Chapter 2: Legislative Remedies and General International Adjudication

The previous chapter showed that legislative reforms are ordered regularly by human rights courts and that they are related to the obligations to legislate included in human rights treaties, to the review of legislation carried out by human rights courts, and more generally also to the constitutionalisation of human rights law. However, it is unclear whether this remedial response is a particularity of human rights adjudication or if this is a common feature of international adjudication more generally. Are international courts generally authorised to order states to reform their domestic laws, or is this a consequence of the specific features of human rights adjudication? This issue will be examined in the next two chapters.

Thus, before delving into human rights adjudication, this chapter will make a brief digression and focus on remedies in general international adjudication, using the remedial practice of the ICJ as the main example in this respect.[295] In this context, the chapter inquires into two main questions. First, it asks rather generally what the landscape of remedies in general international law looks like, and how the ICJ has approached this issue. Second, it inquires more concretely whether legislative measures could be ordered by the ICJ, and what their remedial function would be in the context of general international law. In order to examine these two questions, the chapter will first put into context the award of remedies by the ICJ, together with its precedents at the PCIJ and the legal basis for this practice. Then, it will analyse the specific functions of remedies as applied by the ICJ and codified in the ARSIWA, namely those of cessation, restitution, compensation, satisfaction and non-repetition.

Thereby, the focus will be on legislative remedies, examining their presence in the ARSIWA and their potential use by the ICJ, as well as their specific function in this context. An important aspect of the overall objective of this book is to determine whether reforms of domestic law can be considered an available remedy before general international courts, and what its function would be. This will be useful to determine whether it is a

295 This does not mean that the ICJ is the only judicial forum in general international law, as this field includes also the Permanent Court of Arbitration and further arbitral tribunals.

remedy pertaining to a 'remedial *lex specialis*' in human rights adjudication. Until now, the ICJ has never explicitly ordered a reform of domestic laws in a contentious case. However, the short analysis contained in this chapter will show that the Court's jurisdiction comprises the competence to order such measures.

Although legislative reforms cannot be considered an operative remedy in general international law yet, it is possible that these remedies could be awarded by the ICJ in future cases. However, this presents specific problems concerning the function of this court. The role of the ICJ is in principle limited to solving specific disputes among states and does not comprise the review of the compatibility of domestic legal orders with international treaties, as in the case of human rights courts. In this respect, it seems rather doubtful that domestic laws would play an important role in judicial disputes among states. As will be observed below, legislative reforms could serve to operationalise other types of remedies, but it is more unlikely that they will be ordered as standalone measures of reparation or non-repetition. Another question is what such a hypothetical legislative remedy before general international courts would look like from a functional perspective. Arguably, this may be a different function than that of legislative measures before human rights courts. In order to answer this question, this chapter will examine how legislative reforms relate to each particular category of remedies.

In fact, this remedy has adopted different functions, both in the ARSIWA and in the cases in which the ICJ has dealt with legislative reforms. The ILC Commentary to the ARSIWA makes reference to legislative reforms as a remedy, but its approach is not consistent, mentioning it with respect to three distinct remedial functions. According to the ILC, legislative reforms can adopt the function of providing restitution, satisfaction and non-repetition, depending on the circumstances of the concrete case. In this respect, it seems however that the commentary is referring to different aspects of domestic legislation. When commenting on Arts. 30 and 37 (non-repetition and satisfaction), it deals with the substantive aspects of the law, by talking about legislation that allowed the breach to occur. On the other hand, in the commentary to Art. 35 (restitution), by mentioning that the enactment of the law was contrary to international law, it apparently refers to the procedural element. In addition, it is also worth highlighting that the Commentary refers almost exclusively to negative legislative reforms, as in the former case it mentions "the repeal" and in the latter "the revocation, annulment or amendment" of domestic laws. This represents also an important difference

to human rights law, where positive reforms are prescribed far more often than negative ones.[296] On the other hand, in the cases before the ICJ in which legislative reforms have been discussed as a possible remedy, this has been mainly related to orders of cessation, restitution, and non-repetition, as will be shown below.

The analysis of this chapter will thus be extremely useful for the inquiry on whether legislative remedies form part of a 'remedial *lex specialis*' in human rights adjudication, an issue that will be examined more closely in the following chapter. In this respect, it will be shown that the role and function of legislative remedies is different in the field of general international law than in the field of international human rights law. Moreover, the fact that the ICJ is rather cautious with this type of remedy if compared to human rights courts reflects its self-understanding as an 'old-school' international court, with sovereignty considerations having arguably more weight in its decisions.

I. The Remedial Practice of the International Court of Justice

The award of remedies in general international adjudication cannot be understood without examining the practice of the ICJ, the main judicial body in this area. Despite attracting a lot of attention from scholarship for a long time, the ICJ's remedial practice has (until recently) remained largely outside the scope of analysis.[297] This is probably due to the fact that the ICJ has issued remedial orders only in a small minority of cases. The issue of remedies comes into play exclusively in those cases in which the ICJ finds an infringement of international obligations, and not when the Court is merely asked to clarify a concrete legal situation.[298] In the latter type

296 See Chapter 5 of this book.

297 Malcolm N. Shaw, "The International Court of Justice: A Practical Perspective", 46 *International and Comparative Law Quarterly*, 1997, p. 839 ("it is fair to say that there has been relatively little analysis of the full range of remedial powers of the Court"). Exceptions in this regard are Ian Brownlie, "Remedies in the International Court of Justice", in Vaughan Lowe and Malgosia Fitzmaurice (eds.), *Fifty Years of the International Court of Justice*, Cambridge: CUP, 1996, pp. 557-566; and especially the recent monograph of Victor Stoica, *Remedies before the International Court of Justice*, Cambridge: CUP, 2021.

298 See Juan José Quintana, *Litigation at the International Court of Justice*, Leiden: Brill Nijhoff, 2015, p. 1119, citing the distinction made by judge Gros between '*contentieux de legalité*' and '*contentieux de responsabilité*'.

of cases, judgments are declaratory, consisting essentially of "final, binding determinations of the parties' rights".[299] A typical example in this regard is a case in which the ICJ is asked to define the border between two states.[300] According to Crawford, approximately one-third of the ICJ's judgments involve state responsibility for internationally wrongful acts, while another third "involve boundaries, land or maritime delimitation" and one last third "cannot be classified".[301] Thus, most of the Court's judgments are simply declaratory, not requiring any action from the parties after the judgment has been issued.[302]

Despite it, during more than seventy-five years of judicial practice the ICJ has issued a wide array of remedial measures, although it has failed to provide a systematisation of the remedies it can award.[303] In this regard, Shaw argued that "[w]hile the substantive law to be applied by the Court is coherent and comprehensive, it is true that there remains a need to elaborate in a more sophisticated fashion a systemic range of remedies that may be provided".[304] This problem was also raised by Gray, noting that "remedies are something to be invented anew in each case".[305] This chapter aims to fill that gap by providing a systematic overview of the ICJ's remedial practice. In this respect, the remedies will be categorised with a functional approach, in accordance with the classification established in the ARSIWA, where the customary international law on remedies is codified.[306] Before engaging with each of the remedial categories and their use by the

299 Juliette McIntyre, "The Declaratory Judgment in Recent Jurisprudence of the ICJ: Conflicting Approaches to State Responsibility?", *LJIL* 29, 2016, p. 197.

300 See however Rosalyn Higgins, *Themes and Theories: selected essays, speeches and writings in international law*, Oxford: OUP, 2009, p. 901, including "the designation of a boundary line" among the remedies provided by the ICJ.

301 Crawford in Tams and Sloan (eds.), 2013, p. 85. Regarding the last category (cases which cannot be classified), Crawford mentions as examples those cases involving rivers or transboundary pollution.

302 McIntyre, *LJIL* 2016, p. 180. Note, however, that according to the ICJ in some instances the mere declaration constitutes a reparation in form of satisfaction, as will be explained below.

303 See Shaw, *ICLQ* 1997, p. 840 ("the Court itself has not as yet developed a clear pattern of applicable remedies").

304 Shaw, *ICLQ* 1997, p. 848. Along the same lines Christine Gray, *Judicial Remedies in International Law*, 1990, p. 108 ("Its [the ICJ's] treatment of remedies seems somewhat perfunctory in contrast with its approach to substantive issues").

305 Gray, *Judicial Remedies in International Law*, 1990, p. 108.

306 The ARSIWA establishes three main consequences of internationally wrongful acts, namely cessation, restitution and non-repetition; while reparation is in turn divided into restitution, compensation and satisfaction. See below section 2.

ICJ, the legal basis for the award of remedies as well as the relevant judicial precedents will be briefly examined. Thereby, the focus will be respectively on Article 36 of the Statute of the ICJ and the precedents at the PCIJ, especially the case of *Factory at Chorzów* (1927).

1. The Legal Basis for the ICJ's Remedial Competence

The legal basis for the indication of remedial measures by the ICJ is Art. 36 of its Statute, which deals with the jurisdiction of the Court and is adapted almost identically from Art. 36 of the Statute of the PCIJ.[307] This provision determines two ways of granting jurisdiction to the Court, either by so-called compromissory clauses contained "in the Charter of the United Nations or in treaties and conventions in force",[308] or through optional declarations made by state parties "in relation to any other state accepting the same obligation".[309]

Such compromissory clauses and optional declarations are usually silent on the issue of remedies, as they generally focus only on the substantive issues that the ICJ is authorised to judge upon.[310] However, Art. 36(2) of the Statute, while establishing general limits on the subject matter of the Court's jurisdiction, specifies that, among other issues, its jurisdiction comprises "the nature or extent of the reparation to be made for the breach of an international obligation".[311] This is generally understood as meaning that the ICJ has the inherent power to award any type of remedy, regardless of its character.[312] In addition, the Court has also the authority to determine the scope of its own competence, according to Art. 36(6) of its Statute and

307 Which was in turn adapted from Art. 13(2) of the Covenant of the League of Nations. With respect to the differences in the wording see Robert Kolb, *The International Court of Justice*, Oxford: Hart Publishing, 2013, p. 357.

308 Statute of the ICJ, Article 36, para. 1.

309 Statute of the ICJ, Article 36, para. 2.

310 As stated by Christian Tomuschat, "Article 36", in Andreas Zimmermann et al. (eds.), *The Statute of the International Court of Justice*, Oxford: OUP, 2019, p. 740.

311 See Kolb, 2013, pp. 359-360, arguing that the provisions contained in Art. 36(2) are also valid for Art. 36(1), precisely because their function is to give expression to these general limits in a broad sense.

312 Chittharanjan Felix Amerasinghe, *Jurisdiction of International Tribunals*, The Hague: Kluwer, 2003, p. 422. See also in this regard Tomuschat, "Article 36", p. 741.

the doctrine of '*Kompetenz-Kompetenz*'.[313] In this regard, the competence to award remedies was confirmed by the PCIJ in the case of *Factory at Chorzów* in 1927.

2. The Precedent at the PCIJ: *Factory at Chorzów*

The most fundamental judicial decision concerning the award of remedies by international courts is the judgment on the PCIJ's competence in the *Factory at Chorzów* case, which was delivered in 1927 and remains the *locus classicus* in this field.[314] It was not the first judgment in which the PCIJ awarded remedies, but in previous instances its competence to do so had not been contested.[315] The *Factory at Chorzów* case was brought by Germany against Poland, and related to the damage suffered by two German companies after Poland took possession of their factory. The PCIJ declared this seizure of property to be unlawful in its judgment on *Certain German Interests in Polish Upper Silesia* (1926).[316] Subsequently, both states started negotiations in order to determine the concrete way of remedying this violation. Failing to reach an agreement, Germany submitted an appeal before the PCIJ requesting a monetary sum in the form of compensation. Poland contested this claim arguing that the PCIJ's jurisdiction to interpret and apply the corresponding treaty did not comprise the competence to decide on "differences in regard to reparations".[317] The Court rejected this argument, stating for posterity that

313 Statute of the ICJ, Article 36, para. 6 ("In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court"). See also generally Georges Berlia, "Jurisprudence des Tribunaux Internationaux en ce qui Concerne leur Compétence", *The Hague Academy of International Law: Recueil des Cours* 88, 1955, pp. 112-160.

314 PCIJ, *Case concerning The Factory at Chorzów (Germany vs. Poland)*, Competence, PCIJ Series A. No 9, 1927. See in this respect Chester Brown, "Factory at Chorzów (Germany v Poland) (1927-1928)", in Eirik Bjorge and Cameron Miles (eds.), *Landmark Cases in Public International Law*, Oxford: Hart Publishing, 2017, pp. 61-88, referring to this case as one of "the most frequently cited judgments to have emanated from an international court or tribunal" (at p. 61).

315 For example, in the *S/S Wimbledon* case the PCIJ ordered Germany to pay a specific amount for damages in form of compensation. See PCIJ, *Case of the S.S. Wimbledon (United Kingdom et al. vs. Germany)*, PCIJ Series A. No 1, 1923, operative para. 5.

316 PCIJ, *Certain German Interests in Polish Upper Silesia (Germany vs. Poland)*, Merits, PCIJ Series A No. 7, 1926, operative para. 2(a).

317 PCIJ, *Factory at Chorzów,* Competence (1927), p. 20.

> *[i]t is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself. Differences relating to reparations, which may be due by reason of failure to apply a convention, are consequently differences relating to its application.*[318]

This was the last time in which the competence of the PCIJ or the ICJ to award remedies was put into question.[319] In addition, an important number of international courts have relied on this statement – which today undoubtedly reflects customary international law – in order to declare their competence to decide on the consequences of a breach.[320] In the words of Rosalyn Higgins, "[i]t has been clear ever since the Chorzów case that (…) the existence of jurisdiction to decide the merits carries with it the legal authority to remedy any breach found".[321] On that basis, the PCIJ ordered Poland to pay "a compensation corresponding to the damage sustained" by the aforementioned companies.[322]

II. A Categorisation of Remedies in General International Law

As mentioned, the ICJ has not yet developed a clear pattern of applicable remedies. Thus, the systematisation of judicial remedies used in this

318 PCIJ, *Factory at Chorzów,* Competence (1927), p. 21. See James Crawford, *State Responsibility: The General Part*, Cambridge: CUP, 2013, p. 480, considering this passage as the "classic general statement of the consequences of an internationally wrongful act".

319 There are some cases in which the Court's competence to issue a particular type of remedy was contested, but not its authority to award remedies as such.

320 See Brown, in Bjorge and Miles (eds.), 2017, pp. 85-87, with examples of the impact of this statement in investment treaty arbitration.

321 Higgins, 2009, p. 10. See also Tomuschat, in Zimmermann *et al.*, (eds.), p. 741, arguing that "it is now firmly established that the Court is empowered to make precise determinations on reparation owed to a state victim of a breach of international law".

322 PCIJ, *Factory at Chorzów,* Merits, PCIJ Series A. No 17, 1928, p. 63. The Court did not establish the specific amount to be paid, but instead convened an "expert inquiry" under Art. 50 of its Statute in order to examine these issues (pp. 51-52). However, shortly after the PCIJ issued this judgment, the matter of the amount of compensation to be paid was solved through an agreement between the parties. See in this regard Brown, in Bjorge and Miles (eds.), 2017, p. 85.

chapter is based on the one contained in the ARSIWA. It is nowadays evident that the practice of the ICJ and the ARSIWA have mutually influenced each other, establishing a "dialectical relationship".[323] First, the ILC, while drafting the ARSIWA, derived the rules contained therein from – among other sources – the previous practice of the ICJ.[324] These provisions have then also influenced the Court's subsequent practice, as can be observed through explicit references to the ARSIWA in the ICJ's case law.[325] Crawford argued in this respect that the "symbiotic relationship between the ILC and the Court has also been significant in achieving a situation where there is now a presumption that the ILC Articles reflect international law".[326]

In the ARSIWA, the consequences of an internationally wrongful act are essentially three, consisting of the obligations of cessation, reparation and non-repetition.[327] In turn, the obligation of reparation is also tripartite and may consist of restitution, compensation and satisfaction.[328] These remedial categories will be examined along this section, starting with the primary consequence – the cessation of the unlawful conduct – and ending with the most exceptional one – the award of guarantees of non-repetition.

However, it has to be noted that this categorisation is different from the ones used by most authors when examining the remedial practice of the ICJ. Brownlie, for example, uses only three categories, consisting of

323 Crawford in Tams and Sloan (eds.), 2013, p. 75.

324 See Crawford in Tams and Sloan (eds.), 2013, p. 74 ("rules of state responsibility have been derived from cases, from practice, and from often unarticulated instantiations of general legal ideas").

325 See for example ICJ, *Gabčíkovo-Nagymaros Project (Hungary vs. Slovakia)*, ICJ Reports 7, 1997, paras. 47, 79 and 83; ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 136, 2004, para. 140. In this respect see also Alain Pellet, "Some Remarks on the Recent Case Law of the International Court of Justice on Responsibility Issues", in Péter Kovács (ed.), *International Law: A Quiet Strength*, Budapest: Pázmány Press, 2011, p. 133 ("generally speaking, and although it does not always expressly state so, the Court applies the rules contained in the [ARSIWA], rules that are in their turn quite largely based upon the Court's own case-law").

326 Crawford in Tams and Sloan (eds.), 2013, p. 86. Along the same lines, Shelton, *AJIL* 2002, p. 834, arguing that "[t]he use and influence of the articles partly reflects the close ties between the International Law Commission (ILC) and the ICJ". See also, regarding this connection, Philippe Couvreur, *The International Court of Justice and the Effectiveness of International Law*, Brill Nijhoff, 2017, pp. 205-263.

327 ARSIWA, Arts. 30 and 31.

328 ARSIWA, Arts. 34 - 37.

declaratory judgments, damages and restitution.[329] Similarly, Brown states that "there are three forms of reparation which are generally available as remedies in international adjudication: restitution, compensation and declaratory judgments".[330] Gray adds another category, which she calls "injunctions",[331] while Amerasinghe, leaving out the category of declaratory judgments, includes "negative injunctions", "specific performance" and satisfaction.[332] Finally, Stoica includes cessation and guarantees of non-repetition in the same category and adds declaratory judgments, specific performance, restitution, compensation and satisfaction.[333] In sum, the only categories which are used by all these authors are restitution and compensation, while the ones most often ignored by them are those of cessation and guarantees of non-repetition.

In this regard, it can also be observed that several of these authors include declaratory judgments a category of remedies. One could ask in this respect whether declaratory judgments are not precisely those with an absence of remedies, as there is no secondary obligation for the respondent state arising from these judgments.[334] According to Crawford, declaratory judgments were not included in the ARSIWA because any court has the authority to make declarations on the lawfulness of a conduct, independently of its power to award remedies.[335] Certainly, declaratory judgments can form the basis of a post-judgment negotiation among states, and as they allow for flexibility in this regard states are usually satisfied with them. This marks an important difference with human rights law, where parties do not stand on an equal footing and thus leaving the issue of reparations to a negotiation among them is probably not the best solution. However, in both cases, a declaratory judgment carries with it some expectations of compliance, at least with respect to the state obligations of cessation and non-repetition. But in the absence of a binding remedy, these expectations are rather 'soft', based on the principle of good faith and reputational con-

329 Brownlie, in Lowe and Fitzmaurice (eds.), 1996, pp. 559-565.
330 Brown, 2007, p. 223. In this context, compensation and damages have the same meaning.
331 Gray, *Judicial Remedies in International Law,* 1990, pp. 77-107, especially pp. 95-96.
332 Amerasinghe, 2009, p. 177.
333 Stoica, *Remedies before the International Court of Justice*, Cambridge: CUP, 2021.
334 See below section II(4). As Kolb points out, these are decisions which are "binding but not executory". See Kolb, 2013, p. 755. On the main features of declaratory judgments see also generally Edwin Brochard, *Declaratory Judgments*, Cleveland: Banks-Baldwin, 1934, especially pp. 23-26.
335 Crawford, *State Responsibility*, 2013, p. 529.

siderations. In any case, if considered a remedy, it would be more precise to include such declaratory judgments under the category of satisfaction measures. Indeed, the Commentary to the ARSIWA specifies that such a "declaration of wrongfulness by a competent court" is "one of the most common modalities of satisfaction".[336] This was also sustained by the ICJ already in its first judgment and then confirmed in numerous subsequent cases.[337]

Finally, some authors include an additional category of remedies under the heading of "injunctions", "specific performance", or "consequential orders".[338] Such categories are however not contemplated by the ARSIWA, nor is there a clear distinction with other remedial categories, such as restitution or cessation, which also take the form of consequential orders of specific performance when applied by the ICJ. For instance, some examples mentioned under these labels are the measures prescribed in the *Tehran Hostages* judgment (1980) or the *Genocide* judgment (2007).[339] However, these orders dealt with the obligation to cease an ongoing violation, as will be explained next.

1. Cessation

The "first requirement in eliminating the consequences" of an internationally wrongful act is the adoption of measures that aim at the cessation of the infringement, or more specifically at the "discontinuance of wrongful acts or omissions".[340] This secondary obligation is considered to be "inherent in the primary obligation", and therefore acquires an 'automatic' character for cases of continuing violations.[341] Also, in contrast to restitution or satisfaction, cessation does not only aim at protecting the interests of the injured state but also those of the international community as a whole,[342]

336 See ARSIWA, Commentary to Art. 37, at para. 6.
337 See the references below, in section II(4) of this chapter.
338 Regarding the latter see Quintana 2015, pp. 1156-1167.
339 Quintana 2015, pp. 1157-1160.
340 ARSIWA, Commentary to Art. 30, para. 4; Crawford, *State Responsibility*, 2013, p. 265.
341 Robert Kolb, *The International Law of State Responsibility*, Edward Elgar, 2017, p. 149.
342 ARSIWA, Commentary to Art. 30, para. 5.

whereby its underlying principle is the protection of the rule of law.[343] It is precisely for this reason that cessation is not considered a form of reparation under the general law of state responsibility, but a separate consequence of an internationally wrongful act. However, in some instances, these types of remedies have been equated with forms of restitution[344] or satisfaction,[345] although the ICJ and the ILC confirmed that they belong to an autonomous remedial category.[346]

a) Cessation in the ICJ's case law

The ICJ has considered that the obligation to cease ongoing illegal conduct follows from the mere finding of such illegality and that an explicit order in this regard is only necessary under special circumstances.[347] There are however several judgments where such explicit orders have been included. A form of cessation was first ordered by the ICJ in the *Temple* case (1962), with the Court including in the operative part Thailand's "obligation to withdraw any military or police forces, or other guards or keepers, stationed by her at the Temple, or in its vicinity on Cambodian territory".[348]

343 Crawford, *State Responsibility*, 2013, pp. 459-460. In this regard, the ICJ stated that the obligation of cessation "derives both from the general obligation of each State to conduct itself in accordance with international law and from the specific obligation upon States parties to disputes before the Court" (ICJ, *Dispute regarding Navigational and Related Rights* (2009) para. 148).

344 Couvreur, 2017, at p. 233 ("In practice, therefore, the cessation of the wrongful act may correspond to a form of restitution"). See also Shelton, *AJIL* 2002, p. 836 ("Further, in some circumstances cessation and restitution can be satisfied by the same act").

345 See Shelton, *AJIL* 2002, p. 839 ("Cessation and guarantees of non-repetition were considered a form of satisfaction").

346 ICJ, *Dispute regarding Navigational and Related Rights (Costa Rica vs. Nicaragua)*, ICJ Reports 213, 2009, para. 149 ("cessation of a violation of a continuing character (…) constitute[s] a form of reparation for the injured State"). In the ARSIWA, the remedy of cessation is included in Art. 30, whereas the other forms of reparation are stated in Art. 31. See however Crawford, *State Responsibility*, 2013, p. 465, who claims (while upholding this distinction) that "[t]he result of an act of cessation may be indistinguishable from that of restitution".

347 ICJ, *Dispute regarding Navigational and Related Rights* (2009), para. 148. This reflects the aforementioned implications of declaratory judgments with respect to the obligation of cessation.

348 ICJ, *Temple of Preah Vihear (Cambodia vs. Thailand)*, ICJ Reports 6, 1962, p. 37. The Court used a similar wording in the *dispositif* of the *Land and Maritime Boundary* judgment, stating the obligation of both Cameroon and Nigeria to withdraw the

The obligation to cease the wrongful conduct may consist of both negative or positive actions by the state.[349] One form of negative action prescribed by the ICJ can be found in the *Nicaragua* judgment (1986), where the Court referred to the US' obligation "to cease and to refrain from all such acts as may constitute breaches of the foregoing legal obligations".[350] However, in most cases, an active course of action is required to cease the infringement. A prominent example in this regard is the *Tehran Hostages* case (1980), in which the ICJ stated that Iran "must immediately terminate the unlawful detention of the United States Chargé d'affaires and other diplomatic and consular staff and other United States nationals now held hostage in Iran, and must immediately release each and every one (…)".[351] The remedial order contained in the *Genocide* case (2007) consisting of the transfer of those accused of genocide to the ICTY also adopts the form of cessation. Here, the ICJ specified that this was a requirement in order to cease Serbia's continuing infringement of its obligation to punish acts of genocide.[352] Further examples of active cessation orders include the obligation to prosecute or extradite an individual,[353] or to provide consular officers access to a prisoner.[354]

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administrative and military forces from certain areas under the sovereignty of the opposing state. See ICJ, *Land and Maritime Boundary between Cameroon and Nigeria* (*Cameroon vs. Nigeria: Equatorial Guinea intervening)*, ICJ Reports 303, 2002, operative para. 5 (b).

349 As stated by the France-New Zealand Arbitration Tribunal in *Rainbow Warrior (New Zealand vs. France)*, UN Reports of International Arbitral Awards, vol. XX, 1990, para. 113.

350 ICJ, *Military and Paramilitary Activities in und against Nicaragua (Nicaragua vs. United States of America)*, Merits, ICJ Reports 14, 1986, operative para. 12. The same was done in the judgment of ICJ, *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua vs. Colombia)*, General List No. 155, 21 April 2022, para. 261 (4).

351 ICJ, *Case concerning United States Diplomatic and Consular Staff in Tehran (United States of America vs. Iran)*, ICJ Reports 3, 1980, operative para. 3(a).

352 This obligation stems from Art. IV of the Convention on the Prevention and Punishment of the Crime of Genocide. See ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina vs. Serbia and Montenegro)*, ICJ Reports 43, 2007, operative para. 8.

353 The ICJ ordered Senegal to prosecute or extradite an individual, after establishing the state's responsibility for a violation of the CAT precisely for "failing to submit the case of Mr. Hissène Habré to its competent authorities for the purpose of prosecution". ICJ, *Questions relating to the Obligation to Prosecute or Extradite (Belgium vs. Senegal),* ICJ Reports 422, 2012, operative paras. 5 and 6.

354 In the *Jadhav* judgment, the ICJ indicated that Pakistan is obliged "to inform Mr. Kulbhushan Sudhir Jadhav without further delay of his rights and to provide Indian

These examples show that, although according to the ICJ it will only order cessation under special circumstances, it is not uncommon to find such remedies in the Court's case law when the infringement has an ongoing character. Sometimes they are certainly difficult to distinguish from orders of restitution, as putting an end to the violation is also a way of restoring the *status quo ante*. Authors have therefore considered some of the aforementioned examples under the heading of restitution.[355] It is however more accurate to define them as remedial orders pertaining to the autonomous category of cessation, as they are addressing continuing violations, and their main aim is precisely to put an end to these.[356]

b) Legislative reforms as cessation

There are some cases in which the reform of domestic laws can be a way of ceasing illegal conduct. The two conditions for ordering a remedy of cessation, as stated by the arbitral tribunal in the *Rainbow Warrior* case (1990), are precisely the continuing character of the wrongful act and the maintenance in force of the infringed provision at the time when the remedy is issued.[357] In addition, an example mentioned by Crawford in this respect are those cases "where a legislative provision is maintained which is incompatible with a treaty obligation of the enacting state".[358] In such a case, the order to repeal or modify the corresponding provision would clearly constitute a measure of cessation.

A legislative reform in order to cease the violation was requested for example by Costa Rica in the case of *Certain Activities* (2015). The State included among the alleged breaches of its rights of navigation "the enactment by Nicaragua of Decree No. 079-2009 of 1 October 2009, concerning

consular officers access to him in accordance with Article 36 of the Vienna Convention on Consular Relations". See ICJ, *Jadhav (India vs. Pakistan)*, ICJ Reports 418, 2019, operative para 6.

355 See for example Brownlie in Lowe and Fitzmaurice (eds.), 1996, p. 565 ("Such orders [of restitution] were made in the Temple, Tehran Hostages and Nicaragua cases"). See also Brown, 2007, p. 196, with regard to the *Tehran Hostages* case (1980).

356 See for example ICJ, *Jadhav* (2019), para. 134, where the Court affirms that several breaches by Pakistan "constitute internationally wrongful acts of a continuing character", and that "[a]ccordingly, the Court is of the view that Pakistan is under an obligation to cease those acts".

357 France-New Zealand Arbitration Tribunal, *Rainbow Warrior* (1986), para. 573.

358 Crawford, *State Responsibility*, 2013, p. 462.

navigation on the San Juan River".[359] In consequence, one of its requests was the "repeal, by means of its own choosing, [of] those provisions of the Decree No. 079-2009 and the Regulatory Norms annexed thereto of 1 October 2009 which are contrary to Costa Rica's right of free navigation (…)".[360] Although the Court rejected this submission, considering that none of Nicaragua's breaches of international obligations were related to the application of the specific law,[361] it remains an instance in which the reform of domestic laws would have taken the form of cessation.

Furthermore, the only instance in which the ICJ expressly mentioned that a legislative reform would be necessary – although not in the form of a binding order – was the *Wall* Advisory Opinion (2004). Here, the Court stated that "Israel is under an obligation to terminate its breaches of international law; it is under an obligation to cease forthwith the works of construction of the wall (…) and *to repeal or render ineffective forthwith all legislative and regulatory acts* relating thereto".[362] In this case, Israel's legislative framework was considered to be part of the infringement, and therefore the legislative reform would clearly be a form of putting an end to it. This advisory opinion is considered "a rare example of an indirect constitutional compatibility review" between domestic laws and general international law.[363] Nevertheless, this statement cannot be considered a proper legislative remedy, as it was issued in the context of an advisory proceeding and thus lacks the binding character that remedies possess.[364]

The reform of domestic laws could thus fulfil the function of cessation in general international law, although mainly the negative aspect of such reforms (i.e., the repeal of norms that contribute to the ongoing nature of the infringement) and not the positive one (i.e., the adoption of laws in order to cease a wrongful act). In a case in which an internationally wrongful act clearly stems from legislation, it would also be in principle unproblematic for the ICJ to order such measures, although such a scenario is rather uncommon.

359 ICJ, *Certain Activities Carried Out by Nicaragua in the Border Area* (Costa Rica v. Nicaragua) and *Construction of a Road in Costa Rica along the San Juan River* (Nicaragua v. Costa Rica), Merits, ICJ Reports 665, 2015, para. 134.
360 ICJ, *Certain Activities* (2015), para. 137.
361 ICJ, *Certain Activities* (2015), para. 138.
362 ICJ, *Wall* Advisory Opinion (2004), operative para. 3 (B) (emphasis added).
363 Çalı, in Lang and Wiener (eds.), 2017, p. 294.
364 See on that the conceptual clarifications included in the Introduction to this book.

2. Restitution

The concept of restitution stems from Roman law and the form of redress called *restitutio in integrum*.[365] It consists of "re-establish[ing] the situation which existed before the wrongful act was committed".[366] In the aforementioned *Factory at Chorzów* case (1927), the PCIJ considered it to be the primary form of reparation in international law.[367] There are generally two main forms of restitution – material restitution and juridical restitution.[368] Material restitution refers to "the return or restoration of territory, individuals or property",[369] while juridical restitution is "the modification of a legal situation".[370] In the ICJ's case law, the latter form of restitution is found much more often than the former one.

a) Restitution in the ICJ's case law

One of the few instances in which the ICJ ordered a material restitution is the *Temple* judgment (1962), where the Court found that "Thailand is under an obligation to restore to Cambodia any objects (…) which may, since the date of the occupation of the Temple by Thailand in 1954, have been removed from the Temple or the Temple area by the Thai authorities".[371]

365 See Suzan L. Haasdijk, "The Lack of Uniformity in the Terminology of the International Law of Remedies", *LJIL* 5, 1992, pp. 245-263, especially at p. 250.

366 ARSIWA, Art. 35.

367 PCIJ, *Factory at Chorzów,* Merits, 1928, p. 47; Crawford, *State Responsibility*, 2013, p. 509. See also Chittharanjan Felix Amerasinghe, *Jurisdiction of Specific International Tribunals*, Leiden: Brill Nijhoff, 2009, p. 178, situating restitution at the top of the hierarchy of remedies.

368 Crawford, *State Responsibility*, 2013, pp. 511-512. The latter form is also called by some authors "legal restitution" (see Gray, *Judicial Remedies in International Law*, 1990, p. 590; Quintana, 2015, p. 1131).

369 Crawford, *State Responsibility*, 2013, p. 511.

370 Crawford, *State Responsibility*, 2013, p. 512. See also Jan Wouters et al*., International Law: A European Perspective*, Oxford: Hart, 2019, p. 539.

371 ICJ, *Temple of Preah Vihear* (1962), p. 37. Another similar example can be found in the *Wall* Advisory Opinion. In this case the ICJ affirmed Israel's obligation "to return the land, orchards, olive groves and other immovable property seized from any natural or legal person for purposes of construction of the wall in the Occupied Palestinian Territory". However, the alternative of compensating was also foreseen for the event that restitution "should prove to be materially impossible". ICJ, *Wall,* Advisory Opinion 2004, para. 153. As previously mentioned, this cannot be considered a remedy as such, as it lacks the binding nature.

This example shows that in practice it is often difficult to distinguish material restitution from cessation.[372] In this context, the remedy issued in the *Tehran Hostages* case (1980) consisting of the release of the US' diplomatic and consular staff could also be interpreted as a form of material restitution, as it implies the return of individuals. Nevertheless, in this case, the ICJ clearly ordered it as an obligation to cease the ongoing violation.[373]

Juridical forms of restitution, on the other hand, are included in various cases and typically consist of the annulment or modification of administrative acts or judicial decisions. Concerning the former, this type of remedy can be found for example in the *Arrest Warrant* case (2002), where the ICJ ordered Belgium to cancel an arrest warrant issued against the Congolese Foreign Minister in violation of his immunity,[374] or in the *Whaling* case (2014), where it ordered Japan to revoke all whaling permits that were granted infringing the state's international obligations.[375] In addition, more recently the ICJ ordered Colombia to amend a Presidential Decree establishing maritime areas.[376] The annulment of domestic judgments issued in violation of international norms was for example prescribed in the *Jurisdictional Immunities* case (2012), where the ICJ ordered Italy to annul the judicial decisions that were inconsistent with Germany's immunity under international law.[377]

Another specific type of juridical restitution can be found in cases concerning a violation of the Vienna Convention on Consular Relations (VCCR). In three cases – *LaGrand* (2001), *Avena* (2004), and *Jadhav* (2019) – the ICJ considered the US and Pakistan, respectively, to be responsible

372 See Crawford, *State Responsibility*, 2013, p. 512 ("Often, the result of restitution will be indistinguishable from that of cessation").

373 The wording used by the Court in this regard was "terminate the unlawful detention", which clearly situates this order under the sphere of the remedial category of cessation. See also Crawford, *State Responsibility*, 2013, p. 512.

374 ICJ, *Arrest Warrant of 11 April 2000* (*Democratic Republic of the Congo v. Belgium)*, ICJ Reports 3, 2002, operative para. 3. See in this case however the separate opinion of judges Higgins, Kooijmans and Buegenthal, at paras. 88-89, disagreeing with the fact that the Court regarded this order as a form of restitution and arguing that "a call for the withdrawal of an instrument is generally perceived as relating to the cessation of continuing international wrong".

375 ICJ, *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, ICJ Reports 226, 2014, operative para. 7.

376 ICJ, *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua vs. Colombia)*, General List No. 155, 21 April 2022, para. 261 (6).

377 ICJ, *Jurisdictional Immunities of the State (Germany vs. Italy; Greece intervening)*, ICJ Reports 99, 2012, operative para. 4.

for the detention and conviction of foreign individuals in violation of their consular rights under Art. 36 of the VCCR. In these three cases, the ICJ ordered to "review and reconsider" the sentences issued in violation of this provision. The *LaGrand* case (2001) only referred to possible future sentences against German nationals, as the victim had already been executed by the US.[378] Hence, in this case, the remedy would not take the form of restitution but rather of a guarantee of non-repetition. However, the same was repeated some years later in the *Avena* case (2004), and here the Court also ordered the review and reconsideration of the actual decisions against the individuals affected by this infringement.[379] This type of remedial measure became thus in *Avena* a form of juridical restitution, as the review aimed at restoring the *status quo ante* of the victim by modifying a legal situation. These remedies were considered especially innovative, as they went beyond the usual approach of providing reparation to a state and moved into the realm of human rights.[380]

The *Jadhav* judgment (2019) shows that the ICJ is still willing to order these measures to remedy infringements of Art. 36 VCCR, despite the problems regarding compliance with the aforementioned judgments against the US.[381] Here, the Court abstained from issuing an order regarding prospective convictions, but it ordered to review and reconsider the sentence against Mr Jadhav.[382] In these cases, one can also see that the ICJ has generally adopted a flexible approach towards juridical restitutions, leaving at the discretion of the state the concrete modalities of giving effect to this order.[383] The form of restitution requested respectively by Mexico and

378 ICJ, *LaGrand (Germany v. United States of America)*, ICJ Reports 466, 2001, operative para. 7. See also, with respect to this case, Robert Jennings, "The LaGrand Case", *LPICT* 1, 2002, p. 13.

379 ICJ, *Avena and Other Mexican Nationals (Mexico v. United States of America)*, ICJ Reports 12, 2004, operative para. 9.

380 See Enrico Milano, "Diplomatic Protection and Human Rights before the International Court of Justice: ReFashioning Tradition?", *Netherlands Yearbook of International Law* 35, 2004, pp. 85-142, especially at p. 90 ("the remedies envisaged in its *dispositifs* go a long way in seeking to protect human rights in their substance and they represent a progressive development in the jurisprudence of the Court").

381 See Dirk Pulkowski, "Testing Compliance Theories: Towards the United States Obedience of International Law in the Avena Case", *LJIL* 19, 2006, p. 511; Andreas Paulus, "From Neglect to Defiance? The United States and International Adjudication", *EJIL* 15, 2004, p. 783.

382 ICJ, *Jadhav* (2019), operative para. 8.

383 The ICJ specified in this regard that this review and reconsideration shall be provided by the corresponding State "by means of its own choosing". ICJ, *Jadhav*

India in these cases was the annulment of the respective judgments.[384] The Court, however, did not go that far and ordered a measure of restitution based on an obligation of means (the review and reconsideration) and not of result.

b) Legislative reforms as restitution

The ILC Commentary to the ARSIWA, when examining the concept of juridical restitution as the change of a legal situation, uses the example of a "revocation, annulment or amendment of a constitutional or legislative provision enacted in violation of a rule of international law".[385] The same is also mentioned by several authors.[386] There are indeed situations in which legislative reforms could help to restore the situation that existed before the infringement of international obligations, as can be observed in the practice of the ICJ. In the cases examined in this section that contain a measure of juridical restitution, such measures consisted of the review or annulment of domestic administrative or judicial decisions. Sometimes a review or annulment of this sort is prevented by domestic provisions, establishing for example the finality of certain domestic judgments. Thus, it could be possible for the ICJ to order the reform of such laws to achieve effective restitution. Actually, in two instances the Court has recommended legislative reforms precisely for this purpose.

These two cases in which the ICJ recommended states to enact domestic laws in order to restore a legal situation are *Jurisdictional Immunities* (2012) and *Jadhav* (2019). In the latter one, dealing with a conviction in violation of the VCCR, the Court specified in the argumentative part of the judgment that Pakistan "shall take all measures to provide for effective review and reconsideration, including, if necessary, *by enacting appropriate*

(2019), operative para. 8; ICJ, *LaGrand* (2001), operative para. 7, ICJ, *Avena* (2004), operative para. 9. See for another example of juridical restitution leaving the choice of means to the state's discretion, ICJ, *Jurisdictional Immunities* (2012), para. 137.

384 ICJ, *Avena* (2004), para. 13(1)(b); ICJ, *Jadhav* (2019), para. 19(3).

385 ARSIWA, Commentary to Art. 35, para. 5.

386 Crawford, *State Responsibility*, 2013, at p. 512, mentions as an example for juridical restitution "the revocation of a provision of national law enacted in violation of international law". Gray, *Judicial Remedies in International Law*, 1990, p. 13, states that this form of reparation "involves an order by a tribunal for the repeal or alteration of a measure of the defendant's state legislature, executive or judiciary".

legislation".[387] In the former case, this was even included in the operative part of the judgment. The Court, after finding Italy responsible for violating Germany's immunity under international law, decided that Italy "must, *by enacting appropriate legislation*, or by resorting to other methods of its choosing, ensure that the decisions of its courts and those of other judicial authorities infringing the immunity which the Federal Republic of Germany enjoys under international law cease to have effect".[388]

This was the closest the ICJ has been to ordering a legislative reform, although in the end, it left the door open to "other methods". However, it can be observed that both the enactment and the annulment of domestic laws could be forms of providing restitution under general international law. Actually, in these two contentious cases in which the ICJ expressly mentioned the reform of domestic laws, this concerned the enactment of laws that would allow for either the review or the annulment of domestic judicial decisions. These are certainly special laws, related to the functioning of the domestic judicial system, and more specifically to the possibility of reviewing a *res judicata*. In this context, requesting such a legislative reform is probably the only way of ensuring compliance with the Court's orders when a review of final judgments is not foreseen in the domestic legal order. However, these legislative reforms would - as such - not fulfil the function of restitution, as the review of the domestic judgment is the concrete act that restores the victim to its *status quo ante*. Thus, the role that such reforms would play is simply that of allowing the state to comply with another remedial measure. It is even doubtful whether they could be considered a self-standing remedy in this regard.

3. Compensation

When the injury caused by an illegal conduct can no longer be reversed through restitution, general international courts may order the payment of a pecuniary sum in the form of compensation.[389] This is also the case

387 ICJ, *Jadhav* (2019), para. 146 (emphasis added).

388 ICJ, *Jurisdictional Immunities* (2012), operative para. 4 (emphasis added).

389 This was already established in the *Factory at Chorzów* case, with the PCIJ stating that "[r]estitution 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 principles which should serve to determine the

when restitution is available but inadequate or disproportionate.[390] In this regard, the ARSIWA specifies that compensation "shall cover any financially assessable damage".[391] Hence, the appropriate remedy for non-financially assessable damage, such as moral damage to the state, would take the form of satisfaction.[392] The ILC defines this remedy as being "perhaps the most commonly sought in international practice".[393] Nevertheless, the ICJ's approach towards it has been rather restrictive, with only a handful of cases ordering compensation.[394] There are, in this regard, cases in which the Court refused to award compensation due to an insufficient link between the infringement of an international obligation and the concrete damage suffered by the state.[395]

a) Compensation in the ICJ's case law

The ICJ already awarded this form of reparation in its first contentious case, known as the *Corfu Channel* case (1949).[396] Here, the UK claimed compensation for the material damage suffered by the loss of two naval destroyers and the deaths and injuries of naval personnel. In its judgment on the merits, the ICJ determined that its competence to award compensation also implies the competence to establish the specific amount to be paid in this regard.[397] It however reserved the assessment of this amount

amount of compensation due for an act contrary to international law". PCIJ, *Factory at Chorzów Case,* Merits, (1928), p. 47 (emphasis added).

390 ARSIWA, Art. 35 (b). See generally on this point Christine Gray, "The Choice between Restitution and Compensation", *EJIL* 10(2), 1999, pp. 413-423.

391 ARSIWA, Art. 36(2).

392 Crawford, *State Responsibility*, 2013, p. 517. Nevertheless, moral damages suffered by nationals of a state that is claiming on their behalf by way of diplomatic protection take the form of compensation. See ARISWA, Commentary to Art. 36, para. 16, citing in this regard the *Lusitania* case.

393 ARSIWA, Commentary to Art. 36, para. 2.

394 See in this regard Crawford, *State Responsibility*, 2013, p. 518 ("It seems rather that the Court is averse to awarding compensation").

395 See for example ICJ, *Genocide* case (2007), para. 462. Here, the Court considered that there was no direct causal nexus between Serbia's failure to prevent genocide and the damages caused.

396 ICJ, *Corfu Channel,* Merits (1949), p. 36.

397 ICJ, *Corfu Channel,* Merits (1949), pp. 25-26. See also in this regard Hersch Lauterpacht, *The Development of International Law by the International Court*, London: Stevens and Sons Limited, 1958, pp. 203, 246-248, arguing that this case

"for further consideration".[398] Then, after entrusting the assessment of the claims brought by the UK to a group of experts, the Court validated the amount solicited by the applicant in a subsequent judgment.[399]

A measure of compensation was not issued again until the *Nicaragua* case (1986), where the Court decided that the US was under an obligation to "make reparation" to Nicaragua "for all injury caused by the breaches" of its international obligations.[400] It deferred the decision regarding the "amount of such reparation" and encouraged the parties to reach an agreement on this issue.[401] Nevertheless, before reaching an agreement Nicaragua decided to renounce its rights of action based on this case.[402] This judgment shows that the terminology used by the ICJ is not always consistent, as in that case the term 'reparation' is clearly meaning 'compensation'.[403]

Reserving the assessment of the specific amount to be paid for a later stage if the parties do not reach an agreement has been the ICJ's usual approach towards compensation. In fact, since the *Corfu Channel* case (1949) the ICJ has only determined the specific amount to be paid as compensation in three further cases, in which the parties failed to reach such an agreement. The first one is the *Diallo* case (2010), dealing with the unlawful arrest, detention and expulsion of a Guinean national by the Democratic Republic of the Congo (DRC). Here, the ICJ found in its judgment on the merits the DRC to be under the obligation "to make appropriate reparation, in the form of compensation, to the Republic of Guinea",[404] and then issued another judgment two years later determining the precise amount to be

shows the tendency of the ICJ to secure the effectiveness of the clauses conferring jurisdiction upon it.

398 ICJ, *Corfu Channel* (Merits), 1949, p. 36.

399 ICJ, *Corfu Channel (United Kingdom vs. Albania)*, Compensation, ICJ Reports 244, 1949, Annex 2 (Experts' Report).

400 ICJ, *Nicaragua* (1986), operative paras. 13 and 14.

401 ICJ, *Nicaragua* (1986), operative para. 15. See also similarly, although referring expressly to compensation, ICJ, *Gabčíkovo-Nagymaros* (1997), operative para. 2 (d).

402 Therefore, the Court discontinued the proceedings and removed the case from its list. See ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Discontinuance, ICJ Reports 47, 1991.

403 See Haasdijk, *LJIL* 1992, pp. 249-250, arguing that the same terminological inconsistency is also reflected in the *Tehran Hostages* case (1980).

404 ICJ, *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, ICJ Reports 639, 2010, operative para. 7.

paid.[405] This is notably the only case in which compensation has been ordered with respect to damages suffered by an individual and not the state as such.

Another instance in which the ICJ specified the amount to be paid as compensation is the *Certain Activities* judgment (2015), dealing with the environmental damage caused by Nicaragua in Costa Rica's territory. The parties to this case did also fail to reach an agreement, and the Court issued a second judgment in 2018 assessing the amount owed to Costa Rica as a compensation for this damage.[406] This amount comprised 120,000 USD "for the impairment or loss of environmental goods and services" and 2,708.39 USD "for the restoration costs".[407] The payment of a much bigger amount was ordered in the last judgment on compensation, in the *Armed Activities* case (2022). This is due to the seriousness of the violations, related to the prohibition of the use of force and the principle of non-intervention, as well as to numerous obligations under international human rights law and international humanitarian law. There, Uganda was ordered to pay the DRC 225,000,000 USD for damage to persons, 40,000,000 USD for property damage, and 60,000,000 USD for damage related to natural resources.[408] In sum, it can be observed that the ICJ applies compensation surprisingly scarcely, and when it does it mostly leaves the content of that remedy open, allowing the parties to reach an agreement on this issue and fixing an amount only when they fail to do so.

b) Legislative reforms as compensation

Due to the exclusively pecuniary character of this remedy, it is rather difficult to think of instances in which the orders to reform domestic laws could fulfil the function of compensation. It could be possible that in some cases

405 ICJ, *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Compensation, ICJ Reports 324, 2012. This included 85.000 USD in the form of non-material damage and 10.000 USD for material damage. The latter amount is surprisingly low, and the ICJ expressly rejected to include Mr. Diallo's loss of earnings during his unlawful detentions and following his unlawful expulsion (see in this respect ICJ, *Diallo* [Compensation], 2012, Declaration of judge Yusuf).

406 ICJ, *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Compensation, ICJ Reports 226, 2018.

407 ICJ, *Certain Activities,* Compensation (2018), para. 157 (1) (a) and (b).

408 ICJ, *Armed Activites on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Reparations, General List No. 116, 09 February 2022.

the state would need to amend its laws in order to allow for compensation to be made, in a similar way to the aforementioned legislative reforms that would allow for the review of domestic judgments.[409] This would however be as a matter of domestic law, and the act of compensation would still be the payment of the awarded sum, not the eventual internal arrangement leading thereto. Thus, legislative reforms can hardly be conceptualised as fulfilling the function of compensation.

4. Satisfaction

The remedial category of satisfaction is aimed at redressing infringements that "cannot be made good by restitution or compensation".[410] It is however "rather exceptional", according to the ILC Commentary.[411] Its specific characteristics being less clear than the ones of the other categories, some authors have defined satisfaction very broadly, as "every performance which is extended to the aggrieved party in reparation of non-pecuniary detriments".[412] Despite being the only form of reparation that was not already recognised and applied by the PCIJ, nowadays "the availability of satisfaction is well established in international law".[413] Satisfaction can be both pecuniary and non-pecuniary, and some authors even include guarantees of non-repetition under its scope.[414] The ARSIWA contains a non-exhaustive list of modalities that satisfaction can take, including "an acknowledgement of the breach, an expression of regret, a formal apology

409 It is however less likely, as an administrative act such as the payment of a monetary sum is usually not restricted by domestic laws in the same way that the review of finals judgments is.

410 ARSIWA, Art. 37(1).

411 ARSIWA, Commentary to Art. 37, para. 1. See also Crawford, *State Responsibility*, 2013, p. 574.

412 Haasdijk, *LJIL* 1992, p. 255.

413 Crawford, *State Responsibility*, 2013, p. 507. See also in this sense *Rainbow Warrior* (1990), para. 122 ("There is a long established practice of States and international Courts and Tribunals of using satisfaction as a remedy or form of reparation").

414 See Amerasinghe, 2003, p. 418, arguing that "the most common types of satisfaction [...] may be divided into four groups: apologies, punishment of the guilty, *assurances as to the future* and pecuniary satisfaction" (emphasis added). However, the ARSIWA clearly situates guarantees of non-repetition as an autonomous remedial category in its Article 30 (b).

or another appropriate modality".[415] As will be seen in the next chapter, the scope of satisfaction is much narrower in general international adjudication than in human rights adjudication. A classic example of satisfaction in general international adjudication can be found in the *I'm Alone* case (1935), in which the arbitral tribunal resolving the dispute determined "that the United States ought formally to acknowledge its illegality, and to apologize to His Majesty's Canadian Government therefor[e]".[416]

a) Satisfaction in the ICJ's case law

The ICJ, however, has taken a different approach towards this sort of remedy. Indeed, the only type of satisfaction it has awarded has been in the form of declaratory judgments. The aforementioned *Corfu Channel* judgment (1949), awarded satisfaction this way. After declaring that the actions of the British Navy "violated the sovereignty of the People's Republic of Albania", it stated that "this declaration by the Court constitutes in itself appropriate satisfaction".[417] This form of providing satisfaction to the injured state merely by declaring the infringement of an international obligation has been confirmed in numerous subsequent judgments.[418] Such remedies are usually found in cases in which there has been no material damage, or when the damage cannot be attributed to the injuring state. Judicial declarations are however not included among the forms of satisfaction listed in the ARSIWA. According to Crawford, the reasons for this omission are that the articles were not primarily thought of as rules to be applied in formal

415 ARSIWA, Art. 37.2. There is however no hierarchy or preference in this regard (ARSIWA, Commentary to Art. 37, para. 5).

416 *S.S "I'm Alone" (Canada vs. United States of America)*, UN Reports on International Arbitral Awards, vol. III, 1935, p. 1618.

417 ICJ, *Corfu Channel*, p. 36. See also Crawford, in Tams and Sloan (eds.), 2013, p. 74, arguing that this statement constitutes a "clearly discretionary and flexible finding".

418 ICJ, *Pulp Mills on the River Uruguay (Argentina vs. Uruguay)*, ICJ Reports 14, 2010, operative para. 1; ICJ, *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti vs. France)*, ICJ Reports 177, 2008, operative para. 2(a); ICJ, *Arrest Warrant* (2002), para. 31; ICJ, *Genocide* (2007), operative para. 9. See also, critical with the remedial approach in the latter case, Conor McCarthy, "Reparation for Gross Violations of Human Rights Law and International Humanitarian Law at the International Court of Justice", in Carla Ferstman et al. (eds.), *Reparations for Victims of Genocide, Crimes against Humanity and War Crimes: Systems in Place and Systems in the Making*, Brill Nijhoff, 2009, pp. 250-251.

adjudication procedures and that the authority to make declarations on the lawfulness of a conduct is independent of the power to award remedies.[419]

Certainly, the ICJ can limit its adjudicatory function to the award of judicial declarations and – although often not expressly considering it a form of satisfaction – this is indeed what it does in most cases. Nevertheless, some commentators have been critical towards this practice. Lauterpacht warned already in 1958 about the risk that "unless the rendering of declaratory judgments (…) is kept within limits, the contentious jurisdiction of the Court might be used as a means for obtaining Advisory Opinions by States".[420] Similarly, according to Tomuschat, "if the Court were confined to delivering declaratory decisions (…) its real impact in the process of conflict resolution would be greatly diminished".[421] Others however indicate that "in many instances the declaration can be sufficient to entirely resolve the dispute".[422]

If declaring a violation of international law is considered by the ICJ to be a form of satisfaction, it provides for this type of remedy in all cases concerning state responsibility, even if it does not expressly mention it. However, this also means that it is a remedial category with very limited impact, as it does not mandate any subsequent action by the infringing state. As mentioned before, it is even doubtful whether judicial declarations as such should be considered a remedy at all, as they do not give rise to any secondary obligation.

b) Legislative reforms as satisfaction

The common understanding of satisfaction in general international law comprises rather symbolic forms of providing reparation to the injured state, thus generally not including reforms of domestic law in this respect. Nevertheless, according to the ILC, there are some instances in which satisfaction can also consist of guarantees of non-repetition.[423] The example

419 See Crawford, *State Responsibility*, 2013, p. 529.
420 Lauterpacht, 1958, at p. 250.
421 Tomsuchat, in Zimmermann et al. (eds.), 2019, p. 740.
422 McIntyre, *LJIL* 2016, p. 181.
423 This was stated in the ARSIWA, Commentary to Art. 37, para. 5. See in this regard also Crawford, *State Responsibility*, 2013, at p. 475 ("[w]ether assurances and guarantees are a form of satisfaction caused a marked division of opinion during the drafting of Article 30(b)").

it uses with respect to this potential overlap is "the repeal of the legislation which allowed the breach to occur".[424]

Such an understanding can also be found in literature,[425] although in none of the cases in which legislative reforms were sought by the applicants or recommended by the ICJ did these correspond to a form of satisfaction. Taking into account the aforementioned restrictive approach of the ICJ towards satisfaction, which is only awarded in the form of declaratory judgments, it is rather doubtful that the Court would order legislative reforms for this purpose. Instead, if the remedial practice of the ICJ concerning satisfaction would evolve to include specific measures, it would most likely order apologies or other types of symbolic measures.

5. Guarantees of Non-Repetition

The last remedial category comprises the assurances and guarantees of non-repetition, and in contrast to the other categories it does not aim at redressing an infringement, but at preventing its recurrence. As opposed to 'assurances', 'guarantees' do not only consist of a verbal statement but require something more, such as the adoption of preventive measures.[426] The remedies of this sort have a rather exceptional character, as indicated by the words "if circumstances so require" in the ARSIWA.[427] In fact, the paragraph containing this remedial category was – according to Crawford – "the most contentious" during the process of drafting this part of the Articles.[428]

a) Guarantees of non-repetition in the ICJ's case law

The award of these remedies by the ICJ is an issue in which disagreements persist in literature. Some authors consider that the ICJ has ordered guarantees of non-repetition in a few cases, while others maintain that it has

424 ARSIWA, Commentary to Art. 30, para. 11.
425 See Haasdik, *LJIL* 1992, p. 252 ("Sometimes, however, actions as a declaration that the relevant act of the executive, legislature or judicial organs of the respondent state is a nullity in international law are classified as an aspect of satisfaction").
426 ARSIWA, Commentary to Art. 30, para. 12.
427 ARSIWA, Art. 30(b). See also ARSIWA, Commentary to Art. 30, para. 13.
428 Crawford, *State Responsibility*, 2013, pp. 469 - 470.

never done so. The cause of this controversy are the cases of *LaGrand* (2001) and *Avena* (2004). Indeed, the *LaGrand* case was the first time in which the ICJ had to deal with its competence to order guarantees of non-repetition.[429] Upon the request of such remedial measures by Germany,[430] the US declared that "the requirement of assurances of non-repetition sought in the fourth submission has no precedent in the jurisprudence of this Court and would exceed the Court's jurisdiction and authority in this case".[431] The Court rejected this view by affirming that "[w]here jurisdiction exists over a dispute on a particular matter, no separate basis for jurisdiction is required by the Court to consider the remedies a party has requested for the breach of the obligation".[432] It stated in addition that due to the seriousness of the breach – a German national had been convicted and subsequently executed by the US after a violation of his right to consular assistance in the context of his detention – an apology would not suffice.[433]

The ICJ considered however in this respect that the mere commitment expressed by the US to comply with its international obligations met Germany's request for assurances and guarantees of non-repetition.[434] It moreover specified concrete measures to be taken by the State in case it failed to comply with this commitment. As previously mentioned, it stated in the operative provisions that if German nationals should be convicted in violation of their rights under the VCCR in the future, the US "shall allow the review and reconsideration of the conviction and sentence".[435] Then, the ICJ applied exactly this same reasoning with respect to guarantees of

429 See in this regard Christian J. Tams, "Recognizing Guarantees and Assurances of Non Repetition: LaGrand and the Law of State Responsibility", *YJIL* 27, 2002, pp. 441-444. Also, the importance of this case for the law on state responsibility is reflected in the fact that the ILC decided to wait until the *LaGrand* judgment was issued in order to complete the second reading of the ARSIWA, in which guarantees of non-repetition were included as an autonomous remedy. Until then, these guarantees had been considered a form of satisfaction. See Pierre-Marie Dupuy and Cristina Hoss, "The LaGrand Case", *MPEPIL*, especially at para. 37.

430 ICJ, *LaGrand* (2001), para. 122. Germany in fact stated that "an effective remedy requires certain changes in US law and practice".

431 ICJ, *LaGrand* (2001), para. 119.

432 ICJ, *LaGrand* (2001), para. 48.

433 ICJ, *LaGrand* (2001), para. 123.

434 ICJ, *LaGrand* (2001), para. 124; operative para. 6 ("finds that this commitment must be regarded as meeting the Federal Republic of Germany's request for a general assurance of non-repetition").

435 ICJ, *LaGrand* (2001), operative para. 7.

non-repetition in the *Avena* judgment (2004), as it was dealing with the same substantive issues.[436]

Whether or not the inclusion of the aforementioned operative paragraph can be considered a guarantee of non-repetition is what causes disagreement.[437] According to Higgins, this review and reconsideration of future cases "could be viewed either as a reiteration of a primary obligation, or as a remedy for a breach".[438] Shelton affirms that it meets the "specific assurance [of non-repetition] requested by Germany".[439] Tams also considers it to be a guarantee of non-repetition, stating that "by recognizing this remedy, the [*LaGrand*] judgment seems to move away from a purely restorative approach to responsibility".[440] The Court, on its side, seems to consider that it has already ordered guarantees of non-repetition. This can be seen in the *Navigational Rights* judgment (2009), where it stated that "the Court may order, *as it has done in the past*, (…) to provide the injured State with assurances and guarantees of non-repetition".[441]

Crawford has a different view, affirming that leaving the choice of means to the discretion of the state "does not reflect the character of assurances and guarantees that the Court can award".[442] Quintana also considers that "while in LaGrand the Court did not grant a guarantee or assurance of non-repetition as a remedy, it refrained from closing the door to this form of relief being used in future cases".[443] This latter view is arguably more convincing, as the ICJ is requesting a review and reconsideration of future judgments only if the State were to fail again in complying with its primary obligation of providing consular assistance. Thus, it does not aim at a non-repetition of the violation, but at a redress after a potential repetition. Moreover, as it does not require any particular action on behalf of the state, it is doubtful whether this statement constitutes a remedy at all.

436 ICJ, *Avena* (2004), para. 150.

437 See Pellet in Kovács (ed.), 2011, at p. 129, arguing that "[t]his confusion highlights the quite artificial character of the distinction operated by the ILC Articles between, on the one side, guarantees and assurances of non-repetition (…) and on the other side, restitution".

438 See Rosalyn Higgins, "The International Court of Justice: Selected Issues of State Responsibility", in Maurizio Ragazzi (ed.), *International Responsibility Today*, Leiden: Matrinus Nijhoff, 2005, p. 278.

439 Shelton, *AJIL* 2002, p. 847.

440 Tams, *YJIL* 2002, p. 443.

441 ICJ, *Dispute regarding Navigational and Related Rights* (2009), para. 150 (emphasis added). The same was also stated in ICJ, *Pulp Mills* (2010), para. 278.

442 Crawford, *State Responsibility*, 2013, p. 477.

443 Quintana, 2015, p. 1155. On similar terms also Brown, 2007, p. 213.

There have been a number of subsequent cases in which the applicants requested specific guarantees of non-repetition but the Court refused to award them.[444] For example, in the *Armed Activities* case (2005), the ICJ considered that "the commitments assumed by Uganda under the Tripartite Agreement must be regarded as meeting the DRC's request for specific guarantees and assurances of non-repetition".[445] This approach has been followed in several instances, whereby the ICJ has usually relied on the presumption of good faith for rejecting the award of concrete guarantees of non-repetition. In several judgments, it stated that "as a general rule, there is no reason to suppose that a State whose act or conduct has been declared wrongful by the Court will repeat that act or conduct in the future".[446] Some authors have considered as "puzzling" the fact that the ICJ did not issue this type of remedy even in cases in which it would have been justified.[447] Nevertheless, there is no controversy nowadays on the fact that the ICJ does have the competence to order guarantees of non-repetition if it deems it appropriate.[448]

b) Legislative reforms as guarantees of non-repetition

Non-repetition is probably the most common function of legislative remedies in the field of human rights law.[449] In general international law, it is less clear whether legislative reforms should be conceptualised as fulfilling this role. Legislative reforms are on the one hand referred to in the Commentary to the provision of ARSIWA on guarantees of non-repetition. As

444 See for example ICJ, *Genocide* (2007), para. 466; *Pulp Mills* (2010), para. 278; *Jurisdictional Immunities* (2012), para. 138.

445 ICJ, *Armed Activites on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Merits, ICJ Reports 168, 2005, para. 257.

446 ICJ, *Navigational Rights*, para. 150; ICJ, *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia vs. Greece)*, ICJ Reports 644, 2011, para. 168; ICJ, *Pulp Mills* (2010), para. 278. See in this regard Robert Paulson, "Compliance with Final Judgments of the International Court of Justice Since 1987", *AJIL* 98(3), 2004, pp. 434-461.

447 Crawford in Tams and Sloan (eds.), 2013, p. 82.

448 Crawford, *State Responsibility*, 2013, p. 473.

449 The UN Basic Principles and Guidelines on the Right to a Remedy and Reparation include under the heading of guarantees of non-repetition the obligation of "[r]eviewing and reforming laws contributing to or allowing gross violations of international human rights law and serious violations of international humanitarian law" (UN Basic Principles, para. 23(h)). See Chapter 3 of this book.

was mentioned in the previous section, this is done when the Commentary mentions the similarity between this remedial category and the one of satisfaction. Legislative remedies can also be found as a typical example in literature when referring to guarantees of non-repetition.[450]

In addition, in the two cases in which non-repetition was extensively discussed by the ICJ – *LaGrand* (2001) and *Avena* (2004) – both Germany and Mexico requested a reform of US law as a guarantee in this respect.[451] The Court, pointing out explicitly that it "can also hold that a domestic law has been the cause of this violation", held however that the contested law was not "inherently inconsistent" with the US' treaty obligations, as the infringement lied rather in the application of that law in the concrete case.[452] In these cases, it became clear that the ICJ can, in principle, request a legislative reform as a guarantee of non-repetition, as its competence to do so was not contested by the Respondent State nor by the Court itself. On the other hand, it seems rather doubtful that it will do so, especially taking into account the restrictive approach of the Court towards such guarantees, as shown in this section.

Interim Conclusion: The Particular Functions of Remedies in General International Adjudication as a Barrier for Legislative Measures

This chapter has provided a general overview of remedies before general international courts, as exemplified by the remedial practice of the ICJ. The first relevant observation in this regard is that this Court's remedial measures are mostly focused on achieving the cessation of internationally wrongful acts and the restitution of the injured state. Measures of compensation are also included in some – rather few – cases, while those of satisfaction have only been applied in the form of declaratory judgments. Despite some controversy in this respect, it is submitted that guarantees of non-repetition have not been ordered yet by the ICJ. Satisfaction and

450 For example, when commenting on the *inter partes* character of guarantees of non-repetition, Tams argues that "where a state is under a duty to adopt changes to its existing laws and regulations, the fiction underlying Article 59 of the ICJ Statute will become more difficult to uphold". Tams, *YJIL* 2002, p. 444.

451 ICJ, *LaGrand* (2001), para. 11(4); ICJ, *Avena* (2004), para. 12(2) ("the United States must take the steps necessary and sufficient to ensure that the provisions of its municipal law enable full effect to be given to the purposes for which the rights afforded by Article 36 are intended").

452 ICJ, *LaGrand* (2001), para. 125.

guarantees of non-repetition are thus clearly disfavoured in general international law, according to Shelton because the former "has been used in the past as a punitive measure" and the latter "anticipate[s] future breaches", while the ICJ relies on the good faith of states.[453]

In addition, most likely due to its status as the 'classical' international court per excellence, the ICJ has maintained a rather conservative approach towards the issue of remedies. It is a court that may be more hesitant to develop its jurisprudence in a way that could cause resistance by states. This is also related to its competence to adjudicate disputes, which is more dependent on instances of state consent for individual cases. By contrast, in the field of human rights adjudication, consent is given for the respective court to adjudicate alleged treaty violations by the state more generally, being therefore more difficult to withdraw.[454]

With regard to legislative remedies, two main conclusions can be drawn from this analysis. First, although the ICJ has never expressly ordered a legislative reform in one of its judgments, it would arguably have the competence to do so. This conclusion flows both from the codification of remedies included in the ARSIWA and from the practice of the Court. With respect to the latter, this chapter has shown cases where the ICJ recommended states to reform their domestic laws, as well as others in which states explicitly requested binding legislative measures. Such requests were not dismissed by the Court arguing a lack of competence. On the contrary, it even explicitly determined in the *LaGrand* judgment that a domestic law can be the cause of an internationally wrongful act, thus implying that it could prescribe a legislative reform in such a context.

However, despite having this competence, it is less clear whether it would be wise for the ICJ to exercise it. Ordering a legislative reform would not be without problems, as it interferes very strongly with the democratic element of the states' sovereignty. As shown in Chapter 1, legislation enjoys a higher democratic legitimacy than executive decrees or domestic judgments, thus causing reforms ordered by international courts to be capable of triggering resistance and even backlash.[455] In this respect, the judicial review of

453 Shelton, *AJIL* 2002, p. 844.

454 As it was mentioned before, the competence of the ICJ is based on 'compromissory clauses' included in treaties or optional declarations issued by states. While the former is similar to the competence of human rights courts, the latter leaves much more discretion for states to decide whether consent for jurisdiction is given for a concrete dispute.

455 See on the latter issue especially Chapter 6 of this book.

legislation by this Court without explicit delegation could be seen as an "usurp[ation of] power from states".[456]

Moreover, it is arguably not the function of the ICJ to ensure the compatibility of domestic laws and international instruments, but only to solve specific disputes among states. It has been argued in this context that the ICJ is "attracted by a transactional justice approach specifically tailored to address the contingencies of individual cases rather than by large-scheme purposes".[457] This is also reflected in the inter-state nature of the disputes that are submitted to this Court, which – when dealing with internal affairs of states – are more likely connected to administrative or judicial practices rather than to legislation, as the latter does generally not affect other states.[458] Although the ICJ can deal (and, in some instances, has indeed dealt) with human rights-related issues, it links the potential human rights violations to the bilateral relationship of the corresponding states and the obligations they owe each other, and not to the issue of compliance with a human rights treaty more generally. Thus, it seems that the ICJ will be cautious as to the advancement of its remedial practice on that front.

Another question which necessitates further study is the function that legislative measures would adopt in general international adjudication. If the ICJ were to include legislative remedies, they would most probably adopt the form of an order of cessation or a measure leading to juridical restitution. They would thus function as a way of ceasing the violation (for example ordering the review of a law that is directly causing an internationally wrongful act) or allowing the restoration of the legal situation that existed before the violation took place (for example, as hinted in *LaGrand*, with respect to a law that prevents courts from reviewing final domestic acts or judgments, thus impeding restitution). From a doctrinal point of view, legislative reforms could certainly also be labelled as a form of satisfaction or a guarantee of non-repetition, but the ICJ's aforementioned practice towards these sorts of remedies makes it rather doubtful that they would adopt any of these functions in its case law.

To sum up, the analysis contained in this chapter has shown that, in practice, the main function of remedies in the field of general international adjudication is putting an end to ongoing violations and providing states

456 See Çalı in Lang and Wiener (eds.), 2017, p. 295 ("In the face of a lack of explicit delegation, general international courts performing judicial review-type activities usurp power from states").
457 Zarbiyev, *JIDS* 2012, p. 259.
458 Çalı in Lang and Wiener (eds.), 2017, p. 294.

with restitution. This represents an important difference with remedies in international human rights adjudication, a field that will be examined in the next chapter. There, the use of compensation measures is especially notable, as well as the focus on guarantees of non-repetition and measures of satisfaction. Moreover, legislative remedies are not as problematic in human rights law, especially because the sovereignty of states and its democratic features can be more easily overstepped if the state in question does not respect human rights, not least because the protection of human rights is nowadays seen as an important element of this democratic principle.[459] With other international norms that are arguably less fundamental to the international legal order, sovereignty and democracy considerations are rightly taken more seriously by courts and should only be overstepped under highly exceptional circumstances. It is of course difficult to argue that some international obligations are hierarchically superior to others, but in any case, human rights have a counter-majoritarian dimension that other international rules are lacking, and this should also be taken into account when designing remedies.

459 See Chapter 1 of this book.