

Specific Aspects of Restoration as a Form of Invocation of International Responsibility of a State

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Abstract

Restoration is one of the most complex forms of intangible international legal responsibility. The problem lies in the absence of a generally accepted notion of restoration as an independent form of responsibility, and its primary consideration is only as a form of restitution. Even the term “restoration” is rarely used in international legal documents. Without denying the existence of the common goal of restitution and restoration – restoring the situation that existed before the violation of the law, based on the analysis of international legal acts, as well as the practice of judicial and quasi-judicial bodies, it is concluded that the restoration has a specific character. It is expressed in the need to adopt domestic legal acts to restore the violated rights of the injured subjects of international law, which indicates the independence of this form of responsibility. Responsibility in the form of restoration can be invoked not only by the injured states but also by individuals by applying to international quasi-judicial bodies, such as the UN Committees on Human Rights, against tortures, to eliminate discrimination against women. In turn, the European Court of Human Rights does not have the competence of calling states to such kind of responsibility.

Keywords

International Legal Responsibility, Internationally Wrongful Act, Restoration, Restitution, Reparation

Introduction

The commission of an international wrongful act, regardless of its gravity and nature, entails serious legal consequences, in particular, the emergence of a secondary legal relationship of responsibility between the infringer of the law and the injured or other subject. The content of this legal relationship is expressed in the right of the victim to demand the cessation and non-repetition of the wrongful act, as well as the provision of amends. This right corresponds to the duty of the person who caused the damage to compensate for the damage caused. Fundamentally important in this legal relationship is that the injured party has the choice of a method of reparation of the damage. And the most preferred form of responsibility in terms of compliance with the goals and functions of calling for international legal responsibility is restitution.

In the theory of international law, restitution is considered to be the material form of responsibility [1]. However, the Articles on State Responsibility for Internationally Wrongful Acts developed by the United Nations International Law Commission states that “the state responsible for the internationally wrongful act is obliged to carry out restitution, that is, to restore the situation that existed before the wrongful act ...” (Article 35), and such restoration can exist in two forms: *restitutio in integrum* and *restitutio in pristinum*. There is no doubt about the substantive nature of the first form (which in the international doctrine is called restitution in kind), since in this case we are talking about the return of illegally seized individually determined property, for example, archives, historical and artistic values, etc. The second form of restitution is expressed in the restoration of the incorporeal rights of injured subjects of international law. This form of responsibility, despite what is considered within the framework of restitution, refers to intangible forms of responsibility and is called “restoration”, which can be expressed in the release of unlawfully apprehended persons, the withdrawal of troops from an illegally occupied territory, the restoration of previously existing borders with the neighboring state and so on. However, given the lack of consonance in opinions about the nature of restoration, the difference of views on the independent nature of this form of international legal responsibility, its study is of considerable interest.

Methods

The study of forms of international legal responsibility is impossible without due attention not only to the existing norms of international law of a binding nature but also the documents of a recommendatory nature, which are often regarded by the theorists as usual norms of international law.

These include, first and foremost, the documents developed by the UN International Law Commission and recommended by the UN General Assembly, as well as the Articles of Responsibility of States for Internationally Wrongful Acts and Articles of Responsibility of International Organizations for Internationally Wrongful that are open for signature by states. Of no small importance is the study of other international legal acts of a recommendatory nature, in particular, the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, approved by Resolution 40/34 of the UN General Assembly.

Special attention should be paid to the decisions of international judicial bodies, which confirmed the invocation of states to responsibility in the form of restoration. An example of such decision is the case of the diplomatic and consular staff of the United States of America in Teheran (the USA against Iran). In its judgement on this case,

delivered on May 24, 1980, the International Court of Justice of the United Nations Organization issued a decree, among other things, that the Iranian government was obliged to immediately release the citizens of the United States detained as hostages [2].

Results and Discussion

When studying the question of terminology applicable in international law, attention is drawn to the fact that the term “restoration” is rarely used in international legal documents. In the process of drafting the Articles of State Responsibility, the Special Rapporteur of the UN International Law Commission, Arangio Ruiz, proposed two definitions of restitution. The first one was based on the restoration of the status quo ante, the second definition was completely based on the definition formulated by the Permanent Chamber of International Justice, enshrined in the decision on the case of the factory in Chorzów. This definition disclosed restitution as “... establishing or restoring a situation that would, or could have existed, if the offense had not occurred” [3]. It is worth noting that during his work on the draft Articles on State Responsibility, the emphasis was placed on the fact that responsibility should be directly related to the consequences of the offense. The frankly punitive concept of responsibility created a situation in which preference was given to restitution in kind instead of compensation, even despite the obvious advantages of compensation for the very injured party [4].

The UN International Law Commission has given preference to the first definition, which is quite reasonable, given the already complex character of the liability relationship, which is even more complicated by hypothetical reflections on what the situation could have been if the offense had not been committed. Moreover, any uncertainty or the emergence of evaluative categories when deciding on damages may result in abuse of the right.

Concerning restoration proper, the UN International Law Commission noted that the obligation to provide restitution includes not only the material but also the legal component, and therefore, in the theory of international law, restoration is also often called legal restitution.

A. de Hoogh, in this regard, notes that the need for the wrongdoing state to make certain changes in the domestic legal system in order to ensure the fulfillment of the obligations arising from the legal relationship of responsibility has no significance from the international legal point of view [5].

In practice, the situations are quite possible when restoration is not required or, on the contrary, it can take place without restoring the situation in material terms. As an example, one can cite the situation around Iraq associated with the territorial restoration. After Iraq's invasion of Kuwait, the Security Council, by its resolution 660 of August 2, 1990, [6] demanded the withdrawal of Iraqi troops from the territory of Kuwait. In this resolution there was no word of the need for Iraq to take domestic measures. Only after Iraq declared “merger fully and forever” with Kuwait, the Security Council, in resolution 662 of August 9, 1990, [7] decided that any annexation of Kuwait had no legal effect and was insignificant. On this basis, the Security Council demanded Iraq to cease its actions aimed at annexing Kuwait.

In this regard, quite often in the international legal literature there is an opinion that it is unreasonable to attribute restitution, through which the status quo ante is restored, to the forms of state responsibility.

According to R.L. Khachaturov, this form of intangible liability is not consistent with the idea of international responsibility for the offense as a duty of enduring certain hardships. In this case, the wrongdoing state, restoring the status quo ante in the form of restoration, does not incur deprivation as it should be when bringing to international responsibility [8].

V. David and V. Vasilenko adhere to similar opinion. They believe that although restitution is a very important and necessary way to eliminate the harmful effects of an international delinquency, but considering it along with satisfaction and reparation in practice may entail serious contradictions. Thus, a delinquent state, having carried out the restitution, can refer to the principle of non bis in idem and refuse to bear responsibility “repeatedly”, although the restoration of the former state was not accompanied by any deprivation for it [9]. That is, the delinquent state, according to the authors, can proceed to fulfill obligations from the legal relationship of responsibility only after it fully restores the situation existed before the offence.

Summary

However, it is the consideration of restitution and restoration as the forms of responsibility under international law that will allow to achieve the goal of responsibility under international law in corpore. Invocation of responsibility in the form of restitution in no way prevents the invocation of responsibility in other forms, if restitution alone will not be enough to respond in damages. Thérèse O'Donnell believes, compensation is often considered forward-looking and utilitarian, restitution backward-looking and rights-based [10]. Ana Filipa Vrdoljak interprets the consequences of wrongful act more loosely, pointing to the fact that restitution, compensation, rehabilitation, and satisfaction must all be considered and utilized to achieve full reparation for the injury or loss flowing from the wrongful act [11].

International practice knows many cases of holding the perpetrator of an offence accountable in the form of restoration concurrently with bringing the state to other forms of responsibility. For example, on December 22, 2011, the State of Nicaragua appealed to the UN International Court of Justice to file a lawsuit against Costa Rica regarding “violations of Nicaraguan sovereignty and significant damage to the environment in its territory”. Nicaragua claimed that Costa Rica was carrying out large-scale construction work in most of the border area between the two countries which caused serious damage to the environment.

In a statement, Nicaragua claimed, in particular, that “one-sided actions of Costa Rica ... threaten to destroy the San Juan de Nicaragua and its fragile ecosystem, including adjacent biosphere reserves and internationally protected wetlands, the preservation of which depends on clean waters of the river and its continuous flow” [12].

In this regard, Nicaragua asked the Court to decide and declare that Costa Rica violated a number of obligations enshrined in bilateral and multilateral agreements. In addition, Nicaragua asked the Court to decide and declare that Costa Rica should:

- a) restore the situation in the same condition;
- b) compensate for all damages incurred, including expenses incurred to deepen the San Juan River;
- c) not conduct any further work in the area without proper transboundary environmental assessment and that the results of such expertise should be submitted to Nicaragua for analysis and response in time”.

Thus, in this case, the injured party (Nicaragua) demanded that the transgressing state (Costa Rica) be held accountable in several forms at once:

- 1. in the form of satisfaction, demanding to recognize the fact of the offence itself;
- 2. in the form of restoration, demanding to restore the situation that existed before the offence;
- 3. in the form of compensation, demanding to compensate for the damages;

Restoration as a form of intangible liability of the wrongdoing state can be used not only by the injured state but also by an international organization, for example, in the event of unlawful detention or arrest by official authorities of the host state or transit of the personnel of the United Nations.

An individual also privately, by filing a complaint with a competent international body, has the right to demand from the transgressing state to restore the situation that existed before the offense, for example, in the case of unlawful arrest and detention, in the case of unlawful deprivation of nationality, unlawful eviction from the host country and so on.

It should be noted, however, that when an individual complaint is filed with the European Court of Human Rights, an individual cannot count on the court to hold the transgressing state accountable in the form of restoration, since this is not its responsibility. This judicial authority does not have the right to revoke a decision made by a state authority or a national court, does not give instructions to the legislator, and has no right to give orders to take measures that have legal consequences. The court deals with only specific complaints in order to establish whether violations of the requirements of the Convention have actually been committed, and sentence “fair satisfaction of the claim” in the form of financial compensation for material and moral damage, as well as reimbursement of the applicant of all costs and expenses if his claims are met.

At the same time, as emphasized by B.L. Zimnenko, decisions and rulings of the European Court of Human Rights are the result of law enforcement, and not law-making activity, and therefore these judicial acts cannot contain any legal norms [13].

But the UN Committee on Human Rights, against torture, on the elimination of all forms of racial discrimination, on the elimination of discrimination against women has the right to establish the responsibility of the delinquent state in the form of restoration.

Thus, in re of K. Ackla against Togo, the UN Human Rights Committee acknowledged the presence in the actions of the state of signs of violation of the provisions of the International Covenant on Civil and Political Rights of 1966. K. Ackla argued that he was discharged for inaptitude from law enforcement agencies, the accusation was fabricated. His demand for the establishment of a disciplinary commission to consider the case was not satisfied by the state. K. Ackla was arrested. After his release, he was forbidden to return to his hometown. Based on the results of the consideration of the case, the Committee decided to oblige Togo to provide the claimant with fair compensation in the form of a restoration of freedom of movement and residence, as well as to pay him compensation [14].

In a case of D. Pinto against Trinidad and Tobago, the UN Committee on Civil Rights met satisfaction of the applicant party, the Committee obliged the state to provide restoration in the form of releasing the claimant, being under sentence of death, from prison [15].

Analogous decisions have been made by the UN Human Rights Committee in a number of cases related to non-compliance by states with the provisions of the International Covenant on Civil and Political Rights [16].

In addition to violations during the trial, the UN Human Rights Committee has tried a number of cases concerning the restoration of the applicants’ parental rights. For example, in the case of N.T. against Canada in 2007, it was decided to restore the right to see her daughter [17], a similar decision was also taken in the case of J.A. Martinez against Paraguay [18].

Conclusion

The analysis of the norms of international law, as well as the practice of judicial and quasi-judicial bodies, suggest that restoration is an independent type of intangible responsibility under international law. The use of different terminology in relation to this legal category only emphasizes the specifics and characteristics of restoration as the most preferred form of non-material state responsibility, since, first of all, it is necessary to consider the possibility of restoring the old state of things.

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