Flexibility in the Award of Reparation: The Role of the Parties and the Tribunal

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I Introduction

It is axiomatic that jurisdiction to determine breach of an obligation implies jurisdiction to award reparation for any breach found. This principle was articulated in general terms by the Permanent Court of International Justice (PCIJ) in the Chorzów Factory case:

The decision whether there has been a breach of an engagement involves no doubt a more important jurisdiction than a decision as to the nature or extent of reparation due for a breach of an international engagement the existence of which is already established.2

As elaborated by the PCIJ in its subsequent decision on the merits, “jurisdiction as to the reparation due for the violation of an international convention involves jurisdiction as to the forms and methods of reparation”.3 This principle has been affirmed by the International Court of Justice (ICJ) in clear terms,4 and is firmly established.5

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2 Chorzów Factory at Chorzów, Jurisdiction, (1927) PCIJ Ser A No 9, 23.

3 Chorzów Factory at Chorzów, Merits, (1928) PCIJ Ser A No 17, 61.

4 In 1987 Gray stated in respect of the Chorzów Factory principle that "the Court has consistently maintained this approach in all its later decisions": C Gray, Judicial Remedies in International Law (1987), 60. As one example, in LaGrand the ICJ stated "[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": LaGrand (Germany v. United States of America), Judgment, ICJ Reports 2001 pp. 466, 485.

5 Commentary to the ILC Articles on the Responsibility of States for Internationally Wrongful Acts, Art 36, para 2, printed in Yearbook of the International Law Commission
Less well explored are the ramifications of the *Chorzów Factory* principle, two of which will be considered in this chapter. The first is the extent of judicial discretion to determine the appropriate form of reparation. The second is the exercise of an injured state’s right to elect between available forms of reparation and the effect on that right of any action taken by an injured state in connection with judicial proceedings.

## II Judicial Discretion in Awarding Remedies

An injured state’s entitlement to reparation for breach is affirmed in the International Law Commission (ILC) Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA). Article 31(1) of the ARSIWA provides that:

> The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.

As is clear from the wording of the Article, reparation is an ‘obligation’ of a responsible state. That is, an obligation to provide reparation arises automatically on the commission of an internationally wrongful act. It is not contingent upon, for example, a demand or protest by the injured state.

Article 34 goes on to identify the three forms which reparation may take:

> Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination...

The ARSIWA contain separate articles on restitution, compensation and satisfaction. While each of those Articles refers to an ‘obligation’ to provide restitution,

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6 The ARSIWA are annexed to GA Res 56/83, 28 January 2002, and are also printed in *Yearbook of the International Law Commission 2001*, vol ii(2), 26 (ARSIWA).

7 J Crawford, “Third Report on State Responsibility”, *Yearbook of the International Law Commission 2000*, vol ii(1), 3, at 18; ARSIWA Commentary, * supra* n 5, Art 31, para 4. This is one of the reasons why the Article was changed after the first reading from a provision which expressed reparation to be an *entitlement* of an injured state: Draft Articles on the Responsibility of States for Internationally Wrongful Acts, Art 42(1), printed in *Yearbook of the International Law Commission 1996*, vol ii(2), 58.