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## INTRODUCTION

1. Of all the questions involved in the subject of international responsibility, reparation alone combines two distinguishing features: it cannot be considered without constant reference to virtually every problem or principle connected with responsibility as a whole; and the diplomatic and arbitral practice, as also the writings of the authorities thereon, are at present in a state of complete anarchy. As far as the first point is concerned, the "duty to make reparation" is, above all, an obligation stemming from the non-fulfilment of international obligations; to that extent, therefore, it tends to merge and become identified with the very notion of responsibility. Since it is concerned with the injury resulting from the acts or omissions which give rise to responsibility, that duty is directly related to one of the component elements of responsibility; and it is also to a considerable extent bound up with another of those elements, for reparation often depends not only on the injury but also on the gravity of the act or omission which caused it. If the subject is viewed from another angle — without suggesting in any way that the interrelationship discussed here will thereby be fully outlined — it will be noted that some of the modes of reparation are similar in form to the "compensation" due in respect of certain measures which affect the patrimonial rights of aliens. As to the anarchy prevailing in the matter, it cannot be attributed to any single cause; obviously, however, it is largely the result of the political factors introduced by the traditional concept of responsibility.

2. This last fact explains the space allotted to "satisfaction" in a study fundamentally concerned with the reparation of the real injury sustained exclusively by the individual alien. In traditional international law, this reparation is only one of the two forms of discharging the duty to make reparation. No purpose would therefore be served by considering it separately and in isolation. Moreover, at least in diplomatic practice and in certain private and official codifications, measures of satisfaction have in the past been regarded as means of making reparation in cases which involve injury to aliens. Accordingly, without prejudice to the conclusions which may be reached on this point, it will first be necessary to consider the question of "satisfaction" at some length, principally because, in certain circumstances, the partial applicability of a type of measure usually placed under that heading must still be admitted.

3. In this report, consideration is also given to some special modes of reparation and to certain questions which there was no opportunity to examine in the reports prepared with a view to the presentation of the preliminary draft. The Special Rapporteur hopes that all this will facilitate the Commission's task when it undertakes the codification of the topic in conformity with the principles and trends of international law in its present state of development.

## Chapter I

## THE DUTY TO MAKE REPARATION

1. *The "duty to make reparation" in traditional international law*

4. In his first report (A/CN.4/96) the Special Rapporteur endeavoured to stress the distinctly special characteristics of reparation when considered in the light of *traditional* international law. By contrast with municipal law, where the institution is already perfectly defined in both character and function, in international relations it retains a close link with the idea of punishment or penalty; in other words, with the idea of a sanction or censure of the wrongful act which caused the injury. It is useless to contend that an act or omission contrary to international law has no other consequence than to impose upon the State to which it is imputable an exclusively "civil" responsibility — i.e., the duty to repair, purely and simply, the damage caused by the act or omission. A study of diplomatic practice and international case-law, as also of the writings of publicists, immediately shows that this obligation stemming from the wrongful act or omission may have, and in practice often does have, other consequences.

5. In *traditional* international law, the "duty to make reparation" comprises both reparation proper (restitution, damages, or both) of the injury caused to an alien or to the State itself, as a body corporate, and the measures of "satisfaction" which have frequently accompanied those of reparation *stricto sensu*. The latter, determined much more by the nature of the imputable act than by the injury actually caused, are essentially "punitive" in character and purpose. This is so obvious that it is perhaps hardly necessary to state it expressly, although such statements are often made. Moreover, even measures of reparation in the strict sense are not always directed towards a strictly "compensatory" objective. On occasions, again determined by the gravity of the act causing the injury, reparation assumes a manifestly "punitive" character. In the circumstances, therefore, the Special Rapporteur feels bound to consider the "duty to make reparation" in the light of all these considerations, the purpose remaining at all times to determine the extent to which the Commission will be able to codify the subject, as already stated in the introduction, in conformity with the principles and trends of international law in its present state of development.

6. Nor was reparation regarded, in *traditional* international law, as the sole "consequence" of the wrongful act or omission imputable to a State. Both practice and doctrine show that international responsibility was regarded in the past as involving not only the duty to make reparation but also the right of the injured State to resort to the "sanctions" then recognized by international law: reprisals and war. Viewed from such an angle, the problem is simply whether or not the exercise of that right is conditioned by the failure to make reparation — in other words, whether the injured State can immediately opt in favour of sanctions or whether it is first obliged to demand reparation. The prevailing

opinion in doctrine has naturally always favoured the second alternative, and the same can generally be said of the practice followed by States.<sup>1</sup> In that sense, reparation or the duty to repair is not only not the sole consequence of the act or omission contrary to international law, but rather is the condition *sine qua non* of the application of any of the aforesaid sanctions. It is not difficult to see, however, that this relationship between the two institutions, conceivable in *traditional* international law, has no place or justification in the present system of international law and organization. A wrongful act or omission imputable to the State will give rise to its international responsibility and, consequently, to its duty to repair the damage caused. The reparation may, admittedly, in certain circumstances assume a character or perform a function involving some degree of censure of the act imputed and thus become an essentially punitive measure, but the idea of "sanctions" imposed unilaterally and implying any measure of coercion is one that must be absolutely rejected. In the event of a State's non-compliance with its duty to make reparation, the only recourse now open is to the peaceful means and procedures provided for the purpose; and it is particularly in the matter of international claims that such sanctions can now least be invoked.<sup>2</sup>

7. Those, however, are not the only questions arising in connexion with the study of the duty to make reparation in *traditional* international law. On the contrary, the greatest difficulties encountered in a study of the subject in the light of the principles and trends of international law in its present state of development derive from the special character of the traditional concept of "damage" and of the claimant or beneficiary of the reparation. Another category of questions includes those which arise in connexion with the true nature and scope of the duty to make reparation, particularly in specific circumstances.

## 2. Other special features of the traditional concept

8. Undoubtedly the outstanding peculiarities of the traditional international doctrine and practice lie in their conception of the "injury" calling for reparation and of the recipient of the reparation. As the Special Rapporteur has repeatedly stated in his earlier reports, international responsibility had been viewed as a strictly "interstate" legal relationship. Whatever may be the nature of the imputed act or omission or of its consequences, the injured interest is in reality always vested in the State alone. Vattel seems to have been the first to formulate the traditional view, no doubt reflecting

<sup>1</sup> For a recent and detailed analysis of the doctrine and practice relating to this question, see Reitzer, *La réparation comme conséquence de l'acte illicite en droit international*, Paris, Sirey, 1938, pp. 25 *et seq.*

<sup>2</sup> On the obligation to seek peaceful settlement and the prohibition of recourse to force or to other means of coercion in this matter, see the Special Rapporteur's first report, sections 30 and 31, *Yearbook of the International Law Commission, 1956*, vol. II (United Nations publication, Sales No. 1956.V.3, vol. II), pp. 216-219; and fifth report, sections 39-41, *Yearbook of the International Law Commission, 1960*, vol. II (United Nations publication, Sales No. 60.V.1, vol. II).

the political and juridical realities of his age: "Whoever maltreats a citizen indirectly offends the State which owes him protection. . . ." <sup>3</sup> Subsequently, the idea was adopted and developed by the most eminent publicists, by governments in the exercise of diplomatic protection over their citizens abroad, and even by claims commissions, culminating in the well-known statement of the Permanent Court of International Justice: ". . . by taking up the case of one of its subjects . . . a State is in reality asserting *its own rights*. . . The question, therefore, whether the present dispute originates in an injury to a private interest . . . is irrelevant from this standpoint." <sup>4</sup>

9. Beginning from that premise, there was no avoiding the conclusion that the State was the true and only beneficiary of the reparation. Thus, the Harvard Law School draft convention of 1929 provided: "A State is responsible . . . when it has the duty to make reparation to another State for the injuries sustained by the latter State as a consequence of an injury to its national." <sup>5</sup> The Permanent Court also took this position in stating that "The reparation due by one State to another does not, however, change its character by reason of the fact that it takes the form of an indemnity for the calculation of which the damage suffered by a private person is taken as the measure." <sup>6</sup> Nobody, however, has explained the traditional view on this aspect of the question better than Anzilotti. In his view: <sup>7</sup>

" . . . International responsibility does not derive, therefore, from the fact that an alien has suffered injury, and does not form a relationship between the State and the injured alien. . . . The alien as such has no rights against the State, save in so far as the law confers them upon him; accordingly, a right to reparation can only be vested in him on the basis of the legal provisions in force in the State and is independent of the right which the State to which he belongs may have to demand reparation for a wrong suffered in consequence of treatment contrary to international law. . . . The reparation sought by the State in cases of this kind [denial of justice] is not, therefore, reparation of the wrong suffered by individuals, but reparation of the wrong suffered by the State itself."

10. Referring to the position of the laien with regard to the duty to make reparation, Anzilotti had previously written that "The indemnification of individuals is no more than an *indirect* effect of international responsibility: the sole direct consequence of that responsi-

<sup>3</sup> *Le droit des gens* . . . (1758 ed., Carnegie Publ., Washington (1916), p. 309).

<sup>4</sup> Publications of the Permanent Court of International Justice, *Collection of Judgements*, series A, No. 2, The Mavrommatis Palestine Concessions case, p. 12. For other statements of this type, see the Special Rapporteur's first report, section 15, *Yearbook of the International Law Commission, 1956*, vol. II, pp. 192-193, and sections 6 and 8 of this report concerning the "moral injury" caused [indirectly] to the State through the injuries sustained by its nationals abroad.

<sup>5</sup> See *Yearbook of the International Law Commission, 1956*, vol. II, p. 229 (annex 9, article 1).

<sup>6</sup> Publications of the Permanent Court of International Justice, *Collection of Judgements*, series A, No. 17, The Chorzów Factory (Merits) case, p. 28.

<sup>7</sup> *Corso di diritto internazionale*, 4th ed. (Padua, 1955), vol. I, p. 423.

bility is the obligation of the responsible State to give to the *injured State* reparation for the wrong which has been caused.”<sup>8</sup> Accordingly, even though this notion does not accurately reflect the criterion applied in practice, as a study of concrete cases reveals, the duty to make reparation is conceived as a juridical relationship between State and State, which inevitably leads to the conclusion that, theoretically, the injuries suffered by the individual are impossible of reparation.<sup>9</sup>

11. The artificiality, and consequently also the inconsistencies and contradictions, of the traditional doctrine become clearly apparent when one considers the criterion generally applied for measuring the reparation. Let us again consider the statement of the Permanent Court in the *Chorzów Factory* (Merits) case, referred to above, with the relevant passage cited in full:

“The reparation due by one State to another does not however change its character by reason of the fact that it takes the form of an indemnity for the calculation of which the damage suffered by a private person is taken as the measure. The rules of law governing the reparation are the rules of international law in force between the two States concerned, and not the law governing relations between the State which had committed the wrongful act and the individual who had suffered damage. Rights or interests of an individual the violation of which rights causes damage are always on a different plane to rights belonging to a State, which rights may also be infringed by the same act. The damage suffered by an individual is never therefore identical in kind with that which will be suffered by a State; it can only afford a *convenient scale* for the calculation of the reparation due to the State.”

Since it was dealing with claims made on behalf of individuals, the Court naturally could not ignore the injuries sustained by them. But as, in its view, “the question . . . whether the present dispute originates in an injury to a private interest, which in point of fact is the case in many international disputes, is irrelevant from this standpoint”, the damage suffered by the individual would only be taken into consideration as “a convenient scale for the calculation of the reparation due to the State”; in other words, solely for the purpose of determining the means of repairing the injury caused to the State. Besides being manifestly artificial, this criterion is inconsistent with the distinction, also traditionally drawn, between injuries caused to the State as such and the “moral injury” caused to it “indirectly” through the person or property of its nationals. Although this distinction, as will be shown in the next chapter (section 8), is also not fully in keeping with what happens in reality, it has in practice at least helped to determine the reparation due in each particular case and to separate satisfaction for “moral injury” from the reparation for the damage actually sustained by the individual. Moreover, the criterion is at variance with the practice, generally followed in the decisions of claims commissions and

of the International Court itself, of fixing the form and amount of reparation with due regard to the damage in fact caused to the private person concerned. Far from having served merely as a “convenient scale for the calculation of the reparation due”, that damage has constituted the sole basis of the reparation granted. This general statement does not, of course, apply to cases in which the nature or gravity of the act or omission was also taken into account, nor does it diminish the influence often exerted by political and moral factors, especially in diplomatic practice, on the material or financial content of international claims.

### 3. Nature and scope of the duty to make reparation

12. Certain special features of the nature and scope of “the duty to make reparation” should be pointed out immediately, in order to facilitate the study of the different forms and modes of reparation in international law. Some of these features are closely linked to the traditional concept, and a survey of them will therefore help to round off the comments made in the preceding two sections of this chapter.

13. The first question which we shall consider is not necessarily related to the traditional concept, but rather to the origin or basis of reparation in certain cases — viz., its so-called “*ex gratia* reparation”. In international law reparation cannot be demanded except when the act or omission that caused the injury can be imputed to the State — i.e., when the State can be declared internationally “responsible” in the strict sense of the word. In practice, however, injury caused to aliens has fairly frequently been repaired irrespective of any question of (legal) responsibility, and even when the respondent State had not admitted responsibility.<sup>10</sup> Some claims commissions, while holding that, strictly according to the law, no reparation of the injury was due, have recommended to the State that it indemnify the loss as “an act of grace”.<sup>11</sup> But the quantum of reparation in these cases is generally determined in the same manner as when the responsibility of the State is admitted.<sup>12</sup>

14. *Ex gratia* reparation has been linked with the notion of “moral” responsibility, in the sense that it is based on non-compliance with moral standards.<sup>13</sup> This is certainly true in principle, but can these “moral” standards always be distinguished in international law from legal standards properly so called? Under a provision common to virtually all the conventions concluded by Mexico with the United States and with certain European countries, each member of the various claims commissions was to examine and decide the claims “according to the best of his judgement and in accordance with the principles of justice and equity”,

<sup>8</sup> See “La responsabilité internationale des états à raison des dommages soufferts par des étrangers”, *Revue générale de droit international public* (1906), vol. XIII, p. 309.

<sup>9</sup> In this connexion, it has even been said that “All injuries sustained by the alien individual which have not been caused by such a wrongful act [affecting the right of the plaintiff State] should be disregarded.” Decencière-Ferrandière, *La responsabilité internationale des états à raison des dommages subis par des étrangers* (Thesis, Paris, 1925), pp. 248-249.

<sup>10</sup> See the many cases referred to in Personnaz, *La réparation du préjudice en droit international public*, Paris, Sirey, 1939, pp. 71-73.

<sup>11</sup> See Ralston, *The Law and Procedure of International Tribunals* (Revised ed. 1926), pp. 57-58.

<sup>12</sup> On this point see Whiteman, *Damages in International Law*, Washington, U.S. Govt. Print. Off., 1937, vol. I, pp. 745 *et seq.*

<sup>13</sup> See Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (1953), p. 164.

since "the Mexican Government desires that the claims shall be so decided because Mexico wishes that her responsibility shall not be fixed according to the general accepted rules and principles of international law, but *ex gratia* feels morally bound to make full indemnification and agrees, therefore, that it will be sufficient that it be established that the alleged loss or damage in any case was sustained and was due to any of the causes enumerated in article III hereof."<sup>14</sup> But under the corresponding provision of the Convention establishing the United States-Mexican General Claims Commission, the Commission was to decide: "... in accordance with the principles of international law, justice and equity."<sup>15</sup> In view of the nature of the cases heard and decided by these commissions, was there really a possibility of disregarding completely the rules of international law governing the responsibility of the State for injuries caused to the person or property of aliens? Moreover, do these clauses constitute a true expression of the desire of the States parties to a dispute that the same should be decided *ex aequo et bono*? When the decisions of these commissions are considered in the course of this report, it will be seen to what extent these doubts are justified.

15. Just as the "duty to make reparation", in the strictly juridical sense of the expression, presupposes that the respondent State has incurred international responsibility, so in certain circumstances it is apparently sufficient that there has been a wrongful act or omission which is imputable to that State. Even if the consequences of the act or omission have not materialized or run their course, or, in any event, even if it has not been possible to prove injury, some form of "reparation" has in practice been held to be due. This takes the form of what is usually called, by analogy with municipal law, a "declaratory judgement". This institution will be considered elsewhere in this report, where its true juridical character will be determined (section 10 (b) *infra*); what is of interest for the moment is whether the reparation, regardless of the form which it takes, is in fact based on the injury sustained or reflects rather the act or omission contrary to international law; in other words, whether in the circumstances just mentioned, as in any other, "injury" is always deemed to have been sustained by reason of the mere fact that there has been a violation of a prohibitory rule of international law. These questions call for a further glance at the traditional concept and the opinion expressed by Anzilotti, who was its most consistent exponent and, to some extent, its principal architect.

16. In his opinion, "... a violation of international juridical standards by a State bound by those standards thus gives rise to a duty to make reparation, which generally consists in the restoration of the juridical position that has been disturbed.... Injury is thus deemed implicit in the anti-juridical character of the act. A violation of a rule always constitutes trespass

upon the interests which the rule protects...."<sup>16</sup> The idea that the "injury" is inherent in the actual breach of the international legal order, and that consequently the reparation is due chiefly in respect of the act or omission contrary to international law, receives expression in the first part of the statement of the Permanent Court to which repeated reference had been made: "It is a principle of international law that the reparation of the wrong [tort] may consist in an indemnity corresponding to the damage which the nationals of the injured State have suffered as a result of the act which is contrary to international law."<sup>17</sup> According to this doctrine, then, the reparation of the actual injury caused is no more than a means of repairing the violation of international law. On the other hand, even according to the traditional doctrine itself, it is usual to speak of the "reparation of the injury".<sup>18</sup> And even when the duty to make reparation is defined in another manner, the element of "injury" may appear linked with the reparation. "Responsibility," states Eagleton, "is simply the principle which establishes an obligation to make good any violation of international law *producing injury*, committed by the respondent State."<sup>19</sup>

17. The question, then, is how to unravel this apparent confusion regarding the basis of the duty to make reparation. In the first place, it is clear that in the traditional doctrine the idea of "injury", wherever it may originate and whatever it may consist of, is never wholly absent. Since in the final analysis the prevailing notion in this doctrine is that of "moral injury", which is theoretically always done to the State whenever injury is caused to its nationals, reparation must necessarily be related, as a matter of principle, to the unlawful act or omission. This is implicit in the Permanent Court's definition of diplomatic protection, in one of the decisions already referred to, as the State's "right to ensure, in the person of its subjects, respect for the rules of international law."<sup>20</sup> If, then, one looks at the question from another angle, and if one considers what really happens in international practice as regards the forms and functions of reparation *lato sensu*, what is the true purpose of reparation? When it is intended as "satisfaction" the purpose of the reparation is undoubtedly to punish or censure the act or omission imputable to the respondent State. And even when it is reparation proper if account is taken, as is sometimes done, not only of the nature of the injury caused to the alien, but also of the gravity of the act or omission, this second factor obviously gives the reparation a "punitive" character. It can accordingly be said, without resorting to a fiction which does not even correspond to the practice normally followed, that the duty to make reparation relates

<sup>16</sup> See the article cited in footnote 8, p. 13.

<sup>17</sup> See the judgement cited in footnote 6, pp. 27-28.

<sup>18</sup> See the expressions cited in the preceding section and in the Special Rapporteur's first report, *op. cit.*, section 6.

<sup>19</sup> *The Responsibility of States in International Law*, New York, The New York University Press, 1928, p. 22.

<sup>20</sup> On the notion of "moral injury" caused to the State through injury to individuals, see section 8, *infra*.

<sup>14</sup> See Feller, *The Mexican Claims Commissions 1923-1934* (1935), p. 222. See the original texts in the appendices, pp. 321 *et seq.*

<sup>15</sup> *Ibid.*, p. 324.

to the injury, to the act or omission contrary to international law, or to both simultaneously.

18. Secondly, the mere existence of an injury does not necessarily involve the duty to make reparation. This is not, of course, a reference to the need for the presence of all the other essential components of international responsibility, according to the circumstances of the case, which were considered in the Special Rapporteur's earlier reports. What is envisaged here are the intrinsic conditions which the injury itself must satisfy in order to be reparable. Thus, in cases of injury to the person or property of individuals, the principle whereby reparation "must wipe out all the consequences" of the act or omission does not oblige the respondent State to make good all the damage or loss which the individual is claiming, or has in reality suffered, by reason of the said act or omission. The reparation will extend only to such injury as is genuinely the "normal", "natural", "necessary or inevitable" or, where applicable, "foreseeable" consequence of the act which has given rise to the responsibility of the State.<sup>21</sup>

19. The last of the special features to be considered in a study of the nature or scope of the duty to make reparation is the "appropriateness" of certain reparation measures; they may, for example, prove incompatible with the municipal law of the respondent State, offend national honour and dignity or be seriously out of proportion to the injury sustained or to the character of the act or omission imputable to that State. As will be shown below (section 16, *infra*), any of these factors may render the measure "inappropriate", and thereby entitle the respondent State to raise a valid objection thereto, without the duty to make reparation being in any manner affected.

#### 4. The problem of "sources"

20. Although the duty to make reparation is linked, and tends almost to merge, with the notion of international responsibility, in the sense that it constitutes an obligation arising from the imputability of an act or omission contrary to international law, the problem of the "sources" from which are derived the principles and criteria governing the nature and scope of the reparation does not arise in exactly the same manner as when the only question to be determined is that of the conditions on which depends the imputation of the injurious act or omission.

21. The problem was in fact first perceived when doubts and divergences of opinion arose as to whether, under general international law, the duty to make reparation was the sole consequence of unlawful acts or omissions.<sup>22</sup> In the present context, however, the question is whether, besides imposing the duty to make reparation, general international law contains fully defined principles and criteria for determining the nature and extent of the reparation. It would certainly

be very difficult to find any authority prepared to give an affirmative answer, and there are even some, like Kelsen, who believe that the absence of such principles and criteria constitutes an additional reason to deny the very existence of the right to a reparation and of the duty to make reparation unless these are stipulated in an international treaty or convention.<sup>23</sup>

22. General international law certainly does not provide any principles, criteria or methods for determining *a priori* how reparation is to be made for the injury caused by a wrongful act or omission, or, where applicable, for the very violation of the rule of international law which gives rise to the responsibility of the State. Some writers refer to "the general principles of law recognized by civilized nations," apparently regarding them as the source of the rules applicable in the matter of reparation.<sup>24</sup> As will be seen, these principles have likewise been cited quite frequently, as the "source" of the rules or criteria applied, in international case-law. The applicability of such principles, however, is in the first place only conceivable with regard to reparation *stricto sensu*; i.e., when the issue is restitution in kind or damages, but not where it is "satisfaction", the other principal form of reparation known to international law and also employed in cases of injury to the person or property of private persons. And even as regard the modes of reparation proper, it can hardly be argued that "general principles of law" — which have been and remain one of the most prolific sources of international law in other fields — have systematically and consistently served as the basis for determining the nature and quantum of reparation. While this point will be raised again below, it is not contrary to the traditional view to say that these principles apply to the reparation of the injury caused to an individual since, in the very words of the Permanent Court, that injury "can only afford a convenient scale for the calculation of the reparation due to the State", because "the rules of law governing the reparation are the rules of international law in force between the two States concerned" and the "rights or interests of an individual... are always on a different plane to rights belonging to a State, which rights may also be infringed by the same act."<sup>25</sup>

23. A survey of the clauses of the compromis setting up and organizing various arbitral tribunals and claims commissions shows that they, too, contain no detailed and precise rules on the subject of reparation. As will be seen when the question is considered in chapter III (section 17), clauses relating to this matter rarely occur, and when they do, they are too vague to offer guidance concerning the exact way in which the injury is to be repaired. The vagueness and lack of precision of these clauses increase when they provide, as is not infrequent, for the application of the general principles of justice and equity. In both cases, the arbitrator had no choice but to exercise a wide discretion, which has

<sup>23</sup> Cited by Reitzer, *op. cit.*, p. 113.

<sup>21</sup> On the chain of causation which must exist between the injury and the act or omission imputable to the State see, in particular, section 22, *infra*.

<sup>24</sup> For such a view see, among other authorities, Anzilotti, in the work cited in footnote 7, p. 426.

<sup>22</sup> On this point, see section 1, *supra*.

<sup>25</sup> See the complete text of the Court's statement in section 2, above.

frequently resulted in an arbitrary decision— itself often the product of a “settlement behind closed doors”. Furthermore, the situation in diplomatic practice is, for obvious reasons, even more deplorable, the exercise of the discretionary power in favour of the “injured” State being essentially subject to no limitation in this case.<sup>26</sup>

24. In such circumstances, it is not surprising that both official and private draft codifications have generally omitted any rules relating to the nature and scope of reparation in the varied and different contingencies which may arise. When, exceptionally, the drafting of some such provisions has been attempted, they have been drawn up in terms so general and imprecise as to contribute in reality very little to a satisfactory solution of the problem. A good example of this is basis of discussion No. 29 prepared by the Preparatory Commission of the Hague Conference (1939).<sup>27</sup> In commenting on this basis, one of the sub-committees of the Conference stated that “the question of measure of damages, it seemed to the Committee, had best be left to the jurisprudence of the courts for the present, until there had been a sufficient crystallization of principles to warrant codification.”<sup>28</sup> Perhaps that was why the text adopted in first reading by committee III maintains absolute silence on the form which the reparation of damages should take.<sup>29</sup>

##### 5. The problem of terminology

25. In a discussion of “the duty to make reparation” in international law, certain additional difficulties are encountered by reason of the lack of uniformity in the terminology used. This is true not only of diplomatic practice and international case-law, but also of the writings of authors. What is serious is that this lack of uniformity is quite often attributable to differences of opinion concerning substance, and that the differences cannot always be distinguished from those deriving solely from the grammatical interpretation placed on the term or expression used. The problem of terminology has thus inevitably contributed, to a considerable degree, to the confusion prevailing in the matter, for the use of different terms and expressions has led to individual, and at times capricious, interpretations of substantive issues. The purpose of this section is solely to draw attention to the problem and to point out, by way of illustration, the principal terms and designations used in connexion with “reparation” and “injury”, the two basic notions underlying the “duty to make reparation”. On that basis, it will be easier to appreciate the concrete examples cited in this report as well as the problem of terminology in general.

26. The term “sanction” is at times used as a synonym either of “reparation” or of some of its

forms or modes of execution. For example, the Permanent Court of Arbitration declared on one occasion that an arbitral award which held an act to be contrary to international law constituted a “sanction sérieuse”.<sup>30</sup> This assimilation of the two words and notions is also found in the works of certain learned authors.<sup>31</sup> Again, the same or similar words have been used to describe the “punitive” character or purpose of certain reparation measures. At other times, the word used properly denotes some form or mode of reparation other than the one envisaged, strictly speaking, in the context. This happens with the term “satisfaction”, which has at times been used to designate a pecuniary indemnification demanded or granted solely as reparation for the injury sustained by the private individual; but, as will be seen, the same word has also been used, both in diplomatic practice and in international case-law, in a generic sense, to describe all the reparation measures claimed or accorded in respect of a given claim. Some specific forms of satisfaction have also been identified with modalities of reparation proper; this is particularly true of the expressions “satisfaction of a pecuniary nature” and “reparation of a punitive character”. To give another example, satisfaction and reparation *strictu sensu* are at times distinguished by their respective “moral” or “material” nature or content; this distinction was apparently intended to be drawn in the following clause: “. . . in order that [the Court] may decide the questions of law, define the responsibilities and determine the *moral* and *material* reparation flowing therefrom”.<sup>32</sup> In other cases, however, the first form of reparation is described as “political” and the second as “financial”.<sup>33</sup>

27. As far as “injury” is concerned, the terminological problem is principally caused by the confusion and uncertainty surrounding its very definition and by the different categories of injury which can result from acts or omissions contrary to international law. What is, in fact, the “injury” caused by an illegal or arbitrary act or omission? When the only entity affected is the State as such, there are no major difficulties, since it is strictly a case of a “moral and political” injury except in the very exceptional cases in which the only property or interest affected is held by the State under a title of private ownership (*jure gestionis*). But when the wrong consists of “moral injury” caused to the State “indirectly”, through the injury done to its nationals, how can the injury be defined and delimited? Moreover, how and to what extent does the nature of the injury (whether the actual victim is the State, or the individual, or both) influence the form

<sup>30</sup> See the decision in the *Carthage* and *Manouba* cases, section 10 (b), below.

<sup>31</sup> See, among other authorities, Bourquin, “Règles générales du droit de la paix”, *Recueil des cours de l'Académie de droit international*, 1931, I (vol. 35), p. 212.

<sup>32</sup> Agreement of 15 April 1912 between France and Italy relating to the question of the S.S. *Tavignano* and others. See J. B. Scott, *Les Travaux de la Cour Permanente d'Arbitrage de La Haye* (1921), p. 444.

<sup>33</sup> See Antonio Sánchez de Bustamante, *Derecho internacional público* (Havana, Carasa y Cía., 1936), vol. III, pp. 488-489.

<sup>26</sup> See on this point section 12, below.

<sup>27</sup> See the complete text in the Special Rapporteur's first report, *Yearbook of the International Law Commission*, 1956, vol. II, p. 223 (annex 2).

<sup>28</sup> See League of Nations publication, 1930.V.17, p. 234.

<sup>29</sup> *Ibid.*, p. 236, art. 3.

and measure of reparation? For the idea that satisfaction is the mode of repairing an injury caused to the State, and that restitution or indemnification for damage is the mode of repairing a wrong caused to an individual, has not always found corroboration in diplomatic practice or international case-law. Similarly, attention has already been drawn to the difficulties encountered in trying to ascertain the relationship between the "injury" and the true object of the "duty to make reparation". And finally, to what extent should the various injuries be separated or segregated from the original act or omission in order to avoid any possible confusion between the two notions?

28. From the etymological point of view, the difficulties derive either from the translation of the terms from one language into another or from the different meanings of a word in the same language. As an example of the former, the English word "injury" is synonymous with "damage", so that the two can be, and often are, used indiscriminately, but in translating them into French or Spanish the words "dommage" and "daño", or some equivalent word, have always had to be used.<sup>34</sup> As to the second, in every language there are various words which are frequently used as mere synonyms. In Spanish, for example, besides the word *daño*, which is obviously the most generic, as is also the case with the corresponding words in other languages, it is possible to use the word *lesión*, *perjuicio*, *pérdida* or *detrimento*. Again, in the three languages referred to, the plural of the word corresponding to the Spanish *daño* (injury) appears in the name given to one specific form of reparation: indemnification for "damage and loss" (*daños y perjuicios*, *dommages - intérêts*); and the English "damages", without further qualification, is also the term most frequently used to designate the reparation itself, regardless of the form envisaged.

## Chapter II

### THE INJURY AND THE FORMS AND FUNCTIONS OF REPARATION IN GENERAL

#### 1. *The different categories of injury*

29. In a study of injury in international law, relatively little purpose would be served by seeking analogies with municipal law. As has been shown, the traditional concept has perhaps more special features in this regard than can be found anywhere else. The resulting difficulties begin to appear as soon as an attempt is made at a systematic classification of the injuries susceptible of reparation.

#### 6. *Possible classifications*

30. Under one system, injuries may be classified according to the personality of the actual victim. In applying this criterion, authors generally distinguish between injuries caused to the State (as a body corpo-

rate) and injuries caused to private persons (aliens). In other words, according to the traditional concept, the distinction is between an injury caused to the State "directly", through one of its organs or component elements, and an injury caused "indirectly" through its nationals. To take a typical statement of this view, "The wrongful act or omission... may consist of a direct injury to the public property of the [claimant] State, to its public officials, or to the State's honor or dignity, or of an indirect injury to the State through an injury to its nationals."<sup>35</sup> It has already been shown that, in the present stage of development of international law, the notion on which this classification is based is strictly artificial. It would be insufficient, however, to speak only of injuries to the State and to aliens. Today the classification must also cover injuries caused to international organizations as such, which constitute a third category whose existence has been formally recognized by the International Court of Justice.<sup>36</sup>

31. The first category comprises the various manifestations of what is usually called "moral and political" injury *stricto sensu*. It includes attacks of various kinds against the person of the official representatives of the State or the premises of its diplomatic or consular missions. Other manifestations of such injury may take the form of insults to the flag or other emblem of the foreign State, or insulting words or demonstrations against such State or its government. A third and last group consists of violations of territorial sovereignty, in circumstances where the principal issue is that of reparation.<sup>37</sup> The second category should also be subdivided, in order to facilitate the study of the forms of reparation, a distinction being drawn between injuries to the person and injuries to property. This distinction is often encountered in draft codifications and is constantly observed in diplomatic practice and international case-law. Injuries to the person, for their part, may consist of deprivation of liberty, physical and mental injury or moral damage. Damage to property can also take different forms, depending on the nature of the property concerned or on the manner in which the alien's assets have been affected. As will be shown below, injuries caused to the person, whether physical or moral, quite frequently result in financial loss, either to the injured individual himself or to third parties entitled to claim. The reason is that a single act or omission can result in several different types of injury or loss susceptible of reparation.

32. Injuries have also been classified according to their nature, those of a "moral and political" character being distinguished from those described as "pri-

<sup>35</sup> Whiteman, *Damages in International Law* (1937), vol. I, pp. 80-81. For a detailed analysis of the classification, see, amongst other authorities, Personnaz, *La Réparation du préjudice en droit international* (1952), pp. 45 *et seq.*; and Bissonnette, *La satisfaction comme mode de réparation en droit international* (Thesis, Geneva, 1952), pp. 45 *et seq.*

<sup>36</sup> See the Special Rapporteur's first report, *Yearbook of the International Law Commission*, 1956, vol. II, p. 195.

<sup>37</sup> Some authors simplify the classification, distinguishing between violations of a treaty and those of a "duty of mutual respect", within which all the above-mentioned are included. See Podestà Costa, *Derecho internacional público* (third ed., 1955), vol. I, p. 413.

<sup>34</sup> See *Reparation for Injuries Suffered in the Service of the United Nations*, advisory opinion, *I.C.J. Reports* 1949, p. 174.

vate". The first category comprises all injuries caused to the State, whether "directly" or "indirectly", while the second covers those caused to aliens, whatever the nature of the damage, or to property held by the State under a title of private ownership [domaine de gestion].<sup>38</sup> As can be seen, except for this last distinction, this classification leads to practically the same results as the previous one. If the purpose is to distinguish injuries in a manner which will have some bearing on the question of their reparation, the sole generally applicable criterion would be their origin — i.e., whether the damage was caused directly by the act or omission of an organ or official of the State, or by the act of a private individual acting either independently or in the course of internal disturbances. As will shortly be shown, the distinction is important for the purpose of determining whether, in the latter case, the reparation will reflect the damage actually caused by the act of the individual or the conduct of the local authorities before or after the said act took place (chapter III, section 19, *infra*).

33. The different categories and types of injury may also be classified and distinguished in other ways, as will be shown later in this report. For the time being, however, it is necessary to describe the two principal categories already referred to: damage suffered by an alien and "political and moral" injury. In connexion with the latter category, it will be necessary to examine separately the "moral injury" caused to the State through damage sustained by its nationals. Since the sole purpose of the three sections immediately following is to facilitate the study of the forms and modes of reparation, the description of the various injuries will be somewhat summary, especially as far as damage caused to individuals is concerned, in order to avoid unnecessary repetition.

#### 7. Injury caused to an individual

34. The injury sustained by an alien may consist of damage to his person or damage to his property. The former comprises all injury affecting the physical or moral personality of individuals, without prejudice to the consequences of a proprietary character which often derive therefrom in favour of the individual directly injured or of third party claimants. This last point is particularly important. Another fact which needs stressing is that in the majority of cases the various heads of damage cannot be considered in complete isolation from each other, because they are usually sustained concurrently and, hence, it is not always possible to differentiate between them or to separate them for purposes of reparation. This difficulty arises in every one of the groups into which injuries are usually divided for the purposes of analysis.

35. Thus, for example, in the different cases of deprivation of liberty, the consequences of the act or omission imputable to the State often cannot be reduced to the mere fact that the alien was illegally or arbitrarily detained, arrested or placed in prison. As will be

seen during the consideration of reparation in such cases, in addition to the financial loss which the individual may have sustained as a result of his detention, arrest or imprisonment, he may also have suffered physical or moral maltreatment, which represents another type or class of injury to the person. This group should also include cases of expulsion of aliens, if the expulsion takes place in circumstances contrary to the applicable rules of international law. The expulsion may also be accompanied by circumstances which aggravate the responsibility of the State, as happened in the *Maal* case, when it was necessary to take into consideration not so much the fact of the expulsion itself as the unnecessary humiliation to which the victim was subjected (chapter III, section 18 (a)). The notion of "deprivation of liberty" also covers certain restrictions on a person's right of free movement.

36. Bodily and mental injury, as well as violent death, constitutes a second group of injuries to the person. The former may lead to other loss and injury which will have to be borne in mind for purposes of reparation, such as the medical expenses which the victim had to incur, pecuniary loss suffered during convalescence and, if the injuries are of a permanent character or have in some manner affected the person's health, limitations on future capacity for work. With regard to this last point, it is of course important to know whether the chain of causation between the original injury and its consequences is sufficiently direct for this additional damage to be taken into account in computing reparation. One of the consequences may be a mental injury, although damage of this nature may also be a direct consequence of the act which gives rise to the duty to make reparation and thus constitute an independent injury. The anguish suffered by some of the passengers of the *Lusitania* as a result of the shock of being hurled into the water during the sinking of the ship was held by umpire Parker to constitute an injury susceptible of indemnification (chapter III, section 18 (d)). In the event of violent death the situation is different, since in that instance the damage is not the taking of a person's life but the loss sustained as a result thereof by a certain category of third persons. First, there is the strictly pecuniary loss sustained by persons dependent on the deceased, which is measured mainly by the degree of financial dependency that existed between them at the time of his death. Secondly, there is the purely moral damage determined by the close relationship between the third parties and the deceased. Losses of this category, which may give rise to an independent and separate reparation, belong rather to the group of "moral injuries" caused to a person as a consequence of certain acts or omissions contrary to international law.

37. A "moral injury" in its widest sense can be described as the opposite to a physical injury, but its nature does not easily lend itself to an exact definition. The matter is, in effect, essentially psychological and dependent on circumstances. Its manifestations are extremely varied and range from attacks against the honour or reputation to the moral injury resulting from a business failure, from the suffering caused by

<sup>38</sup> See Personnaz, *op. cit.*, p. 17.

the death of a close relative or from ill treatment.<sup>39</sup> This strictly psychological or "intellectual" character is precisely what distinguishes "moral" damage from the mental injuries referred to in the preceding paragraph, which are of a more organic and pathological character. Moreover, moral injury may be sustained in the most varied circumstances which necessarily influence the assessment of the reparation due especially in cases where the responsibility and duty to make reparation derive from the conduct of the State vis-à-vis the acts of the private individuals who caused the original damage. Moreover, in order to be susceptible of reparation the injury "must be real and actual, rather than purely sentimental and vague".<sup>40</sup>

38. Damage caused to the property of aliens can also take different forms and arise in very varied circumstances. Occasionally it results from the acts of private individuals, but only in exceptional cases is the conduct of the local authorities considered to justify reparation. This is also true of cases of injury caused during a civil war or other internal disturbances. If the State cannot be shown to have been at least manifestly negligent in the performance of its duty of preventing and punishing the injurious acts, there is technically no "reparable" injury because the State has incurred no international responsibility. In such cases of internal disturbances, reparation will be more likely to be due if the damage was the consequence of measures taken by the state authorities or, where applicable, by the revolutionaries if the insurrection ultimately succeeds. Thus, the reparation of the injury will depend on the circumstances in which such measures were taken (chapter III, No. 21 (b)).

39. The chances of the damage being "reparable" improve if it is the consequence of other official measures. One of the most frequent instances is the detention or sequestration or other similar measure affecting the property of aliens. At times the measure is accompanied by the use and exploitation of the property by the State. Some of these measures affect immovable property and other rights *in rem*, although the difficulty of deciding whether the damage is "reparable" arises regardless of the nature of the property involved. This difficulty is due to the fact that the responsibility of the State, and hence the question whether reparation is due depends not so much on the measure *per se* as on the circumstances in which it was taken or the manner in which it was applied.

40. The difficulties referred to above increase, or at least assume a special character, because many of the measures in question are taken in the exercise of powers vested in the State with regard to private property, whatever the nature of such property or the nationality of the owner. This applies to cases of expropriation and other related measures affecting "acquired rights" examined in the Special Rapporteur's fourth report (A/CN.4/119). In those cases, the measure should

not be regarded as resulting in "injury" in the true sense of the word, since injury can only derive from an act or omission intrinsically contrary to international law. The fact that the State is generally duty bound to compensate the owners of the property affected does not mean in any way that the "compensation" involves any "reparation" *stricto sensu*, or that, consequently, the victim is being "compensated" for an "injury". The obvious importance of this distinction has already been pointed out;<sup>41</sup> and it will, in any case, be emphasized again, in connexion with the reparation for injury caused to property, in chapter III of this report (section 21 (d)).

#### 8. The "moral injury" caused to the State through injuries to private individuals

41. Under the traditional view of international responsibility and of the duty to make reparation, the interest injured in consequence of an act or omission contrary to international law is always vested in the State. This is not, of course, true only of acts or omissions which damage the interests of the State as such. It applies also to cases in which the State's interests are damaged "indirectly" — i.e., by reason of the "moral injury" caused to the State through injuries sustained by its nationals abroad. As a claims commission has expressed it, "The injury inflicted upon an individual, a national of the claimant State, which implies a violation of the obligations imposed by International Law upon each member of the Community of Nations, constitutes an act internationally unlawful, because it signifies an offense against the State to which the individual is united by the bond of nationality."<sup>42</sup> Thus, since any injury to the person or property of aliens implies a violation of the obligations imposed by international law, the State of nationality is always "indirectly" affected by the unlawful act or omission. In short, any injury to the person or property of an alien constitutes, at the same time, a "moral injury" to that State.

42. The basis of this "moral injury" has been said to reside in the juridical nature of any act or omission contrary to international law. "Injury," said Anzilotti, "is thus deemed implicit in the anti-juridical character of the act. A violation of a rule always constitutes trespass upon the interest which the rule protects and, consequently, upon the subjective right of the person whose interest is affected; in international relations, the injury caused is generally moral (failure to respect the honour and dignity of the State as a juridical person) rather than material (financial or patrimonial injury in the true sense of the term)."<sup>43</sup> The same idea is expressed in the statement that "an injury to a private individual could not in itself constitute a viola-

<sup>41</sup> See the Special Rapporteur's fourth report, *Yearbook of the International Law Commission, 1959*, vol. II (United Nations publication, Sales No. 59.V.1, vol. II), sections 16 and 34.

<sup>42</sup> *Dickson Car Wheel Co.* case, decided by the General Claims Commission (United States-Mexico). Cf. *Opinions of Commissioners* (1931), p. 188.

<sup>43</sup> "La responsabilité internationale des états . . ." *Revue générale de droit international public* (1906), vol. XIII, pp. 13-14.

<sup>39</sup> See Personnaz, *op. cit.*, p. 202.

<sup>40</sup> See *Opinion in the Lusitania Cases* (1923) in *Reports of International Arbitral Awards*, vol. VII (United Nations publication, Sales No. 56.V.5), p. 37.

tion of international law. Responsibility of this kind can arise only from the non-observance of an obligation to the State of which the individual in question is a national."<sup>44</sup> In this connexion it is relevant to recall that the right of "its own" which the State asserts in affording diplomatic protection is in reality "its right to ensure, in the person of its subjects, respect for the rules of international law"<sup>45</sup> Viewed from this standpoint, there can be no doubt that any injury caused to an alien by an act or omission contrary to international law in theory involves a "moral injury" to the State of nationality.

43. The question does not, however, always present itself in these terms. Even in the body of traditional doctrine statements occur which are at variance with the orthodox or absolute view outlined above. De Visscher, for example, wrote that "An act which is contrary to international law *may*, irrespective of whether it causes material injury, result in *moral* injury to another State which consists in the impairment of the latter's honour or prestige."<sup>46</sup> This is, in fact, the view taken both in international case-law and in diplomatic practice. "Moral injury" to the State is not always alleged or taken into consideration in cases involving injury to the person or property of aliens. There are relatively few cases in international case-law in which responsibility and a duty to make reparation have been found to exist on this ground. When the various forms of reparation, particularly in the case of injury to individuals, are examined, it will be seen in what situations and circumstances "moral injury" to the State of nationality has been taken into consideration or alleged in addition to the injury to the individual in question. It will be seen that the determining factor is not so much the nature of the injury to the individual as the character or gravity of the imputable act or omission. This question will be discussed below in the conclusions of the present report, and attention will again be drawn to the importance of distinguishing between the "private interest" and the "general interest" in considering the various categories of acts and omissions contrary to international law.<sup>47</sup>

#### 9. "Moral and political" injury *stricto sensu*

44. Like injuries to aliens, "moral and political" injury *stricto sensu* may be caused to the State by the acts or omissions of organs or agents of another State or by the acts of private individuals of that State. However, even if the injury is caused by the acts of individuals, there need not be an accompanying act

or omission imputable to the State, such as must exist in all cases of international responsibility for injuries to the person or property of aliens. In diplomatic practice, this condition is not generally required, no doubt because of the highly political character of the interest injured by such acts of individuals; consequently, reparation for injuries of this type may be made in circumstances other than those in which a duty to make reparation normally exists and may not be subject to the same conditions.

45. The most typical and most frequent cases involving moral and political injury are those arising from acts of various kinds against the person of official representatives of the State or against the premises of its diplomatic or consular missions. Such acts may take the form of insults to the Head of State, as was the case when King Alfonso XII was hissed by a crowd during his visit to Paris in 1883, and an apology was offered to the King by President Grévy.<sup>48</sup> They may also consist of violations of diplomatic immunity, one of the earliest precedents being the arrest of Russian Ambassador Muttueof in England (1708).<sup>49</sup> Even if the incident does not affect the head of the diplomatic mission the act may constitute a violation of diplomatic immunity and call for some form of satisfaction. Yugoslavia demanded satisfaction from Bulgaria for an attack on a military attaché accredited to its embassy at Sofia (1923).<sup>50</sup> Such incidents have also frequently arisen in connexion with the immunity enjoyed—generally under treaties—by consular officials, or with the "special protection" to which they are entitled from the receiving State. Satisfaction may be called for even if the act complained of does not involve a serious offence such as the murder of a consular official or physical assault. On one occasion, the United States Government acknowledged that "the search of the person of a foreign consul, his imprisonment, and the carrying off of his archives... is a violation of the law of nations, for which the Government of the United States considers itself bound to apologize and to give all other suitable redress."<sup>51</sup> For similar reasons, acts committed against members of an official mission, even where it does not possess the status of a special diplomatic mission, have in practice also been treated on the same footing as acts against the representatives of a foreign State.<sup>52</sup> Injuries to members of foreign armed forces may also be included in this category. In connexion with the Valparaiso incident involving sailors from the U.S.S. *Baltimore* (1891), the United States Department of State expressed the view

<sup>44</sup> Decencière-Ferrandière, *La responsabilité internationale des états, à raison des dommages subis par des étrangers* (Thesis, Paris, 1925), p. 35.

<sup>45</sup> Publications of the Permanent Court of International Justice, *Collection of Judgements*, series A, No. 2, The Mavrommatis Palestine Concessions case, p. 12.

<sup>46</sup> "La responsabilité des états", *Bibliotheca Visseriana* (1924), vol. II, p. 119.

<sup>47</sup> With regard to this distinction, see the Special Rapporteur's first report, *Yearbook of the International Law Commission, 1956*, vol. II, p. 195 (section 16) and third report, *Yearbook of the International Law Commission, 1958*, vol. II (United Nations publication, Sales No. 58.V.1, vol. II), p. 70 (section 21).

<sup>48</sup> See Moore, *A Digest of International Law*, vol. VI, p. 864.

<sup>49</sup> See Stowell & Munro, *International Cases* (1916), vol. I, p. 3.

<sup>50</sup> See Eagleton, "The Responsibility of the State for the Protection of Foreign Officials", *American Journal of International Law* (1925), vol. 19, p. 299.

<sup>51</sup> Moore, *op. cit.*, vol. V, p. 41. As will be seen below, it has been held on occasion that in certain circumstances attacks or injuries suffered by a consul are to be considered on the same footing, for purposes of reparation, as those suffered by private persons. See the case of consul *Mallén*, cited in section 14 *infra*.

<sup>52</sup> For examples of incidents involving such official missions see Bissonnette, *La satisfaction comme mode de réparation en droit international* (Thesis, Geneva, 1952), pp. 55-56.

that "an attack upon the uniform of the U.S. Navy, having its origin and motive in a feeling of hostility to this government and not in any act of the sailors" called for an apology and some adequate reparation for "the injury done to this government".<sup>53</sup>

46. Violation of the premises of a diplomatic mission by the state authorities and any acts by private individuals resulting in breaches of the inviolability of such a mission also constitute acts against the foreign State concerned. The Persian Government apologized to the British Government when the local authorities entered the latter's embassy for the purpose of seizing certain political refugees (1908).<sup>54</sup> Similarly, Hungary presented an apology to Yugoslavia for the hostile demonstrations of a crowd outside the Yugoslav legation at Budapest (1920).<sup>55</sup> In practice, incidents involving consular premises, which have been much more frequent, are generally treated on the same footing as acts of this kind. Such violations, whether committed by individuals or by the local authorities, may result in material damage, and in such cases, in addition to the outrage against its mission, any pecuniary losses which may have been caused to the foreign State are taken into account.<sup>56</sup>

47. Outrages against the flag or other emblem of a foreign State, and insulting words or demonstrations directed against the State or its government, constitute another type of "moral and political" injury. In contrast to the acts mentioned earlier, these acts are purely symbolic in character as no material injury is likely to arise from them. The same is true of insults to official representatives of a foreign State. Despite this fact, however, acts of this type have been placed on an equal footing with the others and satisfaction has been demanded or offered. Thus, in the case of mass demonstrations outside the German consulate at Lausanne, in the course of which the flag was torn down, the measures of satisfaction given included a warrant of arrest for "an act contrary to the law of nations".<sup>57</sup> During the blockade of Venezuela in 1903, Great Britain and Germany demanded satisfaction when a crowd compelled the British vessel *Topaze* to strike its colours.<sup>58</sup> An act directed against any object having symbolic value for the offended nation may cause injury of this kind. Thus, the United States ambassador at Havana made a public apology to the Minister of Foreign Affairs of Cuba after several United States sailors had climbed on the statue of José Martí, the hero of Cuban independence (1949).<sup>59</sup> As an example

of insulting words or demonstrations constituting a breach of the respect due to foreign nations, reference may be made to the remarks offensive to Germany made by a United States magistrate on the occasion of the *Bremen* incident (1935).<sup>60</sup>

48. With regard to insults to a flag, the most common incidents are those resulting from official acts which constitute an infringement of freedom of navigation or of other safeguards afforded to vessels under customary international law. When the British vessel *Trent* (1861) was visited on the high seas by a Union warship and compelled to surrender two Confederate commissioners who were on board, Great Britain characterized the incident as "an act of violence which was an affront to the British flag and a violation of international law".<sup>61</sup> An even graver insult to the flag is, of course, committed if a vessel is seized or attacked without justification. When the United States merchant vessel *Colonel Lloyd Aspinwall* (1870) was arrested and towed to port by a Spanish frigate, the United States demanded the return of the vessel and reparation for the offence against the freedom and dignity of its flag.<sup>62</sup> In connexion with the incident resulting from an attack on another United States merchant vessel by a Japanese brig in the Straits of Shimonoseki (1863), Secretary of State Seward said that "When the injury involves also an insult to the flag of the United States, the demand for satisfaction must be imperative."<sup>63</sup> Acts against vessels in port may also be regarded as an insult or affront to the flag. For example, after the incident at Constantinople on the French steamer *Circassie*, when a captain of artillery threatened the crew with a weapon, the local military authorities offered an apology to the French Embassy and punished the culprits.<sup>64</sup> Satisfaction has on occasion been demanded for insults to the flag committed by private individuals, as in the case of the storming of the Romanian vessel *Imperatul-Trajan*.<sup>65</sup>

49. Violation of a State's territorial sovereignty may involve various types of conduct contrary to international law, depending on the nature, purpose and circumstances of the violation. Only in certain situations, however, is the violation of national territory of special interest from the point of view of the class of injuries under consideration. In the rather numerous cases in which military or customs authorities or other officials of one State have crossed the frontier of another State for any purpose without the latter's authorization or consent, apologies have generally been demanded or volunteered as reparation for the violation of territorial sovereignty, and, in many instances, the culprits have been punished.<sup>66</sup> Violations of territorial waters have resulted in incidents of the same type, although much

<sup>53</sup> Moore, *op. cit.*, vol. VI, p. 857.

<sup>54</sup> See Eagleton, *op. cit.*, p. 297.

<sup>55</sup> Fauchille, *Traité de droit international public* (1921-26, eighth ed.), vol. I, part I, p. 528.

<sup>56</sup> See Bissonnette, *op. cit.*, pp. 59-61, for examples of cases of these types and for the case in which satisfaction was given because of an act of local jurisdiction performed on the premises of the French consulate at Florence.

<sup>57</sup> See *Revue générale de droit international public* (1916), pp. 340-5.

<sup>58</sup> *Ibid.* (1904), p. 409.

<sup>59</sup> *Time*, New York, 21 March 1949, p. 24, cited by Bissonnette, *op. cit.*, p. 67.

<sup>60</sup> See Eustathiades, *La responsabilité internationale de l'Etat pour les actes des organes judiciaires, etc.* (1936), vol. I, pp. 295-7.

<sup>61</sup> Moore, *op. cit.*, vol. VII, p. 768.

<sup>62</sup> See Lapradelle & Politis, *Recueil des arbitrages internationaux* (1923), vol. II, p. 669.

<sup>63</sup> See Moore, *op. cit.*, vol. VII, p. 117.

<sup>64</sup> See *Revue générale de droit international public* (1895), p. 626.

<sup>65</sup> See *ibid.* (1910), pp. 408-10.

<sup>66</sup> See examples cited by Bissonnette, *op. cit.*, pp. 46-8.

less frequently. In some incidents of this type, warships of one State have captured warships or merchant vessels of another State in harbours of a third State, as in the case of the *Postillion*, the *General Armstrong* and the *Chesapeake*.<sup>67</sup> Other cases, on the other hand, have involved a simple violation of the territorial waters of one State by warships of another State, as in the relatively recent *Corfu Channed* case (1949), which was brought before the International Court of Justice.<sup>68</sup>

50. Before this discussion of "moral and political" injury is closed, it should be pointed out that, in diplomatic practice, the question of the existence of any intention to offend the honour or dignity of the State has been raised on occasion. In the *Virginus* (1873) and *Maria Luz* (1875) cases, for example, measures of satisfaction were considered not to be called for since the claimant State recognized that in seizing the vessels there had been no intention to offend its honour or dignity. In the *Henry Crosby* incident (1893), the United States Department of State acknowledged that a "mistake" had been made and that there had been no insult to the flag.<sup>69</sup> As the question has a bearing on the conditions under which reparation may be claimed in such cases as well as on the character of this category of injuries, it will be discussed below in examining the essential characteristics of satisfaction (section 12, *infra*).

## II. The various forms and functions of reparation

51. Before considering the question of the reparation of injuries caused to aliens, the principal subject of the present report, it will be of value to examine the various forms and functions of reparation in general. In traditional international law, because of the traditionally accepted concept of "injury", the notions of reparation *stricto sensu* and of "satisfaction" are, of course, closely intertwined, with the result that, although only reparation is of interest in this context, it cannot usefully be studied separately. The two traditional forms of reparation and the special procedure known as the "declaratory judgement" are examined below.

### 10. Reparation lato sensu

#### (a) The traditional forms of reparation

52. From ancient times, the term "reparation" has been defined in terms broad enough to embrace both reparation *stricto sensu* and satisfaction, which represent the two principal traditional methods of making reparation for injuries resulting from an act or omission contrary to international law. As regards codification, the two were given formal recognition in the drafts of the Preparatory Committee of The Hague Conference (1930). Point XIV of the questionnaire submitted to governments dealt both with the various procedures employed in reparation *stricto sensu* and the problems involved in determining the amount of pecuniary com-

ensation, and with some of the customary methods of giving satisfaction, such as the offer of an apology and the punishment of the guilty persons.<sup>70</sup> Despite differences on specific points, the two forms of reparation were generally accepted in a number of the replies from the governments.<sup>71</sup> In the light of the views of governments, the preparatory committee drafted the following basis of discussion (No. 29):<sup>72</sup>

"Responsibility involves for the State concerned an obligation to make good the damage suffered in so far as it results from failure to comply with the international obligation. It may also, according to the circumstances, and when this consequence follows from the general principles of international law, involve the obligation to afford satisfaction to the State which has been injured in the person of its national, in the shape of an apology (given with the appropriate solemnity) and (in proper cases) the punishment of the guilty persons."

It will be recalled, however, that the text adopted in the first reading by the Third Committee of the Conference mentioned only "the duty to make reparation for the damage sustained in so far as it [the international responsibility of a State] results from failure to comply with its [the State's] international obligation." The reasons for the omission from the article of the two methods of giving satisfaction referred to in the basis of discussion will be discussed below (section 15, *infra*).

53. The two forms of reparation also appear in the writings of authorities, who differentiate them on the basis of the type of injury covered by each. As early a writer as Vattel stated that the purpose of reparation *stricto sensu* was to make good the injury actually caused by the unlawful act, while satisfaction was given in the case of injuries which "cannot be repaired".<sup>73</sup> More recent writers have continued to make this distinction and have tried to define each of these forms of reparation more clearly, with particular reference to the type of injury for which reparation is made. Anzilotti, for example, states that there are "two possible consequences of an unlawful act: satisfaction and reparation (in the strict sense). . . . The concept of satisfaction is based on that of moral wrong. . . . It is intended primarily to make good an offence against the dignity and honour [of the State]. . . . Just as the concept of satisfaction is based on that of moral wrong, the concept of reparation is based on that of material wrong."<sup>74</sup> Accioly, too, holds that "implicit in the idea of reparation is that of material wrong. . . . Implicit in the idea of satisfaction is that of moral wrong and that of compensation — also moral — proportionate to the wrong suffered."<sup>75</sup>

<sup>70</sup> League of Nations publication, *V, Legal*, 1929.V.3 (document C.75.M.69.1929.V), p. 146.

<sup>71</sup> *Ibid.*, pp. 146 *et seq.*

<sup>72</sup> *Ibid.*, p. 151. The paragraph of the basis of discussion quoted here substantially reproduces the text of article X of the draft prepared by the Institute of International Law at its Lausanne session (1927). See the Special Rapporteur's first report, annex 8, *Yearbook of the International Law Commission, 1956*, vol. II, p. 228.

<sup>73</sup> *Op. cit.*, vol. I, book II, chapter XVIII, section 324.

<sup>74</sup> *Corso di diritto internazionale*, pp. 425-7.

<sup>75</sup> *Tratado de direito internacional público* (second ed., 1956), vol. I, pp. 354-5.

<sup>67</sup> *Ibid.*, pp. 48-9.

<sup>68</sup> With regard to this case and the Court's decision concerning the satisfaction due, see section 10 (b), below.

<sup>69</sup> See Moore, *op. cit.*, vol. VI, p. 760.

54. It has been argued that it is futile to attempt to maintain this distinction since "in international practice, material and moral injuries are inextricably intertwined".<sup>76</sup> Anzilotti himself acknowledged, in this connexion, that in all forms of reparation "there is invariably an element of satisfaction and an element of reparation, the idea of punishing the wrongful act and that of making good the damage sustained; what varies is, rather, the relative proportion of the two elements."<sup>77</sup> This is undoubtedly the case under the strict traditional view in which every injury, irrespective of the identity of the victim or the nature of the act or omission by which it is caused, is regarded as a "moral injury" to the State. Even in diplomatic practice, however, as has been indicated and as will be shown below, "reparation" is not always claimed for the moral injury to the State; often, the issue is solely one of making reparation for the real injury actually caused to the individual alien, or for the purely material injury suffered by the State in cases in which the property affected is held by the State under a title of private ownership. What happens — fairly frequently in diplomatic practice, but less commonly in cases adjudicated by international tribunals — is that the two types of reparation are employed together in respect of the same injury or, perhaps more properly, the same unlawful act or omission. But, as Bissonnette has observed, this does not mean that satisfaction cannot be regarded as a distinct form of reparation; the joint employment of measures of satisfaction and of reparation *stricto sensu* in such cases is intended to accomplish the purpose of "wiping out . . . all the consequences of the unlawful act or omission".<sup>78</sup> In this connexion, it should be pointed out that even in cases involving the reparation of injuries sustained by private individuals where the question of "moral injury" to the State of nationality is not raised, certain measures are sometimes applied which imply "satisfaction", given to the individual concerned rather than reparation *stricto sensu*; however, this is a question of terminology and not of substance.

55. In the light of the foregoing, it is natural to ask on what basis it can be decided whether the measures taken in a specific case constitute reparation *stricto sensu* or satisfaction. The practice of international tribunals shows that the most characteristic method of reparation *stricto sensu* — the payment of "damages" — may be employed for the purpose of affording satisfaction. Hence, even though the converse is not true, it is not always possible to define and identify these two forms of reparation in terms of their content. Nor can they be differentiated on the basis of whether the injured party is the private individual or the State of nationality, and in any case this approach indirectly involves a return to differentiation on the basis of the nature of the injury itself. Although, as a rule, reparation *stricto sensu* is applicable in the case of injury to private individuals and satisfaction in cases where

the question of "political and moral" injury is raised, satisfaction is often employed in cases of injury to private individuals, either alone or in conjunction with measures of reparation for the injury sustained. Nevertheless, it is possible to differentiate between the two types of reparation, as many writers do, on the basis of the purpose underlying the measures taken in each specific case. Thus, if the reparation allowed is intended strictly as compensation, it is to be regarded as reparation *stricto sensu*. If on the other hand, reparation is intended to make good a "political and moral" injury caused directly or indirectly to the State, it is to be regarded as satisfaction, even if given in the form of a pecuniary indemnity. It may of course be difficult in some cases to determine the purpose for which reparation is made, or to what extent it constitutes compensation and to what extent satisfaction, not to mention the theoretical difficulties encountered if every injury is regarded as a "moral injury" to the State.

56. There would appear to be no question that satisfaction, whatever the form it assumes, always entails reparation for a "moral and political injury" and, hence, constitutes reparation made *to the State*. What is open to some question is the rather widely stated view that reparation *stricto sensu* is always purely "compensatory" in nature. Can reparation in fact be regarded as exclusively compensatory in cases where all or part of the indemnity is obviously awarded for the purpose of punishing or censuring the unlawful act — i.e., in cases where the reparation of the injury caused to a private individual is, in view of the gravity of the act or omission imputable to the State, "punitive" in nature? It would seem not, even where in such cases the sole beneficiary or recipient of reparation remains the private individual and not the State of nationality. In these cases, the reparation undoubtedly contains an element of satisfaction. Unlike satisfaction, which, as will be seen below, is essentially and invariably penal in character, reparation *stricto sensu* is a civil institution, although it may in certain cases assume a characteristically "punitive" form because no distinction is made in traditional international law between the concepts of civil and criminal responsibility.<sup>79</sup>

#### (b) "Declaratory judgements"

57. In the discussion of the nature and scope of the duty to make reparation in chapter I, section 3, reference was made to situations in which "reparation" has been held to be due even through the injury alleged by the private individual in question has not materialized or run its course, or, in any event, even though it has not been possible to prove injury. Essentially, international tribunals have followed one of two courses in dealing with such cases. Either the claim has been dismissed as unfounded or not receivable, no decision being taken on the question of the responsibility incurred by the State, or else a "declaratory" judgement has been rendered. An example of the first approach is the *Sánchez* case, in which the Spanish-Venezuelan Com-

<sup>76</sup> Reitzer, *La réparation comme conséquence de l'acte illicite en droit international* (1938), pp. 125-6.

<sup>77</sup> *Op. cit.*, p. 425.

<sup>78</sup> *Op. cit.*, p. 84.

<sup>79</sup> In this connexion, see the Special Rapporteur's first report, *Yearbook of the International Law Commission, 1956*, vol. II, p. 211 (section 8).

mission considered it unnecessary to deal with the question of responsibility on the ground that, if Venezuela was held responsible in principle, it would not be possible to fix the terms of that responsibility concretely in order to make it effective since the claimant had not proved even one of the facts necessary to estimate and determine an indemnity.<sup>80</sup> It should be noted that, in this instance, not only is the claim dismissed by reason of failure to prove injury, but, in addition, the Commission refuses to deal with the question of substance on the ground that "it would not be possible to fix the terms concretely in order to make it [the responsibility] effective".

58. The position is reversed in the case of a "declaratory judgement". While it is recognized that no material or objective injury has been suffered, or that it has not been possible to prove such injury, the act or omission imputed to the defendant State is declared to be unlawful. The judgement of the Permanent Court in the *Mavrommatis Concessions* case (1925) contains a declaration of this kind: "... That the existence, for a certain space of time, of a right on the part of M. Rutenberg to require the annulment of the aforesaid concessions of M. Mavrommatis was not in conformity with the international obligations accepted by the Mandatory for Palestine; that no loss to M. Mavrommatis, resulting from this circumstance, has been proved; that therefore the Greek Government's claim for an indemnity must be dismissed."<sup>81</sup> In some instances, purely "declaratory" judgements of this nature are given because no pecuniary or other reparation is claimed. Thus, in its advisory opinion of 4 December 1935, the Permanent Court merely declared, in conformity with the terms of the request submitted by the Council of the League of Nations, that the legislative decrees promulgated by the free city of Danzig "are not consistent with [the latter's] constitution" and, therefore, not consistent with the international obligations implicit in the special régime to which the free city was subject.<sup>82</sup> In the *Trail Smelter Arbitration* (1941), one of the tribunal's decisions was also, for the same reason, purely declaratory in nature. With regard to the second question under article III of the convention of 15 April 1935, the tribunal held that "it is ... the duty of the Government of the Dominion of Canada to see to it that this conduct [i.e., the future conduct of the Trail Smelter] should be in conformity with the obligation of the Dominion under international law as herein determined."<sup>83</sup>

<sup>80</sup> See Ralston, *Venezuelan Arbitrations of 1903*, p. 938.

<sup>81</sup> Publications of the Permanent Court of International Justice, *Collection of Judgments*, series A, No. 5, p. 51. In the *Case concerning certain German interests in Polish Upper Silesia* (1925), the court held, with reference to the "abstract interpretation of a treaty", that articles 36 and 63 of its statute provided for "the possibility of a judgement having a purely declaratory effect". *Ibid.*, series A, No. 7, pp. 18-19.

<sup>82</sup> Publications of the Permanent Court of International Justice, *Judgments, Orders and Advisory Opinions*, series A/B, No. 65, p. 57.

<sup>83</sup> *Reports of International Arbitral Awards*, vol. III (United Nations publication, Sales No. 49.V.2), p. 1966. In an earlier passage, the tribunal had stated that "... under the principles of international law, as well as of the law of the United States, no State has the right to use or permit the use of its territory in

59. In some cases a declaratory judgement, instead of merely declaring that the act or omission imputable to the State is unlawful, assumes, as will be seen below, the character of a "sanction" or measure of "satisfaction". In contrast with the cases referred to earlier, this occurs when a State alleges a "political and moral" injury caused by the unlawful act or omission. The decision of the Permanent Court of Arbitration in the *Carthage* and *Manouba* cases (1913) is a declaratory judgement of this kind. In refusing to award the damages sought by France "as reparation for the moral and political injury resulting from the failure to observe general international law and conventions binding on both Italy and France", the Court stated that the "establishment" of this fact, especially in an arbitral award, constitutes in itself a serious penalty and that "this penalty is made heavier in such case by the payment of damages for material losses".<sup>84</sup> In its judgement in the *Corfu Channel* case (1949), the International Court of Justice expressed itself in different terms but apparently intended that the meaning or effect of its declaration concerning the British Navy's operations in Albanian territorial waters should be the same as in the case just referred to. Under the terms of the special agreement, the Court was to rule both on the claim based on the damage and loss of life resulting from the explosion of the mines and on the question of whether the British Navy's operations had constituted a violation of international law and whether there was, under international law, "any duty to give satisfaction". On the last point, the Court stated that "to ensure respect for international law, ... the Court must declare that the action of the British Navy constituted a violation of Albanian sovereignty" and that "This declaration is in accordance with the request made by Albania through her Counsel [for "the declaration of the Court from a legal point of view"] and is in itself appropriate satisfaction."<sup>85</sup>

60. In the light of these precedents, can it be said that the "declaratory judgement" truly constitutes a form of reparation? There seems to be no doubt so far as judgements of the second type are concerned: they constitute a simple means of giving satisfaction for "moral and political" injury caused to the State, or, in other words, a method of "making reparation" for an act contrary to international law by formally declaring it to be unlawful and thus sanctioning or censuring the conduct imputable to the defendant State. But can the same be said of the judgements in the first group? There the position is somewhat different, for they simply find or declare that the conduct

such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence." *Ibid.*, p. 1965.

<sup>84</sup> See Scott, J. B., *Les travaux de la Cour Permanente d'Arbitrage de La Haye* (1921), pp. 356-57. In the discussion below of "pecuniary satisfaction" in cases of injury caused to private individuals (section 15), other precedents will be examined which show the position that has been taken by international tribunals with regard to pecuniary claims based on "political and moral" injury to the State.

<sup>85</sup> *I.C.J. Reports* (1949), p. 35.

of the State is unlawful, although it might be argued that such a declaration constitutes, in itself, an implicit or indirect sanction or censure, which does not, however, appear to be the purpose of judgements of this kind. Nor can an analogy be drawn with "juridical restitution", since, as will be seen in the next section, the characteristic feature of this form of reparation is that it is intended to bring about the revocation of the legislative, executive or judicial measure held to be contrary to international law. A declaratory judgement does not, in a strictly legal sense, seek to re-establish the *status quo ante*.

61. It would also be wrong to think in terms of the "moral injury" caused to the State of nationality and to say, in accordance with the traditional view, that "injury is deemed implicit in the anti-juridical character of the act". As has been shown, the question is not always presented in these terms in practice and in the cases cited the reparation was viewed solely from the standpoint of the interests of the private individual concerned and of the injuries sustained by him. The only correct view of the declaratory judgement, in these cases, would therefore appear to be that its sole purpose is to define or affirm a right where there has been non-observance of the rule of law by which that right is recognized and protected. In this sense, the declaratory judgement unquestionably constitutes a type of "juridical reparation" for the unlawfulness of an act or omission capable of occasioning actual and effective injury and therefore constitutes a form of reparation *sui generis*.

#### 11. Reparation stricto sensu

62. In a discussion of reparation *stricto sensu*, the chief concern must be to determine its actual nature or scope, for it is in connexion with this form of reparation, rather than with reparation *lato sensu*, that the principle is put forward that reparation must be made "in full" for the injury caused by an act or omission contrary to international law. The principle is defined in the well-known declaration by the Permanent Court quoted in the Special Rapporteur's earlier reports:<sup>86</sup>

"The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due for an act contrary to international law."

63. On another occasion, the Court had declared that "the breach of an engagement involves an obli-

gation to make reparation *in an adequate form*".<sup>87</sup> The idea that reparation "must wipe out all the consequences" of the illegal act and must be "full" or "adequate" is frequently stated in international case-law. Thus, in the *Opinion in the Lusitania cases* it was stated that the "remedy must be commensurate with the injury received... The compensation [a term employed in the opinion as synonymous with "reparation"] must be adequate and balance as near as may be the injury suffered."<sup>88</sup>

64. But can the principle that "full" or "adequate" reparation must be made for an injury be really applied in practice? In the opinion quoted above, umpire Parker admitted that "In many tort cases, including those for personal injury and for death, it is manifestly impossible to compute mathematically or with any degree of accuracy or by the use of any precise formula the damages sustained... This, however, furnishes no reason... why he who has suffered should not receive reparation therefor measured by rules as nearly approximating accuracy as human ingenuity can devise."<sup>89</sup> On this point, Personnaz went so far as to say that it is impossible in most cases to re-establish the previously existing situation, so that the term "reparation" should not be construed in the strict sense—i.e., it should not be understood to mean restoring what has been taken away or wiping out the past, but should merely be taken to mean affording the victim the possibility of obtaining satisfaction equivalent to that which has been lost.<sup>90</sup> In short, the strict, absolute application of the principle referred to is not always possible in practice. Even in cases of injury to property, where it is somewhat easier to assess the consequences of the unlawful act or omission than in the case of physical or moral injury to the person, serious difficulties are often encountered, as will be seen below, in determining what reparation is to be made.

65. Apart from these considerations, the purpose of reparation should certainly be to wipe out all the consequences of the unlawful act or omission. This purpose can be achieved if reparation takes the two forms explicitly mentioned in the declaration of the Permanent Court quoted above: restitution in kind (*restitutio in integrum*) and pecuniary damages (*dommages-intérêts*).<sup>91</sup> The distinction between these two forms or methods of reparation is quite frequently drawn in international case-law and even, on occasion, in diplomatic practice. It has even been specifically embodied in international instruments setting up arbitration tribu-

<sup>87</sup> Judgement in the *Chorzów Factory (Jurisdiction)* case, *ibid.* series A, No. 9, p. 21.

<sup>88</sup> See United Nations, *Reports of International Arbitral Awards*, vol. VII, pp. 35, 36.

<sup>89</sup> *Ibid.*, p. 36. See a similar statement by umpire Ralston in his opinion in the *Di Caro* case, Ralston, *Venezuelan Arbitrations of 1903*, p. 770.

<sup>90</sup> *Op. cit.*, pp. 197-8.

<sup>91</sup> Some writers speak of "direct" reparation, which consists in re-establishing the situation existing prior to the injurious act, and "indirect" reparation, which consists in the payment of an indemnity. Cf. De Visscher, *La responsabilité des états*, *Bibliotheca Visseriana* (1924), vol. II, p. 118.

<sup>86</sup> Publications of the Permanent Court of International Justice, *Collection of Judgements*, series A, No. 17, p. 47.

nals and commissions.<sup>92</sup> Before each of these two forms of reparation is discussed separately, it should be noted that, since they share a common purpose, neither one necessarily precludes the other.

(a) *Methods of restitution*

66. In international practice, *restitutio in integrum* possesses certain characteristics which are not found in domestic law. Although essentially of the same legal character in both cases, in international practice this type of restitution sometimes assumes forms or pursues objectives which are necessarily imposed upon it by the special nature of reparation for injuries caused by acts or omissions imputable to a State.

67. Restitution may be either of the "material" or of the "legal" type, depending on the nature of the injury to be repaired or of the act or omission which caused the injury. Material restitution is most commonly made in cases of injury to property belonging to an alien or to the State itself. The most frequent cases have been those resulting from unlawful expropriations, from the confiscation of property, or from the seizure of vessels or of other property or goods. As will be seen from the discussion of reparation in respect of this type of injury in the next chapter, restitution is accompanied by the payment of damages in the great majority of cases, both in diplomatic practice and in international case-law. In addition, however, material restitution can also be considered to have been made in those cases, which will be mentioned presently, where a person who has been unlawfully detained, arrested or seized is released. An example of restitution for the benefit of a State is the award of Arbitrator Huber ordering Spain to provide premises for use by the British consulate at Tetuán.<sup>93</sup> It must be pointed out, however, that the idea underlying material restitution is not always precisely that of making reparation for material injury to a private individual. Thus, in his decision in the *Compagnie générale des asphaltes de France* case, umpire Plumley, while acknowledging that there had been no actual injury inasmuch as customs duties had not been collected a second time, ordered restitution to be made on the ground that the action of the Venezuelan consul in requiring the payment of duties at Trinidad had constituted a violation of British territorial sovereignty. The purpose of this decision was to give "satisfaction" to the British Government rather than to make reparation for an injury which had not actually materialized.<sup>94</sup>

68. The special features of restitution in international law are most often in evidence in the case of legal resti-

<sup>92</sup> For example, article IX of the convention of 8 September 1923, which set up the United States-Mexican General Claims Commission, provided that "In any case the Commission may decide that international law, justice and equity require that a property or right be restored to the claimant in addition to the amount awarded in any such case for all loss or damage sustained prior to the restitution." Feller, *The Mexican Claims Commissions, 1923-1934* (1935), pp. 328-9.

<sup>93</sup> See Max Huber, *Réclamations britanniques dans la zone espagnole du Maroc* (The Hague, 1925), pp. 176-81.

<sup>94</sup> See Ralston, *op. cit.*, p. 340.

tion—i.e., where the reparation consists in abrogating or modifying a specified provision of an international agreement or in rescinding a legislative, executive or judicial measure.<sup>95</sup> An example of the first type is the judgement of the Central American Court of Justice requiring Nicaragua to use all available means, in conformity with international law, to re-establish and maintain the legal situation existing between the litigant States prior to the conclusion of the treaty in which Nicaragua had granted the United States the right to build a canal across its territory joining the Atlantic and the Pacific, as well as certain rights in the Gulf of Fonseca.<sup>96</sup> More precedents exist for the second type of legal restitution. For the most part, they concern legislative and even constitutional measures incompatible with specified provisions of agreements concluded between the States concerned, as in the case of the tariff measure adopted by Serbia in contravention of the Treaty of 28 July/9 August 1892 with the Austro-Hungarian Empire, and in the case of article 61, paragraph 2, of the Weimar Constitution, which was regarded as incompatible with the obligations imposed on Germany by article 80 of the Treaty of Versailles.<sup>97</sup> In the face of a protest by the Japanese Government and pressure by the United States Government, the San Francisco Board of Education rescinded a measure barring persons of Japanese nationality from the public schools.<sup>98</sup> In diplomatic practice, too, there have been cases in which the setting aside of a sentence or other judicial decision has been demanded as reparation. That is what happened in the *Lueders* case, which will be examined below, and in the case of the arrest and sentencing of *Bonhomme*, in which France requested not only that the person concerned should be released but also that the sentence should be set aside.<sup>99</sup> It will be noted that here, as in the decision of the British-Venezuelan Commission referred to in the preceding paragraph, restitution constitutes satisfaction in the true sense.

69. In international case-law, legal restitution does not as a rule go so far as to involve the repeal or rescission of the legislative, executive or juridical measure in question. In fact, one should perhaps mention, as the only exception to the rule, the *Martini* case (1930), which

<sup>95</sup> Not included here is "punishment of the culprits", which some authorities, such as Personnaz, *op. cit.*, pp. 79-80, appear to regard as restitution in cases of "direct" responsibility, i.e., where the punishment is imposed as reparation for the act or omission imputable to the State. Punishment of the guilty, as will be seen in the next section, is a typical method of giving satisfaction which should not be equated with restitution, since, like other forms of satisfaction, it does not serve to re-establish the *status quo ante*. Perhaps, from a psychological point of view, a certain parallel could be drawn in the sense that punishment, as a measure intended to express censure of the unlawful act, tends to prevent the latter from being repeated. In this sense, however, the other forms of satisfaction would also have to be regarded as restitution.

<sup>96</sup> See *Anales de la Corte de Justicia Centroamericana* (1917), vol. IV, sections 16-18, pp. 124-5.

<sup>97</sup> See Bissonnette, *op. cit.*, p. 21.

<sup>98</sup> See *Revue générale de droit international public* (1907), pp. 636-85.

<sup>99</sup> See de Martens, *Nouveaux suppléments au recueil de traités*, vol. III, pp. 570 et seq.

was decided by the Italian-Venezuelan Commission. In one passage, the award stated that "These obligations [imposed by a judicial decision described as 'manifestly unjust'] must be annulled by way of reparation." In ordering them annulled, the Arbitral Tribunal noted that an unlawful act had been committed and it proceeded on the principle that the "consequences of the said act must be wiped out". Although no injury had actually been sustained, since the judicial decision in question had never been carried out, the arbitrator held that the payment obligations imposed on the Martini enterprise had constituted "a patent injustice" to that firm and that, consequently, "the obligations exist in law" even though they had never been carried out.<sup>100</sup> As regards the nature or, rather, the effects of legal restitution in cases like this one where injury was not actually suffered, it must be said that, strictly speaking, the reparation consists solely in ordering the unlawful act to be annulled or rendered ineffective and not in "wiping out" consequences which have not come to pass. To be sure, when the Tribunal in the case just referred to stated that the obligations existed in law, it may have been thinking in terms of presumed, potential and future consequences or injuries.<sup>101</sup> However, if the principle of "full" reparation is interpreted literally—and that is how it is in fact interpreted and applied in practice—the consequences which are to be "wiped out" by reparation are the injuries already caused by the act or omission imputable to the State, not those which may possibly be caused by it in the future. Hence, it is sufficient to think purely in terms of annulling the measure which is deemed to be unlawful, since that is enough to ensure the accomplishment of the sole purpose which reparation is intended to achieve in the case just considered—namely, the re-establishment of the *status quo ante*.

### (b) Damages

70. As a method of reparation, restitution presents serious practical difficulties. In the pronouncement by the Permanent Court quoted at the beginning of this section, restitution in kind is explicitly made contingent on whether it is "possible" to carry it out. In actual fact, restitution is rarely practicable. Sometimes it is not possible for purely material reasons, as in cases where the property of which the alien in question was unlawfully deprived has been destroyed. At other times it is not possible for legal reasons, since, as will be seen in connexion with the admissibility of certain methods of reparation, it is no simple matter from the point of view of domestic law to contemplate compelling a State to rescind a legislative measure or to set aside a decision pronounced by its courts (sec-

<sup>100</sup> See United Nations, *Reports of International Arbitral Awards*, vol. II, p. 1002.

<sup>101</sup> Bustamante maintained that a claim may be based "on past injury and on presumed injury", pointing out that "it is not necessary for the injury to result in material or pecuniary loss, since the mere failure to permit the exercise of a right can provide grounds for a claim". See *Derecho internacional público* (1936), vol. III, p. 481.

tion 16). Another consideration is that restitution does not always serve, "as far as possible, [to] wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed". For example, where a claim is admissible on the basis of loss of profits, the mere restitution of the property or rights of which the alien in question was deprived is not sufficient.

71. When *restitutio in integrum* is not possible for material or legal reasons, or when it is not in itself sufficient to repair all the consequences of the act or omission imputable to the State, the payment of an indemnity is appropriate either in lieu of or as a supplement to restitution. There appears to be a third situation in which this other type of reparation may also be employed in place of restitution—viz., where the claimant elects in its favour because he regards it as more advantageous than restitution. In the *Chorzów Factory* (Merits) case, the Permanent Court, describing payment of an indemnity as "the most usual form of reparation", declared that "it is the form selected by Germany in this case and the admissibility of it has not been disputed."<sup>102</sup> In any one of the situations described above, reparation takes the form of the payment of "damages", just as under domestic law, and it is pecuniary in nature because, in Grotius' well-known phrase, "money is the common measure of valuable things". Even where, as often happens, no material injury is involved or the purpose in making reparation is not solely that of compensation, the indemnity always consists of a sum of money.

72. The nature or scope of "damages" is also completely different from that of restitution. While restitution merely restores the property or right of which the alien in question has been deprived, an indemnity is intended to compensate him for all the other consequences of the act or omission contrary to international law. In this sense, reparation is not confined to the *damnum emergens*, but may also be made for the *lucrum cessans* and other injuries consequential on the original injury or on the act by which it was caused, provided that the necessary causal connexion can be proved. This form of reparation, where appropriate, also applies to types of injury which by their nature are not capable of restitution, such as "moral injury" and other kinds of injury to the person of aliens. If it is interpreted broadly, it can even include the payment of a sum of money for interest, expenses and costs as an integral part of the indemnity, or as a supplement thereto. For all these reasons, "damages" are, in fact, the only method of reparation which makes it possible in all situations to abide by the principle, discussed at the beginning of this section, that "full" reparation must be made for any injury caused by an act or omission contrary to international law. As a result, various problems arise with regard to the criteria to be applied

<sup>102</sup> See Publications of the Permanent Court of International Justice, *Collection of Judgments*, Series A, No. 17, p. 28. With regard to the question how the amount of the indemnity is to be fixed in the type of case here considered, see the dissenting opinion by Lord Finlay, *ibid.*, pp. 70 *et seq.*

in fixing the quantum of the indemnity, the limits to which it is subject, and so forth, as will be seen in connexion with the question of reparation for injuries caused to private individuals (chapter III of this report).

## 12. *The essential characteristics of satisfaction*

73. Notwithstanding the difficulties of differentiating clearly between the two major forms of reparation, satisfaction possesses certain characteristics which are, essentially, peculiar to it. For one thing, satisfaction takes a particular, characteristic form, even in the case of injuries to private individuals; furthermore, and above all, the two kinds of reparation differ in substance. The determining factor in satisfaction is not so much the nature or scope of the injury for which reparation is to be made as the actual or alleged gravity of the act giving rise to satisfaction. This is a basic consideration in examining this type of reparation. Whereas in reparation *stricto sensu* the primary consideration is the injury actually sustained by the individual in question (or by the State, as the case may be), in satisfaction the "political and moral" injury is appraised in the light of the act imputable to the State and even in that of external circumstances affecting the act which aggravate it or diminish its seriousness, such as the amount of publicity which it received, the popular attitude towards the persons responsible, and so forth.<sup>103</sup>

74. Owing to the very nature of the injury for which it seeks to make reparation, and to that of the acts which give rise to it, what characterizes satisfaction above all is that its context is variable and ill-defined. A "political and moral" injury is not capable of objective assessment, nor are the acts by which it is caused; hence, it would be virtually useless to try to work out guiding rules for the kind of reparation to be made in the various situations in which the State claims to have suffered such an injury. Satisfaction is generally given in the shape of one or more of what may be regarded as its typical forms (the offer of an apology, punishment of the guilty, and so forth). However, satisfaction does not always represent purely "moral" reparation, since it is sometimes pecuniary in nature and at times even takes the form of an increase in an indemnity paid as reparation for injuries suffered by nationals of the State concerned. The practice of simultaneously employing two or more different methods of satisfaction in respect of the same act is even more wide-spread and, in fact, was the practice most commonly adopted in the past. Even more than the factors already referred to, however, what adds to this inconsistency and imprecision characteristic of satisfaction is the fact that it is not even possible to affirm in all cases that satisfaction "is due", since, when injury has been caused to the State in an "indirect" manner, reparation is generally made only for the injuries actually sustained by the private individuals concerned. There are also cases where, even though a "political and moral" injury in the proper sense of the term is in fact involved, the State refrains from requesting

satisfaction — a curious political phenomenon which is observed with increasing frequency in modern times.

75. The inconsistency characteristic of satisfaction is closely bound up with another of its essential characteristics: its highly discretionary nature. In this connexion, it is no exaggeration to say that the "discretion enjoyed by the injured State is, in principle, unlimited"<sup>104</sup> This is readily understandable in the light of the *de facto* situation that generally obtains when the occasion arises for this type of reparation. In the great majority of cases, the "injured party" is a powerful State and the other party is a State that is incapable of resisting successfully the demands for satisfaction put forward by the first State, even though they may be utterly disproportionate to the acts imputed to the respondent State. Frequently, too, the political prestige of the claimant State is involved and that State's prestige requirements can be met only if it decides itself what measures of satisfaction are "due". What most strikingly characterizes the history of satisfaction, or at all events its history until fairly recently, is this disequilibrium of power between the States concerned and the resultant abuse of discretion by one State for the purpose of demanding, and perhaps exacting, from the other State such measures of satisfaction as it considers appropriate.<sup>105</sup> It is perhaps because of this state of affairs that the measures of satisfaction to be applied in each case have generally been decided by direct diplomatic negotiation.

76. So far as form is concerned, it can be said that a characteristic feature of satisfaction is the publicity attending it. Sometimes the actual measure constituting satisfaction includes a public act, such as a salute to the flag or other forms of presenting an apology. However, other measures of satisfaction are also accompanied by wide publicity so that they will accomplish what is in fact their twofold purpose — that of "satisfying" the honour and dignity of one State and that of "punishing" the act imputed to the other State. This second purpose reflects the last of the characteristics of satisfaction which will be emphasized here — viz., its essentially punitive nature. When the question of reparation for injuries to private individuals is examined in the next chapter, it will be seen that even reparation *stricto sensu* is at times frankly "punitive" in its nature or purpose. However, in all cases of satisfaction, whatever the nature of the injury involved or of the act giving rise to satisfaction, the element of censure or condemnation is implicit in the measure or measures demanded if it is not explicitly indicated in the claims put forward by the State concerned — as will be more fully demonstrated in subsequent sections of this report.<sup>106</sup>

77. A final problem that has sometimes been raised by the authorities is whether the "duty" to give satisfaction is dependent on an intention (*animus*) to offend

<sup>104</sup> See Reitzer, *op. cit.*, p. 141.

<sup>105</sup> The "manifest abuses" resulting from the discretionary nature of satisfaction have not escaped the attention of the commentators. See, for example, Personnaz, *op. cit.*, p. 289.

<sup>106</sup> This characteristic of satisfaction is so obvious that it is stressed constantly by the authorities. See, for example, Personnaz, *op. cit.*, pp. 306 *et seq.*, and Bissonette, *op. cit.*, pp. 27-30.

<sup>103</sup> See Anzilotti, *Corso di diritto internazionale*, p. 426.

the dignity or honour of the claimant State. This is related to, although not identical with, the question whether international responsibility is dependent not only upon an unlawful and injurious act, but also upon a wilful attitude (*culpa* or *dolus*) on the part of the respondent State.<sup>107</sup> The first to raise this question was Triepel, although he did so only with respect to cases of responsibility for acts of private individuals ("indirect" responsibility). In his view, material reparation for injuries suffered by aliens was called for only if there was fault on the part of the State; "however, regardless of whether it gives rise to a duty to make reparation, the act of an individual may give rise to a duty on the part of the State to give *satisfaction* to the injured State. The giving of such satisfaction does not represent an obligation arising out of an offence; it may arise even in the absence of fault. . . . It represents neither compensation nor damages. . . . Rather, it is a measure designed to *appease the sensibilities of the alien offended by the act in question.*"<sup>108</sup> Others, however, share the view of Pons, who stated, with reference to all cases of responsibility, that an act "cannot, by rights, give rise to measures of satisfaction (e.g., diplomatic apologies) unless there has at least been fault on the part of the State responsible for the act."<sup>109</sup>

78. As will be seen below, in connexion with the conditions and circumstances in which satisfaction has been employed, it is not always apparent in a particular case whether or not satisfaction was dependent on the element of intention. In some rather exceptional cases specific reference is made to this point — e.g., in cases where the State refrains from requesting satisfaction because it feels that there was no intention to offend its national honour or dignity. Thus, in the incident arising out of the seizure of the *Virginus* (1873), the Spanish Government was not required to give satisfaction of any kind because it was felt that there had been no intention to show disrespect for the United States flag, while in the incident caused by the arrest of the *Maria Luz* (1875) the Peruvian Government noted "with satisfaction the statement that the Japanese Government had no intention of offending the dignity of Peru."<sup>110</sup> In other cases, even those involving acts which resulted in "political and moral" injury in the proper sense of the term, it would be useless to inquire into the basis of the claims for satisfaction. Only in a very few cases would it be possible to establish that there had in fact been an intention to "offend" the

honour or dignity of the claimant State. However, the view taken in the past has been that, if it is not at least presumed that there was such an intention, it is scarcely possible even to conceive of an injury whose very existence is essentially dependent on the subjective judgement of the "offended" State.

### 13. Typical measures of satisfaction

79. Since the primary purpose of this report is to examine the duty to make reparation in cases involving injuries to the person or property of aliens, it will surely be useful to provide a description of the various methods of giving satisfaction so as to see to what extent and in what circumstances they have been employed in cases of this type and which of them are normally used in making reparation for "moral injury" indirectly caused to the State. For methodological reasons, a distinction will be drawn between the "typical" methods or measures and "pecuniary satisfaction", which will be examined in the next section. Although the latter contains all the essential elements of satisfaction, it is, strictly speaking, the "typical" measures that are usually considered to be the "moral reparation" that is made to a State when its interests are injured directly or indirectly as the result of an act or omission contrary to international law. In a sense, it could be said that these measures represent the ways in which satisfaction *stricto sensu* is given expression. A brief description of the typical measures will, of course, adequately serve the purpose indicated above; a convenient guide can be found in the system of classification and differentiation devised by Bissonnette, whose monograph is unquestionably the best and most systematic study yet made of satisfaction.<sup>111</sup>

80. To begin with, in Bissonnette's view all these forms and methods of satisfaction can be grouped under three headings: apologies, punishment of the guilty persons, and guarantees for the future. As will be seen shortly, neither this classification nor the system of sub-classification which should be used within each of these categories should be taken to mean that various forms or methods are not employed simultaneously in many cases. That is, in fact, what occurs when measures of the first type are applied, presumably because apologies constitute the form of satisfaction most often employed in practice. It should be noted in this connexion that it is not always possible, either in theory or in practice, to make a distinction between apologies in the strict sense and expressions of regret at what has occurred. It should also be pointed out that certain other methods of satisfaction are sometimes employed where the objective, avowed or implicit, is that the State should offer its apologies in that way.

81. Apologies in the strict sense are generally presented verbally. For example, when a number of western European countries protested to the Turkish Government concerning the violation of mail pouches at Constantinople (1901), the Turkish Minister for Foreign Affairs was instructed to present his government's apologies verbally to the diplomatic missions con-

<sup>107</sup> Concerning theory and practice with regard to this question, see the Special Rapporteur's fifth report, Part B, chapter II, *Yearbook of the International Law Commission, 1960*, vol. II (United Nations publication, Sales No. 60.V.1, vol. II).

<sup>108</sup> *Droit international et droit interne* (trans. by R. Brunet, 1920), p. 332.

<sup>109</sup> L. Pons, *La responsabilité internationale de l'Etat à raison de dommages causés sur son territoire aux étrangers* (Thèse, Toulouse, Imprimerie F. Boisseau, 1936), p. 70.

<sup>110</sup> See other cases in Personnaz, *op. cit.*, pp. 283-4. An arbitral decision rendered by the King of Belgium in 1863 stated that "in the mode in which the laws of Brazil had been applied towards the English officers there was neither premeditation of offence nor offence to the British Navy." See Whiteman, *op. cit.*, vol. I, p. 288.

<sup>111</sup> See pp. 85 *et seq.* of the thesis cited in footnote 35.

cerned.<sup>112</sup> Written apologies, of course, receive much less publicity than those presented verbally and sometimes none at all; hence, the written method is employed only when the incident in question has had no impact on public opinion.<sup>113</sup> The instrument of apology may be a letter addressed to a high authority of the offended country, or an ordinary diplomatic note. Apologies have even been transmitted by telegraph — e.g., in the case of the *Baltimore* incident (1891), as a result of which the Chilean Minister for Foreign Affairs cabled an apology to the United States Government.<sup>114</sup> Expressions of regret are, as has already been said, frequently equated with apologies *stricto sensu*. An instance in which regrets were expressed although an apology was neither asked for nor given was the incident caused by the violation of Argentine territory by a Brazilian police officer (1907).<sup>115</sup> Such expressions of regret should not be confused with those which represent merely a gesture or an act of courtesy. This point can be illustrated by reference to the *Chesapeake* incident (1863), as a result of which Mr. Seward, the United States Secretary of State, informed Lord Lyons that if authority had been exercised by agents of the United States Government within the waters or on the soil of Nova Scotia, that government would “at once express its profound regret; and it stands ready, in that case, to make amends which shall be entirely satisfactory.”<sup>116</sup> It will be noted that such gestures or acts of courtesy, far from constituting satisfaction or having that as their purpose, are intended by the State in question precisely as a means of declining any international responsibility with respect to the act which gives rise to them. In this sense, their similarity to *ex gratia* reparation, which has been dealt with elsewhere (section 3 above), is readily recognizable.

82. Saluting the flag of the offended State is, as Bissonnette points out, the “most ceremonious and spectacular” of all forms of apology, but relatively little used. For the most part, a salute to the flag has been demanded as a result of breaches of the inviolability of diplomatic and consular missions (or violations of the immunity of diplomatic and consular representatives), violations of the national territory or vessels of the State concerned, or an affront against the flag itself. In one case which received wide publicity, that of the murder of General Tellini and other members of his commission, the Conference of Ambassadors demanded, among other measures of satisfaction, that the Greek fleet should fire a twenty-one gun salute to the flag of each of the three Powers (Italy, Great Britain and France).<sup>117</sup> Another form of satisfaction falling within this category is that which consists in

expressing disapproval of the injurious or offensive act. Such disapproval may, at various times, take the form of disavowal of the act and punishment of the person responsible, as in the case of *Captain Haddock* (1863);<sup>118</sup> of disavowal, an expression of regret, and the issuance of orders designed to prevent a repetition of the act, as was requested in the *Alliança* incident (1895);<sup>119</sup> or merely of condemnation or reprobation of the act, which was the nature of the apology made by Secretary of State Hay to the German Ambassador for the conduct of soldiers from the transport *Sheridan* (1900).<sup>120</sup> Apologies may be conveyed, and quite often are, by dispatching an extraordinary or special mission, which is in the nature of an “expiatory mission” quite apart from any measures it may be instructed to take for the purpose of giving satisfaction to the State that receives it. The mission called for in the first of the long series of demands for satisfaction which the Powers presented to the Chinese Government as a result of the *Boxer Rebellion* (1900) was of this kind.<sup>121</sup> Finally, apologies may take a much simpler form when a request is made merely for an explanation of the act in question. Thus, in the *Major Barbour* incident (1857), the United States Government simply requested an explanation by the Mexican Government for the shots fired at the vessel in the harbour of Coatzacoalcos.<sup>122</sup>

83. Measures of satisfaction of the second type referred to above — punishment of the guilty persons — generally arise in practice as a result of injuries caused to nationals (officials or private individuals) of the claimant State. Within this category, an effort has been made to distinguish between demands for the actual punishment of the guilty persons and demands for an investigation of the facts or for the trial of nationals of the claimant State who are considered to have been unlawfully imprisoned. An investigation is, of course, appropriate only if the acts or circumstances which occasioned the injury have not been sufficiently clarified. Hence, it is doubtful to what extent it can be regarded as a measure of satisfaction, since any such measure is necessarily dependent on an actual, proved act or omission contrary to international law. This does not mean, of course, that in exceptional cases a demand for an investigation cannot be made in conjunction with demands for satisfaction, as occurred in the *Corfu* incident.<sup>123</sup> Nor can the trial of an unlawfully detained person really be regarded as a form of satisfaction. Since this problem arises only in connexion with injuries suffered by private individuals, it will be dealt with in the context of the applicability of satisfaction in cases of that

<sup>112</sup> See *Revue générale de droit international public* (1901), p. 777 *et seq.*

<sup>113</sup> In this connexion, see Personnaz, *op. cit.*, pp. 295-6.

<sup>114</sup> See Moore, *A Digest of International Law*, vol. VI, p. 859.

<sup>115</sup> *Ibid.*, vol. V, p. 42.

<sup>116</sup> *Ibid.*, vol. II, p. 366. Concerning this distinction, see also Anzilotti, *op. cit.*, pp. 426-7.

<sup>117</sup> See Eagleton, “The Responsibility of the State for the Protection of Foreign Officials”, *American Journal of International Law* (1925), vol. 19, p. 304.

<sup>118</sup> See Moore, *op. cit.*, vol. II, p. 370.

<sup>119</sup> *Ibid.*, pp. 908-9.

<sup>120</sup> *Ibid.*, pp. 141-142.

<sup>121</sup> See Eagleton, *The Responsibility of States in International Law*, p. 185.

<sup>122</sup> See Moore, *op. cit.*, vol. VI, p. 955.

<sup>123</sup> The sixth of the demands made on Greece by the Conference of Ambassadors was that it should agree to the appointment by the conference of a special commission which would supervise, and, indeed, have full powers to take part in, the preliminary investigation undertaken by the Greek authorities. See the article cited in footnote 117 above.

kind; it will then be seen that, rather than constituting a claim for satisfaction, a demand for the trial of an unlawfully detained person is, like a demand for an investigation, made for the purpose of elucidating the facts in the case and so obtaining the revocation of the detention order.

84. The actual punishment of guilty persons, on the other hand, poses a different problem, since one of the conditions for such punishment is, of course, that the act or omission contrary to international law should be imputable to the respondent State. Hence, serious doubts arise with regard to the many cases cited by Bissonnette and others as instances where the punishment of the guilty persons served as a measure of satisfaction. For example, in the *Duvall* case (1894), the United States Secretary of State refrained from presenting a claim for damages because "The Mexican authorities promptly apprehended the murderers, and the Department understands that they were tried, convicted and punished."<sup>124</sup> However, in this as in other cases, the guilty person to be punished was a private individual. The situation is completely different and absolutely clear-cut where agents or authorities of the State are involved. While there is no need to cite here any of the numerous cases of this kind, it may be noted that the punishment sometimes consists in the execution of the agent concerned but, as a rule, takes the form of dismissal or some other disciplinary measure.<sup>125</sup> The use of punishment in these cases as a measure of satisfaction is readily understandable, for the very status of the guilty person at the time of the act or omission which is imputable to the State has the effect of automatically establishing the latter's international responsibility and, consequently, the appropriateness of punishment as a means of making reparation for the injuries sustained.

85. The third category of measures of satisfaction referred to above also tends to give rise to confusion concerning the actual nature or function of the measure in question. This is because demands for guarantees for the future are sometimes made even where the international responsibility of the State for the act giving rise to such demands has not been established. This is particularly common in cases of injuries caused by private individuals, where the real purpose of the demand is to ensure that the State will be more diligent or effective in the future in carrying out its obligation to afford protection. An obvious example of this is the demand submitted by the Chinese Government as a result of incidents which had occurred at Denver, Colorado; in that instance, the United States Government offered renewed assurances that Chinese residents would receive the same protection from the authorities as that enjoyed by citizens.<sup>126</sup> At other times, the demand is made as the result of an act or circumstance which has in fact given rise to international responsi-

bility on the part of the State. For example, among the demands presented to the Chinese Government as a result of the *Boxer Rebellion* was one for the continuance of the import ban on arms and on materials used exclusively for their manufacture.<sup>127</sup> A form of satisfaction sometimes demanded by one State of another, which falls within the category here considered, is that of the express recognition of a particular right. For example, as a result of the *Constitución* incident (1907), Uruguay demanded that Argentina should make a statement to the effect that it had had no intention of disregarding the jurisdiction enjoyed by Uruguay, as a neighbouring riparian country, in the River Plate.<sup>128</sup> Also to be included in this category are demands for the enactment of legislation that will forestall the recurrence of the acts in question. The classic example would still appear to be the *Mattueof* affair (1708), as a result of which the British Parliament enacted a law, the "Act of Anne", providing penalties for attacks on ambassadors in the future.<sup>129</sup> With some exceptions, all other cases in which this form of satisfaction has been employed have related to injuries suffered by private individuals, as will be seen below.

#### 14. Pecuniary satisfaction

86. This section is concerned with a particular form of satisfaction, the payment of a pecuniary indemnity to the claimant State for the "political and moral" injury sustained by reason of an act or omission contrary to international law. Reparation for this category of injury is, as has been seen, normally moral or political in form, but moral or political reparation has fairly frequently been regarded as inadequate or as not the most appropriate form of reparation for such injuries, which may include material losses. While the distinction will be taken up again later, pecuniary satisfaction should not be confused, as it is by some writers, with a form of reparation *stricto sensu* whose basis is similar to that of the various forms of satisfaction. As will be seen in the next section, the distinction between the two is valid, even in the case of injury to individuals. Strictly speaking, the term "pecuniary satisfaction" should be applied only when the indemnity, or a part of it, is claimed or allowed as reparation for an injury suffered directly or "indirectly" by the State. The distinguishing mark of pecuniary satisfaction is in fact the purpose for which the indemnity is intended.<sup>130</sup>

87. The question of pecuniary satisfaction generally arises in cases involving injury to officials of the claimant State, when special circumstances accompany the injury or the act imputed to the respondent State. Claims for satisfaction of this kind, as distinct from the typical forms of satisfaction, have fairly frequently been made in cases heard by claims tribunals and commissions. Thus, in the *Charles Weile* case (1870), which arose from the arrest and imprisonment of

<sup>124</sup> See Moore, *op. cit.*, vol. VI, p. 806.

<sup>125</sup> For a virtually exhaustive enumeration, see Bissonnette, *op. cit.*, pp. 116 *et seq.*

<sup>126</sup> See *Foreign Relations of the United States* (1881), p. 319. See other examples in section 15 below.

<sup>127</sup> See the work cited in footnote 121 above.

<sup>128</sup> See *Revue générale de droit international public* (1908), p. 318.

<sup>129</sup> See Stowell & Munro, *op. cit.*, vol. I, p. 3.

<sup>130</sup> For differentiation from "punitive" damages, see section 20, *infra*.

the United States consul at Tumbes, Peru, the United States Commissioner "insisted on the importance of giving a decision which would, by the magnitude of the *award*, show the local authorities how wrong it is for them to act in a hasty manner when the *liberty and honour* of the consul of a friendly Power are concerned." The size of the award (\$32,407.40), which was clearly disproportionate to the injury likely to have been caused by the consul's arrest and imprisonment, seems to confirm the view that the respondent State was required to pay the indemnity on these grounds.<sup>131</sup> In the case of *F. Mallen* (1927), a Mexican consul at El Paso, Texas, who was attacked and arrested by the deputy State constable, no pecuniary satisfaction was allowed, but the Presiding Commissioner, Mr. Van Vollenhoven, stated that "while recognizing that an amount should be added as *satisfaction for indignity suffered*, for lack of protection, and for denial of justice, as established heretofore, account should be taken of the fact that very high sums claimed or paid in order to uphold the consular dignity related either to circumstances in which the nation's honour was involved, or to consuls in backward countries, where their position approaches that of the diplomat. [Reference was then made to the *Casablanca* case, decided by the Permanent Court of Arbitration in 1909.]"<sup>132</sup>

88. Notwithstanding the foregoing, when the British Vice-Consul at San José, Guatemala, *John Magee* (1874), was arrested, ill-treated and threatened with death by the Guatemalan authorities, Great Britain demanded (1) a reiteration of the promise to prosecute the guilty parties, (2) an agreement by the Guatemalan Government to order a salute of twenty-one guns to the British flag, and (3) "an indemnity for the outrage done to Vice-Consul Magee of Guatemala by Commandant Gonzalez." The sentences imposed on the guilty parties (ten years' imprisonment, deprivation of the right to hold office, etc.) being in its opinion unsatisfactory, the Government demanded and obtained the sum of \$50,000 as pecuniary satisfaction.<sup>133</sup> During disturbances at New Orleans in 1851, the Spanish consul and consulate were attacked by demonstrators. In a note from Secretary of State Webster, it was recognized that, in contrast to private persons of Spanish nationality, the consul, because of his official status, had a right to a "special indemnity". In his message to Congress of 2 December 1851, President Fillmore explained the purpose of the indemnity as follows: "... that you might make provision for such indemnity as a just regard for the *honour of the nation and the respect which is due to a friendly Power*..."<sup>134</sup>

89. A special note is struck, within this group of cases, by that of Vice-Consul R. M. Imbrie (1924),

who was murdered by a mob at Teheran. The United States Government stated that it had "no wish to offend a friendly government or to require punitive damages." The indemnity requested, in addition to the compensation which the Persian Government had undertaken to grant to the widow, was intended to pay the expenses of a United States warship to transport the body home. It appears, however, that it was decided, under a joint resolution of Congress, that \$30,000 of the sum received for this purpose (\$110,000) should be granted to the widow in addition to the \$60,000 she had received from the Persian Government.<sup>135</sup>

90. Injuries suffered by members of the armed forces and other officials or official representatives have also given rise to claims of this kind. In connexion with the murder of *Dr. Mauchamp*, a French physician attached to the dispensary at Marrakesh (Morocco), France demanded, in addition to other measures of satisfaction and the payment of an indemnity to the victim's family, another "indemnity to be paid to the French Government as reparation for the offence it has suffered through the death of a person to whom it had entrusted an official mission." This indemnity, which was to be fixed by the French Government, was intended for the construction of a hospital honouring the victim's memory.<sup>136</sup> In connexion with the murder of *Sergeant Mannheim*, a French soldier on guard at the French Embassy at Berlin, France requested and obtained one million francs as satisfaction (*amende*), in addition to the sum of 100,000 francs as compensation for the loss suffered by the victim's family.<sup>137</sup>

91. The reparation granted for the murder of *General Tellini* (1923) while he was serving as a member of a commission appointed by the Conference of Ambassadors was complex. The reparation decided upon by the conference included an indemnity which the Greek Government was to undertake to pay the Italian Government "in respect of the murder of its delegate." Although it had been agreed that the amount of the indemnity would be determined by the Permanent Court of International Justice acting by summary procedure, the conference later decided, without waiting for the final report of the Commission appointed to investigate the incident, that "as a penalty [for negligence in the punishment of the guilty parties], the Greek Government shall pay to the Italian Government a sum of 50 million Italian lire." Before the close of the Conference, the Italian Government had presented direct demands to the Greek Government for various measures of satisfaction, including the payment of an indemnity of 50 million lire. The Greek Government declared its willingness to give the satisfactions requested, although in a modified form, "taking into consideration that the abominable crime was committed in Greek territory against subjects of a great friendly State en-

<sup>131</sup> Mixed Claims Commission established under the Convention of 4 December 1868 between the United States and Peru. See Moore, *History and Digest* . . . (1898), vol. II, pp. 1653, 1646.

<sup>132</sup> General Claims Commission (United States-Mexico), *Opinions of Commissioners*, 1927, p. 264.

<sup>133</sup> See Whiteman, *Damages in International Law* (1937), vol. I, pp. 64-65.

<sup>134</sup> Moore, *A Digest of International Law*, vol. VI, pp. 812-813.

<sup>135</sup> See Whiteman, *op. cit.*, pp. 136-138.

<sup>136</sup> See *Revue générale de droit international public* (1908), pp. 301-302.

<sup>137</sup> See Fauchille, *Traité de droit international public* (8th ed., 1921-1926), vol. 1, part 1, p. 528.

*trusted with an international mission.*"<sup>138</sup> The last phrase is italicized in order to draw attention to the fact that the Greek Government was apparently prepared to give the satisfaction demanded, including the pecuniary satisfaction, because of the international character of General Tellini's mission. This circumstance was, however, only taken into account by the Conference in ordering the other measures of satisfaction; the indemnity was to be paid to one of the members of the Delimitation Commission. In this connexion, it is interesting to note that in his claim to the Government of Israel for damages caused by the assassination of Count Bernadotte, the Mediator for Palestine, the Secretary-General asked only for a formal apology, for continued efforts to punish the perpetrators of the crime and for payment of \$54,628 "for the monetary damage borne by the United Nations."<sup>139</sup>

#### 15. Satisfaction in cases involving injury to individuals

92. As has been shown, satisfaction, in its various forms, is a method of making reparation for "political and moral" injury. But in accordance with the traditional view, injury to the person or property of an alien also involves a "moral (indirect) injury" to the State of nationality, and consistency would therefore seem to require that measures of satisfaction should be recognized as admissible in all cases, even when the injury is sustained by a private individual. This conclusion is not, however, borne out in practice. In the great majority of cases, the State in fact only claims reparation, in the strict sense of the term, for the injuries suffered by its nationals, although it has been argued that in such cases the State considers that the reparation constitutes sufficient "satisfaction" of the "moral injury" it has "indirectly" sustained.<sup>140</sup> Not only would it be difficult to substantiate this argument, but also what is quite clear, at least from the formal point of view, is that (apart from the cases discussed below in this section) the only reparation claimed is that for the damage caused to the person or property of the private individual. The only purpose of analysing such cases from this point of view is therefore to determine the situations or circumstances in which, in addition to damages for the injury sustained by the alien, measures of satisfaction have been deemed appropriate to repair the "moral injury" claimed by the State. Cases in which typical measures of satisfaction have been applied are examined below.

##### (a) Application of typical measures of satisfaction

93. The Preparatory Committee of The Hague Codification Conference (1930) explicitly recognized the applicability of some of the typical measures of satisfaction in cases involving injury to private individuals.

<sup>138</sup> See pp. 306 and 304 of the article cited in footnote 117 above.

<sup>139</sup> See Eagleton, "International Organization and the Law of Responsibility", *Recueil des cours de l'Académie de droit international* (1950-I), vol. 76, p. 377. In a memorandum (document A/955), the Secretary-General said that he "would not advance any claim for exemplary damages".

<sup>140</sup> See Personnaz, *op. cit.*, p. 285.

As will be recalled, basis of discussion No. 29 laid down that the international responsibility of the State in such cases "... may also [in addition to reparation of the damage suffered by the private individual], according to the circumstances, and when this consequence follows from the general principles of international law, involve the obligation to afford satisfaction to the State which has been injured in the person of its national, in the shape of an apology (given with the appropriate solemnity) and (in proper cases) the punishment of the guilty persons."<sup>141</sup> The preparatory committee was undoubtedly influenced by the fact that the replies of governments tended generally to regard the various measures of satisfaction as admissible in cases of injury to private individuals.<sup>142</sup>

94. What were the "circumstances" (and the "general principles of international law") which the preparatory committee had in mind?<sup>143</sup> By using the term "circumstances" the committee may have meant to refer to the nature of the injury caused to the private individual—i.e., whether he suffered injury in his person or in his property; or to the nature or seriousness of the act or omission imputable to the State; or to some other factor or criterion—e.g., whether the injurious act was the act of an individual or of an agent of the State. In so far as concerns the "general principles of international law," the only precedents, as will be seen below, are those offered by diplomatic practice, and here again the pattern that emerges is not consistent. It will, nevertheless, be useful to examine the precedents briefly, in order to see how the typical measures of satisfaction have been applied in the cases under discussion.<sup>144</sup> One precedent that might be cited is that of the *Kellet* case (1897), in which a commission constituted as a board of arbitration allowed measures of satisfaction of this type; in this case, however, the person injured was a vice-consul and not a private person.<sup>145</sup> There have also been cases, although rather infrequent, in which typical measures of satisfaction were stipulated by the States concerned in submitting to arbitral settlement or arbitration by third parties the pecuniary reparation of injuries caused to a private individual. The *Cerruti* case (1886), involving Colombia

<sup>141</sup> See the full text at the beginning of section 10 (a), *supra*.

<sup>142</sup> The German Government considered that reparation in international law was more comprehensive than in private law, and might include satisfaction of any kind as well as reparation. In the Belgian Government's view, pecuniary reparation did not necessarily exclude the granting of satisfaction to the injured State in the form of apologies, saluting of the flag, etc. The Danish Government requested that the circumstances in which satisfaction was to be granted should be defined. League of Nations publication 1929.V.3, pp. 146-151.

<sup>143</sup> It may be noted also that the text finally approved by committee III of the conference spoke only of the "... obligation to make good the damage suffered..." See the complete text at the beginning of section 10 (a), *supra*.

<sup>144</sup> The admissibility of such measures of satisfaction appears to have been submitted to arbitration on only one occasion: the Peruvian-Bolivian agreement of 26 August 1895 "to submit to the arbitration of a friendly government the question of a salute to the Bolivian flag". See La Fontaine, *Pacificisme internationale* (1902), pp. 603-604.

<sup>145</sup> See Moore, *History and Digest . . .*, vol. II, pp. 1863-4.

and Italy, and the *Alabama* case (1872) are perhaps the only cases which need be cited.<sup>146</sup>

95. Measures of satisfaction have most frequently been demanded by the State of nationality in cases involving injury to the person of aliens. Diplomatic practice affords few instances of satisfaction of this kind for injury to property. One such case is that of the *Natalia Sugar Plantation* (1897), which was the property of three United States citizens and which, after being occupied by the Spanish forces during the Cuban war of independence, was looted and devastated by members of those forces. In a note to the Spanish Minister at Washington, Secretary of State Sherman observed that the acts in question violated not only the treaty rights of United States citizens but the ordinary rules of war, and requested not only that full compensation should be made to the individuals concerned, but that the matter should be investigated, that guilty persons be punished and strict orders given to prevent the recurrence of such acts.<sup>147</sup> The measures of satisfaction demanded have not been the same in all cases. In some instances only an apology has been requested. In connexion with the assault and robbery of *Dr. Shipley*, a United States citizen, by a Turkish policeman, in the presence of another Turkish policeman who refused to intervene, the United States, in demanding an apology, stated that this was a minimum and that it might also demand the dismissal of the policeman.<sup>148</sup> On occasion repayment of the costs incurred in connexion with the incident, and even the execution of the culprit or person responsible for the injury, have been requested in addition to an apology.<sup>149</sup> It is interesting to note that the Third Sub-Committee of committee III of The Hague Conference, in discussing the reference to an apology in basis of discussion No. 29, agreed unanimously that it should be deleted because that form of satisfaction involved "political questions which might better be omitted from the draft."<sup>150</sup>

96. In the majority of cases involving injury to the person of private individuals, the punishment of the guilty parties was requested, either alone or in conjunction with other measures of satisfaction. Most of the cases related to arbitrary expulsion, unlawful arrest or imprisonment, bodily injury, loss of life, or exceptionally serious denials of justice. The precedents are not, however, sufficiently consistent to permit a systematic classification that would show the relationship between the gravity of the injury or of the act or omission and the specific measure or measures of satisfaction demanded. A glance at some of the best-known cases will illustrate this point.

97. In the cases in which aliens suffered violent death, the form of satisfaction most frequently demanded

<sup>146</sup> *Ibid.*, pp. 295-6 and Moore, *A Digest of International Law*, vol. I, pp. 547-78.

<sup>147</sup> *Ibid.*, vol. VI, p. 970.

<sup>148</sup> *Ibid.*, pp. 746-7.

<sup>149</sup> With regard to this type of case see Bissonnette, *op. cit.*, pp. 70-71.

<sup>150</sup> League of Nations publication, 1930.V.17, pp. 129, 234.

was the punishment of the murderer and his accomplices, if any. Thus, in the case of *Frank Pears* (1900), the United States required from Honduras, first, the arrest and punishment of the sentry who had killed Pears, and second, the payment of an indemnity of \$10,000 to Pears' relatives.<sup>151</sup> Similarly, in the case of *G. Webber* (1895), who died as a result of ill-treatment in prison, the United States demanded that Turkey conduct an investigation, punish each of the guilty parties, and remove the governor of the prison.<sup>152</sup> In the case of the death of another United States citizen, *W. Wilson* (1894), it demanded that the Government of Nicaragua manifest its disapproval of the conduct of its officials, that the person who had committed the crime and his accomplice be tried and punished, and that the Government should adopt such measures as to leave no doubt as to its purpose and ability to protect the lives and interests of United States citizens in the area and to punish crimes committed against them.<sup>153</sup>

98. Though they differ appreciably from the above-mentioned cases in the seriousness of the act and of its consequences, in some cases of denial of justice, when they were accompanied by other acts, the punishment of the guilty parties, including the judicial authorities involved, has likewise been demanded as satisfaction for the injury caused to an alien. For example, in 1838 France demanded, in an ultimatum, that Mexico remove two high-ranking officers and a judge who had been guilty of ordering a massacre and attempting to murder French citizens, and of having imposed illegal sentences on them. In 1831, before taking reprisals, France demanded of Portugal, among other things, that it release a French citizen and quash the sentence imposed on him, that it remove the judges who had imposed the sentence, and that it make official publication of the rehabilitation order.<sup>154</sup> In the *Lueders* case (1897), Germany, after taking certain steps to obtain the release of its citizen, who had been unjustly sentenced to imprisonment by a Haitian court, demanded his release, the removal from office of the judges who had convicted him, the arrest and imprisonment of the policeman who had made the charge, and a large sum as indemnity for the days its citizen had spent in prison. However, the punishment of the guilty persons was no longer included among the measures of satisfaction demanded by Germany at a later stage of the negotiations and accepted by Haiti under the threat of bombardment of its public buildings and fortresses by German naval units.<sup>155</sup>

99. There is a contrast between the cases cited above and cases of personal injuries at the hands of agents of the State, or cases of arrest and imprisonment and expulsion. As Bissonnette points out, punishment of the guilty persons has rarely been demanded as a form of satisfaction in either of the two latter groups of

<sup>151</sup> See Moore, *op. cit.*, p. 762.

<sup>152</sup> *Ibid.*, p. 746.

<sup>153</sup> *Ibid.*, pp. 745-6.

<sup>154</sup> See Bissonnette, *op. cit.*, pp. 77-8.

<sup>155</sup> See Moore, *op. cit.*, pp. 474-5.

cases.<sup>156</sup> In two cases in the first group, that of *Wheelock* (1884), a United States citizen, who was tortured by a Venezuelan police superintendent, and that of *Knapp and Reynolds* (1883), two missionaries, also United States citizens, who were severely beaten in Turkey, a form of satisfaction was demanded.<sup>157</sup> In cases of arrest and imprisonment, other than those referred to in the preceding paragraph, other forms of satisfaction have been demanded, such as the repeal of a legislative provision, the expression of regrets, and the rehabilitation of the victim, in addition to the payment of an indemnity.<sup>158</sup> In cases of arbitrary expulsion, satisfaction has been given in the form of the revocation of the expulsion order and the return of the expelled alien.<sup>159</sup>

100. On occasion, punishment of the culprits appears to have been demanded where aliens were killed by private individuals, although in all cases of injury caused by private persons, the State is internationally responsible and hence under a duty to make reparation only when failure to observe its obligation to protect aliens can be imputed to it. Thus, in the case of *Charles W. Renton* (1894), United States Secretary of State Olney stated that "... the desire of this government is, first, that the authorities of Honduras may be left free to punish the murderers of Renton; after that, such action as the conditions call for will be taken respecting the claim."<sup>160</sup> In this connexion, it is interesting to note that when the third sub-committee of committee III of The Hague Conference discussed the phrase "... the punishment of the guilty persons", used in the basis of discussion quoted at the beginning of this section, it was pointed out that the phrase was covered by basis of discussion No. 18, which placed on the State the duty of punishing offenders, failure to do which would entail international responsibility.<sup>161</sup>

101. In a somewhat greater number of cases of injury to aliens, satisfaction is afforded to the State of nationality in the form of assurances or guarantees against the recurrence of the acts which occasioned the injury complained of. Thus in the *Wilson* case cited above the third of the measures of satisfaction demanded was of this kind. But, as was indicated in the general discussion of typical forms of satisfaction, a distinction should be drawn, also in the case of this third category, between cases in which the measures are not demanded or applied as a form of satisfaction properly so called and those where the object is to ensure a more effective observance by the State of residence of its duty to protect aliens. Although the distinction is not always evident in diplomatic practice, which is frequently inconsistent, it is one that must be taken into account in deciding whether a measure is, strictly speaking,

<sup>156</sup> See Moore, *op. cit.*, pp. 78-80.

<sup>157</sup> See Moore, *op. cit.*, pp. 323 and 801 respectively.

<sup>158</sup> See in this connexion Bissonnette, *op. cit.*, pp. 79-80.

<sup>159</sup> See the cases of *Lampton* and *Wilbank* (United States citizens expelled from Nicaragua in 1894) and that of four British subjects also expelled from Nicaragua, Moore, *op. cit.*, vol. IV, pp. 99-100 and 100-1, respectively.

<sup>160</sup> *Ibid.*, vol. VI, p. 797.

<sup>161</sup> See the publication cited in footnote 150 above.

one of satisfaction or in fact intended to avoid the international responsibility of the State. There would seem to be no doubt that the measures taken are in the nature of satisfaction in those cases where guarantees or assurances are given through the enactment of legislation, which implies at least tacit recognition that responsibility has been incurred for acts of the kind which the legislation is designed to prevent. The United States Government has at various times been willing to take measures of this kind. After the lynching of Italian citizens in Tallulah, President McKinley repeatedly asked Congress to "confer upon the federal courts jurisdiction in this class of international cases where the ultimate responsibility of the Federal Government may be involved."<sup>162</sup> Similarly, in connexion with the *Japanese schools* incident (1906), President Roosevelt requested Congress to amend the criminal and civil law of the United States to enable the Executive to protect the rights of aliens in conformity with the provisions of international agreements.<sup>163</sup> Previously, in connexion with the case of *McLeod*, who had been arrested in New York State for murder during the destruction of the *Caroline* (1840), it had been held that the federal authorities were not competent to deal with the British Government's claim. In order to prevent any recurrence of that difficulty, Congress amended the Habeas Corpus Act in 1842.<sup>164</sup>

#### (b) *The award of pecuniary satisfaction*

102. "Pecuniary satisfaction", which was discussed in the previous section, has also been the form of satisfaction in cases of injury to private individuals. In connexion with the murder in Persia of a missionary, the Rev. *B. M. Labaree* (1903), the United States Secretary of State asserted the right to demand reparation for the wrong done to the United States in the person of one of its citizens. This was to include "the remedial reparation due to the widow" and "the exemplary redress due to the Government of the United States..." In his note, the Secretary of State went on to say that the two governments should agree that the fine to be imposed on all those implicated in the murder should be punitive in nature and purpose. "It cannot be viewed in the light of a mere additional indemnity to the family of the murdered man. That form of reparation has already been completely accomplished. It can not inure to the pecuniary benefit of the Government of the United States, for we may not and will not purchase lucrative gain at the cost of acquiescence in a failure of justice." Lastly, the note suggested that as a practical solution the fine might, as had been done in China in earlier years, be used for the construction of a hospital or school to stand as a monument of reprobation of the crime and as an augury of a better state of things to come.<sup>165</sup>

103. In some instances pecuniary satisfaction was stipulated in an agreement between the States con-

<sup>162</sup> See Moore, *op. cit.*, vol. VI, p. 847.

<sup>163</sup> See *Revue générale de droit international public* (1907), p. 679.

<sup>164</sup> See Moore, *op. cit.*, vol. II, pp. 24, 30.

<sup>165</sup> See *Foreign Relations of the United States* (1907), part 2, pp. 942-944.

cerned, as in the Italian-Venezuelan protocol of 13 February 1903, which established a Mixed Commission empowered to settle pending claims for injuries suffered by Italian subjects. Under article II of the protocol: "The Venezuelan Government agrees to pay to the Italian Government, as a satisfaction of the point of honour, the sum of £5,500 in cash or its equivalent, which sum is to be paid within sixty days."<sup>166</sup> Even where the *compromis* was silent in the matter, some arbitral decisions have awarded a pecuniary indemnity as satisfaction for the "moral injury" caused to the State of nationality of injured individuals. Although these decisions are relatively few in number, there is no doubt as to their content and character.

104. In the *Van Bokkelen* case (1873) involving a claim for \$113,000 for wrongful imprisonment, the arbitrator appointed by the two governments concerned held, in ordering the payment of a smaller sum (\$60,000), that the imprisonment was "in derogation of the rights to which [the deceased] was entitled as a citizen of the United States under stipulations contained in the treaty between the United States and Haiti".<sup>167</sup> While there is no explicit statement to that effect in the decision, it is clear that neither the indemnity claimed nor that awarded by the arbitrator was intended solely as reparation for the injury caused to the individual or his relatives. In view of the ground on which so large a sum was awarded, there can be no doubt that the dominant consideration was the interests acquired by the State of nationality under an international treaty.<sup>168</sup> In other decisions, the fact that the indemnity is to be regarded as satisfaction is explicitly stated. In the *Arends* case (1903), umpire Plumley, while recognizing that the material losses occasioned by the detention of the vessel were small, expressed his belief that "... the respondent government is willing to recognize its responsibility for the untoward act of its officers under such circumstances and to express to the sovereign and sister State, with which it is on terms of friendship and commerce, its regret for such acts in the only way that it can now be done, which is through the action of this Commission by an award on behalf of the claimant sufficient to make full amends for the unlawful delay."<sup>169</sup> In the *Maninat* case, umpire Plumley distinguished between the losses suffered by the private individuals and "the more important feature of this case, [which] is the unatoned indignity to a sister Republic..." and awarded "just compensation which covers both aspects."<sup>170</sup>

105. The decision in the *I'm Alone* case (1935) is perhaps the only other example which can be cited,

<sup>166</sup> See Ralston, *Venezuelan Arbitrations of 1903*, p. 643.

<sup>167</sup> See Moore, *op. cit.*, vol. VI, p. 701.

<sup>168</sup> The true character of the indemnity becomes even clearer if the decision is compared with those given in other cases of unlawful detention. See section 18 (a) *infra*.

<sup>169</sup> Ralston, *op. cit.*, p. 913.

<sup>170</sup> Ralston, *French-Venezuelan Arbitrations* (1906), p. 78. This decision may be compared with that given by umpire Plumley in the *Maal* case, in which he referred only to the indignity done to the individual, and awarded the indemnity on that ground alone. See section 20 *infra*.

in spite of the varying interpretations to which it is open. In their *Joint Final Report* the Commissioners held that as neither the ship nor its cargo was the property of the claimant State, no compensation ought to be paid in respect of the loss of either. With regard to compensation for the losses caused by the sinking they took into account only those persons who were not "a party to the illegal conspiracy" (to smuggle liquor). They considered, however, that "the act of sinking the ship by officers of the United States Coast Guard was, as we have already indicated, an unlawful act; and the Commissioners consider that the United States ought formally to acknowledge its illegality, and to apologize to His Majesty's Canadian Government therefor; and, further, that as a material amend in respect of the wrong, the United States should pay the sum of \$25,000 to His Majesty's Canadian Government."<sup>171</sup> Commenting on this passage in the decision, Professor Hyde observed that, in view of the fact that the Canadian Government had claimed a sum of \$33,810.43 for expenses incurred in repatriating the crew and "legal expenses", the \$25,000 which the Commissioners recommended should be paid to the Canadian Government constituted partial compensation for expenses incurred by the latter in the prosecution of its claim. In his opinion the award could not be regarded as reparation for an "essentially public claim" and the decision should therefore not be taken "as a precedent indicative of the propriety of the imposition by an arbitral tribunal or by a joint commission of penal damages against a respondent State in satisfaction of an essentially public claim."<sup>172</sup>

106. In contrast to these decisions, other cases can be found in which the propriety of pecuniary satisfaction as a form of reparation for the "moral injury" caused to the State of nationality was denied in principle by international tribunals. For example, in the *M. Miliani* case, umpire Ralston declared that "... unless specially charged, an international commission would scarcely measure in money an insult to the flag, while diplomats might well do so... Italy, save when her own pecuniary rights are affected, recovers nothing for her own benefit before a tribunal such as this, however much her own dignity may have been affected by the treatment of her subjects."<sup>173</sup> In the *Stevenson* case, decided by the British-Venezuelan Commission, it was stated that "The attention of the umpire has not been brought to an instance where the arbitrators between nations have been asked or permitted to declare the money value of an indignity to a nation simply as such. To have measured in money by a third and different party the indignity put upon one's flag or brought upon one's country is something to which nations do not ordinarily consent. Such values are ordinarily fixed by the offending party and declared in its own sovereign voice, and are ordinarily wholly

<sup>171</sup> See the complete text of the Final Joint Report in White-man, *op. cit.*, vol. I, pp. 155-7.

<sup>172</sup> "The Adjustment of the *I'm Alone* Case", *American Journal of International Law* (1935), vol. 29, p. 300.

<sup>173</sup> *Venezuelan Arbitrations of 1903*, p. 762.

punitive in their character — not remedial, not compensatory.”<sup>174</sup>

107. The decision of the Permanent Court of Arbitration in the *Carthage* and *Manouba* cases (1915) is also consistent with these precedents. The French Government's claim included: “1. The sum of one franc for the indignity to the French flag; 2. The sum of 100,000 francs as reparation for the moral and political injury resulting from the non-observance of general international law and the agreements reciprocally binding on Italy and France.” As reparation for the material losses sustained by individuals in consequence of the seizure and detention of the ships, the Court ordered the payment of an indemnity amounting to 160,000 francs. But in so far as concerned the reparation claimed for “moral and political” injuries, the Court, as was noted above (section 10 (b) *supra*), merely gave a “declaratory judgement”, on the ground that “. . . the establishment of this fact, especially in an arbitral award, constitutes in itself a serious penalty.” The Court stated that as a general rule and without prejudice to special circumstances, a penalty of this kind seemed sufficient; that, again as a general rule, the imposition of a further pecuniary penalty appeared superfluous, and would go beyond the object of international jurisdiction, and, lastly, that in view of all those considerations, the circumstances of the case did not justify such supplementary penalty.<sup>175</sup> It will be noted that neither in this nor in the other decisions referred to in the preceding paragraph is the possibility denied that, in connexion with injuries caused to aliens, an international body may be authorized to order the payment of an indemnity as satisfaction to the State of nationality for the “moral injury” occasioned to it. In fact, the Permanent Court's decision explicitly recognizes that this may be allowable in “particular cases”.

108. Lastly, the decisions awarding a “nominal indemnity” likewise, although for different reasons, embody no clearly defined position. The decision in the *Brower* case (1923) offers an example. The claim arose out of the British Government's refusal to recognize the right of Brower, a United States citizen, to ownership of certain islands belonging to the Fiji or Ringgold group. Referring to the question of the damages appropriate in the case, the President of the Claims Commission stated: “In these circumstances [the fact that the islands had no real value] we consider that notwithstanding our conclusion on the principle of liability, the United States must be content with an award of nominal damages. . . . The Tribunal decides that the British Government shall pay to the United States the nominal sum of one shilling.”<sup>176</sup> One author, commenting on this decision, has said that, in general, “nominal damages” may be regarded as reparation for the “moral

injury” caused to the State, in accordance with the same principles as those governing pecuniary satisfaction.<sup>177</sup> This opinion seems correct, although the decision does not state specifically that the indemnity was intended as reparation for moral injury and even though the claimant State does not appear to have based the claim on those grounds. There would appear to be no room for doubt on this score in view of the fact that such trifling damages would never have been awarded as reparation for the injury suffered by the individual and of the explicit statement that “the United States must be content” with these nominal damages.<sup>178</sup>

#### 16. *The appropriateness of certain measures of reparation*

109. In the discussion in chapter I on the nature and scope of the duty to make reparation (section 3 *supra*), attention was drawn to the problem of the appropriateness of measures of reparation which might prove incompatible with the municipal law of the defendant State, offend national honour or dignity or be seriously out of proportion to the injury sustained or the character of the act or omission imputed. A measure of reparation may be “inappropriate” for any of these reasons, although this fact will not, of course, affect the duty to make reparation for the injury caused.

110. With regard to compatibility with municipal law, it has been seen that “legal restitution” may involve serious practical difficulties (section 11 *supra*). The adoption of a legislative measure or the rescission of an executive or administrative decision may raise little difficulty, but the repeal of a law which is in force or the revocation of a judicial decision is a much less simple proposition. In this connexion, the Government of Colombia, in its observations on bases of discussions Nos. 5 and 6 drawn up by the preparatory committee on The Hague Conference (1930), argued that, without prejudice to the responsibility which may arise as a result of a final decision manifestly inconsistent with the State's international obligations, the decision must be enforced. “The reparation due for violation of international law,” the Colombian Government added, “does not mean that the decision must be annulled.”<sup>179</sup> In connexion with these difficulties, Anzilotti referred to the additional protocol of 1910, to convention XII of The Hague Conference of 1907 (concerning the establishment of an international prize court), under which the signatory States were authorized to declare that resort to the Court

<sup>177</sup> Bissonnette, *op. cit.*, p. 153.

<sup>178</sup> In other cases in which the question of “nominal damages” has arisen, it has been linked with the form in which “satisfaction” is to be given for an act or omission contrary to international law. See the *United States and Paraguay Navigation Company* (1860) and *Corfu Channel* (1949) cases, in which the payment of “one cent” and “one franc” respectively was considered “ridiculous” as reparation for the unlawful act. See Moore, *History and Digest etc.*, vol. II, p. 1485, and *I.C.J., Pleadings*, vol. III, p. 422.

<sup>179</sup> League of Nations publication, 1930.V.17, pp. 204-205. See in the same sense replies of Germany, Belgium and Czechoslovakia to the questionnaire prepared by the same committee, L. of N. publication 1929.V, 3, pp. 42, 43, 147, and 151, respectively.

<sup>174</sup> *Ibid.*, pp. 450-451. Compare, however, umpire Plumley's opinions in the *Arends* and *Maninat* cases cited earlier, in which he appears to have taken a completely different position.

<sup>175</sup> See Scott, J. B., *Les Travaux de la Cour Permanente d'Arbitrage de La Haye* (1921), pp. 356-357.

<sup>176</sup> See Nielsen, *American and British Claims Arbitration, etc.* (1926), p. 616.

could not be had against them except in the form of an action for damages, so as to avoid the constitutional difficulties encountered by some States in restoring ships and cargo which had been confiscated by their national courts. In his opinion, these instruments, although unratified, were evidence of "the importance attached by States to internal difficulties" raised by restitution in certain cases.<sup>180</sup> The repeal of legislation incompatible with a State's international obligations may give rise to similar difficulties.<sup>181</sup> Consequently, it may be said that, whereas the plea of municipal law is not a good defence in a case involving responsibility for acts and omissions contrary to international law, the State can, on the other hand, legitimately resist a demand for or the imposition of forms of reparation which create difficulties of this kind.

111. A measure of reparation may also offend the honour or dignity of the State, or even impair its sovereignty and independence. For example, in the Greek reply of 30 August 1923 to the Italian note demanding various measures of reparation for the murder of General Tellini and the members of his mission, three of those measures were termed "prejudicial to the sovereignty and honour of the Greek State."<sup>182</sup> It was presumably in the light of this and many other precedents that Strupp included an article ruling out "demands tending to offend the honour of the respondent state" in the draft he presented to the German International Law Association in 1927.<sup>183</sup> Although this is a matter which will often depend on the subjective judgement of the offending State or on the circumstances prevailing when the reparation is claimed, there is no doubt that a State can, without thereby avoiding its duty to make reparation, legitimately resist a demand for or the imposition of measures of reparation which offend its national honour or dignity.

112. On logical grounds, too, a measure of reparation which is appreciably out of proportion to the injury caused or to the nature of the act or omission imputable to the State should probably be regarded as "inappropriate". In the *Mavrommatis* case, the British Government asked the Permanent Court to find that "in any event the compensation claimed [by the Greek Government] is unreasonable and excessive."<sup>184</sup> The question has been repeatedly raised in claims commissions by umpires or arbitrators as well as by commissioners appointed by respondent States, as will be seen in the next chapter, dealing with the form in which the reparation of the injury caused to the alien has been determined.

<sup>180</sup> *Op. cit.*, p. 427.

<sup>181</sup> See in this connexion Kopelmanas, "Du conflit entre le traité international et la loi interne", *Revue de droit international et de législation comparée* (1937), pp. 134-5.

<sup>182</sup> The measures in question were: an investigation in accordance with certain stringent conditions; the death sentence for the guilty persons and payment of an indemnity of 50 million lire within five days from the presentation of the demands. See the article cited in footnote 117 above.

<sup>183</sup> Cited in Reitzer, *op. cit.*, p. 142.

<sup>184</sup> Publications of the Permanent Court of International Justice, *Collection of Judgements*, Series A, No. 5, p. 10.

### Chapter III

#### THE REPARATION OF INJURY CAUSED TO THE ALIEN

##### 17. Difficulties of repairing such injuries

113. Chapter II was concerned with general questions and principles relating to reparation *stricto sensu*. The present chapter discusses more thoroughly the reparation of injury caused to aliens, especially reparation in the form of "damages". Before proceeding any further, however, we should recall what was said in earlier reports concerning the formidable — not to say insuperable — difficulties that beset any attempt to classify methodically the factors taken into account in determining the quantum of reparation or the criteria applied for this purpose in diplomatic practice and by international tribunals. The reason for these difficulties is that international law provides no precise methods of measurement for the award of pecuniary damages.<sup>185</sup> So fragmentary and confused is this part of the law of international claims that the frequency of comments similar to that quoted should occasion no surprise.<sup>186</sup>

114. The reasons for the absence of any consistent system or theory in the matter of the reparation of injury caused to aliens are various. One important factor may have been the fact that clauses concerning reparation are very rarely embodied in *compromis*, and that such clauses as do appear are not worded in terms that afford a satisfactory solution. One of the most explicit clauses of this type is perhaps that included in the convention of 19 November 1926 establishing the British-Mexican Commission:<sup>187</sup>

"In order to determine the amount of compensation to be granted for damage to property, account shall be taken of the value declared by the interested parties for fiscal purposes, except in cases which in the opinion of the Commission are really exceptional.

"The amount of the compensation for personal injuries shall not exceed that of the most ample compensation granted by Great Britain in similar cases."

115. The first provision furnishes a specific standard, although it is one that strictly speaking can only be applied in the case of immovable property. The second, as Feller has pointed out, does not indicate whether or not the "most ample compensation" refers to compensation awarded by courts or by administrative authorities in the United Kingdom.<sup>188</sup> The Convention establishing the General Claims Commission (United States-Mexico) does not furnish standards of this kind and merely provides that citizens of the two countries are to receive "just and adequate compensation" for their losses or damages.<sup>189</sup> The provisions concerning the application of general principles of justice and

<sup>185</sup> Eagleton, *The Responsibility of States in International Law*, p. 191.

<sup>186</sup> See, for example, Feller, *The Mexican Claims Commissions*, p. 290.

<sup>187</sup> *Ibid.*, p. 473.

<sup>188</sup> *Ibid.*, p. 292.

<sup>189</sup> *Ibid.*, p. 326.

equity or reparation *ex aequo et bono* included in other treaties or conventions are marked by a similar vagueness.<sup>190</sup>

116. The vagueness and lack of precision of these clauses are such that arbitral tribunals and commissions have of necessity been compelled to exercise a wide discretion. In this respect the situation has much in common with the position in diplomatic practice, in the sense that in the latter case the measure or amount of the reparation depends on the "unilateral will of the injured State," while in the case of international tribunals it depends on the discretionary powers delegated to disinterested third parties.<sup>191</sup> This wide discretion has on occasion been expressly invoked by arbitrators themselves. Thus, in the *E. Roberts* case, umpire Lieber said that "... we, the Commissioners, are compelled to proceed solely by simple conjectures and inferences, drawn from the few facts we have before us, and to make a very ample use of the discretionary power which pertains to our office."<sup>192</sup> It is of course true that in exercising their discretionary power arbitrators frequently accept certain self-imposed limitations,<sup>193</sup> which at least saves them from utter arbitrariness. But it is no less true that arbitral awards are frequently the result of "settlements behind closed doors," and thus "present a patchwork of seemingly arbitrary determinations on this subject."<sup>194</sup> Cases which illustrate this state of affairs have been cited in the previous chapter and further examples will be examined below.

117. In spite of this situation, publicists and even arbitrators themselves have sought to identify some of the general criteria and factors taken into consideration in fixing reparation for injuries to aliens. One of these, the basic and at the same time general criterion, is that the reparation should be commensurate with the nature or extent of the actual injury. But the assessment of the injury is not always easy, for, as will be seen in this chapter, even in the case of material injuries to persons or to property, the reparation is not always strictly in keeping with the true nature or extent of the injury. Other factors generally come into play, such as the circumstances in which the injury occurred, the gravity, in special situations, of the act or omission imputable to the respondent State and, on occasion, factors justifying a reduction in the amount of the reparation.

118. For these reasons, it is proposed first to consider the reparation of injuries to persons and property in general, and then to examine specific situations and problems arising in connexion with the reparation of these two classes of injury.

<sup>190</sup> See Reitzer, *La réparation comme conséquence de l'acte illicite en droit international*, 1939, p. 161. The convention between the United States and Mexico of 2 March 1897 fixed a maximum amount which no reparation was to exceed. *Ibid.*, p. 158, footnote 141.

<sup>191</sup> *Ibid.*, p. 160.

<sup>192</sup> See Whiteman, *Damages in International Law*, vol. II, p. 833.

<sup>193</sup> See Personnaz, *La réparation du préjudice en droit international public* (1939), pp. 35-7.

<sup>194</sup> See Feller, *op. cit.*, p. 290.

## 18. The reparation of personal injuries in general

119. For the purpose of a proper study of the reparation of this general category of injuries, cases of deprivation of liberty and expulsion must be distinguished from those where bodily and mental injury, including death by violence, are occasioned separately, and from cases of moral injury *stricto sensu*.

### (a) Deprivation of liberty, and expulsion

120. As will be seen later on, the expression "deprivation of liberty" in the broad sense covers both cases of the expulsion of foreigners and cases of any form of restriction on freedom of movement. In its more strict sense, both in international and in municipal law, it refers only to cases of arrest, detention and imprisonment. If for the moment we speak only of the latter, we should first point out that reparation under this head will generally apply to the specific injury and damage which may result from the arbitrary or illegal deprivation of liberty which the alien has suffered, as well as the financial prejudice he may have suffered through loss of time while held in detention or in prison, and the moral injury he may have sustained in the event of ill-treatment or other circumstances tending to aggravate the act or omission imputable to the State.<sup>195</sup> Before going on to describe and classify the various cases, we should explain that there are certain special circumstances in which, despite an apparent analogy with the acts or omissions which give rise to international responsibility in such cases, reparation has been disallowed. They include, for example, unnecessarily prolonged detention, unsuitable conditions of imprisonment, detention and arrest on reasonable suspicion, the issue, in error, of an order of detention or arrest and the holding of the person arrested or imprisoned *incomunicado*.<sup>196</sup>

121. Whiteman identifies four main groups of cases according to the circumstances giving cause for reparation. The first group includes cases of unjustified detention or arrest. The case of the *Costa Rica Packet* falls within this group inasmuch as reparation was ordered for the injuries caused as the result of the arrest of the ship's captain by the Netherlands authorities without "real grounds."<sup>197</sup> The second group includes cases of unjustified arrest accompanied by ill-treatment. The case of *D. Gahagan* (1842), which falls within this second group, shows to what extent the latter circumstance may affect the decision regarding the quantum

<sup>195</sup> Ralston, citing numerous cases, has indicated in this respect that "In cases of this sort where the respondent government has been liable, awards have varied in amount dependent upon the physical or moral hardship connected with the imprisonment, its duration, the station in life of the person offended against, the incidental injury to or destruction of his business (although the latter would seem rather consequential than direct), and other special circumstances." *The Law and Procedure of International Tribunals* (rev. ed., 1926), pp. 262-3.

<sup>196</sup> See examples of such cases in Whiteman, *Damages in International Law* (1936), vol. I, pp. 287 *et seq.*

<sup>197</sup> *Ibid.*, p. 314. See also the case of *Battistini*, in Ralston, *French-Venezuelan Arbitrations of 1902* (1904), p. 764.

of reparation.<sup>198</sup> The third group consists of cases where arrest was justified but was accompanied by irregularities in procedure. A typical case is that of *B. E. Chattin*, a United States citizen who was arrested in Mexico and tried, according to the arbitral decision, without "proper investigations," with "insufficiency of confrontations" and with the authorities "withholding from the accused the opportunity to know all of the charges brought against him..." etc.<sup>199</sup> The fourth and last group consists of cases where the arrest was likewise justified, but was accompanied, this time, by ill-treatment. The case of *Captain B. Ripley*, another United States citizen arrested in Mexico, who was the victim of cruel treatment by the local authorities, falls within this fourth group.<sup>200</sup>

122. Let us now see how damages were computed in these cases of deprivation of liberty, particularly when accompanied by circumstances aggravating the arrest or imprisonment of the alien. Referring to the precedents of the General Claims Commission (United States—Mexico), Feller notes a marked inconsistency in the criteria employed to determine the total amount of the indemnity. For example, in the *Faulkner* case, the Commission relied on the criterion established in the case of the warship *Topaze*, decided by the British-Venezuelan Commission,<sup>201</sup> in which the sum of \$100 was awarded for each day of detention. In other cases, however, the sums awarded do not conform to this criterion, nor do they appear to be governed by the particular circumstances of each case.<sup>202</sup> Personnaz quotes further cases to illustrate the same inconsistency in the case-law of other claims commissions.<sup>203</sup> In the *Chevreau* case (decided in 1931), the Permanent Court of Arbitration rejected the method or criterion of determining the amount of reparation by the duration of the period of arrest or imprisonment, preferring that of a global sum which should include fair compensation for all injury and loss. "... The calculation of the indemnity at a certain rate per day is simply a practical means of avoiding an arbitrary figure. Basically, what is necessary is to determine, in the light of the individual circumstances of each case, the total sum which would represent fair compensation for the moral or material damage sustained..."<sup>204</sup>

123. The expulsion of foreigners only exceptionally gives rise to the reparation of the injury or damage suffered by the individual. Despite the parallel which has been pointed out between the damage or loss which may be caused by expulsion and that deriving from the acts referred to above, there are certain very real differences which are the result, not only of the intrinsic difference between the two classes of acts or measures,

but also of the wide scope of the State's right to expel from its territory persons not of its nationality. In this connexion it has been said that<sup>205</sup>

"It is only when the expelling State exercises this right in such an arbitrary or harsh manner as to constitute a departure from the standard obtaining for such procedure between civilized States or contrary to treaty provisions, that a liability for the payment of damages arises on the part of the respondent State. Accordingly, there is an obligation to pay damages in relatively few cases of expulsion."

One of these cases was that of *Zenman*, in which the United States-Mexican Commission established in 1868 allowed an indemnity of \$1,000 on the ground that Mexico had not given proof of its reasons for the expulsion.<sup>206</sup> In the *Paquet* case (expulsion) the arbitral commission ordered the payment of 4,500 francs on the ground that "... the general practice among governments is to give explanations to the government of the person expelled, if it asks them, and when such explanations are refused, as in the case under consideration, the expulsion can be considered as an arbitrary act of such a nature as to entail reparation."<sup>207</sup> In the case of *Boffolo*, umpire Ralston allowed only 2,000 bolivars in view of the low character of the person expelled, and also of the fact that he was soon allowed to return to the country.<sup>208</sup> Expulsion sometimes occurs in circumstances which genuinely aggravate responsibility, as in the case of *Maal*, a Netherlands citizen who was arrested, stripped of his clothes in public view and ridiculed, before being expelled from the country. In view of the gravity of these circumstances, the umpire considered an indemnity of \$500 justifiable "solely because of these indignities."<sup>209</sup>

124. Certain restrictions on ordinary freedom of movement may also give rise to the international responsibility of the State and afford grounds for the reparation of the injury which an alien thereby sustains. For example, in the case of *J. L. Underhill*, who was prevented from leaving the country because her passport was wrongfully withheld from her, umpire Barge allowed an indemnity of \$3,000 for the month and a half by which she was compelled to delay her departure.<sup>210</sup>

#### (b) Bodily and mental injury and violent death

125. The injuries meant here are those caused separately from and independently of any other injurious act; in this sense, they are distinguishable from the cases just considered. Furthermore, as was indicated in the discussion of this class of injuries in the previous chapter (section 7), this class generally includes, in addition to the physical and mental injury or suffer-

<sup>198</sup> See Whiteman, *op. cit.*, p. 322.

<sup>199</sup> *Ibid.*, p. 329.

<sup>200</sup> *Ibid.*, p. 344.

<sup>201</sup> See Ralston, *Venezuelan Arbitrations of 1903*, p. 329.

<sup>202</sup> See *The Mexican Claims Commission*, pp. 300-1.

<sup>203</sup> See *La réparation du préjudice en droit international* (1949), pp. 211-2.

<sup>204</sup> *Reports of International Arbitral Awards*, vol. II, United Nations publication, Sales No. 49.V.1, p. 1139.

<sup>205</sup> Whiteman, *op. cit.*, p. 419.

<sup>206</sup> *Ibid.*, pp. 427-8.

<sup>207</sup> See Ralston, *Venezuelan Arbitrations of 1903*, p. 267.

<sup>208</sup> *Ibid.*, p. 705.

<sup>209</sup> *Ibid.*, p. 916. However, this decision may be interpreted to mean that the indemnity was ordered rather as a "satisfaction of a pecuniary nature" to the State of the expelled person's nationality. On this point see section 15 (b), *supra*.

<sup>210</sup> *Ibid.*, p. 51.

ing, the medical expenses incurred, the financial loss suffered during the period of convalescence and also the diminution (if any) in the person's future capacity for work. Consequently, in determining the quantum of the reparation, the arbitrator may take all these elements into account, over and above the actual bodily and mental injury.<sup>211</sup> At the same time, however, the causality factor plays an important part, and the reparation will not cover damages which are not sufficiently closely connected, by a cause-and-effect relationship, with the original injury. Besides, it is not apparently always essential to distinguish, for the purpose of determining the amount of the reparation for such injuries, cases in which the injury is the result of acts of local authorities from those in which it is caused by an individual. The same is true in the case where the alien loses his life; for as will be seen in detail later, the form and amount of the reparation in the event of loss of life, as in the cases mentioned earlier, depend rather on the nature of the act or omission imputable to the State and, in the case of violent death, on the presence of some loss or damage sustained as a result of that act by third persons.

126. With regard to bodily injury, the cases which appear to present least difficulty are those in which the injury has no consequence other than the temporary disablement of the injured individual. The amount of the reparation is usually limited, particularly if the injuries do not fall within the category of serious injuries. For example, in the decision concerning the riot which took place in 1912 in the *Cocoa Grove District* (Panama), when a number of United States nationals were injured, two of these were awarded an indemnity of only \$75 for wounds and bruises on the head caused by members of the local police.<sup>212</sup> In other cases, however, the fact that the original injuries were indirectly aggravated as a result of some act or omission by the local authorities led to an increase in the indemnity.<sup>213</sup> On the other hand, if the injury results in the permanent disablement of the alien, the computation of the damages is based primarily on the permanence of the injury. Other cases will be mentioned in the following paragraphs, but even in the same decision on the disturbances in Panama, arbitrator Rappard awarded damages according to the degree of permanence of the injury. As Whiteman has indicated, the permanence or durability of this kind of injury is subject to proof — i.e., it is not usually taken for granted.<sup>214</sup>

127. The reparation may also cover consequences which at times result from the injury to a person's health; this occurs particularly in cases where an indemnity is granted for mental injury. A number of the survivors of the *Lusitania* were indemnified in this way. For the most part the injury consisted of the shock suffered on being thrown into the sea when the sink-

ing took place, but there were also cases of persons who lost members of their families or underwent other mental anguish which affected them permanently. In those cases, some of the indemnities granted amounted to as much as \$12,000 with interest.<sup>215</sup> As will be seen later, such mental injuries, which are the direct result of a physical injury or at any rate of the act which gives rise to the reparation, should not be confused with what are called "moral injuries" (*préjudice moral*) in the strict sense which this term may be given. The former are primarily pathological in nature, whereas the latter are essentially moral or psychological.

128. So far as the reparation of the injury is concerned, cases involving the violent death of an alien are of a rather different nature. In the first place, as will be remembered from chapter II, the damage in these cases derives not from the actual loss of life, but from the prejudice suffered in consequence thereof by a certain class of third persons — namely, the dependants of the deceased — and sometimes also persons who, by reason of close relationship or for some other cause, suffer "moral injuries" as a result of the death. This second group will be dealt with separately, for this class of injury may also be the consequence of other acts or omissions considered to be contrary to international law. With regard to the first group, the normal criterion in determining the amount of reparation must usually be the actual circumstances of the persons held to have suffered the prejudice. In this connexion, in one of the *Lusitania* cases, umpire Parker stated: "Claims growing out of injuries resulting in death are not asserted on behalf of the *estate* of the deceased, the award to be distributed according to the provisions of a will or any other fixed or arbitrary basis. The right to recover rests on the direct personal loss, if any, suffered by each of the claimants."<sup>216</sup> In the cases now under consideration, the "direct personal loss" referred to is pecuniary in nature and is measured principally by the degree of financial dependence which existed between the claimant and the deceased. This basic criterion, however, has not prevented claims commissions in certain cases from also taking into account other special factors, such as the general health of the deceased, the number of his dependants, their ages, the probable increase or decrease in their incomes, etc.<sup>217</sup>

### (c) Moral injury

129. In sub-section (b), reference was made to the difference between "mental injury" and "moral injury" in the strict sense. The latter is more psychological in character, purely "intellectual", usually temporary, and includes conditions or situations such as the grief and suffering caused by the loss of a loved one, the anguish and anxiety arising from this or other causes, as well as the states of mind resulting from attacks upon a

<sup>211</sup> On this point see Personnaz, *op. cit.*, p. 206.

<sup>212</sup> See Whiteman, *op. cit.*, vol. I, pp. 523-4.

<sup>213</sup> See case of *Coleman* (1928), *Reports of International Arbitral Awards*, vol. IV, United Nations publication, Sales No. 51.V.1, pp. 367-368.

<sup>214</sup> *Op. cit.*, p. 593.

<sup>215</sup> See Mixed Claims Commission (U.S.-Germany), *Opinions* (1925), docket 430, p. 418.

<sup>216</sup> See Administrative Decision No. II, in United Nations, *Reports of International Arbitral Awards*, vol. VII, p. 27.

<sup>217</sup> In this connexion see Whiteman, *op. cit.*, pp. 667 *et seq.*

person's dignity, honour or feelings. As was indicated in chapter II, insults or attacks upon the reputation may be included within the broad concept of "pré-judice moral". In the present context, however, the question is whether this class of injury is capable of reparation, and if so, how the reparation has been computed in the past. So far as the second half of the question is concerned, we are not here speaking of the purpose or character which the reparation has had in past cases; this is a separate problem, which will be investigated later.

130. With regard to the first half of the question, one of the opinions delivered by umpire Parker appears to express the general principle of international law in the matter :<sup>218</sup>

"That one injured is, under the rules of international law, entitled to be compensated for an injury inflicted resulting in mental suffering, injury to his feelings, humiliation, shame, degradation, loss of social position or injury to his credit or to his reputation, there can be no doubt, and such compensation should be commensurate to the injury. Such damages are very real, and the mere fact they are difficult to measure or estimate by money standards makes them none the less real and affords no reason why the injured person should not be compensated therefor as compensatory damages, but not as a penalty. . . ."<sup>219</sup>

The difficulty lies rather in the way in which these damages are to be computed. In this connexion, in the *Di Caro* case, Umpire Ralston recognized that "For all this no human standard of measurement exists, since affection, devotion and companionship [of the deceased] may not be translated into any certain or ascertainable number of bolivars or pounds sterling."<sup>220</sup> However, that did not rule out the separation of the moral injury nor, as in the case just quoted and, it seems, in the majority of those in which such injury has been claimed, has it prevented the injury from figuring among the factors which have helped to determine the total amount of reparation. The illustrations below will show how the computation has been made in various cases, including some where there were no other factors or injuries to be taken into consideration.

131. In the first place, there are the cases in which the claim is in favour of the person who suffered the moral injury. Within this first group the most frequent have been those of ill-treatment suffered by aliens upon their arrest or imprisonment. In the case of *A. C. Le More* (1883), an indemnity of \$10,000 was allowed for eleven days' imprisonment, the greater part of which must have been for his "unnecessary, extreme and much too severe" punishment during imprisonment.<sup>221</sup> In the case of *McNeill* (1931), the British-Mexican Claims Commission granted an indemnity of 6,000

<sup>218</sup> See *Opinion in the Lusitania Cases*, in *Reports of Arbitral Cases*, vol. VII, p. 40.

<sup>219</sup> Exceptionally, reparation for moral injuries has been denied as happened in the *Davis* case, in which umpire Rappard declared: "Neither can mental anguish of the beneficiaries be indemnified; the umpire holds that a *solatium* for the loss of a member of the family and for the grief caused by that death cannot be granted." *Foreign Relations of the United States (1916)*, p. 919.

<sup>220</sup> See Ralston, *Venezuelan Arbitrations of 1903*, p. 770.

<sup>221</sup> See Whiteman, *op. cit.*, vol. I, p. 344.

pesos without clearly stating the grounds, but in the claim the sum of £5,000 was asked as compensation for the permanent damage to the claimant's health together with such sum as might be considered equitable compensation for the "moral and intellectual damages" suffered by the claimant during the twenty hours of his imprisonment, in the course of which he had been threatened with death by the rebel forces.<sup>222</sup> The £2,000 which *Chevreau* secured from the Permanent Court of Arbitration was granted by the latter on the grounds of "damages for imprisonment and the physical and moral suffering resulting from that imprisonment".<sup>223</sup> In another case, decided *ex aequo et bono*, the indemnity granted was as much as £4,802 plus interest, to cover "the material and moral injury to his person resulting from the difficulties, vexations and ill-treatment".<sup>224</sup> It would be possible to cite a number of cases of maltreatment or other acts contrary to human dignity which took place in different circumstances.<sup>225</sup> Another feature to be found in such cases, although of an entirely different kind, is that reflected in the decisions of arbitrator Sissett, in allowing \$35,000 in consideration of the fact that "the United States Government also claim the sum of \$50,000 in respect of loss of time, injury to credit and grave anxiety of mind on account of the cancellation of the contract."<sup>226</sup>

132. The reparation of an injury to a person's reputation does not always appear to be treated in the same way as compensation for other moral injuries. In fact, the only occasions on which international case-law has recognized the admissibility of indemnification for damage to repute seem to have been those where the financial credit or solvency of the person was affected as a direct consequence of the acts imputable to the respondent State. For instance, in the *Fabiani* case, the arbitrator declared that Fabiani had suffered considerable material, and more particularly moral, damage (tort) as a result of the declaration of his bankruptcy in Venezuela, the closure of his commercial establishments at Maracaibo, the financial difficulties which inevitably ensued, and the compulsory abandonment of his business.<sup>227</sup> In the *Santangelo* case, the reparation took account of the fact that the person had been "injured in health and reputation and ruined in for-

<sup>222</sup> See *Reports of International Arbitral Awards*, vol. V, United Nations publication, Sales No. 52.V.3, pp. 165 *et seq.*

<sup>223</sup> *Ibid.*, vol. 11, p. 1139.

<sup>224</sup> Campbell case (1931), United Kingdom v. Portugal, United Nations, *Reports of International Arbitral Awards*, vol. II, p. 1154.

<sup>225</sup> For example, the *Maal* case cited in connexion with the expulsion of aliens, in which an indemnity of \$500 was granted. A still more niggardly sum (\$250), considering the nature of the humiliation, was granted in the case of *McDaniel*, an American citizen who was forced, among other things, "to follow a circuitous route to a bull ring", and was also "subjected to gross insults, indignities and assaults". See US-Mexico Special Claims Commission, *Reports to the Secretary of State*, U.S. Govt. Print. Off., Washington, D.C., 1940, p. 150.

<sup>226</sup> *Shufeldt Claim* (1930), United Nations, *Reports of International Arbitral Awards*, vol. II, p. 1101.

<sup>227</sup> Ralston, *Report of French-Venezuelan Mixed Claims Commission of 1902* (1906), p. 182.

tune by his sudden and harsh expulsion".<sup>228</sup> A British-United States commission granted \$30,204 in the *Shaver* case in which \$100,000 was claimed for three months' imprisonment and because, as a result of this, the claimant had been deprived of a lucrative position as the agent of a railway company, a fact which had in turn caused him to lose the confidence of his employees.<sup>229</sup> In connexion with this particular type of moral injury, the admissibility of reparation has sometimes been questioned in cases concerned not with individuals but with certain bodies corporate.<sup>230</sup>

133. A second group among the cases now under discussion consists of those in which the moral injury was caused to third persons through the loss of a near relative. These cases usually arise as a result of acts committed by individuals in circumstances which give rise to the (indirect) international responsibility of the State. Since the question of reparation in connexion with this kind of responsibility is to be studied in the next chapter, it will suffice for the present to refer to the cases in which the death of an alien was caused by an agent or authority of the State; this does not necessarily mean, of course, that either the nature of the injury sustained in one or the other case or, in consequence, the title to or the amount of the reparation is essentially different.<sup>231</sup> There is also a further type of case which cannot be classified in either of these two categories — those where, as in the *Lusitania* cases, death was caused by an independent event.

#### 19. *Reparation in cases of injuries caused by acts of individuals*

134. Where the injuries are caused to an alien not as the direct consequence of an act or omission on the part of the organs or officials of the State, but through acts of private individuals, the reparation presents different features and problems. International responsibility in these cases originates, not in the act of the individual itself, but in the conduct of the organs or officials towards that act, that is to say, from the lack of "due diligence" which may be imputed to the State in that connexion. This particular situation naturally raises the question of the grounds on which reparation is to be based: the injurious act of the individual or, on the contrary, the act or omission truly imputable to the State from the international standpoint. To facilitate the examination of practice in this matter it is useful to begin by distinguishing between two possible situations — namely, negligence in not preventing the punishable act, and failure to prosecute and punish the guilty.

135. Let us first consider the second of these, which is the one that has caused the greatest difficulties and complications both in the practice of the claims commissions and in the writings of learned authors. Before the famous *Janes* case (1926), judicial precedent seems

to show that reparation was determined on the basis of the injury actually suffered by the alien, although at times the nature or gravity of the conduct imputable to the State was taken into account. Perhaps the typical decision is that of the German-Mexican Commission in the case of *M. L. Plehn*, in which the widow was awarded the sum of \$20,000 gold, in consideration not of the degree of negligence of the Mexican authorities in apprehending and punishing the guilty, but of the financial support she would be deprived of in the future through the loss of her husband.<sup>232</sup> Similarly, no considerations other than those of the material loss suffered by the relatives appear to have been taken into account when the General Claims Commission (United States-Mexico), determined the amount of the reparation in the cases of *L. S. Kling*, *M. Roper*, *M. Brown* and *R. Small*.<sup>233</sup> The amount of damages was therefore determined, or so it seems, in the same way as in the ordinary everyday cases of "direct" responsibility considered in section (b) of the previous chapter.

136. In the case of *Laura M. B. Janes*, however, the reparation was determined on an entirely different basis. In the first place, the General Claims Commission rejected the criterion which had generally been followed, with these comments:<sup>234</sup>

"If the murdered man had been poor, or if, in a material sense, his death had meant little to his relatives, the satisfaction given these relatives should be confined to a small sum, though the grief and the indignity suffered may have been great. On the other hand, if the old theory is sustained and adhered to, it would, in cases like the present one, be to the pecuniary benefit of a widow and her children if a government did *not* measure up to its international duty of providing justice, because in such a case the government would repair the pecuniary damage caused by the killing, whereas she practically never would have obtained such reparation if the State had succeeded in apprehending and punishing the culprit."

In the Commission's opinion, the solution reached in the past in other cases of improper governmental action would have been adequate to the present case too, for "the indignity done the relatives of *Janes* by non-punishment in the present case is, as that in other cases of improper governmental action, a damage directly caused to an individual by a government."<sup>235</sup> And the following passage, referring to the method of computing this class of damages, reiterates the basis for their reparation:<sup>236</sup>

"As to the measure of such a damage caused by the delinquency of a Government, the non-punishment, it may readily be granted that its computation is more difficult and uncertain than that of the damage caused by the killing itself. The two delinquencies being different in their origin, character and effect, the measure of damages for which the Government should be liable cannot be computed by merely stating the damages caused by the private delinquency of Carbajal [the murderer]. But a computation of this character is not more difficult than computations in other cases

<sup>228</sup> See Whiteman, *op. cit.*, p. 40.

<sup>229</sup> See *Opinions of Commissioners* (1931), p. 36 and (1927), pp. 205, 211 and 212, respectively.

<sup>230</sup> *Ibid.* (1927), pp. 115-116.

<sup>231</sup> *Ibid.*, pp. 117-118.

<sup>232</sup> *Ibid.*, pp. 118-119.

<sup>228</sup> See Moore, *International Arbitrations* . . . , vol. IV, p. 3333.

<sup>229</sup> See Whiteman, *op. cit.*, pp. 364-365.

<sup>230</sup> In this connexion see Personnaz, *op. cit.*, pp. 203-4.

<sup>231</sup> See list of these cases in Whiteman, *op. cit.*, p. 709, footnote 246.

of denial of justice such as illegal encroachment on one's liberty, harsh treatment in jail, insults and menaces of prisoners, or even non-punishment of the perpetrator of a crime which is not an attack on one's property or one's earning capacity, for instance a dangerous assault or an attack on one's reputation and honor. Not only the individual grief of the claimants should be taken into account, but a reasonable and substantial redress should be made for the mistrust and lack of safety, resulting from the Government's attitude. . . .

"Giving careful consideration to all elements involved, the Commission holds that an amount of \$12,000, without interest, is not excessive as satisfaction for the personal damage caused the claimants by the non-apprehension and non-punishment of the murderer of Janes."

The award of reparation for the "grief and indignity" suffered by the relatives of the victim is found also in other cases decided by the same commission, such as those of *A. Connelly and M. E. A. Munroe*, although they show considerable differences in the sums allowed on this ground.<sup>237</sup>

137. In one case, in particular, that commission referred to the peculiar nature of this kind of reparation contrasting it with a reparation of a strictly compensatory character: "It would seem, therefore, that, if in the present case injustice for which Mexico is liable is proven, the claimants shall be entitled to an award in the character of *satisfaction*, even when the direct pecuniary damages suffered by them are not proven or are too remote to form a basis for allowing damages in the character of reparation (compensation)."<sup>238</sup> The French-Venezuelan Commission of 1902 considered that in such cases of responsibility there was, in addition, an injury to the State of the nationality of the person concerned which should be taken into account in determining the reparation. In fact, in the case of the heirs of *J. Maninat*, umpire Plumley stated that, apart from the moral injuries suffered by the relatives, "the more important feature of this case is the unatoned indignity to a sister republic through this inexcusable outrage upon one of her nationals who had established his domicile in the domain of the respondent government." As a "just compensation which covers both aspects of this case" the sum of 100,000 francs was awarded.<sup>239</sup>

138. In the *Neer* case, the General Claims Commission considered the question of the degree of negligence necessary to warrant reparation and, consequentially, whether the amount of reparation should vary according to the measures taken for the purpose of apprehending and punishing the culprits. With regard to the first, it refused to allow an indemnity because it considered that the measures taken, although they proved ineffective, fulfilled the requirements of "due diligence".<sup>240</sup> In the *E. Almaguer* case, the Commission was more explicit in this regard, for it stated that in determining the reparation (\$7,000) it had taken into account the fact that "there was a certain serious prosecution of some persons, while as

regards others there was a negligent prosecution and no punishment."<sup>241</sup> These decisions, independently of their relative merits, are at least interesting as illustrations of the general but fundamental principle which has been applied in the kind of case considered in this context—namely, the principle that the reparation should be based on the nature of the conduct of the State towards the act of the individual and that the amount of such reparation should be determined according to the degree of gravity of such conduct. With regard to the latter, account should also be taken of the fact that sometimes the conduct of the State indicates a certain connivance at or even open complicity in the act of the individual, as will be shown in the next section.

139. In cases of injury caused by lack of due diligence in preventing an act of an individual, no claims commission has ever awarded reparation—or at any rate ever explicitly described it—as "satisfaction" to the injured alien. There has never been anything more than a recognition of its admissibility, in the finding that the injury could have been avoided if adequate measures had been taken, and, at most, an acknowledgment of the attitude of outright acquiescence sometimes adopted by the authorities towards the commission of the punishable act. This aspect of the matter will be taken up again in the next section, but some examples may help to show the circumstances in which reparation has been considered admissible and how the amount has been determined. In the case of *V. A. Ermerins*, the General Claims Commission awarded an indemnity of \$1,464.05, for damage to property, "especially in view of the fact" that since the house which suffered the damage "was situated just across the street from police headquarters and the Alcalde's office," the authorities could have taken measures to prevent the looting.<sup>242</sup>

#### 20. *Reparation of a "punitive" character (punitive damages)*

140. In connexion with the cases considered in the previous and other sections, the question has been raised repeatedly in doctrine and even in diplomatic practice and in international case-law, whether the reparation of the injury caused to the foreign individual can be "punitive" in character. The question is fairly complex, as it is not enough merely to determine whether reparation of this kind can be awarded or not; for, if this question is decided in the affirmative, other aspects of the problem will immediately need to be solved. It will be necessary to determine, for instance, whether such reparation is applicable only to a specific category of injuries or whether, on the contrary, its applicability rests rather on the nature or gravity of the act which gave rise to international responsibility. A further question to be settled is whether this form or mode of reparation is given as a kind of "satisfaction" to the individual himself, or whether it is rather a genuine measure of satisfaction to the State for the

<sup>237</sup> See Feller, *op. cit.*, pp. 298-9.

<sup>238</sup> *Stephens case, Opinions of Commissioners (1927)*, p. 397.

<sup>239</sup> See Ralston, *Report of French-Venezuelan Claims . . .*, p. 78.

<sup>240</sup> See *Opinions of Commissioners (1927)*, pp. 73, 71.

<sup>241</sup> *Ibid.* (1929), p. 299.

<sup>242</sup> *Ibid.* (1929), p. 220.

"moral injury" which it has sustained. The first and most important point, however, is whether there can actually be any reparation of this kind and, if so, what is its real purpose.

141. International courts and tribunals have at times expressly and categorically denied that reparation for injuries caused to aliens can be punitive in character. As was seen in the passages dealing with the reparation of moral injuries in general, in his *Opinion on the Lusitania cases* umpire Parker declared that the injury was subject to reparation "but not as a penalty." In other passages in the same opinion he was more explicit, stating that "In our opinion the words exemplary, vindictive or punitive as applied to damages are misnomers. The fundamental concept of 'damages' is satisfaction, reparation for a loss suffered; a judicially ascertained compensation for wrong...", and that "...as between sovereign nations the question of the right and power to impose penalties, unlimited in amount, is political rather than legal in its nature, and therefore not a subject within the jurisdiction of this Commission."<sup>243</sup> In other cases, the admissibility of this kind of reparation has been denied, not for substantive reasons, but on the grounds of the lack of competence of the arbitral commission. The opinion just quoted stated that it was not necessary to hold that "exemplary damages can not be awarded in any case by any international arbitral tribunal. A sufficient reason why such damages cannot be awarded by this commission is that it is without the power to make such awards under the terms of its charter — the Treaty of Berlin."<sup>244</sup>

142. Nevertheless, in diplomatic practice and even in the case-law of the claims commissions, it is sometimes possible to find reparation of a "punitive" character accepted and defined in unequivocal terms. As regards diplomatic practice, and leaving aside, of course, those incidents which have given rise to "pecuniary satisfaction," we may cite the case of a United States missionary murdered by a mob in Canton province, in which an additional indemnity of 50,000 taels was

<sup>243</sup> Reports of International Arbitral Awards, vol. VII, pp. 39 and 43 respectively.

<sup>244</sup> *Ibid.*, p. 41. The lack of competence of the Commission to award an indemnity as a penalty was also expressly invoked, by reason of the terms of the agreement or as a matter of principle, in the decision on the *Brooks case*, Moore, *International Arbitrations, etc.*, vol. IV, p. 4311; in the Portuguese-German Arbitration of 1919, United Nations, *Reports of International Arbitral Awards*, vol. II, pp. 1076-7; and in the *Torrey and Metzger cases*, Ralston, *Venezuelan Arbitrations of 1903*, pp. 162-4 and 578-80 respectively. These cases have provoked comments such as the following: "While there is little doubt that in many cases the idea of punishment has influenced the amount of the award, yet we are not prepared to state that any commission has accepted the views that it possessed the power to grant anything save compensation." Ralston, *International Arbitral Law and Procedure* (1910), pp. 180-1; "Arbitral commissions, while often apparently taking into consideration the seriousness of the offense and the idea of punishment in fixing the amount of an award, have generally regarded their powers as limited to the granting of compensatory, rather than exemplary, damages. In some cases, they have in dicta considered that there was in a given case no justification for the award of punitive damages, indicating thereby that they might, in an appropriate case, have awarded exemplary damages." Borchard, *The Diplomatic Protection of Citizens Abroad*, p. 419.

asked for the relatives, to be "regarded as exemplary damages to which China, by the failure of her officials to prevent this outrage, has made herself liable",<sup>245</sup> and the United States claim against Panama for "such measure or redress as will be amply compensatory to the persons aggrieved or to their dependents, sufficiently exemplary for the grave offence, and strongly deterrent against similar occurrences in the future".<sup>246</sup> From the case-law of claims commissions, despite the difficulties concerning competence mentioned in the preceding paragraph, examples may even be quoted where the reparation was expressly declared to be punitive in character. One such is the case of *M. Moke*, in which the United States-Mexican Commission stated: "...we wish to condemn the practice of forcing loans by the military, and think an award of \$500 for twenty-four hours' imprisonment will be sufficient. . . . If larger sums in damages, in such cases, were needed to vindicate the right of individuals to be exempt from such abuses, we would undoubtedly feel required to give them."<sup>247</sup> And in the decision in the *Maal case*, cited earlier, the Commission declared that "...the only way in which there can be an expression of regret on the part of the government and a discharge of its duty toward the subject of a sovereign and a friendly State is by making an indemnity therefore in the way of money compensation. This must be of a sufficient sum to express its appreciation of the indignity practised upon this subject and its high desire to fully discharge such obligations."<sup>248</sup> In the other cases in which there were circumstances aggravating responsibility it is clear, as Borchard said with reference to the *Janes case*, that "...the inarticulate purpose of such damages, which may or may not be actually compensatory, must involve the theory that by such penalty the delinquent government will be induced to improve the administration of justice and the claimant government given some assurance that such delinquencies, to the injury of its citizens, will, if possible, be prevented in the future."<sup>249</sup>

143. It will thus have been observed that in case-law, and especially in the cases referred to in the preceding section, the reparation was determined at times wholly or primarily according to the injury (either moral or of some other kind) actually suffered by the individual, but at others according to the nature or gravity of the act or omission imputable to the State. In the latter circumstances, it is certainly much more difficult to see the reparation simply as a measure of

<sup>245</sup> See *Foreign Relations of the United States* (1906), p. 319.

<sup>246</sup> *Ibid.* (1909), p. 476.

<sup>247</sup> Moore, *op. cit.*, vol. IV, p. 3411.

<sup>248</sup> Ralston, *Venezuelan Arbitrations of 1903*, p. 916.

<sup>249</sup> See "Important Decisions of the Mixed Claims Commission United States and Mexico", *American Journal of International Law* (1927), vol. 21, p. 518. Dunn expressed a similar opinion when he maintained that the purpose of the award in cases of lack of adequate punishment of the culprits was clearly not to make good some fancied loss sustained by the relatives but to express disapproval of the actions of the Government. The award in the *Janes case*, he added, "...was in the nature of a penalty imposed on the Government for being derelict in its duties, not an effort merely to repair a material loss sustained by private individuals." See *The Protection of Nationals* (1932), pp. 177-8 and also 185-6.

“compensation” for the injury caused rather than as a measure of punishment for an act or omission contrary to international law which is regarded as particularly grave. At the same time, as Briggs has observed, if damages are regarded as compensatory, it is both illogical and arbitrary, in cases of “indirect” responsibility, to measure them by the consequences of an act for which the State is admittedly not responsible. But if, on the other hand, damages are punitive, it is altogether proper to measure them by the consequences of an act (even by a private individual) which the international community wishes to discourage.<sup>250</sup>

144. The idea that reparation may be punitive appears to have gained fairly wide currency in doctrine. Even Anzilotti himself, who believed that no distinction could be made between civil and criminal responsibility in international law, went so far as to admit that in all the forms of reaction to the unlawful act, even when these are not clearly differentiated, “. . . there is an element of satisfaction and an element of reparation, the idea of the punishment of the act and that of the reparation of the injury suffered; what varies is rather the proportion between these two elements.”<sup>251</sup> But more recently, some authors have tended to regard this type of reparation as a separate and distinct concept from that of reparation *lato sensu*. Eagleton, for example, considers it a supplementary or additional indemnity granted to the injured individual on the grounds of the conduct imputable to the State.<sup>252</sup> Similarly, Schwarzenberger has said that if the term “punitive damages” was intended to express disapprobation of the international tort, or excessive damages were ordered for purposes of deterrence or reform of the offender, such damages would have a truly penal element.<sup>253</sup> Salvioli, earlier, had already denied the basis of the decision in the *Lusitania* cases, because he believed that a réparation-sanction was possible as a means of redress for moral injuries.<sup>254</sup> And other publicists, while referring to this particular kind of reparation in conjunction with other similar forms of satisfaction, have also pointed out that, in the circumstances referred to above, the former is punitive in character.<sup>255</sup> Personnaz, for example, is of the opinion that the manifestly injurious or grave character of

the unlawful act would aggravate the responsibility incurred and that this factor would be reflected in an increase in the indemnity or in special measures of satisfaction. This would be so in the case of an act affecting the State either directly or indirectly (through an injury to one of its nationals).<sup>256</sup>

145. All the foregoing would seem to remove any serious doubt that, both in diplomatic practice and in the case-law of the claims commissions, the reparation of an injury caused to an alien individual is fairly often frankly “punitive” in character. Its purpose — namely, to punish or at least to reprove a State for its conduct — either explicitly or implicitly, and thereby to try to prevent a repetition of such acts in the future, is in fact the most characteristic and distinctive feature of this mode of reparation. This is why its admissibility depends not so much on the nature of the injury suffered by the individual as on the circumstances aggravating the act or omission imputable to the State. The examples quoted, such as the *Opinion in the Lusitania Cases*, suffice to show that the mere existence of moral injury does not necessarily give rise to a reparation of this kind. This does not mean, however, that the nature of the injury which is being repaired is of no importance. Indeed, it is the nature of the injury which accounts for the high indemnity usually awarded, and the amount suggests the idea of “supplementary damages.” It is, again, owing to the special nature of the injury that as was in fact pointed out in one of the decisions quoted, the reparation takes the form of some sort of “satisfaction” accorded to the individual. But this satisfaction should not be confused, as is frequently done by learned authors, with the kind of satisfaction in the strict sense which was considered in the previous chapter — namely, “pecuniary satisfaction”. Although the latter is also sometimes to be found in cases of injuries caused to individuals, it is always, unlike the reparation of a “punitive” character considered here, a satisfaction accorded to the State — not to the individual — and its basis is not the injury suffered by the private person but the “political and moral” injury caused indirectly to the State. There is no denying that it is sometimes difficult, if not impossible, to make the distinction; but that is a different question, though admittedly one which characterizes a good deal of the topic dealt with in this report.

## 21. The reparation of damage to property in general

146. The reparation of this further category of injuries likewise can be studied properly only if certain fundamental distinctions regarding the perpetrator of the harmful act are borne in mind and if it is first determined whether or not the official measures or acts or omissions involved are intrinsically contrary to international law. We shall first discuss the situation in which the damage is caused directly by an individual.

### (a) Damage caused by individuals: circumstances in which reparation is warranted

147. Acts of individuals which cause damage to the property of aliens very rarely give rise to the international

<sup>250</sup> See “The Punitive Nature of Damages in International Law and State Responsibility for Failure to Apprehend, Prosecute or Punish”, in *Essays in Political Science in Honor of W. W. Willoughby* (1937), p. 346.

<sup>251</sup> See *Corso di Diritto Internazionale* (Padova), 1955, p. 425.

<sup>252</sup> See “Measure of Damages in International Law”, *Yale Law Journal* (1929-30), vol. 39, p. 61.

<sup>253</sup> See *International Law*, vol. I, International law as applied by International Courts and Tribunals (third edition, 1957), p. 673.

<sup>254</sup> See “La responsabilité des états et la fixation des dommages et intérêts par les tribunaux internationaux”, *Recueil des cours de l'Académie de droit international* (1929-III), vol. 28, p. 236, note 1.

<sup>255</sup> See, for instance, Lauterpacht, “Règles générales du droit de la paix”, *Recueil des cours de l'Académie de droit international* (1937-IV), vol. 62, pp. 355-357; Reitzer, *La réparation comme conséquence de l'acte illicite en droit international* (1938), pp. 210-212; and Bissonnette, *La satisfaction comme mode de réparation en droit international* (1952), pp. 146 et seq.; Schwarzenberger, *op. cit.*, pp. 658 and 668.

<sup>256</sup> *Op. cit.*, pp. 302. See also pp. 312 et seq.

responsibility of the State. It may even be said that cases of responsibility on this ground are far less frequent than those concerning injuries to the person. It is therefore necessary to determine the exact circumstances in which responsibility arises and the manner in which the damage suffered by the alien is repaired. In cases of robbery, the possibility of reparation has been admitted only in very exceptional circumstances. In the case of *J. Smith*, the United States-Mexican Commission established in 1839 held that the robbery effected by individuals had been made possible by the fact that the authorities had not protected the merchandise which they had seized, and ordered payment of a sum (\$18,762.63) which comprised the value of the stolen property plus an amount intended to cover reasonable mercantile profit on it.<sup>257</sup> In other cases the responsibility and the admissibility of reparation have had a different basis — the fact that the local authorities did not take the necessary steps to apprehend and punish those guilty of the punishable act. The case of *L. A. Mechan*, which was decided by the General Claims Commission (United States-Mexico), may serve as an example. In addition to the sum (\$25,000) allowed for the death of the husband and father of the claimants, the Commission ordered the payment of \$1,510.70, without interest, as compensation for the goods which might have been recovered if the guilty persons had been arrested.<sup>258</sup>

148. The question of the admissibility of reparation arises similarly in connexion with damage caused by individuals during a civil war or internal disturbances of some other kind. The principle governing responsibility in these circumstances is basically still the same, namely, that there is no responsibility and hence no cause for reparation, unless the authorities showed manifest negligence by not adopting the measures which, in the circumstances, are normally taken to prevent or stop the harmful acts.<sup>259</sup> This principle is so widely accepted that it does not seem necessary to spend much time on a consideration of the international case-law. The only cases in which responsibility has been recognized and reparation held due have been those in which the authorities showed manifest negligence and, at times, a certain degree of connivance at and even complicity in the acts.<sup>260</sup>

(b) *Damage caused during internal disturbances*

149. Naturally, the situation is different if the property of aliens is damaged during internal disturbances as a result, not of acts of private individuals, but of measures taken by the lawfully constituted authorities

<sup>257</sup> See Whiteman, *op. cit.*, vol. II, p. 852.

<sup>258</sup> See *Opinions of Commissioners* (1929), p. 168. See also the case of *Coatesworth and Powell*, cited by Commissioner Nielsen in his dissent regarding the computation of the amount of the indemnity awarded, *ibid.*, p. 173.

<sup>259</sup> In this connexion, see the Special Rapporteur's third report, *Yearbook of the International Law Commission, 1957*, vol. II, pp. 125 *et seq.*

<sup>260</sup> On these cases, see *Research in International Law*, Harvard Law School, *Nationality, Responsibility of States, Territorial Waters*, (Cambridge, Mass. 1929), commentary on articles 11 and 12 of the draft convention, pp. 189 *et seq.*

or, as the case may be, by the revolutionaries if the insurrection should succeed. Although there are numerous precedents in this matter, a few examples will suffice to show the circumstances in which reparation is allowed. In the first place, there appears to be no duty to repair the damage if the official measure, even though it results in the total destruction of the property, is designed to avert an imminent general catastrophe. This was the case with the claim on behalf of the *West India Oil Company*, whose stocks were thrown into the sea during the bombardment of Manzanillo by the United States Navy, a claim which was rejected by the Claims Commission established by the Treaty of 1898.<sup>261</sup> The outcome would not have been the same if the property had been destroyed needlessly. In the case of the *China and Java Export Company*, decided by the Chinese Claims Commission, a claim was made on this ground and an indemnity was awarded for the greater part of the damage alleged.<sup>262</sup>

150. The fact that the measure taken by the authorities affected the property of the alien immediately and individually constitutes, as a general rule, a firm basis of claim for the damage sustained. In the *Bertrand* case, the Arbitral Commission ordered the payment of an indemnity for the cotton which had been destroyed to prevent it from falling into the hands of the Confederates; likewise, in the case of *Labrot*, for three acres sown with carob which were destroyed by General Wallace for military purposes.<sup>263</sup> Nevertheless, the same Commission rejected a claim for two houses which had been destroyed during the bombing of Charleston.<sup>264</sup> Similarly, in the decision on the *American and Electric Manufacturing Co.* case, the United States - Venezuelan Commission granted an indemnity for the Government's requisitioning of a telephone line but rejected the claim for other damages caused by the bombardment carried out by the Government's naval forces to put down the rebellion.<sup>265</sup>

(c) *Damage caused by official measures*

151. A systematic and comprehensive study of reparation for damage to the property of aliens resulting from other official measures would present serious and perhaps insurmountable difficulties because of the variety of forms such measures may take and the fact that the circumstances, which generally have a decisive bearing on the solutions adopted, differ greatly from case to case. Moreover, many of the measures are not intrinsically contrary to international law and are indeed, as will be shown below, such that they cannot invariably be regarded as involving a duty to make reparation *stricto sensu*. It is therefore proposed to consider only cases or situations in which reparation has generally been required for damage to property occasioned by

<sup>261</sup> See [US] Department of Justice, *Spanish Treaty Claims Commission, Special Report of W. E. Fuller*, etc. (1907), p. 65.

<sup>262</sup> See Whiteman, *op. cit.*, pp. 944-5.

<sup>263</sup> See *American and British Claims Arbitration* (1883), p. 112 and *ibid.* (1882), p. 131, respectively.

<sup>264</sup> See *Dutrieux* case, *ibid.* (1882), p. 116.

<sup>265</sup> See *Ralston, Venezuelan Arbitrations of 1903*, p. 35.

measures which, at least in principle, should be included in the category of acts under reference.

152. In some cases reparation has been required for injuries or losses arising from detention by the State authorities of goods or other property owned by aliens. In the case of the United States steamer *Colonel Lloyd Aspinwall*, which had been seized on the high seas, the arbitrator considered the detention wrongful *ab initio*, and awarded compensation (\$19,702.50) to cover the losses sustained by reason of the 114 days' detention, the cost of repairing the damage occasioned by the neglect of the vessel, and other expenses.<sup>266</sup> In another case the taking of the property was held to be lawful and justified, but certain acts were considered to involve evident "denial of justice" and damages were allowed.<sup>267</sup> In some cases reparation is based on three grounds: the unlawful or unjustified taking of property, its detention and its use by the authorities. These three grounds were taken into account in a case which was considered by the United States - Mexican Commission established in 1839 and in which the Commission awarded compensation in the amount of \$12,620.54, to cover the value of the property seized plus interest, costs, expenses, etc.<sup>268</sup>

153. Reparation for the damage sustained by an alien by reason of the deprivation of the use or enjoyment of his property may of course also be due in situations other than those mentioned. Claims commissions and other arbitral tribunals have had to consider many cases arising from the detention or seizure of vessels or similar measures. In these cases the assessment of the damages involves serious difficulties and complications, since many factors must be taken into consideration, including the character of the vessel or voyage, the damage caused to the vessel and to the cargo, crew costs, insurance, loss of freight income, etc.<sup>269</sup> The question of reparation may also arise in connexion with certain measures affecting real property and other rights *in rem* of aliens, in particular measures involving wrongful and unjustified interference with rights of ownership or possession acquired by aliens.<sup>270</sup> In such cases, however, as in the case of rights acquired through contractual relations between the individual and the respondent State, the situation may differ from that considered in this section. The distinction will be considered in the following section.

(d) *Expropriation and similar measures distinguished from other measures*

154. This subject was considered in the Special Rapporteur's fourth report in connexion with the discussion of measures affecting acquired rights which are capable of giving rise to the international responsibility of the State; accordingly, it need not be discussed in detail

<sup>266</sup> See Moore, *International Arbitrations . . .*, vol. II, p. 1014.

<sup>267</sup> See *Bischoff* case, Ralston, *Venezuelan Arbitrations of 1903*, pp. 581-582.

<sup>268</sup> See *Mercy Mitchell* case, etc. cited in Whiteman, *op. cit.*, p. 870. For other cases of detention or seizure in which reparation covered *lucrum cessans*, see *ibid.*, pp. 876 *et seq.*

<sup>269</sup> For a detailed exposition of the principal cases see Whiteman, *op. cit.*, pp. 988 *et seq.*

<sup>270</sup> *Ibid.*, pp. 1355 *et seq.*

in this context.<sup>271</sup> The point that should be stressed is the importance of the dividing line between measures of this kind, which are intrinsically contrary to international law and hence, directly and immediately, capable of involving the responsibility of the State, and measures which, on the contrary, constitute the exercise of a right by the State, whose responsibility is therefore only involved if the measures are attended by other factors or circumstances which represent in themselves an act or omission contrary to international law. The question of reparation *stricto sensu*, whatever the form considered proper in the individual case, only arises in the case of measures in the first category. In the case of measures in the second category, there can only be the question of compensation — where compensation can properly be awarded — for the rights of which the alien has been deprived. The same distinction should be drawn where the measures affect rights acquired under contract or concession. In this case, too, the measure may constitute an unlawful act in the true sense of the word, or merely an arbitrary act for which the only remedy is compensation in the proper form and amount.

155. Elaborating on the discussion in the fourth report (section 34), the author would point out that, as in the decision in the *Delagoa Bay Railways* case (1900) cited in that section, it was held in the case of the *Company General of the Orinoco*, despite the explicit and repeated recognition of Venezuela's right to rescind the contract and the reference to a duty to compensate, that the sum awarded in compensation should be commensurate to the damages caused and in the assessment of the damages there was added to the estimated value of the concession (1,636,078.17 francs) the sum of 25,000 francs for expenses and 747,485.18 francs in respect of interest for the fifteen years during which the sum had been in default.<sup>272</sup> In the *Robert H. May* case, although it was recognized that there might be imperative reasons justifying the withdrawal of the concession and the taking over of the railway by the Government, the arbitrator awarded the sum of \$143,750.73 gold, including \$40,000 "by way of indemnity for expenses incurred, two years' time lost, suspension of credit, and grave anxiety of mind" and \$41,588.83 as estimated profits.<sup>273</sup> Similarly, in the *Shufeldt* claim (1930), the arbitrator, although explicitly recognizing the State's right to take legislative action to cancel a contract, held that where such action worked injustice to an alien, the government ought to make compensation for the damage, and awarded an amount of \$225,468.38, including compensation for profits lost and \$10,935.21 for interest (6 per cent).<sup>274</sup>

156. Consequently, in a discussion of official measures involving damage to aliens' property, it is necessary, save

<sup>271</sup> See, in particular, sections 28 and 34 of the Special Rapporteur's fourth report, in *Yearbook of the International Law Commission, 1959*, vol. II (United Nations publication, Sales No. 59.V.1, Vol. II).

<sup>272</sup> Ralston, *French-Venezuelan Claims Commission of 1902* (1906), pp. 362-365.

<sup>273</sup> *Foreign Relations of the United States* (1900), pp. 648, 674.

<sup>274</sup> See United Nations, *Reports of International Arbitral Awards*, vol. II, pp. 1098, 1099 *et seq.*

in the situations discussed in the first two paragraphs of this section, first to determine the exact nature of the measure, in other words its reason or purpose. If in taking the measure which gives rise to the claim the State exercised one of its many powers in respect of patrimonial rights, whatever their nature or the nationality of the owner, one cannot and should not speak of "reparation", although this term is ordinarily used both in practice and in the writings of learned authors. This confusion, whose effects are obvious, should be eliminated so that the State, if held internationally responsible by reason of any such measure, should not be held liable to "make reparation" for the injury, but merely to "compensate" the alien for the rights or interests affected by the measure in question.

## 22. Reparation for "indirect" damage or injury

157. In defining the principle of reparation, the Permanent Court of International Justice held that "reparation must as far as possible wipe out *all the consequences* of the illegal act and re-establish the situation which would in all probability have existed if that act had not been committed". Reparation, the Court held, would include "the award, if need be, of damages for losses sustained which would not be covered by restitution in kind or payment in place of it". The interpretation of the meaning and scope of the Court's ruling involves certain difficulties, since an injury or the act occasioning an injury may set in motion innumerable consequences which cannot always be taken into account in assessing the reparation. At one stage, although this appears no longer to be true of more recent international case-law and writings on the subject, the crucial question was whether reparation should or should not cover "indirect" damage.<sup>275</sup> During that first stage, the award in the *Alabama* arbitration (1872), in which the opinion was expressed that indirect claims did not constitute a good foundation for an award of damages between nations, was regarded as a reliable precedent by other tribunals.<sup>276</sup>

158. This does not mean that subsequent case-law has consistently disallowed claims for damages that were not the direct or immediate consequence of the original injury or of the act which occasioned it. There was in fact a tendency to criticize the terms in which the question was stated as not providing a proper basis for determining the circumstances in which claims for such damages were admissible. Thus, in the opinion in the *War Risk Insurance Claims*, the German-United

States Mixed Claims Commission unanimously expressed the view that:<sup>277</sup>

"The use of the term 'indirect' as applied to the 'national claims' involved in the *Alabama* case is not justified by the early debates in the Senate of the United States, by the record of the preliminary diplomatic negotiations, by the Treaty of Washington, by the 'American Case' as presented by the American Agent, or by the Award. Its use in this connexion has been productive of great confusion and misunderstanding. The use of the term to describe a particular class of claims is inept, inaccurate, and ambiguous. The distinction sought to be made between damages which are direct and those which are indirect is frequently illusory and fanciful, and should have no place in international law. The legal concept of the term 'indirect' when applied to an act proximately causing a loss is quite distinct from that of the term 'remote'. The distinction is important."

158. In their replies to point XIV of the questionnaire drawn up by the Preparatory Committee for The Hague Conference (1930), some governments objected to the distinction between direct and indirect damage, which they described as artificial or unsatisfactory.<sup>278</sup> Similar criticisms are repeatedly voiced by publicists. For example, Hauriou writes: "It must be admitted that the notion is both complex and imprecise and that it is understandable that arbitrators should have been unable to draw a clear distinction between cases of direct damage and those of indirect damage."<sup>279</sup> Later Personnaz, among many other writers, expressed the view that the theory of indirect damage now seemed purposeless and appeared to have no place in international law.<sup>280</sup>

159. These criticisms of the theory of indirect damage appear to be well founded. But how can one tell when the reparation should cover losses which are not a direct and immediate consequence of the act or omission imputable to the State or of the original injury caused by the act of an individual? As will be seen below the answer to this question lies in the causal connexion between the act or omission (or where appropriate the original damage) and the loss allegedly flowing therefrom. In other words the problem is to what extent this consequential damage or prejudice is linked by a claim of causation to the earlier act or omission or injury.

160. For the purpose of determining this connexion an objective rule has generally been applied: the damage must be the "normal" or "natural" (or "necessary and inevitable") consequence of the original injury or of the act or omission by which it was occasioned. Thus, the United States-German Commission cited above held:<sup>281</sup>

"The proximate *cause* of the loss must have been in legal contemplation the act of Germany. The proximate *result* or *consequence* of *that act* must have been the loss, damage, or injury suffered. . . .

<sup>277</sup> United Nations, *Reports of International Arbitral Awards*, vol. VII, pp. 62-63.

<sup>278</sup> See replies of Germany and the Netherlands, League of Nations document C.75 M.69.1929.V, pp. 149 and 146 respectively.

<sup>279</sup> "Les dommages indirects dans les arbitrages internationaux", *Revue générale de droit international public* (1924), vol. III, p. 212.

<sup>280</sup> *Op. cit.*, p. 135.

<sup>281</sup> See *Reports of International Arbitral Awards*, vol. VII, pp. 29-30.

<sup>275</sup> In this connexion, Borchard recognized that "international tribunals do not necessarily apply the rule of municipal courts to the effect that a claimant must, so far as possible, be placed in the same condition as he would have been if he had been allowed to proceed without interference". *Op. cit.*, pp. 418-419.

<sup>276</sup> Borchard, *op. cit.*, p. 414. It has been observed that all the *Alabama* claims were for "indirect" damage since the British Government's responsibility arose solely by reason of its non-performance of its duties as a neutral. The *Alabama* award, therefore, far from serving as a precedent from this point of view, had to be regarded as authority for the allowance of claims for indirect damage. Cf. Yntema, "Treaties with Germany and Compensation for War Damages", *Columbia Law Review* (1924), vol. 24, p. 151.

This is but an application of the familiar rule of proximate cause — a rule of general application both in private and public law — which clearly the parties to the Treaty had no intention of abrogating. It matters not whether the loss be directly or indirectly sustained so long as there is a clear, unbroken connexion between Germany's act and the loss complained of. It matters not how many links there may be in the chain of causation connecting Germany's act with the loss sustained, provided there is no break in the chain and the loss can be clearly, unmistakably, and definitely traced, link by link, to Germany's act. But the law cannot consider... the 'causes of causes and their impulsion one on another'. Where the loss is far removed in the causal sequence from the act complained of, it is not competent for this tribunal to seek to unravel a tangled network of causes and of effects, or follow, through a baffling labyrinth of confused thought, numerous disconnected and collateral chains, in order to link Germany with a particular loss. All indirect losses are covered, provided only that in legal contemplation Germany's act was the efficient and proximate cause and source from which they flowed."

Applying this test, the Commission held it to be obvious that the members of the families of those who lost their lives on the *Lusitania* — dependants who had been receiving regularly and could reasonably have expected to continue to receive pecuniary support from those who died — suffered losses which, because of the natural relations between the deceased and the members of their families, "flowed from Germany's act as a normal consequence thereof and hence, were attributable to Germany's act as a proximate cause. The usages, customs, and laws of civilized countries have long recognized losses of this character as proximate results of injuries causing death". In the same case, the claims of insurers for losses resulting from their being required to make payments under policies insuring the lives of passengers lost on the *Lusitania* were rejected by the Commission on the ground that the losses were not a natural and normal consequence of Germany's act, and were not therefore attributable to Germany's act as a proximate cause.<sup>282</sup>

161. In some cases, a somewhat subjective test — the foreseeability of the consequences of the act or omission or even the presumed intention of its author — has been applied to determine whether the chain of causation was such as to justify the award of reparation. The two tests are combined in the following passage from the Portuguese-German Arbitral Tribunal's decision of 31 July 1928 in the *Angola* case (1928-1930).<sup>283</sup>

"... And, indeed, it would not be equitable to let the injured party bear those losses which the author of the initial illegal act has foreseen and perhaps even intended, for the sole reason that in the chain of causation there are some intermediate links. But, on the other hand, everyone agrees that, even if the strict principle that direct losses alone give rise to a right to reparation is abandoned, it is none the less necessary to exclude losses unconnected with the initial act, save by an unexpected concatenation of exceptional circumstances which could only have occurred with the help of causes which are independent of the author of the act and which he could in no way have foreseen."

In a case decided by the United States-Venezuelan Commission an award, in addition to the reparation for

<sup>282</sup> See decision in the *Life Insurance Claims* (1924), *ibid.*, vol. VII, pp. 112-113.

<sup>283</sup> *Ibid.*, vol. II, p. 1031.

actual damage, was made for other losses "presumed to have been in the contemplation of the parties committing the wrongful acts and in that of the Government whose agents they were". In another decision, the same commission held that international law denied compensation for the remote consequences of official acts "in the absence of evidence of deliberate intention to injure".<sup>284</sup> In connexion with the failure of agents of the State to foresee the consequences of their acts, Salvioli expresses the view that the duty to make reparation arises from the want of due diligence and the *culpa* imputable.<sup>285</sup> With regard to the question of intention, a circumstance aggravating responsibility, if duly proved, might justify the award of reparation even where the chain of causation does not satisfy the objective tests discussed earlier.<sup>286</sup>

162. The determination of the causal connexion between the damage and the act or omission imputable to the State does not present the same problem, or at least not the same difficulties, in the case of claims for loss of prospective profits (*lucrum cessans*). Although such claims were in earlier years not infrequently treated as claims for indirect damage, and therefore not allowed, the position in case-law and in the writings of publicists now appears to admit of no serious doubt.<sup>287</sup> Such losses are now considered on the same footing as *damnum emergens* in the sense that reparation, if due, is made as for "direct" damage. Thus, Anzilotti points out that loss of prospective profits may in some cases plainly be the immediate and exclusive consequence of the wrongful act and adds that in referring, in the decision cited at the beginning of this section, to "losses sustained which would not be covered by restitution in kind or payment in place of it" the Permanent Court appears to have had principally in mind loss of prospective profits.<sup>288</sup> The inclusion of losses of this kind in a claim does not necessarily mean that reparation must be made in respect of them. Anzilotti recognizes that such losses may not be the immediate and exclusive consequence of the wrongful act. The essential test of causality must be applied. In the *Cape Horn Pigeon* case (1902), the arbitrator held that "it is not necessary for the amount of the *lucrum cessans* to be calculable with certainty. It is sufficient to show that the act complained of has prevented the making of a profit which would have been possible in the ordinary course of events."<sup>289</sup> In the light of these and many other precedents it is clear that two conditions must be satisfied: there must be an unequivocal chain of causation linking the *lucrum cessans* and

<sup>284</sup> *Irene Roberts and Dix* cases, Ralston, *Venezuelan Arbitrations of 1903*, pp. 145 and 149 respectively.

<sup>285</sup> *Loc. cit.*, p. 251.

<sup>286</sup> With reference to the point, Salvioli has suggested, on the basis of the decision in the *Fabiani* case, that from a practical standpoint a claim for indirect damage is more likely to be allowed where there is *dolus*, than in the case of gross negligence and that the difficulty is even greater in the case of negligence. *Ibid.*, p. 269.

<sup>287</sup> On this point, see De Visscher, "La responsabilité des états", *Bibliotheca Visseriana* (1924), vol. II, pp. 118-119.

<sup>288</sup> *Op. cit.*, p. 430.

<sup>289</sup> See Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (1953), p. 248.

the imputable act, and at the same time the *lucrum cessans* must not be too remote or speculative.<sup>290</sup>

### 23. Reparation for interest, expenses and costs

163. So far the discussion has been concerned with the reparation of the actual damage or injury sustained by an alien. In the practice of international tribunals, however, reparation frequently also includes the award of sums under other heads. In particular, interest may be allowed, either in the form of a sum added, as part of the award, to the pecuniary damages awarded or as interest payable on the amount of the compensation from the date of the award until the date of payment. The allowance of interest in either of these two forms is not a generally accepted rule either in the writings of authors or in practice, as will be seen from the arbitral awards allowing or disallowing interest examined below by way of example.<sup>291</sup>

164. In some decisions interest has been awarded even where the *compromis* was silent on the subject. This group of decisions includes those of the Mexican commissions. In the *Pinson* case, the presiding Commissioner (Verzijl) of the French-Mexican Commission held that the silence of the Convention meant that in claims where Mexico's liability rested solely on its *ex gratia* promise, no interest could be awarded, but where Mexico's liability was based upon principles of international law interest could be granted, at the rate of 6 per cent.<sup>292</sup> The United States - Mexican General Claims Commission awarded interest only in cases involving breach of contract. Interest was not allowed on any claims for personal injuries.<sup>293</sup> None of the other commissions awarded interest, although on one occasion the Presiding Commissioner of the German-Mexican Commission (Cruchaga) expressed the opinion that interest might be awarded whenever the Commission considered it equitable.<sup>294</sup> In the decisions of other tribunals and commissions, interest has been regarded as an integral part of the reparation — i.e., as an additional sum intended to secure full compensation for the damage sustained by the alien.<sup>295</sup>

<sup>290</sup> See the decisions in the *Rice* and *Shufeldt* cases, *ibid.*, footnote 15.

<sup>291</sup> The payment of interest as part of the reparation is in some cases expressly stipulated in the *compromis*. In this connexion, see the treaties and conventions cited in Feller, *op. cit.*, p. 309, footnote 81, and in Whiteman, *op. cit.*, vol. III, pp. 1914 *et seq.*

<sup>292</sup> See *Jurisprudence de la commission franco-mexicaine des réclamations* (1933), pp. 134 *et seq.* The only cases in which the Commission awarded interest were those decided during the presidency of Commissioner Verzijl.

<sup>293</sup> See Feller, *op. cit.*, pp. 310-311.

<sup>294</sup> *Ibid.*, pp. 311-312.

<sup>295</sup> With regard to these decisions, the amount of interest awarded and the date of commencement of payment of interest, see Whiteman, *op. cit.*, pp. 1920 *et seq.* and Personnaz, *op. cit.*, pp. 221-230 and 233 *et seq.* In the *Wimbledon* case the Permanent Court held that "in the present financial situation of the world and having regard to the conditions prevailing for public loans, the 6 per cent claim is fair". The interest, however, was to run, not from the date of the arrival of the *Wimbledon* at the entrance of the Kiel Canal, but from the date of the judgement. See Publications of the Permanent Court of International Justice, *Collection of Judgements*, series A, p. 32. For decisions in which arbitrators have disallowed claims in respect of *lucrum cessans* and have substituted interest, see Reitzer, *op. cit.*, p. 193, footnote 260.

165. Decisions implicitly or explicitly disallowing interest appear to be more common. It is not easy to analyse the grounds for the refusal to award interest, since those grounds are frequently not stated and, even when stated, do not always follow a uniform or consistent pattern. The greatest degree of uniformity appears to exist in cases involving unlawful arrest or other injuries to the person. For example, in the *Francis W. Rice* and *George Macmanus* cases, the United States-Mexican Commission of 1868 did not allow interest where the claimant had been unlawfully arrested and imprisoned.<sup>296</sup> In the *Walter H. Faulkner* case, in which an award of \$1,050 was made without interest, the General Claims Commission held that "...cases of allowing damages for illegal imprisonment are most similar to the present one, and in such cases, tribunals often allowed a gross sum without interest".<sup>297</sup> In cases concerning death by violence, interest has not normally been awarded except where there were also property losses. An instance of the latter is the *Mary Ann Conrow* case, in which the widow was awarded \$50,000 "without interest" on account of the death of her husband and \$300 "with interest" for the loss of the deceased's personal property.<sup>298</sup> In some instances, the claims commissions have also disallowed interest in claims for property losses.<sup>299</sup>

166. In some instances, the reparation has included sums allowed in respect of expenses incurred by reason of the injury sustained. In the *Dr. John Baldwin* case, in addition to the large amount awarded as compensation for personal injuries, a sum of \$74.75 was allowed for physician's charges. In the *Sara J. Ragsdale* case, the claim was allowed with interest to cover incidental expenses. In the *William Lee* case, the United States-Peruvian Commission awarded damages in the amount of \$22,000 for the unlawful detention of the vessel, including \$4,000 for repairs, and \$1,500 for all expenses during detention.<sup>300</sup> In some cases the reparation has also included the costs or similar expenses incurred by the claimant by reason of the injury. In the *Don Pacifico* case, for example, the Commission, in awarding £150 sterling, stated that it took into consideration the expenses the claimant had incurred during the investigation.<sup>301</sup>

### 24. *En bloc* reparation

167. Reparation for the damage sustained by an alien does not always take the form of an individualized indemnity. In some cases where a relatively large number of claims were made in respect of the same act or of a series of more or less interrelated acts, the States concerned preferred to negotiate the reparation of all

<sup>296</sup> See Whiteman, *op. cit.*, p. 1984.

<sup>297</sup> See *Opinions of Commissioners* (1927), p. 86.

<sup>298</sup> See Whiteman, *op. cit.*, p. 1986.

<sup>299</sup> For such cases, see *ibid.*, pp. 1990 *et seq.*

<sup>300</sup> For these and other similar decisions, see Whiteman, *op. cit.*, pp. 2006 *et seq.*

<sup>301</sup> See La Fontaine, *Pasicrisie internationale, Histoire documentaire...* (1902), p. 115. For other decisions, including decisions explicitly disallowing costs of this kind, see Whiteman, *op. cit.*, pp. 2024 *et seq.*

the injuries and to agree on the payment of a single compensation to discharge and settle all the pending claims en bloc. An example is provided by the protocol of 19 November 1896, under which "the Governments of Brazil and Italy, recognizing the difficulties of reaching agreement on the value of each of the Italian claims which have been considered just by one of the parties and unjust by the other during the negotiations", "agreed to settle the claims by a single act, which shall not imply any departure from the positions of principle taken by either party". The act referred to consisted in the payment of a single sum of 4 million francs.<sup>302</sup> As was indicated in the Special Rapporteur's fourth report, agreements stipulating reparation of this type are not to be confused with the so-called "lump-sum agreements", which are the outcome of negotiations and adjustments between interested States concerning the en bloc compensation to be paid for nationalized properties.<sup>303</sup>

168. En bloc reparation may also be awarded by an arbitral commission dealing with a number of claims, particularly when the governments concerned authorize the Commission to do so. This procedure was followed by the Tribunal which decided the *Alabama* claims. The Treaty of Washington of 8 May 1871 authorized the tribunal, if it found Great Britain to have failed to fulfil any of the duties specified, to award a single sum to be paid by Great Britain to cover all the claims referred to the tribunal. In accordance with this provision, the tribunal decided that it was "preferable to adopt the form of adjudication of an amount en bloc".<sup>304</sup> A similar, although not identical, situation is found in other cases. Under the agreement of 24 December 1923, establishing the American-Turkish Commission, the two governments "agreed, with a view to an amiable, expeditious and economical adjustment, that the Commission should proceed to a summary examination of the aforementioned claims for the purpose of recommending to the two governments a lump sum settlement". On the basis of this agreement the Commission recommended the payment of the sum of \$1,300,000.<sup>305</sup> Where this procedure is followed, the reparation award may differ in various respects from the reparation award of an arbitral tribunal properly so called and is more akin to the type of settlement negotiated by the governments concerned, the only difference being that the final adjustment is made through an arbitral body.

169. En bloc reparation should be distinguished from the method of lump-sum assessment. In assessing the total amount of compensation allowable claims com-

missions quite frequently do not specify the amounts awarded for each of the items of damages set out in the claim or the various circumstances taken into account. A typical example is provided by the *Habana Packet* decision, in which the compensation awarded took into account various kinds of damage and the circumstances in which the incident occurred.<sup>306</sup> Lump-sum assessment may take other forms. In the *Chorzów Factory* (Merits) case, for example, the Permanent Court held "that the legal relationship between the two Companies in no way concerns the international proceedings and cannot hinder the Court from adopting the system of a lump sum corresponding to the value of the undertaking..."<sup>307</sup>

#### 25. *The limitation of reparation and extenuating circumstances*

170. From a study of international case-law, it is possible to discern a number of principles which limit the scope or the amount of reparation. One such principle is the exclusion of damage not linked by a real and evident chain of causation to the imputable act or omission. When an arbitral commission or tribunal refuses to award additional amounts for interest, expenses or costs, the amount of the compensation awarded for the damage is automatically reduced thereby, even though, as is sometimes the case, claims for some of these items are disallowed on grounds of principle. There are, however, other factors which limit the reparation awarded.

171. One such factor is the rule against double damages—i.e., the award of reparation more than once in respect of the same injury—the object of the rule being to ensure that the amount of the reparation does not exceed the damage in fact sustained by the claimant. In its decision in the *Chorzów Factory* (Merits) case, the Permanent Court stated that if it were dealing with damage affecting persons or bodies corporate independent of one another, the natural method to be applied would be a separate assessment of the damage sustained by each of them, but that the interests possessed by the two companies in the undertaking being interdependent and complementary, those interests could not "simply be added together without running the risk of the same damage being compensated twice over."<sup>308</sup> In the *Alabama* claims decision, it was held that "in order to arrive at an equitable compensation for the damages which have been sustained, it is necessary to set aside all

<sup>306</sup> With regard to this and other decisions of this type see Personnaz, *op. cit.*, pp. 193-195.

<sup>307</sup> Publications of the Permanent Court of International Justice, *Collection of Judgements*, series A, No. 17, p. 49. The bearing of this problem on the question of the limitation of the duty to make reparation is discussed in the next section.

<sup>308</sup> Publications of the Permanent Court of International Justice, *Collection of Judgements*, Series A, No. 17, p. 48. See also p. 49 and the advisory opinion of the International Court on reparation for injuries incurred in the service of the United Nations, in which it is stated that the defendant State cannot "be compelled to pay the reparation due in respect of the damage twice over". *I.C.J. Reports 1949*, p. 186. In this connexion, see Schwarzenberger, *op. cit.*, pp. 655-656, 596.

<sup>302</sup> See *Revue générale de droit international public* (1897), vol. IV, pp. 403 *et seq.*

<sup>303</sup> See section 20 of the Special Rapporteur's fourth report, in *Yearbook of the International Law Commission, 1959*, vol. II (United Nations publication, Sales No. 59.V.1, vol. II).

<sup>304</sup> See Lapradelle and Politis, *op. cit.*, vol. II, pp. 780 and 893 respectively.

<sup>305</sup> See Nielsen, *American-Turkish Claims Settlement* (1937), pp. 45, 41. See also the settlement reached by France and Great Britain and the Republic of Uruguay in 1862 through the Commission of Montevideo, in Lapradelle and Politis, *op. cit.*, pp. 119 *et seq.*

double claims for the same losses and all claims for 'gross freights' so far as they exceed 'net freights.'"<sup>309</sup> The problem has also arisen in connexion with claims by insurers for sums paid by them in respect of losses to individuals caused by acts involving the international responsibility of the State. The decisions in such cases do not, however, appear to follow any consistent rule.<sup>310</sup>

172. A second limiting factor is the principle that reparation should not result in the unjust enrichment of the claimant. In the *Cook* case, the United States-Mexican General Claims Commission held that reparation should not cause the claimant an unjust enrichment, but recognized that unjust enrichment would not result in the case before the Commission.<sup>311</sup> In the *F. J. Acosta* case, the Commission converted money orders into dollars at the rate of exchange prevailing at the date of their purchase in order to avoid unjust enrichment of the claimant.<sup>312</sup> In the *Fabiani* case, the tribunal stated that damages ought not to be a source of profit for the persons who obtain them.<sup>313</sup> In this connexion, the Permanent Court held that "This principle, which is accepted in the jurisprudence of arbitral tribunals, has the effect, on the one hand, of excluding from the damage to be estimated, injury resulting for third parties from the unlawful act and, on the other hand, of not excluding from the damage the amount of debts and other obligations for which the injured party is responsible."<sup>314</sup>

173. In the discussion in the Special Rapporteur's third report of the circumstances in which the State is completely exonerated from international responsibility, it was indicated that in some cases the circumstances, while not entirely justifying the act imputable to the State, might be such as to qualify its responsibility.<sup>315</sup> In the section of the report dealing with the criterion for determining the measure of reparation, a number of cases were cited in which extenuating circumstances had been held to justify a reduction in the amount of the reparation.<sup>316</sup> In view of the importance of this aspect of reparation for damage sustained by individuals, it may be useful to discuss various other precedents in international case-law.

174. The typical circumstance in such cases is a fault on the part of the injured individual. In article 8, third paragraph, of the articles approved on first reading by the Third Committee of The Hague Conference (1930), this is implicitly recognized as a circumstance

resulting in exoneration from responsibility.<sup>317</sup> One of the earliest precedents is to be found in the *Cowper* case, in which compensation in respect of *lucrum cessans* appears to have been disallowed because the claimant had not been diligent during the ten years that had elapsed in recruiting labourers to replace the slaves of whom he had been deprived.<sup>318</sup> In his decision on the *Dolan* claim, the umpire, Sir Edward Thornton, considered that the claimant's absence of prudence and the fact that, unlike other claimants, he had not ascertained the character of the Zerman expedition were circumstances which should be taken into account in assessing the compensation to be awarded.<sup>319</sup> In the case of the whaling vessel *Canada* (1870) the damages claimed as prospective profit were not allowed, partly because the master had failed to act with the skill that was to be expected in the circumstances in which the accident occurred.<sup>320</sup> In its decision in the *Wimbledon* case, the Permanent Court also took this circumstance into account and indirectly recognized it as a factor that would limit the duty to make reparation when it examined the conduct of the captain and found that if had been legally unexceptionable.<sup>321</sup> Finally, in the *Macedonian* case (1841), although the fault was imputable not to the individual but to the State of nationality, a similar position was taken. In disallowing the claim for interest, the arbitrator drew attention to the fact that "the Government of the United States had done nothing to hasten a settlement" for twenty years after the date of the incident.<sup>322</sup>

## CONCLUSIONS

175. Before completing the present report, the Special Rapporteur wishes to put forward a number of conclusions, which will be stated in very general terms in order to avoid unnecessary repetition of the conclusions explicitly or implicitly contained in the previous sections.

176. The Special Rapporteur wishes once again to stress that the International Law Commission ought to depart from the traditional conception of "damage" or "injury", and hence of "reparation" itself.<sup>323</sup> Apart from its obvious artificiality and the technical difficulties it involves, the traditional approach is plainly inconsistent, with international law in its present state of development and has in the past had inevitable political implications which the Commission should

<sup>309</sup> Lapradelle and Politis, *op. cit.*, p. 893.

<sup>310</sup> In this connexion, see Cavaré, *Le droit international public positif* (1951), vol. II, p. 307.

<sup>311</sup> See *Opinions of Commissioners* (1927), p. 323.

<sup>312</sup> *Ibid.* (1928), p. 122.

<sup>313</sup> See Whiteman, *op. cit.*, vol. III, p. 1786.

<sup>314</sup> Publications of the Permanent Court of International Justice, *Collection of Judgements*, Series A, No. 17, p. 31. For other precedents see Schwarzenberger, *op. cit.*, pp. 557, 653 *et seq.*

<sup>315</sup> See *Yearbook of the International Law Commission, 1958*, vol. II, pp. 51 *et seq.*

<sup>316</sup> *Ibid.*, p. 68.

<sup>317</sup> See *Yearbook of the International Law Commission, 1956*, vol. II, p. 225. See also the replies of Denmark and Poland to point XIV of the questionnaire submitted to governments, *League of Nations publication, 1929.V.3*, pp. 147-148, 150.

<sup>318</sup> See Lapradelle and Politis, *op. cit.*, vol. I, p. 348.

<sup>319</sup> See Moore, *International Arbitrations . . .*, vol. III, p. 2768.

<sup>320</sup> See La Fontaine, *op. cit.*, p. 133.

<sup>321</sup> Publications of the Permanent Court of International Justice, *Collection of Judgements*, Series A, No. 1, p. 31.

<sup>322</sup> Lapradelle and Politis, *op. cit.*, vol. II, p. 205.

<sup>323</sup> See the Special Rapporteur's earlier reports, *Yearbook of the International Law Commission 1956*, vol. II, p. 192 (section 15) and p. 213 (section 28) and *Yearbook of the International Law Commission, 1958*, vol. II, p. 68 (section 20).

do its utmost to eliminate in the future.<sup>324</sup> The "injury" or "damage" should be considered in terms of the subject in fact harmed — i.e., the alien — and reparation should be considered in terms of its real and only object — i.e., not as reparation "due to the State", but as reparation due to the individual in whose behalf diplomatic protection is being exercised. The departure from the traditional approach, although it would involve substantial changes, would not affect the notion of "moral and political" injury *stricto sensu*, nor would it preclude consideration of cases in which the consequences of the act or omission transcend the specific losses sustained by the individual alien. The expression "moral and political" injury applies to a category of injuries which is independent of and wholly unrelated to that of injuries caused to the person or property of aliens; the situation meant here, although ultimately bound up with the conception of "moral injury" caused "indirectly" to the State of nationality, is an exception that is justified by the nature of the interest affected.<sup>325</sup>

177. With regard to the character and measure of reparation for injuries caused to individuals, the view of the sub-committee of The Hague Conference that the principles had not crystallized sufficiently to permit codification seems still to be substantially true.<sup>326</sup> It would be extremely difficult and in all probability fruitless to attempt a systematic formulation of the principles and rules that have been observed in the infinite variety of situations which arise in practice. It would, nevertheless, be feasible and desirable to formulate a number of general principles that have served to limit the extent of reparation or to define more precisely the forms or measures applicable in the case of injuries sustained by aliens.<sup>327</sup>

178. With regard to the principles limiting the duty

<sup>324</sup> In this connexion, a recent finding of the International Court of Justice which appears to depart from the position traditionally taken by the Court is of interest: "One interest, and one alone, that of Interhandel, which has led the latter to institute and to resume proceedings before the United States courts, has induced the Swiss Government to institute international proceedings. *This interest is the basis for the present claim* and should determine the scope of the action brought before the Court by the Swiss Government . . ." *I.C.J. Reports, 1959*, p. 29.

<sup>325</sup> See the earlier reports cited and the Special Rapporteur's course in *Recueil des cours de l'Académie de droit international* (1958, II), vol. 94, pp. 418 *et seq.*

<sup>326</sup> League of Nations publication, 1930.V.17, p. 234.

<sup>327</sup> In order to avoid the inconsistency referred to in the fourth report and in section 21 above, the term "reparation" should not be considered applicable in the case of acts or omissions causing damage to property, except where the acts or omissions are intrinsically contrary to international law.

to make reparation, in addition to the extenuating circumstances considered in the preliminary draft submitted to the Commission, the principle should be established that reparation may not result in unjust enrichment of the alien sustaining the injury, together with other limitations, related to this principle, such as the rule against double damages and "supplementary damages" where the latter are not fully justified by the gravity of the act or omission imputable to the respondent State. It is also desirable to rule out certain measures of reparation the admissibility of which has been questioned, including some forms of legal restitution and the award of unreasonable and excessive damages.

179. Measures of satisfaction should also be explicitly ruled out, as a matter of principle, for reasons that are in a sense even more weighty. In normal cases involving injury to the person or damage to the property of aliens modes of reparation which are solely conceivable in cases where the State itself is the subject of the injury cannot be regarded as admissible, in keeping with the new conception of "injury" and "reparation" advocated in these reports. Evident abuses have been committed in the past as a result of such measures,<sup>328</sup> which have in fact tended only to create unnecessary friction and ill-feeling in international relations.<sup>329</sup> Even in the case of responsibility for damage or injury to the State as such, traditional measures of satisfaction are less and less commonly employed and can in fact be said to be becoming gradually obsolete.<sup>330</sup> This does not of course mean that the remedy envisaged in article 25 of the draft put forward by the Special Rapporteur — the right to demand that the respondent State take all necessary steps to avoid any repetition of acts of the kind imputed to it — would not be available in the case of acts or omissions whose consequences transcend the specific injury sustained by the alien. A remedy on these lines and with this purpose, rather than "satisfaction" properly so called, would provide a means of protecting the interests which in fact call for the protection of international law in cases involving responsibility of this kind.

<sup>328</sup> In this connexion, see Personnaz, *La réparation du pré-judice . . .*, p. 289.

<sup>329</sup> In this connexion, see the comments of Chou Vei at the Lausanne session of the *Institut de droit international, Annuaire* (1927), vol. 1, p. 519.

<sup>330</sup> "On the other hand, the Court should break away from the familiar medieval procedure, which is not employed nowadays even in schools, such as apologies, flag saluting, etc. All this is reminiscent of *ultimata*, which are becoming more and more obsolete." Dissenting opinion of Judge Azevedo in the *Corfu Channel* case. *I.C.J. Reports, 1949*, p. 114.

## ADDENDUM

Responsibility of the State for injuries caused in its territory  
to the person or property of aliens: *Revised draft* \*

## Explanatory note

The members of the International Law Commission will readily understand why the Special Rapporteur has prepared a revision of the preliminary draft which he submitted with his second and third reports (A/CN.4/106 and 111). After submitting these reports the Special Rapporteur, in conformity with the Commission's instructions, continued his research into the subject of international responsibility, concentrating on those problems and aspects which are dealt with in his fourth, fifth and sixth reports (A/CN.4/119, 125 and 134). It was natural that, as his task came to an end, he should have considered it proper to revise the original preliminary draft in the light of the conclusions he had reached while preparing the last three reports. Had he not done so, his work would have remained incomplete and the contribution he has been endeavouring to make, during the last six years, to the Commission's study of this topic would have been very much smaller.

In order that the reader may be able to see in what respects the original preliminary draft has been amended, the Special Rapporteur has added a brief commentary to each of the articles of the revised text.

On reaching the end of his work, the Special Rapporteur would like to affirm once again the spirit in which his reports and the preliminary draft were prepared: his purpose was to take into account the profound changes which are occurring in international law, in so far as they are capable of affecting the traditional ideas and principles relating to responsibility. The only reason why, in this endeavour, he rejected notions or opinions for which acceptance is being sought in our time, is that he firmly believes that any notion or opinion which postulates extreme positions — whatever may be the underlying purpose or motive — is incompatible and irreconcilable with the idea of securing the recognition and adequate legal protection of all the legitimate interests involved. That has been the policy followed by the Commission hitherto and no doubt will continue to be its policy in the future.

\* \* \*

Revised draft on international responsibility of the State for injuries  
caused in its territory to the person or property of aliens

## Title I

## GENERAL PRINCIPLES

## Chapter I

RIGHTS OF ALIENS AND CONSTITUENT ELEMENTS  
OF RESPONSIBILITYArticle 1. — *Rights of aliens*

1. For the purpose of the application of the provisions of this draft, aliens enjoy the same rights and the same legal guarantees as nationals, but these rights and guarantees shall in no case be less than the "human rights and fundamental freedoms" recognized and defined in contemporary international instruments.

2. The "human rights and fundamental freedoms" referred to in the foregoing paragraph are those enumerated below:

(a) The right to life, liberty and security of person;

\* Circulated in mimeographed form as document A/CN.4/34/Add.1, dated 11 December 1961.

(b) The right to own property;

(c) The right to apply to the courts of justice or to the competent organs of the State, by means of remedies and proceedings which offer adequate and effective redress for violations of the aforesaid rights and freedoms;

(d) The right to a public hearing, with proper safeguards, by the competent organs of the State, in the substantiation of any criminal charge or in the determination of rights and obligations under civil law;

(e) In criminal matters, the right of the accused to be presumed innocent until proved guilty; the right to be informed of the charge made against him in a language which he understands; the right to present his defence personally or to be defended by a counsel of his choice; the right not to be convicted of any punishable offence on account of any act or omission which did not constitute an offence, under national or international law, at the time when it was committed; the right to be tried without delay or to be released.

3. The enjoyment and exercise of the rights and freedoms specified in paragraph 2 (a) and (b) are subject to such limitations or restrictions as the law expressly prescribes for reasons of internal security, the economic well-being of the nation, public order, health and morality, or to secure respect for the rights and freedoms of others.

Article 2. — *Constituent elements of responsibility*

1. For the purposes of this draft, the "international responsibility of the State for injuries caused in its territory to the person or property of aliens" involves the duty to make reparation for such injuries, if these are the consequence of some act or omission on the part of its organs or officials which contravenes the international obligations of the State.

2. The expression "international obligations of the State" shall be construed to mean, as specified in the relevant provisions of this draft, the obligations resulting from any of the sources of international law.

3. The expression "international obligations of the State" also includes the prohibition of the "abuse of rights", which shall be construed to mean any action contravening the rules of international law, whether conventional or general, which govern the exercise of the rights and competence of the State.

4. The State may not plead any provisions of its municipal law for the purpose of repudiating the responsibility which arises out of the breach or non-observance of an international obligation.

## Title II

ACTS AND OMISSIONS GIVING RISE  
TO RESPONSIBILITY

## Chapter II

## DENIAL OF JUSTICE AND OTHER SIMILAR ACTS AND OMISSIONS

Article 3. — *Acts and omissions involving denial of justice*

1. The State is responsible for the injuries caused to an alien by acts or omissions which involve a denial of justice.

2. For the purposes of the foregoing paragraph, a "denial of justice" shall be deemed to occur if the courts deprive the alien

of any one of the rights or safeguards specified in article 1, paragraph 2 (c), (d) and (e), of this draft.

3. For the same purposes, a "denial of justice" shall also be deemed to occur if a manifestly unjust decision is rendered with the evident intention of causing injury to the alien. However, judicial error, whatever the result of the decision, does not give rise to international responsibility on the part of the State.

4. Likewise, the alien shall be deemed to have suffered a denial of justice if a decision by a municipal or international court in his favour is not carried out, provided that the failure to carry out such decision is due to a clear intention to cause him injury.

#### *Article 4. — Deprivation of liberty*

1. The State is responsible for the injuries caused to an alien by reason of his arrest, detention or imprisonment, if carried out on grounds not provided for in the municipal law or in a manner manifestly incompatible with the procedure established for the purpose by municipal law.

2. Notwithstanding the provisions of the foregoing paragraph, the international responsibility of the State shall not be involved in cases where the detention order was based on *bona fide* suspicion, if, when the error was noticed, the alien was released.

#### *Article 5. — Expulsion and other forms of interference with freedom of movement*

1. The State is responsible for the injuries caused to an alien who has been expelled from the country, if the expulsion order was not based on grounds specified in municipal law or if, in the execution of the order, serious irregularities were committed in the procedure established by municipal law.

2. The State is also responsible for the injuries caused to an alien in cases where he was prevented from leaving the country or from moving freely within the country, if the act or omission of the authorities is manifestly arbitrary or unjustified.

#### *Article 6. — Maltreatment and other acts of injury to the person*

Maltreatment and other acts of inhumanity committed by the authorities against the person of an alien shall constitute an aggravating circumstance for the purposes of an international claim under article 22, paragraph 2, of this draft.

### *Chapter III*

#### NEGLIGENCE AND OTHER ACTS AND OMISSIONS IN CONNEXION WITH THE PROTECTION OF ALIENS

#### *Article 7. — Negligence in the performance of the duty of protection*

1. The State is responsible for the injuries caused to an alien by illegal acts of individuals, whether isolated or committed in the course of internal disturbances (riots, mob violence or civil war), if the authorities were manifestly negligent in taking the measures which, in view of the circumstances, are normally taken to prevent the commission of such acts.

2. The circumstances mentioned in the foregoing paragraph shall include, in particular, the extent to which the injurious act could have been foreseen and the physical possibility of preventing its commission with resources available to the State.

3. The State is also responsible if the inexcusable negligence of the authorities in apprehending the individuals who committed the injurious act deprives the alien of the opportunity to bring a claim against the said individuals for compensation for the loss or injury or if he is deprived of such opportunity by virtue of a general or specific amnesty.

#### *Article 8. — Other acts and omissions in connexion with the obligation to protect aliens*

1. In the cases of responsibility referred to in the preceding article, the connivance, complicity or participation of the authorities in the injurious act of the individual shall constitute an aggravating circumstance for the purposes of an international claim under article 22, paragraph 2, of this draft.

2. Independently of the existence of any of the circumstances referred to in the foregoing paragraph, the State is likewise responsible, for the purpose aforesaid, if the authorities were manifestly and inexcusably negligent in the prosecution, trial and punishment of the persons guilty of the injurious act.

### *Chapter IV*

#### MEASURES AFFECTING ACQUIRED RIGHTS

#### *Article 9. — Measures of expropriation and nationalization*

1. The State is responsible if it expropriates property of an alien and the expropriation is not in conformity with the provisions of the municipal law in force at the time when the property in question was acquired by the owner concerned.

2. In the case of nationalization or expropriation measures which are of a general nature and which are not directed against a particular person or against particular persons, the State is responsible if the measures are not taken on grounds of public interest, if they involve discrimination between nationals and aliens to the detriment of the latter in the matter of compensation for the property in question, or if unjustified irregularities which are prejudicial to aliens are committed in the interpretation or application of the said measures.

#### *Article 10. — Non-performance of contractual obligations in general*

1. The State is responsible for the non-performance of obligations stipulated in a contract entered into with an alien or in a concession granted to him, if the non-performance is not justified on grounds of public interest or of the economic necessity of the State, or if there is imputable to the State a "denial of justice" within the meaning of article 3 of this draft.

2. The foregoing provision shall not apply if the contract or concession contains a clause of the nature described in article 19, paragraph 2.

3. If the contract or concession is governed by international law, or by legal principles of an international character, the State is responsible by reason of the mere fact of the non-performance of the obligations stipulated in the said contract or concession.

#### *Article 11. — Public debts*

The State is responsible if it repudiates or cancels its public debts, if the measure is not justified on grounds of public interest or if it discriminates between nationals and aliens to the detriment of the latter.

### *Chapter V*

#### IMPUTABILITY OF ACTS OR OMISSIONS

#### *Article 12. — Acts and omissions of organs and officials in general*

1. An act or omission which contravenes international law is imputable to the State if the organs or officials concerned acted within the limits of their competence.

2. An act or omission shall likewise be imputable to the State if the organs or officials concerned exceeded their competence but purported to be acting in their official capacity.

3. Notwithstanding the provisions of the foregoing paragraph, the act or omission shall not be imputable to the State if the act exceeding the competence of the officials or organs concerned was by its nature totally outside the scope of their functions and powers, even though they may to some extent have relied on their official position or used the means at their disposal by reason of that position.

4. Similarly, the act or omission shall not be imputable to the State if it was so manifestly outside the competence of the organ or official concerned that the alien should have been aware of the fact and could, in consequence, have avoided the injury.

5. For the purposes of the provisions of this article, the act or omission shall be proved in conformity with the municipal law of the State to which it is imputed.

*Article 13. — Acts and omissions of the legislature*

1. The provisions of the preceding article shall apply, *mutatis mutandis*, to the imputability of any legislative (or, as the case may be, constitutional) measures which are incompatible with international law and to the failure to adopt the measures which are necessary for the performance of the international obligations of the State.

2. Notwithstanding the provisions of the foregoing paragraph, the act or omission shall not be imputable to the State if, without amending its legislation (or its constitution), the State can avoid the injury or make reparation therefor and if it does so in due time.

*Article 14. — Acts and omissions of political subdivisions*

1. The acts and omissions of political subdivisions, whatever their internal organization may be and whatever degree of legislative, judicial or administrative autonomy they enjoy, shall be imputable to the State.

2. The imputability of acts or omissions of political subdivisions shall be determined in conformity with the provisions of the two preceding articles.

*Article 15. — Acts and omissions of a third State or of an international organization*

Acts and omissions of a third State or of an international organization shall be imputable to the State in whose territory they were committed only if the latter could have avoided the injurious act and did not exercise such diligence as was possible in the circumstances.

*Article 16. — Acts and omissions of successful insurgents*

The imputability of acts and omissions committed by insurgents during the conflict shall, if the insurrection is successful and a new government is installed, be determined in conformity with the provisions of articles 7 and 8 of this draft.

*Article 17. — Exonerating and extenuating circumstances*

1. An act or omission shall not be imputable to the State if it is the consequence of *force majeure* which makes it impossible for the State to perform the international obligation in question and which was not the consequence of an act or omission of its own organs or officials.

2. Likewise, an act shall not be imputable to the State if it is the consequence of a state of necessity involving a grave and imminent peril threatening some vital interest of the State, provided that the State did not provoke that peril and was unable to counteract it by other means and so to prevent the injury.

3. Similarly, the act or omission shall not be imputable to the State if it was provoked by some fault on the part of the injured alien himself.

4. *Force majeure*, state of necessity and the fault imputable to the alien, if not admissible as grounds for exoneration from responsibility, shall operate as extenuating circumstances for the purposes mentioned in article 26, paragraph 4, of this draft.

*Title III*

THE INTERNATIONAL CLAIM  
AND THE REPARATION OF THE INJURY

*Chapter VI*

ADMISSIBILITY OF CLAIMS

*Article 18. — Exhaustion of local remedies*

1. An international claim brought for the purpose of obtaining reparation for injuries sustained by an alien, or for the purposes mentioned in article 27 of this draft, shall not be admissible until, in respect of each one of the grounds of the said claim, all the remedies and proceedings established by municipal law have been exhausted.

2. For the purposes of the provisions of the foregoing paragraph, local remedies shall be deemed to have been "exhausted" when the decision of the competent body or official that rendered it is final and without appeal.

3. Consequently, except in the cases of "denial of justice" referred to in article 3 of this draft, it shall not be admissible to plead, as an excuse for the failure to resort to all or any of the remedies under municipal law, that the organ or official concerned is not competent to deal with the case and to adjudicate the same or that it is useless to apply to the municipal courts on the alleged grounds that for technical or other reasons such remedies are ineffective.

4. The foregoing provisions shall not apply if the respondent State has expressly agreed with the State of nationality of the injured alien that recourse to any one or to all of the local remedies shall not be necessary.

5. If the respondent State and the alien have entered into an agreement of the nature of those mentioned in article 21 of this draft, the rule concerning the exhaustion of local remedies shall likewise not be applicable, unless the said agreement expressly lays down the observance of the said rule as a condition to be fulfilled before an international claim can be brought.

*Article 19. — Waiver of diplomatic protection*

1. Notwithstanding the provisions of the preceding article, if the States concerned have agreed to restrict the exercise of diplomatic protection for their respective nationals, an international claim shall not be admissible except in the cases and circumstances specified in the said agreement.

2. Similarly, in the case of the non-performance of obligations stipulated in a contract or concession, the international claim shall not be admissible if the alien concerned has waived the diplomatic protection of the State of his nationality and the circumstances are in conformity with the terms of the waiver.

3. An international claim shall likewise not be admissible if the alien concerned has spontaneously reached a settlement or arrangement with the local authorities concerning the reparation of the injury sustained by him.

4. The waiver of diplomatic protection and the settlements or arrangements reached by the alien with the local authorities shall not deprive the State of nationality of the right to bring an international claim in the circumstances and for the purposes described in article 22, paragraph 2, and article 27 of this draft.

*Article 20. — Settlement of questions relating to the admissibility of claims*

Disputes between the respondent State and the alien, or, as the case may be, between that State and the State of nationality, regarding any of the aspects relating to the admissibility of the international claim shall be submitted to the methods of settlement provided for in articles 21 and 22 in the form of a preliminary question and settled by means of a summary procedure.

*Chapter VII*

*SUBMISSION OF THE INTERNATIONAL CLAIM*

*Article 21. — Right of the injured alien to bring a claim*

1. The alien may submit an international claim to obtain reparation for the injury sustained by him to the body in which competence for this purpose has been vested by an agreement between the respondent State and the State of nationality or between the respondent State and the alien himself.

2. If the body mentioned in the foregoing paragraph was established by an agreement between the respondent State and the alien, the consent of the State of nationality shall not be necessary for the purpose of the submission of the international claim.

3. In the event of the death of the alien, the right to bring a claim may be exercised by his heirs or successors in title, unless they possessed or have acquired the nationality of the respondent State.

4. The right to bring claims to which this article refers shall not be exercisable by foreign juristic persons in which nationals of the respondent State hold the controlling interest.

*Article 22. — Right of the State of nationality to bring a claim*

1. The State of nationality may bring the international claim to obtain reparation for the injury sustained by the alien:

(a) If there does not exist an agreement of the type referred to in article 21, paragraph 1; or

(b) If the respondent State has expressly agreed that the State of nationality should substitute itself for the alien in his place and title for the purposes of the claim.

2. The State of nationality may, in addition, bring an international claim in the case and for the purposes mentioned in article 27 of this draft, irrespective of any agreement entered into by the injured alien with the respondent State.

*Article 23. — Nationality of the claim*

1. A State may exercise the right to bring a claim referred to in article 22 on condition that the alien possessed its nationality at the time of sustaining the injury and conserves that nationality until the claim is adjudicated.

2. In the event of the death of the alien, the exercise of the right of the State to bring a claim shall be subject to the same conditions.

3. A State may not bring a claim on behalf of an individual if the legal bond of nationality is not based on a genuine connexion between the two.

4. A State may likewise not bring a claim on behalf of foreign juristic persons in which nationals of the respondent State hold the controlling interest.

5. In cases of dual or multiple nationality, the right to bring a claim shall be exercisable only by the State with which the alien has the stronger and more genuine legal and other links.

*Article 24. — Inadmissible restrictions of the right to claim*

1. The right of the State of nationality to bring a claim shall not be affected by an agreement between the respondent State and the alien if the latter's consent is vitiated by duress or any other form of coercion exerted upon him by the authorities of the respondent State.

2. The right to bring a claim shall likewise not be affected if the respondent State, subsequently to the act or omission imputed to it, imposed upon the alien its own nationality with the object of resisting the international claim.

*Article 25. — Limitation of time affecting the right to bring a claim*

1. Except where the parties concerned have agreed upon a different time limit, the right to bring an international claim shall lapse after the expiry of two years from the date when local remedies were exhausted.

2. Notwithstanding the provisions of the preceding paragraph, the international claim shall be admissible if it is proved that the delay in its submission is due to reasons not connected with the will of the claimant.

*Chapter VIII*

*NATURE AND MEASURE OF THE REPARATION*

*Article 26. — Restitution and pecuniary damages*

1. The reparation of the injury caused to an alien may take the form of restitution in kind (*restitutio in integrum*) or of pecuniary damages, whichever may best serve to wipe out the consequences of the act or omission imputable to the respondent State.

2. Notwithstanding the provisions of the foregoing paragraph, the reparation shall not take the form of restitution if restitution would involve the repeal of a law, the annulment of a judicial decision or the non-application of an executive or administrative measure and it would be incompatible with or cause difficulties under the municipal law of the respondent State.

3. The amount of the pecuniary damages shall be determined in accordance with the nature of the injury caused to the person or property of the alien or, in the event of his death, of his heirs or successors in title. Consequently, irrespective of the nature of the reparation or of the purpose for which it is made, the pecuniary damages shall not result in the undue enrichment of the injured alien.

4. In the determination of the nature and measure of the reparation, the fault imputable to the injured alien and any of the other circumstances described as extenuating circumstances in article 17, paragraph 4, of this draft shall be taken into account.

*Article 27. — Measures to prevent the repetition of the injurious act*

1. Even in the case of an act or omission the consequences of which extend beyond the injury caused to the alien, a fact constituting an aggravating circumstance, the reparation shall not take a form of "satisfaction" to the State of nationality, which would be offensive to the honour and dignity of the respondent state.

2. Notwithstanding the provisions of the foregoing paragraph, in any such case as aforesaid the State of nationality shall have the right, without prejudice to the reparation due in respect of the injury sustained by the alien, to demand that the respondent State take the necessary steps to prevent the repetition of events of the nature of those imputed to that State.

*Title I*  
GENERAL PRINCIPLES

*Chapter I*  
RIGHTS OF ALIENS AND CONSTITUENT ELEMENTS  
OF RESPONSIBILITY

*Article 1. — Rights of aliens*

Article 1 of the revised draft replaces articles 5 and 6 of the original draft. Like them, article 1 lays down the principle that aliens enjoy the same rights and are entitled to the same legal guarantees as nationals, but that these rights and guarantees may in no case be less than the "human rights and fundamental freedoms" recognized and defined in contemporary international instruments; nevertheless, the enjoyment and exercise of certain of these rights and freedoms are subject to the limitations or restrictions laid down expressly by law for any of the reasons mentioned in the article.

Ever since writing his first report (A/CN.4/96), the Special Rapporteur has stressed repeatedly the need to reconcile the traditional opposition and antagonism between the "international standard of justice" and the principle of the equality of nationals and aliens. For this purpose, he has suggested that an attempt should be made to reformulate both principles in a new rule incorporating the essential elements and serving the main purposes of both; in other words, to fuse them into a system based on the international recognition which has been accorded to human rights and fundamental freedoms. In the Special Rapporteur's opinion, this political and legal reality of the post-war world has virtually removed the opposition and antagonism which formerly divided the two principles; it would therefore be wrong to ignore the facts and to continue to wait until one of the principles prevails over the other.

Some members of the Commission have criticized the system on the grounds that neither in his capacity as a national nor in his capacity as an alien can the individual be regarded as a (direct) subject of international law; that human rights and fundamental freedoms are not yet recognized in positive international law; and that the definition or enunciation of these rights and freedoms belongs rather to a different topic of codification, that of the "status of aliens". The Special Rapporteur has had occasion to point out the weakness of these objections (A/CN.4/111, paras. 10-12). Since then, as he studied more thoroughly the various questions and principles connected with the international responsibility which the State may incur for injuries to the person or property of aliens, he has become more and more convinced that it is both necessary and desirable to retain the system described in the draft. The question is not merely by what standard acts or omissions imputable to the State are to be judged: for the purpose of the interpretation and application of the principles governing responsibility in each specific case it is also necessary to know what are the essential rights and freedoms of aliens, and the limitations or restrictions to which the enjoyment and exercise of these rights are subject for the reasons specified in municipal law.

*Article 2. — Constituent elements of responsibility*

The first two paragraphs of this article are identical with those appearing in article 1 of the original draft. They enumerate the constituent elements of international responsibility—viz., the *act or omission* contravening the international obligations of the State, the *injury* to the person or property of the alien and the *imputability* of the act or omission. In addition, the article defines the meaning of the expression "international obligations of the State", and a new paragraph 3 extends the meaning of the expression to cover the prohibition of the "abuse of rights", by which is meant any action contravening the rules of conventional or general international law governing the exercise of the rights and

competence of the State. As was explained in the fifth report (A/CN.4/125, paras. 70 and 71), the prohibition of "abuse of rights" may be regarded as implied in that expression, in view of the extent to which it has been recognized in diplomatic practice and international case-law, but the express provision in the paragraph has the advantage of defining in the draft itself the essential idea on which responsibility is based in these cases.

The article retains, in paragraph 4, the principle that the State may not plead any provisions of its municipal law for the purpose of repudiating the responsibility which arises out of the breach or non-observance of an international obligation. As will be seen below, this principle does not prevent the "imputability" of the act or omission from being determined in conformity with the municipal law (article 12, para. 5), nor does it mean that an act or omission of the legislature cannot be imputed to the state if the State can in some other way avoid the injury or make reparation therefor (article 13, para. 2).

*Title II*  
ACTS AND OMISSIONS  
GIVING RISE TO RESPONSIBILITY

*Chapter II*  
DENIAL OF JUSTICE AND OTHER SIMILAR ACTS AND OMISSIONS

*Article 3. — Acts and omissions involving denial of justice*

As will be seen, the first three paragraphs of the article repeat, with only some drafting changes, the provisions of article 4 of the original draft, and consequently it is not necessary to add anything to the commentary in the second report (A/CN.4/106, chapter II, section 8). The sole innovation is the reference in the new paragraph 4 to the failure to carry out the decision rendered of a municipal or international court in favour of the alien. As is expressly stated in the paragraph, if the failure is due to a clear intention to cause injury to the alien there would seem to be no doubt that the act or omission preventing the execution of the decision involves a "denial of justice". Even though the appropriateness of its description as such may be debatable—as may also be the aptness of the definitions of other acts or omissions for which provision is made in some of the preceding paragraphs—it is undeniable that such an act or omission is capable of giving rise to the international responsibility of the State.

*Article 4. — Deprivation of liberty*

*Article 5. — Expulsion and other forms  
of interference with freedom of movement*

None of the acts and omissions similar to the "denial of justice" was dealt with in the original draft. In a more detailed text, it is natural to deal with those which have arisen most frequently in practice and concerning which a large body of judicial precedents exists. The cases in question are those of the arrest, detention or imprisonment of aliens in circumstances involving the international responsibility of the State. Although there are not many precedents from arbitration concerning cases of expulsion and other interference with freedom of movement, these come within the general notion of "deprivation of liberty", which is not difficult to define, for the purposes of responsibility, by reference to other sources of international law.

*Article 6. — Maltreatment and other acts  
of injury to the person*

This too is a new article, although the principle on which it is based is in no way foreign to the system of the original draft. The intention is simply to equate maltreatment and other acts of inhumanity to which aliens may be subjected by the authorities

with the circumstances aggravating international responsibility, for the purposes stated in article 6 itself. In other words, it is one of the cases in which the consequences of the act or omission transcend the injury causes to the alien and accordingly affect what was called the "general interest" in the first report (A/CN.4/96, chapter VII, section 25; A/CN.4/111, chapter VI, section 6). As will be seen, the general attitude adopted by courts and claims commissions in this matter justifies the inclusion of a provision in the draft intended to revise traditional practice and to adapt it to ideas more in keeping with the present state of development of international law.

### Chapter III

#### NEGLIGENCE AND OTHER ACTS AND OMISSIONS IN CONNEXION WITH THE PROTECTION OF ALIENS

##### Article 7. — *Negligence in the performance of the duties of protection*

Paragraph 1 of the article amalgamates the provisions contained in articles 10 and 11 of the original draft, retaining the same criterion for determining in what cases the State incurs international responsibility by reason of the acts of private individuals which cause injury to an alien. For the reasons stated below, the paragraph deals only with the State's duties of prevention and hence only with the degree of diligence it should exercise, according to the circumstances, in order to avoid the occurrence of such acts. Although the codifications generally confine themselves to this somewhat vague and loose formula, the Special Rapporteur thought it desirable, in revising these provisions of the draft, to refer in the next paragraph to the two criteria most commonly taken into account in practice, viz., the extent to which the injurious act could have been foreseen and the maxim *diligentia quam in suis*.

Paragraph 3 of the article is concerned only with the duty to apprehend the guilty private individuals, and bases responsibility on a criterion entirely different from that generally appearing in the codifications, including the Special Rapporteur's original draft. This is the criterion laid down in the new Harvard draft convention (article 13),<sup>1</sup> under which the State is responsible in those cases only where the failure to apprehend the guilty persons deprives the injured alien of the opportunity to bring a claim against them for compensation for his injuries. Beyond any doubt this criterion is more logical and more equitable than the traditional one, which bases international responsibility on the mere fact of the lack of "due diligence"; for that reason it has been introduced into the draft, with the addition, which seems equally logical and equitable, of the case where the alien is deprived of this opportunity as a result of a general or specific amnesty.

##### Article 8. — *Other acts and omissions in connexion with the obligation to protect aliens*

Paragraph 1 of the article corresponds to article 14 of the original draft and like that article deals with the kind of behaviour on the part of the authorities which can and should be regarded as an aggravating circumstance for the purposes mentioned in the paragraph. It should be noted that the reference is not to negligence in connexion with the injurious acts of the private individuals but to acts or omissions that imply a degree of connivance, complicity or participation of the authorities which justifies the application of the rule established in the draft to this category of acts and omissions.

The same is true of the manifest and inexcusable negligence referred to in paragraph 2 of the article, even though the omission which in this case gives rise to the international responsibility of

the State does not have the particularly serious character of connivance, complicity and, above all, participation. But in view of the purposes for which responsibility is established — viz., to ensure that the respondent State takes the necessary measures to avoid the recurrence of omissions of this kind — the paragraph seems entirely justified. What is involved here is undoubtedly the manifest and inexcusable raw performance of the duty to do justice by punishing the wrongful act, and it should not be forgotten that under the traditional system, as was pointed out in the commentary on paragraph 3 of the preceding article, responsibility by virtue of the mere fact of negligence implied the duty to compensate the alien for the injury caused to him.

### Chapter IV

#### MEASURES AFFECTING ACQUIRED RIGHTS

Some changes and additions have been introduced in this chapter which involve a substantial revision of some of the corresponding provisions of the original draft. These changes and additions are the result of further, more thorough research into the subject, and particularly into the ideas which have been gaining ground since the last war; although these ideas do not as a whole constitute a uniform movement and in some cases are even contradictory, they are unquestionably making a deep impact on traditional views. See the fourth report (A/CN.4/119) and also the fifth report, in which the extraterritorial effects of measures affecting acquired rights are considered and the revised texts appearing in the new draft are introduced (A/CN.4/125, A 1 and C 2 (a) and (b)).

##### Article 9. — *Measures of expropriation and nationalization*

Unlike the corresponding provision of the original draft, this article distinguishes between individual expropriation and general ("impersonal") nationalization or expropriation carried out as part of a programme of economic and social reform. The purpose of distinguishing between the two situations and of providing separate rules for each is fundamentally to subject individual and ordinary expropriations to the rules of municipal law in force at the time of acquisition of the property, and expropriations forming part of a nationalization measure to the rules laid down for the purpose by the expropriating State, without prejudice to the conditions or prerequisites specified in paragraph 2 of the article. As is fully explained in the fourth report, the problem is mainly what form of compensation should be paid to the foreign owners of the nationalized property. In this respect, there is no doubt that to continue to require the nationalizing State to pay an "adequate" or "just" (that is, equivalent to the market value of the property) "prompt and effective" compensation would be essentially incompatible with the exercise of the State's right to nationalize property, rights or undertakings within its jurisdiction (see fourth report, A/CN.4/119, chapter II, section III).

##### Article 10. — *Non-performance of contractual obligations in general*

Paragraph 1 of the article does not differ in substance from paragraphs 1 and 2 of article 7 of the original draft. Thus, in order to give rise to the international responsibility of the State for the repudiation or breach of the terms of a contract or concession, the act or omission must not be justified on grounds of public interest or of the economic necessity of the State, or must involve a "denial of justice". The former article 7, paragraph 2 (b), which explicitly prohibited discrimination between nationals and aliens to the detriment of the latter, has been deleted, in view of the fact that in practice these cases generally arise out of acts or omissions affecting specific persons. In any case, the responsibility of the State in the case of acts or omissions which may give rise to discrimination to the detriment of persons of foreign nationality

<sup>1</sup> *Research in International Law*, Harvard Law School, Nationality, Responsibility of States, Territorial Waters, Cambridge, Mass., 1929.

would be apparent by virtue of the principle of the equality of nationals and aliens embodied in article 1 of the draft.

Paragraph 2 corresponds to paragraph 3 of former article 7. As is explained in the third report (A/CN.4/111, chapter VII, section 11), the presence of the Calvo clause in the contract or concession would enable the respondent State to decline international responsibility even if some of the acts or omissions referred to in paragraph 1 of article 10 were imputable to it. Although international judicial precedents have not yet gone so far as to attribute precisely this validity and these effects to the Calvo clause, the real legal situation it creates makes it impossible, technically, for any "denial of justice" or any other act or omission which is illegal or arbitrary from the point of view of international law to arise.

A new provision has been incorporated in revised draft article 10, paragraph 3. Unlike contractual relations of the ordinary type which are governed by municipal law, the contracts or concessions now under consideration, by virtue of the stipulations which they themselves contain, are governed by international law or by legal principles of an international character. As was explained in the fourth report (A/CN.4/119, chapter III, section 29), where the matter was examined at some length, the legal position arising from such contracts or concessions fully justifies the application of the principle *pacta sunt servanda*, and the State is accordingly regarded as incurring international responsibility by the mere fact of non-performance.

#### Article 11. — Public debts

Ever since preparing the original draft articles, the Special Rapporteur has had some doubt about the need for the inclusion of an additional article setting out the specific conditions governing the international responsibility of the State for the repudiation or cancellation of its public debts. These doubts were occasioned by the fact that the preceding article, inasmuch as it refers to the non-performance of contractual obligations in general, might cover the cases in which the State repudiates or cancels this particular kind of contractual obligation, and further by the fact that, as Borchard has pointed out, "This distinction . . . is important, inasmuch as there is far less reason for governmental intervention to secure the payment of defaulted bonds of a foreign government than there is in the case of breaches of concession and similar contracts."<sup>2</sup> Accioly and other writers took the same view, after explaining why the likelihood of responsibility being incurred was nevertheless more remote than in the case of other contractual relations (see A/CN.4/106, chapter IV, section 13). This attitude appears entirely reasonable to the Special Rapporteur and the wording of the article — which is the same as that of article 8 of the original draft — is based on it.

### Chapter V

#### IMPUTABILITY OF ACTS OR OMISSIONS

The original draft did not contain a separate chapter dealing with the conditions governing the imputability of acts and omissions [to the State]. Reference was made to the question in some of the articles, but it was not dealt with in the thorough and systematic manner now attempted by the Special Rapporteur.

#### Article 12. — Acts and omissions of organs and officials in general

Paragraphs 1, 2 and 4 of this article correspond to the three paragraphs of article 3 in the original draft, which incorporated the provisions of the drafts approved at the first reading by the third

<sup>2</sup> Edwin M. Borchard, *Diplomatic Protection of Citizens Abroad or the Law of International Claims*, New York, The Banks Law Publishing Co., 1915, p. 282.

committee of the Conference for the Codification of International Law (The Hague, 1930). But the article includes two important additions. The purpose of the first, which appears in paragraph 3, is to distinguish between acts *ultra vires* that may give rise to the international responsibility of the State (paragraph 2) and situations in which, although the organs or officials may to some extent have relied on their official position or made use of the means available to them by virtue of that position, yet the very nature of the manner in which they exceeded their competence presupposes an act wholly outside their functions and powers. In cases of this kind, there is no difficulty in understanding why the act should not be imputable to the State as an act performed by an organ or official.

The second addition appears in paragraph 5 of the article; its sole purpose is to establish the criterion by which the act or omission is to be proved for the purpose of determining whether it is imputable to the State. In contradistinction to the views recently expressed by some writers, the draft provision lays down that the decision will be made in conformity with municipal law, this being the only law under which competence is conferred upon organs or officials and defined and determined. In this matter, moreover, the precedents of arbitration cases seem to support the Special Rapporteur's views.

Neither here nor elsewhere in this chapter is there any provision of a general nature dealing with the grounds for imputing the act to the State, in other words, with the question whether, in order to be imputable to the State, the act must have been deliberate and wilful, or whether, for the purpose of the imputability of the act or omission, the mere occurrence of an event which is objectively contrary to international law is sufficient. After considering the question at some length in his fifth report (A/CN.4/125, B II and C 1(b)), the Special Rapporteur came to the conclusion that, from the point of view of the method of codification, it is preferable to state specifically in each case whether subjective elements such as *culpa* or *dolus* have to be present, and this is the course which he has followed in the draft articles both in this and in other chapters of this title.

#### Article 13. — Acts and omissions of the legislature

Apart from drafting changes, this article is identical with the original article 2. As will be seen, neither enactments incompatible with international law nor legislative omissions are automatically and inevitably imputable to the State. If the State can avoid the injury or make reparation therefor, and does so without delay, the enactment or failure to enact will not be imputable to it. The importance of this second provision should not be underestimated, particularly in view of its relevance to the question of the "appropriateness" of certain forms of reparation, as will become apparent in connexion with chapter VIII of this draft.

#### Article 14. — Acts and omissions of political subdivisions

Although the subject was not dealt with in the original draft, the article does not require a lengthy commentary. It states a principle which, at least in modern times, is not in dispute. Whatever reason may be given to explain or to justify this principle, the essential point is that, after the doubts which existed in the past, it is today recognized that acts and omissions of political subdivisions which contravene the international obligations of the State are imputable to the State.

#### Article 15. — Acts and omissions of a third State or of an international organization

This is likewise a new article. By contrast with the previous case, here there is certainly no well-defined trend of opinion, still less an adequate body of precedents taken from practice. Nevertheless, the article as drafted provides a rule which would make it possible

to deal with the situations in question in conformity with the general principle applying in cases where the injury to an alien is not caused by an act or omission of the organs or officials of a State, but by the conduct of third parties. This principle is indeed all the more applicable here because the third parties are likely to be bodies over whose acts and omissions the State has very little or no control.

*Article 16. — Acts and omissions of successful insurgents*

The object of this article, which replaces article 12, paragraph 2, of the original draft, is that the imputability of the acts and omissions of insurgents in the course of civil strife should be determined by the same rules as those applicable under the draft for the purpose of determining in what circumstances negligence and other acts and omissions in connexion with the protection of aliens give rise to the international responsibility of the State. While admitting that the subject is beset by uncertainties, the Special Rapporteur thought that this was the most reasonable and practical rule.

*Article 17. — Exonerating and extenuating circumstances*

The main point here is that this article, unlike chapter VI of the original draft, makes no reference to "aggravating" circumstances; the reason is, as the reader will have noted, that these circumstances are referred to in other chapters and articles, in consequence of the rearrangement of the draft. Paragraphs 1 and 2 correspond to paragraph 1 of former article 13, but differ from it in that they deal separately with *force majeure* and state of necessity, the object being to set out with greater clarity and as precisely as possible the conditions under which each of these defences is admissible. Paragraphs 3 and 4 correspond, without any change of substance, to the last two paragraphs of former article 13.

*Title III*

THE INTERNATIONAL CLAIM  
AND THE REPARATION OF THE INJURY

*Chapter VI*

ADMISSIBILITY OF CLAIMS

*Article 18. — Exhaustion of local remedies*

Certain changes have been made in the form and substance of this article, which corresponds to article 15 of the original draft. Paragraph 1 makes it clear that the requirement that all remedies must have been exhausted also applies to each of the grounds for the international claim. Paragraph 2 is unchanged. Paragraph 3 again is more explicit than the original draft as regards the reasons which are not admissible as excusing the failure to resort to all or any of the remedies, except that the reference to "inadequacy of the reparation for the injury" has been dropped because this case really constituted a "manifestly unjust decision" within the meaning of article 3.

Paragraph 4 corresponds to article 17 of the original draft concerning agreements between the respondent State and the State of nationality of the alien who has suffered the injury. In the fifth report, in the passages discussing the systems of direct settlement between the State and the foreign private individual, it was suggested that it should not be necessary to exhaust the local remedies, unless the agreement between the parties expressly so required as a condition for the submission of a claim on the international level (A/CN.4/125, A II, 41 and C 2 (c)). For if the essential purpose of the arbitration clause is precisely to empower the parties to submit the claim to the international tribunal when the dispute arises, what would be the sense of requiring recourse to municipal jurisdiction? Paragraph 5 of the article as now drafted reflects these views.

*Article 19. — Waiver of diplomatic protection*

Apart from some drafting changes intended to clarify the text, paragraphs 1 and 2 of this article are the same as the first two paragraphs of the former article 16. Paragraph 3, on the other hand, contains a new provision, the intention of which also is to bar an international claim if the alien has of his own free will reached a compromise or a settlement with the local authorities in connexion with the reparation of his injury. The case is similar to that where the alien has waived diplomatic protection (Calvo clause), and for that reason it is right in this case too that the international claim should be barred. The provisions of paragraph 4 also remain unchanged from those set out in the former paragraph 3, except that, for the same reasons, it takes into account the situation to which reference has just been made.

*Article 20. — Settlement of questions regarding the admissibility of the claim*

Except for a slight drafting change, this article is identical with article 18 of the original draft.

*Chapter VII*

SUBMISSION OF THE INTERNATIONAL CLAIM

*Articles 21-25*

The articles of this chapter remain as they were in chapter VIII of the original draft. The only differences are in article 22 (formerly 24), paragraph 2, in which certain drafting changes have been made in order to define more precisely one of the acts and omissions enabling the State of nationality to bring an international claim for the purposes set out in article 27; and in article 23 (formerly 21), where a new paragraph 3 has been added in order to incorporate the rule laid down by the International Court of Justice in the *Nottebohm* case.<sup>3</sup>

*Chapter VIII*

NATURE AND MEASURE OF THE REPARATION

*Article 26. — Restitution and pecuniary damages*

Actually, no change of substance has been introduced in paragraph 1 of this article. Only the last part has been re-drafted so as to reflect more precisely the idea that the object of the reparation should be to "wipe out" the consequences of the act or omission which contravened international law. For this purpose, the terminology used in the revised draft is based on a well-known passage in a judgement of the former Permanent Court of International Justice.

Paragraph 2, on the other hand, is entirely new; its aim is to draw attention to cases where restitution, as a mode of repairing the injury, would be inappropriate. If restitution would involve the repeal of a law, the annulment of a judicial decision or the non-application of an executive or administrative measure and it would be incompatible with or cause difficulties under the municipal law of the respondent State, the reparation of the injury should take another form: the payment of pecuniary damages. Because the essential purpose of reparation can always be achieved in this way, it would not be right to compel the respondent State to perform some act which is repugnant to its legislation or creates some other kind of difficulty for that State. Since the dispute is between private interests—those of the injured alien—and general and public interests—those of the respondent State—clearly, the only way of settling it is that laid down in the draft.

Paragraph 3 of the article contains a new clause, which was in fact implied in the first part of the paragraph. Whatever may be

<sup>3</sup> *Nottebohm Case* (second phase), *I.C.J. Reports* 1955, p. 26.

the nature or purpose of the pecuniary damages, the quantum of the damages should be strictly commensurate with the nature of the injury caused to the alien, or, as the paragraph puts it, the damages should not become a source of undue enrichment for him, a point which has been expressly recognized in arbitral decisions. Paragraph 4 lays down the same rule as the original draft, but is more explicit.

*Article 27. — Measures to prevent the repetition  
of the injurious act*

Article 25 of the original draft appears in paragraph 2 of the new article and no change of substance has been made in it. Para-

graph 1, however, contains an additional rule which the Special Rapporteur considers to be fully justified in the light of the more detailed analysis of this and other aspects of reparation made in his sixth report (A/CN.4/134, *supra*). Under this provision, it will not be admissible — whatever may have been the consequences of the act or omission imputed to the respondent State, and however serious the act or omission may be — to use forms of reparation involving “satisfaction” to the State of nationality which offend the honour and dignity of the respondent State. The intention is, of course, to condemn certain practices followed in the past which are manifestly inconsistent with international law at the stage which it has now reached.