Forms of reparation of prejudice in international law – reflections on common aspects in the draft regarding the responsibility of the states for internationally wrongful acts –

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Abstract

The international responsibility of states has been a topic that has attracted the attention of numerous entities existing at international and regional level, but also of education institutions involved in codifying international law. When it came to the problem of codification at international or regional law, the responsibility of the states was especially considered a topic of great importance and introduced in the established working programs. Thus, it is has been started off from the international responsibility of the states for damage caused on their territory to foreign persons of their property, a problem subsequently abandoned, but somehow reconsidered as part of diplomatic protection and the study has come to the responsibility of the states for internationally wrongful acts, separating from it the responsibility of the states for prejudicial consequences resulted from activities that are not banned by international law. The experts involved in the preparation of the draft regarding "The Responsibility of the States for Internationally Wrongful Acts" have identified in the practice of the states and in international case law essential aspects that need to be considered in codifying the indicated field. Considering that satisfying the claims of a prejudiced state is covered, special heed has been paid to the forms of reparation of prejudice, namely: restitution in kind (restitutio in integrum), by equivalent (damages) and satisfaction.

Keywords*: internationally wrongful acts, prejudice, restitution in kind, damages, satisfaction*
JEL Classification*: K33*

1. General considerations

Responsibility in international law has represented in time a field that has led to complex and various problems, which has raised intense concern both in doctrine and specialized international case law, as well as with regard to codification in the field. The thorough knowledge conducted during a rather long period of time has evinced problems on which responsibility in international law needs to be focused. Thus, it has been started from the international responsibility of the states for damage caused on their territory to foreign persons or their property, a problem subsequently abandoned, but somehow reconsidered as part of diplomatic protection, and the study has come to the responsibility of the states for

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internationally wrongful acts, separating from it the responsibility of the states for prejudicial consequences resulted from activities that are not banned by international law. Subsequently, it has been noted that although the states continue to be the main subjects of responsibility in international law, globalization, integration, but also the fragmentation of the international community have brought to the centre of discussion the responsibility of other international actors which have become important in their turn, such as: international organizations, non-governmental organizations, transnational companies and individuals.

By means of codification at international level, if we consider the problems discussed, the purpose has been to prepare regulations to establish a set of rules of a general character aiming at covering all the particular cases occurred in international practice.

International law experts, involved in the preparation of the draft "The Responsibility of the States for Internationally Illicit Acts", have identified in the practice of the states and in international case law essential aspects that need to be considered in codifying the afore mentioned field[2]. Thus, the rapporteurs of the International Law Commission (ILC) of UNO have identified the general principles and have clarified the notion of internationally wrongful act, as well as the conditions for the existence of an internationally wrongful act. The category of circumstances that exclude the wrongful character has been considered to include the following cases: consent, self-defence, countermeasures, force majeure, state of danger and state of necessity. Establishing the content of the liability of the states for internationally wrongful acts has taken into account the identification of obligations of the state guilty of the violation occurred, shaping the forms of the prejudice occurred, but also the ways of repairing the prejudice[3]. Considering that satisfying the claims of a prejudiced state is done when the prejudice suffered is covered, further down is a detailed analysis of the forms of repairing the prejudice determined by an internationally wrongful act.

2. Forms of repairing the prejudice

Establishing responsibility has as consequence and finality the reparation of the prejudice effected, an obligations that might be preceded by the obligation of the author of the internationally wrongful act of ceasing the adopted behaviour.

[2] General Assembly of United Nations Decided to include in the provisional agenda of its sixty-eight session (2013) the item entitled "Responsibility of States for internationally wrongful acts" and to further examine, within the framework of a working group of the Sixth Committee, the question of a convention on responsibility of States for internationally wrongful acts or other appropriate action on the basis of the articles; see http://untreaty.un.org/ilc/guide/.

[3] Draft articles on Responsibility of states for internationally wrongful acts, Text adopted by the Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session. The report, which also contains commentaries on the draft articles, appears in Yearbook of the International Law Commission, 2001, vol. II (Part Two). Text reproduced as it appears in the annex to General Assembly resolution 56/83 of 12 December 2001, and corrected by document A/56/49(Vol. I)/Corr.4;see http://untreaty.un.org/ilc/guide/.

This *ex nunc* obligation does not relieve the state from the responsibility of repairing the prejudice effected until such time as the wrongful act ceases-*ex tunc*[4].

The prejudice can be repaired by one of the following three forms: restitution in kind (restitutio in integrum), by equivalent (damages) and satisfaction[5].

2.1. Restitutio in integrum

The *restitution in integrum* concept has been defined in a uniform manner in the specialized literature. The most common definition presents the restitution in kind as of the specific forms of repairing the prejudice aiming, as possible, at restoring the previous status which might have existed if the wrongful act had not occurred. On the other hand, another definition contemplates the restitution in kind as being the establishment or restoration of the status which might have existed if the wrongful act had not occurred[6]. It is said that the first definition is a limited one, as it does not extend to the compensations that might have been owed to the victim state, for instance, in case it is invoked the problem of losing the use of the goods confiscated in an wrongful manner and subsequently returned.

The restitution in a limited sense must be completed by offsetting in order to ensure the full reparation of the prejudice caused. The second definition introduces in the concept other elements that result in a full reparation of the damage caused, recognizing the restitution in kind as a primordial, fundamental form of meeting the obligation of making reparations[7]. The two theories have found their applicability both in the practice of the states and in international case law, however, ILC has adopted a definition that represents the *stricto sensu* restitution in kind, which has the advantage of focusing on the situation in fact and not on the claims for the damages that might have been allegedly realized if the wrongful act had not taken place. The ILC recognizes as a full reparation of the prejudice the restitution in kind by compensation.

In this regard, it is stated that a state guilty of having committed an internationally wrongful act has the obligation of returning the prejudice in kind, in order to restore the situation that existed before the wrongful act occurred, the restitution being made, if possible, from a material point of view and if it does not

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[4] R.Miga Beşteliu, *Drept internaţional public-Curs universitar (Public international law – University Course)*, vol. II, C.H.Beck Publishing House, Bucharest, 2008, p. 37.

[5] James Crawford, *The International Law Commission's articles on State Responsibility, Introduction, Text and Commentaries*, Cambridge University Press, 2003, p. 211; D.Popescu, *Drept internaţional public (Public international law)*, Titu Maiorescu University Press, 2005, p. 281; D.Popescu, F. Maxim, *Drept internaţional public (Public international law)*, Renaissance Publishing House, Bucharest, 2010, p. 328; F.Maxim, *Dreptul răspunderii statelor pentru fapte internaţional ilicite (Responsibility of the States for Internationally Wrongful Acts)*, Renaissance Publishing House, Bucharest, 2011, p. 230.

[6] Yearbook of the International Law Commission, vol. II (1), 1988, p. 21; see http://untreaty.un.org/ilc/guide/.

[7] Yearbook of the International Law Commission, vol. II, Part Two, 2001, p. 238; see http://untreaty.un.org/ilc/guide/.

involve a disproportion between the benefit determined by the restitution in kind and the benefit determined by damages.

Irrespective of the interpretation given, *restitutio in integrum* has been recognized by international case law as being the first form of repairing the prejudice caused, available to the state victim of an wrongful act. The content of the restitution in kind is determined by the content of the primary obligation that has been breached.

Restitution as a primary from of reparation is significantly important if the violated obligation has a continuous character, or, furthermore, comes from an imperative norm of international law. Restitution involves, to the extent possible, restoring the situation existing before the occurrence of the wrongful act, taking into consideration all the changes occurred[8]. In its simplest form, restitution can consist in freeing illegally held persons or in returning illegally confiscated property. In other cases, restitution can take a much more complex form.

For the first time, restitution was confirmed by PCIJ in the case *Factory at Chorzow,* when it was asserted that "the guilty state is obligated restore the situation created and if this is not possible, to pay the value as at the time of offsetting, value which has the role of replacing restitution, which has become impossible"[9]. The Court added that the impossibility, which the parties had recognized and noted, of restoring the factory took into account the establishing of an amount that constitutes offsetting for the prejudice created. We note that the international court granted the compensation only when restoration was impossible.

Although, in spite of the difficulties occurred, restoration is encountered in the practice of the states, they nevertheless insist for setting compensations. Indeed, in special cases, for instance, the ones regarding an infringement of imperative norms, restoration can be requested as a way of ensuring the realization of the content of the "primary rules" violated. A case where balance invariably favours restitution is when the lack of applying restitution would jeopardize the political independence and economic stability of the harmed state[10]. On the other hand, often there are cases where the victim states give priority to other forms of repairing prejudice. Irrespective of the form chosen by the respective parties, it is normal that the restitution in kind should be excluded if it cannot be achieved, that is in case of destruction of property or of fundamental change of its character or where it is no longer possible to go back to the situation existing before for certain reasons.

The material impossibility is not limited only to the cases where the goods have been destroyed, covering much more complex situations. In many cases, international courts, taking into account the compromise reached between the parties of the parties' position, have granted damages excluding restitution in kind.

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[8] Pierre-Marie Dupuy, *Droit international public*, 5e Edition, DALLOZ, Paris, 2000, p. 458.

[9] Factory at Chorzow, Merits, 1928, P.C.I.J., Series A, No.17, p. 48; see http://www.icj-cij.org/pcij/; Denis Alland, *Droit international public*,Presses Universitaires de France, Paris 2000, p. 420.

[10] Dinah Shelton, *Righting Wrongs: Reparations in the Articles on State Responsibility*, American Journal International Law, vol.96, 2002, p. 836.

For instance, in the *Walter Fletcher Smith case*, the arbiter although recognizing restoration as a proper form, interpreted the compromise reached between the parties and granted damages, grounded his decision by invoking the interest of the litigating parties[11].

Restitution in kind may take a material form, but also a legal form or a combination of the two. Examples of restitutions under material form are the cases where withheld persons are released, seized ships are returned or other forms of rehabilitation of the property right, including the one exerted on documents, works of art or shareholder certificates. Thus, in the *Diplomatic and Consular Staff case*, ICJ ordered Iran to immediately release all the American nationals held[12], in the *Giaffarieh case* it has been invoked the problem of restoring the situation determined by capturing Italian commercial ships, by restitution in kind or granting compensations for the damage effected[13], and in the *Temple of Preah Vihear case*, ICJ decided in favour of the Cambodian request for unavoidable restitution of the objects taken from the temple[14] etc.

The phrase "legal restoration" is sometimes used when the restitution consists in changing the legal status related to the internal legal system of the guilty state with regard to the relations with the victim state. Such cases include the revocation, cancellation or amendment of the facts that constitute violations of the international norms[15], cancelation or reconsideration of an illegal judicial or administrative measure taken against a foreign person or property, or the request that that step should be taken in order to perform an international treaty. In the *Martini* case, between Italy and Venezuela, the arbitral court decided that the Venezuela Government had the obligation to cancel the court decision ruled by the court in Venezuela[16].

In the cases presented, there can be identified the material form, and also the judicial form of the restoration in kind. In other cases, the international tribunals and courts have provided for the restitution in other forms. Thus, in case of illegal annexation, reparation is met mostly under the form of cessation, rather than under the form of restoring the situation created.

The restitution in kind cannot be requested is it is noted a clear disproportion between the prejudice covered under the form of restitution in kind and the prejudice granted based on compensation. It is thus invoked the equity and the reasonableness, although from the position of the states manifested in the

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[11] United Nations, Reports of International Arbitral Awards (UNRIAA), vol. II, 1929, p. 915. http://www.un.org/law/riaa/

[12] I.C.J. Reports, 1980, p.3; see http://www.icj-cij.org/.

[13] Yearbook of the International Law Commission, 1988, vol. II, Part One, p. 24; see http://untreaty.un.org/ilc/guide/.

[14] Martin Dixon, Robert McCorquodale, work cited, *Cases and Materials on International Law,* Fourth Edition, University Press, Oxford, 2003, p. 247; I.C.J. Reports, 1962, p. 6; see http://www.icj-cij.org/.

[15] I. Brownlie, *Principles of Public International Law,* Oxford, Clarendon Press, 1998, p. 464.

[16] United Nations, Reports of International Arbitral Awards, vol. II, 1949, p. 97; see http://www.un.org/law/riaa/

solved cases, many times there has not resulted the preference for compensation instead of restitution in kind[17].

In conclusion, the obligation to restore is not unlimited, and it is required only when it is not materially impossible or totally disproportioned[18].

2.2. Reparation by equivalent- damages

It has been noted that *restitutio in integrum,* in spite of being referred to as the first form of repairing the prejudice, has been considered inapplicable or inadequate, its place being taken by reparation by equivalent. Therefore, in case where social or material reasons make impossible or inapplicable the resort to *restitutio in integrum*, the guilty state is obligated to grant reparations by the payment of damages equivalent to the prejudice effected[19].

The role of compensation is to ensure the full reparation of the damage caused when by restitution in kind this cannot be achieved. The analysis of the practice of the states and international case law have proven that reparation by equivalent is very often used, being preferred to restitution in kind. The role of compensation was underscored by PCIJ as follows:

"If restitution in kind is not possible, an amount corresponding to the value of the restitution in kind shall be granted; however, the ruling shall take into account the damage suffered that is not covered by the restitution in kind or by the payment made instead of it"[20]. Further on, the Courts adds that these are the principles that could serve in determining the value of compensation resulted further to the occurrence of the illicit act.

ICJ stated in the *Gabcikovo-Nagymaros Project* case that "it is well known the rule establish at international level, according to which the victim state is entitled to request compensation from the state that has committed the wrongful act that has caused the prejudice"[21].

The recognition of compensation of a usual means of covering the prejudice covered by the guilty states has not raised special problems, what has led to various controversies has been the determining of the value of the prejudices caused in order to identify correctly and equitably the compensation owed to/by the states involved. In order to achieve a correct individualization of the prejudice owed, there have been applied the notions and procedures of internal civil law. Among these, there can be mentioned the causality relation between the wrongful act and the prejudice effected, the way of determining the prejudice, that is of

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[17] Yearbook of the International Law Commission, vol.II, Part Two, 2001, p.243; see http://untreaty.un.org/ilc/guide.

[18] R. Miga Beşteliu, work cited, 2008, p.37.

[19] D. Popescu, A. Năstase, *Drept internaţional public,* Revised and enlarged edition, „Şansa" Publishing House and Press, Bucharest,1997, p. 349; D.Popescu, F. Maxim, work cited, 2010, p. 328.

[20] Factory at Chorzow, P.C.I.J., Series A, No17, 1928, p. 47; see http://www.icj-cij.org/pcij/.

[21] I.C.J. Reports, 1997, p.7; see http://www.icj-cij.org/.

direct damages and indirect damages, only to the extent where these can be determined in a certain manner[22].

The general rule admitted states that the reparation of the prejudice must include both the actual loss incurred (*damnum emergens)*, and the earning not realized (*lucrum cessans)*. *Damnum emergens* represents the prejudice caused by diminishing the value of the asset[23] or "a damage that arises"[24]. *Lucrum cessans* can be defined as being the prejudice suffered by an earning not realized[25] or "an earning that ceases"[26]. On the other hand, damages granted include material losses and also non material losses, such as the moral prejudice caused by the loss of a close person. Although it is recognized the obligation to repair the moral prejudice, it is stated that this is a topic that has to do more with satisfaction as a third form of repairing the prejudice[27]. Compared to satisfaction, the function of compensation is to grant the loss suffered as a result of the occurrence of the internationally wrongful act. In other words, the function of reparation by equivalent is compensatory, consisting in assessing the damage incurred by the harmed state or by its nationals. Hence it can be deduced that reparation by equivalent does not have a punitive function, an aspect also recognized by international case law, for instance in the *Velasquez Rodriguez case*, settled by the Inter-American Court of Human Rights. In conclusion, as part of the reparation by equivalent, the obligation to pay a certain amount of money is the effect of the moral prejudice effected, determined according to clearly stated rules, having a compensatory role, and in case of satisfaction, although the guilty state can by obligated to pay an amount of money, this has a punitive, exemplary role, making an approximate determination of the amount due.

The responsible state has the obligation of repairing any damage that can be assessed in terms of money. The prejudices assessed financially include the damages suffered by the state as well as the damages suffered by its nationals, who can request reparations through the state as part of diplomatic protection. The value of the damages granted shall be determined according to the content of the primary obligation and by a careful analysis of the behaviour of the parties involved aiming at obtaining an equitable and acceptable result. The cases settled by the international courts help the identification of the types of damages that can be compensated and of the quantification methods that can be used. The prejudices can be caused by the actions of destroying a flying airplane, or sinking ships, by action directed against an embassy of the diplomatic staff, damage can be caused to public property or by activities that result in polluting the environment etc.

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[22] D. Popescu, A. Năstase, work cited, 1997, p. 349.

[23] Mircea Costin, Mircea Mureşean, Victor Ursa, *Dicţionar de drept civil*, Scientific and Encyclopedic Publishing House, Bucharest, 1980, p. 170.

[24] Felicia Ştef, *Dicţionar de expresii juridice latine (Dictionary of Latin Legal Phrases)*, Oscar Print Publishing House, 1995, p. 60.

[25] Mircea Costin, Mircea Mureşan, Victor Ursa, work cited, p. 322.

[26] Felicia Ştef, work cited, p. 135.

[27] Yearbook of the International Law Commission, vol. II, Part Two, 2001, p. 244; see http://untreaty.un.org/ilc/guide/.

In the *Corfu Channel case*, the United Kingdom of Great Britain and Northern Ireland requested compensations for the damage incurred, invoking three arguments: the replacement of the Saumarez destroyer, which had been completely wrecked, the losses caused to the Volage destroyer and the losses resulted further to the death and suffering effected to the sailing crews. Further to the expert appraisal, the Court found that the request addressed by the United Kingdom was grounded, and set the value of the damages owed further to the destruction of the two ships and also the value of the amounts necessary to cover the prejudices suffered by the crews, that is the payment of pensions, medical treatment for the victims, and also compensations for the heirs in case of death[28].

In the *M/V "Saiga" Case,* Saint Vincent and Grenadines requested compensations further to the illegal seizure and holding of the Saiga ship and its crew. The International Court for Sea Law granted the assessed amount plus interest. The aspects considered in establishing the prejudice regarded the prejudices suffered by the ship, the expenses incurred with the repairs, the losses incurred with leasing the ship, the costs related to the seizure of the ship, captain, crew and other persons aboard[29].

Other cases where states consider that they are entitled to request compensations for the damage suffered and those that regard pollution. The correct and rapid identification of the prejudice caused in cases of pollution is important but difficult to quantify, considering the effects it produces. The damage to the environment often extend beyond the costs necessary to restoring the initial situation or what represents the devaluing of property. Further to the crash of Soviet satellite Cosmo 954 on the Canadian territory in January 1978, Canada formulated a request for compensations for the prejudice suffered, represented by the expenses incurred with the localization of the effects, restoration of the affected area, neutralizing the consequences and examination of the radioactive debris. Also, Canada claimed that in order to establish the amount due, there had to be taken into account the principles of general international law, according to which the compensation granted should be fairly established and reasonable. The request was solved by an agreement signed between the two states[30].

In respect of the field of diplomatic protection, it is well known that the state can request compensations for the damage caused to the premises, but also for the prejudice incurred by the diplomatic staff and other related persons. The compensation for the prejudice effected to the diplomatic staff is not limited to material loss, including the moral damage under the form of losing close persons, the pain and physical and psychological suffering, affecting private life. In the *Lusitania case,* the arbiter considered that international law grants compensations for the mental suffering, for gross language that affects human feelings, shame, degradation, losing social position, gross language that affects credibility and reputation, and the fact that the money value of this type of prejudices is difficult to

[28] I.C.J. Reports, 1949, p.244; see http://www.icj-cij.org/.
[29] International Tribunal for the Sea Law, decision dated 1 July 1999, para.176.
[30] Protocol between Canada and the USSR dated 2 April 1981.

determine does not constitute a grounded reason that would prevent compensation[31].

Compensation for the moral prejudices was recognized, especially by the international courts that aim at protecting human rights. The decisions pronounced considering both the material prejudice (determined by losing the right to receive salary, pensions or health insurance), but also the immaterial prejudice quantified in an equitable manner.

From the facts presented above we note that the aim pursued in settling a dispute is to ensure a full reparation of the prejudice suffered irrespective of the form. It is, however, true that the situations occurred trigger certain particularities of the categories of damages requested and the way of calculating such damages, however, a set of basic rules can be set in this field. Form this point of view, the differences that have had a constant role in setting the rules have been those that regard the violation of the property right of the nationals of a state. Damages in such litigations included the compensation of the value of loss of capital, compensation for the profit not realized and other incidental expenses. The compensation of the value of the loss of capital involves the assessment of the object on which the property right is exerted as against the market value, hence the differences between the amounts set due to the particularities of the assessed object. For instance, in case of exerting the property right on goods traded on the free market, the value is easily established the limits being clearly set; in case of assessing the goods part of the cultural heritage of the state, determining the value is more difficult given the character of the goods in this category.

The profit not realized has been considered part of the amount due as compensation by international courts. Thus, PCIJ in the *Factory at Chorzow Case* decided that the harmed party is entitled to request the value of the affected property as at the time of actual granting the compensation, and not at the time of expropriation[32]. In any case, irrespective of the nature of the litigation occurred, it is taken into account only that profit that appears to be "normal and predictable" and "most likely would have been obtained" if the wrongful act had not been committed[33].

It is stated that the loss of profit can be identified in three cases:

1. Profit not realized from the income made by the property during the period when the use right was temporarily lost (in the *Montijo Case*, the arbiter set an amount of money as compensation for the days when the use right of the American ship confiscated by Panama could not be exerted[34]);
2. Loss of profit from the income made by the property from the date of seizure to the date of the court decision;

[31] UNRIAA, vol. II, 1923, p.32; see http://www.un.org/law/riaa/
[32] P.C.I.J. SeriesA, No.17, 1928, pp.47-48, 53; see http://www.icj-cij.org/pcij/.
[33] D. Popescu, A. Năstase, work cited, 1997, p.349.
[34] International Arbitrations, vol. II, 1875, p.1421.

3. Anticipated future profit after the date of the decisions has not been granted in all case as it has been difficult to identify.

The amount granted as compensation can include the occasional expenses if such are reasonable and have aimed at removing the effects of the internationally wrongful act, as for instance the expenses incurred with the replacement of the diplomatic staff.

The practices of states and international case law have been the guidelines in the activity of the ILC in codifying the responsibility of the states for internationally wrongful acts, thus with regard to compensation, ILC has established:

- the state responsible for commissioning of a wrongful act is obligated to repair by equivalent the prejudice caused, to the extent where it cannot be covered by restitution in kind;
- damages shall cover any financial prejudice caused including the loss of profit to the extent it is proven[35].

2.3. Satisfaction

Satisfaction is the third form of repairing the prejudice available to the guilty state to fully meet its obligation of making full reparations of the prejudice caused by the internationally wrongful act. It is not a mandatory way, in the sense that in many cases the prejudices cause can be repaired in full by using the first forms analysed here, that is by restitution in kind or by reparation by equivalent. Satisfaction consists of an aspect of the obligation to repair the prejudice caused in a wider sense[36]. Consequently, satisfaction is recognized especially in the cases where by restitution in kind or by compensation, a full reparation of the prejudice cannot be obtained, as a moral prejudice exists.

As a result, satisfaction is a remedy in the event where it is identified the existence of a moral prejudice, having in most cases a symbolic character, irrespective of the material consequences effected in case of committing the internationally wrongful act. The recognition of satisfaction as a form of repairing non material prejudices has been established by international case law in the *Rainbow Warrior Case*[37], saying that the application of satisfaction as remedy or as a form of reparation of the prejudice caused by an internationally wrongful act has been instated in the practice of the states also by the international case law.

Satisfaction as a reparatory measure plays an important role when the harmed party suffered insults, improper treatment or in case of an attack against the head of state or government, diplomatic and consular representatives or its citizens[38]. Moreover, international practice has stated the obligation to also give

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[35] art. 36 of the Draft articles regarding the responsibility of the states for internationally wrognful acts; see http://untreaty.un.org/ilc/guide/.

[36] I. Brownlie, *Principles of Public International Law*, Clarendon Press, Oxford, 1998, p. 462.

[37] UNRIAA,vol. XX, 1990, p.217; see http://www.un.org/law/riaa/.

[38] D. Popecu, A.Năstase, work cited, 1997, p.350.

satisfaction in cases regarding the provocations against state signs, violation of sovereignty and territorial integrity or attacks against ships and aircraft[39].

In respect of the forms in which it can be manifested, satisfaction can be given by expressing regret, or by formulating excuses for the situation created. Given assurances or guarantees of not committing again the internally wrongful act can also be forms of giving satisfaction. Also, the guilty state can sanction internally the person guilty of having committed the internationally wrongful act. One of the mostly used ways of recognizing satisfaction for moral or immaterial prejudices is the case where a relevant international court or tribunal declares act as being wrongful. The identification of the proper form of satisfaction can be done according to the circumstances of each case and cannot be established before the careful analysis of the international litigation.

Ascertaining the wrongful character of the fact by the international court is a frequently used way. Thus, in the *Corfu Channel Case,* ICJ stated that the action taken by the British fleet was a violation of Albania's sovereignty and as a result Albania's request for satisfaction was entitled[40]. However, the statement formulated by the relevant international court or tribunal is a form of satisfaction, which, however, cannot be associated with satisfaction as a form of reparation. International courts and tribunals that have jurisdiction to settle a dispute have the authority to determine the wrongful character of the conduct under scrutiny and to declare this. The statement can constitute a preamble of the decision stating the obligation of repairing the prejudice and the way to do it.

Expressing regrets of excuses as a form of satisfaction has been identified in many cases in international case law, such as: the *Rainbow Warrior Case*[41]*, the LaGrand* Case a.o. Expressing regrets or giving excuses is a constant diplomatic practice justified and a simpler way of settling the disputes. However, expressing excuses or regrets cannot be applied in all cases, sometimes being considered insufficient. In the *LaGrand Case,* ICJ considered that the excuses expressed by USA were not sufficient in the case subject to the trial and cannot be considered sufficient in other cases where citizens of a state are deprived of their rights recognized, under art. 36, para. 1 of the Convention regarding the consular right of 1963, on the territory of a foreign state.

The excessive use of satisfaction in the past has determined ILC to pay special heed to the codification works. As a result, the draft prepared by ILC points out that the state responsible for the commissioning of a internationally wrongful act is obligated to give satisfaction for the prejudice caused to the extent where this cannot be realized by restitution or compensation. Moreover, it is mentioned that satisfaction can consist in recognizing the breach, expressing regrets, formal

[39] R. Miga Beşteliu, work cited, 2008, p.38.
[40] I.C.J. Reports, 1949, p.4; see http://www.icj-cij.org/.
[41] UNRIAA, vol. XX, 1990, p.217; see http://www.un.org/law/riaa/.

excuses or other specific ways and that satisfaction should be proportionate to the prejudice determined and should not constitute humility for the responsible state[42].

ILC has included in the regulation instated three aspects that interest satisfaction: the first aspect regards the legal character of satisfaction, the second aspect regards the identification of the forms that can be taken by this way of repairing prejudices and the third aspect identified by ILC considers the limitation of the obligation to give satisfaction.

The forms stated by the ILC in art. 37 are given just as a matter of example, to these other forms can also be added in the practice of state and international case law. On the other hand, the listing made does not aim at making a classification or indicating preferences. Limitation of the obligation to give satisfaction is made as against two criteria: the proportionality between satisfaction and the prejudice determined constitutes the first criterion and the second criterion regards the condition that the request formulated should not constitute humility to the guilty state. It is true that the term "humility" is not clearly defined in the draft, but the practice of the states can help the interpretation of such term.

The correct identification of the ways of repairing the prejudice and the calculation of the prejudice determined shall be done by considering whether the guilty state or entities of it have contributed to effecting the prejudice by negligence or even with intent. As a result, the participation in covering the prejudice equitably in the spirit of equality between the state author of the wrongful act and the victim state[43].

Conclusions

The research regarding the forms of repairing a prejudice has been focused on the study of the forms instated in the practice of the states and international case law, namely: *restitutio in integrum*, reparation by equivalent and satisfaction. It has been noted that *restitutio in integrum* has been considered sometimes inapplicable or inadequate, being replaced with reparation by equivalent. Recognition of compensation as a usual means of covering prejudices has not raised special problems, what has led to various controversies has been the determination of the value of the prejudices, as there are no general criteria set at international level. As part of satisfaction, there have been identified the limits within which it can be exerted, limits also set by the Draft Articles of ILC. Thus, proportionality between satisfaction and the prejudice determined constitutes a first criterion, and a second criterion regards the condition that the request formulated should not constitute humility to the guilty state.

[42] art. 37 of the draft articles regarding the responsibility of the states for internationally wrongful acts; see http://untreaty.un.org/ilc/guide/.

[43] R. Miga Beşteliu, work cited, 2008, p.39.

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