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ASSURANCES AND GUARANTEES OF NON-REPETITION AS A FORM OF INTERNATIONAL RESPONSIBILITY

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Abstract.Invocation of international responsibility of a state is carried out in ways that not only eliminate the negative consequences of the wrongful act, but also provide proportional and appropriate satisfaction to an offended party. Proceeding from the provisions of the Articles on Responsibility of a State for internationally wrongful acts developed by the UN International Law Commission and the practice of international judicial bodies, the author concludes that assurances and guarantees of non-repetition are an independent form of international responsibility. The obligation to provide assurances and guarantees of non-repetition arises not automatically as a result of the commission of an internationally wrongful act, but only in the case of a claim of the offended entity. Such a need may arise in the absence of confidence that a delinquent State will not commit a similar violation of international law in the future.

Keywords: international responsibility, international delinquency, assurances and guarantees of non-repetition, compensation of damage.

1. INTRODUCTION

The forms of state responsibility existing in international law have been worked out by centuries of practice. Depending on the nature and gravity of the offense, compensation for damages may go beyond mere satisfaction and be expressed in the duty of an offender to undergo additional deprivations.

Compensation for damages is specified in the Articles on Responsibility of a State for internationally wrongful acts as the second (after the cessation of the breach of an international obligation) primary responsibility of a delinquent State. This responsibility arises from the commission of an offense by the state. The UN International Law Commission emphasized that the wording of this provision is that the obligation to provide recovery is an immediate and unconditional consequence of state responsibility (*Responsibility of States for Internationally*, n. d).

The forms of compensation (reparation) include restitution, compensation and satisfaction, i.e. reparation implies recovery for all damages, both tangible and intangible, caused by an internationally wrongful act of a State or an international organization which member states are obliged to provide the organization with the necessary funds (Moeldner, n. d). This list of forms of reparation is enshrined in the Articles on Responsibility of a State for Internationally Wrongful Acts and is exhaustive.

However, considering that the purpose of calling for international responsibility is not only to provide reparation for the damage caused, but also to prevent violations of international law in the future, the above forms of liability do not contribute to its achievement. It is possible to achieve this goal only by putting on a state-offender of additional burdens which, on the one hand, would not be contrary to the fundamental principles of international law, and on the other hand, will prevent a repetition of the offense. The author believes that assurances and guarantees of non-repetition should be considered as a form of international responsibility.

2. MATERIALS AND METHODS

In the process of working on the draft Articles on Responsibility of a State for internationally wrongful acts, the attitude of developers towards

the importance of assurances and guarantees of non-repetition as a consequence of an unlawful act has undergone significant changes. Initially, they were included in the number of forms of recovery for the damage caused, among such forms of reparation as restitution, compensation and satisfaction. However, the special rapporteur of the UN Commission on International Law noted the ambiguous nature of assurances and guarantees of non-repetition (Arangio-Ruiz, 1989), which gave rise to further careful study of them. As a result, the assurances and guarantees of non-repetition were included in Part Two of the Articles on Responsibility of a State, entitled as "Contents of the international responsibility of a State", which referred them to the general principles of this Part. Article 30 established the duty of a delinquent State to "cease this act if it continues" and "provide appropriate assurances and guarantees of non-repetition, if circumstances so require" (<http://www.un.org/russian/document/gadocs/56sess/56res2.htm>, 2017).

These duties are independent, although interrelated. As noted by J. Crawford, it is much more appropriate to associate them with the cessation of the offense, because both of them relate to the future actions of an offender, in spite of the fact that in some cases it is possible to use assurances and guarantees of non-repetition as a form of satisfaction (Crawford, Peel & Olleson, 2001). When discussing the draft of this article in the Sixth Committee of the UN General Assembly it was also noted that assurances and guarantees of non-repetition are closely and logically connected with the obligation to stop a wrongful act and can serve in a certain context as tangible evidence that the state which had committed the internationally wrongful act recognized its offending behaviour (<http://daccessdds.un.org/doc/UNDOC/GEN/N01/292/20/PDF/N0129220.pdf?>, 2017). The same opinion on the inextricable logical connection between the termination of a breach of an international obligation and the provision of assurances and guarantees of non-repetition is contained in the comments of the UN International Law Commission itself. The comments emphasize that termination is a priority requirement to address the consequences of an unlawful act, since its task is to put the end of the violation of international law and to ensure the correct and effective discharge of the obligation. As for guarantees of non-repetition, they are necessary for restoring trust in continuing relationships and are required by far not in all cases

(Responsibility of States for Internationally Wrongful, n. d).

3. RESULTS AND THEIR DISCUSSION

It seems unreasonable to enshrine the consequences of an internationally wrongful act such as the cessation of an offense and the assurance of non-repetition within a single paper, because they pursue different goals and are inherently different in nature from each other in a meaningful way.

The purpose of the first is to restore the violated rights of an offended state. The obligation to stop an internationally wrongful act arises automatically in connection with the commission of an offense, and only if "it continues" while the purpose of providing assurances and guarantees of non-repetition is to prevent violations of international law in the future.

Moreover, Article 30 is called "cessation and non-repetition", and the article is about ending and providing assurances and guarantees of non-repetition. It is necessary to distinguish the duty not to repeat a wrongful act and the obligation to provide assurances and guarantees of non-repetition. In the first case, it is an obligation arising automatically after the commission of an offense, by virtue of the very fact of wrongfulness of the act. And in the second case it is a question of an additional duty of the offender, arising only in the event that the offended subject demands it.

Thus, the author believes, that the provision of assurances and guarantees of non-repetition is an independent form of non-material responsibility of the wrongdoing state that goes beyond the recovery of the damage caused. The need to provide such assurances and guarantees "if circumstances so require" gives an exceptional character to this form of responsibility. A.J. de Hug believes that the granting of guarantees is possible only in circumstances established by a third party (Hoogh, 1995). Such circumstances can only be a real threat of recurrence of the act and subsequent serious damage from such an act. Obviously, such a risk appears when the wrongful act is aggravated by violence, deception, coercion from the wrongdoing state, which take place mainly upon commission of an international crime.

4. SUMMARY

Modern international law knows two forms of guaranteeing non-repetition: oral and written. Practice has proven that guarantees of non-repetition of a wrongful act can be provided in the

course of a trial. Thus, in the case of the La Grande brothers, the United States of America recognized their violation of Article 36 § 1 b of the Vienna Convention on Consular Relations. In addition to the apologies to Germany, the USA appealed to the court to declare that the state will take serious measures aimed at preventing such violations in the future. Such assurances and guarantees of non-repetition were expressed both in oral and in written forms. The Court has considered the expression of determination by the United States of America to ensure the implementation of specific measures to fulfill the above obligations as a satisfactory response to the Germany's demand for a general guarantee that such actions would be prevented in the future (*The case of La Grande*, 2006). The decision of the International Court of Justice on this case was subjected to a comprehensive analysis not only in scientific works but also in the course of the work of the UN International Law Commission because this decision made an invaluable contribution to the progressive development of the law on international responsibility. As K.J. Tams rightly points out, in the last part of the La Grande judgment, the Court attempted to influence the rules of law governing the consequences of an unlawful act, having argued that the offended State may be entitled to require the wrongdoing State to assure and guarantee that such an offense will not be repeated again (Tams, 2002). P. Dupuis and C. Hoss also note the fact that prior to the decision in the La Grande case, the assurances of non-repetition were only oral, and after the adoption of this decision, the assurances have obtained a new meaning (Dupuy & Hoss, n. d).

An example of invocation of international responsibility in the form of guarantees of non-repetition is also found in the relatively recent practice of the International Court of Justice. Thus, on May 31, 2010, Australia applied to the Court to recognize that "the continuation by Japan of a large-scale whaling program under the second phase of the Japan Whale Research Program carried out in Antarctica on the basis of a special permit (YARPA II) violates the commitments made by Japan to the International Convention for the Regulation of Whaling (ICRW), as well as other international obligations for the protection of marine mammals and the marine environment". In its application, Australia requested the Court to issue a decision instructing Japan to provide assurances and guarantees that it will not take any further action under the YARPA-II program or any similar program until such a program is aligned with its obligations under international law" (*Report*

of the *International Court of Justice of the United Nations*, 2013). Australia specified its requirements, explaining which methods of providing assurances and guarantees of non-repetition in this case are adequate in the opinion of the victim.

However, there are frequent cases when even the victim itself applying to the international judicial authorities can not indicate which means of assurances and guarantees of non-repetition must be provided. For example, in the case *Germany v. Italy on jurisdictional immunities*, the applicant (Germany) appealing to the International Court of Justice requested the Court to adjudge and declare that the Italian Republic should take all and any measures to ensure that in the future Italian courts did not consider claims based on violations of international humanitarian law by the German Reich during the Second World War from September 1943 to May 1945 (*Report of the International Court of Justice*, 2012).

It is worth noting that the invocation to this form of responsibility is realized, as a rule, precisely through the appeal of a victim to the international judicial body. However, A. de Hug believes that in the case of international delicts this issue must be resolved by agreement between the offender and the victim (Hoogh, P.148-149, 1995).

In the comments of the UN International Law Commission to the Articles on Responsibility of a State, the opinion is expressed that there might be a partial overlap between assurances and guarantees of non-repetition with satisfaction (for example, when repealing legislation allowing an offense) [1]. The need to consider assurances and guarantees of non-repetition as an ordinary satisfaction was also pointed out in domestic science (David & Vasilenko, 1986). However, the author believes that these two forms of non-material responsibility are not identical, since they pursue completely different goals. Responsibility in the form of satisfaction is aimed at eliminating the damage caused (that is, already existing damage). Guarantees of non-repetition, in turn, are aimed at preventing an offense in the future, when there is no confidence in the offender, and there is a potential threat of a repeat of an unlawful act.

The requirement to provide assurances and guarantees of non-repetition can be brought to the offender not only by another state, but also by an international organization. In particular, the United Nations, in the event of an attack on its personnel in the territory of a state, has the right to demand from the state that did not provide the necessary measures to protect personnel, to take

administrative and other appropriate measures to prevent the recurrence of such offenses, even if the attack was committed by a non-state actors.

As for individuals, international law does not provide them with an opportunity to demand from the state-offender assurances and guarantees of non-repetition. The possibility to protect violated rights is mentioned in universal treaties on human rights only. For a specific individual, the decision taken by the competent international body confirming the illegality of the act of the state against him/her will already be a kind of a guarantee that the rights of the individual will not be violated in the future.

For example, following a review by the UN Human Rights Committee of the complaints of a Colombian citizen X regarding the actions of Colombian authorities, the Committee recognized their actions as violating the provisions of Article 26 of the International Covenant on Civil and Political Rights. The crux of the matter was that the citizen X was denied a benefit in connection with the death of his domestic partner who had been in charge of the Citizen X for the past 7 years, because the domestic legislation allowed only heterosexual couples to be recognized as permanent partners for the purposes of pension provision. The Committee, in its decision, obliged Colombia to review the request for granting to citizen X of pension provision without discrimination based on gender and sexual orientation. Colombia was also obliged to take the necessary measures to prevent similar violations in the future (*UNO Communication No. 1361/2005: Colombia*, 2005).

The UN human rights committees in all their decisions enshrine the duty of a state-offender to provide adequate guarantees of non-repetition of the wrongful act in the future. However, such a requirement does not come from the applicant, but directly from the committee, because the state party to the relevant human rights convention is obliged to bring its legislation into line with the provisions of these conventions.

An enshrinement of the obligation to provide assurances and guarantees of non-repetition by a wrongdoing state in the decisions of human rights judicial bodies is also not infrequent. In particular, the literature emphasizes that the great achievement in the practice of the Inter-American Court of Human Rights is the awarding of assurances and guarantees of non-repetition (Quintana, 2007) that have a significant social impact and prevent the

commission of similar offenses in the future (Galván, n. d). Moreover, international human rights judicial bodies quite often use as a form of guarantee of non-repetition precisely the requirement to introduce changes into domestic legal acts.

The European Court of Human Rights also resorts to invocation of responsibility in this form by broad interpretation of the reparations provisions of art.41 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1951. Under this article, if the Court establishes a violation by a state of the provisions of the Convention or its protocols, and the domestic law of this state allows only partial elimination of the consequences of this violation, the Court awards fair compensation to the offended party, if necessary.

5. CONCLUSION

A provision of assurances and guarantees of non-repetition is a form of non-material responsibility that is used in exceptional cases when there is no confidence in the state-offender, and the offended party considers it necessary to obtain additional confirmation that such an offense will not happen again. Such requirement may be put forward by the offended state (independently or through judicial and quasi-judicial bodies) or international organization on its own behalf or on behalf of the offended subject. The form of assurances and guarantees of non-repetition is determined by the offended subject itself adequately to the circumstances and based on the existing relationship between the offender and the victim.

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