lacaze cases mentioned earlier (para. 64). In William Lee the United States was awarded lucrum cessans for the profits the unlawfully seized whaler would have been able to earn during the normal continuation of the fishing season. 128/ In Yuille etc. the United Kingdom was awarded damages for the profits the company would have earned if its activities had not been interrupted by lengthy and irregular proceedings instituted by the Portuguese Authorities. 129/ The decision on the Sheofeldt claim, brought by an American citizen whose property had been expropriated by executive decree in Guatemala, placed great stress on the requisite of predictability with regard to lucrum cessans. The court held that:

> "The damnum emergens is always recoverable, but the lucrum cessans must be the direct fruit of the contract and not too remote or speculative. This is essentially a case where such profits are the direct fruit of the contract and may be reasonably supposed to have been in the contemplation of both parties as the probable result of the breach of it. 130/

Lucrum cessans also played a role in the Chorzow case. The Permanent Court decided that the injured party should receive the value of the property by way of damages not as it stood at the time of expropriation but at the time of indemnification. As Gray puts it, "The Court apparently assumed that the factory would have increased in value between the date of dispossession and

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127/ LA FONTIANE, cit., p. 402.

128/ Moore, History, p. 3495.

129/ LAPRADELLE-Politis, op. cit., vol. II, p. 78. Other instances of inequivocal statements in favour of the possibility to compensate lucrum cessans may be found in Bollecker-Stern, op. cit., p. 219.

130/ Int. Law Rep. 1929-30, vol. 5, pp. 181-182.

that of the judgement, otherwise its choice of date would not have benefited the claimant". 131/ (See infra, para. 72)

C. "Abstract" and "Concrete" Evaluation of Lucrum Cessans

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

> "La détermination in abstracto s'effectue au moyen de procédés mécaniques ou forfaitaires pris dans des situations présentant des analogies avec l'espèce, que le juge prend pour étalon pour appliquer à cette dernière un mode automatique. Au contraire, dans le mode de détermination in concreto, on part de la réalité, et l'on se base sur des faits concrets, et l'on tient compte des éléments techniques de la réalité ... Le premier procédé est le plus simple et le plus rapide, puisqu'il ne demande qu'une détermination automatique, mais il risque de conduire à des erreurs d'appréciation. Il doit être employé quand la recherche du dommage réel présenterait trop de difficultés et d'incertitude, et il joue un rôle transactionnel. Au contraire, le second procédé permet de serrer de plus près la réalité et évite les susdits inconvénients, mais son application est difficile et réclame une connaissance précise des faits. Aussi, parfois, le juge trouve-t-il avantage à combiner plusieurs systèmes de manière à obtenir une approximation plus grande" 132/

68. The more commonly used in abstracto method consists in attributing interest on the amounts due by way of compensation for the principal damage. Indeed, this method raises typical problems, which it is advisable to analyse separately below (infra, paras. 71 ff). Suffice it for the moment to say that the in abstracto system often seems to be used as the result of a negotiated

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131/ Op. cit., p. 80. The court made the following observations when ordering that the factory be evaluated at the date on which damages would be effected: "... Up to a certain point, therefore, any profit may be left out of account, for it will be included in the real or supposed value of the the undertaking at the present moment. If, however, the reply given by the expert ... should show that after making good the deficits for the years during which the factory was working at a loss, and after due provision for the cost of upkeep and normal improvement during the following years, there remains a margin of profit, the amount of such profit should be added to the compensation to be awarded". (PCIJ, series A, No. 17, p. 53).

132/ Op. cit., p. 185.

settlement between the parties, while the judge can always replace the award of the principal damages and interest by a higher lump sum taking account of the fact that the real profits accruing to the property would certainly have been greater than those calculated in terms of interest, including compound interest. A typical example is the Fabiani case between France and Venezuela. The arbitrator awarded a lump sum for lucrum cessans which was approximately twice the amount that would have been awarded by way of compound interest. 133/

69. Less "abstract", although usually characterized as "in abstracto" as well, 134/ are other methods of assessing lucrum cessans which are based upon paradigms that seem to be more concrete than interest. These other methods - used in the case of business activities - are based either upon the profits earned by the same physical or juristic person in the period preceding the unlawful act, or upon the profits earned during the same period by similar business concerns. 135/

70. The so-called "in concreto" system is used when the estimate is "based on the facts of the particular case, on the profits which the injured enterprise or property would have made in the period in question". 136/ One example is the Cheek case 137/ in which the court explicitly tried to award the injured

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133/ As the arbitrator explained the award: "En effet les intérêts composés de la somme de Frs. ..... ne représentent pas le gain intégral dont Fabiani a été frustré par le non-recouvrement des sommes comprises dans la sentence d'arbitrage. Si Fabiani avait pu tirer parti de ces sommes et les employer dans son négoce, il est vraisemblable qu'il aurait fait des bénéfices supérieurs aux intérêts composés de ce capital pendant le laps de temps durant lequel il serait autorisé à les porter en compte". LA FONTAINE, cit., p. 343.

134/ SALVIOLI, p. 263; GRAY, p. 26.

135/ Instances of a valuation of the first kind are: Youille, Shortridge & Co., cit.; Masonic (LA FONTAINE p. 282); William Lee, cit.; Cape Horn Pigeon, cit. Instances of a valuation of the second kind are: James Lewis (RGDIP 1903, Doc. p. 159), White (Ibid.), Irene Roberts (Ralston, Venezuelan Arbitrations, p. 142).

136/ GRAY, op. cit., p.26. in the same sense, Salvioli, op.cit., p. 263 and Reitzer, op. cit., p. 189.

137/ MOORE, History cit., p. 5068.

party damages to make good the situation which would have obtained without the unlawful act, involving complicated calculations and valuations to arrive "at a probable figure for lost profits". 138/

D. In Particular: Lucrum Cessans in the Case of Unlawful Taking of a "Going Concern"

71. The determination of lucrum cessans involves naturally the most problematic choices in cases where the reparation is due for the unlawful taking of foreign property consisting of the totality or a part of a going commercial-industrial concern. A proper analysis of the relevant practice should not overlook in a measure also that part of international jurisprudence which has dealt with lawful expropriations of going concerns. The necessity for the adjudicating bodies to pronounce themselves on the claim of unlawfulness advanced by the dispossessed owner has led them in fact to develop interesting considerations on the principles governing compensation - and notably compensation for lost profits - in case of unlawful taking.

72. Once again the most frequently recalled precedent is the Permanent Court's judgement on the Chorzow Factory case, in which the necessity of determining the consequences of the unlawful taking by Poland of the assets of German companies moved precisely from an unambiguous and sharp distinction between lawful and unlawful expropriation. 139/ It was after formulating that distinction (and assuming the case before it to be one of unlawful expropriation) that the Permanent Court set forth that famous principle of full

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138/ GRAY, op. cit., p. 26.

139/ For a lawful expropriation the Court declared that a fair compensation would (have been) be sufficient, the standard of "fairness" being met whenever compensation was equivalent to the value of the concern at the time of taking with the addition of interest until the time of effective payment. This would have been, according to the Court, the standard of indemnification required by international law for the nationalization of foreign property. In the second case, (where the taking was unlawful), one could not assume that an unlawful act could become a lawful one or vice versa through the payment or the refusal of an indemnity. To apply here the same standard applied to lawful expropriation would have meant, according to the Court, to make "lawful liquidation and unlawful dispossession indistinguishable in so far as their financial results were concerned" (PCIJ, Series A, No. 17, p. 47).

compensation according to which the injured party was entitled to be re-established in the same situation which in all probability would have existed if the wrongul taking had not taken place. In brief, the Court applied a principle of full restitution in the literal and broad sense of restitutio in integrum as distinguished from the technical and narrow sense in which the expression is used to indicate naturalis restitutio. According to the Court a full compensation could be achieved by different means. Whenever possible, one should apply naturalis restitutio (restitution in kind, restitution en nature) or restitutio in integrum stricto sensu as described in the Preliminary Report. Whenever and to the extent that such a remedy did not ensure full compensation (namely restitutio in integrum in the broad literal sense), one should resort to pecuniary compensation in such a measure as to cover any loss not covered thereby up to the amount necessary for such full compensation 140/ (Supra para. 66).

73. It is on the same principle that the Permanent Court of Arbitration decided the Lighthouses Case between France and Greece. 141/ Considering the activity which was the oject of the contract and the impossibility of assessing the value of the concession (at the time of expropriation) on the basis of the "residual amortization value of the buildings", the tribunal found the injured party to be entitled to a compensation equivalent to the profits the company would have earned from the concession for the rest of the

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140/ The Permanent Court's logical scheme was: wrongful act implying an obligation of full reparation (or restitutio in integrum in a broad sense) such full reparation being effected by (a) naturalis restitutio (or equivalent sum); plus (b) compensation for any further damage.

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

duration of the contract. 142/ This interpretation of the principle of full compensation seems to have depended, however, on the particular circumstances of the case. It depended notably, it seems, on the fact that the contract article contemplating the possibility of "taking over" of the concession indicated that the indemnifiable damage should consist, in such eventuality, in "all compensation which may be determined by the parties or by arbitration in case of failure to agree". 143/ Within such a contractual context any settlement with regard to compensation was bound to be settled by a discretionary power of the arbitral tribunal rather than on the basis of any objective legal principle. All that can be drawn from this case, therefore, is that the tribunal awarded an amount of compensation calculated on the basis of the capitalization of future profits, such sum representing the "value of the concession in 1928" (namely, the value which the Greek Government was contractually bound to pay for in case it exercised its agreed right of redemption).

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

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

74. On the same principle of full compensation was based the decision in Sapphire International Petroleums Ltd. v. Nioc of 1963, where the injured party obtained compensation for both the loss corresponding to the expenses met for the performance of the contract and the net lost profits. 144/ As regarded the assessment of such lost profits, the arbitrator noted, however, that that was "a question of fact to be evaluated by the arbitrator" 145/ and after considering "all the circumstances", including "all the risks inherent in an operation in a desolate region" and "the troubles, such as war, disturbances, economic crises, slumps, which could affect the operations during the several decades during which the agreement was to last", the arbitrator awarded a compensation for loss of profits amounting to a sum corresponding to two fifths of the amount claimed by the Company. This case shows that, while lucrum cessans was decidedly included in the compensation, the Arbitrator was unable to indicate any preference of principle for one or the other of the possible methods of evaluation.

75. Although the LIAMCO case concerned a lawful expropriation, with regard to which the arbitrator rejected the claim to naturalis restitutio, some considerations were made with regard to "cases of wrongful taking of property". With regard to such cases the arbitrator had no difficulty in admitting with the claimant that an internationally wrongful violation of a

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144/ According to the tribunal:

> "... the object of damages is to place the party to whom they are awarded in the same pecuniary position that they would have been in if the contract had been performed in the manner provided for by the parties at the time of its conclusion. ... This rule is simply a direct deduction from the principle pacta sunt servanda, since its only effect is to substitute a pecuniary obligation for the obligation which was promised but not performed. It is therefore natural that the creditor should thereby be given full compensation. This compensation includes the loss suffered (damnum emergens), for example the expenses incurred in performing the contract, and the profit lost (lucrum cessans), for example the net profit which the contract would have produced. The award of compensation for the lost profit or the loss of a possible benefit has been frequently allowed by international arbitral tribunals (cf. Hauriou, "Les dommages indirects dans les arbitrages internationaux", in Revue générale de droit international public, vol. 31 (1925), pp. 203 et seq., in particular pp. 211 et seq., and the various precedents cited in this study)".

Int. Law Rep. 1967 vol. 35, pp. 185-186.

145/ Ibid., p. 187

"concession agreement ... entitles claimant in lieu of specific performance to full damages including "dammum emergens and lucrum cessans". 146/ Again however, no precisions were given with regard to the method by which lucrum cessans should, in such cases, be assessed. Something more seems to emerge from AMINOIL v. Kuwait. 147/. Again, the expropriation was considered to be a lawful one. It was stated later, however, in connection with the issue of compensation for loss of profits, that the method of the Discounted Cash Flow (DCF), unsuitable for the calculation of lost profits compensation in a case of lawful taking, might be adequate in a case of unlawful expropriation. 148/ This in view of the fact that the application of such a method would ensure, in a case of a wrongful taking affecting decisively the assets involved, a compensation globally apt to restore the situation that would have existed if the wrongful act had not been committed. 149/ A confirmation comes from AMCO v. Indonesia, 150/ a case of unlawful taking. After recalling the principle of full compensation as being inclusive of dammum emergens and lucrum cessans - the latter not to exceed the "direct and foreseeable prejudice" 151/ -, the Tribunal evaluated the lost profits on the basis of DCF, rendering thus more explicit what had been stated only incidentally in AMINOIL: namely, that DCF should be considered one of the

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146/ Int. Law Rep. 1982/62, pp. 201 ff.

147/ Int. Leg. Mat., vol. 21, pp. 1031 ff.

148/ In the words of the Tribunal the Discounted Cash Flow is: "a method based on the sum total of the anticipated profits, reckoned to the natural termination of the concession, but discounted at an annual rate of interest in order to express that total in terms of its "present value" on the day when the indemnification is due; and without taking account of the value of the assets that would have been transferred to the concessionary Authority, 'free of cost', upon that termination" (Ibid., p. 1034) ... "This calculation is based on a projection of the quantities of oil recovered, the prices, the costs of production, and the operations to be undertaken until the end of concession" (p. 1935).

149/ Ibid., pp. 1031 and 1035.

150/ Int. Leg. Mat., vol. 24, pp. 1032 ff.

151/ Ibid., p. 1037

most appropriate methods of evaluation of an unlawfully taken going concern. 152/

76. The latter conclusion does not find confirmation however in the Amoco case, partly decided by an award of the Iran-US Tribunal, paragraphs 189-206 of which are devoted precisely to the effects of lawfulness or unlawfulness on the standard of compensation. In evaluating the parties' contentions the Tribunal confirmed the distinction between lawful and unlawful taking, "since the rules applicable to the compensation to be paid by the expropriating State differ according to the legal characterization of the taking" (para. 192). 153/ The study of that case suggests that the Tribunal saw a certain discrepancy between the evaluation of lucrum cessans in the case of unlawful taking (such a valuation to be confined in any case to the profits lost until the time of settlement), on one side, and the lost profits calculated on a DCF basis until the time originally set for the termination of the concession on the other. The Tribunal however does not go any further in the analysis of the discrepancy. It confines itself to the rejection of DCF as a method applicable to the case at hand. 154/ We have not been able to complete the analysis of the jurisprudence of the Iran-US Claims Tribunal.

152/ "271 ... the only prejudice to be taken into account for awarding damages is the loss of the right to the Kartika Plaza, that is to say the loss of a going concern. Now, while there are several methods of valuation of going concerns, the most appropriate one in the present case is to establish the net present value of the business, based on a reasonable projection of the foreseeable net cash flow during the period to be considered, said net cash flow being then discounted in order to take into account the assessment of the damages at the date of the prejudice, while in the normal course of events, the cash flow would have been spread on the whole period of operation of the business" (Ibid., p. 1037).

153/ "The legal bases of the two concepts (reparation of the damage caused by a wrongful expropriation and payment of compensation in case of lawful expropriation) are totally different and, logically, the practical methods to be used in order to derive the amount due should also differ" (para. 194).

154/ "The Tribunal need not express an opinion upon the admissibility of such a projection (= of future earnings), when the reparation must wipe out all the consequences of an illegal taking, but it certainly cannot accept it for the compensation due in case of a lawful expropriation" (para. 240).

Section 5. Interest

A. Allocation of Interest in Literature and Practice

1. Literature

77. Notwithstanding some theoretical differences, the literature seems to agree that interest on the amount of compensation for the principal damage is due under international law not less stringently than under municipal law. The view of Anzilotti's and other authors, 155/ who denied the existence of an international rule to that effect, 156/ was already opposed at the time by de LaPradelle. According to the latter there was "a general presumption that the creditor could have reinvested the amounts due to him". 157/ Salvioli made the same point. 158/

78. The positive view, which seems to be generally shared by contemporary authors, finds, we submit, its main support in the concept of "full compensation". Once admitted that reparation must "wipe-out" all the injurious consequences of a wrongful act, and once admitted that pecuniary

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155/ Views reported, inter alios, by PERSONNAZ, op.cit., pp. 217 ff.; and SUBILIA, op.cit., pp. 126 ff.

156/ Anzilotti criticized the automatic (mechanical) transposal into international law of municipal rules which presuppose conditions which are absent or different in the relations between States. According to that author (corso cit., p. 430; and the article Sugli effetti dell'inadempienza di obbligazioni internazionali aventi per oggetto una somma di denaro, Riv. di dir. internaz., 1913, pp. 54 ff.), "escluso un interesse legale che operi di diritto fra gli Stati come fra privati, il ritardo nel pagamento di una somma di denaro può dar diritto soltanto al risarcimento del danno che si provi esserne effettivamente derivato, sensa alcuna presunzione a favore dello Stato creditore, anche se tale danno potrà poi risultare compensato mediante l'assegnazione di un interesse sulla somma ritardata, nella misura richiesta dalle circostanze del caso". Positions similar to this (strangely not very clear) one seem to have been taken at the time by STRUPP, Das völkerrechtliche Delikt in Stier-Somlo's Handbuch d. Völkerrechts, III, Stuttgart, 1920, p. 212; and GUGGENHEIM, p., Traité de Droit international public, Genève, 1954, p. 73; and MORELLI, Nozioni, cit., p. 361.

157/ LAPRADELLE, op.cit., Vol. III, p. 530 (commentary on the Dundonald case); in the same sense WENGLER, Völkerrecht, Berlin, 1964, Vol. 1, p. 513.

158/ Op.cit., pp. 278-279.

compensation includes not only damnum emergens but also lucrum cessans, it seems correct to hold that the payment of interest, obviously a part of the latter, is the subject of an international obligation. 159/ This would appear to be the position of Schoen, 160/ Personnaz, 161/ Salvioli, 162/ and more recently Graefrath 163/ and Nagy. 164/ The awarding of interest seems to be the most frequently used method for compensating the type of lucrum cessans stemming from the temporary non-availability of capital. According to Subilia "les intérêts, expression de la valeur de l'usage de l'argent, ne sont pas autre chose qu'un moyen offert au juge de déterminer forfaitairement le préjudice qu'entraîne pour un créancier l'indisponibilité d'un capital pendant un laps de temps donné". 165/

79. We shall see further on that it is on the basis of the same general principle that the contemporary literature holds that dies a quo must be the date on which the damage actually occurred; and dies ad quem the date on which monetary compensation is actually paid. But on these issues, as well as on the rate of interest, we better look first at the relevant jurisprudence. 166/

159/ "Il est plus simple et plus exact de fonder l'allocation d'intérêts moratoires sur le principe général suivant lequel tout dommage susceptible d'être réparé doit comporter le versement d'une indemnité adéquate: et il n'est pas douteux à cet égard que le retard dans le paiement d'une dette liquide et exigible cause au créancier un dommage de cette nature" (ROUSSEAU, Droit International Publique, Paris 1983, Vol. 5, p. 244).

160/ Die völkerrechtliche Haftung der Staaten aus unerlaubten Handlungen, (Ergänzunsheft I zu Bd x, Zeitschrift fur Völkerrecht, Breslau 1917, pp. 128-129).

161/ Op.cit., p. 186.

162/ Op.cit., p. 261.

163/ Op.cit., p. 98.

164/ Op.cit., pp. 182-183.

165/ Op.cit., p. 142.

166/ The various doctrinal positions on the three above-mentioned issues are well described (summed up) by SUBILIA, op.cit., pp. 120-125.

Indeed, substantial differences emerge from the study of the practice (notwithstanding its uniform support for the principle that allocation of interest is due) with regard to dies a quo, dies ad quem and rate of interest.

2. Practice

80. International practice seems to be in support of awarding interest in addition to the principal amount of compensation. Compared with dozens of decisions which, with or without express reference to international law or equity, have awarded interest, 167/ the only case in which interest has been denied as a matter of principle (and not because of the circumstances of the claim) seems to have been the Montijo case of 1875. 168/

167/ Relevant judicial decisions in that sense are listed in the subsections covering the problems of dies a quo, dies ad quem and interest rate (infra., paras. 82 ff).

168/ In that sense, in addition to SUBILIA, p. 63, see also PERSONNAZ, p. 229 and GRAY, p. 30. As reported by Subilia, the claim was brought against Colombia by the United States for the seizure of S/S Montijo by Panamanian insurgents while in navigation along the coast of Colombia. Having remained for some time in the hands of the insurgents, it had later been used by the government after the failure of the revolution to be finally returned to the owners. Dissenting from the American arbitrator's view, Umpire Bunch motivated his decision not to award interest in the following terms (MOORE, History cit., p. 1445):

> "As regards the opinion that interest at the rate of 5% per annum should be allowed from the 1st January 1872 to the date of payment of the claim the undersigned is not prepared to say that such an allowance would not be strictly justifiable. He nevertheless decides against it for the following reasons: first, because there is no settled rule as to the payment of interest on claims of countries or governments; secondly, because it seems open to question whether interest should accrue during the progress of diplomatic negotiations which are often protracted in their character; thirdly, that this reason applies with special force to negotiations which result in an abritration or friendly arrangement; fourthly, that whilst doing what he considers strict justice to the claimants by fixing to them the full value of the use of their vessel during her detention, he wishes to avoid any appearance of punishing the Colombian people at large for an act with which very few of them had anything to do and which affected no Colombian interests beyond those of a few speculators in revolutions in Panama."

81. By way of example of the prevailing jurisprudence, we may refer to a few of the positive decisions. In Illinois Central Railroad Co.v. Mexico, decided in 1921 by the United States-Mexico Claims Commission, the dictum was explicit. Mexico had been found in breach of a contract to purchase from an American Company a locomotive for which it had not paid. The Commission held that a fair compensation should comprise not only the principal amount due under the contract but also compensation, in the form of interest, for the loss of use of that sum during the period within which payment continued to be withheld. 169/ The United States Foreign Claims Commission's motivations in the Lucas case are also clear regarding damages for the destruction of two buildings by the Italian military in Yugoslavia. 170/ Another important case

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169/ According to the Commission: "None of the opinions rendered by tribunals ... with respect to a variety of cases appears to be at variance with the principle to which we deem it proper to give effect that interest must be regarded as a proper element of compensation. It is the purpose of the Convention of September 8, 1923, to afford the respective nationals of the High Contracting Parties, in the language of the Convention, 'just and adequate compensation for the losses or damages'. In our opinion just compensatory damages in this case would include not only the sum due, as stated in the Memorial, under the aforesaid contract, but compensation for the loss of the use of that sum during the period within which the payment thereof continues to be withheld." (UNRIAA, Vol. IV, pp. 134 and 136.)

170/ According to the Commission: "There are no definite rules governing the payment of interest in international war damage claims although the great majority of the authors express the view, which is supported by the decision in numerous cases and by international agreemments, that such payment is justified, and that a 'just and adequate compensation must include the payment of interest'". (Int. Law Rep., Vol. 39, p. 222.) After recalling several examples in which international judicial practice had awarded interest, the Commission added that: "... there is no legal or practical reason why the payment of interests in this case should in principle not be recognized. Legally, the Italian Government as the tort feasor, on the theory of culpability generally recognized in international law, is responsible for the payment of damages with the monetary interest from the day the damage was committed until the day of payment (ibid., p. 233). From the practical point of view, the denial of the payment of interest could result, in the case that the total of the awards is less than the deposited sum, in an unjustified return of the remainder to the wrongdoer" (ibid.).

is Administrative Decision No. III of the United States-German Claims Commission, which considered interest to be a natural part of the damages due for loss or property. 171/

B. Dies a quo

82. Regarding the day from which interest should be calculated, three positions have emerged in judicial practice. One, rather frequent, is to calculate interest as from the day on which the damage occurred. This always happens when the principal damage itself consisted of the loss, or failure to collect, a sum of money in cash and collectable; a situation usually arising in cases of breach of contract. An example is the Mexican-Venezuelan Commission's decision in the Del Rio case, in which interest was calculated as from the date established by the parties for the reimbursement of the loan, rejecting the submission that interest should only be calculated from the day on which the demand for payment had been made. 172/ But the allocation of

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171/ According to that decision: "... The Commission holds that in all claims based on property taken and not returned to the private owner, the measure of damages which will ordinarily be applied is the reasonable market value of the property as of the time and place of taking in the condition in which it then was, if it had such market value; if not, then the intrinsic value of the property as of such time and place. But as compensation was not made at the time of taking, the payment now or at a later day of the value which the property had at the time and place of taking would not make the claimant whole. He was then entitled to a sum equal to the value of his property. He is now entitled to a sum equal to the value which his property then had plus the value of the use of such sum for the entire period during which he is deprived of its use. Payment must be made as of the time of taking in order to meet the full measure or compensation. This measure would be met by fixing the value of the property taken as of the time and place of taking and adding it to an amount equivalent to interest at 5% per annum from the date of the taking to the date of payment. This rule the Commission will apply in all cases based on property taken during a period of neutrality. ... This construction used a rule in harmony with the great weight of decisions of international arbitral tribunals in similar cases in which the terms of submission did not expressly or impliedly prohibit the awarding of interests" (UNRIAA, Vol. VII, pp. 64 and 66).

172/ "Considering finally - it was stated - that at the time when Colombia contracted the obligation it was a principle of justice, as it is today, according to the legislation of the most advanced nations, that the debtor is to be considered in default by the sole fact of the non-performance of his obligation, without the necessity of making demand after the day of the expiration of the term allowed him; by reason of the foregoing, which is proved by the evidence, it must be decided that Venezuela is obliged to make reparation to Mexico for the damages and injuries resulting from delay in the fulfilment of its obligation, by paying interest at the rate of 6 per cent per annum, upon the original capital of the debt, counting from the 7th day of October, 1827." (UNRIAA, Vol. X, p. 703.) See also the cases cited by SUBILIA, p. 76, Note No. 3.

interest from the day of the injurious event is frequent also in cases in which the exact monetary assessment of the principal damage is only made at the moment of decision. This has often occurred in cases of expropriation. An example is the Central Rhodope Forests dispute where Umpire Undèn stated that the award of interest was in response to a general principle of law, adding that: "Conformément aux principes généraux du droit international, les dommages-intérêts doivent être fixés sur la base de la valeur des forêts, respectivement des contrats d'exploitation, à la date de la dépossession définitive, c'est-à-dire au 20 septembre 1918, en y ajoutant un taux équitable d'intérêt calculé sur cette valeur depuis la date de la dépossession". 173/ Another case, in a different instance, was the Cape Horn Pigeon case mentioned earlier. Interest was calculated here from the day on which the ship was seized and applied to the sum awarded in compensation for the temporary detention of the ship, namely for loss of foreseeable profits. 174/

83. Much less frequent are decisions which consider dies a quo the day in which the quantum decision was rendered. One such ruling was made by the PCIJ in Wimbledon. This related to reparation due from Germany for damage caused to the French charterers of S.S. Wimbledon as a result of the refusal of German authorities to allow the ship to pass through the Kiel Canal (in violation of article 380 of the Versailles Treaty). The court decided that interest "should run, not from the day of the arrival of the Wimbledon at the entrance of the Kiel Canal, as claimed by the applicants, but from the date of the present judgement, that is to say from the moment when the amount of the sum due has been fixed and the obligation to pay has been established". 175/ The date of the decision was also taken as dies a quo by the Franco-Mexican Claims Commission of 1924 with regard to a number of expropriations and other internationally (non-contractual) wrongful acts. It was only at the moment the judgement had been made, according to Umpire Verzijl, that the international claim "se transforme en droit d'exiger une somme déterminée,

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173/ UNRIAA, Vol. III, p. 1435. A reference to calculation of interest from the time of the taking is also present in the Chorzòw case, PCIJ, Series A, No. 17, p. 47.

174/ UNRIAA, Vol. IX, p. 66. Other cases where dies a quo has been set at the time of the loss are mentioned by SALVIOLI, op.cit., p. 280.

175/ PCIJ, Series A, No. 1, p. 32.

montant liquide qui doit commencer à porter des intérêts". 176/ A distinction between "liquidated" and "unliquidated claims" was also made by the United States-German Mixed Claims Commissions in the above-mentioned Administrative Decision No. III. According to that Commission, interest on an "unliquidated claim", should be awarded only when the exact amount of the loss has been fixed. 177/

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

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176/ Pinson case, UNRIAA, Vol. V, p. 452.

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

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

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

in any event, "no interest is to be allowed until a proper demand for payment has been made on the Republic of Venezuela". While believing in principle that the "presumption of knowledge" argument put forward by the German Commissioner should be given consideration, the Umpire thought that this argument should not be applied in too rigid a fashion, especially in view of the complex nature of States as persons of international law. On the other hand the Umpire considered the formal requirements indicated by Venezuela for interest to accrue to be excessive. Apparently some proof that a claim was filed with Venezuelan authorities would be sufficient. Whether the injured party's action was sufficient for such a purpose should be assessed, in his view, on a case-by-case basis. 178/

85. As recalled earlier, the question of interest was considered at length in several of its aspects in the Pinson case. In particular Umpire Verzijl believed that interest should be allocated only in the case of "dettes contractuelles liquides, portant sur un montant fixé". As for dies a quo he stated:

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

"Il pourrait être douteux, à compter de quelle date ces intérêts doivent être censés dus, soit de la date à laquelle la dette révolutionnaire fut contractée, ou le prêt exigé, soit de celle de la mise en demeure de l'Etat débiteur. Etant donné que l'agent français a choisi comme date initiale la dernière date visée dans le dilemme ci-dessus, la Commission ne saurait allouer d'intérêts à partir d'une date antérieure". 179/

In the Campbell case (United Kingdom/Portugal) 180/ interest was awarded as of the date on which the injured private party had filed its brief with the Portuguese authorities. The amount of the principal award was established on a lump-sum basis, ex aequo et bono, with specific reference to time elapsed from the moment of the injury to that of the filing of the brief. The date of the claim preferred in this decision does not seem to have been considered as an alternative to the time of injury as being in conformity with a rule of international law. It is rather an integral part of a decision which already contemplated the lump-sum coverage of the damage up to the moment in which the brief had been filed.

86. The date of the claim was also the choice of the British-Venezuelan Commission in the Stevenson and Kelly cases. 181/ As well as in Christern and Company, the possibility that in Stevenson the respondent government was aware of the injured party's claim is considered relevant for the accruing of interest. This is what one can infer from the rather laconic statement of the

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179/ On account of this (UNRIAA, Vol. V, p. 451) the arbitrator decided that "(c) Sur les indemnités pour cause de dettes contractuelles éventuelles pour un montant certain et de prêts forcés, des intérêts seront dus aux taux de 6% par an, à compter de la date à laquelle la réclamation a été portée à la connaissance du Gouvernement mexicain, ou a fait l'objet d'une action devant la Commission nationale des réclamations" (ibid., p. 453). Therefore, in so far as dies a quo was concerned, the Umpire's remarks do not appear to be particularly decisive. He did not intend to solve the alternative between the date of the wrongful act and the date of the "mise en demeure" (equivalent to the date of the claim) stating that either one was more correct under international law. His main preoccupation seems to have been not to go beyond the request of the injured party.

180/ UNRIAA, Vol. II, pp. 1151, following.

181/ The following explanation was given in the Stevenson case:

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

award according to which: "Interest as damages begins only after default". In the Macedonian case, the King of Belgium was required to decide, on the basis of equity, a claim by the United States regarding a sum of money illegally taken from United States citizens by Chilean authorities. 182/ The issue was decided in the sense that: "Considérant toutefois que jusqu'au 19 mars 1841 le Gouvernement des E.-U. n'a rien fait pour hâter une solution ... nous sommes d'avis que, outre le capital de 42 240 piastres ou dollars, le Gouvernement du C. doit payer à celui des E.-U. les intérêts de cette somme au taux de 6% par an, depuis le 19 mars 1841 jusqu'au 15 décembre 1848". 183/ It thus appears that the arbitrator did not intend to suggest the existence of a norm of international law according to which interest should accrue from the time of the claim. He rather intended to take account of the fact that the injured party had not acted with diligence in putting forward its claim. It would have been unfair, according to the arbitrator, to charge the Chilean Government with an additional onus for the 20-year delay of the injured party in filing the international claim. 184/ The date of the claim has also prevailed in two more recent cases: the Proach case and the American Iron Pipe Company case. 185/

182/ More specifically, the following question was put:

> "3. Le Gouvernement du C., outre le capital, doit-il l'intérêt, et, dans l'affirmative depuis quelle date et à quel taux l'intérêt doit-il être payé?" (Lapradelle-Politis, R.A.I., p. 204).

183/ Ibid., p. 205.

184/ The criterion based on the date of the claim was also adopted by the American-Venezuelan Commission in the Alliance case, but no reason for this is given. (UNRIAA, Vol. IX, p. 144.)

185/ The formula adopted in those cases was the following:

> "... there is no settled rule in universal effect as to the period during which the interest shall run. Various terminal dates have been applied by different Commissions, including the date of the original injury, the date of the notice of the claim, or the date of payment. The Commission notes further that the date the claim arose in this case is the date of loss." (ILR 40, p. 173.)
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> The expression "the date the claim arose" does not suggest a choice in favour of the "date of claim" as opposed to the "date of injury". It appears to indicate not a specific moment in which the claim was made - distinct from the time of injury - but rather the moment in which the injured party became entitled to compensation.

87. In the Cervetti case (Italy-Venezuela Commission, 1903) the Italian party claimed that fair reparation for the seizure of goods belonging to an Italian trader could not be made simply by restitution of the monetary equivalent of the seized goods, an appropriate interest being also due as from the moment of the seizure. Venezuela maintained that since the Italian claim had only been notified officially to the Venezuelan Government at the hearing before the Commission, it would be unfair to allow interest to run on amounts which the Venezuelan Government had not been aware of until that particular moment. Umpire Ralston awarded an interest calculated not, however, on the basis claimed by Italy. 186/ In fact, Ralston appears to have subjected the award of interest to a specific, ad hoc, mechanism, the prevailing purpose of which was to avoid charging the responsible State with an extra financial onus, over and above the amount of the principal damage, for a period during which one could not have presumed that that international person was aware of its obligation to furnish compensation. Only such a "method of procedure" would ensure in international relations - according to the Umpire - the ratio of justice which, in relations between individuals in municipal law, is ensured by "mise en demeure". The same reasoning was applied by the Permanent Court of Arbitration in the Russian Indemnity case relating to compensation due to

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186/ "According to the general rule of the civil law, interest does not commence to run, except by virtue of an express contract, until by suitable action (notice) brought home to the defendant he has been 'mise en demeure'. Approximately the same practice exists in appropriate cases in some jurisdictions controlled by the laws of England and the United States. If such be the rule in the case of individuals, for stronger reasons a like rule should obtain with relation to the claims against governments. For, in the absence of conventional relations suitably evidenced, governments may not be presumed to know, until a proper demand be made upon them, of the existence of the central power, and even against its express instruction. So interest whatever is allowed upon any claim against the Government except pursuant to express contract.

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

Russia under article V of the Constantinople Peace Treaty and paid over by Turkey 20 years later than the agreed date. 187-188/ The reasoning of the Permanent Court of Arbitration in the Russian Indemnity case appears to be similar to the reasoning - already commented upon - in the Cervetti case. In addition, there is a repeated reference to equity - as opposed to existing rules of international law - as a criterion for assessment.

88. This brief review of case-law calls for the following comments. Decisions tend in most cases to justify the choice of the time of claim as dies a quo with the exigency of not burdening the "responsible" State with the payment of interest for a period during which it ignored the existence of its obligation. Only the submission of the injured party's claim can be assumed as evidence of the other party's knowledge. Of course there is a difference according to whether one refers to the moment of the presentation of the claim by the injured private person at municipal level or by the injured State at the international level. Considering however that the damage suffered by private parties is also damage suffered by their State, both moments are equally relevant for the purpose of the presumption of the wrongdoing State's knowledge. In either case the international equivalent of mise en demeure of municipal law would be ensured. In several cases, in support of the need for such a requirement, the fact that an analogous requirement is met in municipal law with the principle of "mise en demeure" is highlighted. Equity requires, according to the relevant dicta on the subject, that - especially if account is taken of the complex nature of the subjects of international law - the reasons underlying this similar principle of internal law be duly considered at international level.

187-188/ Pointing out that most European legislations required "mise en demeure" the tribunal concluded on interest that:

> "Il n'y a donc pas lieu, et il serait contraire à l'équité de présumer une responsabilité de l'Etat débiteur plus rigoureuse que celle imposée au débiteur privé dans un grand nombre de législations européennes. L'équité exige, comme l'indique la doctrine, et comme le Gouvernement Impérial Russe l'admet lui-même, qu'il y ait eu avertissement, mise en demeure adressée au débiteur d'une somme ne portant pas d'intérêts. Les mêmes motifs réclament que la mise en demeure mentionne expressément les intérêts, et concourent à faire écarter une responsabilité dépassant les simples intérêts forfaitaires." UNRIAA, Vol. XI, p. 443.

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

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

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

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

90. The doctrine generally criticizes that part of international jurisprudence which places dies a quo at the time of the decision (or of the settlement). Of course, the authors who adopt this attitude do not overlook the fact that abritrators often proceed, at the time of decision, to a global assessment of the amount due, in such a manner as to cover the whole damage caused, from the time of occurrence of the wrongful act to the time of award. Such assessments clearly cover the whole period during which interest is of relevance prior to the decision. 189/ The placing of dies a quo at the time

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189/ Very clear in the above sense are the dicta of the Permanent Court of Arbitration on the Lighthouses case (1956) between France and Greece:

> "It remains to examine the question, fully discussed in the course of the proceedings, whether interest is payable on the sums awarded to the parties. The tribunal remarks in the first place that in this field no more than in many others do there exist strict rules of law of a general nature which prescribe or forbid the award of interest. The tribunal cannot therefore accept the arguments of the two agents who refer to the matter, although in opposing senses. Here again, the solution depends largely on the character of each individual case.
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> If the tribunal had adopted the matter of fixing the amount of the debts, at the time of their origin, in the currencies of origin, and

of decision is otherwise rejected. Salvioli, for instance, believes that in so far would one accept time of decision or settlement as dies a quo as one considered that the right of the injured State to recover damages together with interest (dommages-intérêts) derived from the decision, the latter being envisaged as a "constitutive" judgement. If one considers, on the contrary, that the majority of the relevant international decisions are merely "declaratory" of the right of the injured State, the choice of the time of decision as dies a quo would be unjustified. 190/ Brownlie, for his part, rejects the tendency to exclude or reduce interest in certain cases on the basis of a questionable distinction between "liquidated" and "unliquidated" damages. 191/

91. Doctine seems to be not unanimous in accepting the view that dies a quo should be the time of the international claim. Salvioli considered this to be

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consequently of allowing the effect of the devaluations of those currencies to fall on the parties, there would have been some reason to allow the latter to benefit similarly from interest ...

... In expressing this actual cost value as exactly as possible in terms of present-day currency, the tribunal deliberately excluded all the vicissitudes of the currencies of origin. It has, so to speak, thrown a bridge across the steering period of the years which have elapsed and placed itself consciously in the present. In these circumstances, justice as well as logic required that no interest covering the past be awarded." (International Law Reports, Vol. 23 (1956), p. 659, 675-676.)

190/ Op.cit., p. 281; in the same sense Personnaz, op.cit., p. 255.

191/ To use Brownlie's own words:

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

an unacceptable solution. 192/ A similar position in Subilia. 193/ Others express doubts. Personnaz, for example, suggests that: "Il faut maintenant préciser le terme de réclamation: quel acte pourra constituer une réclamation suffisante pour donner au réclamant droit à intérêt? La question ne saurait faire l'objet d'une solution précise, et la plupart du temps, la plus grande latitude a été laissée sur ce point au juge international". 194/ Gray, for

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192/ He wrote: "Il est vrai que le différend international naît au moment où l'Etat prend en main l'affaire de son ressortissant, mais de cette proposition théoriquement exacte il ne faut pas conclure que la phase précédente de la controverse entre l'Etat et le particulier soit dépourvue de toute valeur juridique; il est encore exact que l'Etat ne se substitue pas à son ressortissant, mais qu'au contraire il fait valoir son propre droit, de nature différente de celle du droit du particulier, mais cependant le lien indéniable qui existe en fait entre la réclamation de l'individu et celle de son Etat ne nous permet pas de considérer la phase interne précédente comme étant inexistante pour le rapport international" (op.cit., pp. 283-284).

193/ Who believes that to place dies a quo at the time of the claim "revient en effet à imputer au lésé le préjudice résultant nécessairement de l'observation de la règle de l'épuisement des recours internes à laquelle est subordonnée la protection diplomatique. Quand on sait la longueur des délais qu'implique parfois une telle procédure, l'on s'aperçoit que ce système peut conduire à priver le lésé d'une partie considérable de la réparation" (op.cit., p. 147).

194/ Op.cit., p. 241, and further on: "Doit-on exiger qu'il s'agisse d'une réclamation internationale faite à un autre Etat, ou bien une simple réclamation interne présentée aux autorités de l'Etat lésant suffit-elle? La pratique se montre assez divergente". He concludes with the question:

> "Peut-on admettre qu'une réclamation interne puisse être considérée comme suffisante pour porter la demande à la connaissance du gouvernement? Si l'on se place au point de vue de la victime et au point de vue théorique, il semble que oui, car elle a fait preuve d'activité en présentant sa demande; d'autre part, une fois qu'elle a confié sa réclamation à son Etat, ce dernier est seul qualifié pour intenter une réclamation internationale et en a l'entière disposition; il peut, si cela lui semble bon, la différer sine die.
>
> Mais, d'autre part, cette solution pourrait être injuste pour l'Etat responsable, car si, comme nous l'avons vu, il ne peut être présumé avoir connaissance des actes de tous ses fonctionnaires, comment serait-il informé de toutes les réclamations portées devant un de ses agents ou un de ses ministres? A quel moment la réclamation sera-t-elle censée présenter un degré de notoriété suffisant pour lui donner le caractère de connaissance acquise? Même en rejetant l'objection qu'on peut tirer de la confusion entre l'ordre international et l'ordre interne et en prenant en considération, comme l'a fait la Cour permanente de justice internationale dans son arrêt No. 2, la procédure interne constituant un fait juridique que l'on ne peut passer sous silence en raison des difficultés que l'on peut éprouver à en déterminer la date exacte des premières réclamations, il paraît plus pratique de prendre comme point de départ la réclamation internationale" (ibid., pp. 242-243).

her part criticizes the assurance of those who reject the date of the claim and favour the date on which injury occurred since it "would not always lead to a just result where the delay in settling the claim was caused by the claimant State". 195/ Gray seems thus to favour, as the dies a quo, the day of the claim.

92. For our part, we believe dies a quo should be the date of the damage (injury). We would agree with Brownlie when he states that: "In the absence of special provision in the compromis the general principle would seem to be that, as a corollary of the concepts of compensation and restitutio in integrum, the dies a quo is the date of the commission of the wrong". 196/

C. Dies ad quem

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

> "In their choice of the date until which interest is allowed tribunals again come to different conclusions. Most common is the date of the decision or of the final award. ... This is sometimes based on the erroneous impression of the tribunal that it has no jurisdiction to make an order for the payment of interest after its functions have terminated. This was the reasoning apparently accepted by the various Venezuelan commissions of 1903, and the 1868 and 1923 United States-Mexican commission. Interest is allowed until the date of payment of the award more often in individual arbitrations than by claims commissions. This was the date accepted in the Portendick claims, the Delagoa Bay Railway Company case, the Rhodope Forests case, and the Cape Horn Pigeon". 197/

94. Doctrine largely agrees that dies ad quem should be the date on which compensation is actually paid. However, Brownlie recently distanced himself from this position and said that "a presumption based upon ordinary legal logic that the terminus ad quem is the date of the award or the date of ultimate settlement of the claim, in the case of provisional awards and valuation procedures". 198/

195/ Op.cit., p. 31.

196/ System, cit., p. 299. In the same sense, amply, SUBILIA, op.cit., pp. 144-156.

197/ Op.cit., p. 31; SUBILIA, op.cit., pp. 88-92.

198/ System, cit., p. 229.

D. Interest Rate

95. It has been noted, with regard to practice, that the rate is rarely commented upon, "et il n'est pas possible de déceler les raisons qui ont pu pousser les arbitres à en adopter tel un plutôt que tel autre". 199/ In many cases, particularly in cases decided by Claims Commissions, interest awarded is measured on the statutory rate adopted in the respondent State. For example, the United States International Claims Commission stated in the Senser case - a case concerning arbitrary confiscation of property in Yugoslavia - that "Under settled principles of international law which, by the international Claims Settlement Act of 1949 the Commission is directed to apply (sec. 4 (a)), interest is clearly allowable on claims for compensation for the taking of property where, in the judgement of the adjudicating authority, considerations of equity and justice render such allowance appropriate". The Commission added that: "As to the rate at which [interest is] allowable we refer to established principles of international law which suggest the use of the rate allowable in the country concerned". 200/ The Commission accordingly applied the said principles and ruled that all claims against Yugoslavia should be calculated with interest at 6 per cent as practised in Yugoslavia.

96. Decisions in isolated cases tend to vary. Some of them use the rate applied by the respondent State; others use the rate in force in the claimant State or the commercial rate or the creditor's home rate. 201/ It is interesting in this regard to consider, on the one hand the decision in Lord Nelson, 1910, which stated that "... c'est un principe de droit international généralement reconnu, que le taux applicable est celui qui a cours là où le principal devait être payé", 202/ and on the other hand the contrary decision in the Royal Holland Lloyd case, which stated that "... il n'existe pas en droit international de règles gouvernant la question du taux

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199/ Subilia, op.cit., p. 94.

200/ Int. Law Rep., Vol. 20, pp. 240-241.

201/ GRAY, op.cit., p. 32.

202/ NIELSEN, American and British Claims Arbitrations, Washington 1926, p. 435.

des intérêts". 203/ Mention should also be made of the PCIJ decision in the well-known Wimbledon case in which it was stated that "as regards the rate of interest, the court considers that in the present financial situation of the world, and having regard to the conditions prevailing for public loans, the six per cent claimed is fair". 204/

97. Writers generally seem to hold that it is a question to be solved on a case-by-case basis with a view to ensuring "full compensation". However, there is a certain support for the criterion used in Wimbledon that the interest rate should be the one "normally carried by loans granted to States at the time the injury is sustained". 205/ Subilia holds that it could be useful to refer to the lending rate laid down annually by the IBRD, particularly in cases for damage caused directly to a State without the intervention of private individuals. He believes that when the United Nations codifies the law of State responsibility, a conventional rate (of around 6 per cent) should be adopted, accompanied by the possibility that each State may be allowed to prove that the damage is higher and hence obtain a higher rate. 206/ It is desirable that the Commission express itself on the solution to be preferred.

E. Compound interest

98. Compound interest has been considered by jurisprudence rather infrequently. In Norwegian Shipowners' Claims (1922), between the United States and Norway, the Permanent Court of Arbitration considered the possibility of allocating compound interest. After noting that compound

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203/ Int. Law Rep., Vol. 6, pp. 445-446.

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

205/ NAGY, p. 184. In the same sense: VERDROSS, Völkerrecht, Vienna 1964, p. 404 e, BROWNLIE, System, cit., p. 229.

206/ Op.cit., pp. 162-163.

interest had never yet been allocated, it found that the claimants had not advanced sufficient reasons why an award of compound interest should be made. 207/

99. Different conclusions were reached in three subsequent cases. In Compagnie d'électricité de Varsovie (fond), the City of Warsaw was deemed to be responsible for the injury sustained by the company as a result of lack of implementation of a previous arbitral decision relating to a concession of which the company was the beneficiary. Arbitrator Asser decided that the City should pay, in addition to the main amount of compensation, "une somme en francs suisses équivalant au jour du paiement à la valeur de roubles - or 3 532 311 avec les intérêts composés à 5% 1'an à partir du 1er janvier 1935 jusqu'au jour du paiement". 208/ Compound interest was thus allocated only as of the date up to which the injured party had calculated the amount of damage it had sustained (an amount which was considerably reduced by the Arbitrator). This decision was in no way motivated by the judge or objected to by the parties. In Chemin de Fer Zeltweg-Wolfsberg et Unterdrauburg-Woellan, the arbitrators decided in favour of compensation of the company which was unlawfully injured by the modification of a concession agreement. Compound interest was awarded once more without any indications of principle. In this case also the compound interest is apparently considered to be a non controversial issue. 209/ In the Fabiani case, compound interest, albeit not

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

208/ UNRIAA, Vol. III, p. 1699.

209/ UNRIAA, Vol. III, p. 1808.

allocated, seems to be considered to be a means of ensuring full compensation. In the words of the tribunal, "Si Fabiani avait pu tirer parti de ces sommes et les employer dans son négoce, il est vraisemblable qu'il aurait fait des bénéfices supérieurs aux intérêts composés de ce capital pendant le laps de temps durant lequel il serait autorisé à les porter en compte". 210/

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

101. An explanation on the question of compound interest is to be found in Arbitrator Huber's decision in the British Claims in the Spanish Zone of Morocco. 211/ Compared with Norwegian Shipowners, Huber's decision appears to lay down stricter requirements for allocation of compound interest. He considers the existence of "arguments particulièrement forts et de nature toute spéciale" necessary in order to justify a decision in contrast with the prevailing negative case-law.

102. In the German-Portuguese case, decided in 1930, Portugal filed a claim for compound interest at a rate of 30 per cent "à titre de manque à gagner" following a loss of cattle. After noting the exorbitant amounts claimed by the

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210/ La Fontaine, Pasicrisie cit., p. 343.

211/ "En ce qui concerne le choix entre les intérêts simples et les intérêts composés, le Rapporteur doit tout d'abord constater que la jurisprudence arbitrale en matière de compensation à accorder par un Etat à un autre pour dommages subis par les ressortissants de celui-ci sur le territoire de celui-là - ... - est unanime, pour autant que le Rapporteur le sache, pour écarter les intérêts composés. Dans ces circonstances, il faudrait des arguments particulièrement forts et de nature toute spéciale pour admettre en l'espèce ce type d'intérêt. Pareils arguments ne sembleraient cependant pas exister, étant donné que les circonstances des réclamations dont le Rapporteur se trouve saisi ne diffèrent pas en principe de celles des cas qui ont donné lieu à la jurisprudence dont il s'agit. Cela est vrai entre autres de certaines éventualités où les intérêts composés sembleraient par ailleurs mieux correspondre à la nature des choses que les intérêts simples, à savoir les cas où les biens que les indemnités accordées ont pour but de remplacer s'augmentent par progression géometrique plutôt qu'arithmétique, ce qui arrive par exemple pour les troupeaux de bétail" (UNRIAA, Vol. II, p. 650).

injured State and the prevailingly negative attitude of jurisprudence with regard to the award of compound interest, the tribunal allocated simple interest. According to the arbitrators:

> "Il n'a en effet pas été prouvé et il est contraire à toute vraisemblance que des bénéfices nets de l'ordre indiqué eussent pu normalement être réalisés si les intéressés étaient demeurés en possession des instruments de travail dont la perte est imputable à l'Allemagne. Et d'ailleurs, les choses dont il s'agit n'étant pas irremplacables, les propriétaires auraient pu, en en rachetant de semblables, se procurer les même gains. S'ils reçoivent la valeur complète, plus les intérêts normaux dès la date de la perte, ils sont, par conséquent, complètement indemnisés." 212/

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

104. Essentially on the "law of precedents" seems also to be based the rejection of a claim for compound interest by the German-Venezuelan Commission in Christern and Company. 213/ An only implied rejection of claims for compound interest considering the lack of motivation seem also to characterize, according to Subilia, 214/ the arbitral decisions in Deutsche Bank 215/ and Dundonald. 216/

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

(a) Among the negative decisions one should distinguish:

(i) the decision that simply adjusts a not well defined negative orientation of previous case-law (Christern and Company);

212/ UNRIAA, Vol. II, p. 1074.

213/ "... the decision in that case also decides the liability of Venezuela for the loan to the State of Zulia. The Commissioner for Germany, however, allows the claimants the full amount of this item of their claim, 10,459.1 bolívars, with the usual interest. This amount includes interest at 1 per cent a month, compounded with yearly rests, and increases the original amount of the item thereby 4,589.37 bolívars. The umpire is unable to concur in this finding. He does not find any warrant or authority in the proofs for compounding interest." (UNRIAA, Vol. X, p. 4247.)

214/ Op.cit., p. 101.

215/ UNRIAA, Vol. III, pp. 1901 following.

216/ Lapradelle and Politis, RAI, Vol. III, pp. 447 following.

(ii) decisions that, while recalling previous case-law, indicate however that in special circumstances the mechanism of compound interest could be useful in fulfilling the requirement of full compensation (British Claims and Norwegian Shipowners);

(iii) the decision that considers that in the specific case the compound interest mechanism would result in a sum exceeding by far the actual lucrum cessans (German-Portuguese case);

(iv) the decision which, on the contrary, considers that compound interest, while acceptable in principle, would lead in the specific case to an insufficient compensation (Fabiani).

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

105a. We are therefore inclined to conclude that compound interest should be awarded whenever it were proved that it is indispensable in order to ensure a full compensation of the damage suffered by the injured State.

CHAPTER THREE - SATISFACTION (AND PUNITIVE DAMAGES)

Section 1. Satisfaction in the literature

106. As stated in Chapter One, satisfaction is very frequently mentioned in the literature as one of the forms of reparation for an internationally wrongrul act. As noted in that Chapter, two not incompatible tendencies seem to emerge from the literature with regard to the specific function of this remedy. A considerable number of authors, only a few of whom were mentioned earlier (supra, paras. 13 and 14) consider satisfaction as the specific remedy for the injury to the State's dignity, honour or prestige. Such is notably the position of Bluntschli, 217/, Anzilotti, 218/ De Visscher, 219/ Morelli, 220/ Jimenez de Aréchaga 221/ and others. 222/ It was also noted that

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217/ "Lorsqu'il est porté atteinte à l'honneur ou à la dignité d'un Etat, l'Etat offensé a le droit d'exiger satisfaction", Bluntschli, Le droit International Codifié, (Paris, 1870), p.247, art. 436.

218/ Il Soddisfazione - Alla base dell'idea della soddisfazione vi è quella del danno immateriale, o, comme dicono gl'inglesi, di un "moral wrong", che, comme si è detto, può anche consistere soltanto nel disconoscimento del diritto di uno Stato. Essa mira sopratutto a sanare l'offesa recata alla dignità e all'onore", Anzilotti, D., Corso di diritto internazionale, IV ed., (Padova, 1955), p.426.

219/ "Un acte contraire au droit international peut, indépendamment du préjudice matériel qu'il cause, entraîner pour un autre Etat un préjudice d'ordre moral, consistant dans une atteinte à son honneur ou à son prestige", De Visscher, C., La responsabilité des Etats, Bibl. Visseriana, II, p.119.

220/ "Trattandosi di un fatto illecito che consiste nella lesione o che importa comunque la lesione di un interesse morale, come l'onore o la dignità (e le violazione di qualsiasi diritto di uno Stato può, in date circostanze, implicare una lesione di tale natura), la forma di riparazione dovuta (eventualmente accanto alla riparazione dipendente dalla contemporanea lesione di interessi materiali) consiste nella soddisfazione", Morelli, G., Nazioni di diritto internazionale, (Padova, 1967), p.358.

221/ "9.23 Satisfaction

This third form of reparation is appropriate for non-material damage or moral injury to the personality of the State", Jiminez de Aréchaga, E., "International Responsibility" in Manual of Public International Law, Sørensen, ed., 1968, p.572.

222/ Personnaz, op. cit., p.277; Bissonnette, op. cit., p.161; Garcia Amador, op. cit., para. 92; Sereni, op. cit., p.1552; Przetacznik, La responsabilité internationale de l'Etat, RGDIP, 1974, p.944; Rousseau, Droit International Public, v. V., Paris, 1983, p.218; Graefrath, op. cit., p.84.

a number of the said authors believe that the specific function of satisfaction is performed also with regard to the juridical injury suffered by the offended State. By such injury they understand the infringement of the offended State's juridical sphere deriving from any internationally unlawful act, regarldess of whether a material injury is present. 223/ It was concluded in Chapter One that in the specific sense in which it is so widely used in the literature, the term "satisfaction" has moved away from its etymological meaning even though it is precisely "dans le sens étymologique premier du verbe satisfaire, qui est celui de remplir, acquitter ce qui est dû" 224/ that the term recurs at times in the practice and the literature.

107. Satisfaction is not defined only on the basis of the type of injury with regard to which it operates as a specific remedy. It is also identified by the typical forms it assumes, which differ from restitutio in integrum or

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223/ This role of satisfaction is particularly stressed by Anzilotti and Bluntschli. "Le dommage se trouve compris implicitement dans le caractère antijuridique de l'acte. La violation de la règle est effectivement toujours un dérangement de l'intérêt qu'elle protège, et, par voie de conséquence, aussi du droit subjectif de la personne à laquelle l'intérêt appartient; il en est d'autant plus ainsi que dans les rapports internationaux le dommage est en principe plutôt un dommage moral (méconnaisance de la valeur et de la dignité de l'Etat en tant que personne du droit des gens) qu'un dommage matériel (dommage économique ou patrimonial au vrai sens du mot)", Anzilotti, D. La responsabilité internationale des Etats à raison des dommages soufferts par des étrangers, RGDIP, 1906, pp.13 and 14. "Lorsqu'il est porté atteinte aux droits d'un Etat ou à l'ordre des choses établi, la partie lésée peut non seulement réclamer la réparation de l'injustice et le rétablissement de ses droits, mais encore exiger satisfaction et au besoin se faire accorder des garanties contre le renouvellement d'attaques de ce genre", Bluntschli, op. cit., art. 464, p.248.

224/ Bissonnette, P.A., La satisfaction comme mode de réparation en droit international (Genève, 1952), p.40. Bissonnette is however firmly against this understanding of satisfaction.

compensation. 225/ Bissonnette 226/ and Przetacznik 227/ mention regrets, punishment of the responsible individuals and safeguards against repetition. 228/ Bissonnette adds saluting the flag and expiatory missions in the context of the expression of regrets. But the forms of satisfaction are not limited to these three. 229/ Very frequent mention is also made of the payment of symbolic sums or nominal damages, 230/ the decision of an international tribunal declaring the unlawfulness of the offending State's

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225/ "L'examen de la pratique, et en particulier l'examen de la correspondance diplomatique, révèle cependant l'existence de demandes de réparation qui ne peuvent être assimilées ni à la restitutio in integrum ni aux dommages-intérêts. Tel est le cas des demandes d'excuses ou de regrets, de saluts au drapeau; demandes de punition des coupables, demandes de démission ou de suspension des fonctionnaires coupables; ou encore demandes d'assurance contre la répétition de certains actes, ...", Bissonnette, P.A., op. cit., p.25. This aspect is also indicated in the writings of Anzilotti, D., Corso cit., p.426. De Visscher, C., op. cit., p.119, Eagleton, C., The Responsibility of States in International Law (New York, 1928), p.189; Sereni, op. cit., p.1552; Morelli, G., op. cit., p.358; Jimenez de Aréchaga, E., op. cit., p.572; Giuliano, Scovazzi, Treves, op. cit., p.593; Brownlie, I., op. cit., p.208; Rousseau, C., op. cit., p.218 ff.; Gray, C.D., Judicial Remedies in International Law (Oxford, 1987), p.42.

226/ Op. cit., p.85 ff.

227/ Op. cit., p.945 ff.

228/ The three categories in question are already included in the avant-projet of article 13 introduced by Stisower to the Institute de Droit International, in Annuaire, 1927, I, p.490.

229/ Contra Dominicé op. cit., p.105 ff., who denies that contemporary international law provides for an obligation to express regrets, to punish the responsible persons or to give assurances against repetition.

230/ "... nulla esclude, e se ne hanno anzi vari esempi, che la soddisfazione consista nel pagamento di una somma di danaro, che non sia intesa a riparare un danno materiale effettivamente sofferto, ma rappresenti un sacrificio che simbolizza l'espiazione del torto commesso", Anzilotti, D., Corso cit., p.426. Pecuniary satisfaction is also mentioned by Eagleton, C., op. cit., p.189; Sereni, op. cit., p.1552: Morelli, G., op. cit., p.358; Przetacznik, F. op. cit., p.968 ff; Giuliano, Scovazzi, Treves, Diritto Internazionale (I vol., Milano, 1923), p.593; Rousseau, C., op. cit., p.220; Gray, C.D., op. cit., p.42; Bissonnette, op. cit., p.127 ff., who firmly believes in a reparatory (in the civil law sense) idea of satisfaction is

conduct. 231/ Frequent mention is made in addition - although not without any objections - of pecuniary satisfaction. 232/

108. A crucial point is the question whether satisfaction is punitive or afflictive, or compensatory in nature. Satisfaction is considered to be purely reparatory (in the sense that no consequence ought to go beyond what in internal law is generally provided for as a consequence of a civil tort) by Ripert, 233/ Bissonnette, 234/, Bin Cheng, 235/

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instead against admitting such a form of satisfaction because it would, in most cases, have a punitive character. In relation to Bissonnette's theoretical construction, Gray, op. cit., pp.41, 42, says "According to Bissonnette, ..., the function of satisfaction is to repair moral injury to a State, but on this question as to when such injury exists Bissonnette unfortunately closes his circular argument by saying that there is a moral injury when the appropriate remedy is satisfaction". Schwarzenberger and Dominicé are also against this idea. "As international judicial practice permits monetary compensation to be awarded for other than material damage, it appears an unnecessary overcomplication to dinstinguish from it pecuniary satisfaction. Whether symbolical or excessive, any award of damages is a form or monetary compensation". Schwarzenberger, G., International Law, I, p.658, (London, 1957), "Si l'on observe en outre qu'aujourd'hui les Etats, ni dans leurs conclusions devant les tribunaux, ni semble-t-il dans leur pratique diplomatique, ne réclament de satisfaction pécuniaire, il faut bien admettre que désormais elle n'entre plus en considération". Dominicé, C., op. cit., p.111.

231/ Morelli, G. op. cit., p.358; Gray, C.D., op. cit., p.42.

232/ De Visscher, C., op. cit., p.119; Personnaz, J., op. cit., p.298; p.572; Brownlie, I., op. cit., p.209; Rousseau, C., op. cit., p.220; Graefrath, B., op. cit., p.86; Gray, C.D., op. cit., p.42.

233/ "En droit privé, l'action en responsabilité est une action en réparation; elle n'a aucun caractère pénal, le droit civil ne s'occupe pas de la punition du coupable. Cette idée doit être maintenue, même dans la réparation du dommage moral, bien que, dans ce cas, on constate, après la réparation, une augmentation du patrimoine de la victime. La réparation du dommage moral a sans doute un caractère un peu trouble, la victime recevant une satisfaction de remplacement; il y a pourtant réparation et non punition", Ripert, G., "Les règles du droit civil applicables aux rapports internationaux", Hague Rec., 1933, II, p.622.

234/ ... "Nous sommes donc en présence d'un mode de réparation distinct de la restitutio in integrum et des dommages-intérêts. Ce ne peut être qu'un mode par compensation puisque la restitution est le seul mode direct de réparation. Comme la restitution, il a le plus souvent une forme non pécuniaire mais s'en distingue par son défaut de caractère restitutif. D'autre part, au contraire des dommages-intérêts, il ne semble jamais prendre la forme pécuniaire. La doctrine et la pratique ont toujours dénommé ce mode de réparation, la satisfaction", Bissonnette, P.A., op. cit., pp.24 and 25.

235/ Cheng Bin, General Principles of Law as applied by International Courts and Tribunals (London, 1953), p.236 and note 14.

Jimenez de Aréchaga. 236/ An afflictive nature of satisfaction (together with punitive damages) appears to be recognized instead by Bluntschli, 237/ Anzilotti, 238/ Eagleton, 239/ Lauterpacht, 240/

236/ "In some cases, under the guise of compensation, a mild form of sanction has been imposed to induce the delinquent government to improve its administration of justice (Janes claim (1926), 4 RIAA, 81, at 89; Putnam claim (1927), 4 RIAA, 151; Massey claim (1927), 4 RIAA, 155; Kennedy case (1927), 4 RIAA, 194). This, however, does not go beyond the ordinary concept of civil liability, or imply criminal liability.

But punitive or exemplary damages, inspired by disapproval of the unlawful act and as a measure of deterrence or reform of the offender, are incompatible with the basic idea underlying the duty of reparation", Jimenez de Aréchaga, E., op. cit., p.571.

237/ "1. La violation du droit d'un Etat étranger est plus grave que la non-exécution des engagements qu'on a contractés envers lui; elle peut être comparée aux délits en droit pénal. Mais comme il n'existe pas de juridiction criminelle en droit international, on est forcé de laisser à chaque Etat le soin de fixer les conditions auxquelles il se déclarera satisfait. Le droit international en est aujourd'hui au point où en était le droit pénal sous les rois francs; le citoyen lésé déterminait lui-même l'expiation à laquelle le coupable devait se soumettre s'il voulait échapper à la vengeance de la famille de la victime", Bluntschli, op. cit., comment., art. 464, p.248.

238/ "Ma nulla esclude, e se ne hanno anzi vari esempi, che la soddisfazione consista nel pagamento di una somma di denaro, che non sia intesa a riparare un danno materiale effettivamente sofferto, ma rappresenti un sacrificio che simbolizza l'expiazione del torto commesso", Anzilotti, D. Corso cit., p.426.

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

240/ "... la violation du droit international peut être telle qu'elle nécessite, dans l'intérêt de la justice, une expression de désapprobation dépassant la réparation matérielle. Limiter la responsabilité à l'intérieur de l'Etat à la restitutio in integrum serait abolir de droit criminel et une partie importance de la loi en matière de 'tort'. Abolir ces aspects de la responsabilité entre les Etats serait adopter, du fait de leur souveraineté, un principe qui répugne à la justice et qui porte en lui-même un encouragement à l'illégalité", Lauterpacht, H. "Règles Générales du Droit de la Paix", in Hague Rec., 1937, IV, p.350.

Personnaz, 241/ Garcia Amador, 242/, Morelli. 243/ It is denied recently - together with the autonomy of the remedy - by Dominicé who believes satisfaction to be a form of reparation not distinguishable from restitutio in integrum and pecuniary compensation. This because the juridical wrong - as an object of satisfaction - would be inseparable, in his opinion (if we understood him correctly), from the other consequences of an internationally wrongful act. 244/

241/ "Rappelons, tout d'abord, que puisqu'il s'agit d'une responsabilité complémentaire d'une responsabilitié civile, la sanction pénale sera conçue en la même forme que la réparation: ce qui la différenciera, c'est un élément matériel, ou même intentionnel. L'indemnité comportera non seulement un élément réparateur, qui sera mesuré sur le dommage subi par l'Etat - ou le particulier lésé - mais aussi un facteur pénal qui se surajoutera au premier. En sorte qu'au cas d'indemnité pécuniaire, une part de l'indemnité correspondra à la réparation du préjudice matériel ou moral effectivement subi par l'Etat, et une autre part à la sanction pour la violation particulièrement grave du droit international qui l'aura nécessitée. Il est donc nécessaire d'examiner quelle a été, dans un cas donné, l'étendue du préjudice, ce qui permettra de déterminer la part de la réparation qui lui correspond; l'excédent de l'indemnité représentera la part afférente à la sanction pénale; la mesure de celle-ci consistera dans la différence entre l'indemnité totale et la réparation du préjudice effective", Personnaz, J., op. cit., pp.317 and 318.

242/ "Lorsqu'il n'en est pas ainsi, on donne une large publicité aux mesures de satisfaction de manière qu'elles atteignent leur double objectif: 'satisfaire' l'Etat offensé dans son honneur et sa dignité et 'condamner' l'acte imputé au défendeur. De ce deuxième objectif découle la dernière caractéristique que nous voudrions souligner: il s'agit d'une institution essentiellement pénale", Garcia Amador, F.V., op. cit., p.20, para. 76.

243/ Morelli, op. cit., p.358.

244/ "La première conclusion qui se dégage de cette étude est qu'il n'existe pas, en droit international, un mode de réparation, au sens strict du terme, qui serait la satisfaction et prendrait place, avec la restitutio in integrum et le versement de dommages-intérêts, parmi les diverses formes que revêt l'obligation de réparer. Celle-ci, entendue comme obligation bilatérale - et c'est cela la réparation stricto sensu - ne comprend que des modalités de caractère matériel. ... Nous pensons, quant à nous, que la vraie raison en est que le dommage moral de l'Etat n'est pas identifiable, il se confond avec le fait illicite et est insaisissable, contrairement au préjudice moral subi par l'individu, qui apparaît nettement dans certains circonstances et peut faire l'objet, tant bien que mal, d'une compensation en argent", Dominicé, C., La Satisfaction de droit des gens, in Mélanges Georges Perrin (Lausanne, 1984), p.118.

109. Related to the idea of its afflictive or punitive nature is the idea that satisfaction should be proportioned to the seriousness of the offence or to the degree of fault of the responsible State. This point is made by Bluntschli, 245/ Anzilotti, 246/ Personnaz, 247/ Sereni, 248/ and Przetacznik. 249/ But objections are raised by Reitzer, according to whom "Abstraction faite de la question de savoir s'il est très heureux de transporter la notion de la culpabilité psychologique dans le domaine du droit international, le problème de la gravité de la faute est excessivement fuyant et laisse une marge abondante à toutes les interprétations". 250/

245/ "La nature et l'étendue des dédommagements ou de la satisfaction à fournir, se règlent d'après la nature et la gravité du préjudice. Plus le crime sera grand, plus ses conséquences seront considérables. Il existe une certaine proportion entre la peine et la culpabilité. Des prétentions exagérées constituent une violation du droit", Bluntschli, op cit., p.250, art. 469.

246/ "La scelta di una o piú forme di soddisfazione dipende dalla volontà delle parti, che naturalmente terranno conto della natura e della gravità del fatto; non vi sono regole fisse in proposito. Giova soltanto notare che, nel determinare il modo della soddisfazione, le parti non possono non tener conto di elementi morali, quali, ad esempio, la simpatia o l'antipatia dimostrata dall popolazine per gli autori del delitto, il contegno della stampa, i precedenti, la propaganda fatta nel paese, ecc. Non si tratta di dolo o copla come elemento dell'atto illecito; si tratta di circonstanze estrinseche determinanti la gravità politica del fatto, che non possono a meno di esser prese in considerazione, se la soddisfazione ha da esser tale che raggiunga l'intento", Anzilotti, D., Corso cit., p.426.

247/ "Le caractère manifestement lésif ou grave de l'acte illicite justifierait une aggravation de la responsabilité existante, qui se traduirait par une augmentation de l'indemnité ou par des mesures spéciales de satisfaction", Personnaz, J., op. cit., p.302.

248/ "La colpa o il dolo, nel mentre non sono elementi costitutivi dell'illecito, vengono in considerazione al fine della determinazione dell'eventuale obbligo di soddisfazione e del tipo di soddisfazione dovuto", Sereni, op. cit., p.1554.

249/ "La satisfaction présente certaines caractéristiques qui lui sont propres. En raison du caractère même du préjudice moral et politique, dont le contenu est variable et imprécis, elle est avant tout évaluée en fonction de l'acte illicite imputable à l'Etat et même des circonstances détermiant le degré de gravité d'un tel acte", Przetacznik, F., op. cit., p.944.

250/ Reitzer, L., La Réparation comme conséquence de l'acte illicite en droit International (Paris, 1938), pp.117 and 118.

110. The question is also raised in the literature whether the injured State would have a choice with regard to the form satisfaction should take. 251/ This raises the further question of what limitations should be placed to such a choice in order to prevent abuse. 252/ A number of authors stress that practice shows that powerful States tend to make requests not compatible with the dignity of wrongdoing State and with the principle of equality. 253/

251/ Reitzer, L., op. cit., p.134 and note 61.

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

The misuse of satisfaction for suppression and humiliation of whole peoples is typical for the period of imperialism. The anachronistic forms of marks of tribute towards flags and State emblems appearing in the manuals scarcely correspond to the present style of international relations. We can agree with Tammes when he writes that claims of satisfaction 'often have looked like feigned hysteria ... and were calculated only to ensure enduring humiliation'", Graefrath, B., op. cit., p.85. Also Personnaz, J., op. cit., p.289 and Garcia Amador, F.V., op. cit., p.20, para. 75, speak about the abuse of satisfaction.

253/ "L'Etat dont l'honneur ou la dignité ont été offensés ne peut rien exiger d'incompatible avec la dignité et l'indépendance de l'Etat duquel il exige satisfaction.

1. Plus le sentiment de l'honneur se développe dans le monde civilisé, plus aussi on doit user de ménagements et apporter de tact dans l'application de cette règle. La prudence le commande lorsqu'on se trouve en présence d'un Etat puissant. A l'égard des Etats faibles on élève plus facilement des prétentions exagérées. Cependant aucun Etat ne peut subir d'humiliation sans compromettre son existence, car l'Etat est la personnification des droit et de l'honneur d'un peuple. Le droit international, appelé à protéger l'existence et la sûreté des Etats, ne peut tolérer de semblables affronts. Si un Etat ne mérite plus d'être traité en personne honorable, il vaut mieux refuser de suite de reconnaître son existence", Bluntschli, op. cit., pp.250 and 251, art. 470 and related comment. Similar requirements are included in article 27, para. 1 of the draft submitted to the ILC by Garcia Amador (op. cit., p.51) and in Przetacznik, F., op. cit., pp.972 and 973.

Section 2. Satisfaction in International Jurisprudence

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

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

113. Lack of competence seems to have been the main if not the exclusive reason for a negative decision on satisfaction (in the form of punitive damages) in such cases as Miliani, 254/, Stevenson, 255/ Carthage and

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

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

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

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

Manouba, 256/ Portuguese Colonies. 257/ In Carthage and Manouba, however, satisfaction was awarded, as indicated below, in the form of the tribunal's declaration of the wrongfulness of the offending State's action.

256/ "CONSIDERANT que la capture ne pourrait non plus être légitimée par la régularité relative ou absolue, de ces dernières phases envisagées séparément.

Sur la demande tendant à faire condamner le Gouvernement royal italien à verser à titre de dommages-intérêts:

1° la somme de un franc pour atteinte portée au pavillon français;

2° la somme de cent mille francs pour réparation du préjudice moral et politique résultant de l'inobservation de droit commun international et des conventions réciproquement obligatoires pour l'Italie comme pour la France.

Et sur la demande tendant à faire condamner le Gouvernement de la République française à verser la somme de cent mille francs à titre de sanction et de réparation du préjudice matériel et moral résultant de la violation du droit international, notamment en ce qui concerne le droit que le belligérant a de vérifier la qualité d'individus soupçonnés être des militaires ennemis, trouvés à bord de navires de commerce neutres.

CONSIDERANT que, pour le cas où une Puissance aurait manqué à remplir ses obligations, soit générales, soit spéciales, vis-à-vis d'une autre Puissance, la constatation de ce fait, surtout dans une sentence arbitrale, constitue déjà une sanction sérieuse;

que cette sanction est renforcée, le cas échéant, par le paiement de dommages-intérêts pour les pertes matérielles;

que, en thèse générale, l'introduction d'une autre sanction pécuniaire paraît être superflue et dépasser le but de la juridiction internationale;

CONSIDERANT que, par application de ce qui vient d'être dit, les circonstances de la cause présente ne sauraient motiver une telle sanction supplémentaire: que, sans autre examen, il n'y a donc pas lieu de donner suite aux demandes susmentionnées", UNRIAA, vol. II, p.475.

An almost identical decision was given by the same Court in the Carthage case (cf. p.458 of the same volume).

257/ "E. Indemnité spéciale réclamée à titre de sanction.

En sus de la réparation des dommages proprement dits, causés par les actes commis par l'Allemagne pendant la période de neutralité, le Portugal réclame une indemnité de deux millards de marks en raison 'de toutes les offenses à sa souveraineté et pour les attentats contre le droit international'. Il motive cette réclamation en exposant que l'indemnité qui

114. More complex is the well-known Lusitania case where Arbitrator Parker was mainly concerned with confining its task to the award of material and moral damages on a purely compensatory basis. To that effect he stated that: "The superimposing of a penalty in addition to full compensation and naming its damages, with the qualifying word exemplary, vindictive or punitive, is a hopeless confusion of terms inevitably leading to confusion of thought". 258/ At the same time, far from denying the role of satisfaction as an afflictive remedy, he admitted that such a role was in the nature of satisfaction. This is the meaning that we believe should be attributed to his statement that: "as between sovereign nations the question of the right and power to impose penalties, unlimited in amount, is political rather than legal in its nature, and therefore not a subject within the jurisdiction of this Commission". 259/ Of course, he qualifies the imposing of penalties as a "political" rather than a "legal" matter. However, it seems to us justified to presume that he used those two terms - perhaps not too precisely - in order to distinguish the direct relations between States, one the one hand, and his role as arbitrator

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sera accordée de ce chef 'donnera la mesure de la gravité des actes pratiqués vis-à-vis du droit international et des droit des peuples', et 'qu'elle aidera ... à faire savoir que ces actes ne pourront impunément continuer à être pratiqués. Outre la sanction de la désapprobation par les consciences et par l'opinion publique internationale, ils auraient la sanction matérielle correspondante ...".

Il résulte très clairement de cela qu'il ne s'agit pas, en réalité, d'une indemnité, de la réparation d'un préjudice matériel ni même moral, mais bien d'une sanction, d'une peine infligée à l'Etat coupable et inspirée, comme les peines en général, par les idées de rétribution, d'avertisseement et d'intimidation. Or, il est évident qu'en confiant à un arbitre le soin de fixer le montant des réclamations introduites pour des actes commis pendant la période de neutralité, les Hautes Parties contractantes n'ont pas entendu l'investir d'un pouvoir répressif. Non seulement le § 4 qui institue sa compétence est contenu dans la partie X du Traité, intitulée 'Clauses économiques', tandis que c'est la partie VII qui traite des 'sanctions', mais en outre il serait contraire aux intentions nettement exprimées des Puissances alliées d'admettre qu'elles ont envisagé la possibilité de frapper l'Allemagne de peines pécuniaires en raison des actes qu'elle a commis, l'article 232, al. 1, portant expressément qu'elles reconnaissent que même la simple réparation des pertes proprement dites causées par elle dépasserait sa capacité financière. La sanction réclamée par le Portugal est donc en dehors à la fois des sphères des compétences des arbitres et du cadre du Traité", UNRIAA, vol. III, p.1618.

258/ UNRIAA, vol. IV, p.38.

259/ Ibid., p.43.

on the other hand. By saying that imposing penalties upon States was a matter of a political nature he probably meant that it was a matter for States to settle at ordinary diplomatic level. By denying the legal nature of such a function he probably meant that it was not a matter for arbitration ("therefore not a subject within the jurisdiction of this Commission"). It is on the basis of such a distinction that he concluded that the imposition of penalties (scilicet: satisfaction in the form of punitive damages) would have exceeded the terms of reference of the Mixed Commission. Arbitrator Parker's point is probably not without significance, in our opinion, for the conclusions to be drawn from the comparative analysis of jurisprudential and diplomatic practice (infra para. 135, footnote 320).

115. Among the cases where one or more forms of satisfaction were awarded, the most famous instance is the I'm Alone (a British vessel owned by United States nationals sunk by the United States Coast Guard). The Commissioner decided not to award any compensation for the loss of the vessel, but stated that "The act of sinking the ship, however, by officers of the United States Coast Guard, was, as we have already indicated, an unlawful act; and the Commissioners consider that the United States ought formally to acknowledge its illegality, and to apologize to His Majesty's Canadian Government therefor; and, further, that as a material amend in respect of the wrong the United States should pay the sum of $25,000 to His Majesty's Canadian Government; and they recommend accordingly". 260/ Satisfaction was granted here in the dual form of excuses and pecuniary damages. Another instance is the Moke case, in which punitive damages were awarded for the purpose of condemning the use of force against private parties in order to induce them to grant loans. 261/ The form chosen was the granting of an indemnity

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260/ UNRIAA, vol. III, p.1618.

261/ "Les emprunts forcés étaient illégaux; l'emprisonnement ne dura qu'un jour et il n'en résulta pas de dommages actuels pour le réclamant ou sa propriété; mais nous voulons condamner la pratique des emprunts forcés levés par l'autorité militaire, et nous pensons qu'une indemnité de $500 par jour pour vingt-quatre heures d'emprisonnement sera suffisante ... Nous ne pouvons condamner trop fortement cette manière arbitrale, illégale et injuste de pourvoir aux besoins de l'armée. Si des indemnités plus considérables étaient nécessaires dans de tels cas pour justifier de droit des individus pour échapper à des tels abus, nous nous sentirions sans aucune doute obligés de les accorder", in Moore, J.B., History and Digest of International Arbitrations to which the U.S. has been a Party, p. 3411.

calculating to condemn the unlawful practice in question. A further case is the Arends case, in which Venezuela was sentenced to pay a small sum in the presence of a presumed loss of small proportions. Satisfaction in this case is explicity indicated by the arbitrator as consisting in the expression of regrets by the payment of $100. 262/ Satisfaction in the form of regrets has been awarded, in addition to the I'm Alone and the Arends cases, in the Kellet case. This was the case of a United States Vice Consul harassed by Siamese soldiers. The Arbitral Commission decided that "His Siamese Majesty's Government shall express its official regrets to the United States Government ...". 263/

116. Further cases of pecuniary satisfaction are Brower and Lighthouses. Brower was a United States national who had bought six small islands of the Fiji archipelago. For not recognizing Brower's rights when it was acquiring sovereignity over the Fiji islands, the United Kingdom was sentenced to the payment of one shilling. The decision stated: "These are six small islands of the Ringgold group. They are mere islets with a few coconut trees on them. They are situated in a remote portion of the Colony at a distance of about 180 miles from Suva. If put up to auction, I doubt if there would be a single bid for them. In these circumstances we consider that notwithstanding our conclusion on the principle of liability, the United States must be content with an award of nominal damages. Now therefore: The Tribunal decides that the British Government shall pay to the United States the nominal sum of one shilling". 264/ In Lighthouses arbitration: "Le Tribunal considère

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262/ In particular, Arbitrator Plumley stated that: "The damages consequent upon the detention of this vessel are necessarily small, but it is the belief of the umpire that the respondent Government is willing to recognize its responsibility for the untoward act of its officers under such circumstances and to express to the sovereign and sister State, with which it is on terms of friendship and commerce, its regret for such acts in the only way that it can now be done, which is through the action of this Commission by an award on behalf of the claimant sufficient to make full amends for the unlawful delay. In the opinion of the umpire this sum may be expressed in the sum of $100 in gold coin of the United States of America, or its equivalent in silver, at the current rate of exchange at the time of payment, and judgement may be entered for that amount", UNRIAA, vol. X, p.730.

263/ Moore, op. cit., p.1862.

264/ UNRIAA, vol. IV, p.112.

la base de cette réclamation comme suffisamment prouvées, si bien qu'il s'agit seulement de fixer le montant du dommage subi de ce chef par la Société. Devant l'inconsistance de la réclamation française qui, après avoir fixé à 10.000 francs Poincaré le montant du préjudice, a ensuite déclaré ne plus pouvoir le chiffrer, le Tribunal, tout en reconnaissant en principe le bien-fondé de la demande, ne peut qu'accorder une indemnité symbolique de 1 franc". 265/

117. As noted (supra para. 107) another form of satisfaction is the formal recognition of the wrongfulness of the wrongdoer State's conduct. Important examples are the already cited Carthage and Manouba cases. According to the Manouba award, it was considered that: "pour le cas où une Puissance aurait manqué à remplir ses obligations, soit générales, soit spéciales, vis-à-vis d'une autre Puissance, la constatation de ce fait, surtout dans une sentence arbitrale, constitue déjà une sanction sérieuse". 266/ An identical language was used in Carthage. The term "sanction" should obviously be read as an equivalent of satisfaction, especially of those aspects of satisfaction which appear to have a punitive nature. 267/ Even more significant, in the same sense, is the ICJ judgement in the Corfu Channel case. Addressing the question "Has the United Kingdom under International Law violated the sovereignty of the Albanian People's Republic by reason of the acts of the Royal Navy in Albanian waters on the 22nd October and 13th November 1946, and is there any duty to give satisfaction?", 268/ the Court stated: "that by reason of the acts of the British Navy in Albanian waters in the course of the Operation of November 12th and 13th 1946, the United Kingdom violated the sovereignty of the People's Republic of Albania, and that this declaration by the Court constitutes in itself appropriate satisfaction". 269/

265/ UNRIAA, vol. XII, p.216.

266/ Supra, footnote 6.

267/ Supra, para. 6 of the literature.

268/ I.C.J. Reports, 1949, p.12.

269/ Ibid., p.36. The Court, with 12 votes against and 2 in favour, did not instead consider the acts committed by the British Navy on 22 October 1946 to be in violation of Albanian sovereignty.

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

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

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

Section 3. Satisfaction in Diplomatic Practice

119. Compared with jurisprudence in the area of satisfaction, diplomatic practice in the area offers a more abundant material. For the purposes of analysis it seems useful to divide the study of this material into two periods: one from around 1850 to the Second World War; the second from 1945 to the present time. In the first of these periods, claims for satisfaction were not always used exclusively for the purpose of obtaining reparation for a moral wrong. A number of instances reveal that claims for satisfaction were put forward with the additional purpose of exercising political constraint against a weaker State and possibly obtaining "advantages" for the more powerful State. 270/ In the practice following the Second World War claims for satisfaction seem instead not to present such "iniquitous" aspects. As well as in the cases submitted to arbitration and dealt with in the preceding section, more than one form of satisfaction is often claimed and eventually obtained.

120. The diplomatic practice prior to the Second World War includes in the first place cases of satisfaction following the violation of symbols of the State, such as the national flag. 271/ A form of satisfaction which is typical of these cases consists in a ceremony during which the offending State salutes the flag of the offended States. Examples are the Magee case, 272/

270/ Infra, para. 123.

271/ In some cases it was considered that the national flag had been insulted even though no material injury against it had actually been caused. For example, in 1864, an Italian sailor was pursued aboard his ship moored in a Tunisian port and - after ill-treatment by a local official - was arrested. Following the event, the Italian Consul General in Tunis demanded satisfaction for the insult against the Italian flag. La prassi italiana nel diritto internazionale, vol. II, n. 1012. A similar example is in Ibid., no. 1013.

272/ "When, on 24 April 1874, John Magee, the British Vice Consul at San José, Guatemala, was arrested and flogged by order of the commandant of the port of San José, and his life spared only on condition of a payment of money, the Guatemala Government acted promptly - as soon as it was informed of

the Petit Vaisseau, 273/ and the case which arose from the Berlin disorders of 14 July 1920. 274/

121. Insults, ill-treatment or attacks against Heads of State or Government or against diplomatic or consular representatives abroad were frequently met with claims for satisfaction on the part of the offended State. Following the insult to the Italian consul in Casablanca by a Moroccan employee in June 1865 the Consul General in Tangiers informed his Foreign Minister that he had asked the Moroccan Government for a "luminosa soddisfazione" which seems to have been obtained. 275/ A claim for satisfaction was also made when the Italian

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the affair - to assure the arrest and punishment of the assailants. A garrison was sent to San José by the Government to effect the arrest of the persons involved, and precautions were taken to prevent their escape.

The outrage gave rise to an active correspondence between the British Chargé d'Affaires and the Government of Guatemala, and on 1 May 1874, the Minister of Foreign Relations of Guatemala and the British Chargé d'Affaires signed a protocol of conference containing (1) a reiteration of promises to prosecute the guilty parties, which had already been ordered, and the British Chargé d'Affaires 'declared himself satisfied with this action on the part of the Government; (2) an agreement by the Guatemalan Government to order a salute of 21 guns to the British flag 'as a proof of the deep pain with which it has seen the outrage;' (3) a request for 'an indemnity for the outrage done to Vice Consul Magee of Guatemala by Commandant Gonzalez'", Whiteman, M. Damages cit, p. 64.

273/ La prassi italiana cit, vol. II, n. 1010. Following a rather unmannerly occurrence concerning a letter of congratulations sent by the King of Italy to the Sultan of Zanzibar, the Sultan ordered that the Italian flag be saluted and that written apologies be presented. La prassi italiana cit, vol. III, n. 2557. Another case involving Brazil and Italy is reported ibid., vol. III, n. 2564.

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

275/ The satisfaction claimed by the injured State and promised by the wrongdoer involve the Moroccan employee's arrest as well as his apoligies in front of all those who had witnessed the episode. La prassi italiana cit, vol. II, n. 1014.

Chargé d'Affaires in Caracas was physically ill-treated by an officer. The responsible officer was immediately arrested, sentenced to three years imprisonment and downgraded. Regrets were expressed by the President of the Republic of Venezuela and by the Foreign Minister and a ceremony in honour of the Italian Legation was organized. 276/ A similar event occurred in 1896 when the Italian General Consul in Sofia was forcibly taken to a police station by two officers. 277/ Following the ill-treatment, in 1887, of the Italian Consular Agent in Hodeida by the Deputy Head of the Customs of that city, the Italian Government first threatened a naval shelling and then instead agreed that the Governor of Hodeida pay an official visit to the Consulate in the city in order to present apologies. 278/ The Italian Vice Consul in Rio requested and obtained satisfaction in the form of a declaration deploring the events, the punishment of the responsible individuals and an indemnity for the death of an Italian sailor after an attack by Brazilian soldiers. 279/ Following the killing of Sergeant Mannheim, on guard at the French Embassy in Berlin, France

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276/ The Italian Chargé d'Affaires however was not satisfied. He asked for the individual responsible to be publicly discharged and other forms of satisfaction. Not having obtained this, he interrupted all official relations with the host Government. The seriousness of the situation prompted a request for advice from the legal advisers to the Foreign Ministry. That office maintained that "sia di fronte ai principii del diritto internazionale, sia di fronte ai precedenti diplomatici, le riparazioni solite a darsi nei casi simili al presente consistono nella punizione del colpevole, in iscuse presentate per parte del Governo presso cui l'Agente diplomatico è accreditato, ed in guarentigie per l'avvenire". The responsible official having subsequently been punished and the Government of Venezuela publicly apologized, the suspension of diplomatic relations was discontinued. La prassi italiana cit., vol. II, n. 1017.

277/ As soon as he was released, the Consul demanded the presentation of apologies and the punishment of the officers. Following a note from the Bulgarian Minister of Foreign Affairs expressing regrets and giving assurances that the responsible agents would be punished (which the Consul did not consider to be sufficient) the Bulgarian Prime Minister presented formal apologies and provided for the immediate punishment of the policemen. La prassi italiana cit., vol. III, n. 2563.

278/ La prassi italiana cit., vol. III, n. 2559.

279/ La prassi italiana cit., vol. III, n. 2576.

obtained from Germany a sum of 1 million francs as satisfaction and 100,000 francs more for the loss suffered by the family of the victim. 280/ In 1924, Imbrie, Vice Consul of the United States in Tehran, was killed by the crowd for having tried to take photographs of a religious ceremony. The Government of Persia presented its apologies to the United States and paid an indemnity of $US 170,000 as compensation. Failure to punish the policemen who had not defended the victim seems to have been due to the fact that they were not identified. 281/

122. As in the case of offences against State representatives, violation of the premises of embassies or consulates (as well as of the homes of the members of foreign diplomatic missions) has also resulted in claims for satisfaction. For example when in 1851, the Spanish Consulate in New Orleans was attacked by demonstrators, the United States Secretary of State Webster recognized that Spain was entitled to the payment of a special idemnity. 282/ Following the violation by two Turkish officials of the residence of the Italian Consul in Tripoli in 1883, the Italian demand of apologies and punishment of the guilty party was complied with by the Otoman Empire. 283/ Italy also requested and obtained the punishment of the guilty parties and a solemn, public apology from the Governor of Alexandria following a failed attempt to violate the seat of the Consulate by two Egyptian policemen. 284/ A similar episode occurred in 1892 between Italy and the Otoman Empire. 285/

280/ Garcia Amador, F.V., op. cit., p. 24, para. 90.

281/ Whiteman, M.M., Damages cit., pp. 732 and 733.

282/ Garcia Amador, F.V., op. cit., p. 24, para. 88.

283/ La prassi italiana cit., vol. II, n. 1018.

284/ La prassi italiana cit., vol. III, n. 2558.

285/ La prassi italiana cit., vol. III, n. 2561.

123. Among the episodes preceding the Second World War two cases appear to present a particular relevance. One was occasioned by the so-called Boxer revolt in China. That event caused, inter alia, the death of the German Ambassador to China, the looting of several foreign legations, the killing of the Chancellor of the Japanese Legation and of other foreign citizens, as well as the wounding of other foreign nationals and the profanation of cemeteries. The combined note sent to the Chinese Government by the States concerned included extremely vexatory requests such as the negotiation of new more favourable commercial agreements. 286/ The second case concerning the killing

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

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

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

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

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

III. Honorable reparation shall be made by the Chinese Government to the Japanese Government for the murder of Mr. Sugitama, Chancellor of the Japanese Legation.

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

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

VI. Equitable indemnities for governments, societies, companies and private individuals, as well as for Chinese who have suffered during the late events in person or in property in consequence of their being in the service

in 1923, of the Italian official participating for the Conference of Ambassadors, in the delimitation of the Greece-Albanian frontier, Greece, allegedly responsible for the murder received particularly onerous requests from the Conference of Ambassadors. These included, inter alia, the payment

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of foreigners. China shall adopt financial measures acceptable to the powers for the purpose of guaranteeing the payment of said indemnities and the interest and amortization of the loans.

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

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

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

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

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

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

(B) An imperial decree shall be issued and published everywhere in the Empire, declaring that all governors-general, governors, and provincial or local officials shall be responsible for order in their respective jurisdictions, and that whenever fresh anti-foreign disturbances or any other treaty infractions occur, which are not forthwith suppressed and the guilty persons punished, they, the said officials, shall be immediately removed and forever prohibited from holding any office or honours.

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

XII. The Chinese Government shall undertake to reform the office of foreign affairs and to modify the court ceremonial relative to the reception of foreign representatives in the manner which the powers shall indicate", Eagleton, C., op. cit., pp. 185 and 186.

of 50 million liras to the Italian Government. 287/ In both these cases the injured States appear to have taken not little advantage, in dealing with the

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

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

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

After the vessels of the three Powers have anchored in the roadstead of Phaleron the Greek fleet will salute the Italian, British and French flags, with a salute of 21 guns for each flag;

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

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

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

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

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

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

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

(7) The Greek Government will undertake to pay to the Italian Government in respect to the murder of its delegate, an indemnity, of which the total

matter and claiming severe measures of satisfaction, of their military, political and/or economic superiority. 288/

124. Claims for satisfaction have also been put forward in cases where the victims of an internationally wrongful act were the private citizens of a State. As a result of the ill-treatment of an Italian worker by a Serbian police officer and the subsequent Italian protests, the Serbian Minister for Foreign Affairs expressed regrets and assured the injured State that the responsible officer had been discharged. 289/ A well-known case concerns the lynching of three Italians who had been acquitted of the murder of the Chief of Police of New Orleans. The United States deplored the occurrence and awarded Italy a sum of Lire 125,000 to be distributed by the Italian Government to the victims. 290/ In the case regarding the murder of Reverend Labaree, a United States citizen in 1904, the Persian Government paid a sum of $30,000 and punished the Kurds who were responsible for the murder. 291/ In the case concerning the killing of a French man near Tangiers in 1906, the French Government considered the local authorities responsible in

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amount will be determined by the Permanent Court of International Justice at the Hague, acting by summary procedure...

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

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

289/ La prassi italiana cit., vol. II, n. 1020.

290/ La prassi italiana cit., vol. III, n. 2571.

291/ Whiteman, M.M., Damages cit., p. 725 ff.

the first place (and the Government of Morocco in the second place) for having allowed the Tangiers region to fall into complete anarchy. After examining the circumstances of the murder the French Government formulated a long list of requests aimed at obtaining satisfaction. 292/ In 1912 the American national Hicks was killed and two others (Sheldon and Hofman) seriously injured by a group of Chinese. The United States Ambassador in Peking requested and obtained $50,000 from the Chinese Government as punitive damages. 293/ Severe measures were obtained in 1922 by the United States from the Chinese Government following the murder of Coltman, a United States citizen, by Chinese soldiers. 294/

125. In the period prior to the Second World War two cases seem to be of importance. The first case concerns a military action carried out in Bulgarian territory by Greece in 1925. The Council of the League of Nations, after finding Greece responsible, decided that Greece should pay an indemnity exceeding the value of the material damage suffered by Bulgaria, in order to

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292/ Kiss, A.C., Répertoire de la pratique française en matière de droit international public, vol. III, n. 982.

293/ Hackworth, Digest of International Law, vol. V., Washington, 9143, p. 725.

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

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

provide reparation for the moral wrong suffered as well. 295/ The second (the Panay incident between Japan and the United States) is an instance in which all the forms of satisfaction were cumulatively resorted to in conjunction with reparation by equivalent. Oppenheim refers to the Japanese Note of 14 December 1937, concerning the sinking of that American gunboat and three United States vessels by Japanese aircraft in the course of hostilities in China. Japan expressed her profound regret for the incident, presented sincere apologies, promised indemnification for all losses, and undertook "to deal appropriately" with those responsible for the incident and to issue instructions with a view to preventing similar occurencies in the future. 296/

126. Diplomatic practice from 1945 to the present day. More recent diplomatic practice includes to begin with a number of cases in which apologies were made or regrets expressed. 297/ In March 1949, a United States soldier on leave in Havana climbed on to the statue of José Marti, a hero of Cuban independence. He did so with the encouragement of his comrades. Following the Cuban Government's protest, the United States Ambassador placed a wreath of flowers at the foot of the statue and read a declaration of regrets. 298/ Following an attack against the United States Embassy in Taipei in 1957, the Republic of China acknowledged responsibility and presented its apologies to the United States. 299/ Apologies were also presented by France to the Soviet Union in 1961 following the USSR protest for the attack against a Soviet airplane (with President Breznev on board) carried out by French fighter planes over the international waters of the Mediterranean. 300/

295/ Sociéte des Nations, Journal Officiel, 1926, II, p. 172 ff.

296/ Oppenheim, L., International Law, 7th ed., vol. I (Peace), p.319.

297/ Apologies or expressions of regret are also present in cases in which States have not acknowledged their responsibility. For example, in the case of the acident of 27 July 1955, in which an Israeli airliner was shot down by Bulgarian military aircraft, Bulgaria expressed its regrets for what had happened but denied that it had violated the right to freedom of air navigation. Whiteman, M.M. Digest cit., vol. VII, p. 781 ff.

298/ Bissonnette, P.A., op. cit., p. 67 and p. 88.

299/ Whiteman, M.M. Digest cit., vol. 8, pp. 747 ff.

300/ RGDIP, Chronique des faits internationaux, 1961, pp. 603 ff.

Apologies and expressions of regret also followed demonstrations in front of the French Embassy in Belgrade in 1961; 301/ the fires in the United States libraries in Cairo in 1964, 302/ and in Karachi in 1965. 303/ Similar actions were taken following a demonstration against French President Pompidou on visit in the United States; 304/ following the searching of Lebanese President Frangie's luggage in New York airport in 1974; 305/ and on a great number of similar episodes. Finally, apologies, together with a promise of compensation, were presented by the Cuban Government following the sinking of a ship of the Bahamas in 1980 by a Cuban airplane. 306/

127. Forms of satisfaction such as the salute to the flag or expiratory missions seem to have disappeared in recent practice. Conversely, forms of publicity - concerning in particular the request for apologies or the offer thereof seem to have increased in importance and frequency. Following the looting of the French Embassy in Saigon by Vietnamese students in 1964 the Government of Vietnam issued a communiqué to the local press presenting apologies and suggesting that the damage suffered by persons and property be assessed in order to allow the payment of compensation. 307/ When, in 1967, disorders and acts of violence took place in front of the Embassy of Yugoslavia in Washington and in front of the same country's Consulates in New York and San Francisco, the United States Secretary of State presented his country's apologies to the Yugoslav Ambassador by means of a press statement. 308/ The Chinese Government requested public excuses from

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301/ Ibid., p. 610.

302/ Ibid., 1965, pp. 130 and 131.

303/ Ibid., 1966, pp. 165 and 166.

304/ Ibid., 1971, p. 181.

305/ Ibid., 1975, pp. 810 and 811. It was, it seems, a matter of "sniffing dogs" inspection.

306/ Ibid., 1980, pp. 1078 and 1079.

307/ Ibid., 1964, p. 914.

308/ Ibid., 1967, p. 775.

Indonesia for the looting in 1966 of the Chinese Consultates in Giakarta and Medan during anticommunist riots. 309/ The People's Republic of China also requested and obtained public excuses following incidents at Ulan Bator Railway Station where Chinese diplomats and nationals were ill-treated by the local police. 310/

128. It should be stressed that the resonance effect of public apologies can be achieved in the kind of cases considered in the preceding paragraph not only by involving the press or other mass-media. It can be pursued even more effectively by the choice of the level of the wrongdoer State's organization from which the apologies emanate. For example, following the attempt on the life and the physical injury of the United States Ambassador in Tokyo in 1964, the Prime Minister and the Foreign Minister of Japan presented apologies to the United States Ambassador; and the Minister of the Interior resigned from office. In addition, Emperor Hirohito sent a delegate of his own to join the members of the Government in the presentation of apologies. 311/

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

130. A case of désaveu 312/ involved Bolivia and the United States. Following statements by the spokesman of the United States Embassy in La Paz, which appeared in Time Magazine in March 1959 and considered to be offensive towards Bolivia, the United States State Department immediately corrected those statements. 313/

131. Two cases concerning the punishment of responsible individuals are well-known. The first case concerns the killing in 1948, in Palestine, of Count Bernadotte while acting in the service of the United Nations. The

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309/ Ibid., 1966, p. 1013 ff.

310/ Ibid., 1967, pp. 1067 and 1068.

311/ Ibid., 1964, p. 736.

312/ Cases of désaveu concerning the period from 1850 to 1939 are in Bissonnette, P.A. op. cit., pp. 104 ff.

313/ Whiteman, M.M., Digest cit., vol. V, p. 169 ff.

United Nations requested from Israel the punishment of the responsible individuals the presentation of apologies and payment of an indemnity. 314/ The second case concerns the kidnapping and the deportation to Israel of Adolf Eichmann, charged with crimes against humanity. Although the Argentine Government's requests were not met by Israel, the nature of such requests was not insignificant from the point of view of the practice of satisfaction in international relations. 315/ Punishment of the guilty individuals was requested in the cases concerning the bombing of the United States Information Service library in Athens. 316/ In the case of the killing of two United States officers in Tehran the responsible parties were executed. 317/

132. The diplomatic practice of recent years includes at least three cases which are worthy of mention: the Rainbow Warrior, the Stark and the shooting down, in July 1988, of an Iranian airliner by United States ship Vincennes.

133. As widely known, the Rainbow Warrior was sunk in Auckland harbour by agents of the French security services who had used false Swiss passports to enter New Zealand; and a Dutch citizen aboard ship was killed. New Zealand demanded that France present formal apologies and pay $US 10 million a sum which exceeded by far the value of the material loss sustained. France acknowledged responsibility but refused to pay the considerable amount claimed by New Zealand by way of indemnification. The case was finally submitted to the United Nations Secretary-General who decided that France should present formal apologies and pay a sum of $US 7 million to New Zealand; in addition,

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314/ Ibid., vol. VIII. p. 742-743. An indemnity was also claimed by the United Nations for the murder (assassination) of Colonel Sérot (ibid., p. 744).

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

316/ Ibid., vol. VIII, p. 816.

317/ Ibid., 1976, p. 257.

the Secretary-General decided that the two French agents should be handed over to France and later be restricted to the island of Hao for at least three years. 318/

134. In the Stark case, following the damaging of the ship by an Iraqi missile, the Iraqi President immediately wrote to the President of the United States explaining the attack as an accident and expressing his "heartfelt condolences" for the death of United States sailors. President Reagan claimed however: "Sorrow and regrets are not enough". 319/

Section 4. Satisfaction (and punitive damages) as a Consequence of an Internationally Wrongful Act and its Relationship with other Forms of Reparation

135. The analysis of literature, jurisprudence and - especially - diplomatic practice indicates with certainty the existence of various forms of satisfaction as a mode of reparation in international law. It confirms, in particular, the position of the prevailing doctrine, according to which the remedy for the moral, political or juridical wrong suffered by the injured State is satisfaction, namely a form of reparation with a tendentially afflictive nature - distinct from compensatory forms of reparation such as restitutio and pecuniary compensation. Of course, the distinction between compensatory and afflictive or punitive forms of reparation, notably between pecuniary compensation and the various forms of satisfaction, is not an absolute one. Even such a remedy as reparation by equivalent (not to mention restitution in kind) performs, in the relations between States as well as in interindividual relations, a role that cannot be deemed to be purely compensatory. If surely not a punitive role, it does perform the very general function of dissuasion from, and prevention of, the commission of wrongful

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318/ Ibid, 1986, pp. 223-4 and pp. 1094-5; 1987, pp. 11 ff, 623 and 624.

319/ The United States and Iraq have already reached an agreement over the payment of a sum of $US 27.3 million for the 37 sailors killed on board the Stark. In so far as the indemnity for the damage to ship and crew are concerned, negotiations are underway. (New York Times, 28 March 1989, p. A5).

acts. The predominantly afflictive and not compensatory role of satisfaction is nevertheless widely recognized and indisputably emphasized by a long standing diplomatic practice. 320/

320/ An opposite view is maintained, as noted (supra para. 108), by Dominicé whose brilliant essay concludes in the sense (p. 121): "En definitive, ce n'est pas la satisfaction qui est un mode de réparation, mais la réparation qui constitue l'une des formes de satisfaction". The clear tendency of this author to absorb, if not dissolve, the various forms of satisfaction into reparation in a broad sense - a tendency which is emphasized by the use of the term satisfaction as a mere synonym of reparation (supra, end of para. 106) - is presumably due to a different evaluation of the practice of States (notably of diplomatic practice). This leads him to underestimate the specific, autonomous function of international satisfaction in a narrow sense. That very practice analysed perhaps by us more thoroughly, leads us instead to an opposite conclusion, which might be of considerable importance as a matter of both codification and progressive development in the field. From the viewpoint of progressive development, in particular, the various forms of satisfaction appear to be the most suitable to meet the necessity of adjusting the consequences of delicts to the degree of fault and of tackling the problem of the special, even more severe, consequences that should be attached to international crimes (infra, para. 143). Our evaluation of the diplomatic practice (as compared in particular with jurisprudence) finds some comfort - in addition to our own reading of Arbitrator Parker's dictum in Lusitania (supra, para. 114) - in the following thoughts put forward by Reitzer in his often cited work: "La conclusion découlant de l'analyse qui précède n'est pas difficile à tirer une bifurcation entre la pratique diplomatique, d'une part, et la jurisprudence arbitrale et judiciaire, d'autre part, s'impose. En d'autres termes, les normes juridiques régissant la mesure de la réparation sont différentes suivant que seuls les deux Etats en litige se trouvent sur la scène, ou qu'une tierce instance impartiale et désintéressée y fait son entrée. Il n'y a, dans cette proposition, rien d'étonnant. Tous les juristes savent qu'une différence fondamentale dans les règles de procèdure entraîne presque invariablement une différence dans les normes matérielles de droit. Le fait d'avoir méconnu cette distinction cardinale et d'avoir voulu étendre la réglementation arbitrale à des hypothèses où deux Etats se trouvent face à face, constitue, à notre avis, l'erreur principale de la doctrine courante, et la source d'une grande partie des malentendus et des équivoques qui pèsent sur toute la matière. En d'autres termes, ces équivoques provenaient surtout de ce que l'on a fréquemment présenté les règles tirées - à tort ou à raison - de la jurisprudence arbitrale concernant les préjudices matériels, comme relevant du droit international coutumier. La ligne de démarcation correcte se trouve non pas entre les dommages causés aux citoyens d'un Etat et les autres préjudices, mais entre la pratique diplomatique et la jurisprudence internationale." (Op. cit., pp. 131-132).

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

137. The autonomous nature of satisfaction does not, on the other hand, prevent it from often appearing to be absorbed into, or even confused with, the more rigorously compensatory remedies. It may have been so, for example, in the Rainbow Warrior case, where both the sum claimed by New Zealand and the sum awarded by the Secretary-General of the United Nations exceeded by far the value of the material loss. 321/ Other examples include the case concerning the lynching of Italians in New Orleans 322/ and the Labaree case. 323/ In such instances one may doubt, at first sight, whether they involved satisfaction stricto sensu. The element of satisfaction is however equally perceptible, either because one or more forms of satisfaction had been requested and obtained by the offended State or because the amount of the pecuniary compensation exceeded to a greater or lesser degree the extent of the material loss. And there are instances where the presence of satisfaction in some form is suggested by admissions made by the offending State.

138. As clearly revealed by jurisprudence and diplomatic practice (and indicated by doctrine), satisfaction takes on forms which are all typical and in a sense specific to international relations. These are in particular: apologies, with the implicit admission of responsibility and the disapproval of, and regret for what has occurred; punishment of the responsible individuals; a statement of the unlawfulness of the act by an international body, either political or judicial; assurances or safeguards against repetition of the wrongful act; payment of a sum of money not in proportion

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321/ Supra, para. 133.

322/ Supra, para. 124.

323/ Ibid.

to the size of the material loss. This latter form of satisfaction is obviously equivalent, in our opinion, to the payment to the offended State of what a part of the doctrine, using a well-known common law concept, refers to as "punitive damages".

139. Satisfaction in the form of punitive damages, or in any other form of an afflictive nature, may be by its forms or circumstances incompatible in given cases with the principle of equality among States. Such has been the case of measures claimed as satisfaction - especially prior to the Second World War - by offended States which took advantage of the situation to make excessive or humiliating demands upon weaker States, in contempt of their dignity and sovereignty. Examples include the case of the Boxer revolt and the case of the Tellini murder. 324/ We should add, however, that there are cases in which decidely afflictive forms of satisfaction have been granted to injured States by powerful offending States. Instances are Panay case 325/ and the Rainbow Warrior. 326/

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

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

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

140a. Although arguments such as these are not without force, they do not seem to us to constitute valid reasons against the acceptance of satisfaction among the forms of reparation. There seem to be, on the contrary, good reasons positively to emphasize the role of satisfaction.

324/ Supra, para. 123.

325/ Supra, para. 125.

326/ Supra, para. 133.

141. In the first place, the very absence, in the "society of States", of institutions capable of performing such "authoritative" functions as the prosecution, trial and punishment of criminal offences, makes it even more necessary the resort to remedies susceptible of reducing, albeit in a very small measure, the gap represented by the absence of the said institutions. To confine the consequences of any international delict (let alone an international crime) to restitution in kind and pecuniary compensation would mean to overlook the necessity of providing some specific remedy - in a preventive as well as a punitive function - for the moral, political and juridical wrong suffered by the offended State or States in addition to, or instead of, any amount of material damage. 327/ To overlook such a function would in its turn encourage States - especially the richest among them - inopportunely and dangerously to assume that any injury they may cause to one or more other States can easily be made good by a merely pecuniary compensation. One must conclude that far from being incompatible with the lack of institutionalization of the "society of States" an afflictive or relatively more afflictive/punitive form of reparation like satisfaction in its various forms would help reduce the gap represented by the inexistence of adequate institutions. Although not identical surely similar is the inspiration of Sir Hersch Lauterpacht's passage quoted supra, in para. 108, footnote 240.

142. The punitive or afflictive nature of satisfaction is not in contrast with the sovereign equality between the States involved. Whatever its form, the satisfaction claimed by the injured State never consists, as shown by the abundant practice analysed, in any action or measure directly taken by the injured State itself against the offender. Of a sanction to be inflicted upon the offending State by a direct conduct of the injured State there may be question, of course, at a later stage: and we think, obviously, of reprisals. This will namely be the stage where, demands for reparation and/or satisfaction having been put forward unsuccessfully, the situation will move from the substantive or immediate consequences of the wrongful act to those consequences which are represented by the reaction of the injured State to

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327/ We refer here to the material damage suffered by the injured State as inclusive of any patrimonial, personal and/or moral damage suffered by (inflicted upon) its nationals.

non-compliance by the injured party with its so-called "secondary" obligation to make reparation. Prior to that more crucial, critical stage, satisfaction does not involve any direct measures of the kind. Although the demand for satisfaction will normally come - unless felicitously preceded by the offending State's own initiative - from the injured State, the satisfaction to be given consists of actions to be taken by the offender itself. One should not fear, therefore, that satisfaction will entail the notion of a sanction applied by one State against another, and thus a serious encroachment upon the offending State's sovereign equality. 328/ In the measure, surely relative, in which one can speak of a sanction, it is not so much a question of a sanction inflicted upon the offending State. It is rather a matter of atonement, of a "self-inflicted" sanction, intended to cancel by deeds of the offender itself, the moral, political and/or juridical injury suffered by the offended State. A passage by former Judge Morelli, once our Professor, is enlightening in this respect. 329/

143. While neither of the possible objections to satisfaction seem thus to hold, there is, on the contrary, as indicated, good cause to believe that such a remedy performs a positive function in the relations among States. In addition to the reasons emerging from the preceding discussion it must be stressed that it is precisely by resorting to one or more of the various forms of satisfaction (as qualitatively distinct from purely compensatory remedies) that the consequences of the offending State's wrongful conduct can be adapted to the gravity of the wrongful act. We refer in particular to the degree of

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328/ The confusion between the two stages is of course inevitable whenever one disregards the distinction - for us indispensable - between the immediate (or substantive) and the mediate (or instrumental) consequences of an internationally wrongful act.

329/ "La soddisfazione presenta una certa analogia con la pena. Anche questa adempie una funzione satisfattoria. D'altra parte, la soddisfazione, al parti della pena, ha un carattere afflittivo, in quanto persegue il fine a cui è diretta mediante un male che il soggetto responsabile subisce. La differenza sta in ciò che, mentre la pena è un male che viene inflitto da un altro soffetto, nella soddisfazione il male consiste in una certa condotta dello stesso soggetto responsabile, condotta che constituisce, come per le altre forme di riparazione, il contenuto di un obbligo di tale soggetto". Morelli, G., op. cit., p. 358.

fault in a broad sense, namely to the various conceivable "nuances" of dolus and culpa which, even in an internationally wrongful act, are bound, after all, to become relevant at some point. Indeed while aware that the Commission has rightly or wrongly excluded fault from the prerequisites of international responsibility, we find it difficult to believe that fault in any degree could not be deemed to be - de lege lata or ferenda - of some relevance in the determination of the consequences of an internationally wrongful act. As mentioned in the Introduction, the question of the impact of fault is to be addressed to in Chapter Five. It will be shown therein that it is especially in cases where claims to satisfaction were successfully put forward that fault was of relevance. 330/ And it is also probable that it would be precisely in such cases, namely in the case of delicts of particular gravity (not to mention crimes for the time being), that a refusal of the offender to provide adequate satisfaction may justify resort to more severe measures on the part of the injured State.

144. To the extent that the above conclusions are acceptable, Part Two of the Commission's draft on State responsibility should, in our opinion, not fail to include a provision contemplating satisfaction as a distinct, specific form of reparation. We actually believe such a provision to be indispensable as a matter of strict codification as well as progressive development of the law of international responsibility. We therefore submit such a provision in Chapter VI.

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

330/ See, infra, paras. 184 ff.

CHAPTER FOUR - GUARANTEES OF NON-REPETITION OF THE WRONGFUL ACT

146. The study of practice and literature shows that the consequences of an internationally wrongful act also include safeguards against its repetition. This remedy, however, is generally dealt with only marginally and within the framework of other consequences, notably of satisfaction 331/. Guarantees against repetition are also seen in other forms of reparation, including "punitive damages" and pecuniary compensation as well. Personnaz, for example,

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331/ Bissonnette, for example, maintains that safeguards against repetition of a wrongful act "se distinguent aussi de la restitutio in integrum par l'absence d'intention de rétablir la situation bouleversée par l'acte illicite. D'autre part, bien que la demande de sécurité pour le futur se distingue de la demande de punition des coupables parce qu'elle ne contient aucun élément punitif, elle s'en rapproche cependant parce qu'elle cherche à prévenir la répétition des actes illicites. Pour ces raisons, elle doit être considérée comme une des formes de la satisfaction", La satisfaction comme mode de réparation en droit international, Thèse, Geneva, 1952, p. 121. Similarly, Przetacznik, F., La responsibilité internationale de l'Etat à raison des préjudices de caractère moral et politique causés à un autre Etat, in RGDIP 1974, pp. 966-967. Graefrath, B., Responsibility and damages caused: relationship between Responsibility and Damages, in R.d.C. 1984/II, pp. 86-88, observes that "Reaffirmation of the obligation breached, in order to safeguard the violated right against further new violations, is the real sense of a formal apology, of the prosecution and punishment of culprits, or the enactment of corresponding legal or administrative measures to prevent such violations in future. The State dissociates itself from the violation either because the act was unintentional or because it, in any case, will take care in future that such a violation would not be repeated. It affirms guarantees for the future observance of the obligation. In this sense, satisfaction by all means has practical importance ... In all cases where continuation or repetition of a violation may be feared and particularly if violations of obligations are concerned which are arising from jus cogens norms, the claim for satisfaction is directed to measures to be taken that would forestall contintuation or repetition of the wrongful conduct that would prevent such a disturbance of peaceful international co-operation in future. According to Brownlie, the "objects" of satisfaction are three and are often cumulative. These are "apologies or other acknowledgment of wrong doing by means of a salute to the flag or payment of an indemnity, the punishment of the individuals concerned, and the taking of measures to prevent a recurrence of the harm", Brownlie, Y., System of the law of Nations: State responsibility, I, Oxford, 1983, p. 208. See also Garcia Amador, F.V., Principios de derecho internacional que rigen la responsabilidad - Analisis critico de la concepcion tradicional, Madrid, 1963, pp. 447-453.

sees in indemnification such a preventive function 332/; Garcia Amador, in his turn, stresses the preventive function of "punitive damages" 333/.

147. Even though most authors consider safeguards against repetition to be a form of satisfaction, it is undeniable that those safeguards include aspects often insufficiently clarified, which distinguish them from other forms of satisfaction. In the first place, the safeguards in question are not among the consequences of any wrongful act. They manifest themselves only with respect to wrongful acts the repetition of which appears to be more likely. It is of course also true that all measures - whether afflictive or compensatory - are themselves more or less directly useful in avoiding repetition of a wrongful act. For example, there is no doubt that "la meilleure faç pour l'Etat de prévenir la répétition d'actes illicites contre ses ressortissants et, par conséquent, de les protéger, est d'exiger la punition des coupables par l'appareil judiciare du pays sur le territoire duquel s'est commis l'acte illicite" 334/. A request of safeguards against repetition suggests that the injured State appears to seek from the offender something in addition to, and different from, mere reparation, the re-estabishment of the pre-existing situation being considered insufficient. For example, following demonstrations against the United States Embassy in Moscow in Februry 1965 (less than three months after those of November 1964), the United States President affirmed that "... Les Etats-Unis doivent insister pour que leurs propriétés et leur personnel diplomatique reçoivent la protection exitée par le droit international et par l'usage, protection qui est nécessaire à la conduite des relations diplomatiques entre les Etats Des expressions de regrets et l'offre d'une indemnité ne sauraient tenir lieu de

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332/ Personnaz, J., La réparation du préjudice en droit international public, Paris, 1939, p. 325: "l'indemnité pécuniaire peut avoir pour effet d'inciter les Etats à prendre à l'avenir les mesures nécessaires pour éviter dorénavant le retour d'un tel état de choses. L'intention implicite de telles indemnités qui peuvent être ou non compensatoires peut englober l'idée que par de telles pénalités le gourvernement délinquant peut être amené à améliorer l'administration de sa justice et donner au réclamant l'assurance que de tels manquement et injustice envers ses citoyens seront évités à l'avenir".

333/ Garcia Amador, F.V., Sixth Report, YB/ILC 1961, p. 35, para. 145.

334/ Bissonette, P.A., La satisfaction, cit., p. 72.

protection adéquate" 335/. In other words, the injured State demands guarantees against repetition because it feels that the mere restoration of the normal, pre-existing situation does not protect it satisfactorily.

148. The main issues arising in connection with the practice and theory of guarantees of non-repetition are: (i) the source of the offending State's obligation to provide such guarantees; (ii) the question whether an explicit request by the offended State is necessary; (iii) whether the choice of the specific guarantees to be provided belongs to the offending or to the offended State; and (iv) whether the offending State may refuse to provide given safeguards. The study of previous attempts at codification offers a few interesting indications.

149. According to article 13 of the report introduced by Strisower at the 1927 session of the International Law Institute: "La responsabilité de l'Etat à raison des dommages causés aux étrangers comprend ... une satisfaction à donner à l'Etat lésé dans la personne de ses ressortissants, sous la forme d'excuses plus ou moins solennelles et dans les cas appropriés, par la punition, disciplinaire ou autre, des coupables, ainsi que les mesures de garantie nécessaires contre la répétition de l'action offensante" 336/. On the other hand, according to article 27 of the Sixth Report by Garcia Amador (significantly entitled "measures to prevent the repetition of the injurious act") "the State of nationality shall have the right, without prejudice to the reparation due in respect of the injury sustained by the alien, to demand the respondent State take the necessary steps to prevent the repetition of events

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335/ Rousseau, C., Chronique des faits internationaux, in RGDIP 1965, p. 161. Italy too, following the lynching of its citizens in the United States in the period from 1890 to 1895, did not consider the payment of an indemnity by the Government of the United States to be sufficient and requested that laws of the United States be modified in order to avoid repetition of similar episodes.

336/ Report by Strisower, M., in Annuaire de l'Institut de droit international, I, Bruxelles, 1927, pp. 560-561.

of the nature of those imputed to that State" 337/. The role assigned to safeguards against repetition appears to be still different in the Riphagen Reports. According to point 3 of draft Article 4 as introduced in the 1981 Report, "3. In the case mentioned in paragraph 2 of the present article, the State shall, in addition, provide satisfaction to the injured State in the form of an apology and of approrpriate guarantees against repetition of the breach" 338/. Article 6 of the Fifth report by the same Rapporteur (according to which "1. The injured State may require the State which has committed an internationally wrongful act to: ... (d) provide appropriate guarantees against repetition of the act ..." 339/) seems to add some emphasis to the provision. Omitting as it does any reference to satisfaction, the latter formulation seems to assign safeguards against repetition a more distinct role. The expression "appropriate guarantees", however, has prompted a great deal of discussion. Unaccompanied as it was by any specification, it has been viewed as a possible source of abuse on the part of the injured State 340/.

150. Previous codification projects seem thus to show:

(i) a certain tendency to give guarantees an autonomous position in relation to other remedies, including satisfaction itself;

(ii) the existence of an offending State's obligation, under circumstances to be determinated, to provide guarantees against repetition subject to a demand from the injured State;

(iii) that the choice of guarantees rests in principle with the injured State;

(iv) no indications concerning either the kind of gaurantees to be offered or the limits in the choice thereof.

151. While confirming the conclusions drawn from the study of the above-mentioned projects, States practice appears to be more complex and

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337/ Garcia Amador, F.V., Report, in YILC, 1961, II, p. 49: Article 27, para 1 reads: "1. Even in the case of an act or omission the consequences of which extend beyond the injury caused to the alien, a fact constituting an aggravating circumstance, the reparation shall not take a form of "satisfaction" to the State of nationality, which would be offensive to the honour and dignity of the respondent State."

338/ Riphagen, Second Report, YILC 1981, vol. II, (Part One) p. 101.

339/ Riphagen, Fifth Report, YILC, 1985, vol. II, part I, p. 8.

340/ See especially Calero Rodriguez's statement, in YILC 1985, vol. I, 1892nd meeting, para. 34.

nuanced. In particular, as the offended State's right to demand safeguards against repetition has never been questioned, one would seem to have to conclude that the safeguards are generally considered to be among the consequences of an internationally wrongful act. The same practice suggests that the corresponding obligation of the offending State must be fulfilled only on the injured State's demand.

152. With regard to the kinds of guarantees which may be requested international practice is not univocal. In most cases the injured State demands:

(a) either safeguards against the repetition of the wrongful act without any specification; or

(b) where the wrongful act affects its nationals, to ensure a better protection of the persons and property of the latter.

153. Examples of the first hypothesis (a) include: - the Dogger-Bank incident between Russia and the United Kingdom in which the United Kingdom requested, among other things, "sécurité contre la répétition de tels incidents intolérables" 341/; - the 1980-81 case between the United States and Spain concerning the "visition and search of American merchant vessels by armed cruisers of Spain on the high seas off the eastern coast of Cuba". In the latter case the United States declared that it expected "a prompt and ready apology for [the] occurrence, a distinct assurance against [...] repetition ..." from Spain 342/; - the exchanges between China and Indonesia following the attack against the Chinese Consulate in Djakarta. The Chinese representative requested, among other measures, "une garantie contre tout renouvellement de pareils incidents à l'avenir" 343/; - the case concerning the attack in Zurich by four members of the PLO on 18 February 1969. The Swiss Government delivered formal notes of protest to Jordan, Syria and

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341/ Martens, G.F., Nouveau Recueil Général de Traités, serie II, vol. XXXIII, p. 642.

342/ Moore, J.B., A digest of international law as embodied in diplomatic discussions, treaties and other international agreements, Washington, 1906, vol II, pp. 907-908.

343/ Rousseau, C., Chronique des faits internationaux, in RGDIP 1966, p. 1013.

Lebanon condemning the attack and urging the three governments to take steps "to prevent any new violation of Swiss territory" 344/.

154. Examples of hypothesis (b) are: - the exchanges between the United States and Spain concerning American missionaries and, in particular, the Doane case in which "the Spanish government endeavoured in a measure to repair the wrong it had done by restoring Mr. Doane to the scene of his labours and by repeating its assurances with reference to the protection of the missionaries and their property" 345/; - the Wilson case, between the United States and Nicaragua, in which the United States claimed, inter alia, "... that the Government of Nicaragua ... adopt such measures as to leave no doubt as to its purpose and ability to protect the lives and interests of citizens of the United States dwelling in the reservation, and to punish crimes committed against them" 346/; the Vracaritch case between Yugoslavia and the Federal Republic of Germany: "Quant au Ministère fédéral allemand de la justice, il remit à la presse le 8 novembre une déclaration où l'on pouvait relever le passage suivant: L'arrestation du ressortissant yougoslave Lazo Vracaritch constitue un regrettable cas isolé et les autorités compétentes ont pris les mesures propres à garantir qu'une telle affaire ne se renouvellera pas" 347/; - the exchanges between the United States and the

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344/ Falk, The Beirut raid and the international law of retaliation, in AJIL 1969, p. 419.

345/ Moore, J.B., A digest ..., ct., vol. VI, pp. 345-346. "These proceedings culminated in the arrest of Mr. E.T. Doane, the older of the American missionaries in the islands, because of a letter addressed by him to the governor protesting against the seizure of certain lands belonging to the mission. He was subsequently deported to Manila, where he was released. The government of the United States protested against these acts ...".

346/ Moore, J.B., A digest ..., cit., vol. VI, pp. 745-746. Mr. Wilson was "a citizen of the United States, shot at Bluefields, without provocation, by Norberto Arguello, acting governor of Roma".

347/ Rousseau, C., Chronique des faits internationaux, in RGDIP 1962, pp. 376-377 "M. Lazo Vracaritch, ressortissant yougoslave âgé de 44 ans, directeur commercial de l'enterprise nationalisée Me-Ga á Zagreb et ancien capitaine dans les forces de résistance yougoslaves, était arrêté à Munich sur mandat du parquet de Constance sous l'inculpation d'avoir 'lâchement assassiné' des soldats allemands lors de l'occupation de la Yougoslavie en 1941".

Soviet Union in which, following the "Atteinte à l'immunité personnelle des attachés militaires américains par les autorités soviétiques (29 septembre 1964) et l'expulsion de ces derniers (14 décembre 1964), the United States insisted "pour obtenir du Gouvernement soviétique l'assurance formelle que de nouvelles violations de l'immunité diplomatique ne se reproduiraient plus ..." 348/; - the incident between China and the United Kingdom in which, following an attack against the British Consulate in Shanghai, (1967), the British Government demanded "des garanties pour la sécurité de ses diplomates et des autres sujets britanniques en Chine" 349/.

155. In both the hypotheses considered, the offending State would seem to be placed under an obligation of result. In the face of the injured State's demand for guarantees, the choice of the measures most apt to achieve the aim of preventing repetition remained, it seems, with the offending State.

156. On other occasions - generally less recent - the injured State has asked that the offending State adopt specific measures or act in certain ways considered to be apt to avoid repetition. In such instances the offending State would seem to find itself under an obligation of conduct. Three possibilities seem to emerge here:-

(a) In one set of cases the request for guarantees takes the form of a demand for formal assurances from the offending State that it will in future respect given rights of the offended State or that it will recognize the existence of a given situation in favour of the offended State. Examples include - the 1893 controversy between France and Siam in which France asked Siam "la reconnaissance formelle de ses revendications territoriales sur la rive gauche du Mékong" 350/; - the 1901 case of the Ottoman post offices in which the Western Powers presented an ultimatum in which they "exigeraient des réparations et des excuses pour la violation des courriers du 5 mai 1901, ainsi que la reconnaissance officielle et définitive des postes étrangères actuellement établies à Constantinople et dans les diverses villes de

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348/ Rousseau, C., Chronique des faits internationaux, in RGDIP 1965, pp. 156-157.

349/ Rousseau, C., Chronique des faits internationaux, in RGDIP 1967, p. 1064.

350/ Martens, C.F., Nouveau Recueil ..., cit. vol. XX, pp. 160 ff.

l'Empire ottoman; la Turquie faisait des excuses pour les faits du 5 mai, et donnait l'assurance formelle que désormais les postes anglaise, autrichienne et française fonctionneraient librement en Turquie" 351/; - the Constitucion case of 1907, between Uruguay and Argentina, in which Uruguay requested that "le Gouvernement argentin condamnât l'incident (de l'Hurucan) et déclarât n'avoir pas eu l'intention d'offenser la dignité de la République orientale, ni de méconnaître la juridiction qui lui appartient sur le rio de la Plata comme pays voisin et limitrophe" 352/; - the Arménie case of 1894, between France and Turkey, in which, following French protests, Turkey granted "une indemnité de 18 000 francs pour la Compagnie Paquet ... et promit de faire mieux respecter dorénavant les stipulations des traités garantissant l'inviolabilité de la personne et du domicile des Français en Orient" 353/.

(b) On other occasions the injured State has asked the offending State to give specific instructions to its agents. Examples include: the Alliance case of 1895 between the United States and Spain in which the United States affirmed that it "will expect prompt disavowal of the unauthorized act and due expression of regret on the part of Spain, and it must insist that immediate and positive orders be given to Spanish naval commanders not to interfere with legitimate American commerce passing through that channel, and prohibiting all acts wantonly imperiling life and property lawfully under the flag of the United States" 354/; - the Herzog and Bundesrath case, in which Germany requested Great Britain "d'émettre des instructions interdisant à tout commandant naval britannique de molester les navires marchands allemands qui ne se trouvaient pas dans les environs du siège de la guerre (guerre des Boers)" 355/; - the Jova case of 1896, in which the

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351/ Rousseau, Chronique des faits internationaux, in RGDIP 1901, pp. 777-797.

352/ Rousseau, Chronique des faits internationaux, in RGDIP 1908, p. 318.

353/ Rousseau, Chronique des faits internationaux, in RGDIP 1895:II, pp. 623-625.

354/ Moore, J.B., A Digest, cit., vol. II, pp. 908-909.

355/ Martens, G.F., Nouveau recueil ..., cit., vol. XXIX, p. 486.

United States indicated that "... The circumstances narrated seem, therefore, to call for the most searching inquiry and rigorous punishment of the offenders, with reparation to the injured party, as well as stringent orders to prevent the recurrence of such acts of theft and spoliation" 356/.

(c) In a third set of instances the injured State asked the offending State to adopt a certain conduct considered to be apt to prevent the creation of the conditions which had allowed the wrongful act to take place. The most interesting examples are: - the above mentioned Boxer case in which a number of the measures demanded from China was clearly intended to the specific purpose of preventing future occurrences of the same kind (supra, para. 123 357/; - the French-Japanese case of 1868, when 11 sailors were killed and 5 wounded in Sakai, following orders given by the Mikado Government. On that occasion France asked that "les troupes du Daimio responsables de la mort de marins français ne passeraient ni ne stationneraient dans les ports ouverts aux étrangers" 358/ - Specific guarantees against repetition were also indicated by the Arbitral Tribunal in the Trail Smelter case 359/.

356/ Moore, J.B., A digest ..., cit., vol. VI, p. 910.

357/ Kiss, A.C., Répertoire de la pratique française en matière de droit international public, Paris, vol. III, p. 550.

358/ Whiteman, M.M., Damages in international law, Washington, vol. I, pp. 722-723. A specific safeguard is the one claimed by France from Mexico in 1837 in order to prevent the repetition of the non-payment of certain credits. The French representative presented the Mexican Government with a sort of ultimatum in which it asked, inter alia, for "...2) engagement pris par le Gouvernement mexicain de ne pas susciter de difficultés à l'acquittement régulier et ponctuel des créances des citoyens français reconnues contre lui ... 4) engagement précis et solennel du Gouvernement mexicain, sous condition de réciprocité: b) de ne prélever sur ces sujets, dans aucun cas, aucune espèce de contributions de guerre ni d'emprunts forcés, pour quelque destination que ce fût; ..." Lapradelle, A.G., and Politis, N., Recueil des arbitrages internationaux, t.I. Paris, 1905, pp. 545 ff.

359/ UNRIAA, vol. III, pp. 1933 ff.

In deciding on Question No. 3, in Article III of the Convention (which was as follows: "(3) In the light of the answer to the preceding question, what measures or régime, if any, should be adopted or maintained by the Trial Smelter") that tribunal mentioned specifically a series of measures (at first provisional and later definitive) apt to "... prevent future significant fumigations in the United States ...".

157. In a number of occasions the request for guarantees went so far as to include the adoption or abrogation by the offending State of specific legislative provisions. Examples include: - previously mentioned Boxer case, in which the foreign powers, in addition to the measures already referred to, requested the following: (a) Le Gouvernement chinois fera afficher pendant deux ans, dans toutes les sous-préfectures, un décret impérial portant défense perpétuelle, sous peine de mort, de faire partie d'une société anti-étrangère; ... (b) Un édit impérial sera rendu et publié dans tout l'Empire, déclarant que tous les gouverneurs généraux, gouverneurs et fonctionnaires provinciaux ou locaux, seront responsables de l'ordre dans leurs circonscription ...360/; - the case between Great Britain and Persia of 1838, in which Great Britain "précisa la procédure par laquelle elle voulait obtenir la protection des sujets britanniques en exigeant un Firman à cet effet" 361/. - the Matheof case, which led to the adoption by the British Parliament of the Diplomatic Privileges Act of 21 April 1709 362/: - the case between France and Belgium

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360/ Kiss, A.C., Répertoire ..., cit., p. 550.

361/ Martens, G.F., Nouveau recueil de traités, vol. XVI, p. 151.

362/ Dumas, J., La responsabilité des Etats à raison des crimes et délits commis sur leur territoire au préjudice d'étrangers, RCADI 1931/II, pp. 188-189: "... Ainsi, sous le règne de la Reine Anne, l'ambassadeur Mathéof, qui représentait la Russie auprès de la Cour de Londres, put être arrêté par ses créanciers sur la voie publique parce que la loi anglaise ne mettait pas les étrangers à l'abri de la prison pour dettes. Après avoir été malmené, il fut placé sous la garde d'un officier de justice; malgré les excuses qu'il reçut du gouvernement et les poursuites dont ses agresseurs furent l'objet, Mathéof quitta l'Angleterre dans un état de grande irritation, sans présenter ses lettres de rappel et sans vouloir accepter le cadeau d'adieu de la Reine. Il fut admis que la faute de ceux qui l'avaient arrêté était la conséquence des lacunes de la loi elle-même et, en 1707, un acte du Parlement fut voté en vue de compléter la législation en vigueur et d'empêcher qu'un attentat à l'habeas corpus pût se renouveler aux dépens d'un ambassadeur étranger".

concerning an attempt made by a French citizen who took refuge in Belgium to kill Emperor Napoleon III and which led to the emission by the Belgian Parliament of the Law of 22 March 1956 363/; - the 1886 incident between the United States and Mexico in which "... les Etats-Unis ne voulurent ... pas rester sous l'éventualité du renouvellement d'un tel incident. Ils exigèrent et ils obtinrent que le Mexique modifiât un article aussi fâcheux de sa loi pénale" 364/; - the Provin and Erwin cases, in which Italy asked the United States to modify the law which did not recognize jurisdiction over certain cases to Federal Courts, thus in practice preventing the punishment of the authors of crimes against foreigners 365/; - the Alabama case, in which Great Britain, following a request from the United States, issued the 1870 Act "interdisant sur son territoire la simple construction de navires destinés à des belligérants; permettant d'arrêter sur simple soupçon tout navire suspect; et condamnant le navire infracteur de la neutralité britannique à restituer les prises qu'il aurait amenées dans un port britannique" 366/.

158. In the case of abrogation the request for guarantees is absorbed into the request for reparation (restitutio in integrum) which, therefore, acquires the additional function of protecting the offended State against possible future wrongful acts of the same kind. In the case of emission of a legislative act, the request - according to some authors 367/ - has an essentially preventive function, which is typical of guarantees of non-repetition.

363/ Dumas, J., La responsabilité ..., cit., p. 189.

364/ Ibid., pp. 189-90. The case originated from the condemnation in Mexico of an American national for the publication in the United States of an article considered by Mexico to be defamatory of the latter nation. The provision of the criminal code of Mexico under which the condemnation had been pronounced (article 186) provided for the prosecution and punishment of crimes committed by foreigners abroad against a Mexican citizen.

365/ Moore, B., A digest ..., cit., vol. VI, pp. 848-849.

366/ Bissonnette, P.A., La satisfaction ..., cit., p. 126. The United States declaration on the case is particularly significant: "Si le neutre n'a pas, dans ses lois, les ressources suffisantes pour assurer l'exécution de son devoir de neutralité, il est tenu, sur la demande du belligérant, de changer ses lois ..." in Lapradelle, A.G. and Politis, N., Recueil ..., cit, vol II, p. 788.

367/ Bissonnette, P.A., La satisfaction ..., cit, pp. 124-125.

159. It must be noted, however, that the more recent practice does not register explicit demands to modify or issue legislation. Similar requests are however made by international bodies. For example, it is frequent that ad hoc international bodies request States responsible for violations of human rights to adapt their legislation in order to prevent the repetition of violations. These requests include those by the Human Rights Committee in its decisions on individual complaints. In the Torres Ramirez case, the Committee, after ascertaining that Uruguayan law was not in conformity with the International Covenant on Civil and Political Rights, stated that "The Committee, accordingly is of the view that the State party is under an obligation to provide the victim with effective remedies, including compensation, for the violations which he has suffered and to take steps to ensure that similar violations do not occur in the future". 368/

160. A difficult question is whether and in what circumstances the offending State may reasonably refuse guarantees of non repetition. It seems open to question, for example, whether and to what extent the offending State could invoke the existence of "juridical abstacles of municipal law". To be sure, such obstacles would be, from the point of view of international law, "factual obstacles" and not "strictly legal obstacles" 369/. However, the claims of Italy in the Provin and Erwin cases 370/ and the successful claim of the United States in Alabama 371/ are significant in this respect. A similar issue is whether an offending State may lawfully refuse to provide safeguards allegedly too onerous in nature. It was noted in dealing with satisfaction that the forms of this remedy should be commensurate to the gravity of the offence. Although State practice does not contain explicit statements to that effect, the same principle should perhaps apply with regard to safeguards against repetition.

368/ Decision of 23 July 1980 in Human Rights Law Journal, 1980, pp. 226 ff.; other examples include the Lanza case of 3/4/1980, ibidem, pp. 221 ff.; the Dermit Barbato case of 21/10/1983, ibidem, 1983, pp. 196 ff. A complete analysis of the practice of the Human Rights Committee and the study of the jurisprudence of the European Commission and Court of Human Rights has not been possible for lack of time.

369/ A/CN.4/416/Add.1, p. 21.

370/ Supra, para. 157.

371/ Supra, footnote 366.

161. The analysis of doctrine and practice seems to justify the conclusion that guarantees against repetition constitute a form of satisfaction performing a relatively distinct and autonomous remedial function. It would therefore seem justified that the draft article of Part Two covering "Satisfaction" should include an explicit mention of assurances and guarantees against repetition. This remedy would obviously be subject to the limiting clause applying to any form of satisfaction.
