Print ISSN: 2321-6379
Online ISSN: 2321-595X
DOI: 10.17354/ijssSept/2017/023

Original Article

Practice of International Judicial Bodies on Invocation International Responsibility in the form of Satisfaction

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Abstract

Satisfaction is one of the most common forms of international responsibility. Given that there is no precise definition of satisfaction, and the calling order to its various forms is not fixed in the international legal instruments, it is necessary to proceed from an analysis of the practice of international judicial and quasi-judicial bodies, which is rather ambiguous. When making decisions, these bodies are guided, as a rule, by the provisions of the Articles on responsibility of the states for internationally wrongful acts, considering these provisions as the norms of common law, notwithstanding their recommendatory nature. It is noteworthy that the international courts, as well as the UN human rights committees, apply an extensive interpretation of the provisions on satisfaction, often using the symbolic compensation as a satisfaction for the non-material damage.

Key words: Satisfaction, International responsibility, Non-material damage, International delinquency

INTRODUCTION

In the theory of international law, the satisfaction is understood as meeting the non-material claims made by the victim by the offender. The purpose of this form of responsibility is to recover a non-material damage. It performs the compensatory and punitive functions of the international responsibility.

The satisfaction as a form of non-material responsibility is known for a long time to the international law. D. Anzilotti, who initially denied the satisfactory nature of state responsibility and recognized only its reparative nature in his monograph of 1902 [1], recognized two forms of responsibility in the latest edition of the course of international law: satisfaction and reparation. In his opinion, the responsibility is expressed in satisfaction if there is a non-material damage, although there are some cases when the satisfaction resulting from the non-material damage is expressed in the payment of a certain amount of money [2].

According to P. Foshill, when it comes to the responsibility of states, the satisfactions expressed in disavowing or dismissing an official, initiating harassment against the culprit, public declarations, and apologies made in a diplomatic order, etc. may take place along with the reparations [3]. J. de Hug believes that any manifestations of satisfaction (with the exception of hidden recognition of an offense) may be considered as guarantees of non-repetition [4].

The Articles "Responsibility of States for Internationally Wrongful Acts" (hereinafter referred to as the Articles on Responsibility of States) stipulate the provision according to which the state responsible for an internationally wrongful act is obliged to provide satisfaction for the damage caused by this act, to the extent it cannot be reimbursed by the restitution or compensation [5]. That is, there is no precise definition of satisfaction in the Articles on Responsibility of States. Apparently, this is due to the fact that there is no unity of opinion as to the nature of damage compensated by satisfaction in the doctrine of international law. It is called political, moral, non-material,

Access this article online

www.ijss-sn.com

Month of Submission : 04-2017
Month of Peer Review : 05-2017
Month of Acceptance : 06-2017
Month of Publishing : 09-2017

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and legal. Perhaps this is also due to the fact that such a wording is a kind of guarantee that the offender will compensate for all the damage caused.

Nevertheless, such a wording of the article can be treated in a different way. For example, the Commentary of the UN International Law Commission to this article emphasizes the "exceptional nature of satisfaction", which may be required only if the damage is not fully compensated by restitution and compensation. The Commission proceeds from the premise that any damage, as a rule, can be repaired financially, that is, with the help of compensation. However, the compensation covers only the damage "calculated in financial terms" according to Article 36 of the Articles on Responsibility of States [6]. The satisfaction will take place in those cases when the damage caused cannot be estimated financially, when the injured subject is publicly insulted or when the violated rights cannot be restored financially.

MATERIALS AND METHODS

Undoubtedly the main source is the Articles on Responsibility of States in studying the issues of bringing to the international responsibility in the form of satisfaction. Despite the fact that they are not part of positive international law and are only of a recommendation nature, the international judicial bodies refer to them when making decisions, considering them as the norms of common law. However, given that this document does not contain an exact definition of a satisfaction, and the list of its forms is not exhaustive, and taking into account the absence of a clear mechanism for bringing to the international responsibility in this specific form, a special attention should be paid to the materials of the practice of judicial and quasi-judicial bodies. This analysis is an integral part of the complex study of such a complex institution of international law.

The decisions of the UN International Court of Justice are of particular interest, in particular the decision on the La Grand case, which has been repeatedly subjected to a comprehensive analysis in the scientific works, as well as during the work of the UN International Law Commission, since this decision has made an invaluable contribution to the progressive development of the law of international responsibility. K. J. Tams pointed out that the Court attempted to influence the rules of law governing the consequences of an unlawful act in the last part of this case decision [7].

The decisions of the European Court of Human Rights are also of great interest, since it is necessary to recognize that a private person may be injured from acts or omissions to act of the state, thereby violating its international obligations, despite the controversial nature of a dispute on the ability of an individual person to be a subject of international law. Therefore, the very mechanism of bringing the offending state to responsibility through such an international human rights body is of great interest.

We also believe that the decision of other international human rights bodies, such as the UN Human Rights Committees, against torture, on elimination of all forms of racial discrimination and on the elimination of discrimination against women should be subject to the comprehensive analysis. These Committees, while acting in the interests of the affected individuals, have the right to invoke the offending state to responsibility, going beyond the requirements of the applicants themselves in order to ensure compliance with the norms of relevant international instruments by the given state.

RESULTS AND DISCUSSION

We believe that it is not justified to limit the grounds for bringing the offending state to satisfaction with the typical cases of exclusively non-material damage, since the non-material damage is present in the commission of any violation of the norms of international law in a certain form, even if the only obvious consequence is material damage, since the non-performance of the obligations in respect of a subject of international law always damages his honor, dignity, prestige. At the same time, the non-material damage may occur in the absence of material damage. For example, as a result of offensive statements by the officials of one state against the officials of another state.

When it comes to the injured state, such non-material damage is purely symbolic for the most part, taking place due to the very fact of the international obligation violation. As examples of international delinquencies, as a result of which the injured state has the right to demand satisfaction, the UN International Law Commission gave the insulting of state symbols (for example, flag), violation of sovereignty or territorial integrity, attack on an airship or sea vessel, improper handling with the head of state, government, diplomatic or consular employees, as well as attack on the listed individuals, invasion of the territory of embassy, consulate or special mission building [6]. Similar violations of international legal norms may also cause a non-material damage to the interests of international organizations, for example, by insulting the officials of this organization. If we talk about private persons, such damage can consist in the pain, moral sufferings, inconveniences, etc. caused to an individual.

For example, in the case of Kalashnikov v. Russia, examined by the European Court of Human Rights (hereinafter referred to as the ECHR), the applicant claimed compensation for the moral damage caused to him in connection with the poor conditions of his detention in the remand prison [8]. At that, the Court does not require the applicant to prove moral damage and the depth of his/her suffering, that is, the presence of such damage as a result of a violation of the Convention provisions by the state is presumed. In this issue, the Court took the approach of American and English courts, in which, as stressed by N.S. Izmaylova, there is no need to prove that the victim has a diagnosed body or mental disorder as a consequence of emotional anxiety when considering the cases of human rights violations. This rule is applied in the USA [9] and in the UK [10]. That is, as noted by N.S. Izmaylova, the English and American courts proceed from the principle that the action of a wrongdoer should be such as to cause a similar reaction in a person with normal psyche [11].

The satisfaction may consist in the violation recognition, in the expression of regret, in an official apology or in another appropriate form. The appropriate method depends on the circumstances of the case and cannot be stipulated or prescribed in advance. if we talk about the injured state, the "other suitable forms" may include: honoring of the flag and execution of the anthem of the injured state; imposition of the obligation to compensate for the material damage to persons involved in the commission of an offense; criminal or administrative punishment of the persons involved; adoption of special laws aimed at ensuring compliance with the international obligations; investigation of the incident circumstances. In some cases it is possible to send special missions to the injured state.

The case of La Grand brothers [12] can be cited as an example of satisfaction in the form of an apology, during which, among other issues, the United States of America brought an official apology to Germany in connection with violation of paragraph 1b of Article 36 § of the Vienna Convention on Consular Relations.

If the state violates the human rights and freedoms, the practice of the international judicial bodies shows that an individual person very seldom demands that the offending state only recognize the offense or apologize when filing a complaint. In the overwhelming majority of cases, the applicants demand a fair monetary compensation for the non-material damage caused to them.

For example, in the case of Burdov v. Russia, the ECHR awarded the applicant to be paid three thousand euros in respect of non-material damage calculated in the national currency of the respondent state at the rate applicable at the date of the judgment; as well as to be paid the necessary taxes within three months from the date on which the judgment entered into force [13]. A similar decision was taken by the ECHR in the case of Popkov v. Russia [14].

Sometimes, recognizing a violation of the applicant's rights, the ECHR independently reduces the demands placed by him/her in its decisions, since the main objective is to provide fair compensation for the damage caused. Thus, in the case of Kaya v. Turkey, the applicant claimed the offending state to pay him a compensation for the moral damage as a result of his brother's illegitimate deprivation of life in a total of 60,000 pounds sterling. However, the court awarded only 10,000 pounds sterling [15].

The demand for just compensation for the moral damage may be given not only by the individual persons, but the legal entities as well. For example, in the case decision Sunday Times v. United Kingdom, the ECHR found a prohibition to the newspaper on publishing the materials covering the scandal of a harmful thalidomide drug [16] a violation of the right to free sentiment expression (Article 10 of the Convention).

There are also the cases of invocation of responsibility in the form of satisfaction as a fair compensation for the non-material damage not only by an individual, but by the state as well in the international practice. Thus, on December 28, 1998, the Republic of Guinea filed a statement with the International Court of Justice on "gross violations of international law" by the Democratic Republic of the Congo, allegedly committed against a "Guinean citizen". The Court ruled unanimously that the Congo had an obligation to pay appropriate compensation in the form of compensation to Guinea for the harmful consequences of failure to comply with the obligations set forth in the International Covenant on Civil and Political Rights and the African Charter on Human and Peoples' Rights, namely, at the arrest and detention of a citizen of Guinea with a view to his removal, as well as his further expulsion [17]. In this case, it was impossible to assess the amount of non-material damage inflicted on the state itself and its citizen, so the Court did not fix the specific amount in its decision, but allowed the parties to agree on an adequate amount of symbolic compensation. The parties failed to reach an agreement and submitted pleadings to the Court concerning the compensation issue. They indicated which harm is compensable, in their opinion, and also indicated their calculations in these papers. The International Court of Justice considered legitimate and justified the demands for compensation to the Congo in Guinea's favor only in respect of non-material damage inflicted on the citizen of Guinea. As to the material damage inflicted on him, the

Court considered that only the damage to property, but not to loss of professional remuneration and potential profit, was subject to compensation. The costs of the state itself were also considered not to be compensable by the Court.

It is noteworthy in this decision of the International Court of Justice that the state was a plaintiff, as required by the provisions of Article 34 of the Statute of the International Court of Justice, but the compensation for material and non-material damage was awarded in favor of an individual person - a citizen of that state, in whose defense an application was submitted to the Court. Nevertheless, the International Court of Justice also defended the interests of the applicant state by recognizing the wrongfulness of the Congo's act, which in itself was invocation to responsibility in the form of satisfaction by this decision. We think that this outcome is not less effective for Guinea, despite the fact that the Court did not satisfied the requirements in full.

There are also the cases of invocation of responsibility in the form of satisfaction in the practice of international quasi-judicial bodies. In particular, in the case of Ya. Filipovich v. Lithuania, the UN Committee on Human Rights pointed to the obligation of the offending state to provide compensation for the moral damage [18]. The decisions were made in a number of other cases in a similar way [19-24]. However, a symbolic compensation is not the only form of satisfaction required by the UN Committees. They also impose other encumbrances on the offending states. Thus, in the case of Idiyeva v. Tajikistan, the UN Human Rights Committee ordered the state to institute the criminal proceedings to identify the persons guilty of ill-treatment of the applicant's son [25]. In the case of V. Dunayev, the Committee ordered the state not only to initiate and continue the criminal prosecution in order to establish the persons guilty of ill-treatment of the applicant's son, but also demanded to review the case in the court [26]. At the same time, the UN Human Rights Committees are not limited to the requirements for the judicial bodies of the offending state only; the decisions often concern the activities of the administrative bodies. For example, in the case of Mavlonov and Saydi v. Uzbekistan, the Human Rights Committee ordered the state to review the application for repeated registration of the printed publication [27].

The practice of the International Court of Justice includes the cases when the injured party claims to recognize the very fact of an offense commitment. For example, Bolivia instituted proceedings against Chile concerning a dispute over "Chile's obligation to conduct the negotiations with Bolivia in good faith and in an effective manner in order to reach an agreement providing Bolivia with full sovereign access to the Pacific Ocean" on 24 April 2013. Among other issues (three claims were claimed), Bolivia requested the Court to declare that "Chile violated this obligation" [28].

CONCLUSIONS

Summing up the existing theoretical views on the satisfaction nature and the established practice of international judicial and quasi-judicial bodies, we believe that satisfaction should be defined as compensation to the injured subject or subjects of non-material damage that has arisen as a result of an act committed by a subject of international law that is contrary to the norms of international law.

The injured state should not have the right to claim satisfaction in a form that would be disproportionate to the inflicted damage or humiliating for the offender. But this does not prohibit the injured state from demanding satisfaction not in one, but in two or more forms. However, the most common form is apology.

If we talk about the injured individual persons, satisfaction can also consist in the recognition of an offense by the state, in an official apology or in some other appropriate form. In this case, other appropriate forms should include the forms most often met in the international law enforcement practice: implementation of symbolic material compensation for moral damage, investigation of the offense circumstances, bringing the directly responsible persons to responsibility.

The symbolic material compensation should be considered precisely as a form of non-material liability, since it is compensated the non-material damage, which cannot be estimated by any formulas or clear evaluation criteria, its amount is not objective, but depends entirely on the subjective opinion of the injured person about the degree and depth of moral suffering.

If the European Court of Human Rights establishes specific compensation amounts of the non-material damage, then the UN Committee on Human Rights, against torture, on elimination of all forms of racial discrimination, on elimination of discrimination against women use more general wordings. In general, the operative part of such decisions is as follows: the member state should provide the applicant with the effective remedies, including the appropriate compensation. The "proper compensation" is not often specified.

Recognition of an offense as a form of satisfaction may be legal and actual. In the first case, recognition is clearly expressed and constitutes a written or oral official statement by the authorized officials of the offending state. For example, in the case of Kalashnikov v. Russia, examined by the European Court of Human Rights, Russia's position was such that the very recognition of the applicant's rights violation would be sufficient just satisfaction of his claims [8].

The actual recognition takes place when the offending state commences reimbursement of the damage caused by it in the form of restitution, compensation and/or satisfaction, thereby effectively acknowledging its guilt in the damage caused to the injured state.

As for apologies and expression of regret, sympathy, condolences, their delimitation is of great legal significance. The apology should take place, if an unlawful act takes place; when the offending state is guilty of committing an offense. If the offense is carried out without guilt or not on behalf of the state, it is enough to express regret, sympathy, condolences by this state, which is not a form of responsibility. In this regard, it seems unreasonable to attribute the expression of regret, sympathy, condolences to the form of satisfaction, especially in the light of the Articles on Responsibility of States, whose effect does not extend to the international responsibility for damage caused by the lawful activity.

In addition, Chapter V of this document, among others, includes force majeure, distress and a state of necessity for circumstances that not only exclude responsibility but exclude the unlawfulness in general.

Satisfaction, even if it is not explicitly expressed, is automatically implied in the very fact of compensation for the material damage, since by that the state recognizes the commission of an offense, which is already a certain encumbrance for it. And in accordance with paragraph 2 of Article 37 of the Articles on Responsibility of States, the recognition of an offense is one of the types of satisfaction. This form of international responsibility should be given a special attention in determining the scope of responsibility of the offending state. Satisfaction should be an integral part of the responsibility regime that is chosen in each specific case in relation to the offender. The goals and functions of the international legal responsibility will not be achieved without the appropriate satisfaction.

ACKNOWLEDGEMENTS

The work is performed according to the Russian Government Program of Competitive Growth of Kazan Federal University.

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How to cite this article: Krivenkova MV, Kurdyukov GI. Practice of International Judicial Bodies on Invocation International Responsibility in the form of SatisfactionW. It J Sci Stud 2017;5(6):106-110.

Source of Support: Nil, **Conflict of Interest:** None declared.