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The question of the interaction of the forms of reparation in the international legal order was resolved by the ILC in an apparently simple way, structured on the basis of a hierarchical principle: priority is to be given to restitution; then immediately following restitution are the forms of reparation by equivalent: compensation first and satisfaction where compensation is not possible.[1] This is presented as the codification of customary law and has been widely accepted in international legal doctrine. And yet, a survey of practice evidences a much more ambiguous reality.

There are three forms of reparation for injury in international law. According to article 34, 'full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction'. The first form, also known as *restitutio in integrum*, *restitutio in pristinum*, or *naturalis restitutio*, corresponds traditionally to a form of reparation in kind which is effected by the re-establishment of the situation which existed before the wrongful act: the good unlawfully confiscated is restored to its owner, the act which caused the injury is annulled, etc. The other two forms operate by equivalent: compensation takes place through the payment of damages and interest to the injured party, that is, by the allocation of a sum of money covering the damage; satisfaction takes the form of non-material or moral reparation (apologies, expressions of regret, or the recognition of the breach). The list of the forms of reparation is restrictive. Some have attempted to enlarge it by including the offering by the responsible State of assurances or guarantees of non-repetition. Introduced in article 30, the question was raised by the doctrine whether it was preferable to consider these assurances and guarantees as a form of satisfaction,[2] as an autonomous and thus new form of reparation,[3] or as not being

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(p. 574) *stricto sensu* related to reparation. It is this last solution which was eventually retained by the ILC: the offer of assurances or guarantees does not constitute, *stricto sensu*, reparation for the injury but it is linked to the performance of the primary obligation that is imposed on the responsible State whose conduct attests a known risk of new breaches. As a consequence of wrongful acts, assurances or guarantees of non-repetition do not replace the primary obligation breached: they are in addition to the reparation. They respond to the expectations of the injured State to obtain from the author of the unlawful act 'something additional to and different from mere reparation, the re-establishment of the pre-existing situation being considered insufficient'.[4] The International Court of Justice's judgment in *Armed Activities on the Territory of the Congo* reinforces this solution by clearly distinguishing in its reasoning the question of the offering of assurances and guarantees of nonrepetition from the question of reparation of the injury suffered.[5]

Although there are only three forms of reparation, they are not mutually exclusive. The Articles on State Responsibility highlight this, specifying in article 34 that the forms of reparation can be taken 'either singly or in combination'. Compensation can therefore be associated with restitution in order to compensate, for instance, the loss of enjoyment of a good which was unlawfully seized. Satisfaction is often granted in addition to the other two forms of reparation. In total, seven combinations can be identified, even if factual circumstances often reduce the number of possible combinations applicable. In practice, restitution is very often impossible. The question of the choice of the form of reparation is thus raised and it is consequently convenient to determine how, and initially by whom, the choice of the form of reparation is to be made.

Ordinarily, the choice of the means for the reparation of an injury is left to be mutually agreed between the injured party and the author of the injury. The criteria governing the choice of the form of reparation are thus contingent and mainly political (at least, given that the two parties are States). Law only takes a secondary role in the negotiations and can only have a small influence on the result. Its importance is only felt when there is a dispute between the injured State and the responsible State and a solution must be established on the basis of the law. Concretely, then, the legal discussion is not relevant unless the parties

entrust a third jurisdictional body (an arbitral tribunal or a judicial body) with the task of determining the form or forms of reparation most adequate to make reparation for the injury suffered by one of them. Seized of this dispute, the arbitral or judicial tribunal generally proceeds in two phases. First, it considers whether there is an existing express or tacit agreement between the parties concerning the form of reparation. If it cannot find such an agreement, it turns to the rules of the international law of responsibility.

1 Interaction based on the search for the common intention of the parties

Arbitral and judicial case law evidence that when a dispute concerning the consequences of a wrongful act has been referred to a tribunal having jurisdiction, the tribunal tends to look for a solution by reference to the common intention of the parties. This method allows the will of the parties to be taken into account and, as such, respects the sovereignty of the

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(p. 575) parties. It also relieves the tribunal of the task of choosing the form of reparation itself, which would necessarily expose the tribunal to criticism by the parties.

In certain cases, the search for such agreement does not present any difficulties. This is the case when the two parties have agreed to a form of reparation in their jurisdictional *compromis*. For instance, the arbitration agreement concluded in 1979 between Aminoil and Kuwait expressly recognized that re-establishment of the *status quo ante* was impossible in the circumstances and that the company was thus seeking only financial compensation and/or damages.[6] Similarly, the United States and Mexico agreed in the *compromis* related to the *Oberlander and Messenger* case that if the arbitrator held that the United States was entitled to obtain reparation, the Mexican government would grant compensation. *Restitutio* as a form of reparation was thus excluded from the agreement.[7] In these cases, which are not infrequent, the determination of the form of reparation by the tribunal is simple: it is achieved by giving effect to the express common will of the parties. This even constitutes an obligation for the tribunal: its competence is limited by the will of the parties, hence the tribunal cannot question whether an alternative form of reparation is more appropriate, for the parties have not requested it to do so. Case law confirms this and contrary examples are hard to find. The famous *Martini* award,[8] often quoted in support of the opposite statement, in reality is in conformity with that rule. In that case, Italy and Venezuela had agreed in an arbitral agreement to request the tribunal to rule on 'the pecuniary reparation that could be granted in law' to one of the parties.[9] The arbitrators decided that Venezuela ought to 'recognize as reparation, the annulment of the obligations of payment' required of Martini by an internal court. The annulment of the obligations of payment is frequently interpreted by the doctrine and case law as a form of *restitutio in integrum*.[10] This analysis led to the *Martini* case being cited as an example of the freedom of arbitrators to choose the most adequate form of reparation. And yet, in the award the arbitrators did not depart at all from the Italian-Venezuelan agreement. The reparation granted was not, properly speaking, a form of restitution: the company was not re-established to its previous situation, that is, in its situation as a holder of a concession granted by the Venezuelan government; to the contrary this was rejected by the arbitrators on the ground that it would have been excessive. The tribunal contented itself with asking 'whether it [was] appropriate to grant pecuniary compensation calculated on the standard that [had been] adopted by it'.[11] The tribunal held that the termination of the contract alone did not give rise to reparation insofar as it did not constitute an obvious injustice. But since certain unlawful acts had nevertheless caused injury to Martini, the tribunal decided, by way of reparation, to annul certain financial obligations of the company towards Venezuela. The annulled financial obligations related to debts that had accrued as a result of the failure to pay the concession fee. So this measure was a way of assuring pecuniary compensation by Venezuela for the damage caused. The measure therefore amounted to reparation by equivalent.

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(p. 576) In the absence of a formal agreement between the parties concerning the choice of a form of reparation, their intention may be inferred from the unilateral acts adopted by them throughout the proceedings. The tribunal thus must consider the written and oral proceedings, and in particular, the

submissions of the parties, for it is not uncommon that during the proceedings one or the other party—often the claimant State or individual—indicates its preference for a specific mode of reparation and/or its refusal to accept another or all other forms. Iran, for instance, chose compensation as a form of reparation in the case concerning the *Aerial Incident of 3 July 1988*, specifying in its submissions that it requested the ICJ to state that the:

> Government of the United States is responsible to pay compensation to the Islamic Republic, in the amount to be determined by the Court, as measured by the injuries suffered by the Islamic Republic and the bereaved families as a result of these violations.[12]

In *Barcelona Traction*, Belgium had initially requested restitution; but eventually, in its reply, it opted for compensation since restitution seemed practically and legally impossible in the case.[13] The position of Germany in the proceedings of *Chorzów Factory* was similarly amended.[14] Conversely, Switzerland and New Zealand only requested restitution during the proceedings in *Interhandel*[15] and *Rainbow Warrior*,[16] respectively. For its part, before the Court Finland refused at every occasion the option of compensation in *Passage through the Great Belt*, but eventually accepted financial compensation in settlement.[17]

In these cases, the tribunal always took into account the request of the injured State in relation to the forms of reparation and refused to consider the other forms. The question arises whether the choice of the form of reparation depends entirely on the will of the injured State and whether the attitude of the author of the injury is thus totally irrelevant. Some have maintained so[18] and this position manifestly inspired the final text of the ILC. Article 43 implicitly recognizes it:

> **1**. An injured State which invokes the responsibility of another State shall give notice of its claim to that State.
>
> **2**. The injured State may specify in particular …
>
> **(b)** what form reparation should take in accordance with the provisions of Part Two.

The Commentary notes that the provision of each of the forms of reparation can be 'affected by any valid election that may be made by the injured State'.[19]

And yet practice does not completely support the idea that the form of reparation is entirely dependent on the claimant State's election. It is possible to distinguish two

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(p. 577) situations according to the attitude of the responsible party during the proceedings. First, when the responsible State has not objected to the claim of the victim to obtain reparation in the form of its choice, its passivity is interpreted as acquiescence, creating an informal or *solo consensu* agreement between the parties on the choice of the form of reparation.[20] This situation is not rare in practice; in fact the respondent may prefer for strategy reasons to concentrate its defence on the existence of its obligation to make reparation or on the reduction of the amount requested by the victim, rather than on the form of reparation chosen by it. Second, when the injured State's request for a specific form of reparation meets with the objection of the responsible State, the tribunal—especially due to considerations of sovereignty—cannot decide on this issue without taking into account the opposition of the author of the injury.

Supporters of the opposite view mention case law favourable to their position. A decision frequently cited in this respect is the *Zuzich* decision of the United States Foreign Claims Settlement Commission of 1954. The indifference of the Commission to the claims of the responsible State appears from the following passage:

> once it is established that the Yugoslav Government took the property within the period covered by the Agreement, it is not warranted in taking unilateral action to compensate claimants in some degree by restoring their property unless they waive dollar compensation by this Commission and accept restitution. The fact that claimants have filed a claim for compensation of course militates against the notion that they are willing to accept restitution.[21]

The *Rainbow Warrior* award is also commonly cited in relation to this issue. New Zealand had requested a form of restitution in its conclusions entailing the return of Major Mafart and Captain Prieur to the island of Hao, to which they had been assigned. It did not request any form of compensation. The arbitral

tribunal initially rejected the request of New Zealand for restitution, but eventually, having limited its examination to the applicant's claim, it refused to decide on the possibility of awarding reparation by equivalent. The tribunal only indirectly admitted New Zealand's right to obtain pecuniary compensation in an *obiter dictum*: it suggested that a fund be constituted 'to promote close and friendly relations between the citizens of the two countries', supported by an 'initial contribution' from France of two million dollars.[22]

The question is whether it is possible to draw from these two cases the existence in general international law of a rule pursuant to which the injured State can unilaterally determine the adequate form of compensation, independently of the reaction of the responsible State. This conclusion would certainly be hasty. Not only is case law scant in this respect, but the first case mentioned (*Zuzich*) confirms that it is necessary to take into account the intention of the parties to the dispute: by their decision, the arbitrators recalled that if it is convenient to take into account the intention of the author of the wrongful act, the intention of the victim cannot be ignored. As for *Rainbow Warrior*, two elements of procedural law explain the decision. The first is the requirement of the contradictory character of the proceedings:

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(p. 578) The fact that New Zealand has not sought an order for compensation also means that France has not addressed this quite distinct remedy in its written pleadings and oral arguments, or even had the opportunity to do so.[23]

The second element relates to the characteristics and the competence of a tribunal in international legal proceedings. Since the injured State had asked the judge to order a specific form of reparation and the responsible State had purely and simply requested the judge to reject this claim, the tribunal could not consider another form of reparation not specifically requested, by considering issues not submitted to it without violating the *non ultra petita* rule. This limit is also relevant when the author of the wrongful act does not only object to the reparation requested, but also requests the tribunal to order another form of reparation.

There are several factors moderating the *non ultra petita* rule. The first and most important one is the large measure of competence recognized to international jurisdictions to interpret the scope and the content of the requests presented to them. This competence allows the tribunal to indicate to the parties a form of reparation that they have not expressly requested when the tribunal considers that the choice of this form implicitly includes an admissible request made by either of them. An example of this principle can be founded in the International Court's decision in *Temple of Preah Vihear*: the majority of the Court considered that Cambodia's claim to obtain restitution of the goods placed in the temple was implicitly included in its claim of sovereignty over the building.[24] It is conceivable that, on the basis of this case law, courts could consider that a request for compensation is included in a request for restitution, and that they may award financial compensation every time the restitution requested is impossible. This idea is supported by some authors. Special Rapporteur Arangio-Ruiz emphasized in his Preliminary Report that 'it goes without saying that option for *restitutio* on the part of the injured State does not exclude resort to compensation whenever restitution is partially impossible'.[25] The award in *Rainbow Warrior* confirms that, failing the existence of a clear intention of the parties, a request for compensation is considered as having a different object than a request for restitution.[26]

A second limit to the *non ultra petita* rule concerns satisfaction: unlike restitution and compensation, both of which require an express request by the injured State, it appears that every request for restitution or compensation implicitly entails a request for satisfaction. This is logical since the form of reparation is chosen after the wrongful act has been established and a mere declaration by the tribunal that one of the parties has breached its obligations is considered, in itself, to constitute a form of satisfaction.[27]

When, contrary to the majority of the cases examined, there exists no agreement between the parties, neither formal nor informal, and the injured State has not indicated any preference

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(p. 579) as to the form of reparation, the tribunal must determine the adequate form of reparation. The tribunal will in such case turn to the general international law of responsibility.

2 Interaction based on general international law

The international judge, having been seized of a dispute as to the form of reparation or with a claim requesting him to indicate a form of reparation for the damage (without specifying the form of reparation), can base his decision on two (alleged) rules of international law of responsibility. These are: first, the rule according to which reparation must be adequate, and second, the rule according to which reparation in kind takes priority over reparation by equivalent. Although the existence of the first rule is not contested, the existence of the second rule is questionable.

The adequacy rule was strongly formulated by the Permanent Court of International Justice in the jurisdictional phase of the *Chorzów Factory* case: 'It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form'.[28] This rule has been repeated on many occasions. In time its content has been defined: adequacy is a function of the injury caused by the author of the wrongful act and it has a double dimension. First, a form of reparation is considered adequate if it allows reparation of the entire damage, material and moral, suffered by the injured party. This aspect was evident in the merits judgment of the Permanent Court: the Court emphasized that the form of reparation chosen must 'as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed'.[29] Article 31 ARSIWA reflects this and the International Court has recently recognized that 'it is well established in general international law that a State which bears responsibility for an internationally wrongful act is under an obligation to make full reparation for the injury caused by that act'.[30] Adequacy, thus understood, has important consequences in the choice of the form of reparation. Notably, it explains why, when restitution is chosen as the form of reparation, it is often accompanied by compensation, or at least by satisfaction, to compensate the loss of enjoyment of the restored good.

Second, the principle of adequacy requires that reparation be proportionate to the injury suffered. The umpire in the *Lusitania* case highlighted the necessity of proportionality in his award: 'the remedy should be commensurate with the loss, so that the injured party may be made whole'.[31] Similarly, the Inter-American Court of Human Rights has recently confirmed that: 'the reparations ordered … must be proportionate to the violations'.[32] In consequence, restitution is excluded when it imposes on the author of the wrongful act a burden which is disproportionate to the advantage that derives from this choice of reparation for the injured party.[33] The injured party cannot obtain punitive damages/interests, at least not by way of pecuniary reparation.[34]

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(p. 580) Two additional remarks can be added. First, since the adequacy of the reparation is a function of the injury, neither the origin nor the character of the primary obligation is relevant for the choice of the form of reparation.[35] The *Rainbow Warrior* tribunal confi rmed this in relation to the customary nature of the obligation breached. New Zealand maintained that the adequate form of reparation for breach of treaty was restitution by way of an order addressed to the responsible State to comply with its conventional obligations.[36] The Tribunal rejected this argument, holding that no specific rule governed breaches of conventional obligations and that, to the contrary, 'questions of appropriate remedies, should be answered in the context and in the light of the customary Law of State Responsibility'.[37] There is thus no reason to separate contractual from delictual responsibility in international law.[38]

Another proposition was abandoned, for these same reasons, by the ILC in its work on State responsibility: that there ought to be a distinction between breaches of peremptory norms and breaches of other rules of international law. Arangio-Ruiz had suggested in his Preliminary Report that a distinction be made between breaches of peremptory norms of international law (*jus cogens* norms) and breaches of 'ordinary' rules: *restitutio in integrum* would be mandatory in the first case, and optional in the second.[39] In the end, this distinction was not adopted by the ILC. This decision is sensible: in addition to the fact that the distinction proposed had no support in State practice or case law, its 'codification' would have led to the distortion of the restorative character of natural restitution and of compensation. The specific consequences attached to the breach of peremptory norms are motivated, not by the importance or the nature of the injury, but by the seriousness of the conduct and the will to put an end to the breach and avoid its future occurrence. These objectives can be achieved both through cessation of the wrongful conduct and through assurances and guarantees of non-repetition; reparation *stricto sensu* is not relevant to the character of the breached obligation. The commentary to article 35 indirectly affirms this, for it

underlines that 'in certain cases, especially those involving the application of peremptory norms, restitution may be required as an aspect of compliance with the primary obligation'.[40]

Second, since the adequacy of a form of reparation depends on the injury, the nature of the injury is, by contrast to the character of the breached obligation, an essential element in the choice. Legal doctrine confirms that satisfaction is a particularly adequate form of reparation for moral or non-material damages, whereas restitution and compensation are more adequate to repair material damages which are financially assessable. This distribution of the forms of reparation is also confirmed by practice. And yet, it must not be

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(p. 581) exaggerated for at least two reasons. First, certain forms of satisfaction often accompany compensation and restitution, even when they are not specifically requested: the judge first declares a wrongful act—a form of satisfaction—and then indicates the means to make reparation for the damage—restitution or compensation. Second, non-material damage could, in certain circumstances, be the object of material compensation. The Tribunal in *Rainbow Warrior* expressly pronounced on this point.[41] In addition, this suggestion is corroborated by abundant case law concerning compensation of indirect damage suffered by foreigners: those States that, in the exercise of diplomatic protection, have taken up the claim of one their nationals have frequently obtained damages as reparation. Yet the injury repaired is non-material for it is limited to the moral damage resulting, for the national State, from the violation of its 'own rights—its right to ensure, in the person of its subjects, respect for the rules of international law'.[42] In these cases, the material damage suffered by the individual serves as a standard for the calculation of the compensation owed to the claimant State for the reparation of its moral damage.

In addition to the principle of adequacy of reparation for the injury, another more specific rule is often mentioned in international legal scholarship. Recalled at the beginning of this chapter, this rule provides that restitution is to take priority over other forms of reparation. The ILC Articles on State Responsibility establish this rule and go beyond it by suggesting the existence of a double priority, first of restitution over compensation (article 36(1)), and second of compensation over satisfaction (article 37(1)):

> The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.[43]
>
> The State responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation.[44]

The second of these rules of priority can be immediately dismissed as it is not an expression of positive law: it is not supported either by practice or jurisprudence. Moreover, its utility has not been demonstrated: compensation and satisfaction are not exclusive but complementary, insofar as the indication by a third party of whatever form of reparation generally entails satisfaction for the injured party. The first rule of priority—priority of restitution over compensation—is more delicate. A survey of international case law reveals a paradoxical situation: the existence of this rule is generally affirmed in the reasoning of the decisions, but is applied only very rarely.

The affirmation of the primacy of restitution over compensation dates back to the judgment on the merits in *Factory at Chorzów*:

> The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that reparation must, as far as possible, wipe-out all the consequences of the illegal act and re-establish the situation which would, in. all probability, have existed if that act had not been committed.

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(p. 582) Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear.[45]

The Permanent Court, in the first part of this dictum, lays down the bases for the assessment of the damages: the goal of reparation is that of re-establishing the situation which would, in all probability, have existed had the wrongful act not been committed, such that the form of reparation chosen must cover not only the *damnum emergens* but also the *lucrum cessans*. In the second sentence, the Court appears to indicate that the re-establishment of the situation *in pristinum* is the natural form of reparation.

Subsequent case law contains numerous references to this passage from the *Factory at Chorzów* judgment. The International Court has mentioned it several times, most recently in its judgment rendered in *Application of the Genocide Convention*.[46] The International Tribunal for the Law of the Sea also cited it in *The MV 'Saiga' (No 2)*.[47] The European Court of Human Rights implicitly referred to it in *Papamichalopoulos*:

> If the nature of the breach allows of *restitutio in integrum*, it is for the respondent State to effect it … If, on the other hand, national law does not allow—or allows only partial—reparation to be made for the consequences of the breach, Article 50 … empowers the Court to afford the injured party such satisfaction as appears to it to be appropriate.[48]

This same reasoning has been repeated by the European Court, notably in *Brumarescu v Romania*,[49] *Beyeler v Italy*,[50] and *Ilaşcu and others v Moldova and Russia*.[51] The Inter-American Court has recently adopted this conceptualization of the relationship between restitution and compensation. In the *White Van* case the Court emphasized:

> Reparation of the damage resulting from the violation of an international obligation requires, whenever possible, the full restitution (*restitutio in integrum*), which consists in the re-establishment of the previous situation. If this is not possible, as in the instant case, the international court must determine a series of measures, which, in addition to guaranteeing the rights that have been violated, make reparation for the consequences of the violations, and also must also order the payment of an indemnity as compensation for the damages caused.[52]

Arbitral practice also contains references to the rule of the primacy of *restitutio in integrum* over the other forms of reparation. Although not applying it, the award in Martini endorses the principle stated in the *Chorzów Factory* judgment.[53] The award in *Texaco v Libya* goes further, for the sole arbitrator Dupuy while applying the principle indicated that:

> This Tribunal must hold that *restitutio in integrum* is, both under the principles of Libyan law and under the principles of international law, the normal sanction for non-performance of contractual

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> (p. 583) obligations and that it is inapplicable only to the extent that restoration of the *status quo ante* is impossible.[54]

The rule was also followed in the *Amoco case* by the Iran-US Claims Tribunal.[55]

Nevertheless, these references are less common in arbitral practice than in judicial practice. Some awards even evidence reluctance to admit that there can exist, in law, a hierarchy between the forms of reparation and the primacy of restitution over the other forms of reparation. In the *Walter Fletcher Smith* award, sole arbitrator Hale stated that before deciding that reparation will take place through the payment of a sum of money 'it would not be inappropriate to find that, according to law, the property should be restored to the claimant'.[56] For him, then, no rule imposed *restitutio* as the primary form of reparation. The award in *Forests of Central Rhodopin* is of a similar tenor:

> it was suggested during the proceedings that in the case of a total or partial success of the claim, the defendant should be obliged to restore the forests to the claimants. The applicant however left to the appreciation of the arbitrator the possibility of effecting such restitution.
>
> The arbitrator considers that he cannot impose upon the defendant the obligation to restore the forests to the claimants … The only practical resolution of the dispute consists … in the imposition upon the defendant of the obligation to pay compensation.[57]

After extensive reasoning, backed by numerous references to practice, arbitrator Lagergren considered in the award in *BP v Libya* that there did not exist a customary international law rule or general principle of law requiring that priority be given to restitution over compensation in cases of expropriation or unlawful nationalization.[58]

Turning to the concrete application of this rule, the results do not often lead to the primacy of restitution over other forms of reparation; examples of decisions where restitution has been awarded are rare. Among the often-cited cases, the following can be mentioned: *Radio-Orient Company*,[59] *Heirs of Lebas de Courmont*,[60] and *Loayza-Tamayo v Peru*.[61] Only two decisions of the International Court of Justice have awarded restitution as a form of reparation: the *Temple of Preah Vihear* case, in which the Court ordered Thailand to 'restore to Cambodia any objects … which may, since the date of the occupation of the Temple by Thailand in 1954, have been removed from the Temple or the Temple area by the Thai authorities';[62] and the *Arrest Warrant* case, in which the Court ordered Belgium to 'cancel' the warrant against Yerodia.[63] But these two cases are special: the first case was decided on the basis of principle, for Cambodia failed to produce evidence that the objects claimed had effectively been removed from the temple by Thai forces;[64] the second because the Court appeared to attach the obligation of legal restitution to the cessation of a continuous unlawful act (although it was indisputably an instantaneous act):

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> (p. 584) The warrant is still extant, and remains unlawful, notwithstanding the fact that Mr. Yerodia has ceased to be Minister for Foreign Affairs. The Court accordingly considers that Belgium must, by means of its own choosing, cancel the warrant in question and so inform the authorities to whom it was circulated.[65]

The judgment in *Avena* is also often considered as a case of *restitutio in integrum*, insofar as the Court decided that:

> the appropriate reparation in this case [for the breaches of Article 36 of the Vienna Convention on Consular Relations] consists in the obligation of the United States of America to provide, by means of its own choosing, review and reconsideration of the: convictions and sentences of the Mexican nationals.[66]

However, the usefulness of this precedent can be doubted. The review and reconsideration of the sentences ordered by the Court do not entail a restoration of the *status quo ante* of the Mexican nationals. It is rather linked to the execution of the primary procedural obligations that States have pursuant to article 36(2) of the Vienna Convention on Consular Relations,[67] and does not constitute a form of restitution *stricto sensu*.

Cases of restitution are so rare in practice that some of the decisions quoted by doctrine as illustrations of this form of reparation appear to be false examples when scrutinized closely. This is the case of the award in *Martini*, for the reasons already explained. The same is true of the award in *British Claims in the Spanish Zone of Morocco* which dealt with the breach by Spain of its undertaking to put a residence in Tetuan at the disposal of the United Kingdom, to be occupied by the British consul. In its decision, the tribunal declared the unlawful act by Spain and decided that Great Britain had the right to obtain 'usufruct of a consular residence … which must be, from the point of view of current exigencies, "suitable" to this purpose in the same way as the [initial] residence was suitable from the point of view of the beginning of the 19th century'.[68] The measure ordered in this case has often been considered a form of restitution, while in truth it corresponds to the execution of the primary obligation that Spain had undertaken. Other examples can be found in the recent judgments of the European Court of Human Rights in *Assanidze v Georgia*[69] and *Ilaşcu v Moldova*.[70] Both cases concerned the situation of individuals deprived of their liberty contrary to article 5 of the European Convention on Human Rights.[71] In both cases the Court held that the State authors of the breaches were under an obligation to free the individuals arbitrarily detained within the shortest delay possible. These decisions are also interpreted as a form of restitution.[72] Yet the European Court only required the cessation of a continuing unlawful act. The judgment

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(p. 585) in *Assanidze* expressly highlights that the measures ordered are intended to 'put an end to the violation that has been found'.[73]

The contrast thus evidenced, between the few cases where restitution was ordered and the relatively numerous cases where the primacy of reparation in kind is affirmed, is largely explained by questions of fact. First, *restitutio in integrum* is rarely requested by the injured party. During the operation of the Iran-US Claims Tribunal, restitution was requested only in one case, which was moreover atypical since it was between the two States and did not involve a private party against a State. In that case, the Iranian government claimed reparation for the confiscation by the United States of military materials sold by the United States to Iran.[74] In addition, the request for restitution was not based on the general law of international responsibility, but on a specific provision of the General Declaration of Algiers which established that 'the US will arrange, subject to the provisions of US law applicable prior to November 14, 1979, for the transfer to Iran of all Iranian properties which are located in the United States and abroad'.[75] The request was rejected by the Tribunal.[76] Second, even when the parties have not excluded restitution, restitution is only possible in exceptional circumstances, either because the object of restitution has disappeared (for example a corporal good, the object of the dispute, has been destroyed), or because restitution faces a legal hurdle, resulting for instance from the absence of competence of the seized organ: thus the European Convention on Human Rights only allows the Court to award 'equitable compensation'.[77]

This exceptional character is not however the sole reason for the discrepancy between cases affirming the primacy of restitution and those actually applying it. In a significant number of cases compensation was in fact ordered even when restitution could have been effected. Another explanation for this phenomenon resides in the role assigned to the primacy rule by international tribunals. Indeed, it seems that international tribunals rarely mention the rule to effect a choice between different forms of reparation. More often, they cite the rule to justify a specific method for calculating the pecuniary compensation. Arbitrator Lagergren emphasized the duality of conceptions of this rule:

> while *restitutio in integrum* in the sense of restitution in kind of industrial property … has sometimes been claimed … no such international tribunal has ever prescribed this remedy with regard to such property, nor considered it in a context such as that presented in these proceedings. The concept has rather been employed at times as a principle for assessing the amount of damages due for breach of an international obligation.[78]

The purpose of the rule of primacy as a standard for the evaluation of damages explains why some decisions in which it is mentioned correspond to cases where the judge could only grant compensation, either because it was specifically requested or because *restitutio*

References

(p. 586) was materially impossible. The most topical example in this respect is the *Chorzów Factory* case itself: since Germany had expressly excluded *restitutio* in its claims, the reference to restitution in the reasons of the judgment was intended to allow the Court to specify 'the principles which should serve to determine the amount of compensation due for an act contrary to international law'.[79] The primacy rule offered, more specifically, a legal justification for the transposition to the international legal order of the principle according to which compensation must cover not only the *damnum emergens*, but also the *lucrum cessans*: since reparation must be at least equivalent to restitution, compensation should 'wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed'.[80] In this context, the rule of primacy of restitution serves only to guarantee the integral character of the reparation, and not to determine the choice between different forms of reparation. It is but an aspect of the principle, already examined, of the adequacy of the reparation having regard to the injury suffered.

Further reading

D Anzilotti, 'La responsabilité internationale des Etats à raison des dommages soufferts par des étrangers' (1906) 13 *RGDIP* 5, 285
P-A Bissonnette, *La satisfaction comme mode de réparation en droit international* (Geneva: Université de Genève, 1952)

I Brownlie, 'Remedies in the International Court of Justice', in V Lowe and M Fitzmaurice (eds), *Fifty Years of International Court of Justice. Essays in honour of Sir Robert Jennings* (Cambridge, CUP, 1996), 557
G Cohen-Jonathan, 'Quelques considérations sur la réparation accordée aux victimes d'une violation de la Convention européenne des droits de l'homme', in *Les droits de l'homme au seuil du troisième millénaire. Mélanges en l'hommage à Pierre Lambert* (Brussels, Bruylant, 2000), 109
E Decaux, 'Responsabilité et réparation', in SFDI, *La responsabilité dans le système international. Colloque du Mans* (Paris, Pedone, 1991), 147
C Dominicé, 'De la réparation constructive du préjudice immatériel souffert par un Etat', in *Le droit international dans un monde en mutation, Liber amicorum en hommage au Professeur Jiménez de Aréchaga* (Montevideo, Fundación de Cultura Universitaria, 1995), 505
C Dominicé, 'La réparation non contentieuse', in SFDI, *Colloque du Mans, La responsabilité dans le système international. Colloque du Mans* (Paris, Pedone, 1991), 191
C Dominicé, 'Observations sur les droits de l'Etat victime d'un fait internationalement illicite', in *Droit international 2* (Paris, Pedone, 1982), 1
P-M Dupuy, 'Le fait générateur de la responsabilité internationale des Etats' (1984-V) 188 *Recueil des cours* 9
C Gray, 'The Choice between Restitution and Compensation' (1999) 10 *EJIL* 413
C Gray, *Judicial Remedies in International Law* (Oxford, Clarendon Press, 1990)
B Graefrath, 'Responsibility and damages caused: relationship between responsibility and damages' (1984-II) 185 *Recueil des cours* 9
FA Mann, 'The consequences of an international wrong in international and municipal law' (1976–1977) 48 *BYIL* 2
J Personnaz, *La réparation du préjudice en droit international public* (Paris, Sirey, 1938)

References

(p. 587) L Reitzer, *La réparation comme conséquence de l'acte illicite en droit international* (Paris, Sirey, 1938)
D Shelton, *Remedies in International Human Rights Law* (2nd edn, Oxford, OUP, 2005)
B Stern, *Le préjudice dans la théorie de la responsabilité internationale* (Paris, Pedone, 1973)
DP Stewart, 'Compensation and Valuation Issues', in RB Lillich and D Barstow Magraw (eds), *The Iran-United States Claims Tribunal: Its Contribution to the Law of State Responsibility* (Irvington, Transnational Publishers, 1998), 325
SD Thomsen, 'Restitution', in R Wolfrum (ed), *Encyclopedia of Public International Law* (Amsterdam, Elsevier Science Publishers), Vol 10, 375
P Weil, 'Droit des traités et droit de la responsabilité', in *Liber amicorum en hommage au Pr Eduardo Jiménez de Aréchaga, Le droit international dans un monde en mutation* (Montevideo, Fundación de Cultura Universitaria, 1994), 523,
reprinted in *Ecrits de droit international* (Paris, PUF, 2000), 191
S Wittich, 'Awe of the Gods and Fear of the Priests: Punitive Damages and the Law of State Responsibility' (1998) 3 *Austrian Rev of Int & Eur Law* 101
S Wittich, 'Non-Material Damage and Monetary Reparation in International Law' (2004) 15 *Finnish Yearbook of International Law* 321(p. 588)

Footnotes:

1 Arts 36 and 37 ARSIWA.