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# HAGUE INTERNATIONAL TRIBUNALS

# INTERNATIONAL COURT OF JUSTICE

# The Declaratory Judgment in Recent Jurisprudence of the ICJ: Conflicting Approaches to State Responsibility?

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**Abstract**

As the list of contentious cases concerning issues of state responsibility brought before the International Court of Justice (the Court) continues to grow, a closer consideration is demanded of the most common remedy granted by the Court – the declaratory judgment. In particular, while the Court continues to issue declarations intended to constitute 'appropriate satisfaction', it also appears that the Court is – or is attempting – to use declarations more creatively in certain circumstances. This immediately provokes a question as to not only the proper role of declaratory judgments, but also whether and to what extent variations in the nature of the obligations owed by states, or the nature of their internationally wrongful acts, gives rise to a coherent differentiation in the remedies granted by the Court.

**Key words**

declaratory judgments; International Court of Justice; state responsibility; remedies; satisfaction; injunction

## 1. INTRODUCTION

A state commits an internationally wrongful act.[1] Perhaps it breached its procedural obligations in respect of construction works on a river,[2] or failed to make a preliminary inquiry into claims of torture.[3] Perhaps the state failed to ensure the

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1 Art. 1 of the 2001 Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA), UN Doc. A/RES/56/83 (2001): '[e]very internationally wrongful act of a State entails the international responsibility of that State.' Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001 YILC, Vol. II (Part I) (ARSIWA Commentary), 32. See also *Spanish Zone of Morocco Claims (Spain v. United Kingdom)*, (1925) II RIAA 615, at 641.

2 *Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Merits, Judgment of 20 April 2010, [2010] ICJ Rep. 14.

3 *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Merits, Judgment of 20 July 2012, [2012] ICJ Rep. 422.

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jurisdictional immunity of another state was respected in its national courts,[4] or failed to give reasons for refusing to comply with an international letter rogatory.[5] Perhaps it hunted whales without a proper permit.[6]

Having breached its international obligation, the wrongdoing state incurs a two-fold, secondary obligation: first, to cease the wrongful conduct, if it is still occurring, and second, to make full reparation for any damage caused, whether material or moral.[7] As the Permanent Court of International Justice (the Permanent Court) made clear in the *Chorzów* case:

> The essential principle contained in the notion of an illegal act … is that reparation must, so far as possible, wipe out all the consequences of the illegal act and re-establish the situation that would, in all probability, have existed if that act had not been committed.[8]

These principles, *in abstracto*, are not contentious; indeed they are axiomatic.[9] So too is the recitation of the various forms that the 'umbrella concept' of reparation[10] may take: primarily restitution, where not materially impossible or out of all proportion to the benefit deriving from restitution; alternatively, compensation for the financially assessable losses. If restitution and compensation are impossible, then 'satisfaction' in the form of 'an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality' may suffice.[11]

Traditional acts equating to satisfaction include apologies,[12] and salutes to the flag. Although these forms of satisfaction are considered by some to be 'anachronistic',[13] or even 'mediaeval',[14] even very recent applications to the Court have included requests for a formal apology in addition to restitution as the appropriate reparation.[15] These traditional modes of satisfaction, while not 'conceived in an

4 *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Merits, Judgment of 3 February 2012, [2012] ICJ Rep. 99.

5 *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Merits, Judgment of 4 June 2008, [2008] ICJ Rep. 177.

6 *Whaling in the Antarctic (Australia v. Japan: New Zealand Intervening)*, Merits, Judgment of 31 March 2014 (not yet published).

7 *Factory at Chorzów (Germany v. Poland)*, Jurisdiction, PCIJ Rep Series A No 9, at 21—2; *Factory at Chorzów (Germany v. Poland)*, Merits, PCIJ Rep Series A No 17, at 47. See also ARSIWA Commentary, *supra* note 1, at 91; J. Crawford, *The International Law Commission's Articles on State Responsibility* (2011), 201; D. Shelton, *Remedies in International Human Rights Law* (2005), 20; D. Shelton, 'Righting Wrongs: Reparation in the Articles on State Responsibility', (2002) 96 *AJIL* 833, at 844.

8 *Chorzów* (Jurisdiction), *supra* note 7, at 47.

9 Their origin may be traced back as far as Vattel, for whom every state has the right to obtain complete reparation when an injury is done: E. de Vattel, *The Law of Nations or Principles of the Law of Nature* (1811), 155. Likewise Grotius observed that 'From … a Fault or Trespass, there arises an obligation by the Law of Nature to make Reparation for the Damage, if any be done': H. Grotius, Bk. 2, Ch. 17, para. 1, in H. Grotius, *The Rights of War and Peace: Including the Law of Nature and of Nations*, translated by A.C. Campbell (2011).

10 C. Brown, *A Common Law of International Adjudication* (2007), 186.

11 ARSIWA, *supra* note 1, Art. 37(2).

12 See, *SS 'I'm Alone' (Canada/USA)*, (1935) III RIAA 1609, at 1618.

13 B. Graefrath, 'Responsibility and Damages Caused: Relationship between Responsibility and Damages', (1984-II) 185 *Recueil des Cours* 19, at 85.

14 *Corfu Channel (United Kingdom v. Albania)*, Merits, Judgment of 9 April 1949, [1949] ICJ Rep. 4, at 114, paras. 44–5 (Judge Azevedo, Dissenting Opinion).

15 *Questions Relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)*, Application Instituting Proceedings, 17 December 2013, 6. Since withdrawn: Order, 11 June 2015.

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unequivocal way',[16] serve to address the non-material, or 'moral' injury[17] concomitant in a breach of obligation which infringes the applicant state's rights, and 'in the injury to its honour, dignity and prestige.'[18] In the modern era, however, by far the most common modality of satisfaction is the award by the Court of a declaratory judgment.[19]

By way of general definition, the declaratory judgment is a 'mere declaration'[20] of the law, yet also a final, binding determination of the parties' rights,[21] which has a 'concrete effect' on the parties' relations.[22] The 'fundamental purpose' of the declaratory judgment is to 'clarify and stabilize' the parties' legal relations.[23] It is a remedy of the widest ambit, 'potentially available in any situation where a right is infringed or threatened',[24] including in situations where no unlawful act has taken place.[25] Declarations, while utilized regularly in the state responsibility context, are not exclusive to it.[26]

Yet, while the fact that the declaratory judgment plays a 'central role'[27] as a remedy for breach of international obligations in the jurisprudence of the Court cannot be denied, the purpose underlying the Court's use of declaratory judgments in the state responsibility context is not clear. In the first part, the Court continues to award declaratory judgments utilising the form first seen in the *Corfu Channel* case, a passage in the *dispositif* stating: 'this declaration by the Court constitutes in itself appropriate satisfaction.'[28] In this form, as explained further below, the declaration could be considered as a kind of penalty rather than as a form of reparation. Concurrently, the Court has evolved a practice of awarding ostensibly declaratory judgments that do not refer to the concept of satisfaction, but rather appear to operate in the form of an injunction – a concept familiar to domestic legal systems but not international courts.[29]

16 E. Wyler and A. Papaux, 'The Different Forms of Reparation: Satisfaction', in J. Crawford, A. Pellet and S. Olleson (Eds.), *The Law of International Responsibility* (2010), 625.
17 C.F. Amerasinghe, *Jurisdiction of International Tribunals* (2003), 417; E. Wyler and A. Papaux, *supra* note 16, at 623; P. Dumberry, 'Satisfaction as a Form of Reparation for Moral Damages Suffered by Investors and Respondent States in Investor-State Arbitration Disputes', (2012) 3 JIDS 205.
18 N. Jørgensen, 'A Reappraisal of Punitive Damages in International Law', (1997) 68 *British Yearbook of International Law*247, at 264.
19 ARSIWA Commentary, *supra* note 1, at 106; Crawford, *supra* note 7, at 233.
20 E.M. Borchard, 'The Declaratory Judgment in the United States', (1931) 37(2) *West Virginia Law Quarterly* 127, at 128.
21 Ibid.
22 S. Rosenne, *The Law and Practice of the International Court 1920–2005* (2006), 1580.
23 *Nuclear Tests (Australia v. France)*, Merits, Judgment of 20 December 1974, [1974] ICJ Rep. 253, at 321, para. 21.
24 R. Zakrzewski, *Remedies Reclassified* (2009), 158.
25 E. Milano, 'Territorial Disputes, Wrongful Occupations and State Responsibility: Should The International Court Of Justice Go The Extra Mile?', (2004) 3 *The Law and Practice of International Courts and Tribunals* 509, at 522–3.
26 For a comprehensive review of the contexts in which a declaratory judgment may be granted, which include declarations of title, right or applicable law, see J. McIntyre, 'Declaratory Judgments of the International Court of Justice', (2012) 25 *Hague Yearbook of International Law* 107.
27 C. Gray, 'Remedies in International Dispute Settlement', in C. Romano, K. Alter and Y. Shany (eds.) *Oxford Handbook of International Adjudication* (2013), 876.
28 *Corfu Channel*, *supra* note 14, at 36.
29 Brown, *supra* note 10, at 210.

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Put simply, the Court appears to be utilising the same remedy, in the same kinds of cases, in respect of the same legal context, but to arguably achieve different ends. Whether the Court's approach to the use of declaratory judgments as a remedy in state responsibility cases can be coherently explained is the question at issue. This article therefore considers the use of the declaratory judgment in the Court's most recent jurisprudence, with a view to better understanding the potentially diverse roles that the declaratory judgment has to play as the leading judicial response to states' internationally wrongful acts.

## 2. The declaratory judgment as a remedy in state responsibility cases: reparation, penalty, or injunction?

To understand the role of the declaratory judgment in the context of state responsibility, it is, of course, necessary to be clear as to the conceptual scope and distinguishing features of the remedy more generally. The factor that most distinguishes the declaratory judgment is that it lacks the 'appendage' of a 'coercive decree'.[30] A declaration is fundamentally different from an executory judgment[31] because there is no requirement for the parties to do anything after the judgment has been handed down.[32] Unlike a judicial order for compensation,[33] or restitution,[34] or even for a formal apology, a true declaratory judgment merely specifies the legal relationship of the parties, and goes no further; it does not provide material relief.[35]

30 E. Borchard, *Declaratory Judgments* (1934), vii; see also E. Borchard, 'The Declaratory Judgment – A Needed Procedural Reform', (1918) 28 *Yale Law Journal* 105, at 149. Stair's treatise described declaratory actions as 'those, wherein the right of the pursuer is craved to be declared, but nothing is claimed to be done by the defender': Viscount Stair, *The Institutions of the Law of Scotland deduced from its Originals, and collated with the Civil, Canon and Feudal Laws and with the Customs of Neighbouring Nations* (1832), 4.1.46, cited in The Rt. Hon. The Lord Woolf and J. Woolf, *Zamir & Woolf: The Declaratory Judgment* (2002), 298. See also L. Sarna, *The Law of Declaratory Judgments* (1978), 1.

31 See generally P. Couvreur, 'The Effectiveness of the International Court of Justice in the Peaceful Settlement of Disputes', in A.S. Muller, D. Raič and J.M Thuránszky, *The International Court of Justice – Its Future Role After Fifty Years* (1997), 106; Q. Wright, 'The International Court of Justice and the Interpretation of Multilateral Treaties', (1947) 41(2) AJIL 445, at 448; 1945 Charter of the United Nations, 1 UNTS 16, Art. 94. M.E. O'Connell, 'The Prospects for Enforcing Monetary Judgments of the International Court of Justice: A Study of Nicaragua's Judgment against the United States', (1989) 30 *Virginia Journal of International Law* 891, at 902–5. On enforcement, see R. Jennings, 'The Judicial Enforcement of International Obligations', (1987) 47 *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht* 3; F.B. Sloan, 'Advisory Jurisdiction of the International Court of Justice', (1950) 38 *California Law Review* 830. On compliance, see C. Paulson, 'Compliance with Final Judgments of the International Court of Justice since 1987', (2004) 98(3) AJIL 434.

32 Woolf, *supra* note 30, at 1.

33 E.g., *S.S. Wimbledon (United Kingdom, France, Italy* et al. *v. Germany)*, PCIJ Rep Series A No 1, at 30; *Corfu Channel (United Kingdom v. Albania)*, Assessment of the amount of compensation due from the People's Republic of Albania to the United Kingdom of Great Britain and Northern Ireland, Judgment of 15 December 1949, [1949] ICJ Rep. 244.

34 E.g., *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Merits, Judgment of 14 February 2002, [2002] ICJ Rep. 3, where the Court ordered Belgium to cancel the warrant (paras. 72–6); Congo viewed this remedy as restitution (para. 73), as did the Court, (para. 76). See also *Jurisdictional Immunities*, *supra* note 4, at 51; and arguably the order to conduct 'review and reconsideration' in *LaGrand (Germany v. USA)*, Merits, Judgment of 27 June 2001, [2001] ICJ Rep. 466, to wit, see A. Orakhelashvili, 'The Concept of International Judicial Jurisdiction: A Reappraisal', (2003) 2 *Law and Practice of International Courts and Tribunals*501, 543.

35 Borchard, *supra* note 20, at 128.

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As Brownlie notes, all judgments on the merits are 'declaratory' in the sense that the parties legal entitlements must be adjudicated before a remedy can be awarded,[36] but in a declaratory judgment proper the Court's function is completed the moment it states the law.[37] Orders for additional remedies may follow in subsequent proceedings,[38] as declaratory judgments, while binding and *res judicata*,[39] do not prevent a further claim on the same facts for material relief such as compensation.[40] However, in many instances the declaration can be sufficient to entirely resolve the dispute.[41] This is particularly evident in declarations of territorial title, one of the most common uses of declarations by the Court.[42] Put simply, judgments that require an act of execution are not properly conceived of as declaratory.[43] While an executory order requires immediate action, a declaratory judgment proper settles the legal situation as between the parties, and binds only their future conduct, prohibiting future breaches of the same type.[44] This was made clear by the Permanent Court in the *Chorzów* case,[45] where it observed that the purpose of such a judgment was:

> to ensure recognition of a situation at law, once and for all and with binding force as between the Parties; so that the legal position thus established cannot again be called in question so far as the legal effects ensuing therefrom are concerned.[46]

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36 I. Brownlie, 'Remedies in the International Court of Justice', in V. Lowe and M. Fitzmaurice, *Fifty Years of the International Court of Justice – Essays in Honour of Sir Robert Jennings* (1996), 560.

37 Jennings, *supra* note 31, at 15; Borchard, *supra* note 30, at 8.

38 C. Gray, *Judicial Remedies in International Law* (1987), 97–8; Brownlie, *supra* note 36, at 560; Borchard, *supra* note 30, at 49.

39 1945 Statute of the International Court of Justice, 33 UNTS 993, Art. 59. See also *Certain German Interests in Polish Upper Silesia (Germany v. Poland)*, Preliminary objections), PCIJ Rep Series A No 6, at 19; *Chorzów* (Merits), *supra* note 7, at 20; *Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów) (Germany v. Poland)*, PCIJ Rep Series A No 13, at 23 (Judge Anzilotti, Dissenting Opinion); *Northern Cameroons (Cameroon v. United Kingdom)*, Preliminary objections, Judgment of 2 December 1963, [1963] ICJ Rep. 15, at 33, 37. On the principle of *res judicata* as a general principle of law, see B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (1953), 336; J. Collier and V. Lowe, *The Settlement of Disputes in International Law, Institutions and Procedures* (1999), 177; V. Lowe, 'Res Judicata and the Rule of Law in International Arbitration', (1996) 8 *African Journal of International and Comparative Law* 38, at 39; I. Scobbie, 'Res Judicata, Precedent and the International Court: A Preliminary Sketch', (1999) 20 *Australian Year Book of International Law* 299.

40 S.L. Bray, 'Preventive Adjudication', (2010) 77 *The University of Chicago Law Review* 1275, at 1293.

41 Brown, *supra* note 10, at 208. As the Court's decision in *Colombian-Peruvian asylum case (Colombia/Peru)*, Merits, Judgment of 20 November 1950, [1950] ICJ Rep. 266, at 288, demonstrates.

42 E.M. Borchard, 'Editorial Comment – Declaratory Judgments in International Law', (1935) 29 *American Journal of International Law* 488, at 489. See *The Minquiers and Ecrehos case (France/United Kingdom)*, Merits, Judgment of 17 November 1953, [1953] ICJ Rep. 47; *Case concerning Sovereignty over certain Frontier Land (Belgium/Netherlands)*, Merits, Judgment 20 June 1959, [1959] ICJ Rep. 209; *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, Merits, Judgment of 23 May 2008, [2008] ICJ Rep. 12; *Sovereignty over Pulau Ligitan and Pulau Sipadan (IndonesialMalaysia)*, Merits, Judgment of 17 December 2002, [2002] ICJ Rep. 625; *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Merits, Judgment of 19 November 2012, [2012] ICJ Rep. 624.

43 Collier and Lowe, *supra* note 39, at 178.

44 H. Kelsen, 'Compulsory Adjudication of International Disputes', (1943) 37 AJIL 397, at 402. Cf. Gray, *supra* note 38, 101–2; Ritter, « L'affaire des Essais nucléaires et la notion de jugement déclaratoire », (1975) 21 *Annuaire français de droit international* 278. See also *Northern Cameroons*, *supra* note 39, and *Application of the Interim Accord of 13 September 1995 (The Former Yugoslav Republic of Macedonia v. Greece)*, Merits, Judgment of 5 December 2011, [2011] ICJ Rep. 644.

45 *Chorzów* (Interpretation), *supra* note 39, at 4.

46 Ibid., at 20.

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Accordingly, declaratory judgments are a *remedy*,[47] and there is certainly no reason an application cannot be made to the Court seeking a declaration of a state's breach of its international obligation(s), and no more than this.[48] If the applicable jurisdictional title is sufficiently broad, an 'interested state' can bring an action seeking a declaratory judgment that another state is in breach of an obligation whether or not the applicant state has suffered any damage.[49]

However, the purpose underlying the utilisation of the declaratory remedy is less obvious than its nature may suggest. There has been some question as to whether declaratory judgments in state responsibility cases serve a purpose as reparation, or whether the Court's reference to satisfaction in such judgments may be reconceived of as a penalty.[50] Additionally, the fact that the Court does not make use of the satisfaction formulation in every state responsibility case, at times adopting a more 'injunctive' form, gives rise to the further question of whether such judgments are true declarations or something else entirely.

### 2.1. The declaratory judgment cannot be reparation

First, the use of declaratory judgments as *reparation* in the state responsibility context raises many conceptual difficulties. Foremost is that a declaratory judgment can only be awarded by a court, which does not fit within the understanding of reparation as an obligation owed by the offending state arising consequent upon the commission of an internationally wrongful act, whether or not a court has pronounced it so.[51] A declaration also does little, if anything, to 're-establish the situation that would, in all probability, have existed' if the unlawful act had not been committed.[52] Moreover, although damage is not a precondition for the invocation of responsibility,[53] it is the 'condition *sine qua non* of reparation'.[54] Whereas responsibility may be invoked

47 E. Borchard, *supra* note 30, at 8.

48 See Gray, *supra* note 38, at 97–8. In an example of this, in *Legal Status of Eastern Greenland*, the Permanent Court issued a declaratory judgment in which it only decided that Norway's declaration of occupation constituted a violation of the existing legal situation, and was accordingly unlawful and invalid (*Legal Status of Eastern Greenland (Denmark v. Norway)*, PCIJ Rep Series A/B No 53, at 75). While Denmark reserved its right to ask for a decision on the nature of the reparation (at 23), following the declaratory judgment, Norway withdrew its claim to the territory and the case was terminated without reparation being decided: *Legal Status of the South-Eastern Territory of Greenland*, Order of 11 May 1933, PCIJ Rep Series A/B No 55, at 157.

49 ARSIWA Commentary, *supra* note 1, at 126 (Art. 48); Crawford, *supra* note 7, at 276. I. Scobbie, 'The invocation of responsibility for the breach of "obligations under peremptory norms of general international law"', (2002) 13(5) *EJIL* 1201.

50 McIntyre, *supra* note 26.

51 It was for this reason that the declaratory judgment was removed from the list of modes of satisfaction in Art. 37 during the International Law Commission's 52nd session: J. Crawford, 'Third Report on State Responsibility', UN Doc. A/CN.4/SER.A/2000/Add.1 (Part 1) (2000), 54–5; ARSIWA Commentary, *supra* note 1, 105; International Law Commission, 'Report on the work of its fifty-second session (1 May–9 June and 10 July–18 August 2000)', *General Assembly Official Records*, Fifty-fifth Session, Supplement No. 10 (A/55/10), 35; Crawford, *supra* note 7, at 233.

52 *Chorzów* (Jurisdiction), *supra* note 7, at 47.

53 ARSIWA Commentary, *supra* note 1, at 34 (Art. 2), 36; Crawford, *supra* note 7, at 84. See also S. Wittich, 'Non-Material Damage and Monetary Reparation in International Law', (2004) 15 *Finnish Yearbook of International Law* 321, at 324.

54 E. Wyler, 'From "State Crime" to Responsibility for "Serious Breaches of Obligations under Peremptory Norms of General International Law"', (2002) 13(5) EJIL 1147, at 1152.

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by any state to which an obligation is due, and a declaratory judgment duly made, only an 'injured state' or a 'specially affected state' is entitled to reparation.[55]

Thus, on a proper analysis it is apparent that declaratory judgments, although often made as *satisfaction*, should not be considered a mode of *reparation*.[56] While satisfaction can be a mode of reparation, and a declaratory judgment a form of satisfaction,[57] it does not therefore follow that a declaratory judgment is reparation.

### 2.2. The declaratory judgment as a penalty

Rather, as I have argued elsewhere,[58] the declaratory judgment, when made as satisfaction, should be conceived of as a *penalty*, that is, the 'condemnation of an internationally wrongful act by an impartial third party of recognized authority',[59] which serves to punish and deter wrongdoing.[60] Such a conception builds upon the distinction noted by Grotius, that 'Injuries done might be considered in a twofold Respect, either as they may be repaired or punished'.[61] Whereas restitution and compensation are means by which to restore the injured party to the situation which would have existed if the wrongful act had not been committed[62] – true reparation – the line between satisfaction as reparation and satisfaction as sanction is less clear.[63] Traditional modes of satisfaction such as apologies or salutes to the flag are the remedial response to 'the perpetration of some sort of *fault*'[64] and, rather than serving the purpose of repairing an injury, may (alternatively or additionally) be intended to punish 'in the most general sense of the word – an injury which is judged not susceptible of being redressed (. . . ) by the traditional forms of reparation'.[65]

This duality inherent in the very concept of satisfaction profoundly affects the interpretation of the Court's usage of declaratory judgments as satisfaction. As observed by Brown, reparation is 'independent of international judicial practice', as the obligation to make reparation arises under state responsibility 'regardless of whether this is determined in international judicial proceedings or through diplomatic processes.'[66] By contrast, the declaratory judgment is indivisible from the judicial act and conceptually at odds with the very notion of reparation. However, a declaratory judgment awarded as punitive, rather than reparatory, satisfaction remains a mere declaration, usefully expressing 'opprobrium to the wrongdoer'[67] while still meeting all of the relevant criteria for a declaratory judgment, including,

55 See ARSIWA Arts. 42 and 48. Invocation of responsibility is understood as encompassing formal measures such as the commencement of proceedings before an international court or tribunal: ARSIWA Commentary, *supra* note 1, at 117; Crawford, *supra* note 7, at 255–6; B. Cheng, *supra* note 39, at 236.
56 Amerasinghe, *supra* note 17, at 417.
57 Or at least, taking a pragmatic view, the Court is not going to cease awarding declarations as satisfaction any time soon.
58 McIntyre, *supra* note 26.
59 Wyler and Papaux, *supra* note 16, at 636.
60 Shelton, *supra* note 7, at 54.
61 Grotius, Bk 2, Ch 20 (Para. 1(1)), in H. Grotius, *supra* note 9.
62 *Chorzów* (Jurisdiction), *supra* note 7, at 22.
63 Shelton, *supra* note 7, at 91.
64 Wyler and Papaux, *supra* note 16, at 623.
65 Ibid., 625.
66 Brown, *supra* note 10, at 186–7.
67 Shelton, *supra* note 7, at 12.

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vitally, the lack of any need for a further act of execution by the parties. A declaratory judgment which is awarded as satisfaction should therefore not be conceived of as an award of reparation, but rather as an explicit recognition of a state's responsibility for its wrongful acts or omissions 'in a manner that censures the wrongdoer'.[68]

### 2.3. The declaratory judgment as injunction

Not all state responsibility cases result in the award of a declaratory judgment as satisfaction, however. The Court has also engaged in a practice of awarding declaratory judgments that appear to have an injunctive character – either as a mandatory order to follow a particular course of conduct, or prohibitive of certain conduct.[69] This is potentially problematic, as it is not at all clear whether the making of such mandatory orders is within the Court's competence.[70] Additionally and perhaps even more serious is the fact that declaratory judgments are not meant to require any act of execution. That they are a declaration of the law and nothing more is their key distinguishing feature. Yet on closer inspection it becomes clear that this 'injunctive' form of judgment should still be considered a true form of declaratory judgment.

This is best evidenced by a comparison of the Court's 2008 judgment in *Questions of Mutual Assistance*, with the 2012 judgment in *Obligation to Prosecute or Extradite*. *Questions of Mutual Assistance* concerned the 1995 death, in Djibouti, of a French national.[71] In 2004, Djiboutian authorities made a request to France via international letter rogatory pursuant to the bilateral 1986 Convention on Mutual Assistance[72] for transmission of the record of a French investigation into the death. The request for assistance was refused,[73] however, Djibouti claimed never to have received notification of the refusal.[74] Djibouti's 2006 application to the Court alleged that France had breached its obligation to execute the international letter rogatory.[75] The Court concluded that France was only in breach of its procedural obligations under the treaty to notify Djibouti of the reasons for its refusal to grant mutual assistance.[76] The Court unanimously held that this failure to comply with the procedural obligation of notification constituted appropriate satisfaction for Djibouti.[77]

In *Obligation to Prosecute or Extradite*, a Belgian national of Chadian origin filed a complaint with a Belgian investigating judge, alleging torture and other crimes against humanity committed by the former President of Chad, Hissène Habré, during

68 McIntyre, *supra* note 26.
69 E.g., *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA)*, Merits, Judgment of 27 June 1986, [1986] ICJ Rep. 14.
70 Cf. Gray, *supra* note 38, at 64–8; Brownlie, *supra* note 36, at 561–3; Brown, *supra* note 10, at 193. *Haya de la Torre Case (Colombia/Peru)*, Merits, Judgment of 13 June 1951, [1951] ICJ Rep. 71, at 79.
71 *Certain Questions of Mutual Assistance in Criminal Matters*, *supra* note 5, at 187–8.
72 1986 Convention Concerning Judicial Assistance in Criminal Matters, 1695 UNTS 287.
73 Ibid., Art. 2(c); *Certain Questions of Mutual Assistance in Criminal Matters*, *supra* note 5, at 192, para. 28.
74 *Certain Questions of Mutual Assistance in Criminal Matters*, *supra* note 5, at 192, para. 29.
75 Ibid., at 193, para. 116.
76 1986 Convention, supra note 72, Art. 17; *Certain Questions of Mutual Assistance in Criminal Matters*, *supra* note 5, at 231, para. 152.
77 *Certain Questions of Mutual Assistance in Criminal Matters*, *supra* note 5, at 246–7, para. 205(2a).

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his presidential tenure.[78] The Belgian judge, considering that the allegations were sufficiently serious, issued an international warrant *in absentia* for the arrest of Mr Habré in 2005. Belgium transmitted the international arrest warrant to Senegal, and requested the extradition of Mr Habré.[79] By 2012, Senegal had neither complied with Belgium's request for extradition, nor had it made any significant progress in respect of prosecuting Mr Habré.[80] Belgium sought the intervention of the Court, and successfully obtained from the Court an order that Senegal had breached its obligations arising under the 1984 Convention Against Torture,[81] insofar as the Senegalese authorities had failed to undertake any preliminary inquiry into the allegations of torture,[82] and was continuing to breach its obligations as Senegal had neither prosecuted Mr Habré nor extradited him to Belgium as it was obliged to do.[83]

While in both cases the applicant states included in their submissions that a declaration by the Court of the wrongfulness of the respondent state's conduct would, in whole or in part, constitute appropriate satisfaction,[84] in *Obligation to Prosecute or Extradite*, the judgment made no mention of satisfaction, but rather contained an exhortation to Senegal to submit the case of Mr Habré to the competent authorities for the purpose of prosecution, or to extradite him to Belgium.[85]

As noted above, this form of judgment appears, at least superficially, to resemble a mandatory order – perhaps for specific performance or possibly even restitution, broadly construed.[86] However, Senegal's obligation to prosecute or extradite Mr Habré arose as a result of Article 7(1) of the 1984 Convention against Torture, and did so *whether or not* the Court made an order in the terms that it did. The Court's judgment recognizes the 'situation at law, once and for all and with binding force as between the Parties',[87] and the *dispositif* does no more than make express Senegal's obligation to cease the wrongful act. In order to cease breaching its *positive* obligations, Senegal was required to take *positive* steps. The Court made this clear when it stated:

> The Court emphasizes that, in failing to comply with its obligations under Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention, Senegal has engaged its international responsibility. Consequently, Senegal is required to cease this continuing wrongful act, in accordance with general international law on the responsibility of States for internationally wrongful acts. Senegal must therefore take without further delay the necessary measures to submit the case to its competent authorities for the purpose of prosecution, if it does not extradite Mr. Habré.[88]

78 *Prosecute or Extradite*, *supra* note 3, at 432.
79 Ibid.
80 Ibid., at 439.
81 1984 United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85.
82 Ibid., Art. 6(2); *Prosecute or Extradite*, *supra* note 3, at 428 and 454, para. 88.
83 Ibid., Art. 7(1); *Prosecute or Extradite*, *supra* note 3, at 428–9 and 461, para. 117.
84 CR 2008/3, at 33, para. 51 (van den Biesen); CR 2012/3 (translation), at 45, para. 7 (Rietjens).
85 Ibid., at 463, para. 6.
86 C. Gray, 'The Different Forms of Reparation: Restitution', in Crawford, Pellet and Olleson (eds.), *supra* note 16, at 592.
87 *Chorzów* (Interpretation), *supra* note 39, at 20.
88 *Prosecute or Extradite*, *supra* note 3, at 461, para. 121.

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This is not the first time that the Court has included recommendations on how the parties should conduct themselves.[89] The judgment in *Obligation to Prosecute or Extradite* is akin to that awarded in the *Arrest Warrant* case, where the Court ordered that Belgium 'must, by means of its own choosing, cancel the arrest warrant of 11 April 2000.'[90] However, these judicial statements nonetheless retain the character of a declaratory judgment and do not stray into the realm of mandatory orders. To the extent that there are executory consequences arising from the judgment, they operate as a result of the rules of state responsibility and not as a direct result of the Court's declaration,[91] which does no more than make express the course of conduct implicitly required by the Court's conclusion of illegality.[92] The details of how to comply – or to be more precise, the details of how to revert to a condition of non-breach – are reserved for the state.[93] Thus, an 'injunctive' form of declaratory judgment does no more than make plain the offending state's already existing obligation to cease its unlawful conduct.[94]

The key issue is therefore whether there is a rationally defensible explanation as to why the Court elected to award a declaratory judgment as satisfaction in *Questions of Mutual Assistance*,[95] and an injunctive declaratory judgment in *Obligation to Prosecute or Extradite*,[96] in a situation where both states had initially requested the same remedy – satisfaction. Ultimately, then, it becomes necessary to closely examine the jurisprudence to identify in which circumstances the Court considers it appropriate to confer a declaratory judgment which could be considered punitive in nature, and in which circumstances the injunctive form is preferred. It then becomes possible to reflect on what this juxtaposition tells us about the role of declaratory judgments in the state responsibility context.

## 3. 'I DEMAND SATISFACTION': REQUESTS FOR SATISFACTION GRANTED AND DENIED

The Court's most recent case law reveals that while the Court commonly awards declaratory judgments, it is only in certain limited circumstances that it does so as punitive satisfaction. To begin with, and quite in contrast to *Questions of Mutual*

89 A. Pellet, 'Article 38', in A. Zimmermann, C. Tomuschat and K. Oellers-Frahm (eds.), *The Statute of the International Court of Justice: A Commentary*(2006), 695–6. See for example *Military and Paramilitary Activities in and against Nicaragua*, *supra* note 69, 149, para. 292(12). See also *Nuclear Tests*, *supra* note 23, at 494–502, paras. 2–18 (Judges Onyeama et al., Joint Dissenting Opinion); *Arrest Warrant*, *supra* note 34, at 33, para. 78(3).*Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Merits, Judgment of 25 September 1997, [1997] ICJ Rep. 7, at 79; *Société Commerciale de Belgique (Belgium v. Greece)*, PCIJ Rep Series A/B No 78, at 178. Cf. *Free Zones of Upper Savoy and the District of Gex (France v. Switzerland)*, PCIJ Rep Series A/B No 46, at 169; *Avena and Other Mexican Nationals (Mexico v. USA)*, Merits, Judgment of 31 March 2004, [2004] ICJ Rep. 12; *LaGrand*, *supra* note 34.

90 *Arrest Warrant*, *supra* note 34, at 33, para. 78(D3).

91 ARSIWA Commentary, *supra* note 1.

92 *Arrest Warrant*, *supra* note 34, at 33, para. 78(D2).

93 Cf. *Haya de la Torre*, *supra* note 70.

94 ARSIWA Commentary, *supra* note 1, at 88 (Art. 30). See discussion in Crawford, *supra* note 51, at 196–8.

95 *Certain Questions of Mutual Assistance in Criminal Matters*, *supra* note 5, at 246–7, para. 205(2a).

96 *Prosecute or Extradite*, *supra* note 3, at 461.

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*Assistance*, the Court's 2010 judgment in *Pulp Mills*[97] resulted in a declaratory judgment being awarded as satisfaction, but this time in a situation where the desirability of such an outcome had been expressly disavowed by the applicant state.

The case concerned the planned construction of one pulp mill and the commission and construction of another on the River Uruguay.[98] Pursuant to the 1975 Statute of the River Uruguay,[99] which established a 'régime for the use of the river',[100] Uruguay had certain procedural obligations to inform, notify, and negotiate when issuing authorizations, commissions, and orders for the construction of the mills,[101] and certain substantive obligations such as the requirement to contribute to the optimum and rational utilization of the river.[102] Argentina claimed that Uruguay had violated both its procedural and substantive obligations which it asserted were indivisible.[103]

Argentina requested primarily an order for restitution, or compensation for any damage caused that would not be remedied by the order for restitution. Argentina also requested that the Court order Uruguay to 'provide adequate guarantees' that it would not attempt to avoid the 1975 Statute again in the future.[104] While Argentina did not entirely renounce the possibility of declaratory satisfaction forming part of a suite of appropriate remedies,[105] the possibility that Argentina might be content with a declaratory judgment alone was expressly rejected.[106]

Uruguay on the other hand submitted that its procedural and substantive obligations were separable,[107] and were the Court to find it had acted in breach of only its procedural obligations, a declaratory judgment to that effect would constitute appropriate satisfaction. Uruguay emphasized that Argentina's 'nominal interest in securing redress for an alleged procedural violation' would be more than adequately addressed by the granting of declaratory relief, relying in support of this submission on the Court's judgment in *Certain Questions of Mutual Assistance*.[108] The Court apparently agreed with Uruguay,[109] and emphasized that 'its finding of wrongful conduct by Uruguay in respect of its procedural obligations per se constitutes a measure of satisfaction for Argentina.'[110] The formulation used by the Court is unusual, as it clearly attempts to frame the use of satisfaction as reparatory (being 'for Argentina'), and yet fails to recognize the necessity of 'full' reparation[111] ('some measure of').

97 *Pulp Mills*, *supra* note 2.
98 Ibid., at 31, para. 24.
99 1295 UNTS 331.
100 *Pulp Mills*, *supra* note 2, at 32, para. 27.
101 Ibid., at 51, para. 81.
102 Ibid., at 73–5, paras. 170–7.
103 Ibid., at 47, para. 68.
104 Ibid., at 29, para 23.
105 CR 2009/21, at 48, para. 9 (Pellet).
106 Memorial of Argentina, 15 January 2007, paras. 8.2, 8.6. Save for in respect of one relatively minor incident related to the announced intention to construct a mill 'elsewhere in Uruguay' but in an unspecified location.
107 *Pulp Mills*, *supra* note 2, at 48, para. 73.
108 Rejoinder of Uruguay, 29 July 2008, para. 1.36.
109 *Pulp Mills*, *supra* note 2, at 106, para. 282(1).
110 Ibid., at 102, para. 269.
111 *Chorzów* (Jurisdiction), *supra* note 7, at 21–2; ARSIWA Commentary, *supra* note 1, at 91 (Art. 31); Crawford, *supra* note 7, at 201.

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The Court's judgment could be more successfully reconceived of as punitive, and therefore it suffices for present purposes to attribute this anomaly to the general confusion that has reigned in respect of the proper role of declaratory judgments in the state responsibility context.

A different result pertained in the *Interim Accord* case,[112] where the applicant state sought – and obtained – a declaration, constituting appropriate satisfaction, that Greece had violated its obligation under Article 11(1) of the Interim Accord. The Accord required Greece 'not to object to the application by or membership of' the applicant in NATO.'[113] The parties agreed that this was an obligation of conduct, not of result, insofar as it did not mean that Greece had to support the applicant's membership or that the applicant in fact had to be accepted into NATO.[114] However, Greece had breached its obligation 'not to object' and this was sufficient to engage its international responsibility. The applicant highlighted in its claim for a declaratory judgment that the award of such 'would avoid further impunity',[115] emphasising the link between declarations and the punitive dimension of satisfaction.[116]

Finally, we see a particularly interesting development in the Court's recent judgment in *Whaling in the Antarctic*. Australia brought proceedings pursuant to declarations made under the optional clause,[117] alleging that Japan's programme to hunt and kill whales (known as JARPA II) was not in accordance with the requirements under Article VIII of the 1946 International Convention on the Regulation of Whaling[118] (ICRW) that such a programme be 'for purposes of scientific research'.[119] If that position was correct, then it followed that Japan had breached, and was continuing to breach, certain of its substantive obligations under the Schedule to the ICRW, which included prohibitions on the killing, taking, and treating of whales.[120] Australia asserted that Japan had also failed to comply with certain procedural requirements which obliged Japan to make proposed permits for scientific whaling available for review and comment by the Scientific Committee of the International Whaling Commission.[121] Australia did not claim to have suffered any damage – they did not, after all, own the whales – but neither was there an attempt, as there had been by Belgium in *Obligation to Prosecute or Extradite*, to formulate Japan's breach of its multilateral obligations under the ICRW as damage per se.[122] Rather, Australia

112 *Interim Accord*, *supra* note 44, at 644.
113 Ibid., at 666, para. 67.
114 Ibid.
115 Reply of the former Yugoslav Republic of Macedonia, 9 June 2010, para. 6.15.
116 Shelton, *supra* note 7, at 54; F.V. Garcia-Amador, *The Changing Law of International Claims*, Vol. 2 (1984), 575.
117 *Whaling*, *supra* note 6, at 18, para. 31.
118 161 UNTS 2125.
119 *Whaling*, *supra* note 6, at 25, para. 51.
120 The obligation to respect the moratorium setting zero catch limits for the killing of whales from all stocks for commercial purposes (para. 10 (e)); the obligation not to undertake commercial whaling of fin whales in the Southern Ocean Sanctuary (para. 7 (b)); and the obligation to observe the moratorium on the taking, killing or treating of whales, except minke whales, by factory ships or whale catchers attached to factory ships (para. 10 (d)). See *Whaling*, *supra* note 6, at 24–5, para. 48.
121 *Whaling*, *supra* note 6, at 25, para. 48.
122 On the concept of 'legal damage', see C. Hoss, 'Satisfaction', *Max Planck Encyclopaedia of International Law*, paras. 6–7; E. Fasoli, 'Declaratory Judgments and Official Apologies as Forms of Reparation for the Non-Material Damage Suffered by the State: the Djibouti-France Case', (2008) 7 *The Law and Practice of International Courts*

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sought only a declaratory judgment, including an express recognition of the obligation of cessation of the breach and the corollary obligation of revoking any extant whaling permits related to JARPA II.[123]

Following a careful examination of the terms of Article VIII, the Court concluded that JARPA II did not constitute whaling 'for the purposes of scientific research'.[124] Japan had not, however, breached its procedural obligations.[125] With respect to Japan's breaches of its substantive obligations, the Court went above and beyond the request of Australia for a simple declaration of the breach. The Court held that because JARPA II was an 'ongoing programme', 'measures that go beyond declaratory relief are warranted'.[126] The Court ordered that not only shall Japan 'revoke any extant authorization, permit or licence to kill, take or treat whales in relation to JARPA II', but also that Japan must 'refrain from granting any further permits in pursuance of that programme',[127] and that it was to be expected that Japan would 'take account of the reasoning and conclusions contained in this Judgment as it evaluates the possibility of granting any future permits under Article VIII'.[128]

The remedies ordered by the Court in the *Whaling* case are peculiar in their form, leading to potential confusion regarding their effect. On the one hand, the judgment may be considered as simply more evidence of the Court's practice of awarding injunctive declaratory judgments, which explicitly order the offending party to cease the unlawful activity.[129] As seen in *Obligation to Prosecute or Extradite*, the injunctive form of declaration simply makes plain the offending state's already extant obligation to cease unlawful conduct, which in the case of positive obligations, may require the taking of positive steps.[130] The requirement to 'revoke any extant authorization, permit or licence to kill, take or treat whales in relation to JARPA II' could thus be characterized as simply an overt statement regarding the need for cessation. However, this was not a situation that required Japan to take positive steps to comply with its already subsisting positive obligations. Rather, the judgment required Japan to revoke – undo – its unlawful permits.

Arguably, such an order begins to resemble restitution rather than a declaratory judgment. This is not *per se* problematic. It may be a simple reversion to the straightforward calculation that wrongdoing gives rise to the dual obligation of cessation and reparation. *Whaling* could therefore be considered equivalent to the declaration in *Jurisdictional Immunities of the State*,[131] where the Court ordered 'legal restitution',[132]

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*and Tribunals* 177, at 179; A. Tanzi, 'Is damage a distinct condition for the existence of an internationally wrongful act?', in M. Spinedi and B. Simma (eds.), *United Nations Codification of State Responsibility* (1987), 9. Contra Wittich, *supra* note 53.

123 *Whaling*, *supra* note 6, at 15, para. 25.

124 Ibid., at 6, para. 228.

125 Ibid., at 72, para 247(6).

126 Ibid., at 70, para. 245.

127 Ibid., at 72, para 247(7).

128 Ibid., at 70, para. 246.

129 For example, *Military and Paramilitary Activities in and against Nicaragua*, *supra* note 69, at 149, para. 292(12). See also *Nuclear Tests*, *supra* note 23, at 312–19; *Arrest Warrant*, supra note 34, at 33, para. 78(D3).

130 *Prosecute or Extradite*, *supra* note 3, at 461, para. 121, and at 463, para. 122(6). See also ARSIWA Commentary, *supra* note 1, at 88, and discussion in Crawford, *supra* note 7, at 196–8.

131 *Supra* note 4.

132 Gray, *supra* note 86, at 591.

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requiring Italy to enact appropriate legislation (or take other measures having similar effect) to reverse the effect of decisions made by the Italian courts in breach of Germany's right of jurisdictional immunity.[133]

However, in *Whaling* the Court did not suggest that the order was related to the undoing of consequences arising from the unlawful act, or that the order should be considered reparatory – Australia's material or moral interests not having been damaged and the dead whales not susceptible of being restored to life. As observed by Gray, judgments that recognize an obligation of restitution 'have, to date, generally taken the form of a declaratory judgment rather than an order.'[134] At the least, *Whaling* falls within this milieu.

Then there is the requirement that Japan 'refrain from granting any further permits' and take account of the reasoning of the Court when it evaluates the possibility of granting any future permits.[135] However, it is incorrect to surmise that the Court has here done anything other than simply affirm the binding character of its judgment. Declaratory judgments, like all judgments, must be complied with,[136] and a future failure by Japan to take account of the reasoning of the Court would result (almost inevitably) in a repeated breach of its international obligations and non-compliance with the Court's judgment.

Overall, a closer examination of the *Whaling* decision reveals that despite desiring to 'go beyond declaratory relief', arguably the Court did not achieve its goal – and neither was there any real reason to proclaim the necessity of doing so. Ultimately, it appears that Japan was required to do no more than cease the unlawful conduct (stop whaling under JARPA II) and was bound by the decision of the Court to not issue non-compliant permits in the future. A simple declaratory judgment is wholly capable of achieving such results.

## 4. A DIFFERENTIATION OF DECLARATORY REMEDIES BASED ON THE NATURE OF THE OBLIGATION AND THE NATURE OF THE BREACH

Taken together, these judgments reveal something of the 'protean and flexible' nature of the declaratory judgment,[137] even within a single field such as state responsibility.[138] Moreover, they illustrate that there remains widespread uncertainty as to the proper function of declarations in the state responsibility context. Nevertheless, they also demonstrate an emergent trend with respect to the manner of cases in which a declaration will be deemed to constitute satisfaction, to be contrasted with those cases which result in an 'injunctive' declaratory judgment.

133 *Jurisdictional Immunities*, *supra* note 4, at 153–4, para. 138.
134 Gray, supra note 86, at 592, referring to *Temple of Preah Vihear (Cambodia v. Thailand)*, Merits, Judgment of 15 June 1962, [1962] ICJ Rep. 6; *United States Diplomatic and Consular Staff in Tehran (USA v. Iran)*, Merits, Judgment of 24 May 1980, [1980] ICJ Rep. 3; and *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea Intervening)*, Merits, Judgment of 10 October 2002, [2002] ICJ Rep. 303.
135 *Whaling*, *supra* note 6, at 70, para. 246.
136 Notes 31 and 36, *supra*.
137 McIntyre, *supra* note 26, at 156.
138 Cf. Brownlie, *supra* note 36, at 560–3.

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Such a trend is all the more apparent when it is appreciated that the award of declaratory judgments as satisfaction cannot be explained solely by reference to *non ultra petita*. This would be the obvious justification for any differential treatment; an applicant state may request, or receive, only a declaration of the breach,[139] or it may request a declaration as satisfaction. Certainly, application of this principle suffices to explain the Court's first use of a declaratory judgment as satisfaction in *Corfu Channel*.[140] Albania had requested an apology, but abandoned this request during the oral proceedings and accepted that a declaration would be sufficient.[141] It could certainly corroborate the result in the *Interim Accord* case.[142] Moreover, it is the rationale regularly trotted out to justify the Court's controversial judgment in the earlier *Genocide* case,[143] in which during the course of the oral proceedings, Bosnia and Herzegovina's counsel had acknowledged that a declaratory judgment might be the appropriate form of reparation 'for *certain* Convention violations'.[144] The Court concluded that for Serbia's breach of its obligation to prevent genocide at Srebrenica, Bosnia and Herzegovina was entitled to 'reparation in the form of satisfaction', and this would take the form of a declaration.[145]

However, in *Obligation to Prosecute or Extradite* the Court rejected (or at least ignored) Belgium's request for a declaratory judgment as satisfaction.[146] The Court also awarded a declaratory judgment as satisfaction where the applicant did *not* request it in *Pulp Mills*.[147] In *Whaling*, the Court claimed that it was going beyond the simple declaratory relief sought by Australia, even though arguably it did nothing of the sort,[148] and it is debatable whether *non ultra petita* truly explains the Court's judgment in *Genocide*.[149]

That the Court has not strictly limited itself to the applicant state's requests in respect of remedies may appear initially surprising, as it is 'generally recognised' that an injured state has a choice as to the form it wishes due reparation to take,[150] or even whether to request reparation at all.[151] But if declaratory judgments are

139 Note 48, *supra*.
140 *Corfu Channel*, *supra* note 14.
141 Ibid., at 25–6.
142 *Interim Accord*, *supra* note 44.
143 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Merits, Judgment of 26 February 2007, [2007] ICJ Rep. 43.; M. Milanović, 'State Responsibility for Genocide: A Follow-up', (2007) 18 EJIL 669, at 689–92; M. Milanović, 'State responsibility for acts of non-state actors: a comment on Griebel and Plucken', (2009) 22(2) LJIL 307, at 323.
144 CR 2006/31, 18 April 2006, 9, para. 23 (Pellet).
145 Ibid., at 234, para. 463, and at 239, para. 471(9). See further S. Sivakumaran, 'Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia And Herzegovina v. Serbia and Montenegro*), Judgment of 26 February 2007', in J.C. Barker (ed.) 'Decisions of International Tribunals', (2007) 56 *International and Comparative Law Quarterly* 695, at 706; C. Tomuschat, 'Reparation in Cases of Genocide', (2007) 5 *Journal of International Criminal Justice* 905, at 910–11.
146 *Prosecute or Extradite*, *supra* note 3, at 461.
147 Counsel for Argentina emphasized that satisfaction (the form of which was not specified) would only be appropriate 'insofar as [the injury] cannot be made good by restitution or compensation': CR 2009/15 (translation), 46, para. 23 (Pellet).
148 *Whaling*, *supra* note 2, at 72, para. 247(7).
149 On this, see Tomuschat, *supra* note 145, at 909.
150 Gray, *supra* note 86, at 593.
151 Milano, *supra* note 25, at 510. See also H. Mosler, 'The Area of Justiciability: Some Cases of Agreed Delimitation in the Submission of Disputes to the International Court of Justice', in J. Makarczyk (ed.), *Essays in International*

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not considered as reparation, this difficulty does not arise. Notably, the Court is not restricted to the requests of the parties.[152] Jurisdiction to award a declaratory judgment is not premised on the Court's jurisdiction to award reparation.[153] Indeed, it is arguably impossible for states to exclude the Court's power to award a declaratory judgment. As the Court noted in *Northern Cameroons*, '[t]hat the Court may, in an appropriate case, make a declaratory judgment is indisputable.'[154] Once the Court is empowered to determine the merits of a dispute, it is invested with the power to *adjudicate*. Necessarily, that adjudication will at a minimum take the form of a declaratory judgment. Were the Court to be deprived of the power to 'adjudge and declare' the law, the Court would be unable to perform its fundamental judicial function of resolving disputes.

If therefore the diverse results in these cases cannot be explained by reference to *non ultra petita*, the issue is whether there exists a rational justification for the differentiation.

An initial point to note is that while all of the judgments discussed above are declaratory judgments, it is abundantly clear that the Court is quite deliberately making an election between the injunctive form and the form utilising satisfaction. Here, it is sufficient to take the form of words used (or not used) by the Court at face value. As noted above, what is vital is that the declaratory judgment is a purely judicial response to acts of state responsibility: a state cannot 'grant or offer a declaration in respect of itself; this can only be done by a competent third party.'[155] The fact that a case results in a declaratory judgment does not automatically mean that judgment constitutes satisfaction. Indeed, quite the opposite situation pertains. Unless one conceives of declaratory judgments as embodying the punitive aspect of satisfaction and therefore as a form of penalty, declaratory judgments do not make sense as satisfaction, because they are certainly not a form of reparation. The injunctive form, by contrast, is either a simple declaratory judgment (with no debate about penalties or reparation arising), or a mandatory order. As explained above, the former view is preferable. The possibility of a state accepting the judgment

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*Law in Honour of Judge Manfred Lachs* (1984), 411. It is also possible that an adjudicatory body might be vested with the power to determine only questions of reparation and not any underlying question of legality: see for example *Alabama Claims Arbitration* (1872) 1 Moore 495.

152 *LaGrand*, *supra* note34, at 485, para. 48. As Orakhelashvili argues, the Court's remedial jurisdiction should be interpreted expansively because 'the notion of remedies is wider than reparation': A. Orakhelashvili, 'Questions of International Judicial Jurisdiction in the LaGrand Case', (2002) 15 LJIL 105, at 115.

153 In *Certain German Interests*, *supra* note 39, the Permanent Court relied on the broader terms of Art. 36 ('[t]he jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in treaties and conventions in force'), along with Art. 63 ('every State ... has the right to intervene in the proceedings: but if it uses this right, the construction given by the judgment will be equally binding upon it'), and a reference to Art. 14 of the 1920 Covenant of the League of Nations, LNTS 1, ('[t]he Court shall be competent to hear and determine any dispute of an international character which the Parties thereto submit to it') to conclude that the award of declaratory judgments was not excluded from its jurisdiction. See also *Northern Cameroons*, *supra* note 39, at 170 (Judge Bustamante, Dissenting Opinion); Rosenne, *supra* note 22, at 524; generally Scobbie, *supra* note 49; H. Lauterpacht, *The Development of International Law by the International Court* (1958), 205–6.

154 *Northern Cameroons*, *supra* note 39, at 37.

155 Crawford, *supra* note 51, at 55.

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as satisfaction or otherwise is irrelevant.[156] States cannot *ex post facto* redefine the nature of the remedy awarded.

Clearly then, the Court is electing to differentiate between these forms of declaratory judgment, and the utilization of these different modalities can be coherently explained by reference to variances in the nature of the obligation owed, and in the nature of the breach.

This immediately raises the question of whether the Court is reintroducing (inadvertently or otherwise) the prospect of differentiated secondary responsibility obligations according to the nature of the obligation breached, an issue that haunted the International Law Commission during the drafting of the ARSIWA.[157] However, having debunked the idea that declaratory judgments serve any purpose as reparation, there is no need to fear the re-emergence of this particular spectre. We are not concerned with obligations owed by the offending state, but rather with the different judicial responses to diverse acts of wrongdoing. The nature and severity of potential breaches of international law is as broad as the myriad obligations into which states may enter,[158] and there is no reason that the Court cannot seek to issue remedies that are concomitant to and appropriate for the nature of the obligation and the nature of the breach.

Considering then those judgments in which the Court ordered a declaratory judgment as satisfaction, a number of key commonalities arise, which is indicative of a pattern of particular remedies being awarded in a particular type of case. The first is that in each of the *Certain Questions of Mutual Assistance*, *Pulp Mills*, and *Interim Accord* cases, the wrongful conduct had effectively ceased.[159] Thus, the issue for the Court was not one of securing compliance with a rule of law, but rather with establishing the wrongfulness of the conduct – penalizing the breach – in order to emphasize that such conduct should not be repeated.

Secondly, in each of the cases considered above, the breach in question was of a minor, procedural, or technical obligation. In *Certain Questions of Mutual Assistance*, it constituted a failure to give reasons; in *Pulp Mills*, a failure to comply with procedural obligations; and in *Interim Accord*, a failure to 'not object' in an international fora. In each case, the breach arguably had only relatively minor impacts on the ultimate factual situation later facing the disputing states. For example, in *Pulp Mills*, the Court emphasized that not only had the procedural breaches occurred in the past and already ceased,[160] but that Uruguay would not have been prevented from ultimately constructing the mill even had it complied with its procedural obligations.[161] Likewise in the *Interim Accord* case, Greece's non-objection would not have

156 E.g., 'In Belgium's opinion, the finding by the Court of the breaches attributable to Senegal constitutes appropriate satisfaction': *Prosecute or Extradite*, *supra* note 3, Memorial of Belgium, para. 5.27 (translation); CR 2012/3 (translation), 45, para. 7 (Rietjens).

157 See e.g., P.M. Dupuy, 'A General Stocktaking of the Connections between the Multilateral Dimension of Obligations and Codification of the Law of Responsibility' Relations', (2002) 13(5) EJIL 1053.

158 ARSIWA, *supra* note 1, Art. 12; see also ARSIWA Commentary, *supra* note 1, at 125–7.

159 *Mutual Assistance in Criminal Matters*, *supra* note 5, at 231, para. 152; *Pulp Mills*, *supra* note 2, at 102, para. 269; *Interim Accord*, *supra* note 44, at 668–70.

160 *Pulp Mills*, *supra* note 2, at 102, para. 269.

161 Ibid., at 104, para. 275.

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guaranteed the applicant state membership in NATO,[162] and in *Certain Questions of Mutual Assistance*, the Court found that France's reasons for not transmitting the judicial file were within the scope of the 1986 Convention, and as such Djibouti would not in the end have obtained the file, even had France not breached its obligations.

Controversially, perhaps, this rationale might also serve to explain the Court's judgment in the *Genocide* case. The Court in that case held that Serbia was responsible under the 1951 Genocide Convention[163] for failing to prevent the genocide committed in Srebrenica in 1995, but that it was not directly responsible for the genocide.[164] In other words, the breach in question had both already occurred, and being in the nature of an obligation of conduct rather than result,[165] was of a lesser magnitude than the commission of genocide itself. In this sense, although an uncomfortable conclusion, the judgment fits the juridical pattern of cases in which declaratory judgments have been awarded as satisfaction.[166]

By contrast, in both the *Whaling* case and *Obligation to Prosecute or Extradite* case, the relevant wrongful acts were ongoing, giving rise to an obligation of cessation,[167] and additionally, constituted breaches of the state's substantive obligations under the relevant treaties. However, the question of reparation did not arise as in neither case had any damage been suffered by the applicant state. Invocation of responsibility is permitted in such situations but reparation is not, leaving the simple declaratory judgment as the only effective outcome of the proceedings. In both cases, it might be suggested, the Court opted for the injunctive form of declaratory judgment to emphasize the imperative of compliance.

## 5. Conclusions

Ultimately, it appears that punitive declaratory judgments – the satisfaction model – are considered suitable as remedies only for certain types of breaches, of certain types of obligation. The declaratory judgment, awarded as satisfaction, serves a useful function as a penalty, issued by an authoritative body.[168] It is consistently awarded in cases involving minor or technical breaches of legal obligation, so much so that Uruguay in its submissions in the *Pulp Mills* case was content to describe the declaratory judgment as being the 'standard remedy'[169] in this context. Uruguay also described the award of a declaratory judgment as a 'grave' matter of the 'highest international significance'.[170] On both counts Uruguay is correct. The declaratory judgment, issued as a penalty for wrongdoing, is not simply a *de minimis* or

162 *Interim Accord*, *supra* note 44, at 662–3, para. 50.
163 1951 *Convention on the Prevention and Punishment of the Crime of Genocide*, 78 UNTS 277.
164 Milanović, *supra* note 143, at 669–70.
165 *Genocide*, *supra* note 143, at 221, para. 430.
166 Cf. Milanović, *supra* note 143, at 669; and generally A. Gattini, 'Breach of the Obligation to Prevent and Reparation Thereof in the ICJ's Genocide Judgment', (2007) 18(4) EJIL 695.
167 *Prosecute or Extradite*, *supra* note 3, at 461, para. 121; *Whaling*, *supra* note 6, at 70, para. 245.
168 A Pellet, 'Can a State Commit a Crime? Definitely, Yes!', (1999) 10(2) EJIL 425, at 434.
169 Rejoinder, *supra* note 108, paras. 2.137 and 7.17.
170 Ibid., at para. 7.17.

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'toothless' remedy.[171] It is not 'milder' than other remedies simply 'because it lacks a command',[172] but rather it continues to be a 'significant sanction'.[173] A breach of a minor, technical or procedural obligation is still an internationally wrongful act, deserving of reprimand.

At the same time, where a breach is more substantive, or ongoing (or both), the Court has proven that it can and will still make use of the declaratory remedy, but that it will tend towards utilising the more injunctive form. This latter mode of declaration too is useful and effective: securing compliance being more important in such a situation than issuing a penalty. In such a case, there is no need for a command. After the declaratory judgment, 'everyone knows what to do.'[174]

There has been significant confusion regarding the proper role of declaratory judgments in the state responsibility context. It would be preferable to discard any lingering doubt. The declaratory judgment is not a mode of reparation. Rather, both forms of judgment utilized by the Court – the satisfaction model and the injunctive form – are no more and no less than simple, straightforward declaratory judgments.

171 Tomuschat, *supra* note 145, at 910. Cf. Amerasinghe's hierarchy of remedies, in which the declaratory judgment is the least 'important': Amerasinghe, *supra* note 17, at 164–5 and 168.

172 S. Bray, 'The Myth of the Mild Declaratory Judgment', (2014) 63 *Duke Law Journal* 1091, at 1105.

173 *Carthage* and *Manouba* (1913) XI RIAA 449 and 463 respectively; *Rainbow Warrior (New Zealand/France)*, (1994) XX RIAA 215, at 273, para. 123.

174 Bray, *supra* note 172, at 1108.

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