Chapter 39

ASSURANCES AND GUARANTEES OF NON-REPETITION

SANDRINE BARBIER

Guarantees of non-repetition as the legal consequence of internationally wrongful acts

1. The obligation of the responsible State to offer guarantees of non-repetition
2. An autonomous consequence of the internationally wrongful act
3. The legal regime of guarantees of non-repetition
4. Circumstances requiring an offer of guarantees of non-repetition
5. The form of guarantees of non-repetition

Further reading

Articles on State Responsibility establish assurances and guarantees of non-repetition as the legal consequence of internationally wrongful acts. According to article 30(b) 'the State responsible for the internationally wrongful act is under an obligation . . . to offer appropriate assurances and guarantees of non-repetition, if circumstances so require'.

According to the Commission, assurances and guarantees of non-repetition are distinguishable from other legal consequences of the wrongful act—reparation and cessation of analogous breaches—in that they aim at preventing the commission by the responsible State of analogous breaches and they thus are exclusively concerned with the future. Having regard to this specific function, guarantees of non-repetition do not constitute a specific consequence of the internationally wrongful act; rather they have an exceptional nature.

In recognition of assurances and guarantees as a specific consequence of an internationally wrongful act is essentially the product of the ILC work on State responsibility. Assurances and guarantees of non-repetition appeared for the first time in the work of the ILC at the suggestion of Special Rapporteur Riphagen. The subsequent Special Rapporteur Arango-Ruiz and Crawford, both maintained that assurances and guarantees of non-repetition should be included as a consequence of internationally wrongful acts, and this report contributed to a better understanding of this notion.

On 27 June 2001, in the LaGrand case, the International Court of Justice granted the request of the United States of America to require the Federal Republic of Germany to assure non-repetition for the first time. This was recorded in the judgment of the Court, which used non-mandatory wording.\(^6\) In their comments and observations concerning guarantees of non-repetition, many States also expressed doubt in relation to the customary character of the obligation to offer guarantees of non-repetition.\(^7\) It can be noted that, for a long time, guarantees of non-repetition played only a marginal role, such that if precedents existed, international practice did not permit it to be inferred with certainty that there existed in general international law an obligation for the responsible State to offer guarantees of non-repetition. In their reports, Special Rapporteur Arangio-Ruiz and Crawford quote very few examples, and those which are included are mostly related to very old diplomatic practice of the 19th and the beginning of the 20th centuries, such as the Dogger Bank\(^8\) incident between Great Britain and Russia in 1898 and the Deane case\(^9\) between the United States and Spain in 1886.\(^10\) More fundamentally, it is clear that many of these examples concern requests on the part of the injured State to the responsible State to offer guarantees of non-repetition. The Special Rapporteurs also stated whether the responsible States accepted to these requests. Among the rare examples, that is, cases where the responsible State agreed to or was required to provide guarantees in order to avoid repetition of the wrongful act in the future, reference may be made to the Declaration of 1961 of the Minister of Justice of Federal Germany in the Kaufmann case and the Award of 11 March 1941 in the Trail Smelter arbitral award.\(^11\) Nevertheless, even if it can be considered that a certain practice has been established, these examples fail to establish the presence of an *opinio juris* of States in support of an obligation to offer such guarantees. It is difficult to determine whether, in these rare cases, the promise of the responsible State constituted a political or moral undertaking or a legal obligation; and whether the undertaking was motivated only by 'considerations of convenience or tradition' or 'by any sense of legal duty'.\(^12\)

1. **Guarantees of non-repetition as the legal consequence of internationally wrongful acts**

Considering guarantees of non-repetition as a consequence of the internationally wrongful act raises a series of preliminary questions. The first question concerns the right of the injured State, in the same way that Article 30 of the 1969 Convention addresses reparation and cessation of the continuous unlawful act, but unlike the latter.\(^13\) The existence of guarantees of non-repetition, specifically whether the undertakings are a form of reparation or an autonomous consequence of the internationally wrongful act, raises a series of preliminary questions. The first question concerns the existence of a legal foundation of guarantees of non-repetition, specifically whether the undertakings are a form of reparation or an autonomous consequence of the internationally wrongful act.

(a) The obligation of the responsible State to offer guarantees of non-repetition

Article 30 ARSIWA establishes guarantees of non-repetition in terms of an obligation of the responsible State and not as a right of the injured State, in the same way that Article 30 addresses reparation and cessation of the continuous unlawful act. But unlike the latter.\(^13\) The existence of guarantees of non-repetition, in general international law, is not always acknowledged by Special Rapporteur Arangio-Ruiz.\(^13\) But despite the general international practice, the obligation of the responsible State to offer guarantees of non-repetition in certain circumstances has become a customary rule. This phenomenon has been underway. If the ILC uses practice and case law to elaborate its drafts—the Draft Committee even deferred the analysis of the provision on guarantees of non-repetition.\(^14\) The judgment in *LaGrand*—it is manifest that its work influences State practice—and the judgment in *LaGrand*—it is manifest that its work influences State practice. Additional elements can be invoked to support the emergence of an obligation on the part of the responsible State to offer guarantees of non-repetition. First, the support

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\(^3\) LaGrand (Germany v United States of America), ICJ Reports 2001, p 466, 514 (para 127), 516 (para 128(6)).

\(^4\) Ibid (para 128(7)).


\(^7\) See also the judgment of Germany, A/CN.4/488, 103.


\(^11\) Ibid 44, 45 (para 156), 45–46 (para 158).

\(^12\) See also *Continental Shelf (Germany v Denmark/the Netherlands), ICJ Reports 1969, p 3, 44 (para 77).

\(^13\) See also *Continental Shelf (Germany v Denmark/the Netherlands), ICJ Reports 1969, p 3, 44 (para 77)."
given by the majority of the ILC members and, most importantly, of States was that guarantees of non-repetition must be mentioned. Indeed, the vast majority of States did not comment on guarantees of non-repetition. Their silence can reasonably be interpreted as an implicit recognition that guarantees of non-repetition cannot be formulated as legal obligations, have no place in customary international law, or at least an absence of agreement. Other States expressed reservations or even opposition to the principle of guarantees of non-repetition, arguing that assurances and guarantees of non-repetition are not customary international law.

Only the United States vigorously objected to the principle of guarantees of non-repetition, arguing that assurances and guarantees of non-repetition cannot be formulated as legal obligations, have no place in customary international law, or at least an absence of agreement. Other States expressed reservations or even opposition to the principle of guarantees of non-repetition, arguing that assurances and guarantees of non-repetition are not customary international law.

In these five cases, the Court did not question the obligation to give guarantees of non-repetition. In this respect, the Court was unanimous in its approval of the principle of guarantees of non-repetition made by Djibouti. By Hungary and Slovakia in the Gabčíkovo-Nagymaros Project; and by Spain in Fisheries Jurisdiction, on the basis that Canada would give Spain guarantees of non-repetition by virtue of the principles drawn from customary international law as stated by the ILC.

After the judgment in LaGrand, the Court was once more seized with claims for guarantees of non-repetition of internationally wrongful acts. That this habit of States making claims is to be regretted. In three cases, the Court considered that such a request could not be upheld. In two other cases, the Court held that the allegations had been satisfied by the commitments undertaken by the respondent States to take concrete measures in case of breach of the Vienna Convention on Consular Relations. However, although the Court pronounced on guarantees of non-repetition for these two other consequences of an unlawful act: by Hungary and Slovakia in the Gabčíkovo-Nagymaros Project; and by Spain in Fisheries Jurisdiction, on the basis that Canada would give Spain guarantees of non-repetition by virtue of the principles drawn from customary international law as stated by the ILC.

The autonomous consequence of the internationally wrongful act

These articles on State Responsibility distinguish guarantees of non-repetition from acceptance and cessation of a continuing breach, the two other consequences of an internationally wrongful act. The recognition of this autonomy is nevertheless fragile. The correspondence of the ILC reflects the persistent hesitations on the legal foundation of guarantees of non-repetition. Traditionally guarantees are considered as a form of reparation. For Professor Riphagen and Arangio-Ruiz, guarantees of non-repetition are a form

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15 See eg comments by Mongolia and the Czech Republic, A/CN.4/488, 113.
16 Comments and observations received from Governments, A/CN.4/515, 36.
17 596 UNTS 261. See LaGrand (Germany v United States of America), IJC Reports 2001, p. 466 (para 127).
19 Fisheries Jurisdiction (Spain v United Kingdom), Jurisdiction of the Court, Judgment, IJC Reports 2003, p 432; See the oral pleading of JA Pastor Ridruejo, CR 98/9, 9 June 1998, 14 (para 9) and A Rebenitschin, 44-45 (para 31-32).
21 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ILC Reports 2004, p 136. See the oral pleading of Judge A Rebenitschin, 44-45 (para 31-32).
22 ibid, 196f.
24 213 UNTS 221.
26 Arena and Other Mexican Nationals (Mexico v United States of America), IJC Reports 2004, p 168, 256 (para 257).
of satisfaction. The inclusion of guarantees in a separate article\(^\text{31}\) marked the distinction and autonomous function. Unlike other forms of reparation which seek to re-establish the state of affairs, they are future-oriented. They thus have a preventive rather than a reparative function\(^\text{32}\).

The "sui generis" character of assurances and guarantees of non-repetition\(^\text{33}\) was highlighted during second reading, to cease treating them as a form of reparation and to regard them as "closely and logically related", for they constitute "two conditions for ensuring that the legal relationship impaired by the breach had been restored".\(^\text{34}\) The relationship of reparation of the wrongful act and guarantees of non-repetition is reinforced by legislation which allowed the breach to occur and there is thus some doubt as to their character. Guarantees of non-repetition, as opposed to the retrospective form of satisfaction, pursuant to article 37(2) ARSIWA.\(^\text{35}\) It remains ambiguous. Guarantees of non-repetition, in fact, can constitute an autonomous consequence of a wrongful act. This link was justified by the fact that the two notions are "closely and logically related", for they constitute "two conditions for ensuring that the legal relationship impaired by the breach had been restored".\(^\text{36}\) The relationship of cessation of the wrongful act and guarantees of non-repetition is reinforced by the mention by the ILC of stopping breaches, constituted either by the extension of the breach or by the existence of a risk of repetition of the breach.\(^\text{37}\) If these consequences of a wrongful act can be considered linked by this fact, they must not be clearly distinguished. While cessation purports to re-establish the initial legal situation, guarantees of non-repetition are aimed at the future respect of the legal relationship impaired by the breach and they are required when "merely restoration of the pre-existing situation does not suffice"\(^\text{38}\). Guaran tees of non-repetition are aimed at the future respect of the legal relationship impaired by the breach and they are required when "merely restoration of the pre-existing situation does not suffice"\(^\text{39}\). It is useful to observe that the case law of the International Court has not add much. The judgments rendered in *LaGrand*, *Avena*, and *Armed Activities in the Territory of the Congo* do not specify whether the Court intended to treat guarantees of non-repetition as an autonomous consequence of an internationally wrongful act. The ILC has in fact underlined the exceptional character of guarantees.\(^\text{40}\) It is in this sense that the expression "if circumstances so require" must be understood: it is the expression "where appropriate", which was considered by the ILC to be too broad.\(^\text{41}\) The ILC justified its relatively strict approach to guarantees of non-repetition by an attempt to avoid excessive and disproportionate demands made by States requesting guarantees of non-repetition.\(^\text{42}\)

The work of the ILC is not lengthy in its treatment of the elements to take into consideration to determine whether the circumstances demand that the responsible State offer guarantees of non-repetition. Nevertheless, three factors seem to emerge: the risk of repetition, the seriousness of the breach, and the character of the obligation breached.\(^\text{43}\) It is in this context that the ILC has underlined the exceptions that may make reparation.\(^\text{44}\) Inasmuch as they may entail a

\[\text{footnotes}\]


\(^{36}\) *Commentary* to art 30, para 2–3.


\(^{38}\) *Commentary* to art 37, para 5.

\(^{39}\) *Commentary* to art 30, para 11.
'new undertaking over and above the initial undertaking that had been breached' is arguably limited to cases of serious and recurring breaches of international law. Reference to the character of the obligation breached is relevant to this inquiry. It is important to note that guarantees of non-repetition do not constitute a specific consequence of breaches of obligations arising under a peremptory norm of general international law pursuant to article 40. But due to the character of peremptory norms they are limited to cases of serious and recurring breaches of obligations.

In LaGrand the International Court did not articulate any general observation concerning the regime of guarantees of non-repetition; nor did the Court do so in any specific cases. Hence the Court did not elaborate on the circumstances entailing the decision on the responsible State to offer said guarantees. But the criteria offered by the Court are implicit in the decision in LaGrand, and certainly influenced the Court's decision in the case of the German nationals. In this respect, it is worth noting that the seriousness of the breach invoked by the ILC, as well as the nature of the measures to be taken, was determinative. Moreover, it is important to note that in LaGrand the Court considered that, in the circumstances, 'an apology [by the United States would] suffice in this case' if analogous breaches were to happen again. This decision could mean that the Court considers the unavailability and/or the insufficient seriousness of the wrongful act, in particular, to constitute one of the circumstances to take into account in determining the necessity of guarantees of non-repetition. Moreover, this seems to have been the reasoning of the Court when refusing to accept the request of the injured State that the guarantees both constitute a suitable and effective response to the breach and that it is the avoidance of the repetition of the wrongful act that is the avowed purpose of the guarantees. The 'adequate' character of the guarantees leads thus to the question of the form of guarantees of non-repetition.

The form of guarantees of non-repetition

The form that guarantees of non-repetition must take is not specified in article 30(b). While preparing Rapporteur undertook a survey of the different forms of guarantees of non-repetition, while emphasizing that the practice was not uniform. Two major categories of guarantees can nevertheless be distinguished: general and specific guarantees. In respect of general guarantees, the international Court of Justice 'safeguards against the repetition of the wrongful act without any specification' as to the means of implementation. In respect of specific guarantees, the injured State requests the responsible State to 'adopt specific measures or act in certain ways considered to be apt to avoid repetition', for example, to give specific instructions to its agents, to adopt a certain line of conduct, and to adopt or to abrogate certain legislative provisions. The latter type remains a rare occurrence in State relations; on the contrary, it has been developed in the framework of international bodies for the supervision of treaty-based human rights.

In LaGrand, the International Court considered that Germany had made a request for specific guarantees of non-repetition. Concerning the first, the Court stated that the general request was satisfied by the 'commitment expressed by the United States to ensure implementation of the specific measures adopted in performance of its obligations under Article 36, paragraph 1(b) of the Vienna Convention on Consular Relations.' The United States had implemented a vast programme destined to ensure that...
its competent authorities respect article 36 of the Vienna Convention. In the specific request, the Court concluded that, if despite the general commitment of the United States, German nationals were in the future:

sentenced to severe penalties, without their rights under Article 36, paragraph 1(b), of the Convention having been respected, the United States of America, by means of its own choosing the review and reconsideration of the conviction and sentence by taking account of the rights set forth in that Convention.

Despite the specificity of the wording of the obligation, the Court recalled that the States was not in a position to provide absolute assurance that a breach would not again in the future. In LaGrand, the Court did not explicitly indicate that the obligation of review and reconsideration of the guilty verdicts and of the sentences constituted for the United States an obligation following from guarantees of non-repetition. But, since the Court established this obligation in response to Germany's request for guarantees of non-repetition, it can be deduced that the foundation of the obligation of review and reconsideration of the responsible State's obligation to give guarantees of non-repetition. LaGrand argues constitutes thus the illustration that guarantees of non-repetition can entail a new undertaking over and above the initial undertaking that had been breached. In fact, the United States remained bound by its obligations under article 36 of the Vienna Convention on Consular Relations—the original undertaking—and was also under the obligation to ensure the review and reconsideration of the guilty verdicts and of the sentences, thus creating certain confusion about the notion of guarantees of non-repetition. In Avena, the Court concluded that:

by not permitting the review and reconsideration, in the light of the rights set forth in the Convention, of the conviction and sentences . . . the United States of America breached the obligation incumbent upon it under Article 36, paragraph 2, of the Convention.

Thus, the Court seems to have considered that the obligation of review and reconsideration did not constitute a new undertaking on the United States by virtue of guarantees of non-repetition, and in any case had only been provided to Germany, in accordance with the relative effect of res judicata, but that it arose from article 36(2) of the Vienna Convention on Consular Relations. In effect, through an interpretation of article 36:

Thus, the Court seems to have considered that the obligation of review and the guarantee of non-repetition, further blurring the understanding of this existence of the unlawful act.

The question concerns the character of the undertaking of the responsible State. If, according to article 30(b) ARSIWA, the responsible State has an obligation, in certain circumstances, to offer guarantees of non-repetition, its offer may have very little mandatory effect, for the offered guarantees may range from 'extraordinarily rigorous arrangements to guarantee the repetition of the unlawful act'. The use of the expression 'guarantees of non-repetition' in the ARSIWA is intended to reflect this variety. Assurance of non-repetition would be normally given verbally, while guarantees of non-repetition involve some procedure—for example, preventive measures to be taken by the responsible State. The Court did not adopt this distinction in LaGrand. It uses, in a constant manner, the term guarantees where dealing with the adoption by the United States of preventive measures to avoid the repetition of the unlawful act. This raises the question whether Germany obtained guarantees or only assurances and whether the choice of the word by the Court is irrelevant or deliberate. The answer cannot be found in the present judgments. The future case law of the Court, and more generally international law, will possibly help to dissipate this semantic hesitation.

The international law regime of guarantees of non-repetition as a specific consequence in case of wrongful act appears filled with uncertainties. Precisely for this reason, the ILC adopted the provision on guarantees of non-repetition very flexibly. However, the question of whether or not to justify cautious treatment of guarantees. The recognition of this obligation on the part of the responsible State seemed to evidence some progressive development in international law. In fact, as emphasized by Dupuy, 'the interest in the “guarantee of non-repetition of wrongful act” highlights the fundamental function of responsibility in the maintenance and guarantee of respect of international legality.'

### Further reading


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60 Avena and Other Mexican Nationals (Mexico v United States of America), ICJ Reports 2006, p. 12.5 (para 153.8).
61 See Declaration of President Guillaume, LaGrand (Germany v United States of America), ICJ Reports.