Article 37. Satisfaction

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

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

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

Commentary

(1) Satisfaction is the third form of reparation which the responsible State may have to provide in discharge of its obligation to make full reparation for the injury caused by an internationally wrongful act. It is not a standard form of reparation, in the sense that in many cases the injury caused by an internationally wrongful act of a State may be fully repaired by restitution and/or compensation. The rather exceptional character of the remedy of satisfaction, and its relationship to the principle of full reparation, are emphasized by the phrase "insofar as [the injury] cannot be made good by restitution or compensation". It is only in those cases where those two forms have not provided full reparation that satisfaction may be required.

(2) Article 37 is divided into three paragraphs, each dealing with a separate aspect of satisfaction. Paragraph 1 addresses the legal character of satisfaction and the types of injury for which it may be granted. Paragraph 2 describes, in a non-exhaustive fashion, some modalities of satisfaction. Paragraph 3 places limitations on the obligation to give satisfaction, having regard to former practices in cases where unreasonable forms of satisfaction were sometimes demanded.

(3) In accordance with paragraph 2 of article 31, the injury for which a responsible State is obliged to make full reparation embraces "any damage, whether material or moral, caused by the internationally wrongful act of a State." Material and moral damage resulting from an internationally wrongful act will normally be financially assessable and hence covered by the remedy of compensation. Satisfaction, on the other hand, is the remedy for those injuries, not financially assessable, which amount to an affront to the State. These injuries are frequently of a symbolic character, arising from the very fact of the breach of the obligation, irrespective of its material consequences for the State concerned.

(4) The availability of the remedy of satisfaction for injury of this kind, sometimes described as "non-material injury",[1712] [580] is well established in international law. The point was made, for example, by the tribunal in the *"Rainbow Warrior"* arbitration:

> There is a long established practice of States and international Courts and Tribunals of using satisfaction as a remedy or form of reparation (in the wide sense) for the breach of an international obliga-

[1712] [580] See C. Dominicé, "De la réparation constructive du préjudice immatériel souffert par un État", *L'ordre juridique international entre tradition et innovation: recueil d'études* (Paris, Presses Universitaires de France, 1997), p. 349, at p. 354.

tion. This practice relates particularly to the case of moral or legal damage done directly to the State, especially as opposed to the case of damage to persons involving international responsibilities.[1713] 581

State practice also provides many instances of claims for satisfaction in circumstances where the internationally wrongful act of a State causes non-material injury to another State. Examples include situations of insults to the symbols of the State, such as the national flag,[1714] 582 violations of sovereignty or territorial integrity,[1715] 583 attacks on ships or aircraft,[1716] 584 ill-treatment of or deliberate attacks on heads of State or Government or diplomatic or consular representatives or other protected persons[1717] 585 and violations of the premises of embassies or consulates or of the residences of members of the mission.[1718] 586

(5) Paragraph 2 of article 37 provides that satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality. The forms of satisfaction listed in the article are no more than examples. The appropriate form of satisfaction will depend on the circumstances and cannot be prescribed in advance.[1719] 587 Many possibilities exist, including due inquiry into the causes of an accident resulting in harm or injury,[1720] 588 a trust fund to manage compensation payments in the interests of the beneficiaries, disciplinary or penal action against the individuals whose conduct caused the

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[1713] 581 *"Rainbow Warrior"* (footnote [40] 46 above), pp. 272–273, para. 122.

[1714] 582 Examples are the *Magee* case (Whiteman, *Damages in International Law*, vol. I (footnote [1007] 347 above), p. 64 (1874)), the *Petit Vaisseau* case (*La prassi italiana di diritto internazionale*, 2nd series (footnote [1485] 498 above), vol. III, No. 2564 (1863)) and the case that arose from the insult to the French flag in Berlin in 1920 (C. Eagleton, *The Responsibility of States in International Law* (New York University Press, 1928), pp. 186–187).

[1715] 583 As occurred in the *"Rainbow Warrior"* arbitration (footnote [40] 46 above).

[1716] 584 Examples include the attack carried out in 1961 against a Soviet aircraft transporting President Brezhnev by French fighter planes over the international waters of the Mediterranean (RGDIP, vol. 65 (1961), p. 603); and the sinking of a Bahamian ship in 1980 by a Cuban aircraft (*ibid*., vol. 84 (1980), pp. 1078–1079).

[1717] 585 See F. Przetacznik, "La responsabilité internationale de l'État à raison des préjudices de caractère moral et politique causés à un autre État", RGDIP, vol. 78 (1974), p. 919, at p. 951.

[1718] 586 Examples include the attack by demonstrators in 1851 on the Spanish Consulate in New Orleans (Moore, *Digest*, vol. VI, p. 811, at p. 812), and the failed attempt of two Egyptian policemen, in 1888, to intrude upon the premises of the Italian Consulate at Alexandria (*La prassi italiana di diritto internazionale*, 2nd series (footnote [1485] 498 above), vol. III, No. 2558). Also see cases of apologies and expressions of regret following demonstrations in front of the French Embassy in Belgrade in 1961 (RGDIP, vol. 65 (1961), p. 610), and the fires in the libraries of the United States Information Services in Cairo in 1964 (*ibid*., vol. 69 (1965), pp. 130–131) and in Karachi in 1965 (*ibid*., vol. 70 (1966), pp. 165–166).

[1719] 587 In the *"Rainbow Warrior"* arbitration the tribunal, while rejecting New Zealand's claims for restitution and/or cessation and declining to award compensation, made various declarations by way of satisfaction, and in addition a recommendation "to assist [the parties] in putting an end to the present unhappy affair". Specifically, it recommended that France contribute US$ 2 million to a fund to be established "to promote close and friendly relations between the citizens of the two countries" (footnote [40] 46 above), p. 274, paras. 126–127. See also L. Migliorino, "Sur la déclaration d'illicéité comme forme de satisfaction: à propos de la sentence arbitrale du 30 avril 1990 dans l'affaire du Rainbow Warrior", RGDIP, vol. 96 (1992), p. 61.

[1720] 588 For example, the United States naval inquiry into the causes of the collision between an American submarine and the Japanese fishing vessel, the *Ehime Maru*, in waters off Honolulu, *The New York Times*, 8 February 2001, sect. 1, p. 1.

internationally wrongful act[1721] [589] or the award of symbolic damages for non-pecuniary injury.[1722] [590] Assurances or guarantees of non-repetition, which are dealt with in the articles in the context of cessation, may also amount to a form of satisfaction.[1723] [591] Paragraph 2 does not attempt to list all the possibilities, but neither is it intended to exclude them. Moreover, the order of the modalities of satisfaction in paragraph 2 is not intended to reflect any hierarchy or preference. Paragraph 2 simply gives examples which are not listed in order of appropriateness or seriousness. The appropriate mode, if any, will be determined having regard to the circumstances of each case.

(6) One of the most common modalities of satisfaction provided in the case of moral or non-material injury to the State is a declaration of the wrongfulness of the act by a competent court or tribunal. The utility of declaratory relief as a form of satisfaction in the case of non-material injury to a State was affirmed by ICJ in the *Corfu Channel* case, where the Court, after finding unlawful a mine-sweeping operation (Operation Retail) carried out by the British Navy after the explosion, said:

> [T]o ensure respect for international law, of which it is the organ, the Court must declare that the action of the British Navy constituted a violation of Albanian sovereignty.
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> This declaration is in accordance with the request made by Albania through her Counsel, and is in itself appropriate satisfaction.[1724] [592]

This has been followed in many subsequent cases.[1725] [593] However, while the making of a declaration by a competent court or tribunal may be treated as a form of satisfaction in a given case, such declarations are not intrinsically associated with the remedy of satisfaction. Any court or tribunal which has jurisdiction over a dispute has the authority to determine the lawfulness of the conduct in question and to make a declaration of its findings, as a necessary part of the process of determining the case. Such a declaration may be a preliminary to a decision on any form of reparation, or it may be the only remedy sought. What the Court did in the *Corfu Channel* case was to use a declaration as a form of satisfaction in a case where Albania had sought no other form. Moreover, such a declaration has further advantages: it should be clear and self-contained and will by definition not exceed the scope or limits of satisfaction referred to in paragraph 3 of article 37. A judicial declaration is not listed in paragraph 2 only because it must emanate from a competent third party with jurisdiction over a dispute, and the articles are not concerned to specify such a party or to deal with issues of judicial jurisdiction. Instead, article 37 specifies the acknowledgement of the breach by the responsible State as a modality of satisfaction.

(7) Another common form of satisfaction is an apology, which may be given verbally or in writing by an appropriate official or even the Head of State. Expressions of regret or apolo-

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[1721] [589] Action against the guilty individuals was requested in the case of the killing in 1948, in Palestine, of Count Bernadotte while he was acting in the service of the United Nations (Whiteman, *Digest of International Law*, vol. 8, pp. 742–743) and in the case of the killing of two United States officers in Tehran (RGDIP, vol. 80 (1966), p. 257).

[1722] [590] See, *e.g.*, the cases *"I'm Alone"*, UNRIAA, vol. III (Sales No. 1949.V.2), p. 1609 (1935); and *"Rainbow Warrior"* (footnote [40] 46 above).

[1723] [591] See paragraph (11) of the commentary to article 30.

[1724] [592] *Corfu Channel, Merits* (footnote [29] 35 above), p. 35, repeated in the operative part (p. 36).

[1725] [593] For example, *"Rainbow Warrior"* (footnote [40] 46 above), p. 273, para. 123.

gies were required in the *"I'm Alone"*,[1726] [594] *Kellett*[1727] [595] and *"Rainbow Warrior"*[1728] [596] cases, and were offered by the responsible State in the *Consular Relations*[1729] [597] and *LaGrand*[1730] [598] cases. Requests for, or offers of, an apology are a quite frequent feature of diplomatic practice and the tender of a timely apology, where the circumstances justify it, can do much to resolve a dispute. In other circumstances an apology may not be called for, *e.g.* where a case is settled on an *ex gratia* basis, or it may be insufficient. In the *LaGrand* case the Court considered that "an apology is not sufficient in this case, as it would not be in other cases where foreign nationals have not been advised without delay of their rights under article 36, paragraph 1, of the Vienna Convention and have been subjected to prolonged detention or sentenced to severe penalties".[1731] [599]

(8) Excessive demands made under the guise of "satisfaction" in the past[1732] [600] suggest the need to impose some limit on the measures that can be sought by way of satisfaction to prevent abuses, inconsistent with the principle of the equality of States.[1733] [601] In particular, satisfaction is not intended to be punitive in character, nor does it include punitive damages. Paragraph *3* of article 37 places limitations on the obligation to give satisfaction by setting out two criteria: first, the proportionality of satisfaction to the injury; and secondly, the requirement that satisfaction should not be humiliating to the responsible State. It is true that the term "humiliating" is imprecise, but there are certainly historical examples of demands of this kind.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

International arbitral tribunal (under the ICSID Convention)

Quiborax S.A. et al. v. *Plurinational State of Bolivia*

In its decision on jurisdiction in *Quiborax S.A. et al.* v. *Plurinational State of Bolivia,* the arbitral tribunal decided that it was more appropriate to entertain in the final award on the merits the claimants' request for a declaratory judgment pursuant to article 37.[1734] [187]

[A/68/72, para. 129]

[1726] [594] See footnote [1722] 590 above.

[1727] [595] Moore, *Digest*, vol. V, p. 44 (1897).

[1728] [596] See footnote [40] 46 above.

[1729] [597] *Vienna Convention on Consular Relations (Paraguay* v. *United States of America), Provisional Measures, Order of 9 April 1998, I.C.J. Reports 1998*, p. 248. For the text of the United States' apology, see United States Department of State, Text of Statement Released in Asunción, Paraguay; Press statement by James P. Rubin, Spokesman, 4 November 1998. For the order discontinuing proceedings of 10 November 1998, see *I.C.J. Reports 1998*, p. 426.

[1730] [598] See footnote [236] 119 above.

[1731] [599] *LaGrand*, *Merits* (*ibid.*), para. 123.

[1732] [600] For example, the joint note presented to the Chinese Government in 1900 following the Boxer uprising and the demand by the Conference of Ambassadors against Greece in the *Tellini* affair in 1923: see C. Eagleton, *op. cit.* (footnote [1714] 582 above), pp. 187–188.

[1733] [601] The need to prevent the abuse of satisfaction was stressed by early writers such as J. C. Bluntschli, *Das moderne Völkerrecht der civilisirten Staten als Rechtsbuch dargestellt*, 3rd ed. (Nördlingen, Beck, 1878); French translation by M. C. Lardy, *Le droit international codifié*, 5th rev. ed. (Paris, Félix Alcan, 1895), pp. 268–269.

[1734] [187] ICSID, Case No. ARB/06/2, Decision on Jurisdiction, 27 September 2012, para. 308.

[International arbitral tribunal (under UNCITRAL Rules)

Valeri Belokon v. *Kyrgyz Republic*

In *Valeri Belokon* v. *Kyrgyz Republic*, the arbitral tribunal noted that, while it had "been directed to the ILC Articles on State Responsibility with regards to questions of attribution (Articles 4 and 8), no reference appears to have been made to this Tribunal's authority to grant Satisfaction (Article 37) or Assurances (Article 30) of the form requested".[1735] [137] It therefore held that its authority to grant the requested relief under international law had "not been sufficiently established" and so declined to grant it.[1736] [138]

[A/71/80, para. 99]]

International arbitral tribunal (under the ICSID Convention)

Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. *Plurinational State of Bolivia*

In *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún* v. *Plurinational State of Bolivia*, the arbitral tribunal, following a detailed examination of the remedy of satisfaction under international law, found that "the remedies outlined by the ILC Articles may apply in investor-state arbitration depending on the nature of the remedy and of the injury which it is meant to repair".[1737] [209] It further noted that "[t]he fact that some types of satisfaction are not available does not mean that the Tribunal cannot make a declaratory judgment as a means of satisfaction under Article 37 of the ILC Articles, if appropriate".[1738] [210]

[A/71/80, para. 142]

[Permanent Court of Arbitration (under UNCITRAL Rules)

Chevron Corporation and Texaco Petroleum Company v. *The Republic of Ecuador*

The arbitral tribunal in *Chevron Corporation and Texaco Petroleum Company* v. *The Republic of Ecuador* referred to articles 28 to 39 of the State responsibility articles under, part III, "Principal legal and other texts",[1739] [150] which were relevant with regard to the parties' claims for relief.[1740] [151]

[A/74/83, p. 28]]

[1735] [137 Award, 24 October 2014, para. 275.]

[1736] [138 *Ibid*., para. 276.]

[1737] [209] See footnote [65] 18 above, para. 555 (see paras. 550–560 for the full discussion).

[1738] [210] *Ibid*., para. 560.

[1739] [150 PCA, Case No. 2009–23, Second Partial Award on Track II, 30 August 2018, paras. 3.34–3.45.]

[1740] [151 *Ibid*., para. 9.9.]

European Court of Human Rights

Moreira Ferreira v. *Portugal (No. 2)*

In *Moreira Ferreira* v. *Portugal (No. 2)*, the European Court of Human Rights noted, regarding the concept of *restitution in integrum*, that "DARSIWA [draft articles on State responsibility for internationally wrongful acts] doctrine on reparation and especially of its Articles 34–37 must be taken into consideration in the interpretation of the [European] Convention [of Human Rights]".[1741] 213

[A/74/83, p. 37]

[Permanent Court of Arbitration (under UNCITRAL Rules)

Bank Melli Iran and Bank Saderat Iran v. *Kingdom of Bahrain*

The arbitral tribunal in *Bank Melli Iran and Bank Saderat Iran* v. *Kingdom of Bahrain* cited the text of article 31 and recalled that "it is a basic principle of international law that States incur responsibility for their internationally wrongful acts. The corollary to this principle is that the responsible State must repair the damage caused by its internationally wrongful act".[1742] 157 The tribunal also referred to articles 36[1743] 158 and 37.[1744] 159

[A/77/74, p. 28]]

International arbitral tribunal (under the ICSID Convention)

Pawlowski AG and Project Sever s.r.o. v. *Czech Republic*

In *Pawlowski AG and Project Sever s.r.o.* v. *Czech Republic*, the arbitral tribunal referred to satisfaction as one of the three forms that full reparation could take, explaining that it "may consist in an acknowledgement of the breach, an expression of regret, a formal apology, or another appropriate modality, as established in Article 37".[1745] 192 Moreover, the tribunal indicated that "[t]he only limitation (identified in Article 37 (3) of the ILC Articles) is that the satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible State".[1746] 193

[A/77/74, p. 32]

[1741] 213 ECHR, Grand Chamber, Application No. 19867/12, Judgment, 11 July 2017, para. 3 and footnote 6.

[1742] [157 PCA, Case No. 2017–25, Final Award, 9 November 2021, para. 738.]

[1743] [158 *Ibid*., para. 740.]

[1744] [159 *Ibid*., para. 701.]

[1745] 192 See footnote [402] 52 above, para. 726.

[1746] 193 *Ibid*., para. 738.

International Court of Justice

Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. *Uganda)*

In its judgment on reparations in *Armed Activities on the Territory of the Congo (Democratic Republic of Congo* v. *Uganda)*, the International Court of Justice referred to article 37 and the commentary thereto in analysing a request for reparations in the form of "the conduct of criminal investigations and prosecutions",[1747] [194] observing that the forms of satisfaction listed in article 37, paragraph 2, "are not exhaustive. In principle, satisfaction can include measures such as 'disciplinary or penal action against the individuals whose conduct caused the internationally wrongful act'".[1748] [195]

[A/77/74, p. 32]

[1747] [194] ICJ, (footnote [1410] 160 above), para. 388.

[1748] [195] *Ibid*., para. 389.