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## The International Court of Justice and applied forms of reparation for international human rights and humanitarian law violations

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### 1. Introduction

This article examines the case law of the International Court of Justice (ICJ or the Court) which is relevant to the issue of reparations that are due to individuals or states for violations of international human rights and humanitarian law.<sup>1</sup> The Court has jurisdiction to establish the nature or extent of the reparations to be made for the breach of an international obligation.<sup>2</sup> The right to reparation is firmly embedded under both international human rights<sup>3</sup> and international humanitarian law,<sup>4</sup> although its enforcement remains difficult. The most important international documents dealing with reparations are the International Law Commission's Articles on State

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1 For other discussions of this topic see *inter alia* C. McCarthy, 'Reparation for Gross Violations of Human Rights Law and International Humanitarian Law at the International Court of Justice', in C. Ferstman et al. (eds.), *Reparations for Victims of Genocide, Crimes against Humanity and War Crimes: Systems in Place and Systems in the Making*, 2009, pp. 283-311.

2 ICJ Statute, Art. 36(2)(d).

3 See *inter alia*, the 1948 Universal Declaration of Human Rights (Art. 8), the 1966 International Covenant on Civil and Political Rights (Arts. 2(3), 9(5) and 14(6)), the International Convention on the Elimination of All Forms of Racial Discrimination (Art. 6), the Convention of the Rights of the Child (Art. 39), and the Convention against Torture and other forms of Cruel, Inhuman and Degrading Treatment (Art. 14). The right to reparations is also found in several regional instruments, e.g. the European Convention on Human Rights and Fundamental Freedoms (Arts. 5(5), 13 and 41), the Inter-American Convention on Human Rights (Arts. 25, 68 and 63(1)), the African Charter of Human and Peoples' Rights (Art. 21(2)). See also the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by General Assembly resolution 40/34 of 29 November 1985; Declaration on the Protection of all Persons from Enforced Disappearance (Art. 19), General Assembly resolution 47/133 of 18 December 1992; Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions (Principle 20), Recommended by Economic and Social Council resolution 1989/65 of 24 May 1989; the Declaration on the Elimination of Violence against Women. For a general discussion of this issue see *inter alia* D. Shelton, *Remedies in International Human Rights Law*, 2001.

4 Worthy of mention here are Art. 3 of the Hague Convention regarding the Laws and Customs of Land Warfare, 1907 Hague Convention IV; Article common to the four Geneva Conventions 1949 (GCI: Art. 51; GCII: Art. 52; GCIII: 131; GCIV: Art. 148); and Art. 91 of the 1977 Additional Protocol I. For a detailed discussion of this topic see *inter alia* E-C. Gillard, 'Reparations for violations of international humanitarian law', 2003 *IRRC* 85, pp. 529-553.

Responsibility (ILC Articles),<sup>5</sup> which focus on state-to-state responsibility and the United Nations General Assembly Resolution ‘The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law’ (Basic Principles),<sup>6</sup> which has a general emphasis on state-to-individual responsibility. The ILC Articles list the following as forms of reparation: restitution, compensation and satisfaction, either singly or in combination,<sup>7</sup> whereas the Basic Principles Resolution lists five reparation types: compensation, rehabilitation, satisfaction and guarantees of non-repetition.<sup>8</sup> The distinctions between the forms of reparation indicated under these two documents are discussed before analyzing the relevant ICJ case law. For our purposes here, it is not necessary to answer first the question of who should be entitled to reparations, the state or the affected individual. That said, the ICJ settles inter-state disputes, which implies that, generally, reparations would be made from the violating state to the harmed state. It is then for that state to dispose of its obligation to provide a remedy for injuries incurred by its citizens or persons in its territory.

In cases that have come before it the Court has made ample use of the fundamental principle of reparation for wrongdoing at the international level. To appreciate the ICJ’s position on reparations generally, reference should be made to a landmark decision by its predecessor, the Permanent Court of International Justice (PCIJ), namely the *Case Concerning the Factory at Chorzów* (the *Chorzów Factory* case), which defined the concept as:

‘[t]he essential principle contained in the actual notion of an illegal act (...) 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.’<sup>9</sup>

In choosing the appropriate type of reparation the Court seems to take a case-by-case approach. Thus, as identified in the *Avena* case, the notion of ‘wip[ing] out all the consequences of the illegal act’ is subject to variances ‘depending upon the concrete circumstances surrounding each case and the precise nature and scope of the injury.’<sup>10</sup>

The case law of the ICJ on reparations confirms the bedrock principle of international law that the responsible state is under an obligation to make full reparation for the injury caused by the internationally wrongful act. However, a detailed analysis and a thorough discussion of reparation types and modalities are generally absent from ICJ decisions. If the Court is viewed as tending to adopt an arbitration and settlement approach to disputes between states rather than

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5 Chapter IV of the report of the International Law Commission on the work of its fifty-third session: *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10 A/56/10 (2001) (ILC Articles).

6 GA Res. 147, 21 March 2006, A/RES/60/147; 13 IHRR 907 (2006).

7 Art. 34 of the ILC Articles, entitled ‘Forms of reparation’, states: ‘Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination (...).’ For a discussion of reparations under the ILC Articles see *inter alia* D. Shelton, ‘Righting Wrongs: Reparations in the Articles on State Responsibility’, 2002 *American Journal of International Law* 96, pp. 833-856.

8 Paragraph 18 of the Basic Principles Resolution states: ‘In accordance with domestic law and international law, and taking account of individual circumstances, victims of gross violations of international human rights law and serious violations of international humanitarian law should, as appropriate and proportional to the gravity of the violation and the circumstances of each case, be provided with full and effective reparation, as laid out in principles 19 to 23, which include the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.’

9 *Case Concerning the Factory at Chorzow*, Merits, Judgment No. 13, 13 September 1928, P.C.I.J. Series A No. 17, p. 47.

10 *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America)*, (Judgment), ICJ Reports 2004, p. 59, Para 119. (*Avena Case*).

a strictly adjudicative approach,<sup>11</sup> it is not surprising that it has chosen not to detail reparation issues and generally to leave the details of the remedial measures to the states concerned.

This article will focus on the ICJ decisions that address not only state reparations, but also reparations owed to natural and legal persons. The most recent case which hinges on the issue of whether jurisdictional state immunity can serve as a barrier to individual claims for reparation concerning international humanitarian law violations highlights the legal complexity and the increasing occurrence of requests combining state reparations and individual reparations.<sup>12</sup> The article is divided according to the four types of reparations applied in those decisions, notably restitution, compensation, satisfaction and guarantees of non-repetition. While, as mentioned above, those decisions provide a limited discussion on the implementation mechanism or modalities of reparations, the emphasis on the obligation to make full reparations for injuries, whether material or moral, caused by the internationally wrongful acts of a state is present in each of them.

## 2. Restitution

The objective of restitution in the ILC Articles is ‘to re-establish the situation which existed before the wrongful act was committed.’<sup>13</sup> Hence, as noted in the Commentary to the ILC Articles, restitution is the first form of reparation that is always considered.<sup>14</sup> In the Basic Principles, restitution refers to either the return of property or the restoration of fundamental rights, and is qualified to apply whenever possible. The PCIJ has held that the first step in reparation was ‘[r]estitution in kind.’<sup>15</sup> When such reparation is impossible, then compensation for losses and damages is the next appropriate reparation.<sup>16</sup> The ICJ has applied the principles of restitution to individual victims, with respect to the return of property as well as to the restoration of fundamental rights. Often, especially in cases of violations of human rights and humanitarian law, restitution might be neither easy, nor feasible.

### 2.1. Return of property

In the *Wall* advisory opinion, the Court considered that the construction of a wall in the Occupied Palestinian Territory by the Israeli government violated the latter’s obligations under international law and was not justified by security concerns.<sup>17</sup> Although the Court has usually focused on state-to-state responsibility, this seminal advisory opinion indicated state-to-individual reparations.<sup>18</sup> The ICJ held that Israel’s construction of the wall resulted in the destruction of homes, businesses and agricultural land, thereby obliging Israel to ‘make reparation for the

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11 McCarthy, *supra* note 1, p 284.

12 See Germany’s Application instituting proceedings in the *Jurisdictional Immunities of the State* case (*Germany v. Italy*), (*Application*), available at <<http://www.icj-cij.org/docket/files/143/14923.pdf>>, Italy’s counter-claim at <<http://www.icj-cij.org/docket/files/143/16017.pdf>>, and the Court’s Order on the counter-claim at <<http://www.icj-cij.org/docket/files/143/16027.pdf>> (last accessed 7 January 2011).

13 ILC Articles, Art. 35, p. 96:

‘A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:

(a) is not materially impossible;

(b) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.’

14 ILC Articles, Commentary to Art. 35, p. 96, Para. 1.

15 *Ibid.*

16 *Ibid.*

17 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, (Advisory Opinion), ICJ Reports 2004, pp.181-194, Paras.114-137 (*Wall*).

18 *Ibid.*, pp.197-198, Paras.147-153.

damage caused to all the natural or legal persons concerned.<sup>19</sup> Applying the reparation principle from the *Chorzów Factory* case to the concept of individual reparations, the Court observed that Israel is ‘under the obligation to return the land, orchards, olive grove and other immovable property seized from any natural or legal person’ during the construction of the wall.<sup>20</sup> This advisory opinion introduced, for the first time in the case law of the ICJ, the right to individual reparations for violations of international human rights and international humanitarian law and the primary importance of the return of individual property in relation to those violations.

In the *Armed Activities* case the Court found that reparations were due to the Democratic Republic of the Congo (DRC) for all damages caused by Uganda’s violations of its international legal obligations, through the ‘illegal use of force, violation of sovereignty and territorial integrity, violations of international human rights law and of international humanitarian law, looting, plunder and exploitation of the DRC’s natural resources.’<sup>21</sup> Given the nature and gravity of the violations, the Court considered that ‘those acts resulted in injury to the DRC and to persons on its territory’ imposing upon Uganda an obligation to make reparations accordingly.<sup>22</sup> In reaching that conclusion, the Court relied generally on its previous decisions, including the *Chorzów Factory* case, for the proposition that ‘it is well established in general international law that a State which bears responsibility for an internationally wrongful act is under an obligation to make full reparation for the injury caused by that act.’<sup>23</sup> The Court remains seized of this case and will hold reparations hearings, if the parties fail to reach an agreement on reparations.<sup>24</sup>

The judgment in the *Armed Activities* case appears to reaffirm two important principles concerning international obligations for reparations. First, following a similar approach as the *Wall* advisory opinion the judgment recognized that injury had been caused to the DRC and to persons on its territory. Thus, even though settling an inter-state dispute, by acknowledging the responsibility of Uganda for injuries suffered by persons in the DRC, the Court implicitly seems to acknowledge the obligation to repair that harm accordingly. Therefore, arguably the DRC has the right to request individual reparations on behalf of its citizens who were wronged by Uganda’s conduct. Following the principles established in the *Chorzów Factory* case, this would include the return of property to individuals for a specific category of international law violations such as the looting and plundering of private property, and so on. Second, the legal proceedings on reparations at the ICJ are separate from those on the merits, eventually requiring an independent hearing when the parties fail to agree on the amount of reparations.<sup>25</sup> Such a process may require extensive hearings and evidence, and would allow the DRC to ‘demonstrate and prove the exact injury that was suffered as a result of the specific actions of Uganda constituting internationally wrongful acts for which it is responsible.’<sup>26</sup> From a practical perspective, however, that is a process fraught with difficulties, since the more time passes by the more difficult it becomes to assess and determine the injury suffered with a satisfactory degree of certainty for both parties.

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19 Ibid., pp. 198, Para. 152.

20 Ibid., pp. 198, Paras. 152-153.

21 *Case Concerning Armed Activities Case in the Territory of the Congo (Democratic Republic of Congo v. Uganda)*, (Judgment), ICJ Reports 2005, p. 82, Para. 259 (*Armed Activities* case).

22 Ibid.

23 Ibid.

24 Ibid., Paras. 260-61.

25 *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, (Merits), ICJ Reports 1986, p. 149, Para. 292 (12) (*Nicaragua* case).

26 *Armed Activities* case, p. 82, Paras. 260-61.

## 2.2. Restoration of fundamental rights

Examining cases involving individual rights violations more generally, besides those specifically concerned with violations of international human rights and humanitarian law, helps in appreciating the restoration of fundamental rights as a remedy at the ICJ. The ICJ has dealt with many cases involving questions closely concerning the rights of individuals.<sup>27</sup> As the Court expressly stated, ‘The mere fact that it is not the rights of States which are in issue in the proceedings cannot suffice to deprive the Court of a competence expressly conferred on it by its Statute.’<sup>28</sup> Thus, when the United States breached its obligation to notify foreign national criminal detainees of their rights under the Vienna Convention on Consular Relations, the proper form of reparation according to the Court was to allow the review and reconsideration of their convictions and sentences by taking into account the violation of the rights set forth in that Convention.<sup>29</sup> While not specifically termed ‘restitution’, the restoration of fundamental rights embodies that concept, in trying to ‘wipe out’ any aspect of the conviction or sentence that was tainted by the failure to provide for consular notification rights, through proper review and reconsideration.

Another example of restitution as the restoration of rights is provided in the *Tehran Hostages Case*. In that case the Court issued an order to terminate the unlawful detention of US nationals held in Iran by releasing them to the US authorities and ensuring their safe transport from Iranian territory in accordance with their rights under the Vienna Convention on Diplomatic Relations.<sup>30</sup> For ongoing violations, in this case involving prolonged illegal detention, there is a substantial overlap in a Court decision between restoring fundamental rights and ordering a cessation of the violation. The restoration of fundamental rights under the Basic Principles is included under restitution and the cessation of a violation is considered to be a form of satisfaction, whereas in the ILC Articles cessation and non-repetition stand on their own and are considered as the first requirement in eliminating the consequences of wrongful conduct before moving on to restitution as a form of reparation. Evidently, there is a considerable conceptual difference between the two sets of legal frameworks proposed under these instruments.

Turning more specifically to the context of international human rights and international humanitarian law violations, in the *Wall* advisory opinion the Court also considered the restoration of fundamental rights. The observations were brief and without explicit discussion, but first and foremost they acknowledged Israel’s obligation to ‘respect the right of the Palestinian people to self-determination and its obligations under international humanitarian law and international human rights.’<sup>31</sup> More specifically, the Court recognized Israel’s obligation to ‘ensure freedom of access to the Holy Places that came under its control following the 1967 War.’<sup>32</sup> That obligation is likely reflected in the concept of restitution contained in the Basic Principles and Guidelines as including the restoration of ‘enjoyment of human rights.’<sup>33</sup> Indeed, the ICJ noted Israel’s breach of the guarantees of freedom of movement under Article 12 of the International Covenant

27 See *inter alia* G. Zyberi, *The Humanitarian Face of the International Court of Justice: Its Contribution to Interpreting and Developing International Human Rights and Humanitarian Law Rules and Principles*, 2008, pp. 65-258.

28 *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal*, (Advisory Opinion), ICJ Reports 1973, pp. 171-72, Para. 14.

29 *Armed Activities* case, p. 59-60, Paras.120-121.

30 *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, (Merits), ICJ Reports 1980, pp. 44-45, Para. 95 (*Tehran Hostages* case).

31 *Wall*, p. 197, Para. 149.

32 *Ibid.*

33 *Basic Principles and Guidelines on the Right to a Remedy and Reparations Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, GA Res. 147, 21 March 2006, A/RES/60/147; 13 IHRR 907 (2006), Annex, Para. 19.

on Civil and Political Rights as well as the specific guarantees of access to Christian, Muslim and Jewish Holy Places in various treaties, including more recent ones signed by Israel.<sup>34</sup>

The ICJ considers restitution as its primary form of reparation and applies it through the return of property or the restoration of rights, depending upon the circumstances of the case before it. As noted above, the concept of restoration of rights at the ICJ remains in need of further development.

### **3. Compensation**

Under the Basic Principles compensation is geared towards economically assessable damage and it must be proportional to the gravity of the violation and the circumstances of each case.<sup>35</sup> This document provides a non-exhaustive list of compensatory examples which can be divided into material and non-material damages. Compensation is strictly aimed at repairing the damage incurred by the injured party. The Commentary to the ILC Articles emphasizes that compensation is not punitive in nature; its function is to address the actual losses incurred as a result of an internationally wrongful act.<sup>36</sup> It is the form of reparation that is considered when restitution is impossible or impractical, or does not fully repair the injured party.<sup>37</sup> Under the ILC Articles compensation is similarly limited to ‘financially assessable damage.’<sup>38</sup> This form of reparation is the most commonly used in international practice.

Material damages refer back to losses of or damage to property that, for reasons of impossibility, cannot be repaired through restitution. Additionally, compensation also covers other readily quantifiable material damages, such as the costs incurred for legal, medical or other associated services, lost opportunities for employment, education or other social services, lost earnings and earning potential. While the Basic Principles include a reference to moral damages in addition to material damages, the qualification ‘financially assessable’ under the ILC Articles is intended to exclude compensation for what is sometimes referred to as ‘moral damage’ to a state, that is the affront or injury caused by a violation of rights not associated with actual damage to property or persons.<sup>39</sup> That is the subject-matter of satisfaction, and has been treated as such by the ICJ thus far. Obviously, it is not easy to economically assess concepts such as ‘pain and suffering’ and the Court has not engaged in the exercise of economically quantifying moral damages suffered by the victims of human rights and humanitarian law violations, even by awarding a symbolic amount of compensation.

In the landmark *Chorzów Factory* case compensation is the alternative to *restituto in integrum* in cases where that latter, preferred form of reparation, is impossible:

‘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 of loss sustained which would not be covered by restitution in kind or payment in place of it – such are the

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34 *Wall*, pp. 188-189, Para. 129.

35 GA Res. 147, 21 March 2006, A/RES/60/147, Annex, Para. 20.

36 See especially the ILC Articles, Commentary to Art. 36 at p. 99, Para. 4.

37 ILC Articles, Art. 36, p. 98:

‘1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.

2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.’

38 ILC Articles, Commentary to Art. 36, pp. 98-99, Para. 1.

39 ILC Articles, Commentary to Art. 36 at p. 99, Para. 1.

principles which should serve to determine the amount of compensation due for an act contrary to international law.<sup>40</sup>

In dealing with compensation in the context of war crimes and human rights violations, the Court has generally emphasized material damages and usually as an alternative to restitution. For instance, in the *Wall* advisory opinion, the Court stated that if the return of land, orchards, businesses and agricultural land taken by Israel as a result of the construction of the wall in the occupied Palestinian territory was no longer possible, then ‘Israel has the obligation to compensate the persons in question for the damages suffered.’<sup>41</sup>

In addition to the return of property or recompense for its loss, the Court also viewed Israel’s obligation to compensate ‘all natural or legal persons having suffered any form of material damage as a result of the wall’s construction.’<sup>42</sup> That finding provides possibilities for both natural and legal persons who suffered material losses.<sup>43</sup> Apart from compensating property loss, which the Court already explicitly identified as a remedy, material damages encompass any other readily quantifiable expenses or detriments incurred, such as medical expenses, lost wages, and lost business opportunities.<sup>44</sup> In contrast, the Court made no provisions for the more difficult calculation of non-material damages, which would include pain and suffering, humiliation, mental anguish and the like.<sup>45</sup> Thus, while opening the door broadly to potential compensation to natural and legal persons for material damages, the Court also restricted the scope of reparations by omitting compensation for moral damages.

### ***3.1. Implications of the causation requirement for purposes of compensation***

The *Application of the Genocide Convention* case provides some guidance concerning the requisite causation element for obtaining monetary compensation in the context of mass atrocities in general, and genocide in particular. The Court rejected a compensation claim brought by Bosnia against Serbia for its role in the genocide during the conflict in the break-up of the former Yugoslavia.<sup>46</sup> The Court concluded that Serbia was not directly responsible for the atrocities in Srebrenica, although it failed in its international obligation to prevent genocide.<sup>47</sup> In determining the appropriate reparation in this case the Court, as is customary, looked first at the possibility of restitution and, since that was impossible, moved on to compensation.<sup>48</sup>

In further examining the applicability of compensation, the Court identified the relevant question as ‘whether there is a sufficiently direct and certain causal nexus between the wrongful act, the Respondent’s breach of the obligation to prevent genocide, and the injury suffered by the Applicant, consisting of all damage of any type, material or moral, caused by the acts of genocide.’<sup>49</sup> Simply put, the Court required a ‘sufficient degree of certainty’ that the genocide would

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40 *Chorzów Factory* case, Merits, Judgment No. 13, 13 September 1928, P.C.I.J. Series A No. 13, 17, p. 47.

41 *Wall*, ICJ Reports 2004, pp. 198, Para. 152.

42 *Ibid.*, Para. 153.

43 The United Nations Register of Damage Caused by the Construction of the Wall in the Occupied Palestinian Territory (UNRoD) was established in accordance with General Assembly resolution A/RES/ES-10/17 of January 2007. UNRoD is not a compensation commission, claims-resolution facility, judicial or quasi-judicial body. For more information see: <<http://www.unrod.org>>.

44 ILC Articles, Commentary to Art. 36, p. 102, Para. 19.

45 *Ibid.*

46 *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, (Judgment) ICJ Reports 2007, p. 165, Paras. 461-62 (*Application of the Genocide Convention* case).

47 *Ibid.*, p. 157, Para. 438.

48 *Ibid.*, p. 164, Para. 460.

49 *Ibid.*, p. 165, Para. 462.

not have occurred if Serbia complied with its obligation to prevent genocide.<sup>50</sup> The Court ultimately held that there was an insufficient causal nexus between Serbia's duty to prevent genocide and the actual injuries suffered.<sup>51</sup> Although Serbia's failure to prevent genocide could be considered a significant contributing factor to the injuries suffered, the Court requires a direct causal link between the violation and the injury before awarding financial compensation for material and moral damages.

The approach adopted by the ICJ in the *Bosnia-Genocide* case regarding reparation for Serbia's failure to prevent genocide indicates that, at least in respect of positive obligations, reparation is to be assessed against the injury caused by the conduct taken as a whole.<sup>52</sup> Compensation for the Court requires sufficient proof that the unlawful act or acts would not have occurred except for the responsible party's involvement.<sup>53</sup> That might as well mean that, due to the high threshold which is applicable, in many cases no compensation would be possible through the ICJ for international law violations falling under the obligation to prevent internationally recognized crimes such as genocide, war crimes and crimes against humanity.

#### **4. Satisfaction**

Satisfaction under the Basic Principles is defined through a list of non-exhaustive measures that have a broad scope. That list includes six sub-categories: the cessation of continuing violations, truth and justice measures, proper searches and reburials for disappeared and the deceased, apology and acknowledgement, commemorations and tributes, and educational and training materials.<sup>54</sup> The measures are generally geared towards state responsibility to amend violations in ways unaddressed by classic forms of restitution and compensation. On the one hand, measures of satisfaction can narrow available relief, and, on the other, can offer broad and transformative measures. In the ILC Articles, the concept of satisfaction is also broad and captures remedies that attempt to repair the injured party 'insofar as it cannot be made good by restitution or compensation.'<sup>55</sup> Satisfaction may consist of an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality.<sup>56</sup> In the context of reparations for human rights and international humanitarian law violations the Court has generally limited its modalities of satisfaction to the acknowledgment of wrongdoing in an operative paragraph of the judgment itself.

##### **4.1. Acknowledgment of wrongdoing**

Satisfaction is one of the first forms of reparation used by the ICJ.<sup>57</sup> While rejecting compensation as a suitable form of reparation in the *Application of the Genocide Convention* case, the Court acknowledged that Bosnia was 'entitled to reparation in the form of satisfaction.'<sup>58</sup> Thus,

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50 Ibid.

51 Ibid.

52 See McCarthy, *supra* note 1, p. 287.

53 For a detailed discussion of the causation element see McCarthy, *supra* note 1, pp. 291-298.

54 GA Res. 147, 21 March 2006, A/RES/60/147, Annex, Para. 22.

55 ILC Articles, Art. 37, p. 105, especially Para.1:

'1. The State responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that *act insofar as it cannot be made good by restitution or compensation.*

2. Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality.

3. Satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible State.' (emphasis added)

56 ILC Articles, Art. 37(2).

57 *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)*, (Merits), ICJ Reports 1949, p. 36.

58 *Application of the Genocide Convention*, ICJ Reports 2007, pp. 165-166, Paras. 462-33.

the Court included an operative paragraph in the judgment stating that Serbia had failed to comply with its obligations under the Genocide Convention.<sup>59</sup> An acknowledgement of wrongdoing was deemed appropriate when Serbia's violation consisted of failing to take reasonable measures to prevent genocide rather than direct participation in the crime of genocide. While the Court has explicitly listed in its operative paragraphs the violations of international human rights and humanitarian law,<sup>60</sup> satisfaction as a form of reparation is used sparingly.

An acknowledgement of wrongdoing in a decision that is already designed to adjudicate and declare the occurrence or not of international law violations would seem of little value as a form of reparation, if looked at from a strictly material perspective. However, the value of such a form of reparation cannot be underestimated when considering that part of the role of the Court is to strengthen the rule of law at an international level. States are sensitive about their image and perception by others, so they would try to avoid being tagged as a violator. The use of satisfaction as reparation by the ICJ seems limited to circumstances involving a violation of international law which is considered to be of such a nature and gravity that it amounts to an affront or a violation of a state's sovereignty, without, however, involving material damage. As the ILC commentary itself notes, these injuries are frequently of a symbolic character, arising from the very fact of the breach of the obligation, irrespective of its material consequences for the state concerned.<sup>61</sup>

#### **4.2. Cessation of ongoing violations**

Under the Basic Principles the cessation of ongoing violations is listed as a form of satisfaction, while under the ILC Articles it is considered to be an independent legal obligation.<sup>62</sup> In cases of ongoing violations the cessation of the wrongful act is a necessary precursor to making reparations. The ICJ has used the cessation of ongoing violations mainly in incidental proceedings on provisional measures, but also in other decisions.<sup>63</sup> Several applicant states have asked the Court to indicate as provisional measures that the respondent state cease and desist from violating their sovereignty and from harming their population and their property. In a number of orders on provisional measures the Court has ordered one or both parties to cease ongoing violations, to take the necessary steps for preventing certain violations, or to refrain from taking any steps which would aggravate the situation.<sup>64</sup> Using a positive obligations language, in the *Armed Activities* case the Court indicated that 'Both Parties must, forthwith, take all measures necessary to ensure full respect within the zone of conflict for fundamental human rights and for the applicable provisions of humanitarian law.'<sup>65</sup> A similar language, aimed at protecting persons, groups of persons or institutions, was employed in the *Georgia v. Russian Federation* case.<sup>66</sup> In discussing Israel's obligations to repair the harm caused by the violations of its international legal

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59 Ibid., Para. 463.

60 *Nicaragua* case, (Merits), ICJ Reports 1986, pp. 146-150, Para. 292; *Wall*, ICJ Reports 2004, pp. 201-202, Para. 163; *Armed Activities* case, ICJ Reports 2005, pp. 279-283, Para. 345; *Application of the Genocide Convention* case, ICJ Reports 2007, Para. 471.

61 ILC Articles, Commentary to Art. 37, p. 106, Para. 3.

62 ILC Articles, p. 88, Art. 30.

63 *Nicaragua* case, (Merits) ICJ Reports 1986, p. 149, Para. 292 (12); *Wall*, (*Advisory Opinion*), ICJ Reports 2004, p. 201, Para. 163(3)(B).

64 See *inter alia* the *Nicaragua* case, (Order on Provisional Measures), ICJ Reports 1984, p. 187, Para. 41; *Application of the Genocide Convention* case, (Order on Provisional Measures), ICJ Reports 1993, p. 24, Para. 52 and p. 349, Para. 61; *Armed Activities* case, (Order on Provisional Measures), ICJ Reports 2000, p. 129, Para. 47; *Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, (Order on Provisional Measures), ICJ Reports 2008, pp. 398-399, Para. 149(A) and (B). For a more detailed discussion on provisional measures see *inter alia* G. Zyberi, 'Provisional Measures of the International Court of Justice in Armed Conflict Situations', 2010 *Leiden Journal of International Law* 23, no. 3, pp. 577 and 584.

65 *Armed Activities* case, (Order on Provisional Measures), ICJ Reports 2000, p. 129, Para. 47(3).

66 *Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, (Order on Provisional Measures), ICJ Reports 2008, pp. 398-399, Para. 149.

obligations, the Court first stated that Israel was obliged to cease forthwith the construction of the wall and dismantle the structure.<sup>67</sup>

Cessation as restitution in the form of the restoration of fundamental rights and the cessation of ongoing violations as a separate form of reparations seem in fact to be two sides of the same coin. Thus, in the *Tehran Hostages* case releasing the US consular staff from unlawful detention could be considered as restitution in the form of the restoration of rights. However, the same action may also be viewed as the cessation of an ongoing violation of Iran's treaty obligations under the Vienna Convention on Diplomatic Relations. The ILC Articles note that 'the question of cessation often arises in close connection with that of reparation, particularly restitution. The result of cessation may be indistinguishable from restitution, for example in cases involving the freeing of hostages or the return of objects or premises seized.'<sup>68</sup> However, the ILC Articles' Commentary notes that the distinguishing element is that restitution is driven by proportionality, whereas compliance with legal obligations may require a party to exceed its past actions, rather than simply reverting to them.<sup>69</sup> Interestingly, all forms of reparation in the Basic Principles are driven by proportionality, which would qualify the cessation of ongoing violations as a modality of satisfaction.<sup>70</sup> Although the Court has still to clarify the precise nature and preferably also the classification of these remedies, it has made ample use of the obligation to cease ongoing violations, including those that would prevent the violation of or restore individual rights.

The cessation of ongoing violations covers a large array of international legal obligations incumbent upon a state. Thus, with respect to the obligation to punish under the Genocide Convention, the Court emphasized that Serbia had a continuing obligation under the Genocide Convention to punish those responsible for genocide, which would include transferring Ratko Mladić to the International Criminal Tribunal for the former Yugoslavia (ICTY) to stand trial.<sup>71</sup> A declaration to that effect was deemed by the Court to constitute appropriate satisfaction, suggesting that it also falls under the rubric of the cessation of an ongoing violation, namely the failure to bring Mladić to justice. Additionally, that specific form of cessation also involves bringing perpetrators to justice, itself a recognized form of satisfaction under the Basic Principles and Guidelines. It is argued that the obligation to bring perpetrators to justice is inherent in a state's obligation to make reparations for an internationally wrongful act.<sup>72</sup> The frequent use of cessation by the ICJ in its decisions demonstrates the prominent impact that this form of reparation generally has in the process of restoring the rights of states or individuals affected by serious violations of human rights and humanitarian law.

## **5. Guarantees of non-repetition**

Guarantees of non-repetition are a separate form of reparation under the Basic Principles, whereas the ILC Articles consider cessation and assurances and guarantees of non-repetition

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67 *Wall*, ICJ Reports 2004, p. 197, Para. 149.

68 ILC Articles, Commentary to Art. 30, p. 89, Para. 7.

69 *Ibid.*

70 *Basic Principles and Guidelines on the Right to a Remedy and Reparations for Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, GA Res. 147, 21 March 2006, A/RES/60/147; 13 IHRR 907 (2006), Annex, Para. 8.

71 *Application of the Genocide Convention*, (Judgment), ICJ Reports 2007, p. 166, Para. 465 and pp. 169-170, Para. 471(6) and (8).

72 For a discussion of this issue see *inter alia* T. Ingadottir, 'The ICJ *Armed Activity Case* – Reflections on States' Obligation to Investigate and Prosecute Individuals for Serious Human Rights Violations and Grave Breaches of the Geneva Conventions', 2010 *Nordic Journal of International Law* 78, pp. 581–598.

jointly as aspects of the restoration and repair of the legal relationship affected by the breach.<sup>73</sup> The ILC Articles' Commentary notes that cessation is the negative aspect of future performance, concerned with securing an end to continuing wrongful conduct, whereas assurances and guarantees of non-repetition serve a preventive function and may be described as a positive reinforcement of future performance.<sup>74</sup> Perhaps the main reason for the differences between these two documents is that the ILC Articles discussed state responsibility in much broader terms than strictly remedial, in contrast to the Basic Principles' main focus on redress. Certainly, it is important that states have confidence that the violations and harm suffered will not reoccur. Each of the measures listed under guarantees of non-repetition under the Basic Principles is geared towards state responsibility to prevent future violations through proper training and education of civilians, military and law enforcement,<sup>75</sup> ensuring protection for social service providers,<sup>76</sup> and legal reform to ensure compliance with requisite international standards,<sup>77</sup> including strengthening the judiciary,<sup>78</sup> and working towards the prevention and resolution of social conflicts.<sup>79</sup> Such measures are intended to be implemented by the relevant state organs.

In the *Application of the Genocide Convention* case, the Court also addressed the concept of non-repetition alongside the issue of reparations, although, like cessation obligations, it is considered an independent legal obligation under the ILC Articles.<sup>80</sup> The Court did not consider it appropriate to impose an obligation in the form of assurances of non-repetition upon Serbia based on the circumstances of the case.<sup>81</sup> In the *Armed Activities* case the Court stated that if a state assumes an obligation in an international agreement to respect the sovereignty and territorial integrity of the other States Parties to that agreement (an obligation which also exists under general international law) and a commitment to cooperate with them in order to fulfil such an obligation, this expresses a clear legally binding undertaking that it will not repeat any wrongful acts.<sup>82</sup> Evidently, guarantees of non-repetition are most appropriate when there is a sufficient likelihood of continuing violations.

## 6. Forms of reparation through the lens of the International Court of Justice

It should be noted that only in one case thus far has the Court assessed the amount of compensation due for an internationally wrongful act.<sup>83</sup> In that case the Court requested from a commission of experts an evaluation of the damage sustained in order to assess the amount of compensation to be paid. Coincidentally, that has also been the only case where the Court has made use of this possibility under Article 50 of its Statute.<sup>84</sup> The Court gives the parties to a dispute the possibility to negotiate the amount of reparations, reserving the right to fix that amount itself only if the parties fail to agree. Besides reparations owed to states, the ICJ's decisions in the *Wall* advisory

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73 ILC Articles, Art. 30, p. 88.

74 ILC Articles Commentary, Art. 30, p. 88, Para. 1.

75 GA Res. 147, 21 March 2006, A/RES/60/147, Annex, Para. 23(a), (b), (e).

76 GA Res. 147, 21 March 2006, A/RES/60/147, Annex, Para. 23(d).

77 GA Res. 147, 21 March 2006, A/RES/60/147, Annex, Para. 23(f).

78 GA Res. 147, 21 March 2006, A/RES/60/147, Annex, Para. 23(c).

79 GA Res. 147, 21 March 2006, A/RES/60/147, Annex, Para. 23 (g).

80 ILC Articles, Art. 30, p. 88.

81 *Application of the Genocide Convention* case, (Judgment), ICJ Reports 2007, p. 166-67, Para. 466 and p. 170, Para. 471(9).

82 *Armed Activities* case, ICJ Reports 2005, p. 256, Para. 257.

83 *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)* (Assessment of the Amount of Compensation) ICJ Reports 1949, p. 244.

84 Art. 50 of the ICJ Statute reads: 'The Court may, at any time, entrust any individual, body, bureau, commission, or other organization that it may select, with the task of carrying out an enquiry or giving an expert opinion.'

opinion and the *Armed Activities* case also seem to acknowledge that individuals have a right to reparations for harm suffered as a result of violations of international human rights and humanitarian law. That is an important development because, although the ICJ cannot deal with complaints by individuals, it practically recognizes the final addressees of reparations for such serious violations.

In the context of reparations for internationally wrongful acts, the Court's case law establishes a number of basic principles. Restitution is the preferred method of reparation with compensation as the next alternative in cases where restitution is impossible. Restitution encompasses the return of property as well as the restoration of fundamental rights. Compensation for violations of human rights and humanitarian law addresses mainly injuries to life and limb and looting and plundering or, more generally, damage to property, excluding moral damages. As mentioned above, in the advisory opinion on the *Wall*, the Court observed the obligation to provide material damages without discussing any non-material or moral damages. In the Court's view compensation requires a causal nexus between the violation of an international obligation and the injuries suffered. It appears that when the violation involves a breach of the duty to prevent rather than a direct form of participation, the causal nexus, as a requirement for awarding compensation, would be more difficult to establish.

Satisfaction, as interpreted by the ICJ, is generally limited to the acknowledgment of wrongdoing within the decision itself or the ordering of a cessation of ongoing violations of human rights and international humanitarian law. Generally, acknowledgments of wrongdoing include violations for which such acknowledgment would constitute appropriate satisfaction, where either there has not been any material damage or eventually such damage cannot be attributed to the respondent state for purposes of compensation. The acknowledgment of wrongdoing as a form of reparation falling under satisfaction has also been used in an instance where there was a somewhat lessened degree of wrongdoing, such as Serbia's breach of failing to take sufficient measures to prevent genocide, as opposed to direct participation in the genocide. The cessation of ongoing violations as a form of satisfaction is somewhat similar to restitution by the restoration of rights. Whether restitution is claimed as a restoration of rights or as a cessation of ongoing violations may be a litigation strategy choice on the part of the applicant state, depending on the desire to emphasize either the victims' rights or the respondent state's legal obligations. Both approaches can and have been used at the ICJ. As expected, guarantees of non-repetition require a sufficient likelihood of a continuation of or a return to violations. An expressed assurance by the respondent state, or a treaty adopted for that purpose, has been considered as sufficient by the ICJ.

It remains to be seen what position the ICJ will take with regard to whether and to what extent reparations need to be made for individual victims of serious violations of international human rights and humanitarian law, whose case or cases might be picked up by their state. By interpreting and further developing the legal framework and rules and principles relating to reparations and forms of reparations the ICJ's case law provides useful guidance to other international courts or arbitral tribunals. While the relatively few ICJ decisions on reparations for violations of human rights and humanitarian law neither go into much detail regarding the forms of reparation, nor provide a coherent legal framework, they do reaffirm basic principles of reparations under customary international law.