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Abbreviations

AJIL	American Journal of International Law
Arb. Int.	Arbitration International
ARSIWA	Articles on Responsibility of States for Internationally Wrongful Acts
Art.	Article
ASIL	American Society of International Law
AYIL	Australian Yearbook of International Law
BYIL	British Yearbook of International Law
CUP	Cambridge University Press
DARIO	Draft Articles on the Responsibility of International Organisations
DRC	Democratic Republic of Congo
EECC	Eritrea- Ethiopia Claims Commission
EJIL	European Journal of International Law
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
ICC	International Criminal Court
ICJ	International Court of Justice
ICJ Rep.	Reports of Judgments, Advisory Opinions and Orders of the ICJ
ICSID	International Centre for the Settlement of Investment Disputes
ICSID Rev	ICSID Review
ICTR	International Criminal Tribunal for Rwanda

ICTY	International Criminal Tribunal for the former Yugoslavia
ILC	International Law Commission
ICLQ	International and Comparative Law Quarterly
ILM	International Law Materials
ILR	International Law Reports
ITLOS	International Tribunal for the Law of the Sea
JIEL	Journal of International Economic Law
JWT	Journal of World Trade
JWIT	Journal of World Investment and Trade
LOSC	(United Nations) Law of the Sea Convention, 1982
Max Planck Y. B. U.N. L.	Max Planck Yearbook of United Nations Law
Mich. J.Int'l L.	Michigan Journal of International Law
MPEPIL	Max Planck Encyclopedia of Public International Law
OAS	Organization of American States
OUP	Oxford University Press
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
RIAA	(United Nations) Reports of International Arbitral Awards
UN SG	United Nations Secretary General
UN	United Nations
UN G.A Res.	United Nations General Assembly Resolution
UNCC	United Nations Compensation Commission

UNCITRAL	United Nations Commission on International Trade Law
UNCLOS	United Nations Conference on the Law of the Sea
UN S.C. Res	United Nations Security Council Resolution
WTO	World Trade Organization

Introduction

Ubi jus ibi remedium

On 5 October of 2016 the International Court of Justice (ICJ) decided on the preliminary objections brought by the United Kingdom on the case of Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament. It is reasonable to assume that the parties to the case would be more interested in page 24, i.e. the Operative Clauses of the Judgment. The legal argumentation and the interpretation of applicable law is not of course of limited importance. Indeed, the remaining 23 pages are those which will occupy the thoughts of scholars and practitioners and elicit controversies and criticism in books and journals. However, when it comes to the actual practical aspect of the law, the outcome of the decision is what it counts to the Applicant and the Respondent. Did they win or lose? Did they get what they asked for? Is the dispute finally settled?

Apparently, a key issue in all contentious cases is reparation, which will be addressed in the Operative clauses of the Judgment. Reparation is the conduct that a litigant found to be in breach of its obligations is expected to perform as a result of its wrongful act or omission. The judgment on reparation depends on the finding of a state's violation of an international obligation and the determination of its responsibility. Nevertheless, the reparation is an obligation which is owed to the injured state irrespective of judicial or other decision. The obligation arises automatically in the case of an internationally wrongful act, i.e. an act or omission attributable to a state and in violation of its obligations (see article 2 ARSIWA).The finding of an internationally wrongful act is not contingent upon a Court's decision. It can thus well be the case that the wrong doing state is engaged in a restorative reaction[1] without court's or tribunal's indication.

The ultimate goal of an effective dispute settlement system is by all means the settlement of disputes that arise between states either through legal or non-legal tools. The ultimate goal of international law, however, is the implementation and enforcement of its

[1] For an interesting approach on "Restoration" see P. Dupuy, "The International Law of State Responsibility: Revolution or Evolution?" (1989-1990) 11 *Mich. J. Int'l L.* 105.

rules. Any breach of international obligation then should be followed by return to legality, ie by the cessation of any continuing violation, and by reparation of any real or legal damage caused.

The issue of reparation has thus a crucial role on the implementation of law and the adjudicative settlement of international disputes.

The term "reparation" can have various meanings in international and national law. Under contemporary international law, the term is used to denote the recompense given to the state who has suffered legal injury at the hands of another and it can take the forms of restitution, compensation and satisfaction.[2]The idea of redressing international violations goes back to Vattel who wrote in 1849 that every state has the right to obtain complete reparation when an injury is done.[3] More generally also, according to the Black's Law Dictionary, remedies are "the means by which a right is enforced or the violation of a right is prevented, redressed or compensated."[4] The idea of reparation in interstate disputes is different than the remedial approach followed in national law or mixed cases where objectives of condemnation or retribution may also come into play.[5]

Christine Gray back in 1990 was the first to write on the consequences of breaches of international law with her invaluable book entitled "Judicial Remedies in International Law."[6] Gray starts her evaluation on judicial remedies going back to arbitral practice of the 16th century. Her research is quite extensive. She deals apart from arbitration, with the case law of the World Court (PCIJ and ICJ) as well as with the very young at that time judicial practice in the European Communities. She also assesses cases by special tribunals, national claims commissions, international commercial arbitration and the Iran/ US Claims Tribunal. Her research stops in 1989, when her book was published.

Gray's work, although of great significance and authoritative character in the area, was concluded in an era when the concept of reparation was rather vague. The International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) had not been drafted yet and the judicial practice was far from

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[2] D. Shelton, Reparations (MPEPIL 392), at 1; Articles 31, 34 International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts (hereinafter: ARSIWA).

[3] E. de Vattel, *The Law of Nations* (LF edn 1797), available online at: http://lf-oll.s3.amazonaws.com/titles/2246/Vattel_1519_EBk_v6.0.pdf .

[4] Black's Law Dictionary (6th edn, 1990), at 1294.

[5] For more on the Theory of Remedies, see the introductory part of D. Shelton, *Remedies in International Human Rights Law* (2nd edn, OUP), at 7.

[6] C., D. Gray, *Judicial Remedies in International Law* (OUP 1987) (hereinafter: Gray, *Judicial Remedies*).

concrete. As an example we can allude to the discussion on "damages", which was central in Gray's work, trying to reveal the relation between different types of injury with the "damages" given by courts and tribunals. The term "damage" is used in ARSIWA as well but only as a constituent of injury. The latter, as we will explain, is necessary for the finding of an obligation of reparation but not for the finding of a state's international responsibility, which does not require the existence of 'damage'. Moreover, the concept of punitive damages, central debate in Gray's era, does not apply anymore in contemporary international law.[7]

The Articles on State Responsibility (ARSIWA) offer specific restorative options to states. Specifically, the Articles provide for cessation of a continuing wrongful act, guarantees of non-repetition of the wrongful act and reparation in the forms of restitution, compensation and satisfaction. It is observed, however, that this clear- cut structure of the ARSIWA is not always reflected in judicial and arbitral practice nor reflects state practice. The ICJ's rather reluctant in awarding a specific form of reparation, especially in the form of compensation, whereas conversely in international investment arbitration the non-availability of restitution most of the times has given compensation an enhanced role.[8]Another interesting aspect is the relation between the remedies that the applicants seek from judicial and arbitral bodies and the ones that the latter finally awards. Do states actually seek to settle their disputes once and for all through adjudication or is the recourse to international courts and tribunals just one of the steps in the long path of dispute settlement under international law?

These thoughts lead us to the research question of this thesis which is the relevance of the ARSIWA Part V on Reparation on the face of contemporary international adjudicative dispute settlement system. By adjudicative dispute settlement system we mean all the international bodies which reach their binding decisions or awards by the application of the law. Thus diplomatic means of dispute settlement are excluded from the ambit of this thesis. The same applies for IOs and their responsibility.[9]

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[7] Gray, *Judicial Remedies*, at 26; Commentary of article 36 ARSIWA, para. 4 (hereinafter: ARSIWA, Commentary), where it is stated that: "the function of article 36 is purely compensatory, as its title indicates. Compensation […] is not concerned to punish the responsible state, nor does compensation have an expressive or exemplary character." See also article 37 ARSIWA, Commentary, para. 8 stating that neither "satisfaction is […] intended to be punitive in character, nor does it include punitive damages."

[8] On judicial discretion in awarding remedies, see J. Crawford, "Flexibility in the Award of Reparation: The Role of the Parties and the Tribunal" in R. Wolfrum, M. Sersic, T., M. Sosic (eds), *Contemporary Developments in International Law: Essays in Honour of Budislav Vukas* (Brill 2015), at 690.

[9] See ILC's Draft Articles on the Responsibility of International Organizations (2011).

In the present paper we will support that ARSIWA's rules on reparation are widely accepted by international courts and tribunals in the sense that a vast majority of judicial and arbitral decisions refer to the articles when discussing issues of reparation and confirm their authoritative nature. However, the leading judicial organ of international law, ie the International Court of Justice very rarely decides on the actual form of reparation due. This practice leaves space for the further settlement of international disputes and renders adjudication only a part of the dispute settlement procedure.

In more detail, we will explore the content of the rule of full reparation in the light of the ARSIWA and the recent case law of international adjudication. In particular, we will assess the principle of reparation in international law as part of the law of state responsibility and the relation of the principle with international adjudication (Chapter I). We will proceed to examine extensively the ICJ's approach in respect of reparation by running through its later judgments but also the applications of the litigant parties. We will then succinctly go through the practice of other adjudicative bodies to compare and contrast their approach in respect of the matter (Chapter II). We will mainly focus on interstate disputes, but also make references to mixed procedures, the increasing number of which in the international sphere makes the latter unavoidable. Our findings will be crucial in evaluating the recent role that the ICJ enjoys in international dispute settlement system in general and in matters of reparation in particular. In the last pages of this thesis we will draw some concluding thoughts regarding the above indicated research question.

I. The Principle of Reparation in International Law.

It is a well-accepted principle in international law that the state responsible for an internationally wrongful act is under an obligation to make full reparation for the injury that it caused to other state or states.[10] This rule is considered of reflecting customary international law value since the famous *Chorzow Factory* dictum that: *"it is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form."*[11] Another famous dictum of the same judgment further elaborates that the reparation given must *"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*."[12] In modern terms the latter part of this dictum is what we call restitution. Chorzow Factory's judgment however talked also about compensation as another form of reparation, but only within the narrow sense of expropriation, which was relevant for that particular dispute.[13] Another form of reparation, namely satisfaction was recognized considerably later by the Rainbow Warrior arbitral tribunal as *"a long established practice of states and International Courts and Tribunals."*[14]

The above methods have been codified in the ILC in the ARSIWA as the accepted forms of reparation under international law. As stated in the introduction, when Gray wrote her book back in 1985 the concept of reparation was quite vague. There were, for instance, debates on the relation of the type of the dispute or the type of the injury caused with the reparation awarded or questions regarding the assessment of damages in relation to specific categories of injuries such as imprisonment, death, breach of contract etc.[15] Some of these questions are currently dated. It is generally accepted today that no injury or damage is required for the international responsibility of a wrongful state to

[10] See article 31 (1) ARSIWA.
[11] *Factory at Chorzow* case, Jurisdiction, PCIJ. Ser. A, No. 9 (1927), at 21 (hereinafter: *Factory at Chorzow*, Jurisdiction).
[12] *Factory at Chorzow* case, Merits, PCIJ. Ser. A No. 17 (1928), at 47 (hereinafter: *Factory at Chorzow*, Merits).
[13] *Factory at Chorzow*, Merits at 31.
[14] *Rainbow Warrior* arbitration (New Zealand v. France) 82 *ILR* 499 (1990), at 272 (hereinafter: *Rainbow Warrior* arbitration).
[15] See Gray, *Judicial Remedies*, Introduction.

arise. What is more the obligation to reparation is automatically triggered the moment of the perpetration of the internationally wrongful act.

Further, a change in terminology is to be observed: in the past, there was no clear-cut enumeration of forms of reparation as it exists under article 34 of ARSIWA. Instead, scholars and judicial bodies were using the all-inclusive term "judicial remedies."[16] ARSIWA commentary uses this term mainly for referring to local and domestic remedies, whereas reserves the words restitution, compensation and satisfaction for referring to the ways that a state can meet its obligation of full reparation. However, the term "remedies" is still used by some international judicial bodies and international conventions. Human Rights treaties, for example, usually use the term "effective remedies" to refer to redress for human rights violations.[17] The same is true in international economic law and, particularly, in the inter-state disputes of WTO Panels and Appellate Body.[18]

Article 30 which deals with assurances and guarantees of non-repetition is not part of reparation, since it relates to the future and has no restorative effect in the injury caused. For that reason, orders of the Court under this rubric will not be assessed in the present paper. As a general rule, however, we should mention the assertion of the ICJ that *"there is no reason to suppose that a State whose act or conduct has been declared wrongful by the Court will repeat that act or conduct in the future, since its good faith must be presumed."*[19] Thus the Court may only order such measures *"when there are special circumstances which justify this, which the Court must assess on a case-by-case basis."*[20] We will return to this later, when talking about the function of declaratory judgments.

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[16] See Gray, ibid; D. Shelton, *Remedies in International Human Rights Law* (2nd edn, OUP 2005); S. Haasduk, "The lack of Uniformity in the Terminology of the International Law of Remedies" (1992) 5 *Leiden J. Int' L.* 245; *LaGrand(Germany v. United States of America)*, ICJ Rep. 2001, at 48.

[17] Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: ECHR), article 13 (right to an effective remedy).

[18] The majority of publicists refer to "Remedies under WTO Law", see *inter alia*, R., R. Babu, Remedies under the WTO legal system (Nijhoff 2012); T. Sebastian, A. Sinclair, "Remedies in WTO Dispute Settlement and Investor- State Arbitration: Contracts and Lessons" in A., J. Huerta- Goldman, A. Romanetti, F., X. Stirnimann (eds), *WTO Litigation, Investment Arbitration, and Commercial Arbitration* (Kluwer Law International 2013); R. Wolfrum, *WTO- Trade Remedies: Max Planck Commentaries on World Trade Law* (Max Planck Institute for Comparative Public Law and International Law 2008).

[19] See for example *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, ICJ Rep. 2009, at 150; The Court reiterated its position in the *Application of the Interim Accord of 13 September 1995 case (The Former Yugoslav Republic of Macedonia v. Greece)*, Judgment, ICJ Rep. 2011, at 168.

[20] *Id.*

Before delving into the recent judgments of the International Court of Justice and other bodies, we will first examine the rule as reflected in the ARSIWA system. At the present chapter we will focus on the contemporary rule of full reparation and its relation to international adjudication. We will examine the source of power of international courts and tribunals to award reparations.

A. Reparation and State Responsibility.

In the 1930 Hague Codification Conference on State Responsibility, the Damages Subcommittee left the issue of reparation *"open to development by the jurisprudence of arbitral tribunals."*[21] The reference to arbitral tribunals makes sense, since, by that time arbitration was much more widespread than traditional judicial bodies.

Since then much has changed in state practice. The International Law Commission (ILC) was established in 1948 by the UN General Assembly and the issue of state responsibility was immediately put in the Agenda. After a lot of controversies, drafting papers and five Special Rapporteurs, the ILC text, ie Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), was approved *ad referendum* by the General Assembly.[22] The adoption by the General Assembly along with the rejection of the idea of turning ILC's text into an international convention with binding effect creates questions on their legal nature. It is accepted that the articles are considered as highly authoritative and they are widely applied in state but also in judicial practice. Arguably, some of the articles in ARSIWA reflect customary law rules, whereas others are part of progressive development work of the Commission.[23]

Relevant to our topic is article 31 and articles 34 to 39, which deal with the issue of reparation. Since *Chorzow Factory* case, these articles are considered, by and large, as reflective of custom. The customary nature of these articles has been reaffirmed in various judicial and arbitral decisions and awards, the latter being subsidiary sources of international law.[24]

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[21] Gray, *Judicial Remedies*, at 10.

[22] UN GA Res. 65/ 19. See more for the history of the articles online at: http://legal.un.org/avl/ha/rsiwa/rsiwa.html

[23] D., D. Caron, "The ILC Articles on State Responsibility: The Paradoxical Relationship between Form and Authority" (2002) 96 *Am. J. Int' L.* 857.

[24] Statute of the International Court of Justice, article 38 par. 1 (d).

The International Law Commission in its assessment of State Responsibility, also included in its Commentary of the Articles, the practice of other international courts and tribunals.[25] An exhaustive analysis of other regimes is beyond the spatial confines of the present thesis; however, we make an attempt to encapsulate the general framework followed by other Courts and Tribunals in respect of the matter.

To start with, in a total of twenty-five contentious cases and advisory proceedings, the International Tribunal for the Law of the Sea has various times referred to ARSIWA, confirming the customary law nature of articles regarding the rules on reparation.[26] In the *Case No. 17* the Seabed Disputes Chamber had to give an advisory opinion on the Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the "Area." When dealing with the form of compensation appropriate in such cases, the Chamber referred both to articles 34 and 31 ARSIWA and it stated that *"the obligation for a State to provide for a full compensation or restitutio in integrum is currently part of customary international law."*[27] Article 31 ARSIWA was also invoked in *Case No. 21,* dealing with the request for an advisory opinion submitted by the sub-regional fisheries commission (SRFC)and also in *Case No. 19* on the *M/V "Virginia G" (Panama/Guinea-Bissau).* Both decisions stated that this rule is a rule of general international law relevant to the cases.[28]

The *Chorzow* rule survives even in mixed cases. Where restitution is not possible, most courts and tribunals seem to start their analysis from *Chorzow's* definition, reaffirming its –at least theoretical- primacy. As far as compensation is concerned, the increasing jurisprudence of bodies such as the UN Compensation Commission, the Iran-U.S. Claims Tribunal, the Human Rights Treaty Monitoring Bodies and of course international investment arbitral tribunals provide for a more coherent framework for the calculation of compensation.[29]

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[25] See ARSIWA Commentary, Article 36, para. 6.

[26] R., R. Churchill, A., V. Lowe, *The Law of the Sea* (3d edn, MUP 1999), at 1- 3; See also article 304 of UNCLOS on Responsibility and Liability for Damage. The Law of the Sea is part of general international law and does not constitute a special regime.

[27] ITLOS, Case No. 17, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the "Area" (Request for Advisory Opinion submitted to the Seabed Disputes Chamber),* 2011, at 194.

[28] ITLOS, Case No. 21, *Request for an Advisory Opinion submitted by the Sub- Regional Fisheries Commission (SRFC) (Request for Advisory Opinion submitted to the Tribunal),* 2015, at 144; ITLOS, Case No. 19, *The M/V "Virginia G" Case (Panama/ Guinea- Bissau),* 2014, at 429.

[29] ARSIWA Commentary, Article 36, at 34.

International investment arbitral tribunals, although they are considered as applying the special rules of international investment law,[30] recognize the general principle character of the rule of full reparation under article 31 ARSIWA and tend to reiterate it. The same applies for the *restitution in integrum* principle. In the *S.D. Myers, Inc. v. Canada* case, the UNCITRAL Tribunal mentioned that "*the principle of international law stated in the Chorzów Factory (Indemnity) case is still recognized as authoritative on the matter of general principle."*[31]In the *CMS Gas Transmission Company v. The Argentine Republic* case, the ICSID Tribunal repeated the ARSIWA standard by stating that "*restitution is the standard used to re-establish the situation which existed before the wrongful act was committed, provided this is not materially impossible and does not result in a burden out of proportion as compared to compensation."*[32]The tribunal under UNCITRAL in the CME v. Czech Republic case referred to *Chorzow Factory* by saying that *"the obligation to make full reparation is the general obligation of the responsible State consequent upon the commission of an internationally wrongful act."*[33]In *Amoco International Finance Corporation v. Iran,* the Iran- US Claims Tribunal affirmed and applied the *Chorzów Factory* standard for the assessment of damages in the context of expropriation of foreign owned property.[34]

It is already readily apparent that a great number of courts and tribunals seem to follow and invoke the ILC's Articles in their decisions. The International Court of Justice has invoked ILC's articles on State Responsibility regarding reparation very few times compared to their invocation by other international bodies. In the 2007 *Genocide Judgment* the ICJ referred to article 31 and 36 in the context of its examination of the question of reparation, whereas in its 2010 judgment in the *Pulp Mills on the River Uruguay case*, the International Court of Justice, recalled article 34. The rule reflected in

[30] According to article 55 of the ARSIWA the ILC Articles *"do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or implementation of the international responsibility of a State are governed by special rules of international law."*

[31]*S.D. Myers, Inc. v. Government of Canada,* UNICTRAL (NAFTA) Award, Merits (2000), at 3.11.

[32]*CMS Gas Transmission Company v. The Republic of Argentina*, Award, ICSID Case No. ARB/01/8 (2005), at 400; See also, *inter alia,Hrvatska Elektroprivreda D. D. v. Republic of Slovenia,* Award, ICSID Case No. ARB/ 05/24 (2015), at 249; *Mr. Franck Charles Arif v. Republic of Moldova,* Award, ICSID Case No. ARB/11/23 (2013), at 559.

[33]*CME Czech Republic B. V. (The Netherlands) vs. The Czech Republic*, UNCITRAL Arbitration Proceedings, Partial Award (2001), at 616.

[34]*Amoco International Finance Corporation v. Iran*, 15 IRAN–U.S. C.T.R. 189 at 191-194.

article 35 was recalled in its 2012 judgment in the case of Germany v. Italy (Greece intervening).

Despite the small number of cases referring to ARSIWA in ICJ case law, according to Crawford there is a rather "symbiotic relationship" between ARSIWA and ICJ in the sense that there is a presumption that the ILC Articles, unless otherwise shown, reflect international law.[35]

A record of the decisions actually referring to ARSIWA is to be found in the work of the UN Secretary General, who in his 2010 Report listed all the decisions of international Courts and Tribunals that explicitly refer to the articles (compilation of 154 decisions and awards).[36] This first Report was followed by his 2012 Report which includes decisions published until 31 January of 2010. This work is indicative of the practical value of the articles. A similar attempt was successfully undertaken by the Athens Public International Law Centre (Athens PIL), which in its 1/ 2016 Research Paper listed all the decisions of international courts and tribunals that explicitly refer to ARSIWA for the period 2010- 2015.[37]

Article 31 ARSIWA reads as follows: *"1. the responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act. 2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State."*

The obligation of the first paragraph puts forth the general rule of full reparation, that for any injury caused by an internationally wrongful act, reparation is owed by the responsible state. As far as the second paragraph is concerned, which attempts to define the word "injury" of the first paragraph, there has been a lot of criticism against its wording.[38] What is crucial to be clarified is that under ARSIWA's regime no damage is needed for a state's international responsibility to arise. The legal wrong of the breach of an international obligation suffices to trigger the international responsibility of the state and is included in the notion of "any damage".[39] It is a distinct matter, whether the

[35] J. Crawford, "The International Court of Justice and the Law of State Responsibility" in C., J. Tams and J. Sloan (eds.), *The Development of International Law by the International Court of Justice* (OUP 2013), at 86.
[36] UN GA Res. 59/35 and 62/61; UN SG Report, Materials on the Responsibility of States for Internationally Wrongful Acts, ST/LEG/SER.B/25, 2012.
[37] Materials on State Responsibility (2010- 2015), Athens PIL, Research Paper 1/ 2016.
[38] J. Crawford, *State Responsibility*, at 485.
[39] Article 31, ARSIWA Commentary, para 6.

primary rule contains a prerequisite of damage within its normative contours in order to be violated. The existence of that damage will then trigger the secondary rules of responsibility. Furthermore it is of significance for the present enquiry that damage is also necessary for reparation to be due and for the assessment of its extent. A violation which is not followed by material or moral damage entails no obligation of reparation on the part of the wrongful state. That is to say that the occurrence of solely a legal injury calls only for compliance with article 30 ARSIWA, ie the obligation of cessation and assurances and guarantees of non- repetition.

Article 34 is the first article of the second chapter of ARSIWA's second part on "Reparation for Injury" and provides the different forms that reparation can take "either singly or in combination": *"Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter."*It must be noted that these different forms refer to the single unified obligation of reparation and that they do not constitute distinct obligations.[40] According to article 43 (2) (b) injured states are able to request a specific form of reparation when invoking the international responsibility of other states and the reparation sought must be notified to the responsible state.[41] An injured state's right of election is not unlimited, as it can be seen from the language of Article 43(2) (b), which does not set out this entitlement in an absolute form. Moreover, the request by the injured state is by no means binding neither for the responsible state nor for the judicial or arbitral body engaged with the matter. Despite the guiding rules provided by ARSIWA, this wide discretion that international courts and tribunals enjoy with respect to the award of reparation, has led to some "incompatibilities". Characteristic example is the consistent practice of the ICJ to award solely declaratory judgments in the vast majority of its judgments dealing with claims for reparation.[42]

Articles 35 to 37 commence with the specification of the content of the three different methods of reparation. Under article 35 regarding restitution *"a State*

[40] Article 34, ARSIWA Commentary, para 6.

[41] Note also that according to article 45 ARSIWA the injured state may not seek reparation if it has validly waived its claim to do so.

[42] For the reluctance of the ICJ to award compensation see J. Crawford, "Flexibility in the Award of Reparation: The Role of the Parties and the Tribunal" in R. Wolfrum, M. Sersic, T., M. Sosic (eds), *Contemporary Developments in International Law: Essays in Honour of Budislav Vukas* (Brill 2015), at 692.

responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution: (a) is not materially impossible; (b) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation."

As far as compensation is concerned, article 36 provides that *"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. 2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established."*

Finally satisfaction is described in article 37 as follows: *"1. 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. 2. Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality. 3. Satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible State."*

The wording and the order of the above three articles indicate a hierarchical relationship. The re- establishment of the status quo ante is clearly prioritized in relation to compensation, which is prioritized in respect of satisfaction. The ILC espoused the order or hierarchy adopted by the PCIJ in the *Chorzow Factory* judgment, which also put restitution first, as the appropriate form of reparation to comply with the same judgment's "wipe-out" mandate.[43] The two conditions of restitution set in article 35 find also warrant in the judgments of the ICJ. Restitution thus must not be materially impossible[44] and not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.[45] This realistic approach confirms the difficulty in applying restitution in practice.[46] Even in international investment arbitration, however, where compensation seems to be the central and most desirable remedy by the investors, the *Chorzow Factory* rule is generally not ignored or abolished in such arbitrations. Dealing with the question

[43] *Factory at Chorzow*, Merits, at 47.

[44] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, ICJ Rep. 2007, at 233.

[45] *Passage through the Great Belt (Finland v. Denmark)*, Provisional Measures, ICJ Rep. 1991, at 19.

[46] C. Gray, "The Different Forms of Reparation: Restitution" in J. Crawford, A. Pellet and S. Olleson (eds.), *The Law of International Responsibility* (OUP 2010), at 589.

whether internationally wrongful acts against foreign nationals were an exception to any general rule of the primacy of restitution in kind, Dupuy as the sole arbitrator in the *Texaco Overseas Petroleum Co. and California Asiatic Oil Co. v. The Government of the Libyan Arab Republic* case, reaffirmed the general international law primacy of restitution and referred to the case of *Chorzow Factory*.[47]

Compensation comes into play *"insofar as such damage is not made good by restitution."* This means that either restitution was absolutely impossible or it was engaged but has not completely re- established the situation existed before. As far as the "financially assessable damage" of paragraph 2 is concerned, according to the article's commentary, it means that no moral damage can be awarded to a state, but only *inter alia,* damage suffered by state's property or personnel or damage suffered by nationals, whether persons or companies in cases of diplomatic protection.[48]

An interesting debate that arose during the work of the Commission was about the assessment of the economic condition of the state concerned. Ethiopia claimed that when considering the reparation due, the Commission must take into account the economic condition of the state and must avoid to burden its population by the award. This approach is similar to the rejected draft article 42 (3) of the ILC which provided that *"in no case shall reparation result in depriving the population of a state of its own means of subsistence."* The Claims Commission, however, did not find any sufficient state practice to accept this argument.[49] On the contrary, in Iran- US claims tribunal decisions, Iran's economic situation did not affect the obligation to provide full reparation but was taken into account while determining the amount of compensation.[50]

If the injury "cannot make good by restitution or compensation," satisfaction is the remaining form of reparation. In paragraph 2 of article 37 it is stated that satisfaction, *inter alia,* may take the form acknowledgment of the breach, expression of regret, formal apology or other, whereas in the commentary of the article it is stated that "assurances and guarantees of non-repetition may also amount to a form of satisfaction."[51] The commentary underlines that it is a "rather exceptional" form of

[47] *Texaco Overseas Petroleum Co. v. Libya*, 17 I.L.M. 3 (1977), International Arbitral Tribunal, at 97, available online at: http://ebooks.cambridge.org/clr/case.jsf?bid=CBO9781316151808&id=CBO9781316151808A040 .

[48] ARSIWA Commentary, Article 36, at 5.

[49] J. Crawford, State Responsibility, General Part, at 484.

[50] See SC Res. 687 (1991) para 19.

[51] Article 37, ARSIWA Commentary, para. 5. See also Article 34, ARSIWA Commentary, para. 2 where it is stated that satisfaction as well as guarantees of non- repetition are to be awarded only in certain cases.

reparation and may only be engaged if restitution and compensation were not available or successful in fulfilling the rule of full reparation. However, the ICJ very often refers to satisfaction by characterizing its own judgments as such. This practice poses some questions regarding its relation to the "satisfaction" provided by article 37, since it is the Court and not the responsible state that offers that satisfaction. According to the ILC ARSIWA does not mention this kind of satisfaction since the articles are not a set of instructions to Courts.[52] However, a justification to this approach would be that to the extent that the litigant parties have submitted the dispute to the Court, they have also delegated to it the power to decide upon the proper remedy.

Moreover, we should note that satisfaction is a rather rare form of reparation, whereas it is unavailable in mixed disputes. In the *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia* casethe availability of satisfaction in investment disputes was discussed.[53] The Claimants in that case were the Quiborax S.A., a Chilean mining company, and Non- Metallic Minerals S.A., a Bolivian mining company. They applied to an ICSID Tribunal against the state of Bolivia, maintaining that the respondent had breached the Chilean-Bolivian BIT and asking, besides of damages, for reparation in the form of appropriate satisfaction. The Tribunal having found Bolivia in breach of its BIT obligations, addressed first the compensatory damages claim. The Tribunal reiterated the well accepted position that for unlawful expropriations the full reparation principle as was articulated in the *Chorzow* case and later expressed in the ARSIWA. The respective BIT provisions do not purport to establish a *lex specialis* according to the Tribunal. For internationally wrongful acts apply only what public international law provides for, ie that every internationally wrongful act of a State entails the international responsibility of that State (Article 1 ARSIWA). The Claimants further alleged that the Respondent through its procedural conduct (referring to a criminal case initiated by Bolivia) breached also other international law obligations. For these breaches the Claimants sought a declaratory judgment. Bolivia argued that an arbitral tribunal does not have the power for such a judgment and that article 37 ARSIWA is not available to investors. The Tribunal agreed with the Respondent that some forms

[52] Article 37, ARSIWA Commentary, para. 6.

[53] *Quiborax S. A. and Non Metallic Minerals S. A. v. Plurinational State of Bolivia,* Award, ICSID Case No. ARB/06/02 (2015).

of satisfaction are not an appropriate remedy to investors in investor- state arbitrations. Indeed, according to Part Two of the ILC Articles and in particular article 37 "*does not apply to obligations of reparation to the extent that these arise towards or are invoked by a person or entity other than a State."*[54]

The hierarchy proposed by the ILC regarding the forms of reparation seems well-accepted at least in theory. Is however this sequence strictly followed by Courts and Tribunals? As Judge Crawford underlines, this hierarchy "is not unqualified."[55] On the other hand, many international bodies tend to confirm ILC's hierarchy, ie the primacy of restitution.

A landmark old case for the issue of reparation, though not an interstate one, is the ECtHR *Papamichalopoulos and Others v. Greece* case of 1966. The Court in that case recognized the primacy of restitution according to the general international law rule. The Greek Government in 1967 had expropriated a real estate for the purpose of building housing for Greek Navy personnel. In 1993 the Court ruled that *"the applicants de facto…have been expropriated in a manner incompatible with their right to the peaceful enjoyment of their possession."*[56] In the remedies stage the Court ruled that "*the act of the Greek Government…contrary to the Convention was not an expropriation that would have been legitimate but for the failure to pay fair compensation."*[57] The Court then cited the passage from the *Chorzow Factory* case[58] and ordered restitution of the land, including all of the buildings and other improvements made over the intervening years by the Greek Navy. It further noted that if restitution would not be made, Greece should pay the applicants for damage and loss of enjoyment since the authorities took possession of the land.[59]

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[54] See also Ripinsky and Williams that have found that "it is clear that certain rules, such as the one introducing satisfaction as a form of reparation, will be of value only in a State-State context": S. Ripinsky, K. Williams, Damages in International Investment Law, British Institute of International and Comparative Law, 2008, at 30, Exh. R-220.

[55] J. Crawford, *State Responsibility, The General Part*, (CUP 2013), at 508 (hereinafter: Crawford, *State Responsibility*).

[56]*Case of Papamichalopoulos and Others v. Greece (article 50)*, ECtHR, application no. 14556/ 89, Judgment (Just Satisfaction) (1995), at 35- 46.

[57]*Ibid.* at 36.

[58]*Id.*

[59]*Case of Papamichalopoulos and Others v. Greece (article 50)*, ECtHR, application no. 14556/ 89, Judgment (Just Satisfaction) (1995), at 38- 40.

It is readily apparent that in the above case the Court upheld that compensation was to be awarded on the basis of the principle set out in the *Chorzów Factory* judgment. In other words, the applicants were firstly entitled to restitution of their land and to compensation for loss of enjoyment of the property or, if that were impossible, to damages corresponding to the current value of their land. The ruling of this judgment dealing with unlawful expropriation was followed by other similar judgments, such as the *Belvedere Alberghiera S.r.l. v. Italy*, the *Carbonara and Ventura v. Italy*, the *Case of the Former King of Greece and Others v. Greece* and the recent *Scordino v. Italy Judgment*.[60] More recent case law also seems to explicitly endorse the ILC's logic. Article 35 ARSIWA was recalled in the *Case of Mr. Pavel Viktorovich Davydov v. Russian Federation*. The Court took the position that *"while restitution is the rule, there may be circumstances in which the State responsible is exempted – fully or in part – from this obligation, provided that it can show that such circumstances obtain."*[61]

It is among the purposes of the next chapter (II) to explore whether this hierarchy does reflect the recent practice of the International Court of Justice, what is the content that the Court gives to the forms of reparation and what form does it award more often and under what circumstances. Before that we will briefly discuss how and where do the powers of the various international judges to award reparations stem from.

B. Reparation and International Adjudication.

According to the former Judge and President of the ICJ Rosalyn Higgins "*the International Court of Justice is properly viewed as the senior of all International Courts."*[62] In line with this observation the ICJ will be the first organ to consider in our examination.

The starting point for this analysis should be the jurisdiction of the Court, which is the first requirement to commence proceedings before it. According to article 36 (2) of its Statute, the Court enjoys jurisdiction with regard to *"all disputes of a juridical nature that arise among them [states] concerning:*

[60] ECtHR, application no. 31524/96 (just satisfaction) (2003), at 34-36; application no. 24638/94 (just satisfaction) (2003), at 39-40; application no. 25701/94 (just satisfaction) (2002); application no. 36813/ 97 (no. 1) (2006) respectively.

[61] *Case of Davydov v. Russia*, ECtHR, application no. 18967/07, Judgment (2014), at 25.

[62] R. Higgins, *Problems and Process: International Law and how we Use it* (OUP 2000), at 187.

a) The interpretation of a treaty ; b) Any question of international law ; c) The existence of any fact which, if established, would constitute the breach of an international obligation ; ***d) The nature or extent of the reparation to be made for the breach of an international obligation."***[63]

The nature and extent of reparation is explicitly mentioned in article 36 (2) of the Statute. The exact same wording of the above article 36 (2) ICJ's Statute is also to be found in other jurisdictional clauses of international instruments. Article XXX1 of the OAS American Treaty of Pacific Settlement (Pact of Bogota), article 1 of the European Convention for the Peaceful Settlement of Disputes of 1967 and article 19 of the Protocol of the Court of Justice of the African Union are pertinent examples.[64]

It is established that if a Court enjoys jurisdiction to judge upon the claims of the parties, under article 36 (2), ie pursuant to optional causes declarations, it enjoys *ipso facto* the jurisdiction to make a judgment on reparation. *Factory at Chorzow* was again the first case to reach this conclusion.[65] Poland had doubted the Court's competence to award reparation. The latter answered that: *"It is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation. In Judgment No. 8, when deciding on the jurisdiction derived by it from Article 23 of the Geneva Convention, the Court has already said that reparation is the indispensable complement of a failure to apply a convention, and there is no necessity for this to be stated in the convention itself. The existence of the principle establishing the obligation to make reparation, as an element of positive international law, has moreover never been disputed in the course of the proceedings in the various cases concerning the Chorzow factory."*[66]The competence of the arbitral tribunal to award compensation had also been an issue discussed in the Alabama Claims case, where there was disagreement between Great Britain and the United States over whether the tribunal was authorized to award compensation for indirect damage. Finally, the tribunal based on article VII of the relevant 1871 treaty between US and Great Britain awarded

[63] Emphasis added.
[64] C., J. Tams and A. Tzanakopoulos, *The Settlement of International Disputes: Basic Documents* (Oxford 2012).
[65] *Factory at Chorzow*, Jurisdiction, at 23; *Factory at Chorzow*, Merits, at 61.
[66] *Factory at Chorzow*, Merits, at 29.

US compensation.[67] The first ICJ case also dealt with the matter. In the *Corfu Channel* case the United Kingdom claimed compensation for loss of property and for the deaths and injuries of the naval personnel. Albania claimed that the Court did not have power, other than to decide on the former responsibility. The Court as expected though took the position that it did have the power.[68]

Since the era of *Chorzow* judgment, the position that no separate jurisdictional basis or consent is required is widely accepted.[69] Crawford characterizes the power of the Court to award reparation for any breach found if it enjoys jurisdiction to determine breach of an obligation as axiomatic,[70] whereas ARSIWA Commentary also endorses this view.[71] This has not always been obvious though. Gray discusses in her book the relevant debate, which is nowadays dated.[72]

Interesting is however the debate on the adverse question of whether a Court that has been given jurisdiction as regards to reparation has also the power to determine responsibility. On that matter, there has been great controversy and conflicting judgments mainly in the field of international investment arbitration.[73] Generally, we would say that the answer depends on the interpretation of the jurisdictional clause, since there is no consistent practice with respect to the matter.

Another interesting question is whether the Court could circumvent the reservation clause of the applicant and award compensation on its own initiative? Furthermore, can the Court award more than the state asks for? Although the Court is the only one competent to decide on the matter of reparation, it is bound by the applicant's claim in the sense that its discretion is limited by the *non- ultra petita* rule and it cannot award more than it has been asked to.[74] Thus, in the *Corfu Channel* Case the Court decided that it cannot award more than the amount claimed by the Applicant. The United

[67]Alabama Claims Arbitration 1872, in John Bassett Moore (eds), *History and Digest of the International Arbitrations to which the United States has been a Party* (1898), available online at: https://www.trans-lex.org/262137/_/alabama-claims-arbitration-1872-in-john-bassett-moore-history-and-digest-of-the-international-arbitrations-to-which-the-united-states-has-been-a-party-1898/ .

[68]*Corfu Channel (United Kingdom v. Albania)*, Judgment (Merits), ICJ Rep. 1949, at 26.

[69]*LaGrand*, Judgment, at 466, 485; Article 36, ARSIWA Commentary, para. 2; C. Brown, *A Common Law of International Adjudication* (OUP 2007), at 66; Crawford, *State Responsibility*, at 615.

[70] J. Crawford, "Flexibility in the Award of Reparation: The Role of the Parties and the Tribunal" in R. Wolfrum, M. Sersic, T., M. Sosic (eds), *Contemporary Developments in International Law: Essays in Honour of Budislav Vukas* (Brill 2015), at 690.

[71] ARSIWA Commentary, article 36, at 2.

[72] See for the relevant debate in Gray, *Judicial Remedies*, at 59- 68.

[73] See for relevant decisions in Crawford, *State Responsibility*, at 600.

[74] Crawford, *State Responsibility*, at chapter 19.

Kingdom had asked for £700,087 compensation for the loss of the ship HMS Saumarez. The expert opinion on the valuation of the ship was that the loss was amounted at £716,780. The Court however held that it could not "award more than the amount claimed in the submissions of the Claimant."[75] Judge ad hoc Ečer expressed a different opinion and maintained that the Court's approach was too proceduralist and that this rule should not have affected the calculation method. In his words *"the Court, without any reference to this rule, must decide, in the first place and on grounds of law, and not of mathematics, what basis [for calculation of compensation] is juridically to be adopted."*[76]However, the prevailing view is that the rule does exist and finds support in the jurisprudence of arbitral tribunals.[77] In the Rainbow Warrior arbitration the Tribunal did not judge upon compensation because New Zealand had solely sought for the return of the French agents to the island where they were detained. This specific claim was seen by the tribunal as a limitation of its powers in awarding any other form of reparation rather than the one sought. In conclusion, it seems that the Court's ability to award certain remedies or a certain amount of compensation may be limited by the claims advanced by the parties.

Part of a court's or tribunal's powers is also the power to order other actions rather than reparation. In the *Rainbow Warrior* case, New Zealand had demanded compensation of 10 million US Dollars as well as a formal apology from France for the sinking of the vessel in Auckland harbor, whereas also the two parties asked from the arbitrator to decide upon the future of the two responsible French agents in prisoned at the time in New Zealand. The return of the two agents requested by New Zealand was seen by the tribunal as an order for the cessation of the wrongful omission rather than a *restitutio in integrum.*[78] In its award the Tribunal held that the authority to issue an order for the cessation or discontinuance of a wrongful act or omission is part of the inherent powers of a competent tribunal which is confronted with the continuous breach of an international obligation.[79] A relevant debate took place in the ICSID *Enron v. Argentina* case. Enron's Argentinian subsidiary had asked for an injunction against the collection of

[75]*Corfu Channel*, Compensation, ICJ Rep. 1949, at 244, 249.
[76]*Corfu Channel*, Judgment, Dissenting Opinion of Judge Ečer, at 253.
[77] See for example the Spanish zone of Morocco Claims Arbitration.
[78]*Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements, concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior Affair*, XX RIAA 215- 284 (1990), at 113.
[79]*Ibid.*, at 114.

various taxes. Argentina claimed that the tribunal does not enjoy jurisdiction to award such a remedy, by arguing that *"the Tribunal lacks such a power under the Convention and the Treaty, and it could only either issue a declaratory statement that might satisfy the investor or else determine the payment of compensation based on a finding that a certain measure is wrongful*" Argentina considered any other remedy to be an infringement of its sovereignty. The tribunal concluded however that it did have *"the power to order measures involving performance or injunction of certain acts,"* based its conclusion and referring also on the above Rainbow Warrior award.[80]

In any event, initial consent to the jurisdiction of a Court is always unequivocally required. All the cases that end up to international courts and tribunals are cases that states have consented to. Consent means that the parties have the power to decide if they want the case to be brought before the court. Consent to the jurisdiction of the ICJ can be given under the *optional clause,* through a *compromis,* a compromisory clause or by the way of *forum prorogatum*. States can further confine the jurisdiction of the court through reservations.[81] Nothing, for example, impedes a state from setting a *rationae materiae* reservation to the jurisdiction of the Court pertaining reparations. No pertinent example exists though. The same applies also in arbitration. The parties can always confine the limits of the future award as they wish. Indeed, in arbitration parties are free to hand-pick every procedural aspect of it.

As we will see later states often try to avoid the award on reparation by asking the court or the tribunal to reserve the reparation phase for later. This avoidance technique is quite popular in ICJ jurisprudence and is one of the reasons why this Court rarely decides on reparation.[82] A similar method can also be found in arbitral practice. In the 1992 *Heathrow Airport Case* for instance between USA and UK, the Tribunal divided the proceedings into two phases. A phase on substantial matters in order to find whether the applicant's claims should be upheld and a second phase, if necessary, for remedies and in

[80] *Enron Corporation and Ponderosa Assets, L. P. v. Argentine Republic*, Decision on Jurisdiction, ICSID Case No. ARB/01/3, (2004), at 79- 81.

[81] C. Tomuschat, "Article 36" in A. Zimmermann, C. Tomuschat, K. Oellers- Frahm, C. J. Tams (eds), *The Statute of the International Court of Justice, A Commentary* (2nd edn, OUP 2012), at 683.

[82] Crawford, *State Responsibility*, at 693- 694.

particular in order to determine compensation. The parties of the dispute reached a settlement so the second phase never took place.[83]

[83] *United States- United Kingdom Arbitration concerning Heathrow Airport User Charges (United States- United Kingdom)*, XXIV RIAA 1- 359 (1992- 1994), at page 298; J., G. Merrills, *International Dispute Settlement* (5th edn, CUP), at 90.

II. The Principle of Reparation as applied by the International Court of Justice.

For the purposes of our research question, we will commence by analyzing the reparation awarded by the ICJ in cases of violation of international law. As we noted in the Introduction though, no judgment or award is needed for a wrongful state to be due to reparation. There is not even the need for a request by the victim.[84] This entails that the relation of dispute settlement mechanisms to the obligation of reparation is only residual. In international practice there are various examples of states giving reparation by no recourse to judicial or arbitral bodies. Israel has done it in the past towards Turkey in respect of Mavi Marmara incident, offering both compensation and satisfaction, in the form of apologies, whereas also Turkey has done so recently with respect to the downing of the Russian military aircraft in the borderline with Syria.

The need to have recourse to dispute settlement bodies arises when either the states cannot settle the dispute themselves or they do not agree on specific issues concerning the nature or the extent of the reparation that must be made for the breach of an international obligation. And even when this is the case, states often face the lack of consent by the wrongdoing state in order to submit the dispute to an adjudicatory body.[85]

However, cases do reach the ICJ and interesting judgments are being issued, thus contributing to the development of international law. Sir Hersch Lauterpacht's suggestion is uncontested: *"[The Court] had made a tangible contribution to the development and clarification of the rules and principles of international law."*[86] It is not the view of the present author that the jurisprudence of the ICJ has gone so far as to reach a "judicial lawmaking" function as some commentators have proposed,[87] but there is certainly a

[84] Article 31, ARSIWA Commentary, para 4.

[85] See for instance, Georgia's struggle in her effort to bring a claim against Russia for the dispute that arose between them in 2008. Georgia submitted applications in three different bodies, ie the ICJ, the European Court of Human Rights and the International Criminal Court: *Case Concerning the Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Provisional Measures, ICJ Rep. 2008; *Georgia v. Russia (II)*, ECtHR, Application No. 38263/08; Report on Preliminary Examination Activities, ICC, Office of the Prosecutor (2012), at 29- 32.

[86] H. Lauterpacht, *The Development of International Law by the International Court* (Stevens & Sons, 1958), at 5.

[87] A. von Bogdandy and I. Venzke, "Beyond Dispute: International Judicial Institutions as Law-make"(2011) 12 *German LJ* 979, at 981.

strong influence of ICJ decisions to the rules of international law, which may go beyond mere clarification and interpretation.[88]

Judge M. Virally argued in 1983 that cases brought before the ICJ and PCIJ were actually of medium importance.[89] For example territorial cases are usually brought before the Court by special agreement, because states prefer to get such disputes settled judicially than carrying the political cost of a decision made by political negotiations.[90] On the other hand there are also other reasons for states to prefer adjudicatory means of settlement rather than diplomatic venues. Weaker states for instance are well aware that their lack of power means no luck in the negotiating table and this is why a settlement by a third party seems more safe and welcoming. Moreover, consistent case law by a court on a matter could persuade a state to bring their claims before it guaranteeing legal certainty. This can be evident in maritime delimitation cases, where the ICJ and the International Tribunal of the Law of the Sea seem to have adopted a consistent approach towards the stages of delimitation they consider crucial for delimiting overlapping maritime zones, especially from the 2009 Black Sea Delimitation Case and onwards.[91]

There are various ways to classify among ICJ cases, with the subject matter of the dispute being the most common one.[92] There are judgments on disputes concerning territorial claims, jurisdiction, diplomatic protection, treaty obligations, law of the sea, pollution and so on and so forth. For the purpose of this thesis a classification based on the reparation given by the Court is to be followed. We will consider applications submitted to the Court in the late 80's until today, whereas we will occasionally refer to older landmark judgments. More specifically our research will have as a starting point applications submitted to the Court in 1986 and thereafter. The reason of the choice of

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[88] K. Bannelier, T. Christakis, S., Heathcote (eds.), *The ICJ and the Evolution of International Law: The enduring impact of the Corfu Channel case* (Routledge 2012).

[89] M. Virally, "Le Champ Operatoire du Reglement Judiciaire International" (1983) 87 *RGDIP* 281.

[90] See for example *Frontier Dispute (Benin/ Niger)*, ICJ Rep. 2005 or *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States of America)*, ICJ Rep. 1984.

[91] *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, ICJ Rep. 2009; *Inter alia, Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment,ICJ Rep. 2012; *Maritime Dispute (Peru v. Chile)*, Judgment, ICJ Rep. 2014; ITLOS Case No. 16, *Dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/ Myanmar)*, Judgment, 2012.

[92] See for such field classification in: C. Gray, "The Use and Abuse of the ICJ in the Enforcement of International Law, in K. Koufa (eds), *International Law Enforcement, New Tendencies*, Thesaurus Acroasium, vol. XXXVI, Institute of International Public Law and International Relations of Thessaloniki (Sakkoulas Publications, Athens- Thessaloniki); R. Bilder, "International Dispute Settlement and The Role of International Adjudication" (1986- 1987) 1 *Emory J. Int' L Disp. Resol.* 131.

this date is twofold: first to confine the research in contemporary cases of the last thirty years and second to avoid overlap with Gray's authoritative work in the area.

A. Forms of Reparation

a. The Court found no violation and hence there was no need for reparation.

First of all, a Court might not include in its judgment a finding on reparation simply because it did not find any violation of international law. Hence a discussion on reparation would be redundant. For example, in the second part of the *Oil Platforms* decision, the Court found that USA's actions did not constitute a breach of the obligations under Article X(1) of the Treaty of Amity and that the claim of Iran for reparation could not be upheld. The same conclusion was reached regarding the counter-claims of Iran.[93]

On the other hand, there are also some cases that by their very nature do not call for any reparation judgment by the Court. In these cases, such as maritime delimitation cases, states use the Court not to obtain a decision on responsibility and violation of international law but simply a judgment on applicable law, principles etc.[94] For example, in the *Maritime Delimitation* case between Denmark and Norway, the applicant asked the Court to decide where a single line of delimitation shall be drawn between Denmark's and Norway's fishing zones and continental shelf areas in the waters between Greenland and Jan Mayen.[95] The same applies to territorial disputes where the Court is called upon to find the border line or the sovereign title on a specific area. Needless to say, such cases cover a considerable part of the Court's docket.[96]

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[93]*Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment, ICJ Rep. 2003; Similar decisions in *Elettronica Sicula S.p.A (ELSI) (USA v. Italy)*, ICJ Rep. 1989, where the Court found that Italy had not committed any of the alleged breaches and accordingly the claim for reparation was rejected and in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, ICJ Rep. 2015, where both the claims and the counter- claims of the litigants were rejected by the Court.

[94] See for example the *North Sea Continental Shelf (Federal Republic of Germany/ Netherlands), (Federal Republic of Germany/ Denmark)*, Judgment, ICJ Rep. 1969 or the *Arbitral Award of 31 July 1989(Guinea-Bissau v. Senegal)*, where the Court had to judge on the validity of an arbitral award.

[95]*Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, ICJ Rep. 1993; *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, ICJ Rep. 2009; *Maritime Dispute (Peru v. Chile)*, ICJ Rep. 2014.

[96]*Territorial Dispute (Libyan Arab Jamahiriya/ Chad)*, ICJ Rep. 1994, *Kasikili/ Sedudu Island (Botswana/ Namimbia)*, ICJ Rep. 1999; *Sovereignty over Pulau Ligitan and Pulau SipadanIndonesia/ Malaysia)*, ICJ Rep. 2002; *Frontier Dispute (Benin/ Niger)*, ICJ Rep. 2005; *Frontier Dispute (Burkina Faso/ Niger)*, ICJ

In the *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea* case (Nicaragua v. Honduras), the Court found that the Republic of Honduras has sovereignty over certain Cays. It also indicated where the starting-point of the single maritime boundary that divides the territorial sea, continental shelf and exclusive economic zones of the Republic of Nicaragua and the Republic of Honduras shall be located. However, the decision includes a further interesting finding which indicates to the parties that they *"must negotiate in good faith with a view to agreeing on the course of the delimitation line of that portion of the territorial sea located between the endpoint of the land boundary […] and the starting-point of the single maritime boundary determined by the Court […]."* The Court thus poses to the litigants a duty to negotiate the exact course of the delimitation line, which is very common also in older delimitation cases, such as the North Sea Continental Shelf cases as well as the Libya-Malta and Tunisia-Libya cases.[97]

Another interesting case is the *Territorial and Maritime Dispute between Nicaragua and Colombia*. In its initial Judgment in 2012 the Court had affirmed Colombia's sovereignty over seven islands and drawn a single maritime boundary delimiting the continental shelf and exclusive economic zones of Nicaragua and Colombia. Moreover, Nicaragua's request to the Court to declare Colombia in breach of international law for allegedly denying Nicaragua's access to natural resources to the east of the 82nd meridian was rejected.[98] More specifically, Nicaragua had sought in its Memorial that the Court should declare Colombia's violations, the cessation of the violations and the obligation of compensation. The Court however found the claim for a declaratory judgment on the part of Nicaragua unfounded, since it pertained an unsettled and undefined maritime boundary. After the judgment on delimitation, the areas that Nicaragua asked the declaration for were attributed to Colombia. The Court thus was firstly engaged in its delimitation work and upon the outcome of this delimitation found itself in the position not to be able to pronounce on any previous violation by the litigants.

Rep. 2013; *Sovereignty over Pedra Branca/ Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/ Singapore)*, ICJ Rep. 2008; There are also mixed cases concerning both maritime and territorial issues, such as *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Merits, ICJ Rep. 2001; *Land, Island and Maritime Frontier Dispute (El Salvador/ Honduras: Nicaragua intervening)*, ICJ Rep. 1992.

[97] *Continental Shelf (Libyan Arab Jamahiriya/ Malta)*, Judgment, ICJ Rep. 1985; *Continental Shelf (Tunisia/ Libyan Arab Jamahiriya)*, Judgment, ICJ Rep. 1982.

[98] *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, ICJ Rep. 2012, at 251.

In the aftermath of this judgment, Nicaragua initiated a further round of proceedings in 2013, on the one hand, with its Application on *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast* with a view to resolving issues left open in the 2012 Judgment and on the other, by requesting a declaration of violation along with reparation in its Application on the *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea.* In the former, Nicaragua has asked for a declaration on the precise course of the maritime boundary of its extended continental shelf and on the principles and rules of international law that determine the rights and duties of the two States in relation to the area of overlapping continental shelf claims and the use of its resources, while pending the delimitation of the maritime boundary between them beyond 200 nautical miles from Nicaragua's coast. The decisions on the merits are still pending.[99]

b. Removal from the Court's list.

Once an application is submitted to the Court, the latter has the power to make orders regarding the proceedings of the case and the conduct of the parties (article 48 of the Statute). In combination with article 89 of the Rules of the Court this means that if during the proceedings the applicant informs the Court in writing that it is not going to commence with the proceedings, and if the respondent either has not yet taken any step in the proceedings or does not object to the discontinuance, the Court can officially order the discontinuance of the proceedings and the removal of the case from the list.

This procedure can take place at any stage of the proceedings. The reasons why states decide to ask the Court for the discontinuance of the proceedings are various and certainly interesting from a dispute settlement point of view.

There are cases where the respondent state offers reparation to the applicant before the Court hear the case or after a certain phase of the proceedings, e.g. after rejection of preliminary objections. This shows the power that the Court's pending decisions may have in terms of negotiation as a potential leverage on the one or the other

[99] For a more detailed analysis on these decisions and their relation to enforcement of international law see discussion in the EjilTalk Blog available online at: http://www.ejiltalk.org/a-new-theory-for-enforcing-icj-judgments-the-world-courts-17-march-2016-judgments-on-preliminary-objections-in-nicaragua-v-colombia/ .

party as well as the reticence of respondent states to enter in judicial proceedings, which are time- consuming and costly. Thus they prefer to settle the dispute by negotiation paying a certain amount to the applicant and not prolong the dispute with an unknown result. This demonstrates how dispute settlement should be assessed as a whole and not in a linear course.

In the case of the *Aerial Incident* between Iran and the USA, Iran requested the Court to determine, on appeal of the decision rendered by the Council of the International Civil Aviation Organization, USA's violation of the Convention on International Civil Aviation and the Convention for the Suppression of Unlawful Act, Against the Safety of Civil Aviation. The alleged wrongful conduct had been the United States actions with respect to the shooting down of an Iranian commercial airliner.[100] If the Court was to find these violations, Iran asked the Court to further find the due amount of compensation. The case was removed from the Court's list before even the latter heard the case. The two parties settled the case with the 1996 Settlement Agreement. USA indeed gave Iran reparation in the form of compensation and *"recognized [the incident] as a terrible tragedy and expressed deep regret over the loss of lives caused by [it]."*[101]

Similar was the outcome in the *Certain Phosphates Lands in Nauru* case (Nauru vs. Australia). Nauru had requested the Court to adjudge and declare that Australia had incurred international legal responsibility and was bound to make restitution or other appropriate reparation to Nauru for the damage and prejudice suffered. It had further requested that the nature and the amount of such restitution or reparation should, in the absence of agreement between the parties, be assessed and determined by the Court in a separate phase of the proceedings. Nauru in its application had also reserved the right to ask for an award of aggravated or moral damages. As we already mentioned, this way of reserving reparation claims for subsequent proceedings is a standard method of the claimants before the ICJ. Australia's objections to the jurisdiction of the Court failed and the 1992 Judgment on Preliminary Objections was in favor of Nauru. The case, however, was removed from the Court's list, since Nauru and Australia reached a settlement. In this case it is

[100] *Aerial Incident of 3 July 1988 (Islamic Republic of Iran v. United States of America)*, see related documents in ICJ's website, available online at: http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=9c&case=79&code=irus&p3=10 .

[101] See the Settlement Agreement of 9 February of 1996, available online at: http://www.icj-cij.org/docket/files/79/11131.pdf .

obvious that Nauru already had a strong trump card having won the jurisdiction phase. The case was settled before the Court had the chance to discuss the merits of the case, but Nauru actually got by other means what it sought by adjudication.

Finland was not as lucky as Nauru in the *Passage through the Great Belt* case (Finland v. Denmark). The Court rejected Finland's application on provisional measures with respect the discontinuance of the building of a bridge in the Great Belt.[102] While the decision on the merits was pending, the two parties reached a settlement, in which Finland accepted compensation, instead of the restitution that it had initially sought in its Application (deconstruction of the bridge built by Denmark over the Great Belt).[103] Admittedly, the deconstruction of the bridge would be "excessively onerous," an implication which must be avoided according to art. 35 (b) ARSIWA.[104] It is here apparent that Finland compromised with compensation having already lost the provisional measures phase.

Lastly, in the *Questions relating to the Seizure and Detention of Certain Documents and Data* case (Timor Leste v. Australia), Australia complied with the orders issued by the Court in the provisional measures phase to return all the documents and data seized in December 2013 by Australia. Thus, Timor-Leste had successfully achieved the purpose of its Application and therefore wished to discontinue the proceedings.

In all the above instances, the Court did not reach the merits phase and did not award any form of reparation. It served however as a motive for the states involved and reparation was successfully offered.

In other instances, states decide to ask for the discontinuance of proceedings because they reached and concluded an agreement by which they resolved their dispute.

In 1989 Guinea Bissau asked the Court to judge on the validity of an arbitral award on delimitation between her and Senegal. The Court found on 12 November 1991 that the Arbitral Award is valid and binding and that the two states have the obligation to apply it. Before the conclusion of this judgment Guinea- Bissau had filed in 12 March 1991 an application to the Court for the *Maritime Delimitation* between it and Senegal. However, by a letter of 2 November 1995 to the Registry of the Court the Agent of Guinea-Bissau, invoking article 89 of the Rules of Court, confirmed that the two parties

[102]*Passage through the Great Belt (Finland v. Denmark),* Order of 29 July 1991 on the Request for the Indication of Provisional Measures.

[103]*Passage through the Great Belt (Finland v. Denmark),* Order of 10 September 1992 for the Removal from List, at 348.

[104]*Supra note* 48, at 12, 19.

reached an agreement on the disputed zone and had decided the discontinuance of the proceedings instituted in 12 March 1991.

An agreement was also reached by Ecuador and Colombia right after the filing of the written proceedings in the *Aerial Herbicide Spraying* case (Ecuador v. Colombia). The dispute was concerning environmental issues, arising out of Colombia's aerial spraying of toxic herbicides at locations near and across its border with Ecuador. Ecuador claimed that the spraying had caused serious damage to people, to crops, to animals, and to its natural environment, whereas it had posed grave risks of further damage in the future. According to Ecuador the agreement reached *"fully and finally resolves all of Ecuador's claims against Colombia."*[105] Among others, this Agreement established an exclusion zone, in which Colombia should not conduct aerial spraying operations, created a Joint Commission to ensure that spraying operations outside that zone had not caused herbicides to drift into Ecuador, set out operational parameters for Colombia's spraying programme, and also established a dispute settlement mechanism.[106] No reparation was given to Ecuador although the latter had asked the Court in its application to order Colombia to: *"indemnify Ecuador for any loss or damage caused by its internationally unlawful acts."*[107]

A rather unique agreement was reached in the case brought before the Court regarding the *Lockerbie incident* (Libya v. UK, USA). The Court had rejected the preliminary objections brought by UK and USA, but the case never reached the merits phase, since in 2003 by a joint letter the three parties notified the Court that they have agreed to discontinue the proceedings initiated by Libya. This was due to the agreement between UK and Libya to transfer the suspected terrorists to The Hague, The Netherlands to be judged there by a special Scottish Court sitting extraterritorially in The Hague pursuant to another treaty between UK and Netherlands. Evidently, this marks one of the more extraordinary ever settlement of international disputes.[108]

It can also happen however that the applicant although it could have won the case, it decides to resign. In the first case before the Court concerning the violation of specific

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[105] *Case concerning Aerial Herbicide Spraying (Ecuador v. Colombia),* Order of 13 September 2013, ICJ Rep. 2013, at 279.

[106] See for more details on the background of the 2003 Agreement: http://www.cancilleria.gob.ec/colombia-y-ecuador-acuerdan-limitar-una-zona-de-exclusion-para-aspersion-con-glifosato/

[107] Case concerning *Aerial Herbicide Spraying (Ecuador v. Colombia),* Application Instituting Proceedings, 2008, at 2.

[108] See A. Aust, "Lockerbie: The other case" (2000) 49 (2) *ICLQ* 278- 296.

rights under the *Vienna Convention on Consular Relations* (VCCR), Paraguay claimed that USA should provide restitution for the violations.[109] The case was about the conviction of Angel Francisco Breard, a Paraguayan national to the death penalty in the USA. According to Paraguay, USA should reestablish the situation existed before the USA failed to provide the required notification to Breard according to the VCCR. USA during the provisional measures phase challenged the availability of restitution, whereas it talked about the possibility of providing apologies if its violation was to be found. This dispute is similar with the cases of *Avena and others v. Mexico* and *LaGrand v. Germany*, which however had a different outcome, as we will see below. In Paraguay v. USA, the Court awarded provisional measures and ordered the United States to take al1 measures at its disposa1 to ensure that Breard is not executed pending the final Court's decision. Nevertheless, seven months after the judgment on provisional measures Paraguay asked the Court for the discontinuance of the proceedings.

Other cases that were eventually removed from the Court's list were the *Certain Criminal Proceedings in France* case (Republic of Congo v. France), where the Court rejected Congo's application for provisional measures and then the latter withdrew its application instituting proceedings. The Commonwealth of Dominica also withdrew its application against Switzerland regarding the *Status vis-à-vis the Host State of Diplomatic Envoy to the United Nations* case. Quite obscure would have been the *Certain questions concerning Diplomatic Relations* case (Honduras v. Brazil), where the Court would have to struggle with difficult questions regarding the Honduran crisis in 2009. However the application was withdrew five months after its submission. Belgium withdrew its application against Switzerland in the *Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters* case in the light of Swiss Federal Supreme Court's statement that "nothing can prevent a Belgian judgment, once handed down, from being recognized in Switzerland in accordance with the applicable treaty provisions."

In light of the foregoing cases it readily appears that different motives can lead states in eventually settling their disputes through other non-judicial means. Possibly the institution of proceedings in most cases suffices to spark off the desire of reaching a settlement, whereas in other cases the Applicant state compromises with its defeat because of objective circumstances, like in *Paraguay vs. USA* case.

[109] *Vienna Convention on Consular Relations (Paraguay v. United States of America)*, Application Instituting proceedings, 1998.

c. The Court awarded a specific form of reparation.

The landmark case under this rubric is arguably the *Diallo* case, which is also unique in the sense that the Court for the first time in its history determined the exact amount of compensation due.

In 1998 Guinea initiated proceedings before the ICJ against the Democratic Republic of Congo regarding its national Ahmadou Sadio Diallo. The case was about violation of Diallo's human rights relating to his detention without trial or any form of charge and his subsequent expulsion. The Court found that indeed DRC had indeed violated Diallo's rights under the International Covenant on Civil and Political Rights, the African Charter on Human and Peoples' Rights, and the Vienna Convention on Consular Relations. Guinea had asked the Court to declare these violations, whereas it also made a claim for reparation in the form of compensation. The Court held that "in addition to a judicial finding of the violations, reparation due to Guinea for the injury suffered by Mr. Diallo must take the form of compensation."[110] In absence of an agreement between the states, the Court made a judgment on Compensation in 2012 awarding an exact sum of compensation and ordering a specific date of its payment.

It is only the second time that the Court had the chance to proceed to the phase of awarding compensation. As the Court underlined in paragraph 161 of its judgment: "In the light of the circumstances of the case, *in particular the fundamental character of the human rights obligations* breached and Guinea's claim for reparation in the form of compensation […]."[111] As a first remark, we shall note that the Court took into account Guinea's claim for reparation and her specific preference in compensation. Of course its judgment was not solely influenced by Guinea's will. The Court justified its decision for compensation by stating that restitution was unavailable[112] and secondly by underlying the "fundamental character" of the obligations breached.[113] Although there is no pertinent rule de lege lata it seems that the Court acted by the implication that the nature of the obligations breached, ie human rights imposed an extra need of reparation. In *Mavromatis* case, the PCIJ had held that "in cases of injury to foreign nationals actual loss is a

[110]*Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Judgment, ICJ Rep. 2010, at 161 (hereinafter: *Diallo*, Judgment).
[111]*Id.*
[112]*Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Compensation, ICJ Rep. 2012, at 31 (hereinafter: *Diallo*, Compensation).
[113]*Diallo*, Judgment, at 161.

necessary condition for the award of damages.[114] Similarly, the Court in *Diallo* found that the DRC shall compensate Guinea for the injury *"flowing from the wrongful detentions and expulsion […], including the resulting loss of his personal belongings."*[115]

In the *Corfu Channel* Case the Court had also found that Albania owed UK compensation. Albania refused to appear at the compensation stage since it had contested the jurisdiction of the Court to rule on compensation (not on responsibility) on the basis of the Special Agreement.[116] The Court had to apply Article 53, para. 2, of the Statute and just checked through an expert opinion if the amounts claimed by the UK were *"well founded in fact and law"* or not. The Court finally fixed the amount of compensation due at 843, 947 Pounds.[117]

Apart from these two cases, the Court has indeed made judgments awarding different forms of reparation but has not proceeded in the phase of determination. These judgments are to be assessed below.

1. Restitution

In the 2002 *Land and Maritime Boundary between Cameroon and Nigeria* case, Cameroon claimed that Nigeria illegally invaded Lake Chad area and attacked the Bakassi peninsula. It also argued that it suffered material damage. The Court said that the territory was of Cameroon's possession and so Nigeria was under the obligation to withdraw its administrations and forces from the area. The Court actually rejected the responsibility claims of both parties' and ordered each of them to withdraw unconditionally and expeditiously from any territory over which the Court had declared that the party did not exercise sovereignty. By allocating sovereignty, the Court avoided questions of responsibility and considered them as a "moot point."[118]

Cameroon also had asked for guarantees of non- repetition. Although the Court found that this claim is an admissible submission as it had also done *LaGrand*, it held that it "cannot envisage a situation where either Party, after withdrawing its military and

[114]*Mavromatis Jerusalem Concessions,* PCIJ Ser. A, No 5 (1925).
[115]*Diallo,* Judgment, at 163.
[116] See discussion in the previous chapter.
[117]*Corfu Channel (United Kingdom v. Albania),* Assessment of the amount of compensation due from the People's Republic of Albania to the United Kingdom of Great Britain and Northern Ireland, Judgement, ICJ Rep. 1949, at 250.
[118]*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening),* Judgment, ICJ Rep. 2002, at 303, 452.

police Forces and administration from the other's territory, would fail to respect the territorial sovereignty of that Party."[119] Hence, the Court did not order any guarantees of non- repetition.

A specific and considerably easy way of restitution is the legal restitution, ie when the Court orders the review or reconsideration of regulation or judgments. As Gray defines it, legal restitution is the modification or repeal of a legislature, executive or judiciary measure of the respondent state, whereas material is the restoration or repair of material loss.[120]

In the 2009 *Avena* Judgment, the Court held that that the US breached its obligations under the Vienna Convention on Consular Relations (art. 36 (1) (b)). Mexico had asked the Court to order restitution[121] and more specifically the annulment of the convictions and sentences of the nationals concerned.[122] However, the Court correctly emphasized that "it is not the convictions and sentences of the Mexican nationals which are to be regarded as a violation of international law, but solely certain breaches of treaty obligations which preceded them."[123] Thus, only the review and reconsideration of all the national judgments was decided as a remedy by the Court and as we will repeatedly see in cases where the Court pronounces restitution, the means of the restitution are most of the times left with the state.[124]

In the *Jurisdictional Immunities of the State* case (Germany v. Italy; Greece Intervening), the Court awarded legal restitution in the form of the modification of a legal situation.[125] In particular, according to the Court, the Italian domestic court decisions infringing Germany's jurisdictional immunity must cease to have effect. However, following its usual line of restitution the Court said that this result is to be reached by Italy also "by resorting to other methods of its choosing."

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[119]*Ibid.* at 318-319.

[120] Gray, *Judicial Remedies*, at 13.

[121]*Avena and Other Mexican Nationals (Mexico v. United States of America)*, Application Instituting Proceedings, 2003, at 6: *"Consistent with the well-established principle of public international law on remedies, Mexico respectfully requests that the Court order restitutio in integrum, reestablish of the situation which would, in all probability, have existed if [the violations] had not been committed."*

[122]*Ibid.* at 278.

[123]*Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment, ICJ Rep. 2004, at 12, 60.

[124]*Ibid.* at 62: "the concrete modalities for such review and reconsideration should be left primarily to the US."

[125]*Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, ICJ Rep. 2012, at 137.

The Court awarded legal restitution also in the *Arrest Warrant of 11 April 2000* case (DRC v. Belgium) by ordering Belgium to cancel the arrest warrant issued against the Foreign Minister of the Democratic Republic of the Congo "by means of its own choosing."[126] In this case, the Court excluded the efficacy of a declaratory judgment and characteristically said that "the situation which would, in all probability, have existed if [the illegal act] had not been committed cannot be re-established merely by a finding by the Court that the arrest warrant was unlawful under international law." Belgium was ordered to cancel the arrest warrant against Mr. Yerodia and inform the authorities in charge.

In the *LaGrand* case, Germany wished to guarantee that "German nationals will be provided with adequate consular assistance in the future" and did not ask to receive material reparation." [127] More specifically, Germany in its application had sought for the Court to adjudge and declare, *inter alia*, that USA had violated its obligations under the VCCR, that the USA must from then and in the future would be in conformity with the Convention's obligations and that Germany is entitled to reparation. Specifying the claim of reparation, Germany asked for the United States to provide compensation and satisfaction for the execution of Karl LaGrand on 24 February 1999 and restitution in the case of Walter LaGrand.

The Court then, took note of the commitment undertaken by the USA to ensure implementation of the specific measures adopted in performance of its obligations under Article 36, paragraph 1 (b) of the Convention and found that this commitment must be regarded as meeting Germany's request for an assurance of non-repetition. However it also found that if German nationals have been sentenced to severe penalties without their rights under VCCR having been respected the USA "by means of its own choosing, shall allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in that Convention."

We should note here that sometimes it is hard to distinguish between the cessation of a continuing breach and restitution. In the *Questions relating to the Obligation to Prosecute or Extradite* case (Belgium v. Senegal) the Court found that Senegal must without delay submit the case of Hissène Habré to its competent authorities for the

[126]*Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, ICJ Rep. 2002, at 33.
[127]*LaGrand*, Memorial of the Federal Republic of Germany, 1999, at 6.24.

purpose of prosecution, if it does not extradite him.[128] This order is rather one of cessation of a continuing wrongful act rather than clear restitution. Similarly, in the *Whaling in the Antarctic* case (Australia v. Japan: New Zealand intervening), the Court decided that Japan "shall revoke any extant authorization, permit or license granted in relation to JARPA II, and refrain from granting any further permits in pursuance of that program."[129]

2. Compensation

In *Gabcikovo Nagymaros* case, which was issued in the Court by both parties under a special agreement, the ICJ observed that "Hungary and Slovakia are both under an obligation to pay compensation and are both entitled to obtain compensation", but reasoned that "given…that there have been intersecting wrongs by both Parties, the Court wishes to observe that the issue of compensation could satisfactorily be resolved in the framework of an overall settlement if each of the Parties were to renounce or cancel all financial claims and counter-claims."[130] The parties thus were entitled to compensation in relation to wrongful acts of different characters. Slovakia was entitled to compensation in relation to damage suffered "as a result of Hungary's decision to suspend and subsequently abandon the works at Nagymaros and Dunakiliti" and Hungary was "entitled to compensation for the damage sustained as a result of the diversion of the Danube." As Crawford observes by that way "the Court avoided awarding damages despite findings of responsibility."[131]

In the *Dispute regarding Navigational and Related Rights* case (Costa Rica v. Nicaragua), Costa Rica asked the Court to find certain violations on the part of Nicaragua but also requested for an order of cessation and non- repetition of the breaches and for reparation "in the form of the restoration of the prior situation and compensation in an amount to be determined at a later stage." The Court made some interesting remarks on those submissions. Firstly, the Court clarified that once its judgment finds that a conduct constitutes a wrongful act, there is no extra need for a cessation order and the wrongdoer state must cease the act immediately.[132] However, the court reserved the right to expressly

[128] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal),* ICJ Rep. 2012.
[129] *Whaling in the Antarctic (Australia v. Japan, New Zealand intervening),* ICJ Rep. 2014.
[130] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia),* Judgment, ICJ Rep. 1997, at 7, 81.
[131] Crawford, *State Responsibility.*
[132] *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua),* Judgment, ICJ Rep. 2009, at 148.

mention the obligation of the cessation of an ongoing wrongful act in special circumstances. As far as guarantees of non- repetition is concerned, the general rule that the Court follows is that good faith must be presumed and that the declared wrongful state will not repeat the wrongful conduct in the future.[133]

Moreover, the Court noted that cessation of the wrongful conduct is part of the reparation sought, whereas it decided that will not uphold the claim for compensation since "Costa Rica has not submitted any evidence capable of demonstrating that it has suffered a financially assessable injury." However, it found that Nicaragua has the obligation to compensate Costa Rica for material damages caused by Nicaragua's unlawful activities on Costa Rican territory and decided that, failing agreement between the Parties on this matter within 12 months from the date of this Judgment, the question of compensation due to Costa Rica will, at the request of one of the Parties, be settled by the Court, and reserved for this purpose the subsequent procedure in the case concerning *Certain Activities carried out by Nicaragua in the Border Area* (Costa Rica v. Nicaragua). In this latter case and the joined case of the *Construction of a Road in Costa Rica along the San Juan River* (Nicaragua v. Costa Rica), the Court found violations and also found that Nicaragua had the obligation to compensate Costa Rica for material damages caused by the former's unlawful activities on the latter's territory. Regarding to compensation the Court further decided that in absence of an agreement between the Parties within 12 months from the date of the Judgment, the question of compensation due to Costa Rica will, at the request of one of the Parties, be settled by the Court, and reserved for this purpose subsequent procedures.

3. Satisfaction in the form of official apologies or other.

Satisfaction in the form of official apologies or other is not to be found in the case law of the ICJ. Although states do ask sometimes for official public apologies in their applications, this form of reparation seems to be considered as quite heavy for the Court to order as such.

[133] *Ibid.* at 150. The Court refers to its previous cases: *Factory at Chorzow*, Merits, at 63; *Nuclear Tests (Australia v. France)*, Judgment, ICJ Rep. 1974, at 60; *Nuclear Tests (New Zealand v. France)*, Judgment, ICJ Rep. 1974, at 63; and *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction and Admissibility, ICJ Rep. 1984, at 101.

Moreover, sometimes the Court finds that reparation must be given to the victim state but does not specify it. In *Armed Activities on the Territory of the Congo (DRC v. Uganda)*, Congo had sought compensation for the injuries caused to it. The Court found that the Republic of Uganda is indeed under obligation to make reparation to the DRC for the injury caused and reserved quantum of damages in subsequent proceedings in case of failing agreement between the Parties. The finding was the same regarding Uganda's counterclaim, and thus Congo was also found to be under an obligation to make reparation to Uganda for the Injury caused. The case is still pending with the latest development to be the fixing of the time- limit for the filing of the Parties Counter-Memorials on reparations.[134]

d. Declaratory Judgments of Non- Compliance.

The Court sees its declaratory judgments as a form of satisfaction. However the wrongful state on the outcome of such a judgment is not engaged in any reparatory action although it is bound by the decision that finds its violations. A declaratory judgment simply declares the violation of the wrongdoing state. A declaration of the wrongful act by a third body, even if this is the World Court, is not included in the forms of reparation provided in the ARSIWA. However, according to the Court these declarations can serve the purposes of satisfaction whatsoever.

Declarations of wrongfulness are included in all the Court's judgments where a breach of a rule is found. Moreover, almost all applications instituting proceedings before the Court, ask for the Court to declare breaches and violations of international law. In the following section, we will address the decisions that do not provide for any further way of reparation considering that declaration of wrongfulness suffices.

Such cases is evidently the *Certain Questions of Mutual Assistance in Criminal Matters case* (Djibouti v. France), where Djibouti averred that France had violated its international obligations towards it regarding mutual assistance in criminal matters. The French government and French judicial authorities had refused to execute an international rogatory letter regarding the transmission to the judicial authorities in Djibouti of the record relating to the investigation in the "Case against X for the murder of Bernard Borrel", in violation of the Convention on Mutual Assistance in Criminal Matters

[134] See ICJ's Press Release 2016/ 39, available online at: http://www.icj-cij.org/docket/files/116/19300.pdf

between the two states of 1986. Djibouti claimed in its application that the Court should adjudge and declare the violations on the part of France and its entailing international obligations to *inter alia* cease the violation, to execute the international letter rogatory, give reparation and guarantees for no repetition. Djibouti in its application reserved the right to subsequently specify the appropriate form and nature of the reparation owed to it, which indeed did in its written memorial. However, the Court did not provide for any of the latter and just declared the violations committed by France.

What is interesting about the case is that Djibouti even though it asked for all the three forms of reparation its memorial, it did not ask for official apologies as a way of satisfaction. Applicants' lawyers in the memorial as well as during their pleading in oral proceedings, submitted that if the Court ascertains the unlawfulness of the acts, it would be as France would have offered official apologies.[135] Indeed, in its 2008 Judgment the Court determined that its finding of French violations constitutes appropriate satisfaction and that no other remedies should be awarded.[136]

Djibouti's memorial endorses thus the standard position of the Court that its judgments suffice as appropriate satisfaction of the violations determined and sheds light on the relationship of declaratory judgments and satisfaction. The same view is also shared by the Congolese memorial in the *Arrest Warrant of 11 April 2000* case, where the DRC sought "a formal finding of the unlawfulness of that act" as "an appropriate form of satisfaction, providing reparation for the consequent moral injury to the DRC."[137]

In the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* case (Bosnia and Herzegovina v. Serbia and Montenegro),[138] the Court found that Serbia breached its obligation to prevent genocide, which is according to the convention, an obligation of conduct, since states are under *"a duty to act which is not dependent on the certainty that the action to be taken will succeed in preventing the*

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[135]*Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Memorial of the Republic of Djibouti, 2007, at 180.

[136]*Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment, ICJ Rep. 2008, at 205, 2 (a): "Finds that the French Republic, by not giving the Republic of Djibouti the reasons for its refusal to execute the letter rogatory presented by the latter on 3 November 2004, failed to comply with its international obligation under Article 17 of the Convention on Mutual Assistance in Criminal Matters between the two Parties, signed in Djibouti on 27 September 1986, and that its finding of this violation constitutes appropriate satisfaction."

[137]*Ibid.* at 11.

[138]*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, ICJ Rep. 2007, at 232.

commission of acts of genocide, or even on the likelihood of that outcome".[139] Bosnia and Herzegovina had asked from the Court to order Serbia and Montenegro to pay reparations for the damage and prejudice suffered by the latter violations. Such an order of reparation was particularly difficult for the Court, since issues of causality had remained unclear. It is beyond the compass of the present dissertation to discuss in extenso causality in the law of international responsibility;[140] however, it shall be noted that it was of crucial importance for the Court to reveal the causal link between the atrocities in Srebrenica and Serbia's conduct in order to decide on owed reparation by Serbia. The peculiarity of this case lies in the fact that something that was irrelevant for the breach of the primary obligation was crucial in the context of damages. Assessing restitution, the Court welcomed Applicant's realistic approach by saying that "*the Applicant recognizes, it is inappropriate to ask the Court to find that the Respondent is under an obligation of restitutio in integrum. Insofar as restitution is not possible as the Court stated in the case of the Gabcíkovo-Nagymaros Project (Hungary/Slovakia), "[i]t is a well-established rule of international law that an injured State is entitled to obtain compensation from the State which has committed an internationally wrongful act for the damage caused by it."*[141]By excluding restitution, the Court turned to compensation, where the above described causal difficulties arose.

The Court finally, made a declaration of the Serbian breaches of obligations under the Genocide Convention. The Court held that its finding of violation constitutes appropriate satisfaction, and that the case is not one in which an order for payment of compensation or a direction to provide assurances and guarantees of non-repetition, would be appropriate, because of the lack of causal nexus between the breach and the damage.[142] Apart from appropriate satisfaction, the Court held that its judgment qualifies as the appropriate remedy for Serbia's failure to punish perpetrators of the genocide, in that it had ordered Serbia to co-operate with the International Criminal Tribunal for the former Yugoslavia and to transfer to The Hague persons wanted for genocide or other crimes under the Genocide Convention.[143] Bosnia's request for guarantees of non-repetition was rejected by the Court, on the grounds that a second genocide was not up to

[139]*Ibid.* at 461.

[140] See however, I. Plakokefalos, "Causation in the Law of State Responsibility and the Problem of Overdetermination: In Search of Clarity" (2015) 26 (2) *EJIL* 471- 492.

[141]*Ibid.* at 233; See also Article 36 ARSIWA.

[142]*Id.*

[143]*Ibid.* at 464.

occur. This good faith presumption is the standard that the Court uses to explain why a declaratory judgment serves the purpose of reparation.

In the *Pulp Mills on the River Uruguay* case (Argentina v. Uruguay), Argentina had asked for restitution in the form of the mill being dismantled.[144]. To rebut this claim, Uruguay invoked article's 35 (b) ARSIWA rule on disproportionality. The Court agreed with this argument by saying that in cases of breach of a procedural obligations restitution might be disproportionate.[145] Thus, it gave a declaratory judgment by saying that Uruguay had breached its procedural obligations under Articles 7 to 12 of the 1975 Statute of the River Uruguay and that the declaration by the Court of this breach constitutes appropriate satisfaction. The Court also noted that where restitution is not possible "reparation may take "the form of compensation or satisfaction, or even both."[146]

Another characteristic judgment of pure declaratory nature is the one concerning the *Application of the Interim Accord of 13 September 1995* case (the Former Yugoslav Republic of Macedonia v. Greece). Here the Applicant's claim was twofold. It asked the Court to adjudge and declare that Greece had violated its obligations under the Interim Accord and to order compliance with the respective provision (Art. 11 par. 1) and hence to cease objecting to the Applicant's membership of the North Atlantic Treaty Organization or other Organization.[147] However, the Court rejected all other submissions of the applicant and solely found that the Hellenic Republic, by objecting to the admission of the former Yugoslav Republic of Macedonia to NATO, had breached its obligation under Article 11, paragraph 1, of the Interim Accord.

A Declaratory Judgment was also given in the *Request for Interpretation of the Judgment of 15 June 1962 in the case concerning the Temple of Preah Vihear* case (Cambodia v. Thailand), where the Court, by way of interpretation, declared that Cambodia had sovereignty over the whole territory of the promontory of Preah Vihear, and that, in consequence, Thailand was under an obligation to withdraw from that territory the Thai military or police forces, or other guards or keepers, that were stationed there. The 1962 Judgment on the *Case Concerning the Temple of Preah Vihear* had imposed these obligations to Thailand as a way of restitution.

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[144]*Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, ICJ Rep. 2010, at 102.
[145]*Ibid.* at 104; Article 34, ARSIWA Commentary, para 3.
[146]*Pulp Mills*, Judgment, ICJ Rep. 2010, at 273.
[147]*Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece)*, Application Instituting Proceedings, 2008, at 23.

-Concluding Remarks on the Application of the Rule of Full Reparation by the Recent Case Law of the International Court of Justice.

In the last 30 years, 84 applications were submitted in the ICJ. 8 of them are still pending. 24 were found to be inadmissible, without jurisdiction, or the Court has dismissed them on other grounds. 17 of them were removed from the Court's list and in 16 cases no violation was found and hence no reparation was awarded. These numbers (categories b and a in above) aptly demonstrate that a large majority of cases is settled by the states without the need of a judgment on the merits and that a large amount of cases does not concern matters of reparation and that the states seek different outcomes (applicable law etc.). In the remaining 19 cases, the Court issued 5 pure declaratory judgments, whereas in 13 instances has awarded some form of reparation. The Judgment on *Diallo,* as we have already mentioned, is unique and constitutes a category on its own.

What is striking from the above analysis is obviously that the ICJ rarely indicates the content of a specific form of reparation even if it has found a violation of international law and has found that reparation is appropriate. The Court in numerous instances has recognized the existence of the different forms of reparation but its jurisprudence is extremely poor in actually awarding them by defining their content and extent. What is more, the Court is very laconic in explaining why and when it awards reparation; hence secure conclusions regarding its practice are difficult to be drawn.

We will proceed by commenting on specific issues arising out of the practice of the ICJ regarding reparation.

i. On Restitution.

Restitution, albeit the primary way of reparation, is the most difficult and most of the times impossible to comply with. This has been recognized by ARSIWA in art. 35 (a), (b), whereas also the tribunal in the Rhodope Forest Case recognized the sometimes unavailability of restitution.[148] In Chorzow factory case the Court decided that Germany should receive money instead of restitution, which had been impossible.

This is probably why the Court usually uses its standard phrase when it awards restitution: "by means of its own choosing."

[148]*Affaire des forets du Rhodope central (fond) (Forests of Central Rhodope) (Greece v. Bulgaria)*, 1933, RIAA 1389.

These remarks concerning restitution incite reasonable questions and doubts with respect to its supremacy among the other ways of reparation. Christine Gray was not convinced of this supremacy[149] and she even doubted it two years before the conclusion of the ARSIWA in her article "The Choice between Restitution and Compensation" in the European Journal where she called the ILC not to be overambitious about the availability of restitution let alone its primacy over other forms of reparation.[150]

In her book, Gray had concluded that the World Court had no consistent pratice regarding the law of remedies and rarely reffered to its own or others' bodies previous jurisprudence on the matter. In her words: *"Maybe pronouncements on the calculation of lost profits or remoteness of damage will not have much content when not applied to particular facts, but other issues such as interest, currency questions, the availability or primacy of restitutio in integrum could be settled by the Court."*[151] And she continued: *"Like cases are not treated alike; results are unpredictable; litigants are not clear on their rights. And the World Court has not contributed much. Its treatment of remedies seems somewhat perfunctory in contrast in contrast with its approach to substantive issues. For it, as for most writers, remedies are an afterthought. The conception of an international law of remedies seems weak. Remedies are something to be invented anew in each case."*[152]

ii. On Compensation.

It is evident that the World Court only rarely adjudicates compensation for the injured state. As we already mentioned, The PCIJ did so in *Wimbledon*[153], whereas the ICJ, has awarded compensation in the *Corfu Channel*[154] and *Diallo*[155]. As Dapo Akande observed in the aftermath of the Diallo Judgment, in EjilTalk Blog, that was only the second time, where the Court awarded a specific amount of compensation owed by one state to another on the basis of international law violations.[156] Admittedly, *Diallo* is not a

[149] Gray, *Judicial Remedies*, at 95-96.
[150] C. Gray, "The Choice between Restitution and Compensation" (1999) 10 (2) *EJIL* 413, at 414.
[151] Gray, *Judicial Remedies.*
[152] *Id.*
[153] *S.S. "Wimbledon"*, PCIJ Ser. A, No. 1 (1923), at 33; Gray, *Judicial Remedies*, at 77.
[154] *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)*, Compensation, ICJ Rep. 1949, at 244, 250.
[155] *Diallo*, Compensation, at 61.
[156] See D. Akanke's post available online at: http://www.ejiltalk.org/award-of-compensation-by-international-tribunals-in-inter-state-cases-icj-decision-in-the-diallo-case/ .

pure interstate dispute but rather an old fashioned case of diplomatic protection. In *Diallo* moreover the Court for the first time in its history calculated the amount of compensation itself and did not hire experts to assess the amount of damage as it had done for the calculation of damages for the loss of the British ships and the deaths and injuries of the naval personnel in the *Corfu Channel.*

With only one case of actual calculation of compensation, it is impossible to conclude on the method that the Court uses. In its Advisory Opinion concerning *Reparations for Injuries suffered in the service of the United Nations 1949* the Court had noted that it is not called upon to determine the precise extent of the reparation. However it gave some indications on the measurement of the reparation by saying that it "should depend upon the amount of the damage which the Organization has suffered as the result of the wrongful act or omission of the Defendant State and should be calculated in accordance with the rules of international law".[157]

Diallo decision is not of much help regarding the calculation of amount of compensation. The Court said that the determination of the amount should be based on "equitable considerations."[158] Guinea had sought 7, 310, 148 US Dollars and finally it was awarded with 85,000 US Dollars for non-material damage and 95, 000 US Dollars in total.

The Court though did not proceed on the awarding and the determination of the actual compensation due, on its own initiative but because of the failure of the parties to settle the matter within the provided six months. The failure of settlement among the parties gave the Court the chance to proceed in the Compensation phase.

This further step of determining the amount of compensation had been taken in the past by the Permanent Court in the *SS Wimbledon* case. The Court had ordered Germany to pay France 140,749.35 francs for refusing the SS Wimbledon access to the Kiel Canal.

In its commentary to Art. 36 of the ARSIWA the ILC noted that: "Of the various forms of reparation, compensation is perhaps the most commonly sought in international practice."[159] If that was true and state's main concern was the amount of compensation, then the applicants would not reserve this determination for subsequent proceedings. In

[157]*Reparation for Injuries Suffered in the Service of the United Nations,* Advisory Opinion, ICJ Rep. 1949, at 181.
[158]*Diallo*, Compensation, at 24.
[159] Article 36, ARSIWA Commentary, para. 2.

their applications states apparently ask for more than one outcomes and forms of reparation. Most of the applications examined above include a claim for declaration of some breach of international law and a claim for reparation, either general or particularized in a specific form. However, the practice of the Applicants is to reserve the reparation proceedings for later and thus the Court never proceeds on its own in awarding specific amount or extent of reparation. It does so only upon the failure of the parties to come to an agreement regarding this matter. This practice is assessed below.

iii. On the Reservation of Reparation Proceedings:

In *Chorzow's Factory* case, the Court never reached the stage of determining compensation because the parties did manage to reach a settlement.[160] Although the Court had decided that Poland was obliged to pay compensation to Germany, it reserved the calculation of the amount of compensation waiting for an expert report.[161]

A reasoning why the Court and the states use this method can be found in *Nicaragua* case, where the Court found that the USA was under an obligation to make reparation to Nicaragua but reserved the question of the amount of reparation for subsequent procedures. The Court explained that *"this would give Nicaragua the opportunity to accordingly amend its claim based on the breaches determined by the Court, which were eventually less far-reaching than the alleged breaches claimed by Nicaragua, and to give the USA a chance to present its views on the appropriate amount of compensation*" (it is reminded that the US had not participated in the proceedings on the merits).[162] Indeed, Nicaragua initiated proceedings for determining the amount of compensation.[163] However, the request was dropped after a regime change that took place in 1990. Other cases where the Court reserved for a subsequent procedure beyond Diallo were the *DRC v. Uganda* case, the *Dispute regarding Navigational and Related Rights* (Costa Rica v. Nicaragua) and the joined cases of *Certain Activities carried out by Nicaragua in the Border Area* and the *Construction of a Road in Costa Rica along the San Juan River*.

The Court's standard reserving phrase is *"….reserves the right subsequently to specify the appropriate form and nature of the reparation owed to it,"* in fact following

[160]*Factory at Chorzow*, Order, PCIJ Ser. A, No. 19, at 12.
[161]*Factory at Chorzow*, Merits, at 64.
[162]*Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America),* Merits, ICJ Rep., at 284.
[163]*Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America),* Memorial of Nicaragua on Reparation, 1988.

states' standard phase that *"the nature and amount of such restitution or reparation should in the absence of agreement - between the Parties be assessed and determined by the Court if necessary, in a separate phase of the proceedings."*[164]This practice confirms the opinion that actually states see Court's decisions as negotiating cards for a subsequent reparation agreement, if necessary. This explains why states are quite happy with declaratory judgments, because they can use them for the settlement of the dispute at stake.

iv. On Declaratory Judgments of Non- Compliance.

As Gray had already put it back in the 90s, *"declaratory judgments are the norm in the practice of the ICJ, rather than reparation, let alone restitution."*[165]Brown also has stated that declaratory judgments are *"the most common form of remedy in litigation before the PCIJ and ICJ"*.[166] Declaration of non-compliance is indeed a very common outcome of the Court's decisions and actually the outcome most commonly sought by the Applicants, which first and foremost ask for the Court to declare the respondent's violations.[167] According article 31 (1) ARSIWA all responsible states are under the obligation of reparation. Hence, once the Court has found the violation of an obligation, the finding of injury remains to be determined. Once injury is found, the obligation of reparation arises independently of whether the Court specifically awards it or not.

Another aspect of the Declaratory Judgments is their function as appropriate satisfaction. Most of the times the Court accompanies its declaratory judgments by the phrase: *"The Court determines that its finding that X has violated its obligation to Y under Z constitutes appropriate satisfaction"*.[168]

This third party satisfaction may sound quite a paradox. All forms of reparation are owed by the wrongdoer to the victim. How can the Court fictionally substitute the wrongdoer and offer satisfaction on its behalf? Indeed, judicial declarations of violation were not always considered as available form of remedy for breaches of international law.

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[164] See for example Nauru's Application Instituting proceedings in *Certain Phosphates Lands in Nauru (Nauru v. Australia)*, at 50.

[165] Gray, 1985, 56 BYIL 25, 39.

[166]C. Brown, *A Common Law of International Adjudication* (OUP 2007), at 208- 209.

[167] On the matter see also: J. McIntyre, "Declaratory Judgments of the International Court of Justice" (2012) 25 *Hague Yearbook of International Law* 107.

[168] Inter allia, Djibouti vs. France; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* case (Bosnia and Herzegovina v. Serbia and Montenegro); *Pulp Mills on the River Uruguay* case (Argentina v. Uruguay).

The first time that an arbitral tribunal made a violation's declaration and considered it as sufficient satisfaction for the breach was PCA's decisions in Carthage[169] and Manouba.[170] As Gray observes the Permanent Court of Justice did not consider its declaratory judgments as a remedy for the claimant state.[171] However, from the very first case of the International Court, there is an explicit indication for the remedial effect of such a judgment. In the *Corfu Channel* case the Court was called to answer whether the UK had violated the sovereignty of Albania and whether is there a duty to on the former's part to give satisfaction. The Court declared that Albania's sovereignty had been violated and that this declaration by the Court constitutes in itself appropriate satisfaction.[172] In the *Bosnian Genocide* case the sole remedy was the declaration of non- compliance, since the ICJ held that restitution was not possible and compensation not appropriate.[173]

However, we believe that a declaration of non-compliance cannot remedy the injuries caused to specific individuals. For that reason the Court should use this method of redress with caution and apply it only where appropriate. On the other hand, it is of importance to note that by declaring the violation of an international obligation the Court adverts the weakening of the obligation. It enhances its significance and existence in the international legal order. It reminds the offender that the Obligation is still binding.

v. On Further Settlement of Disputes.

A Court's decision is of multiple usage and can be seen as only one of the various steps in settling an international law dispute.[174]The judgments of the Court have a major contribution in the settling of disputes in international law. The different methods of peaceful settlement of disputes are to be found in article 33 of the UN Charter. In every dispute more than one methods can be engaged in order for the former to be resolved. In the case of judicial judgments it happens very often that the method of judicial settlement triggers other methods, such as for example negotiation. States are happy with declaratory

[169] 1913 France/ Italy II RIAA 449 at 460.
[170] 1913 France/ Italy II RIAA 463, at 475.
[171] Gray, *Judicial Remedies*, at 97.
[172]*Corfu Channel*, at 36.
[173]*Bosnian Genocide Case*, ICJ Rep. 2007, at 234–235.
[174] S. Georgievski, "The International Court of Justice and Diplomatic Settlement of Disputes: Could ICJ Judgments Play an Effective Role in the Negotiation of Interstate Disputes?" in in R. Wolfrum, M. Sersic, T., M. Sosic (eds), *Contemporary Developments in International Law: Essays in Honour of Budislav Vukas* (Brill 2015), at 709; A. Watts, "Enhancing the Effectiveness of Procedures of International Dispute Settlement" (2001) 5 *Max Planck Y. B. U.N. L.* 21.

judgments. They do not expect from the court to calculate amounts for compensation. And therefore they do not ask for that and they have adopted the practice of reserving that stage for later and only for the case that they do not manage to reach a settlement by themselves. They need the declaratory judgment in order to negotiate afterwards.

As Crawford observes, despite the many responsibility decisions delivered by the ICJ, "damages are not necessarily the best measure of responsibility."[175]

Moreover, the ICJ most of the times respects the choice of reparation made by the application and does not depart from it. Crawford brings as example to that the LaGrand case, where the Court refrained from discussion compensation because Germany had not asked for it.

It is noteworthy also that negotiating states may accept different reparation methods rather than those initially desired. In Chorzów Factory, for example, Germany decided to accept compensation after initially insisting on restitution of the factory. In the Passage through the Great Belt, Finland eventually accepted compensation in a negotiated settlement, after insisting on the deconstruction of the disputed bridge during the proceedings.

In general, we would say that the ICJ smartly enough, in lack of enforcement mechanisms has realized that the safer way for its decisions to be given effect is to keep them declaratory and discrete.

As we will see in the next chapter compensation is of greater importance in other dispute settlement bodies, such as mixed arbitration, investment treaty arbitration, human rights claims.

We also observe that many disputes reaching the ICJ do not even involve issues of damages. Instead a great number of cases aim to elucidate rules of international law and shape their conduct accordingly. Germany's position on that matter in the LaGrand case was rather clear. The purpose of Germany's claim in that case was to "to ensure that German nationals will be provided with adequate consular assistance in the future, and not receive material reparation."[176]

[175] J. Crawford, "The International Court of Justice and the law of State Responsibility", in C. Tams and J. Sloan, *The Development of International Law by the International Court of Justice* (OUP 2013), at 72.
[176] *LaGrand*, German Memorial, at 6. 24.

B. Reparation in other Judicial Mechanisms and Issues of Cross- fertilization.

According to Tomuschat's definition an "international tribunal" is *"a permanent judicial body established by an international legal instrument, utilizing pre-existing rules of procedure and rendering binding decisions based on international law."* There are indeed international bodies fulfilling these definitional criterions, such as the International Tribunal for the Law of the Sea or the International Criminal Court. There are however also other bodies without a permanent character, which are being established on an ad hoc basis and render binding decisions on international law as well.[177]

Although the World Court is indeed considered the leading judicial dispute settlement body of international law, most of the modern international disputes end up to other means of adjudicative dispute settlement. Admittedly, ICJ's jurisdiction is not an easy condition to fulfill. State consent is always required and there is no compulsory jurisdiction for any case or state. What is more there is no enforcement mechanism available and the mere existence of article 94 (2) of the UN Charter has been proved through the years inadequate.

In more detail, although the Court is a UN organ and all UN members are automatically members of the ICJ, this does not suffice for consent to be given to the Court's jurisdiction. Seventy two states have accepted the compulsory jurisdiction of the Court, most of them though have done so by including reservations in their declarations and rather extensive ones.

Applicant states most of the time struggle or even give up in bringing a claim before the World Court. A very characteristic example is that of Georgia's and its effort to apply against Russia on a rather unrelated basis, ie the International Convention on the Elimination of All Forms of Racial Discrimination.[178] On the other hand, decentralization of international system gives states the freedom to choose the way they wish to bring their claims against another or other states. This freedom has caused lately a notable development in the creation of new judicial mechanisms, which are stricter in terms of the acceptance of jurisdiction. That is to say that they are "one package deal" agreements, such as the European Convention of Human Rights or the WTO agreement, which leave

[177] On a brief summary of recent developments of International Court and Tribunals see: N. Combs, D., A. Mundis, U., O., Onwuamaegbu, M., B., Rees and J., A., Weisman, "International Courts and Tribunals" (2003) 37 Int'l L. 523.

[178] *Case Concerning the Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation),* Provisional Measures, ICJ Rep. 2008.

no way in cherry picking by being part of the agreement but not consenting to the jurisdiction of the respective settlement body.

To take things from the beginning, States are under the positive obligation to settle disputes by peaceful means of their choice if and when they seek to settle their disputes.[179] Article 33 of the UN Charter on pacific settlement of disputes provides that: "*The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.*" The provision does not distinguish between judicial or diplomatic methods of dispute settlement nor enumerates them in a hierarchical or temporal order. Thus, a wrongdoer state may offer reparation to the victim state without recourse to judicial mechanism or may use such a mechanism just for one of the aspects of the dispute, for instance to clarify the facts of it. For example in the Dogger Bank incident Russia recognized its responsibility but the facts of the incident were not clear. The states involved established for this purpose an inquiry committee under The Hague Convention. Upon the findings of that Committee Russia voluntarily paid a compensation of 66,000 Pounds for the fishermen and their families that had suffered injury.[180]

Diplomatic methods of dispute settlement, such as negotiation are also of great significance in the international sphere. Actually diplomacy and adjudication most of the times work together to resolve a dispute and sometimes it is not even easy to distinguish among the two. Such an obscure incident was the case concerning the differences between New Zealand and France arising from the Rainbow Warrior affair. France and New Zealand appointed the UN Secretary General as arbitrator and asked for a ruling, *inter alia*, on the amount of compensation owed by France for sinking the vessel in Auckland harbor. Although the parties gave the Secretary General the power to make a binding decision this did not suffice for him to be characterized as acting under his judicial capacity and so the arbitration that took place could not be considered as a judicial method of dispute settlement but rather as a binding conciliation. The crucial issue in this distinction is that of the application of the law. The Secretary General in that case had no obligation to make his decision according to law. Actually, he decided for the

[179] See also the UN GA Res. 2625/ 1970, The Declaration on Principles of International Law concerning Friendly Relations and Co- operation among States, at 2nd Principle.
[180] J., G. Merrills, *International Dispute Settlement* (CUP 2011).

agents to be transferred to a remote island in French Polynesia- according to Merrills this was an "ingenious" solution which would not had been available to a solely law-dependent arbitrator.[181]

This rich variety of dispute settlement methods along with the horizontal structure of the international law adjudicative system brings questions regarding the relations between adjudicative bodies, their practice in awarding reparation, the cross-fertilization between them and their possible complementarity in the awards of reparation.

As we saw in the previous chapter, other courts and tribunals also follow ARSIWA's rules on reparation even though they are considered as special regimes. This of course is not true for some areas which completely deviate from the ARSIWA logic.

-The World Trade Organization

The World Trade Organization for example has its own system of remedies, described in the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). The latter establishes a permanent Dispute Settlement Body (DSB).[182] The innovative characteristics of the WTO dispute settlement system is that it enjoys compulsory jurisdiction and that the interested parties do not have to prove *locus standi* or any particular interest in order to apply against the allegedly incompatible with WTO Law measures taken by other members. Any member can invoke other's member's violations and call for the creation of a panel. Moreover, article 22 of the DSU seeks to ensure compliance with the findings of the Panels or the Appellate Body and allows for counter-measures or temporary compensation. The finding of incompatibility by a Panel or the Appellate Body is followed by recommendations for the measure to be brought in conformity with the violated agreement according to article 19.1 DSU. In other words, the member found in breach of its WTO obligations has an obligation of *ex nunc* full compliance in the sense of withdrawing or modifying the incompatible measure.[183]

This approach clearly deviates from the general rule of retrospective reparation in the form of restitution, compensation and/ or satisfaction. According to Charmody, WTO

[181] *Ibid*, at 99.

[182] See for more detail Y. Guohua, B. Mercurio, and L. Yongjie, *WTO Dispute Settlement Understanding: A Detailed Interpretation* (Kluwer Law International 2005); WTO (edn), A Handbook on the WTO Dispute Settlements System (CUP 2004); J., F. Colares, "The Limits of WTO Adjudication: Is Compliance the Problem?" (2011) 14 *J Int'l Econ L* 403.

[183] P. Eeckhout, "Remedies and Compliance" in D. Bethlehem, D. McRae, R. Neufeld, and I. Van Damme (edn), *The Oxford Handbook of International Trade Law* (OUP 2010), at 447.

law is a "law of expectations."[184] Hence, all the awards look to the future, they have prospective nature.[185]The major objective of WTO is economic efficiency. This goal is not restored by repairing the harm done but only with the conclusion of a feasible agreement acceptable to all the parties. The philosophy of the WTO in matters of reparation is markedly different than the approach adopted by the ILC articles. The role of monetary compensation is profoundly diminished in the WTO system and appears only in the award enforcement provisions.[186] The enforcement mechanism existed in WTO Law is admittedly a very effective one. If the member concerned does not comply with the recommendations of the DSB, specific countermeasures may be taken upon authorization pursuant to article 22 of the DSU. Voluntary trade compensation can be part of those countermeasures as well as the suspension of concessions (article 22.1 DSU).

WTO Law does not follow the maxim *ubi jus, ibi remedium,* which is "sacrificed" in the name of compliance, economic efficiency and trade liberalization. The general concern is the withdrawal of the measure and the conformity of all measures taken by members with WTO agreements (see article 3.7 DSU). This peculiar network of remedies does not of course come without drawbacks. The concept of trade countermeasures can be turned into a "shooting itself in the foot" for the complainant that won, because the cost of those measures can be extremely high especially for poorer or developing countries.[187] Moreover, compensation is only available if the losing party agrees, whereas even if this is the case compensation does not redress those actually damaged by the wrongful measure.

-International Law of the Sea

In contrast, other organs stay closer to the ARSIWA system, such as for example the International Tribunal for the Law of the Sea. Admittedly, the latter is not such a busy

[184] C. Charmody, WTO Obligations as Collective, (2006) 17 (2) *EJIL* 419- 443.

[185] See however the Panel Report, Australia – Subsidies Provided to Producers and Exporters of Automotive Leather ("Australia – Automotive Leather"), WT/DS126/RW, 11 February 2000, para 6. 27 ff., taking the position that remedies could be also retrospective; See also G. Vidigal, "Re- assessing WTO Remedies: The Prospective and Retrospective" 16 (3) *Journal of International Economic Law* 505- 534.

[186] See, however, the proposals of the Report of the Consultative Board "The future of the WTO" and D. Sarooshi, The future of the WTO and its Dispute Settlement System, (2005) 2 *International Organizations Law Review* 129-151, at 144-146.

[187] M. Bronckers and van den Broek, "Financial Compensation in the WTO: Improving the Remedies of WTO Dispute Settlement" 8 (1) *Journal of International Economic Law* 101- 126, at 102; P. Grane, "Remedies under WTO Law", (2001) *Journal of International Economic Law* 755- 772; P., C. Mavroidis, "Remedies in the WTO Legal System: Between a Rock and a Hard Place" (2000) 11 (4) *EJIL* 763- 813; A., D. Mitchel, "Proportionality and Remedies in WTO Disputes" (2007) 17 (5) *EJIL* 985- 1008.

organ, since states seem to prefer the International Court of Justice for settling Law of the Sea disputes. UNCLOS itself has contributed to as a flagship treaty for the free choice of dispute settlement means. The Convention does not provide only for recourse to ITLOS for disputes relating to the interpretation and the application of it. There are four main choices in the section 2 of part XV of UNCLOS: ITLOS, the ICJ, an "Annex VII" arbitral Tribunal and an "Annex VIII" special arbitral tribunal.

The vast majority of ITLOS cases has been about prompt release of vessels. According to article 292 (1) UNCLOS, the procedure of prompt release is available in circumstances where the authorities of one State Party have detained a vessel flying the flag of another State Party. ITLOS has always treated applications for release as independent proceedings reaching a judgment and not an order as it happens in the case of incidental proceedings. However, the prompt release procedure is a very quick one and has priority according to article 112 ITLOS Rules. According to article 113 ITLOS Rules the Tribunal must find if the allegation of non-compliance with the provision 292 (1) is well-founded and if so it must determine the amount, nature and form of the "reasonable" bond or financial security to be posted for the release of the vessel or its crew.

For the purposes of the present enquiry, however, it is doubted whether that judgment will constitute reparation, e.g. restitution as the Court does not per se finds a violation of the freedoms of the flag State but just assess the appropriate amount of the bond to be granted to the coastal state. In this assessment it will consider the alleged violations on the part of the coastal state but ITLOS is not granted the powers under article 292 to settle the issue to this extend. Of relevance is the Saiga case, in which it became apparent that the prompt release proceedings are not the final ones and more pertinently the ones that will determine the responsibility and the reparation.

In its first case for the prompt release of the M/V Saiga, the Tribunal found that Guinea should promptly release the vessel and its crew from detention. Guinea had stopped and arrested a Vincentian ship named Saiga and had detained its crew. ITLOS also decided that this should be done upon security, consisting of the amount of gasoil discharged from the M/V Saiga and the amount of 400,000 United States dollars, to be posted in the form of a letter of credit or bank guarantee or, if agreed by the parties, in any other form.[188] In the second M/V Saiga case, the flag State, Saint Vincent and the Grenadines, claimed that the arrest as such of the vessel was in violation of the UN

[188] ITLOS, Case No. 1, *The M/V "Saiga"Case (Saint Vincent and the Grenadines v. Guinea), Prompt Release*, Judgment, 1997.

Convention on the Law of the Sea and requested appropriate reparation in the form of compensation. The Tribunal, indeed, held Guinea responsible for the violation of the respective rights, i.e. the freedom of navigation under the UNCLOS.[189] For this violation, ITLOS ruled that Guinea should pay compensation of overall $2 million.[190]Compensation was also awarded in No. 19 case, where the Court decided to award Panama compensation in the amount of US$ 388,506.00 with interest, for the confiscation of the gas oil and the amount of € 146,080.80 with interest, for the costs of repairs to the M/V Virginia G. But again this case was not a prompt release case but a classical interstate dispute. In assessing the amount of compensation the ITLOS will look whether it has awarded a prompt release judgment in respect of the same case before it. In this regard, there seems to be a certain complementarity regime, ie the court assess the bond appropriate in order for the vessel to be promptly released and then it takes into account that amount as well as the amount awarded by the national court to evaluate the final amount for compensation.

Provisional Measures applications are quite often in the docket of ITLOS.[191] Orders of provisional measures nevertheless are not judgments and cannot be assessed for reparational issues. In provisional measures procedure, the alleged violation is not examined so no responsibility can be found. Furthermore, ITLOS has only once dealt with a delimitation case, concerning the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal, whereas the dispute concerning the delimitation of the maritime boundary between Ghana and Cote d'Ivoire in the Atlantic Ocean is still pending.

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[189] ITLOS, Case No. 2, *The MM/V "Saiga" (No.2) Case (Saint Vinceent and the Grenadines v. Guinea),* Judgment, 1999, 167- 177.

[190]In all the other prompt release cases of ITLOS, the Tribunal had just decided the prompt release of vessels along with the posting of a bond or security.ITLOS, Case No. 5, *The "Camouco" Case (Panama v. France), Prompt Release,* Judgment, 2000; ITLOS, Case No. 6, *The "Monte Confurro" (Seychelles v. France), Prompt Release,* Judgment, 2000; ITLOS, Case No. 11, *The "Volga" Case (Russian Federation v. Australia), Prompt Release;* ITLOS, Case No. 13, *The "Juno Trader" Case (Saint Vincent and the Grenadines v. Guinea Bissau), Prompt Release* Judgment, 2004; ITLOS, Case No. 14, *The "Hoshinmaru" Case (Japan v. Russian Federation), Prompt Release,* Judgment, 2007.

[191] ITLOS, Case No. 3 & 4, *Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan), Provisional Measures,* 1999; ITLOS, Case No. 10, *The MOX Plant Case (Ireland v. United Kingdom), Provisional Measures,* 2001; ITLOS, Case No. 12,*Case Concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore), Provisional Measures,* 2003; ITLOS, Case No. 20, *The "ARA Libertad" Case (Argentina v. Ghana), Provisional Measures,* 2012; ITLOS, Case No. 22, *The "Arctic Sunrise" Case (Kingdom of the Netherlands v. Russian Federation), Provisional Measures,* 2013; ITLOS, Case No. 24, *The "Enrica Lexie" Incident (Italy v. India), Provisional Measures,* 2015.

-International Arbitration

The first part of Gray's book on Judicial Remedies was dedicated to international arbitration practice. Gray's overall conclusion based on a thorough examination of arbitral practice was that there are not set rules for the awarding of judicial remedies and that arbitral awards do not necessarily give any primacy to restitution.[192] International Arbitration, which according to Collier and Lowe is *"the determination of a difference between States (or between a State and a non- State entity) through a legal decision of one or more arbitrators and an umpire, or of a tribunal other than the International Court of Justice or other permanent tribunal,"*[193] can be *ad hoc* or institutionalized. The case law of the former is dispersed and extends to an unfathomable number and kind of disputes. States create their own tribunals, rules of procedure and terms of reference. Arbitration may deal with as many different kind of disputes as Courts, such as for example cases that call for the determination of land and maritime boundaries.[194]

Mixed arbitration has expanded vastly especially in the field of investment law. Investment arbitration under ICSID is at present one of the most active areas of international law in terms of dispute settlement. The Washington Convention offers the basis for the settlement of investment disputes between nationals of one Contracting State against another Contracting State, if both have submitted to the jurisdiction of ICSID.[195] The ICSID framework offers many advantages, the more prominent of which is that under the Washington Convention, both states and private parties have a direct right to enforce the awards in the domestic courts of the contracting parties. Moreover, ICSID arbitrations present a relative coherence in the application of the law.

As far as the issue of reparation is concerned, we shall note that most of the times the applicant is a private investor, who has interests different in nature comparing to states' interests. The investor for example has little interest in restitution and would rather take their money back. This is why cases of expropriation for example are very often settled by lump sum payments.[196] Compensation in general is in investment arbitration

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[192] Gray, *Judicial Remedies*, at 13-14, 16.

[193] J. Collier, V. Lowe, *The Settlement of Disputes in International Law: Institutions and Procedures* (OUP 1999), at 31.

[194] *Inter alia*, Abyei Arbitration, 48 *ILM* 1254 (2009); Guyana/ Suriname Arbitration, 47 *ILM* 164 (2007); Red Sea islands Arbitration (Eritrea/ Yemen) 40 *ILM* 900 and 983 (2001).

[195] Washington Convention, Chapter II (articles 25- 27).

[196] National Commissions created by lump sum settlement agreements are a common practice for economic injuries arising out of nationalizations and expropriations. See R. Lillich and B. Weston, D. Bederman, *International Claims: Their Settlement by Lump Sum Agreements (1975- 1995)* (Brill 1999).

the most sought and the most often given form of reparation.[197] Investment arbitration case law has created a very extensive analysis of the methodology of calculating compensation.[198] The relevance of ARSIWA's primacy of restitution in mixed investment disputes is actually diminished. According to article 33 (1) *"the obligations of the responsible state set out in this part may be owed to another State, to several States, or to the international community as a whole."* The Special Rapporteur, James Crawford, has explicitly explained that "*the ILC Articles make no attempt to regulate questions of breach between a state and a private party such as a foreign investor' and that'[t]hose rules must be found elsewhere in the corpus of international law, to the extent that they exist at all.*"[199] This does not mean though that investment treaty arbitration does not use the general ARSIWA framework of remedies, when they are in line with investment law special provisions.

Generally, however, if a state has caused injury to the investor by breaching its international obligations, the tribunal will usually award financial compensation. Monetary compensation is actually the only type of remedy indicated by the ICSID Convention. This however, does not indicate that there is a general rule against the award of non-pecuniary remedies.[200] Article 54 (1) of the ICSID Convention provides: *"Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State."* It seems that under ICSID Rules a tribunal may not award a non-pecuniary remedy in the absence of a monetary alternative. Art. 43(1) of the US Model BIT 2004 provides: *"Where a tribunal makes a final award against a respondent, the tribunal may award, separately or in combination, only: (a) monetary damages and any applicable interest; and (b) restitution of property."*

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[197] J. Crawford, "Flexibility in the Award of Reparation: The Role of the Parties and the Tribunal" in R. Wolfrum, M. Sersic, T., M. Sosic (eds), *Contemporary Developments in International Law: Essays in Honour of Budislav Vukas* (Brill 2015), at 693.

[198] See C. Soederlund, "Compensation under International Law in Cases of Treaty Breach Resulting in Impairment of Business Performance" (2012) 13 *The Journal of World Investment and Trade* 279-293; I. Marboe, *Calculation of Compensation and Damages in International Investment Law* (OUP 2009).

[199] J Crawford, "International Arbitration and the ILC Articles on State Responsibility" (2010) 25(1) *ICSID Rev* 127, at 130.

[200] See also, B. Sabahi, *Compensation and Restitution in Investor- State Arbitration: Principles and Practice* (OUP 2011).

-International Human Rights Law

International Human Rights Law allows both states and individuals, under certain circumstances, to bring claims against states in international tribunals.[201] What differentiates human rights obligations from other international obligations is the lack of reciprocity as well as the fact that they are inward looking norms and do not concern per se inter- state relations.[202] As the Inter- American Court has put it *"the object and purpose of human rights treaties is the protection of the basic rights of individual human beings […] In concluding these human rights treaties, the states […] assume various obligations, not in relation to other states, but towards all individuals within their jurisdiction."*[203]Human Rights Obligations belong to art. 48 (1) (b) of ARSIWA, which pertains to obligations due to the international community as a whole, ie *erga omnes* obligations.[204] The protection of individuals is the main objective of human rights law. This distinct legal law nature of human rights has implications also with regard to the issue of reparation. It goes without saying that rights without remedies for their violations are useless. For individuals is even more important to find redress for their inflicted injuries. The majority of Human Rights disputes are applications of individuals against states.

The specific nature of human rights creates some incompatibilities with traditional remedies. Very often human rights violations are irreparable (e.g. right to life) and compensation is considered inappropriate because it tolerates the continuation of the wrong. Payment is sometimes more affordable for the state than compliance.[205] What is more, the injuries caused in a large number of cases are not measurable. D. Shelton endorses the view that the primary goal of human rights remedies should be restitution rather than compensation.[206] However, most of the times this is not possible. Human Rights Courts and Tribunals often struggle between a rights- maximizing and an interest-

[201] See for example the individual complaint mechanism under the European Convention on Human Rights (article 34).

[202] A. Tzanakopoulos, "Collective Security and Human Rights" in Erika de Wet (eds.) *Hierarchy in International Law: The Place of Human Rights* (OUP 2012).

[203] The Effect of Reservations on the Entry into Force of the ACHR (articles 74, 75) (1982) 2 Inter-Am. Ct.H.R. (ser. A), (1982) 3 *H.R.L.J.* 153.

[204]*Barcelona Traction, Light and Power Company, Ltd. (Belgium v. Spain),* ICJ Rep. 1970, Second Phase, at 32.

[205] D. Shelton, *Remedies in International Human Rights Law* (2nd edn, OUP 2006), at 101 (hereinafter: D. Shelton, *Remedies* (2006)).

[206] D. Shelton, *Remedies* (2006), at 21.

balancing approach.[207] The former refers to the injured individual and the latter to the state and the corresponding society. An interesting matter is the one of declaratory judgments by the European Court of Human Rights. It is doubtful whether declaratory judgments are a sufficient redress for victims of human rights violations. Of course the importance of a judicial determination of the violation must not be underestimated, especially when the wrongful state receives it in good faith and returns to legality. On the other hand, restitution and compensation would be a more effective redress for the victims. Restitution though as we already mentioned is most of the times impossible in human rights violations cases. Also, compensation, despite all the drawbacks, seems to be the most appropriate remedy for material or moral human rights injury. Satisfaction could be of some significance here, as well as guarantees of non- repetition.

The European Court of Human Rights is one of the most successful international judicial bodies and probably the one with the largest amount of pending applications.[208] However the majority of the cases are not interstate and for that reason not relevant in the present paper. A prominent however interstate ECtHR case gave an award on reparation. In 2001 the Grand Chamber had to decide on the 1974 Turkish invasion in Cyprus. The judgment indeed found numerous violations of the ECHR by Turkey, arising out of the military operations it had conducted in northern Cyprus in 1974, the continuing division of the territory of Cyprus and the activities of the "Turkish Republic of Northern Cyprus" (the "TRNC"). Regarding the issue of just satisfaction, the Court had held back then that it was not ready for a decision and adjourned its consideration, whereas the procedure for execution of the judgment was vested with the authority of the Committee of Ministers.

In the 2014 judgment on application no. 25781/ 94 in the case Cyprus v. Turkey the ECtHR made a ruling on an application for just satisfaction (article 41 ECHR). According to the judgment Turkey has to pay Cyprus 30,000,000 Euros for the non-pecuniary damage suffered by the relatives of the missing persons, and 60,000,000 Euros in respect of the non-pecuniary damage suffered by the enclaved Greek-Cypriot residents of the Karpas peninsula. The Court also made clear that these amounts must be distributed to the individual victims under the supervision of the Committee of Ministers. To reach that ruling the Court had first to discuss whether article 41 ECHR on just satisfaction was applicable in inter- state cases. The Court recalled the general

[207] *Id.*

[208] By the end of 2016, there are 75, 250 pending cases: http://www.echr.coe.int/Documents/Stats_pending_2016_BIL.pdf .

international law rule on the obligation of reparation in the case of a violation of international law by a state. The Court although recognized the specific nature of article 41 it did not interpret it narrowly and upheld its applicability in interstate cases. Moreover, in its 2011 submission Cyprus requested the Court to adopt a declaratory judgment. The Court answered that there was no need for such a judgment, since Turkey was either way formally bound by the judgment according to article 46 of the Convention.

We would say that although the regime under ECHR is a lex specialis, the European Court of Human Rights awards compensation rather than satisfaction in the terms of ARSIWA.

-International Criminal Law

International criminal law has also developed as to award compensation to the victims of international crimes. In that respect, there is a common provision included in the "Rules of Evidence and Procedure" of the International Criminal Tribunal of the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) and the Special Court for Sierra Leone (SCSL) which reads as follows: *"(a) The Registrar shall transmit to the competent authorities of the States concerned the judgement finding the accused guilty of a crime which has caused injury to a victim.* ***(b) Pursuant to the relevant national legislation, a victim or persons claiming through the victim may bring an action in a national court or other competent body to obtain compensation.*** *(c) For the purposes of a claim made under paragraph (b) the judgement of the Tribunal shall be final and binding as to the criminal responsibility of the convicted person for such injury."*[209]

The above provision is in line with SC's Resolution 827 (1993) adopting ICTY's Statute, which declared that *"the work of the International Tribunal shall be carried out without prejudice to the right of the victims to seek, through appropriate means, compensation for damages incurred as a result of violations of international humanitarian law."* According to Crawford however, *"this mechanism has not been very successful in practice. It appears that no application was made by victims pursuant to it, and in 2000 judges of the ICTY admitted that the rule was 'unlikely to produce substantial results in the near future."*

[209] Emphasis added.

The situation is different in the International Criminal Court. Paragraphs 1 and 2 of Article 75 of the Rome Statute provide: *"1. The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting. 2. The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation."* The Rules of Procedure and Evidence provide: *"taking into account the scope and extent of any damage, loss or injury, the Court may award reparations on an individualized basis or, where it deems it appropriate, on a collective basis or both."*

The provisions follow the general rule of reparation consisting of restitution, compensation and satisfaction. The Court further provides a mechanism for enforcing its order for reparation through its state parties. However most of the times this has proved ineffective, because convicted persons claim indigence. Therefore, the Court has also set up a Trust Fund for Victims *"for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims."* This Fund may receive money and other property collected through fines or forfeiture or donations from private individuals and corporations. The Fund has started operating and is currently functioning as a type of NGO in states under investigation by the Court.[210]

-Other (quasi-) judicial bodies: compensation commissions

Other organs exercising judicial functions also issue awards on reparation. The United Nations Compensation Commission's (UNCC) purpose is to settle claims arising out from Iraq's invasion to Kuwait in August 1990. It was created by the UN Security Council according to Resolution 687 (1991) under Chapter VII of the UN Charter.[211] The UNCC is not a judicial nor an arbitral organ. Its function is mostly focused on fact-finding and evaluating losses. The procedure before the UNCC does not involve any discussion over responsibility. It deals only with questions of causation and quantum. The Security Council through 687 (1991) resolution which is binding on all member states according art. XXV of the UN Charter held irrevocably that Iraq was responsible for

[210] See online at: www.trustfundforvictims.org

[211] UNCC web site: www.unog.ch/uncc ; B. G. Affaki, The United Nations Compensation Commission: a new era in claims settlement? (1993) 10 (3) *Journal of International Arbitration* 21.

losses emanating from its invasion of Kuwait.[212] So, the procedure before the UNCC is more of a procedure similar to those taking place in the national "round" of lump sum settlements where claimants have to prove their losses before a national "claims commission." However, since it resolves the disputed claims in a final way, it can be considered as a quasi-judicial organ.[213]

The UNCC deals with individualized compensations.[214] Its decisions are going so deep in compensation, causation and related matters. It has proved itself as an effective and flexible system to deal with war reparations. Although public international law's objective is inter- state relationships, war victims are specific individuals. It is rather fairer for compensation to be awarded to them and the UNCC procedure is considered an effective procedure to be followed after state responsibility arising out of a wrongful act has been found.[215] Although sparsely, the panel of commissioners has invoked ARSIWA in some of its decisions.[216]

Similarly, the Eritrea- Ethiopia Claims Commission was organized by the Permanent Court of Arbitration in The Hague. It awarded damages, inter alia, for the unlawful occupation of Eritrea by Ethiopia. It was established in the aftermath of the Eritrea–Ethiopia war, pursuant to the Algiers Agreement.[217] It was conceived as a mass claims procedure, but finally the two states preferred not to elect the option of filing mass claims on behalf of individuals and instead filed their own claims. In the final award relating on Eritrea's damages claims, the Commission awarded compensation under 17 different heads of damages (totaling US $163,520,865)[218] whereas, in the final award

[212] "for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals or corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait" (para 16).

[213] On nature of the Commission see the Secretary- General's report: UN Doc. S/AC.26/1991/6, 23 October 1991.

[214] There was also category F dealing with claims by states and International Organizations.

[215] M. E. Schneider, "How fair and efficient is the United Nations Compensation Commission system? A model to emulate?" (1998) 15 (1) *Journal of International Arbitration* 15.

[216] See for example article 36 in Panel of Commissioners of the United Nations Compensation Commission S/AC.26/1999/6 and S/AC.26/2000/2; aarticle 31 in Panel of Commissioners of the United Nations Compensation Commission S/AC.26/2003/15 and S/AC.26/2005/10; article 35: Panel of Commissioners of the United Nations Compensation Commission S/AC.26/2003/15.

[217] See more in Crawford. Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea, 12 December 2000, 2138 UNTS 94, Art. 5.

[218] *Eritrea's Damages Claims*, Final Award, (2009).

relating to Ethiopia's claims, it awarded compensation under 37 different heads (totaling us$174,036,520).[219]

Much has been written about the decentralization of the International Dispute Settlement system and the proliferation of the International Courts and Tribunals.[220] This phenomenon has indeed a strong effect on International Law, in the meaning that on the one hand there are many new special regimes of international law that have been created[221] and on the other, that the increasing number of different and hierarchically horizontal dispute settlement bodies interpret the respective international law rules on their own way. This chaotic legal environment is very possible to produce conflicting decisions.[222]

The Mox Plant case for instance, was a dispute on the construction and operation of a mixed oxide fuel plant at Sellafield in the UK, which was brought before four different international for a, ie the Arbitral Tribunal established under Annex VII and ITLOS, the ad hoc Arbitral Tribunal established under the OSPAR Convention, and the ECJ. Ireland had claimed that the UK was, *inter alia*, in breach of article 123 of the UNCLOS, because it failed to co-operate in the framing and enforcement of anti- terrorist measures on the UK's Sellafield nuclear plant on the Irish Sea shores. ITLOS ruled on provisional measures requested by Ireland pending the constitution of the Annex VII Tribunal (both under the UNCLOS regime).[223]The problem of competing jurisdictions arose because of an incipient conflict between the ECJ and the Arbitral Tribunal sitting

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[219]*Ethiopia's Damages Claims*, Final Award, (2009).

[220]*Inter alia*, Y. Shany, *The Competing Jurisdictions of International Courts and Tribunals* (OUP 2003); A. Reinisch, "The Proliferation of International Dispute Settlement Mechanisms: The Threat of Fragmentation vs. the Promise of a More Effective System? Some Reflections from the Perspective of Investment Arbitration" in *International Law between Universalism and Fragmentation: Festschrift in honour of Gerhard Hafner* (Martinus Nijhof Publishers 2008); T. Buergenthal, "The Proliferation of Disputes, Dispute Settlement Procedures and Respect for the Rule of Law" (2006) 22 (4) The Journal of LCIA Worldwide Arbitration 495- 499; E., U. Petersmann, "Justice as Conflict Resolution: Proliferation, Fragmentation, and Decentralization of Dispute Settlement in International Trade" (2006) 27 (2) University of Pennsylvania Journal of International Economic Law, 273- 366.

[221] Some of the modern adjudicative dispute settlement bodies have proven very active and successful, like for example the European Court of Human Rights. To the other extreme, the European Nuclear Energy Tribunal had never had a single case.

[222] V. Lowe, "Overlapping Jurisdiction in International Tribunals" (1999) 20 Aust. YBIL 191; P. Vigni, "The Overlapping of Dispute Settlement Regimes: An emerging issue of International Law" (2001) 11 Italian Y. B. Int'l L. 139.

[223]*The Mox Plant* case *(Ireland v. United Kingdom)*, Provisional Measures, ITLOS. See relevant materials available online at: https://www.itlos.org/en/cases/list-of-cases/case-no-10/ .

under Part XV and Annex VII of the UNCLOS. The dispute in question was one over which UNCLOS, OSPAR Convention and EC Law applied. The dispute was finally withdrawn from the UNCLOS Tribunal due to an ECJ judgment stating that the case belongs to its jurisdiction.[224]

The No. 7 case concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South- Eastern Pacific Ocean was removed from the Tribunal's list. This dispute between Chile and European Union which was settled by negotiation[225] is another example of conflicting jurisdictions between international Courts. Chile had denied access to its ports to foreign swordfish-fishing vessels. The EU brought this alleged violation before the Dispute Settlement Body of the WTO, whereas Chile applied to ITLOS invoking the protecting migratory species provision.

From a dispute settlement perspective though, this proliferation may have positive results in the settlement of disputes in international community.[226] Many new tribunals deal with cases of specific nature and require from states a narrow jurisdictional basis. This counterbalances the reluctance of states to accept compulsory jurisdiction of a court of a general nature like the ICJ.[227] This is readily evident for example in the Law of the World Trade Organization as explained above.

As far as the phenomenon of complementarity is concerned, we should note that no complementarity issues have arisen yet with respect to awards of reparation. By definition the International Criminal Court is a complementary to national courts organ.[228] According to the preamble and article 1 of the Rome statute, the international criminal court is an institution that *"shall be complementary to national criminal jurisdictions."* That is to say that the Court only has the power to act when domestic authorities have failed in acting against the enumerated in article 5 crimes.[229] This is a form of complementarity pertaining to the relationship between national and international

[224] ECJ Case C-459/03, *Commission v. Ireland*, Judgment of the Court (Grand Chamber) (2006), at 139.

[225] See details on the understanding of the two parties available online at: https://www.itlos.org/fileadmin/itlos/documents/press_releases_english/PR.141-E.pdf

[226] S., W. D. Han, "Decentralized Proliferation of International Judicial Bodies" (2006- 2007) 16 *J. Transnat'l L. & Pol'y* 101.

[227] O. Vicuna, *International Dispute Settlement in an Evolving Global Society: Constitutionalization, Accessibility, Privatization* (CUP 2004).

[228] M. Benjing, "The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight against Impunity" (2003) 7 *Max Planck Yearbook of International Law* 591- 632.

[229] See also article 17 of the Rome Statute.

courts.[230] Complementarity is a notion well established in the context of international criminal law but we can find it also in other frameworks, such as in ITLOS as referred above. Another relevant example could be the rules of diplomatic protection and especially those related to the exhaustion of local remedies, whereas issues of complementarity can also be found in the fields of international investment, international trade law and international commercial arbitration.[231]

[230] M. Jackson, "Regional Complementarity: The Rome Statute and Public International Law" (2016) 14 *Journal of International Criminal Justice* 1061- 1072.

[231] J., D. Fry and J., I. Stampalija, "Towards an Agreement on Investment in MERCOSUR: Conflict and Complementarity of International Investment Law and International-Trade-in Services Law" (2012) 13 *The Journal of World Investment and Trade* 556- 596; S. Fietta and J. Upcher, "Public International Law, Investment Treaties and Commercial Arbitration: an emerging system of complementarity?" (2013) 29 (2) *Arbitration International* 187- 222.

Conclusions

It has become apparent from the foregoing that under the decentralized international law dispute settlement system the practice on reparation is not unified and different forms of reparation are awarded depending on various factors. The rules of ARSIWA are of general application and set out the baselines of the reparation procedure, but international dispute settlement bodies have developed their own ways of specifying, implementing and prioritizing them.

As mentioned in the first page of this dissertation the outcome of a judicial decision is what matters the most for the interested parties. The operative clause of each decision has implications for the further development of the interstate relations and the final settlement of the relevant dispute. Interstate disputes are more complex and multilevel than national or mixed cases. For that reason, adjudication is very often just one of the necessary steps to be taken for the resolution of a conflict. Moreover, the purposes and objectives of international justice are broader than those of national justice or those of an individual resorting to a domestic or even international Court. Individuals seek concrete, specific forms of reparation. This is why declaratory judgments in human rights cases are a major flaw in the system. On the other hand, for states recourse to international justice is only one of their possibilities to resolve a dispute and certainly not the most common one.

The phenomenon of the proliferation of international tribunals and their own rather rich case-law shows that states are looking for new ways to settle their disputes and are increasingly reticent to have recourse to the traditional system of the ICJ. Furthermore, when it comes to the phase of reparation judicial means may seem less attractive to states comparing to other means. The International Court of Justice, cognizant of this policy choice of the litigant parties is very cautious in matters of reparation.

In particular, it is true that since the era of the Permanent Court of International Justice, the Court had recognized itself as serving the purpose of the as friendly as possible settlement of the dispute. In the *Free Zones of Upper Savoy and the District of Gex* case, the PCIJ underlined that *"[T]he judicial settlement of international disputes, with a view to which the Court has been established, is simply an alternative to the direct and friendly settlement of such disputes between the Parties; as consequently it is for the*

Court to facilitate, so far as is compatible with its Statute, such direct and friendly settlement."[232]

The settlement of a dispute is a broad notion, part of which is also the issue of reparation for an internationally wrongful act. It became readily apparent that reparation is something preferably dealt with in negotiation and not in Court, especially when it comes to ICJ cases. However, we must not think that the law is ignored in those procedures. International law and the possibility of adjudication, if there is jurisdiction, may well influence the terms of the further of the prior diplomatic settlement.[233] According to Merrills, although international disputes are generally resolved without adjudication, law plays a significant part in defining the points in issue, and in providing the framework for negotiation or other way.[234] This is also the reason why declaratory judgments are the remedy most often sought and granted in inter-state litigation. The great drawback of adjudication in matters of reparation would be the "winner-takes-all" problem. This solution, though might be fair in some cases, is not favorable by states.

Another main concern against international adjudication and even generally against international law is the lack of enforcement mechanisms analogous to domestic law systems. Arguably, enforcement is the ultimate goal of every law system. Law that cannot be enforced is useless. According to V. Lowe, unless there are some consequences in failing to fulfilling obligations, they are merely aspirations or commitments rather than rules of conduct.[235] And actually enforcement and implementation of International Law have been indeed strongly doubted due to its horizontal structure. Enforcement does not come with a single context. It may refer to the implementation of an international obligation, the performance of a treaty or the enforcement of a judicial decision. The compliance with a judicial decision is the compliance with an international obligation.[236]

The implementation of international law is a supra law matter.[237] There are though some enforcement clauses in international law, especially regarding WTO and

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[232] *Free Zones of Upper Savoy and the District of Gex*, Order of19 August 1929, P. C.I.J., Series A, No. 22, at 13.

[233] V. Lowe, *International Law* (OUP 2006), at 135.

[234] J., G. Merrills, *International Dispute Settlement* (5th edn, CUP 2011), at 291.

[235] V. Lowe, *International Law* (OUP 2007), at 119.

[236] D. Shelton, *Remedies*, at 8: *"Unless a duty is somehow enforced, it risks being seen as a voluntary obligation that can be fulfilled or ignored at will."*

[237] P. Pazartzis, *I Dikaiodotiki Leitourgia sto Diethnes Dikaio* (Nomiki Bibliothiki 2015), at 165.

Human Rights Law.[238] As far as the enforcement of ICJ judgments is concerned, we should note article 94 of the UN Charter which states that: *"1. Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party. 2. If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment*." The Security Council procedure however provided in the UN Charter has been used only by the UK, in 1951, with respect to the Anglo-Iranian Oil Company case, by Nicaragua, in 1986, in the case against the United States and by Bosnia-Herzegovina and in 1993, in the case against the Federal Republic of Yugoslavia.[239]

WTO's innovative enforcement system is a good example of a realistic way to make states complying with their international law obligations. Furthermore, in general international law there is always the "solution" of countermeasures. An injured state can take countermeasures to induce another state to stop the violation. According to art. 22 of the ARSIWA, *"the wrongfulness of an act of a State not in conformity with an international obligation towards another State is precluded if and to the extent that the act constitutes a countermeasure taken against the latter State in accordance with chapter II of Part Three."*

Crawford recognizes that the implementation of state responsibility may also happen through extrajudicial "self-help measures," *"besides implementing state responsibility through formal claims – or through the processes of negotiation and settlement that may avoid the need for such claims – states may also have recourse to certain extrajudicial self-help measures under international law, whether to induce compliance with an obligation or, sometimes, to express disapproval of another state's conduct. Such unilateral acts of self-help may be based on the distinct concepts of*

[238] L., A. Sicilianos, The Role of the European Court of Human Rights in the Execution of its own Judgments: Reflections on Article 46 ECHRin A. Seibert- Fohr and M., E. Villiger (eds.), *Judgments of the European Court of Human Rights- Effects and Implementation,* Studies of the Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law (Nomos 2014);M. Marmo, "The Execution of Judgments of the European Court of Human Rights- A Political Battle" (2008) 15 *Maastricht J. Eur. & Comp. L.* 235; H. Keller and C. Marti, "Reconceptualizing Implementation: The Judicialization of the Execution of the European Court of Human Right's Judgments" (2015) 26 (4) *EJIL* 829- 850; See also http://www.ejiltalk.org/a-new-theory-for-enforcing-icj-judgments-the-world-courts-17-march-2016-judgments-on-preliminary-objections-in-nicaragua-v-colombia/

[239] A. Tanzi, "Problems of Enforcement of the Decisions of the International Court of Justice and the Law of the United Nations" (1995) 6 *EJIL* 539- 572, at 540.

*retorsion, the exception of non-performance (the exceptio inadempleti contractus) or countermeasures."*Of course though according to Article 50(2) (a) ARSIWA *"a state taking countermeasures is not relieved from fulfilling its obligations ... under any dispute settlement procedure applicable between it and the responsible State."*

Is the enforcement of a decision crucial? The compliance with a judgment is the lawful thing to do. But probably the supreme value/ goal is the settlement of the dispute. If the disputant states are not happy with the decision and have come in between the proceedings in an agreement or other form of settlement, they can either disrupt the proceedings or circumvent the judgment. As Bilder put it *"a dispute is really settled only when each of the parties ceases to have a continuing sense of grievance, or at least ceases to continue actively to assert its claim. That is, a settlement, whether reached through negotiated agreement or third-party decision, must be subjectively accepted by both parties as a fair and legitimate resolution of the matter if the dispute is really to be ended and put to rest."*[240]

Overall, the International Court of Justice, though the most prominent international law, has acquainted through time a symbolic role in interstate disputes. States are expecting the Court to analyze and declare the existing legal situation without burdening them with extra obligations uncontrolled by them. Declaratory judgments are useful in some sense. No state enjoys to be called as the wrongdoer, especially in human rights matters. On the other hand, declaratory judgments act only for the future, having no retrospective power. The relevance of ICJ in world disputes is limited by its narrow jurisdiction. Interstate disputes of huge politico economic impact rarely go to the World Court.

In other adjudicative means we can observe that individuals have acquainted an important position in special regimes of international law. And when individuals are part of judicial procedures they do expect something more than a legal declaration. It is indeed characteristic that the single recent case, where the ICJ awarded and calculated reparation in the form of compensation, was not a pure interstate dispute but a case of diplomatic protection concerning human rights violations.

The rule of full reparation as reflected in the ARSIWA does exist and is widely implemented by international courts and tribunals, which also have the potential to develop and adjust the rule to the objectives that each of them serve.

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[240] R., B. Bilder, "An Overview of International Dispute Settlement" (1986- 1987) 1 *Emory J. Int'l Disp. Resol.* 1, 28.