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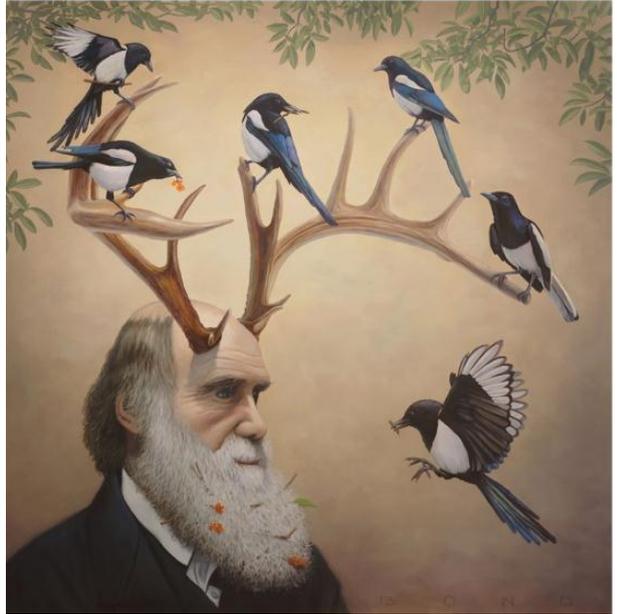
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International responsibility of a state in the form of guarantees of non-repetition

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Abstract

The study aims to investigate the invocation of international responsibility of a state in the form of guarantees of non-repetition in the international judicial body practice via comparative qualitative research methods. As a result, human right judicial bodies often go beyond the requirements of individual applicants, imposing additional requirements on the offender states for the provision of assurances and guarantees of non-repetition. In conclusion, the requirement to provide assurances and guarantees of non-repetition is used in exceptional cases when there is no confidence in the wrongdoing State.

Keywords: International, Legal, Responsibility, Offense, Guarantees.

Responsabilidad internacional de un estado en forma de garantías de no repetición

Resumen

El estudio tiene como objetivo investigar la invocación de la responsabilidad internacional de un estado en forma de garantías de no repetición en la práctica del cuerpo judicial internacional a través de métodos comparativos de investigación cualitativa. Como resultado, los órganos judiciales de derechos humanos a menudo van más allá de los requisitos de los solicitantes individuales, imponiendo requisitos adicionales a los estados infractores para proporcionar garantías y

garantías de no repetición. En conclusión, el requisito de proporcionar garantías y garantías de no repetición se utiliza en casos excepcionales cuando no hay confianza en el Estado infractor.

Palabras clave: internacional, legal, responsabilidad, delito, garantías.

1. INTRODUCTION

The specificity of international legal responsibility is not so much in the subject composition of this legal relationship, but in its forms, which directly depend on the nature and severity of the offense, as well as the objectives of invoking responsibility. Mere compensation for the damage caused in the case when the offender is a state may not be enough, since the wrongful act of the state may affect the interests of other states, and the international community as a whole. In such a situation, it may be necessary to provide additional guarantees by the offender state that a similar offense will not be committed in the future.

The articles on the responsibility of states for internationally wrongful acts reinforce the need to provide assurances and guarantees of non-repetition of an internationally wrongful act, along with the duty of its termination as the consequence of the wrongful act performance (SOFÍA & GALVÁN, 2012). At that, this duty is fixed in Article 30, called Termination and non-repetition, although the obligation not to repeat the wrongful act and the obligation to provide guarantees of its non-repetition, undoubtedly, differ by their content. The second is an additional burden for a wrongdoing state, therefore, it

should be considered as a form of international legal responsibility (LUKASHUK, 2004).

The questions about the subjects who can make such claims on the wrongdoing state and what methods of such guarantee provision are acceptable and debatable, given that neither the international legal acts of a binding nature, nor the Articles on State Responsibility answer the second question. We believe, that of special interest is the following question: whether international judicial bodies are entitled to go beyond the requirements of the injured subject or subject requirements set forth in an application or a complaint and to fix the obligation of the wrongdoing state in their decisions not only to provide adequate compensation for the damage caused, but also to provide the guarantees of non-repetition (AMEEN, AHMED & HAFEZ, 2018; BINDER, ODAG, LEISER, LUDDERS & KEDZIOR, 2018).

2. METHODS

The study of such a complex form of international legal responsibility, especially in the context of international judicial body practice, is impossible without due attention not only to the existing norms of international law of a binding and recommendatory nature, but also to the decisions of international justice authorities. Among the international legal acts that require special attention, they should consider first of all the articles on the responsibility of states for

internationally wrongful acts and the Articles on the responsibility of international organizations for internationally wrongful acts developed by the UN International Law Commission and recommended by the UN General Assembly, as well as open for signature by the states. It is also important to study other international legal acts of a recommendatory nature, in particular, the Declaration of Basic Principles of Justice for the Victims of Crime and Power Abuse, approved by United Nations General Assembly Resolution 40/34.

The use of the case-study method during the study of this topic will allow to draw conclusions on the development of a uniform practice of international judicial bodies and on the problems that the courts face when making decisions requiring the provision of guarantees of non-repetition. Not only the decision of the UN International Court of Justice in the case of the La Grande brothers is of great importance during drafting the provisions of the Articles on State Responsibility, but also other decisions of the International Court of Justice, the European Court of Human Rights, which strengthened the call of states to responsibility in the form of guarantees of non-repetition (ARANGIO-RUIZ, 1989; BULĀAY & ĀETIN, 2018).

3. RESULTS AND DISCUSSION

The assurances and guarantees of non-repetition have gone a rather long way of becoming an independent form of international legal responsibility. Initially, they were considered as the forms of

compensation for damage. However, the special rapporteur of the UN International Law Commission noted the specifics of assurances and guarantees of non-repetition (CRAWFORD, PEEL & OLLESON, 2001). This entailed their further study and the subsequent inclusion of the Articles on State Responsibility Cessation and Non-Repetition in the Article 30, which fixed the obligations of a wrongdoing state to stop this act if it continues and provides proper assurances and guarantees of non-repetition if circumstances so require.

The inseparable link between the obligations to cease and not repeat a wrongful act was repeatedly indicated earlier in the comments to the Articles on State Responsibility and in the scientific literature. As well as attention was drawn to the need to distinguish between non-repetition and the guarantees of non-repetition. Of course, the practice of international judicial bodies makes an enormous influence on the progressive development of the international legal responsibility institution. The case of La Grande brothers, considered by the International Court of Justice was of particular importance for the formation of assurances and guarantees of non-repetition as a separate form of international legal responsibility.

The decision made by the court in this case not only influenced, but established the rule of law, which was later adopted by the UN International Law Commission during the preparation of draft Articles on State Responsibility. In this case, the United States, in addition to apologizing to Germany, has committed itself to take serious measures to prevent similar violations in the future, which was considered by the

court as a satisfactory answer to the German demand for a general guarantee regarding the prevention of similar actions in the future (KRIVENKOVA, 2017). The significance of this decision is difficult to overestimate, especially given that it was taken before the UN Commission of International Law adopted the draft Articles, which not only relied on this decision, but in fact, confirmed its correctness (MWANIKI & ONDIEK, 2018).

As Dupuis & Hoss emphasized, before the decision on the case of La Grande, the assurances of non-repetition were only oral, after the adoption of this decision, the assurances received a new meaning. The absence in the Court's decision of a clear indication of specific actions that the United States needed to take in order to guarantee non-repetition of a wrongful act, perhaps, could be considered as a shortcoming of this decision. However, at that time, even such vague wording as the obligation to provide an opportunity to review and re-examine a decision or a court sentence was already the breakthrough in the development of international legal responsibility institution. Tams stresses that by the consolidation of such a remedy, the Court departed from the exclusively restorative function of responsibility, focusing on another function, which is to restore not the violated right, but the confidence in lasting legal relations (CHRISTIAN, 2002).

Once again, we would like to draw attention to the fact that the International Court of Justice, did not act at its own discretion during making this decision, but satisfied the requirement of the injured state. And the absence of a specific form of granting guarantees of non-

repetition of the wrongful act is partly due to the fact that the Court did not go beyond the limits of the victim's claims. In its subsequent decisions, the Court, satisfying the demands of victims of a rather general nature to provide adequate guarantees of non-repetition, specified independently the means by which the state-offender fulfilled the obligation imposed on them.

Thus, in its decision of 03/31/2004 concerning the case of Avena, the Court indicated that the United States assumed the obligation to ensure the implementation of specific measures taken to fulfill their obligations under subparagraph b of paragraph 1 of the Article 36 of The Vienna Convention on Consular Relations should be considered as the satisfaction of Mexico request for guarantees and assurances regarding non-repetition of violations. At the same time, the Court ruled that if Mexican citizens are sentenced to harsh punishments without respecting their rights, the United States will provide for the review and re-examination of sentences and imposed penalties, but using the means by own choice.

And even though Mexico stated in its statement that the United States program, whatever its constituent elements, proved ineffective in prevention of regular and continuing violations of the rights to consular notification and the receipt of assistance by their competent authorities, the court, however, refused to impose on the United States any additional obligations to provide a guarantee of non-repetition. The Court motivated its decision by the impossibility of proving the facts to which Mexico refers, as well as by the fact that after the La Grande

brothers' case, the United States is already making significant efforts to ensure that their law enforcement agencies provide consular information to every foreign arrested person who they know or have reason to believe is a foreign citizen.

And, in the Court's opinion, if a state repeatedly refers to significant measures taken by it to ensure the compliance with certain international obligations during its proceedings, this already reflects its firm intention to continue its efforts in this regard. It is noteworthy that the Court confirmed the possible ineffectiveness of the program conducted by the USA as the guarantee of non-repetition, but at the same time, according to the Court, no state could give such a guarantee. That is, the firm intention is enough to ensure the implementation of specific measures and consider this the guarantee of non-repetition.

Indeed, often, as in the above-mentioned example on the case of Avena, the victim himself, when applying to international judicial bodies, cannot specify in what ways the assurances and guarantees of non-repetition should be provided. For example, in the German case against Italy on jurisdictional immunities, the applicant (Germany), appealing to the UN International Court of Justice, asked the Court to decide and declare that the Italian Republic should take any and all measures to ensure that the Italian courts do not consider the lawsuits based on violations of international humanitarian law by the German Reich during World War II from September 1943 to May 1945 (HOOGH, 1995).

There are also frequent cases of refusal by the International Court of Justice to impose an additional burden on an offender in the form of guarantees of offense non-repetition, despite the presence of the corresponding request of the injured state. Thus, in the case concerning the dispute over shipping and related rights (*Costa Rica v. Nicaragua*), the Court, by its decision on July 13, 2009, despite Costa Rica request that Nicaragua should provide appropriate assurances and guarantees that illegal behavior will not happen again, refused to grant this request even though Costa Rica left the form for the presentation of such guarantees to the discretion of the Court. Refusing, the International Court of Justice noted that in most cases there is no reason to believe that the state, the act or the conduct of which the Court declared unlawful, will repeat this act or conduct in the future, based on the presumption of good faith.

A similar decision was taken by the International Court of Justice on April 20, 2010 for the case concerning pulp mills on the Uruguay River (*Argentina v. Uruguay*). The Argentine Republic asked the Court to make a decision and declare that after the violation (construction and commissioning of the plant on the left bank of the Uruguay River) the Eastern Republic of Uruguay should, among other things, provide adequate guarantees that it will refrain in future from the actions that impede the application of the Statute of Uruguay river (1975) and, in particular, the application of the consultation procedure provided in chapter II of this international treaty. During the examination of the dispute, the Court did not discern any circumstances that would require it to impose such a duty on Uruguay.

The decision of the International Court of Justice on December 19, 2005 concerning the case of hostilities in Congo is interesting from the point of view of form securing practice for the provision of non-repetition guarantees. Congo filed an application to the Court to institute proceedings against Uganda regarding the dispute concerning the acts of armed aggression committed by Uganda on the territory of the Democratic Republic of the Congo and requested the Court, in particular, to declare that the Republic of Uganda must immediately cease all continuing internationally wrongful acts, and in particular, its support for the irregular forces in DRC, as well as the exploitation of Congolese wealth and natural resources, as well as the provision of specific guarantees and assurances that it does not commit repeatedly wrongful acts that make the subject of the complaint.

The court, in this case, considered the tripartite Agreement on Regional Security in the Great Lakes Region, signed on October 26, 2004 by the DRC, Rwanda and Uganda as the guarantee of non-repetition. That is, the clauses stated in the preamble of this Agreement on the need to ensure respect for the principles of good neighborliness, sovereignty, territorial integrity and non-interference in the internal affairs of sovereign states, especially in this region, the Court regarded as the DRC request satisfaction regarding specific guarantees and assurances of violation non-repetition.

These examples from the practice of the International Court of Justice relating to liability relations in which the state acted like the victim. If the victim of the state wrongful actions is a private person, it

is not entitled to demand assurances and guarantees of non-repetition from the wrongdoing state in accordance with applicable international law. Universal human right treaties provide them only the opportunity to protect the violated right. For a particular individual, a decision made by a competent international body confirming the illegitimacy of the state actions against it will be a kind of guarantee that the rights of an individual related to the facts established by this body will not be violated.

However, human right judicial bodies often go beyond the requirements of individual applicants, imposing additional requirements on the offender states for the provision of assurances and guarantees of non-repetition. In particular, the literature emphasizes that great achievement in the practice of the Inter-American Court of Human Rights is the award to the provision of assurances and guarantees of non-repetition, which have a significant social impact and prevent the commission of similar offenses in the future. At the same time, these judicial bodies quite often resort to a requirement imposition to make changes to the current domestic legislation, which causes a negative reaction from the states.

The practice of the European Court of Human Rights, have the cases of invoking states to respond in the form of assurances and guarantees of non-repetition quite often, which is used in addition to victim's harm compensation. The decision in the *Gazzho v. Hungary* case is of particular interest, in which the European Court found that the existence of another 400 similar complaints to the Court about the

excessive length of civil proceedings in domestic courts testifies to the practice in Hungary that is incompatible with the requirements of the European Convention on protection of human rights and fundamental freedoms of 1951. Such a conclusion led to the adoption of a pilot judgment, requiring Hungary to introduce without delay (no later than one year) a remedy or a combination of such remedies to solve this problem.

5. CONCLUSIONS

The assurances and guarantees of a wrongful act non-repetition are a rather complicated form of the intangible international legal responsibility of states. The lack of an accurate list of such guarantee expression ways creates an ambiguous practice of the judiciary bodies, which in each case must take into account not only the nature and gravity of the committed international offense, but also other circumstances of the case with caution and conscientiousness.

The practice of the International Court of Justice on the vocation to responsibility began to take shape in this form relatively recently, and at the moment it is impossible to speak about the established uniform practice. As for the European Court of Human Rights, this court practices the invoking of responsibility in the form of guarantees of non-repetition by an extensive interpretation of the provisions on reparations, enshrined in the Art. 41 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1951.

According to this article, if the Court establishes a violation of the Convention or its protocol provisions by a state, and the internal law of this state permits only a partial elimination of this violation consequences, the Court, if necessary, awards fair compensation to the injured party.

The presence of special interest of states and the international community as a whole not only in reparation of the damage caused, but also in wrongful act repetition prevention, has given life and development to such a complex form of intangible international legal responsibility. The requirement to provide assurances and guarantees of non-repetition is used in exceptional cases when there is no confidence in the wrongdoing State. It is quite difficult to assess offense repetition potential. However, if violations are repeated due to the imperfection of the domestic legal system, the courts may impose an additional duty on the wrongdoing state to make appropriate changes to its domestic law.

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