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CHAPTER IV

STATE RESPONSIBILITY

Addendum

Page

Article 10

Satisfaction

1. The injured State is entitled to obtain from the State which has committed an internationally wrongful act satisfaction for the damage, in particular moral damage, caused by that act, if and to the extent necessary to provide full reparation.

2. Satisfaction may take the form of one or more of the following:

(a) an apology;

(b) nominal damages;

(c) in cases of gross infringement of the rights of the injured State, damages reflecting the gravity of the infringement;

(d) in cases where the internationally wrongful act arose from the serious misconduct of officials or from criminal conduct of officials or private parties, disciplinary action against, or punishment of, those responsible.

3. The right of the injured State to obtain satisfaction does not justify demands which would impair the dignity of the State which has committed the internationally wrongful act.

Commentary

(1) While compensation is the main and central remedy resorted to following an internationally wrongful act, the study of the doctrine and practice of the law of State responsibility indicates that two further sets of consequences, functionally distinct from restitution in kind and compensation and both quite typical of international relations, must be taken into account. These consequences are the forms of reparation generally designated by the terms "satisfaction" and "guarantees of non repetition". They are dealt with in articles 10 and 10 bis respectively.

(2) The term "satisfaction" is used in article 10 and in much of the literature in a technical "international" sense as distinguished from the broader non-technical sense in which it is merely a synonym of reparation. It has thus moved away from its etymological meaning, even though it is precisely

"in the first etymological meaning of the verb 'to satisfy' which is to fulfil, to settle what is owed" 1/ that the term recurs at times in the practice and the literature. 2/

(3) Although rather widely recognized, the distinction between satisfaction and compensation is not without problems. A minor difficulty is of course the confusion caused by the occasional use of the term "satisfaction" in the broad, non-technical sense referred to above. Another difficulty derives from the ambiguity of the two adjectives generally used to characterize the kinds of injury, damage or loss respectively covered by pecuniary compensation and satisfaction: "material" and "moral". The two adjectives however fail to give an exact picture of the areas of injury covered respectively by compensation and satisfaction.

(4) As made clear in the commentary to article 8, pecuniary compensation is intended to compensate not only material damage but also moral damage suffered by private nationals or agents of the offended State. 3/ Satisfaction on

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1/ P.A. Bissonnette, La satisfaction comme mode de réparation en droit international (thesis, University of Geneva (Annemasse, Impr. Grandchamp, 1952)), p. 248.

2/ Dominice for example writes that "In fact, satisfaction is not a form of reparation, it is reparation that is one of the forms of satisfaction" ("La satisfaction en droit des gens", Mélanges Georges Perrin (Lausanne, Payot, 1984)).

3/ Even though situations are not infrequent in international jurisprudence concerning moral damage to human beings where the arbitrators have expressly qualified the award of a sum covering such damage as "satisfaction" rather than pecuniary compensation. Thus, in the well known Janes case (Decision of 16 November 1925 (United Nations, Reports of International Arbitral Awards, vol. IV, pp. 82 et seq.)), the Mexico-United States General Claims Commission thought that "giving careful consideration to all elements involved ... an amount of ..., without interest, is not excessive as satisfaction for the personal damage caused the claimants by the non-apprehension and non-punishment of the murderer of Janes" (para. 26 of the decision (ibid., p. 90)). In the Francisco Mallén case, the same Commission, while awarding "compensatory damages" for the "physical injuries inflicted upon Mallén", decided that "an amount should be added as satisfaction for indignity suffered, for lack of protection and for denial of justice" (Decision of 27 April 1927 (ibid., vol. IV, pp. 173 et seq. at pp. 179-180)). The same Commission made an identical point in the Stephen Brothers case (Decision of 15 July 1927 (ibid., pp. 265 et seq.)). The tendency to use the concept of "satisfaction" with regard to situations such as these is clearly present also in the literature: see for instance Personnaz, op. cit., pp. 197-198 and C.D. Grey, Judicial Remedies in International Law (Oxford, Clarendon Press, 1987), pp. 33-34.

the other hand is normally understood to cover only the non-material damage to the State. 4/ This is the kind of injury which a number of authorities characterize as the moral injury suffered by the offended State in its honour, dignity and prestige and which is considered at times to be a consequence of any wrongful act regardless of material injury and independent thereof. According to some authors, one of the main aspects of this kind of injury would be actually that infringement of the State's right in which any wrongful act consists, regardless of any more specific damage. According to Anzilotti, for example:

> "... The essential element in inter-State relations is not the economic element, although the latter is, in the final analysis, the substratum; rather, it is an ideal element, honour, dignity, the ethical value of subjects. The result is that, when a State sees that one of its rights is ignored by another State, that mere fact involves injury that it is not required to tolerate, even if material consequences do not ensue; in no part of human life is the truth of the well-known saying 'Wer sich Wurm macht er muss getreten werden' so apparent..." 5/

Less frequently, but perhaps significantly, the kind of injury in question is also indicated as "political damage", this expression being used, preferably in conjunction with "moral damage", in the above-mentioned sense of injury to the dignity, honour, prestige and/or legal sphere of the State affected by an internationally wrongful act. The expression used is notably "moral and political damage": a language in which it seems difficult to separate the "political" from the "moral" qualification. The term "political" is probably intended to stress the "public" nature acquired by moral damage when it affects more immediately the State in its sovereign quality (and equality) and international personality. In that sense the adjective may be useful in order better to discriminate between the "moral" damage to the State (which is exclusive of inter-State relations) from the "moral" damage more frequently

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4/ In this sense the expression "moral damage" is used, inter alia, by J.C. Bluntschli, Das moderne Völkerrecht der civilisirten Staten als Rechtsbuch dargestellt, 3rd ed. (Nördlingen, 1878); French trans. by C. Lardy, Le droit international codifié, 5th rev. ed. (Paris, 1895), p. 264; D. Anzilotti, Corso di diritto internazionale, 4th ed. (Padua, CEDAM, 1955), vol. I; French trans. by G. Gidel of 3rd Italian ed., Cours de droit international, (Paris, 1929), p. 524; C. de Visscher, La responsabilité des Etats, Biblioteca Visseriana (Leyden, 1924), vol. II, p. 119; C. Rousseau, Droit international public, vol. V, Les rapports conflictuels (Paris, Sirey, 1983), p. 13; G. Morelli, Nozioni di diritto internazionale, 7th ed. (Padua, CEDAM, 1967) p. 358.

5/ Anzilotti, loc. cit. (footnote 2 above), pp. 493-494 (emphasis added).

referred to (at national as well as international level) in order to designate the non-material or moral damage to private parties or agents which affects the State, so to speak less immediately at the level of its external relations.

(5) In formulating paragraph 1 of article 10, the Commission did not find it necessary to go into the above terminological issues or the distinctions made in the literature between the various components of the moral damage to the State, particularly as injury to the State's dignity, honour and prestige and "legal" or "juridical" damage tend to be fused into a single "injurious effect". 6/ The all-embracing phrase "damage, in particular moral damage" is intended to convey the notion that the kind of injury for which satisfaction operates as a specific injury consists in any non-material damage suffered by a State as a result of an internationally wrongful act.

(6) Like the corresponding provision of the draft articles on restitution in kind and compensation, paragraph 1 is couched in terms of an entitlement of the injured State. At the same time, the text acknowledges the rather exceptional character of this remedy by making it clear that satisfaction may be obtained "if and to extent necessary to provide full reparation". This phrase recognizes, on the one hand, that there may be circumstances in which no basis exists for granting satisfaction and, on the other hand, that the test in assessing a claim for satisfaction is the principle of full reparation. The following survey of the relevant international jurisprudence and diplomatic practice is intended to provide indications as to the circumstances in which satisfaction may be obtained.

(7) That satisfaction as an exceptional remedy clearly emerges from the awards rendered in the Miliani, 7/ Stevenson, 8/ Carthage and

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6/ Indeed the juridical injury - namely, the mere infringement of the injured State's right - is felt by that State as an offence to its dignity, honour or prestige. Paraphrasing Anzilotti one may say that in not a few cases the damage coincides with - and gets to consist essentially of - the very infringement of the injured State's right. A State, indeed, cannot tolerate a breach of its right without finding itself diminished in the consideration it enjoys - namely, in one of its most precious and politically most highly valued assets. (Anzilotti, loc. cit. (footnote 2 above), p. 425.

7/ United Nations, Reports of International Arbitral Awards, vol. X, p. 59.

8/ Ibid., vol. IX, p. 506.

Manouba 9/ and Lusitania 10/ cases. That the obligation to compensate the injured State for the material damage sustained is distinct from the

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9/ Decisions of 6 May 1913 (France v. Italy). In the Manouba case, the arbitral tribunal declared:

> "... Whereas the capture could not be legitimized, either, by the regularity, relative or absolute, of these latter phases viewed separately.
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> "On the application to condemn the Royal Italian Government to pay damages:
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> "1. the sum of one franc for the affront to the French flag;
>
> "2. the sum of one hundred thousand francs as reparation for the moral and political injury resulting from the failure to observe ordinary international law and reciprocally binding conventions for Italy and for France.
>
> "And on the application to condemn the Government of the French Republic to pay the sum of one hundred thousand francs as a sanction and as reparation for the material and moral injury resulting from the breach of international law, notably the right of a belligerent to verify the status of individuals suspected of being enemy soldiers, found on board neutral trading vessels.
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> "Whereas, in cases in which a Power has allegedly failed to fulfil its obligations, whether general or specific, towards another Power, a finding to this effect, particularly in an arbitral award, already constitutes a serious sanction;
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> "that such sanction is made heavier, where necessary, by the payment of damages for material losses;
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> "...
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> "... that ... generally speaking, the introduction of another pecuniary sanction seems to be superfluous and to go beyond the purpose of international jurisdiction;
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> "Whereas, in the light of the foregoing, the circumstances of the case cannot substantiate such additional sanction; that, without further consideration, there are, accordingly, no grounds for meeting the above-mentioned demands".
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> "..." (ibid., vol. XI, p. 475).

In the Carthage case an almost identical decision was taken by the same tribunal (ibid., vol. XI, pp. 460-461).

10/ Ibid., vol. VII, p. 39.

obligation to provide satisfaction for other types of damages is equally apparent from a number of jurisprudential cases. A famous instance is that of the "I'm Alone", a Canadian vessel owned by United States nationals sunk by the United States Coast Guard. 11/ The Commissioners decided not to award any compensation for the loss of the vessel, but stated that

> "The act of sinking the ship, however, by officers of the United States Coast Guard, was, as we have already indicated, an unlawful act: and the Commissioners consider that the United States ought formally to acknowledge its illegality, and to apologize to His Majesty's Canadian Government therefor; and, further, that as a material amend in respect of the wrong the United States should pay the sum of $25,000 to His Majesty's Canadian Government; and they recommend accordingly".

Other examples include the Arends 12/ and Brower 13/ cases.

(8) In diplomatic practice, satisfaction has been claimed for various types of injurious behaviour including insults to the symbols of the State such as

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11/ Decisions of 30 June 1933 and 5 January 1935 (Canada v. United States of America)(ibid., vol. III, pp. 1609 et seq.).

12/ In which the umpire stated that:

> "The damages consequent upon the detention of this vessel are necessarily small but it is the belief of the umpire that the respondent Government is willing to recognize its responsibilities for the untoward act of its officers ..." (ibid., Vol. X, p. 730).

13/ The case concerned a United States national who had bought six small islands of the Fiji archipelago. For not having recognized Brower's rights when it acquired sovereignty over the Fiji islands, the United Kingdom was sentenced to the payment of one shilling. The Great Britain-United States Arbitral Tribunal, referring to a report of the British Colonial Secretary according to which:

> "These are six small islands of the Ringgold group. They are mere islets with a few coconut trees on them. They are situated in a remote portion of the Colony at a distance of about 180 miles from Suva. If put up to auction, I doubt if there would be a single bid for them",

decided as follows:

> "In these circumstances, we consider that notwithstanding our conclusion on the principle of liability, the United States must be content with an award of nominal damages." (Decision of 14 November 1923 (ibid., vol. VI, pp. 109 et seq.).

the national flag, 14/ violations of sovereignty or territorial integrity, 15/ attacks on ships or aircraft, 16/ ill treatment of, or attacks against heads of State or Government or diplomatic or consular representatives or other diplomatically protected persons 17/ and

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14/ Examples are the Magee case (1874) (Whiteman, Damages, vol. I, p. 64), the Petit Vaisseau case (1863) (ibid., 2nd series, vol. III, No. 2564) and the case that arose from the insult to the French flag in Berlin in 1920 (Eagleton, The Responsibility of States in International Law (New York, 1978), pp. 186-187).

15/ A well known example is that of the Rainbow Warrior (United Nations, Reports of International Arbitral Awards, vol. XIX pp. 197 et seq.) on which Roger Pinto, "L'affaire du 'Rainbow Warrior': A propos de la sentence arbitrale du 30 avril 1990 (Nouvelle-Zélande c. France)" Journal de droit international, 1990, pp. 851 et seq.; J. Charpentier, "L'affaire du 'Rainbow Warrior', AFDI, 1985, pp. 210 et seq., D.W. Bowett, "Treaties and State responsibility" in Le droit international au service de la paix, de la justice et du développement - Mélanges Michel Virally, Paris, Pedone, 1991, pp. 137-145 and G. Palmisano, "Sulla decisione arbitrale relativa alla seconda fase del caso 'Rainbow Warrior'", Rivista di diritto internazionale, LXXIII (1190), pp. 874-910.

Another example of special interest since it involves an international organization, the League of Nations, concerns the military action carried out in Bulgarian territory by Greece in 1925 (League of Nations, Official Journal, 7th year, No. 2 (February 1926), pp. 172 et seq.). Mention may also be made of the kidnapping in Argentina and the deportation to Israel of Adolf Eichman, even though the requests of the Argentinian Government were not met (Whiteman, Digest, vol. V, p. 210).

16/ Examples include the Panay incident (1937) between Japan and the United States (L. Oppenheim, International Law: A Treatise, 8th ed., H. Lauterpacht, ed. (London, Longmans, Green and Co, 1955), p. 354, note 2); the attack carried out in 1961 against a Soviet aircraft transporting President Breznev by French fighter planes over the international waters of the Mediterranean (Chronique des faits internationaux, Revue générale de droit international public, vol. 65 (1961), pp. 603 et seq.); and the sinking of a Bahamian ship in 1980 by a Cuban aircraft (ibid., vol. 84 (1980), pp. 1078-1079.

17/ Examples taken from the Italian diplomatic practice are to be found in La Prassi Italiana di Diritto Internazionale, 1st series, vol. II, Nos. 1014 and 1017 and ibid., 2nd series, vol. III Nos. 2559, 2563 and 2576. Mention may also be made in this context of the killing in 1919 of a French soldier on guard at the French Embassy in Berlin (P. Fauchille, Traité de droit international public (Paris, 1922), vol. I, part. I, p. 528) and of a 1924 incident in which the Vice-Consul of the United States in Tehran was killed by the crowd for having tried to take photographs of a religious ceremony (Whiteman, Damages, vol. I, pp. 732-733). Also relevant is the case concerning the killing in 1923, near Janina, of General Tallini, an Italian

violations of the premises of embassies or consulates (as well as the residences of members of foreign diplomatic missions). 18/ Claims for satisfaction have also been put forward in cases where the victims of an internationally wrongful act were private citizens of a foreign State. 19/

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officer commissioned by the Conference of Ambassadors to assist in the delimitation of the frontier between Greece and Albania. Greece, held responsible for the murder, received particularly onerous requests from the Conference of Ambassadors (see Eagleton, op. cit., pp. 187-188).

More recent examples are the incidents that took place during a visit of President Georges Pompidou of France in the United States in 1970 (Chronique des faits internationaux, Revue générale de droit international public, vol. 75 (1971) pp. 177 et seq., at p. 181) and the searching of the luggage of President Soleiman Frangie of Lebanon at New York airport in 1974 (ibid., vol. 79 (1975), pp. 810-811). For similar episodes, see Przetacznik, "La responsabilité internationale de l'Etat à raison des préjudices de caractère moral et politique causés à un autre Etat", Revue générale de droit international public (Paris), vol. 78 (1974), pp. 951 et seq.

Worthy of special mention since it concerns an international organization is the case relating to the killing in 1948, in Palestine, of Count Bernadotte while he was in the service of the United Nations (Whiteman, Digest, vol. 8, pp. 742-743).

18/ Examples include the attack by demonstrators, in 1851, of the Spanish Consulate in New Orleans (Moore, Digest, vol. VI, pp. 811 et seq., at p. 812), the violation by two Turkish officials, in 1883, of the residence of the Italian Consul in Tripoli (La Prassi Italiana di Diritto Internazionale, 1st series, vol. II, No. 1018) and the failed attempt of two Egyptians policemen, in 1888, to violate the Italian Consulate at Alexandria (ibid., 2nd series, vol. III, No. 2558).

More recently, apologies and expressions of regret followed demonstrations in front of the French Embassy in Belgrade in 1961 (Chronique des faits internationaux, Revue générale de droit international public, 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).

19/ A well-known case concerns the Italian protests over the lynching in 1891 of 11 Italians who had been imprisoned further to the murder of the chief of police of New Orleans. The United States deplored the occurrence and awarded Italy a sum of 125,000 lire, to be distributed by the Italian Government to the families of the victims. (La Prassi Italiana di Diritto Internazionale, 2nd series, vol. III, No. 2571).

Another example concerns the murder in 1908 of the Reverend Labaree, a United States missionary; the Persian Government paid a sum of US$ 30,000 and punished the Kurds who were responsible for the murder (Whiteman, Damages, vol. I, pp. 725 et seq.).

(9) Satisfaction is not defined only on the basis of the type of injury with regard to which it operates as a specific remedy, it is also identified by the typical forms it assumes, of which paragraph 2 of article 10 provides a non-exhaustive list. "Apology", mentioned in subparagraph (a) encompasses regrets, excuses, saluting the flag, etc. It is mentioned by many writers and occupies a significant place in international jurisprudence. Examples are the "I'm Alone", 20/ Kellet 21/ and "Rainbow Warrior" 22/ cases. In diplomatic practice, insults to the symbols of the State or Government, 23/ attacks against diplomatic or consular representatives or other diplomatically protected agents, 24/ or against private citizens of a foreign State 25/ have often led to apologies or expressions of regret, as have also attacks on diplomatic and consular premises 26/ or on

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20/ See footnote 11 above.

21/ Decision of 20 September 1897 (United States of America v. Siam). The arbitral commission decided that "His Siamese Majesty's Government shall express its official regrets to the United States Government" (Moore, Digest, vol. II, pp. 1862 et seq., at p. 1864).

22/ See footnote 15 above. In his ruling, the Secretary-General of the United Nations decided that France should present formal apologies to New Zealand.

23/ In March 1949, a sailor in the United States Navy who was on leave in Havana climbed on to the statue of José Marti, a hero of Cuban independence. Following the Cuban Government's protest, the United States Ambassador placed a wreath of flowers at the foot of the statue and read a declaration of regrets (Chronique des faits internationaux, Revue générale de droit international public, vol. 71 (1967), p. 775).

Cases involving insult to the national flag have been relatively frequent during the period preceding the Second World War. A form of satisfaction which is typical of those cases consists in a ceremony during which the offending State salutes the flag of the offended State.

24/ Examples are to be found in footnote 17 above.

25/ Examples are to be found in footnote 19 above.

26/ Following the looting of the French Embassy in Saigon by Vietnamese students in 1964, the Government of Viet Nam issued a communiqué to the local press presenting apologies and suggesting that the damage suffered by persons and property be assessed in order to allow the payment of compensation. (Chronique des faits internationaux, Revue générale de droit international public, vol. 68 (1994), p. 944). When, in 1967, attempts were made to blow up the Yugoslav Embassy in Washington, D.C., and the Yugoslav Consulates in

ships. 27/ Forms of satisfaction such as the salute to the flag or expiatory missions seem to have disappeared in recent practice. Conversely requests for apologies or offers thereof seem to have increased in importance and frequency.

(10) It should be stressed that the resonance effect of public apologies can be achieved not only by involving the press or other mass media. It can be pursued even more effectively by the choice of the level of the wrongdoing State's organization from which the apologies emanate. 28/ In this context, mention should be made of a form of satisfaction which has a place both in literature 29/ and in international jurisprudence, 30/

New York, Chicago and San Francisco, the United States Secretary of State presented his country's apologies to the Yugoslav Ambassador by means of a press statement (ibid., vol. 70 (1967), p. 775). The Chinese Government requested public excuses from the Indonesian Government for the looting in 1966 of the Chinese Consulates at Jakarta, Macassar and Medan during anti-communist riots (ibid., vol. 70 (1967), pp. 1067-1068). The same Government requested and obtained public excuses following incidents at Ulan Bator railway station, where Chinese diplomats and nationals were ill-treated by the local police (ibid., vol. 71 (1967) pp. 1067-1068).

27/ Examples are the Panay incident referred to in footnote 16 above and the incident including the damaging of the Stark by an Iraqi missile in 1987. In the latter incident, the President of Iraq immediately wrote to the President of the United States explaining the attack as an accident and expressing his "heartfelt condolences" for the death of the United States sailors who had been killed and adding that "sorrow and regrets are not enough".

28/ For example, following the attempt on the life and the physical injury of the United States Ambassador in Tokyo in 1964, the Prime Minister and the Foreign Minister of Japan presented apologies to the United States Ambassador and the Minister of the Interior resigned from office. In addition, Emperor Hirohito sent a delegate of his own to join the members of the Government in the presentation of apologies.

29/ Morelli, op. cit. (footnote 4 above), p. 358; Grey, op. cit. (footnote 3 above), p. 42.

30/ In the "Manouba" case for instance, the arbitral tribunal inter alia declared that:

> "... in cases in which a Power has allegedly failed to fulfil its obligations, whether general or specific, towards another Power, a finding to this effect, particularly in an arbitral award, already constitutes a serious sanction" (loc. cit., footnote 9 above).

namely recognition by an international tribunal of the unlawfulness of the offending State's conduct.

(11) Another form of satisfaction, dealt with in subparagraph (b) of paragraph 2, is that of nominal damages through the payment of symbolic sums. Several examples are to be found in international jurisprudence. 31/

(12) Much more complex is the form of satisfaction dealt with in subparagraph (c) namely "damages reflecting the gravity of the infringement". Such damages are of an exceptional nature as indicated by the phrase "in cases of gross infringement of the rights of the injured State" and they correspond to what in common law is known as "exemplary damages" i.e. damages which are given to the injured party over and above the actual loss, when the wrong done was aggravated by circumstances of violence, oppression, malice, fraud or

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In the "Carthage" case, an almost identical decision was made by the same tribunal.

Even more significant, in the same sense, is the judgment of the ICJ in the Corfu Channel case (Merits). Addressing the question:

> "Has the United Kingdom under international law violated the sovereignty of the Albanian People's Republic by reason of the acts of the Royal Navy in Albanian waters on the 22nd October and on the 12th and 13th November 1946, and is there any duty to give satisfaction",

the Court stated:

> "... that by reason of the acts of the British Navy in Albanian waters in the course of the Operation of November 12th and 13th 1946, the United Kingdom violated the sovereignty of the People's Republic of Albania, and that this declaration by the Court constitutes in itself appropriate satisfaction." (I.C.J. Reports, 1949, p. 12 and 36).

31/ In the Arends case (see footnote 12 above), the umpire of the Netherlands - Venezuelan Mixed Claims Commission indicated satisfaction as consisting in the expression of regrets by the payment of $100. Other examples are the Brower case (see footnote 13 above) and the Lighthouse case, in which the Permanent Court of Arbitration, referring to one of the claims of France against Greece, stated:

> "The Tribunal considers the basis for this claim sufficiently proven, so that only the amount of the damage sustained by the Company needs to be established. In view of the inconsistency of the French claim, which fixed the amount of the damage at 10,000 francs Poincaré and then declared that the amount could not be set in figures, the Tribunal, while recognizing the validity of the claim, can only award a token indemnity of 1 franc." (United Nations, Reports of International Arbitral Awards, vol. XII, p. 216).

wicked conduct on the part of the wrongdoing party. This definition, by distinguishing between compensatory and afflictive damages, brings vividly to light the specific function of satisfaction vis-à-vis restitution in kind and compensation. This aspect is dealt with in the latter part of this commentary.

(13) The international jurisprudence of recent years provides an interesting example of "damages reflecting the gravity of the infringement" namely the case of the Rainbow Warrior, 32/ involving the sinking of a ship in Auckland harbour in 1985 by agents of the French security services who had used false Swiss passports to enter New Zealand. New Zealand demanded that France present a formal apology and pay US$ 10 million - a sum which exceeded by far the value of the material loss sustained. France acknowledged responsibility but refused to pay the considerable amount claimed by New Zealand by way of indemnification. The case was finally submitted to the Secretary-General of the United Nations, who inter alia decided that France should pay a sum of US$ 7 million to New Zealand.

(14) The last of the forms of satisfaction listed in paragraph 2 concerns the sanctioning of responsible officials dealt with in subparagraph (d). This mode of satisfaction is emphasized in literature 33/ and has frequently been requested and granted in diplomatic practice in the form of the disavowal (désaveu) of the action of its agent by the wrongdoing State, 34/ the setting up of a commission of inquiry and the punishment of the responsible individuals. 35/ A variant is provided by the Rainbow Warrior case in

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32/ See footnote 15 above.

33/ See for instance Blüntschli, op. cit. (footnote 4 above), p. 265 and Bissonnette, op. cit., (footnote 1 above), p. 24.

34/ For cases of désaveu during the period from 1850 to 1939, see Bissonnette, op. cit. (footnote 1 above), pp. 104 et seq.:

A case of désaveu involved Bolivia and the United States. Following the publication in the American magazine Time in March 1959 of an article attributing to the spokesman of the United States Embassy in La Paz remarks which were considered to be offensive to Bolivia, the United States Department of State immediately corrected those statements (Whiteman, Digest, vol. V, pp. 169-170).

35/ Punishment of 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 (see footnote 17 above) and in the case of the

which the Secretary-General decided that the two responsible French agents should be handed over to France and later be restricted to the island of Hao for at least three years. 36/

(15) The Commission is aware that extensive application of this form of satisfaction might result in undue interference in the internal affairs of States. It has therefore limited the scope of application of the subparagraph to criminal conduct whether from officials or private individuals and to serious misconduct of officials.

(16) The opening phrase of paragraph 2 makes it clear that the forms of satisfaction listed in that paragraph may be combined. A case in point is the Rainbow Warrior case, 37/ in which the Secretary-General ordered formal apologies, damages and restrictions on the freedom of movement of the responsible officials.

(17) The specificity of satisfaction as a consequence of an internationally wrongful act manifests itself not only in the types of injury with regard to which it operates and in the particular forms which it takes but also, and even more importantly, in the specific function which it performs.

(18) The prevailing doctrine considers and the jurisprudence and practice confirm that satisfaction is a form of reparation which tends to be of an afflictive nature - distinct from compensatory forms of reparation such as restitutio and compensation. Of course the distinction is not an absolute one. Even such a remedy as reparation by equivalent (not to mention restitution in kind) performs, in the relations between States as well as in inter-individual relations, a role that cannot be deemed to be purely compensatory. Though its role is certainly not a punitive one, it does perform the very general function of dissuasion from, and prevention of, the commission of wrongful acts. The predominantly afflictive rather than

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killing of two United States officers in Tehran (Chronique des faits internationaux, Revue générale de droit international public, vol. 80, p. 257).

36/ See footnote 15 above.

37/ Ibid. According to G. Palmisano, op. cit. (footnote 15 above), the confinement of the two French agents should be understood (contrary to the scarce doctrine on the subject) not as satisfaction in the proper sense but rather as the result of an ex aequo et bono settlement of a "political" dispute between the parties, a distinct dispute from the legal dispute over the French liability for the attack on the "Rainbow Warrior" (op. cit. (footnote 15 above), pp. 900 and 901).

compensatory role of satisfaction is nevertheless recognized by many writers 38/ and indisputably emphasized by long-standing diplomatic practice.

(19) The functional distinction between satisfaction, on the one hand, and restitutio and compensation, on the other, does not exclude the possibility that two of those forms, or all three, may come into play together in order to ensure a combined, complete reparation of the material as well as the moral/political/juridical injury. In fact, both in jurisprudence and in diplomatic practice, satisfaction is frequently accompanied by compensation.

(20) The autonomous nature of satisfaction does not, on the other hand, prevent it from often appearing to be absorbed into, or even confused with, the more rigorously compensatory remedies. It may have been so, for example, in the Rainbow Warrior case, where both the sum claimed by New Zealand and the sum awarded by the Secretary-General of the United Nations exceeded by far the value of the material loss. Other examples include the case concerning the lynching of 11 Italians in New Orleans 39/ and the Labaree case. 40/ One may doubt, at first sight, whether those instances involved satisfaction stricto sensu. The element of satisfaction is, however, equally perceptible, either because one or more forms of satisfaction had been requested and obtained by the offended State or because the amount of the compensation exceeded to a greater or lesser degree the extent of the material loss. And

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38/ These writers include Blüntschli, op. cit. (footnote 4 above), p. 426; Eagleton, op. cit. (footnote 14 above), pp. 190-191; Lauterpacht "Règles générales du droit de la paix", Recueil des cours ... 1937 - IV (Paris, 1938) vol. 62, p. 350; Personnaz, La réparation du préjudice en droit international public (Paris, 1939) pp. 317-318; Garcia Amador, Sixth report (Yearbook ... 1961, document A/CN.4/134 and Add.1), para. 76; and Morelli, op. cit. (footnote 4 above), p. 358.

Satisfaction is however considered to be purely reparatory (in the sense that it should have no consequence beyond what in internal law is generally provided for as a consequence of a civil tort) by Ripert, "Les règles du droit civil applicables aux rapports internationaux", Recueil des cours ... 1933-II (Paris), vol. 44 p. 622; Bissonnette, op. cit. (footnote 1 above), p. 25; Cheng, General Principles of Law as Applied by International Courts and Tribunals (London, Stevens, 1953), pp. 236-237; Jimenez de Arechaga "International Responsibility", Manual of Public International Law, M. Sorensen ed. (London, Macmillan, 1968), p. 571; and Dominice, op. cit. (footnote 2 above), p. 118.

39/ See footnote 19 above.

40/ Ibid.

there are instances where the presence of satisfaction in some form is suggested by admissions made by the offending State.

(21) The afflictive nature of satisfaction might appear at first sight - and does in fact appear to some contemporary writers - as not compatible either with the composition or with the structure of a "society of States". It may notably be contended:

(a) that punishment or penalty does not "become" persons other than human beings, and notably not the majesty of sovereign States; and

(b) that the imposition of punishment or penalty within a legal system presupposes the existence of institutions impersonating, as in national societies, the whole community, no such institutions being available or likely to come into being soon - if ever - in the "society of States".

(22) Although arguments such as these are not without force, they do not seem to the Commission to constitute valid reasons for not accepting satisfaction among the forms of reparation. There seems to be, on the contrary, good reasons positively to emphasize the role of satisfaction. In the first place, the very absence, in the "society of States", of institutions capable of performing such "authoritative" functions as the prosecution, trial and punishment of criminal offenses makes even more necessary the resort to remedies susceptible of reducing, albeit in a very small measure, the gap represented by the absence of the said institutions. To confine the consequences of any international delict (whatever its gravity) to restitution in kind and compensation would mean to overlook the necessity of providing some specific remedy - having a preventive as well as an afflictive function - for the moral, political and juridical wrong suffered by the offended State or States in addition to, or instead of, any amount of material damage. To overlook such a function would in turn encourage States - especially the richest among them - inopportunely and dangerously to assume that any injury they may cause to one or more other States can easily be made good by merely pecuniary compensation. The Commission concludes, that, far from being incompatible with the lack of institutionalization of the "society of States", an afflictive or relatively more afflictive form of reparation like satisfaction in its various forms would help to reduce the gap represented by the absence of adequate institutions.

(23) The afflictive nature of satisfaction is not in contrast with the sovereign equality of the States involved. Whatever its form, the satisfaction claimed by the injured State never consists, as shown by the

abundant practice analysed, in any action or measure taken directly by the injured State itself against the offender. At a later stage, the question may, of course, arise of a sanction to be inflicted upon the offending State by a direct conduct of the injured State - and obviously it is reprisals that come to mind. This will be the stage at which, demands for reparation and/or satisfaction having been put forward unsuccessfully, the situation will move from the substantive or immediate consequences of the wrongful act to those consequences which are represented by the reaction of the injured State to non-compliance by the offending State with its so-called "secondary" obligation to make reparation. Prior to that more crucial, critical stage, satisfaction does not involve any direct measures of the kind. Although the demand for satisfaction will normally come - unless felicitously preceded by the offending State's own initiative - from the injured State, the satisfaction to be given consists of actions to be taken by the offender itself. There is no need to fear, therefore, that satisfaction will entail the notion of a sanction applied by one State against another, and thus constitute a serious encroachment upon the offending State's sovereign equality. In the measure, surely relative, in which one can speak of a sanction, it is not so much a question of a sanction inflicted upon the offending State. It is rather a matter of atonement, of a "self-inflicted" sanction, intended to cancel, by deeds of the offender itself, the moral, political and/or juridical injury suffered by the offended State. In the words of Morelli,

> "Satisfaction is in some ways analogous to a penalty, which also fulfils a function of atonement. Again, satisfaction, like a penalty, is afflictive in character in that it pursues an aim in such a way that the subject responsible undergoes harm. The difference is that, while a penalty is harm inflicted by another subject, in satisfaction the harm consists of a particular kind of conduct by the subject who is responsible - conduct which constitutes, as in other forms of reparation, the content of the subject's obligation." 41/

(24) The Commission finds it all the more important to recognize the positive function of satisfaction in the relations among States as it is precisely by resorting to one or more of the various forms of satisfaction that the consequences of the offending State's wrongful conduct can be adapted to the gravity of the wrongful act. This conclusion is of considerable importance as a matter of both codification and progressive development in this field. From the viewpoint of progressive development in particular, the various forms of

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41/ Morelli, op. cit., (footnote 4 above), p. 358.

satisfaction appear to be suitable to meet the necessity of tackling the problem of the special, even more severe consequences that should be attached to international crimes.

(25) On the other hand, the Commission finds it important to draw the lessons of the diplomatic practice of satisfaction which shows that abuses on the part of injured or allegedly injured States are not rare. Powerful States have often managed to impose on weaker offenders excuses or humiliating forms of satisfaction incompatible with the dignity of the wrongdoing State and with the principle of equality. The need to prevent abuse has been stressed by a number of authors. 42/ It underlies paragraph 3 of article 10 which, by making it clear that demands that would impair the dignity of the wrongdoing State are unacceptable, provides an indispensable indication of the limits within which a claim to satisfaction in one or more of its possible forms should be met by such a State.

42/ Including Blüntschli, op. cit. (footnote 4 above), pp. 268-269; Tammes, "Means of redress in the general international law of peace", Essays on the Development of the International Legal Order (Alphan aan den Rijh, Sijthoff and Noordhoff, 1980), pp. 7-8; Personnaz, op. cit. (footnote 38 above), p. 289 and Graefrath, Collected courses ... 1984- II (The Hague, Nijhoff, 1985), vol. 185, p. 101.

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