LAW INSTITUTE
DEPARTMENT OF INTERNATIONAL LAW

PROCEEDINGS OF THE ROUNDTABLES DISCUSSION XVII BLISCHENKO CONGRESS

Moscow, April 13th, 2019

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Peoples' Friendship University of Russia
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Сборник включает материалы круглых столов на английском языке: «Африка и международное право», «ООН, международные организации и другие международные структуры. Многосторонняя дипломатия», «Международная защита прав человека» и «Защита окружающей среды: взаимодействие международного и национального права».

Материалы данного научного форума отражают исследования известных, а также молодых учёных-правоведов, которые, несомненно, будут полезны для преподавателей, научных сотрудников, аспирантов и студентов юридических вузов, практических работников и всех интересующихся актуальными проблемами международного права и международных отношений.

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INTRODUCTION

Every year, International Blischenko Congress confirms its dynamics both in terms of the growing number of participants as well as expanding list of new areas regulated by international law that are covered in the Congress program. These dynamics are reflected in the increased number of sections and round tables. At the same time, Blischenko Congress maintains and strengthens its distinctive features: innovativeness, interdisciplinarity, inclusiveness and accessibility for all – well-known and young scholars, as well as students interested in research. The Congress promotes the unification of scholars dealing with special issues, therefore, sections of this forum became a platform for testing scientific research results of applicants for the degree of Candidate and Doctor of Sciences. Round tables held within the framework of the Congress remain actual due to the discussions of new UN system initiatives, especially in the thematic years and decades celebrated within the UN.

The dynamics of the Congress are also evident due to participation of foreign scholars: not only their number is growing, but geographical representation. More and more interest in the Congress is demonstrated by international professional associations, especially those where the Law Institute of the RUDN University and professors of the Department of International Law are institutional or individual members. This year the Congress was attended by the representatives of the International Institute of Space Law, the Institute of International Law, the European Society of International Law and other professional associations.

The practical value of the results of the annual Blischenko Congresses should be highlighted. These results directly affect the modernization of the Master's program of the Department of International Law in particular with regard to developing special courses based on an intersectoral approach. This tendency is reflected in teaching a new special course combining international space and international air law. Another example is the introduction of the new course "The Arctic and International Law", cove-

ring such areas as international law of the sea, protection of the environment, protection of the rights of indigenous peoples, etc.

Dear reader, you have a pleasure to find in this book the materials of the 2019 Blischenko Congress, which were published in 2020 – the year of the 60th anniversary of the RUDN University.

The publication of these materials in the form of series indicates the potential and scale of the Blischenko Congress, which has received worldwide fame among the scientific community, and represents a gift from the Department of International Law of the Law Institute to the home University – RUDN University.

Aslan Abashidze,
Doctor of Legal Sciences, Professor,
Head of the Department of International Law
of the RUDN University,
Member of the UN Committee on Economic,
Social and Cultural rights,
Chairman of the International Law Commission
of the United Nations Association of Russia,
Honored Lawyer of the Russian Federation

OPENING SPEECH: WORDS OF FRIENDSHIP

Please allow me first of all the to thank the Peoples' Friendship University of Russia (RUDN) for the excellent way in which they are hosting us in the beautiful city of Moscow and in Russia. I bring warm greetings from the Netherlands.

My own association with Russia has deep roots. When I was a young boy, I sometimes joined my father by ship to the harbours of Amsterdam and Rotterdam. My father operated some cargo ships. In the harbours we collected beautiful wood from Russian ships for the construction of houses. We had small domestic boats and the Russian sea vessels were huge: in my memory easily 100 meters high. The wood came down by a crane from the Russian ship. When the job was done the crane lifted me and my father all the way up to the captain's cabin. Of course, for a small boy this was very exciting and nothing less than a dream.

In the cabin my father paid cash for the wood. There were exchanges of gifts: we brought Dutch cheese and beer for the captain and his crew. In return my father got a bottle of vodka and I received empty boxes of matches with beautiful Russian images on them. We did not speak Russian and the captain did not speak Dutch. However, they were very friendly towards me. During our journey home over rivers, lakes and canals I once asked my father: 'how can it be that the Russians have such big ships?' My father replied: 'They owe it to their Czar Peter the Great, who came to the Netherlands at the end of the 16th century.' Peter the Great (1682 - 1725) had a great interest in foreign countries and cultures. He was quite a personality, towering over two meters tall. In 1697 and 1698, he visited *incognito* the then Republic of the United Netherlands and worked undercover in Dutch shipyards to learn about how to build seaworthy vessels. My father said with the knowledge he acquired in the Netherlands he later built his own big ships as well as his own navy.

In my work as a law student and later lecturer in international law I often came across the name of Czar Nicolas II (1894 - 1917). It was he who took the admirable initiative in the late 19th century to organise a World Peace Conference to discuss how to restrict warfare. For that purpose he proposed two main agenda items: 1) how to control armaments and promote disarmament? And 2) how to instituationalise the peaceful settlement of disputes?

Of course, as is the case now, rivalries existed among great powers, and it soon proved to be controversial to have the World Peace Conference in Sint Petersburg, as my name mate Czar Nicolas II intended. Therefore, he turned to his Dutch niece Wilhelmina who in 1898 had just become Queen of the Netherlands at the age of 18, after the passing away of her father William III. Nicolas II asked whether the conference could be convened in her Palace in the Hague. And so it happened that the first Hague Peace Conference took place in 1899. It was a successful conference, with delegations from 26 countries. The delegates stayed for three months in the Hague, in the Palace in the Woods of Queen Wilhelmina. The delegates were all men: can you imagine? All these men every day in the Palace of our young Queen, 18 or 19 years of age! Small wonder, that she proposed that her uncle organise the Second Hague Peace Conference in 1907, now attended by 44 countries, in the Hall of Knights in The Hague, which is part of the Dutch parliament.

During both conferences, Czar Nicolas II was assisted by his legal advisor Professor Friedrich Martens. He is no doubt one of the intellectual fathers of the legacy of the Hague Peace Conferences, as regards the law of international dispute settlement, the law of warfare, and international humanitarian Law. His deep involvement and creativity gave rise to what still today is famously known as ‘the Martens Clause’: in warfare it might at a certain moment be unclear which rules apply, but the behaviour of the warring parties should always be guided by ‘the principles of humanity’ and ‘dictates of public conscience’. This ‘humanity

clause' is widely known as the Martens clause, and is set out in the Hague Conventions and later also in the 1977 Protocols to the Geneva Conventions. This is an intellectual heritage that both The Hague and Russia can be proud of. Like Czar Nicolas II, Professor Martens was also a very energetic man, with a great drive. Some years ago, a beautiful novel was published on him, entitled *Professor Martens' Departure* (by Jan Koss, 1984). Reportedly, he often escaped during the weekends from The Hague to visit Amsterdam and Brussels.

Ladies and gentlemen, dear colleagues, after these introductions on the Czar Peter the Great and Czar Nicolas II, it is only logical that I now turn to my great colleague and friend Professor Aslan Abashidze. We know each other as colleagues from the UN Committee on Economic, Social and Cultural rights in Geneva, the supervisory body of independent experts which oversees the implementation by the 170 States parties to this human rights treaty. Professor Abashidze is one of the most active and committed members of this human rights treaty body, with a keen interest in knowing whether States Parties are serious about implementing the rights conferred in the Covenant, for example labour rights. As the former academic director of the Grotius Centre for International Legal Studies at Leiden University, I am also impressed by the wide range of teaching and research activities and the association with the United Nations of the Department of International Law of this University, directed by Professor Aslan Abashidze.

To conclude: with respect and in friendship, I bring this morning warm greetings from the Hague, from Leiden University and from the Netherlands to this Blischenko Congress and to all of you as participants.

Enjoy our conference. *Spassiba*.

Nicolaas Schrijver,
Professor of Public International Law, Leiden University,
President, the Institut de Droit International

WELCOME SPEECH FROM EUROPEAN SOCIETY OF INTERNATIONAL LAW (ESIL)

Let me immediately thank the local organizers for the kind invitation, which I accepted with a great pleasure.

I am here today under a double role: as a speaker, but first of all and most importantly as Vice-President of the European Society of International Law. For people who are no familiar to it, the European Society is one of the most important and influential scientific societies in the world dealing with international law broadly understood.

In detail, its goals are to contribute to the rule of law in international relations and to promote the study of public international law. For these purposes the Society engages in a series of activities, such as organizing exchanges of ideas on matters of common interest to international lawyers in Europe, fostering a greater appreciation of the role of the European tradition of international law and developing European perspectives in international law.

I am very glad to highlight that currently the People's Friendship University of Moscow takes part in the Society's activities as a premium institutional member. And this is because the Society is open to both individuals and Institutions. Needless to say, having your University as an ESIL institutional member is a great privilege for us and I am absolutely sure there is much room to work together in a fruitful manner. This University's mission, that is "Uniting people of different cultures by knowledge", may very well serve as an apt motto of the European Society itself!

Palombino Fulvio Maria,
Vice-President, European Society of International Law,
Professor of International Law at the Law Department
of the University of Naples Federico II,
Full Professor of International Law

THE UN, INTERNATIONAL ORGANIZATIONS AND OTHER INTERNATIONAL STRUCTURES. MULTILATERAL DIPLOMACY

THE FUNCTION OF INTERNATIONAL ORGANIZATIONS IN THE INTERNATIONAL COMMUNITY, IN TIMES OF NATIONALISM AND POPULISM: PANACEA, PANDORA'S BOX, ПОКАЗУХА?

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Introduction

This paper reflects some ideas presented at the XVII[th] Blischenko Congress (13 April 2019), organized by the Department of International Law of the Peoples' Friendship University of Russia[1]. It discusses today's function of international organizations, in the context of the present international climate of increasing nationalism, populism and anti-multilateralism. Why are international organizations not any more seen as panaceas, as happened to some degree in the past? Are they rather boxes of Pandora, which is how they are sometimes portrayed today? Are they not in fact often used by states for 'window dressing' (показуха)? The ambition of this paper is to go beyond the stereotypes of this 'P3 troika'.

Section 1 will present in some more detail the key question of today's function of international organizations. The analysis in Section 2 aims to assess to what extent the current anti-multilateralism is a new development. Section 3 will offer some ideas on how to address the current nationalist and populist criticism.

1. The key question

The title of this paper is 'The function of international organizations in the international community, in times of nationalism and populism: panacea, Pandora's box, показуха?'

[1] The style of the oral presentation has been largely kept in this short paper. Most of the ideas in this paper were first presented in Paris on 27 November 2018 in the context of a 'Cleveringa lecture'.

This title is partly inspired by Michel Virally's work on the notion of 'function' in the theory of international organizations[2], partly by Hersch Lauterpacht's famous book published in 1933, 'The Function of Law in the International Community'. This paper aims to discuss the following.

A new world order rose from the ashes of the Second World War. This was not an act of nature. World War II was man-made, so was the postwar order. New rules of international law were made, new international organizations were created. *Après la mort, le médecin ...* But this world order as it was created during and after the Second World War is now increasingly criticized, in particular by nationalist and populist governments and leaders. Some examples are the following statements by political leaders:

- Nigel Farage (UK): "We want our country back"[3]
- Donald Trump (US): "We reject the ideology of globalism, and we embrace the doctrine of patriotism"[4]
- Jair Messias Bolsonaro (Brazil): "If I'm elected president, I will leave the UN. This institution serves no purpose… It's a meeting place for communists"[5]

This is a major debate these years. It is part of political polemics, in particular in times of elections. It is discussed in cafes all over the world. It is analyzed in books and articles, blogs

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[2] M. Virally, La notion de fonction dans la théorie de l'organisation internationale, in: *Mélanges offerts à Charles Rousseau - La communauté internationale* 277-300 (1974). This article is reproduced in M. Virally, *Le droit international en devenir - Essais écrits au fil des ans* 271-288 (1990).

[3] Nigel Farage, the then leader of the United Kingdom Independence Party (UKIP), at the Annual Conference in Doncaster, 25 September 2015 (see https://www.bbc.com/news/av/uk-politics-34356165/ukip-leader-nigel-farage-we-want-our-country-back).

[4] Speech before the UN General Assembly, 25 September 2018, available at https://gadebate.un.org/en/73/united-states-america.

[5] Statement made during his campaign for the elections, 22 July 2018. See https://www.telesurenglish.net/news/Bolsonaro-Vows-to-Leave-UN-Its-Where-Communists-Meet-20181028-0007.html.

and podcasts. This paper aims to offer a small and sober academic contribution to this grand debate. From one particular perspective, the law of international organizations, a few observations will be made in the context of the tension between globalization and multilateralism on the one hand, and nationalism and populism on the other hand.

This paper will focus on one important part of the criticism by nationalist and populist governments and leaders. It will not focus on particular areas of international cooperation such as climate change, human rights, criminal justice, economic integration, finance, trade, or other substantive fields of cooperation. Instead, this paper will concentrate on the institutions for international cooperation, *les rouages du monde*, such as the UN, the IMF, the WTO, the ICC, NATO, the EU, the Council of Europe, the Shanghai Cooperation Organization and hundreds of other international organizations. It is these organizations that are often criticized by nationalist or populist governments and leaders. To mention some examples:

- In August 2016, President Duterte of the Philippines threatened to leave the UN, because the UN High Commissioner for Human Rights (Prince Zeid) was criticizing extrajudicial killings in Duterte's war on drugs. This threat to leave the UN received worldwide attention and criticism, and one day later Duterte said that this threat was a joke[6].

- Early March 2018, President Duterte announced plans to leave the International Criminal Court, after the ICC started to examine the extrajudicial killings in the Philippines. This time it was not a joke. On 17 March 2018, the Philippines notified the UN Secretariat (the depository of the ICC Statute) that it would withdraw from the ICC Statute. This withdrawal entered into effect one year later, 17 March 2019. In its notification, the Philippines stated: "The decision to withdraw is the Philippines' princi-

[6] See https://www.bbc.com/news/world-asia-37147630; see also https://www.ejiltalk.org/can-the-philippines-withdraw-from-the-un/.

pled stand against those who politicize and weaponize human rights, even as its independent and well-functioning organs and agencies continue to exercise jurisdiction over complaints, issues, problems and concerns arising from its efforts to protect its people"[7].

• US President Trump criticized various international organizations in his speech before the UN General Assembly: OPEC, the WTO and ICC[8]. He referred to the ICC in the following way: "the ICC has no jurisdiction, no legitimacy, and no authority. The ICC claims near-universal jurisdiction over the citizens of every country, violating all principles of justice, fairness, and due process. We will never surrender America's sovereignty to an unelected, unaccountable, global bureaucracy". Obviously the US cannot withdraw from the Rome Statute, because it is not a party to it.

There are not only these words, fueled with strong criticism and threats to withdraw. Some of these governments and leaders also *practice* what they preach. The Philippines has now withdrawn from the ICC Statute. The US has withdrawn from the UN Human Rights Council, from the International Coffee Organization, and it announced in October 2018 its withdrawal from one of the specialized agencies of the UN, the Universal Postal Union, one of the oldest international organizations[9]. Japan has left the International Whaling Commission in 2019. A number of countries have withdrawn from another specialized agency of the UN, the UN Industrial Development Organization; those UNIDO leavers include 'pro-multilateralist' states as Canada and France. And of course there is Brexit.

The key question discussed in this paper is how to assess these developments. Are these dangerous developments that may

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[7] See https://treaties.un.org/doc/Publication/CN/2018/CN.138.2018-Eng.pdf.

[8] Speech before the UN General Assembly, 25 September 2018, available at https://gadebate.un.org/en/73/united-states-america.

[9] See http://www.ico.org/documents/cy2017-18/dn-136-18e-usa-withdrawal.pdf.

threaten our future? Is our collective memory fading away? Has it been forgotten that the United Nations was once created "to save succeeding generations from the scourge of war", as is mentioned in the first sentence of the Charter? Or is some of the criticism of nationalist and populist governments and leaders justified? Has multilateralism gone too far and is it now firing back on us? Have states 'lost their sovereignty', is there a real or perceived loss of identity?

In order to answer this question, the next section will examine whether what is happening today (the current anti-multilateralism, withdrawals from international organizations) is a new development. As will be demonstrated, on the one hand, some of it is not really new, and a French saying is applicable: *plus ça change, plus ça reste la même chose* … . However, on the other hand, it is also true that there is something new in the current nationalist and populist criticism. This must be addressed, which will be done in the final section of this paper.

2. The current anti-multilateralism: new or not-so-new?

Plus ça change, plus ça reste la même chose …

Much of what is happening today is not completely new. *Plus ça change, plus ça reste la même chose* … . To illustrate this, the following quotation may be given:

"To-day international law finds itself in a state both of rapid flux and of considerable peril. Attempts to make the international community conform to high standards of law, equity *and organization* conflict with the efforts of certain Powers to impose their will, replacing legal relations by relations of force".

This was not written this or last year, but 65 years ago, by two eminent Dutch lawyers (Van Eysinga and Meijers) in their introduction to the newly established *Netherlands International Law Review*[10].

[10] W.J.M. van Eysinga and E.M. Meijers, Introduction, *Nederlands Tijdschrift voor Internationaal Recht/Netherlands International Law Review*, Vol. 1 (1953-1954), pp. 2-4 (quotation at 2, emphasis added).

The study of international organizations, their law and practice, shows that it would be wrong to believe that we are now in an age that is completely 'anti-international organizations' while the post-war period was an age of only building new ones. There is room for nuance here. Plans to create new international organizations have failed in the past (the International Trade Organization (Havana Charter, 1948); the European Defence Community (1952); the European Political Community (1953))[11]. The reasons for such failures are often related to protectionism, nationalism, or more vaguely to 'protection of sovereignty'.

Something similar can be observed concerning withdrawals from international organizations. Brexit is of course the first case of a withdrawal from the EU. But it has happened before that member states have withdrawn from international organizations: Eastern European states withdrew from WHO and from UNESCO (1949-1953), South Africa during *apartheid* (ILO, 1966), Greece (Council of Europe, 1970). *Plus ça change, plus ça reste la même chose* … In almost all of these withdrawals, the states concerned have returned to these organizations after some time. Against this backdrop, it remains to be seen *when* rather than *if* the UK will rejoin the EU, at an appropriate moment in a future that now seems distant[12]. In addition, while Brexit was prepared, preparations were also made for a continued close relationship between the UK and the EU. There is a strong common interest in this. So also in this respect: *plus ça change, plus ça reste la même chose*. As the UK may find out, the Eagles were right in the 1970s: "you can check-out any time you like, but you

[11] While these plans proved to be a bridge too far at the time, much of what was envisaged has now become reality (the establishment of the World Trade Organization in 1994; the EU's common foreign, security and defence policies).

[12] Art. 50.5 of the Treaty on European Union explicitly mentions this possibility.

can never really leave" (Hotel California)[13]. You can withdraw from an international organization, but you cannot fully withdraw from Europanization and globalization. This fact of 21st century life may make it necessary, if nationalist and populists sentiments will remain or become stronger, to further develop the already existing possibilities for participation in international organizations that are 'lighter' than full membership. In this way a possible sovereign wish to withdraw can be accommodated as well as a strong common interest to maintain a certain relationship to limit the negative effects of a withdrawal.

It is therefore not true that the current critical statements and actions by nationalist/populist governments and leaders are completely new. Much of it is not. This may put the current criticism in a larger historical context and should assist to 'dedramatize' this Grand Debate.

What is new in the current anti-multilateralism?

At the same time, while it is true that much of what is happening today is not really new, there also seems to be something that is new, and that must be addressed. This is the criticism that globalization is not, or not sufficiently inclusive. This criticism concerns the situation both within and amongst states. It is argued by the critics that within countries, mainly the elites that benefit from globalization – the same elites that are often criticized by populists. For elites, the world has become a global village in which they feel at home. But other parts of the population, often those living in the countryside or in the *banlieux*, may see globalization more as a threat. They may feel disconnected and may have a reason to vote for political leaders who seem to take their concerns seriously. In addition, the critics argue that *amongst* countries mainly the richer ones benefit, while the least developed countries are disconnected. As UN Secretary-General

[13] See R.A. Wessel, You Can Check out Any Time You like, but Can You Really Leave? On 'Brexit' and Leaving International Organizations, 13 *International Organizations Law Review* 197-209 (2016).

Antonio Guterres has written in the introduction to his Annual Report 2018: "[g]lobalization has taken root, generating remarkable gains, yet too many people are unable to share in these benefits, and millions continue to live in extreme poverty"[14]. He delivered a similar message in 2017, in his first annual report: "[g]lobalization […] has been cruelly unfair: as wealth has increased, so too has its asymmetry, leaving millions behind in all parts of the world. […] this sense of exclusion is not limited to the poorest countries but is vividly on the rise in developed countries as well, fueling trends of nationalism and a lack of trust in national and multilateral institutions" [15].

3. Addressing the current nationalist and populist criticism: the function of international organizations

In my view the best way to address this criticism is to have not less but more multilateralism, international cooperation, 'international organization'. International organizations are not so much (part of) the problem, rather they are (part of) the solution. In an era of global challenges, rapid change and much uncertainty, international organizations may provide answers, guide change and bring more certainty[16]. The function of international organizations is to operate as instrumentalities, *rouages du monde*, not only to facilitate and organize globalization, but also to deal with its negative or uneven effects. International organizations are not only the 'transmitters' of globalization, bringing a different and rude outside world into our relatively calm and safe domestic affairs. They also function as instrumentalities to tem-

[14] Report of the Secretary-General on the Work of the Organization (A/73/1, 2018), para. 5.
[15] Report of the Secretary-General on the Work of the Organization (A/72/1, 2017), para. 7.
[16] Cf. NATO Secretary-General Stoltenberg: "In uncertain times we need stronger institutions, not weaker institutions. Because strong institutions, they help us to reduce risk" (Munich, 15 February 2019; see https://www.nato.int/cps/en/natohq/opinions_163762.htm?selectedLocale=en).

per, to moderate negative or uneven effects of globalization, to make it more inclusive, more fair, more civilized.

Already in the 19th century, in specific fields, sovereign states recognized that it was in their common interest to establish international organizations. One kilo in Japan should be the same as one kilo in France, therefore the Bureau International des Poids et Mesures was created in 1875, and agreement was reached on common standards such as 'le grand K'. One year before, the Universal Postal Union was created, in which also common standards could be agreed upon, for example on the minimum size of letters. Nowadays international organizations are established for rather different purposes, such as the prohibition of chemical weapons (OPCW), cooperation on renewable energy (IRENA) and the prosecution of the most serious crimes of international concern (ICC). But the key underlying principle is similar. States are unable to deal effectively at the national level, in isolation, with a growing list of issues. It is in their common interest to cooperate, often within an institutional setting, in order to deal with these issues. We need to re-discover why we need international organizations or how they should be renovated in the 21th century, to make them more inclusive, more fair, more civilized. This is the direction in which the functioning of international organizations must be improved: towards more civilized governance of globalization.

The next question is: how to do this? How can international organizations better perform this function of tempering globalization? Three ways in which this could be done are the following:

- improve decision-making by international organizations, make them more effective
- make international organizations less inter-governmental
- improve the relationship between international organizations and their members.

(i) More effective decision-making

The first way in which the functioning of international organizations could be improved, so that they can deliver and strengthen their function of tempering globalization, is to make their decision-making more effective. What the Schuman Declaration said in 1950 is now also true at the global level: l'Europe / le monde "ne se fera pas d'un coup, ni dans une construction d'ensemble: elle se fera par des réalisations concrètes, créant d'abord une solidarité de fait"[17].

Being more effective is perhaps first of all necessary for the UN Security Council. While the UN is in a state of semi-permanent reform, the Security Council has been mostly excluded from these efforts since the chances of success are slim.

More effective decision-making is also necessary more generally. Today many international organizations take many of their decisions by consensus. The 2015 Paris Agreement on Climate Change is a good example, as is the 2010 Kampala agreement on the crime of aggression amendments to the ICC Statute. The advantage of taking decisions in this way is that the prospects for implementation are better than when members are outvoted. However, often it is not possible to arrive at a consensus, because of antagonisms or lack of a willingness to compromise. It is therefore important that there is the 'fall-back option' to vote ('a visible shadow of a vote') if consensus cannot be reached, so that international organizations can deliver[18]. It should not be possible for one country to completely block decision-making and to hold all the other members hostage. This may please nationalists or populists in the dissenting country, but not those in the other countries since the organization fails to deliver.

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[17] Europe / the world 'will not be made all at once, or according to a single plan: it will be built through concrete achievements which first create a de facto solidarity'.

[18] The expression 'a visible shadow of a vote' is used by C.-D. Ehlermann and L. Ehring, Decision-making in the World Trade Organization, 8 *Journal of International Economic Law* 51-75 (2005).

The relationship between consensus and a vote was well summarized by the German Chancellor Angela Merkel when President Donald Tusk of the European Council was re-appointed, on 9 March 2017. In spite of massive support by the other member states for the reappointment of Tusk, Poland continued to resist consensus. Finally, it was decided to reappoint Tusk by a qualified majority vote; 27 members of the European Council voted in favour, Poland against. After the meeting, Merkel captured the essence of consensus decision-making, describing the situation as follows: "I think a search for consensus is important even with qualified majority voting. When you're not dependent on getting unanimity and a qualified majority is possible, you should still try to find a consensus. But, of course, the search for a consensus must not be used as a blockade"[19].

Two recent examples may further illustrate the importance of having the 'fall-back option' to vote. A first example concerns the OPCW. This organization decided in June 2018 that it is part of its powers not only to find whether chemical weapons have been used, but also to identify the 'whodunit', "those who were the perpetrators, organizers, sponsors or otherwise involved"[20]. The initiative for this decision was taken by the United Kingdom, following the poisoning of Sergei Skripal – a former Russian spy – and his daughter in Salisbury (UK) in March 2018. It was supported by Western and many other states, but Russia and some others were strongly opposed. The OPCW normally takes decisions by consensus, but in many areas it may also take decisions by two-thirds majority vote, if no consensus can be reached. Since there was strong disagreement about this issue amongst the member states, no consensus could be reached. But a decision could still be adopted because the requirement of a two-thirds majority of members present and voting was met[21].

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[19] See http://www.politico.eu/article/poland-failing-to-tar-donald-tusk-paints-itself-into-a-corner-eu-council-president/.

[20] OPCW Decision C-SS-4/DEC.3, para. 19 (27 June 2018).

[21] 82 votes in favour, 24 against. See OPCW Doc. C-SS-4/3, para. 3.15.

A second example relates to the appointment of members of the Appellate Body of the World Trade Organization. The WTO dispute settlement system is currently in crisis. When the WTO was established in 1994, a new judicial body (the Appellate Body) was created to deal with trade disputes. This Appellate Body has taken final decisions ('adopted reports') in some 150 often very important trade disputes. By far most WTO members are positive about having the possibility to settle their trade disputes in this judicial way and about the functioning of the Appellate Body. However, the US has become more critical in recent years. The Appellate Body has seven members, who are appointed by the Dispute Settlement Body, composed of all WTO members. The decision to appoint Appellate Body members must be taken by consensus. There is no 'fall-back option' to vote. Since May 2016, the US is blocking the consensus on the appointment of members of the Appellate Body. At present there are only three members left, and this is the minimum required for taking decisions. The term of two of these three members will come to an end in 2019. If the US will continue to block appointments, the Appellate Body will no longer be able to work. This would not have happened if the WTO decision-making rules would make it possible to vote in this case[22].

These two examples demonstrate the importance for international organizations of having 'the visible shadow of a vote' if no decision can be taken by consensus.

(ii) Making international organizations less inter-governmental

Traditionally almost all international organizations were forms of cooperation between governments (the ILO being the main exception). Often they were therefore correctly referred to as 'intergovernmental organizations'. This was also how the International

[22] There is much literature on this crisis in the WTO relating to the Appellate Body. See for example E.-U. Petersmann, How Should WTO Members React to Their WTO Crises?, in 18 *World Trade Review* 503-525 (2019).

Law Commission has defined international organizations since the 1960s, and how this definition was subsequently used in a number of treaties, such as the 1969 and 1986 Vienna Conventions on the Law of Treaties. For the purpose of the Articles on the Responsibility of International Organizations, the ILC adopted a more substantial definition of international organizations, and it agreed that they "may include as members, in addition to states, other entities" (Art. 2(a)). We have seen in recent years that international organizations have become less inter-governmental in two ways: by cooperating more with NGOs, private enterprises and other entities, and by incorporating parliamentary and judicial organs within their institutional structures[23].

Many international organizations cooperate more than before with NGOs, private enterprises and other entities. Former Secretary-General Ban-Ki Moon of the UN stressed some years ago: "[o]ur times […] demand a new constellation of international cooperation - governments, civil society and the private sector, working together for a collective global good"[24]. Some organizations have developed policies, guidelines and strategies for such cooperation[25]. The reason for this is simply that organizations can better perform their functions if such other parties are more involved in their activities. For example, the FAO observes that food insecurity can be defeated "[o]nly through effective collaboration with governments, civil society,

[23] See in more detail about these developments: H.G. Schermers and N.M. Blokker, *International Institutional Law* (6th ed. 2018), in particular Chapters 1 and 5.

[24] Secretary-General Ban Ki-moon, *Speech at World Economic Forum Davos, Switzerland (29 January 2009),* available at *https://www.un.org/sg/en/content/sg/statement/2009-01-29/secretary-generals-plenary-speech-world-economic-forum-global* (last visited 17 April 2015).

[25] E.g. UNESCO in 2013 (see UNESCO Doc. 192 EX/5.INF, adopted in 2013 by UNESCO's Executive Board); the WHO in 2016: Resolution WHA69.10 at http://apps.who.int/gb/or/e/e_wha69r1.html.

private sector, academia, research centers and cooperatives"[26]. For the UN, such collaboration is essential for the implementation of its 2030 Agenda for Sustainable Development[27], which is according to Secretary-General Guterres "our contribution to a fair globalization that leaves no one behind" [28].

A second way in which international organizations have become less inter-governmental, is by incorporating parliamentary and judicial organs within their institutional structures. Parliamentary organs have mainly been created in regional organizations. There is some inter-parliamentary cooperation in a few universal organizations (WTO, ICC), but this is less structured, more informal. In earlier times parliamentary organs hardly existed outside Europe. This has changed radically during the last 25 years, when such organs were created in Latin America, Africa and Asia as well, for example in Mercosur, ECOWAS and ASEAN. In addition, parliamentary bodies were added to the institutional structure of specific organizations such as the International Organization of La Francophonie, the Organization of Islamic Cooperation and the Cooperation Council of Turkic Speaking States. It is true that the powers and composition of most of these parliamentary organs are completely different from the powers and composition of the European Parliament and the Parliamentary Assembly of the Council of Europe. At the same time, the current position of these two European assemblies is the result of a remarkable evolution of more than 65 years. If this is taken into account, it is also remarkable that the members of some of the Latin American parliamentary organs and the ECOWAS parliament are now directly elected. The rise of international parliamentary organs has made a number of international organizations

[26] See the website of the FAO, at http://www.fao.org/partnerships/en/.

[27] In the words of UN Secretary-General Guterres: "The ambition and breath of the Sustainable Development Goals make them simply unattainable without robust partnerships" (UN Doc. A/72/684 – E/2018/7, p. 32).

[28] Report of the Secretary-General on the Work of the Organization (A/73/1, 2018), para. 5.

less governmental. Obviously they are far from a panacea to the problems involved in bridging the gap between the need for international cooperation seen by parts of the population and unseen by other parts. But they are the beginning of the representation of the *vox populi* at the international level.

There has also been a remarkable increase of the number of international judicial organs. While some six international courts and tribunals existed in 1990, there are some 30 now, even 50 if international administrative tribunals are included. Some of these courts and tribunals are self-standing international organizations (e.g. ITLOS and the ICC), but most of them are part of the institutional structure of an international organization. Originally this was mainly a European phenomenon, as in the case of parliamentary organs. But nowadays judicial organs have been established also elsewhere, for example the Andean Court of Justice, the East African Court of Justice and the ECOWAS Court. As a result of the functioning of such organs, there is now more rule of law and less 'rule of power' in the relevant international organizations. Cooperation in these organizations is now more 'judicialized', and has become less inter-governmental.

All these new parliamentary and judicial organs as well as the increased involvement of NGOs, private enterprises and other non-state actors make the work of international organizations less exclusively inter-governmental. It must be added that these new developments by far not always bring immediate successes and results. However, these are long-term processes. Rome has not been built in a day.

(iii) Improving the relationship between international organizations and their members

A third and perhaps most fundamental way in which international organizations could better perform their functions is to improve the relationship with their members, so that an international organization is more than the sum of its members.

This relationship is fundamental for any international organization, but is not always well-understood. The ideal scenario

is that an international organization is more than the sum of its members, delivering, successfully performing its functions. The worst case scenario is that members see an organization as a scapegoat. This happens when they blame the UN, the EU, the WHO and other organizations for what is in fact a failure by the members to enable the organization to perform its functions. It does not often happen that members admit that they themselves should be blamed, rather than their organization. An example is the speech by President Macron before the UN General Assembly on 25 September 2018: "Born out of hope, the UN may become, like the League of Nations that preceded it, a symbol of powerlessness. And there is no need to look for those responsible for this disintegration; they are here, in this Assembly. They are speaking today. It's we, the leaders, who are responsible" [29].

How to improve this situation? Essentially this can be done in two ways: international organizations must become better international organizations ('make international organizations great again!'), and members must become better members.

International organizations must become better international organizations

International organizations should become more transparent and accountable, they should have modern management and personnel policies. They should better explain what they are doing, why and how they are doing it. They should become better in 'marketing', i.e. demonstrating why they perform particular functions, showing the advantages and benefits of the work of the organization, as well as the price of non-cooperation.

In recent years many organizations have taken steps in this direction. Examples are the creation of remedial mechanisms to deal with wrongful acts of the organization, and the development of whistleblower policies by a number of organizations.

[29] See https://gadebate.un.org/en/73/france.

Members must become better members

However, even more important is that members must become better members. By enabling international organizations to do what they want them to do. By refraining from micro-management. By respecting the independence of international civil servants. By not blaming international organizations for things for which they should blame themselves. By explaining at home not only the failures but also the advantages and benefits of the work of international organizations (EU). And perhaps most generally, by actively supporting international organizations if they face unjustified criticism. This is what already happened in some cases in recent years: in the EU following the Brexit referendum, in the ICC Assembly of States Parties after some African states criticized the Court, and now also to some extent in the UN General Assembly (Canada, France, the Netherlands). The postwar international order is not self-perpetuating. It requires maintenance, permanent support and regular updating.

Conclusions

Two conclusions may be offered at the end of this paper. First: some of the nationalist and populist criticism is fundamental and must be taken seriously. This may not always be easy in the current climate, in which many talk, shout, twitter, and few listen and reflect, and in which antagonisms are magnified by modern means of communication. But it is in our common interest to better understand and address the part of the nationalist and populist criticism that is fundamental: globalization has not been sufficiently fair and inclusive.

Second: the answer to this criticism should be that we need more rather than less multilateralism, international cooperation, 'international organization'. We should be careful not to throw away the baby with the bathwater. We should not dismantle the postwar order because it has uneven and negative impacts, but we should calibrate and renovate it so that it fits in with society today. The function of international organizations in the international community today is to organize and civilize globalization.

THE ROLE OF INTERNATIONAL ORGANISATIONS IN ENSURING INTERNATIONAL TAX INFORMATION EXCHANGE

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Tax information exchange has recently become one of the top priority issues on the international agenda. Tax information exchange is considered to be an effective measure in countering tax evasion and other infringements of tax law which affect interests of many countries[1].

The problem of establishing adequate tax information exchange mechanisms was raised for the first time in the late XX century. In 1996 the Organisation for Economic Cooperation and Development (OECD) on the mandate of the «Group of Seven»[2] set up a project against harmful tax competition. Key aspects of the project included identifying non-cooperative countries and territories (offshore counties) and introducing measures in order to counter illegal tax practices.

Currently no country has been left uncooperative. Therefore, the basic role of the OECD in the tax sphere is reduced to elaboration of international treaties and standards on various tax

[1] Gonzalez S. The Automatic Exchange of Tax Information and the Protection of Personal Data in the European Union: Reflections on the Latest Jurisprudential and Normative Advances // EU Tax Review. 2016. Vol. 25. Issue 3. P. 146.

[2] Para. 16 of the G-7 Economic Communiqué «Making a Success of Globalization for the Benefit of All» as of 28 June 1996. Lyon, France. - URL: http://www.g8.utoronto.ca (assessed at 31.03.2019).

issues, including tax transparency issues. Membership of the OECD comprises 35 countries, among which there are many members of the European union (EU) and the Unites States of America (USA). The Russian Federation used to seek the OECD member status. However, the accession process was suspended in 2014[3].

It is worth mentioning that one of the most significant international documents regarding tax information exchange is Joint Convention of the OECD and the Council of Europe on mutual administrative assistance in tax matters as of 1988 which was amended in 2010[4]. This international document constitutes a multinational treaty elaborated in order to introduce different types of administrative assistance and mechanisms for countering tax evasion. The Russian Federation ratified this treaty in 2014[5].

Among non-binding documents of the OECD it is important to mention the OECD Model Tax Convention on Income and on Capital[6] and OECD Model Agreement on Exchange of Information on Tax Matters[7]. These documents constitute model treaties recommended for countries as a basis for bilateral treaties on the avoidance of double taxation and on international tax information accordingly.

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[3] Statement by the OECD regarding the status of the accession process with Russia and cooperation with Ukraine as of 13 of March 2014. - URL: http://www.oecd.org (assessed at 31.03.2019).

[4] Joint Convention of the Organisation for Economic Cooperation and Development and the Council of Europe on mutual administrative assistance in tax matters as of 1988 (amended by the Protocol in 2010). - URL: http://www.oecd.org (assessed at 31.03.2019).

[5] Federal Law of the Russian Federation as of 04.11.2014 № 325-FZ «On the ratification of the Convention on mutual administrative assistance in tax matters» // Russian newspaper. № 254. 07.11.2014.

[6] OECD Model Tax Convention on Income and on Capital as of 15 July 2014. - URL: http://www.oecd.org (assessed at 31.03.2018).

[7] OECD Model Agreement on Exchange of Information on Tax Matters as of April 2002 (modified in June 2015). – URL: http://www.oecd.org (assessed at 31.03.2019).

The activities of the Global Forum on Transparency and Exchange of Information for Tax Purposes (the Global Forum) supplement the OECD work in the tax sphere. Today the Global Forum has more than 150 member states, including a large number of offshore countries and territories. The Russian Federation is also a member of the Global Forum. At present focus areas of the Global Forum involve tax information exchange on request, automatic tax information exchange and technical assistance to member states of the Global Forum[8].

Standards of tax information exchange conducted on request and automatically can be found in the above-mentioned OECD documents. In this connection, the main goal of the Global Forum is to monitor and review the implementation of the standards concerned by its member states[9].

The Peer Review Group as a special body of the Global Forum was established in 2009[10]. The Peer Review Group is responsible for verifying the conformity of the national law of the Global Forum member states to the international standards of transparency and exchange of information on request. As a result of such peer reviews, the experts of the Peer Review Group make a decision, according to which an examined country is given one of the following statuses: «compliant», «largely compliant», «partially compliant» or «non-compliant»[11].

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[8] OECD Secretary-General Report to G20 Finance Ministers as of 23-24 July 2016. P. 20. – URL: https://www.oecd.org (assessed at 31.03.2019).

[9] Para. 1 of the Decision of the OECD Council Establishing the Global Forum on Transparency and Exchange of Information for Tax Purposes, as of 17 September 2009. - URL: https://www.oecd.org (assessed at 31.03.2019).

[10] Para. 1 b) of the Summary of Outcomes of the Meeting of the Global Forum on Transparency and Exchange of Information for Tax Purposes Held in Mexico on 1-2 September 2009. – P. 2. - URL: https://www.oecd.org (assessed at 31.03.2019).

[11] Ratings following Peer Reviews on the Exchange of Information on Request. - URL: https://www.oecd.org (assessed at 31.03.2019).

For instance, in 2014 the Global Forum's peer review of the Russian Federation's national law showed that the Russian domestic tax regulation is «largely compliant» with the international standards of transparency and exchange of information[12]. Austria, the Great Britain, the USA, Germany and Switzerland also have this status.

The work of «the Group of Twenty» (G-20) accompanies formal tools exploited by traditional international organisations, the insulating actions of which were acknowledged inefficacious in the context of the global financial crisis as of 2008-2010. The Group of Twenty is a forum made of representatives of all continents, bringing together 47 counties, including the EU members and the Russian Federation.

Members of «the Group of Twenty» initiate various recommendations which set up the international agenda in different areas, including the international legal regulation of taxation. For instance, members of «the Group of Twenty» called for taking the following measures: widespread implementing of the international standards of transparency and exchange of information[13]; becoming members of the Global Forum on transparency[14]; acceding to the Convention on mutual administrative assistance in tax matters[15].

Other suggestions of «the Group of Twenty» related to tax information exchange included the universal implementation of

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[12] OECD, Global Forum on Transparency and Exchange of Information for Tax Purposes Peer Reviews: Russian Federation 2014: Phase 2: Implementation of the Standard in Practice. - URL: https://www.oecd.org (assessed at 31.03.2019).

[13] Para 9 of the Communiqué of the Meeting of Finance Ministers and Central Bank Governors in Xianghe, Hebei, China, October 15-16, 2005. P. 3. – URL: http://www.g20.utoronto.ca (assessed at 31.03.2018).

[14] Para. 15 of the G20 Leaders Statement, Pittsburgh, September 24-25, 2009. – URL: http://www.g20.utoronto.ca (assessed at 31.03.2019).

[15] Para 51 of the G20 Leaders' Declaration, St Petersburg, as of September 6, 2013. - URL: http://www.g20.utoronto.ca (assessed at 31.03.2019).

the Standard for Automatic Exchange of Financial Account Information in Tax Matters[16] as well as not treating bank secrecy as a ground for refusal to provide the requesting state with the tax information requested[17].

In conclusion, it should be noted that the Organisation for Economic Cooperation and Development, the Global Forum on Transparency and «the Group of Twenty» are basic international bodies in the sphere of international tax information exchange. The coordination of their joint efforts is a key factor to ensure effective and accelerated implementation of various international documents devoted to tax information exchange worldwide.

[16] Para. 9 of the Communiqué of the G20 Finance Ministers and Central Bank Governors, March 18, 2017, Baden Baden. – URL: http://www.g20.utoronto.ca (assessed at 31.03.2019).

[17] Para 15 of the Leaders' Statement as of 2 April 2009. P. 4. - URL: http://www.g20.utoronto.ca (assessed at 31.03.2019).

ISIS "MIRRORS" NATO'S STRATEGIC COMMUNICATION

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Dabiq is an online magazine of the Islamic State, the publication of which started in 2014. According to Arthur Beyfuss, a United Nations counter-terrorism analyst and co-author of the book "Branding terror: logos and iconography of rebel groups and terrorist organizations", in the ICON magazine: "Dabiq is not only news – it is public relations". And he goes on saying that this digital full-colored magazine, with an average of 61 pages, is a "brand" and is actively distributed in PDF format to English-speaking audiences in Europe and the United States[1].

By 2017, when Conoscenti's (Professor of the Turin University of Italy) article[2] was written, 11 issues of the Dabiq magazine were published, both in English and in open access on the Internet, so we can talk here about the analysis of information "at first hand". Conoscenti writes that ISIS (the Islamic State of Iraq and Syria) uses various communication technologies and the product of its media coheres with the Western patterns. Moreover, all communication of the journal takes place within the discourse of war, is defined and described by the militaristic doctrine. Thus, Conoscenti in his article shows the direct focus of communication

[1] Beifuss, A. (2016), The Logotypes and Iconography of Insurgent Groups and Terrorist Organizations, The ICON Journal. URL: https://www.iconeye.com/opinion/review/item/12365-isis-magazine-dabiq-is-not-only-news-it-is-public-relations (accessed on 1 April 2019).

[2] Conoscenti, M. (2017), ISIS' Dabiq Communicative Strategies, NATO and Europe. Who is Learning from Whom? Discourses and Counter-discourses on Europe, from the Enlightenment to the EU, edited by Manuela Ceretta and Barbara Curli, pp. 238-257. Abingdon: Taylor & Francis, 2017.

strategies of the magazine Dabiq on the "enemy" – the West and compares them with the strategies of the addressee. That is why the article is called "Who learns from whom". In his earlier text[3] the author shows that the strategy of NATO's (the North Atlantic Treaty Organisation) communication in social networks is not successful and proactive. On the contrary, they are slow in responding to comments (which can be left by anyone registered on Facebook) under their new posts, even when the comments are ambiguous in content and can be perceived by outside observers as a provocation or negative statement against NATO or even a code for a terrorist attack. Conoscenti writes that NATO needs to be careful in handling feedback of this kind on their official resources especially in social networks where information spreads most quickly.

The main goal of Dabiq magazine is to meet the expectations of the Western audience of readers, and they do everything to appear as they are drawn by the Western media to coincide with their cognitive frame. Conoscenti presented interesting data from the content of the magazine's articles in support of this: "The spark was lit here in Iraq, and its heat will continue to increase, with the permission of Allah, until it burns the army of the crusaders in Dabiq". In the first issue of Dabiq we read: "As for the name of the magazine, it is taken from the area named Dabiq in the northern countryside of Halab (Aleppo) in Sham. This place was mentioned in a hadith describing some of the events of the Malahim (what is sometimes referred to as Armageddon in English). One of the greatest battles between the Muslims and the Crusaders will take place near Dabiq"[4]. Conoscenti says that "Armageddon, is highly evocative and immediately echoes images of destruction and violence, which the 1998 Hollywood movie has generated in the collective memory. The reader is thus forced into an interpretative framework pre-established by the authors, which will limit his/her

[3] Conoscenti, M. (2004), Language Engineering and Media Strategies in Recent Wars. Roma: Bulzoni.
[4] Dabiq #1, 4.

ability to veer from the specific script. In this case, a situational framework with the title 'Islamic Terrorist' is activated and determines the rules according to which we interpret and react in a determined situation".

Another citation from Dabiq Conoscenti underlines from the issue of 2014: "We will conquer your Rome, crush your crosses and enslave your women, with the permission of Allah, exalted". The constant appeal to Allah highlights the religious difference between ISIS and the Gentiles. Conoscenti writes that the Western media take everything too literally the quote "we will conquer your Rome", they predict a bomb planted somewhere in Rome and trying to provoke the security service to find her. However, in Dabiq, Rome is not the capital of Italy or even the country itself, but Europe as such. For me, as well as for the author, it is surprising that the media of the West do not see this subtext, because they themselves often use such a reception, talking about Moscow and referring to the Russian Federation.

There are several ways to unite completely disparate and different both in culture and physical space peoples. One of them is a narrative of fear, supported by (the creation of the) common enemy. Such an enemy-assistant for NATO became the Islamic State and Vladimir Putin. Professor Conoscenti agrees with Isaac Kfir[5] that the Ukrainian question at some point was not enough to preserve the unity of the Alliance. "ISIS is another element that can contribute to the achievement of consensus among reluctant allies. The proclamation of the Caliphate in July 2014 was timely for NATO, which faced a difficult crisis and was going to the September 2014 summit in Swansea." Therefore, it would be useful to consider who benefits most from the inclusion of ISIS in the global enemy narrative. Kfir pointed to the main challenges that NATO constantly faces: the wavering commitment of Alliance members

[5] Kfir, I. (2015), NATO's Paradigm Shift: Searching for a Traditional Security–Human Security Nexus. Contemporary Security Policy 36:2, 219–243. DOI: 10.1080/13523260.2015.106176.

who are looking for new ways to address security issues through European Union mechanisms or voluntary coalitions, which has jeopardized NATO's relevance. “If NATO members are unclear about the Alliance's agenda and identity, others may not have the knowledge of what it is prepared to do to protect its interests”.

Adherents of Social Sciences and Humanities have long been familiar with the methods of narration or storytelling. A good story succeeds with the audience if it has a clear structure and includes specific components. It all begins with the presentation of facts that are suddenly interrupted by conflict. As a result, the main character is forced to take some extraordinary actions for him. In the process, he encountered the assistant(s) and the opponent(s) with which he forms the ultimate goal and ways to achieve it. This is followed by action and outcome – conflict resolution and satisfaction.

From this position, Conoscenti considers the narrative of the Ukrainian crisis, where the protagonist is NATO. The coordination of the actions of its members falls, public opinion becomes an opponent, so the Alliance is forced to look for an assistant, and finds him in the person of Vladimir Putin. The desires and resources of the parties – Russia's self-confidence and wealth of funds for military funding - coincide, therefore, there is an action – NATO creates unrest in Ukraine, Russia threatens NATO and saves Ukraine. As a result, Russia controls Ukraine, NATO gains cohesion and can increase costs, and society feels saved and can again rely on the Alliance in its defence, in other words, “and they all lived happily ever after”.

Likewise, the enemy-assistant of the NATO became ISIS, which, as shown by Conoscenti, is the ideal type of enemy for America, as the Islamic State is willing to take responsibility for all terrorist acts that are attributed to it. (“...presumably by the fault of ISIS extremists”, this phrase, uttered in the news in a timely manner should be confirmed by the Islamic State).

Thus, at the strategic level, NATO uses the narrative of fear of ISIS. It operates on two levels: first, it meets the needs of ISIS -

it gives authority and the internal force in a limited geographical area, and secondly, it allows to form a consensus among its opponents and legitimizes military actions in the destabilized zone.

Conoscenti concludes, to paraphrase Churchill, that the key is not ISIS but somebody's national interest. As with any political issue, nothing happens by itself. Living on the same planet, we are all interdependent components of a single system. Each action has its own background, scenario, and impact on all participants of the process. I believe that from a scientific point of view, we can only observe and analyse political developments, draw conclusions and make recommendations. Knowledge itself is a force that can grow in good hands and free people's minds from ideas imposed by propaganda or ideology. I would like to believe that the reflection of what is happening is able to free from the role of pawns in the hands of someone’s political interest both the human and the state.

THE SCOPE OF INTERNATIONAL COURT OF JUSTICE ON THE WAY OF "WORLD COURT"

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"There is no better place than peace conference to create the war". It is mentioned by Arthur Conan Doyle while talking about international peace intended organizations and peaceful side of international public law. It is obvious from the phrase; predecessors of this kind of organizations were not pure as talked today. On the other hand, we have to think about how we can reach this kind of documents and the most important matter to find reliable source and examined body. For that purpose, this article continuous its range from the approach of International Court of Justice and its necessity for today's political arena.

Starting from 20th century, states established the communication method in order to maintain peace and clarify relationships throughout the diplomacy and international law. There was no doubt while this establishment started to act, it would bring various problems alongside of it. If we take into account the fact about the predecessor of International Court of Justice (cont. ICJ) meanly Permanent International Court of Justice, states several times voted against to establish permanent court. However, all these negative actions did not let countries to barrier to establish World Court. The International Court of Justice was created in 1945 regarding the Charter of the United Nations as the main and directed judicial organ (Art. 7, UN Charter). Its place in the realization of the purposes of the UN is "to spread about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace" (Art. 1, UN Charter). The

Court has a two directed role[1]: to maintain, in regard with international law, legal disputes confirmed and submitted to it by sovereignties (contentious cases) and to make advisory opinions (advisory procedures) .To put simple it takes into account legal disputes confirmed and submitted to it by States (contentious procedure) and makes advisory opinions and approach on legal questions regarded to it by vested United Nations organs and agencies[2] (advisory procedure). It works in reference with its Statute which forms an integral or internal part of the Charter (Art. 92, UN Charter). The International Court of Justice consists of 15 judges who are elected by the General Assembly and the Security Council for a nine year term of office. It has its seat in the Peace Palace at The Hague, The Netherlands

Another look to ICJ's formation and composition of judges are based on tough experience and wisdom on legal dispute resolution, international law knowledge. On this manner, the quote mentioned by Azerbaijani-Scottish human rights activist Fuad Alekberov can explain the level of excellence of ICJ in order to compare today and past ICJ acts and steps towards:

"I refuse to watch or listen to Tony Blair, unless he is on trial at the Hague." Furthermore, United Nations General Assembly report for 31th of July, draws attention to the existence of International Court Justice. Quoted saying President of General Assembly Peter Thompson, Seventy years after its inception, the International Court of Justice – the principal judicial part of the United Nations and "tireless custodian of the international legal order" – was more needed now than ever before.

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[1] Park, L., "The International Court and Rule-Making: Finding Effectiveness" (September 20, 2018), University of Pennsylvania Journal of International Law, 39 (2018), No. 4, pp. 1065-1097.

[2] Kunz, R., "Teaching the World Court Makes a Bad Case: Revisiting the Relationship between Domestic Courts and the ICJ" (July 13, 2018), Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper No. 2018-12.

In contentious proceedings, when a solution needed dispute is brought before the Court by a unilateral application filed by one State against another State, the names of the parties in the official title of the case are separated by the abbreviation v. for the Latin versus (e.g., Cameroon v. Nigeria). When a dispute is submitted to the Court on the basis of a special agreement between two States, the names of the parties are separated by an oblique stroke (e.g., Indonesia/Malaysia).

The first case submitted in the General List of the Court (*Corfu Channel (United Kingdom* v. *Albania)*) was called on 22 May 1947[3].

Alongside of it, between 22 May 1947 and 1 August 2018, 175 cases were entered in the General List

Apart from its formation and composition, decisions of International Court of Justice carries binding precedent referred to Article 59 of Court's Statute. On that frame, we have to touch upon which kind of cases has been submitted by parties on the face of state. According to the statistics that was published by Palace of Peace, most intrigues cases were referred to disputes in following[4]:

1. Maritime issues
2. Territorial claims
3. River claims

As a prove of this facts with numbers is demonstrated following; 15% of territorial claims, 2% of river claims, 8% of maritime claims. The first case entered in the General List of the Court (*Corfu Channel (United Kingdom* v. *Albania)*) was submitted on 22 May 1947.

Between 22 May 1947 and 1 August 2018, 175 cases were entered in the General List.

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[3] Liao, Shiping, "Fact-Finding in Non-Appearance Before International Courts and Tribunals" (May 31, 2018).

[4] Güzel, M.Ş. "The Chagos Archıpelago Case in The Internatıonal Court of Justıce" (June 01, 2018), Bölgesel Araştırmalar Dergisi, 2 (2018), No. 1, pp.119-151.

In international law and relations, possessive of territory is important since sovereignty on territory finds out what makes a state. The privileges of having land, so, are only as prosperous as a stipulated state's borders are not in danger. In most cases, these borders have to combat international claims. Range of claims can be separated into nine categories: treaties, geography, economy, culture, effective control, history, uti possidetis, elitism, and ideology. States have referred on all nine categories to clarify the level of legal claims to territory before the International Court of Justice (ICJ).

As visual from the statistics, scope of World Court increases day by day, and it effects world's political systems, even it is demonstrated itself on the face of changing of map (Ukraine vs Russia). Moreover, there is need to defend your side and giving exact proves that will be admissed by judges of ICJ. Whether taking into account defense of Russian Federation on "Annexation of Crimea", result is jaw dropping, since formation of evidences counted as admissible because of referendum that happen in Crimea. It is one of the best example for territorial claims.

As mentioned above as indicator, the ICJ and its predecessor PICJ have been very efficient at putting end and decision making that enumerated parties can be responsible. Amidst of the 29 awards that have been granted of May 2007, only one (3.4%) -- the 1997 decision over the Gabcikovo-Nagymaros dam project, that is still on the round of negotiations intended to produce compliance-meaning of demonstrating the idea of both parties.

After dissolution of Czechoslovakia in 1993, the fresh breath considered Slovak Republic started to work the project. On the contrary of Slovak Republic, Hungary did not carry out the responsibilities fully when the scholars on both sides of the border emphasized scares on the environmental consequences in 1989 (as accepted the catalizator time of dispute) .Afterwards Hungary made an attempt to dissolve the 1977 treaty that signed to indicate the responsibilities of both parties. in May 1992 (Hungary vs Slovakia) agreed to move their legal dispute to the International Court

of Justice in The Hague. In 1994, the Socialists took the control and got power in Hungary but still there were some problematic matters while submitting the documents for court. As a result of these all failures court decided to put a decision on the manner of below in 1997[5]:

"The Court found that Hungary had breached their legal obligations in almost all points. It ordered Hungary to finish the Nagymaros part of waterworks. Per Court decision, Czecho-Slovakia and later Slovakia was entitled to build alternative workaround after Hungary stopped its work, but Slovakia breached on one point - it should not have started to operate alternative temporary solution before court finished. It called on both States to negotiate in good faith in order to ensure the achievement of the objectives of the 1977 Budapest Treaty, which it declared was still in force, while taking account of the factual situation that had developed since 1989".

The other mesmerizing factor on the case between Hungary vs Slovakia is about the relations of public international law and local private law in the face of breach of contract that signed in 1977. If we handle the case on the approach of private law, the considered link should be "breaching of contract" and demanding compensation (material or moral).

Besides other issues, the Hungarian representatives wanted the court to decide whether or not Czechoslovakia was entitled to embark on Proposal C, and to rule that the 1977 treaty was not binding on Slovakia and Hungary. The court handed down a decision in 1997:

Importance of Gabcikovo-Nagymoros Dispute for International Public Law science is about leading factors that it has not happened before. Range of examples starts with court's taking into

[5] Zyberi, G., "Enforcing Human Rights Through the International Court of Justice: Between Idealism and Realism" (April 1, 2018), in Sir Nigel Rodley and T. Van Ho (eds.), Research Handbook on Human Rights Institutions and Enforcement, Edward Elgar, 2018, Forthcoming

account while making decision about the case and first time in the court history paying visit the dispute area.

It should also be marked that the ICJ and PCIJ have not been utilized exclusively by Western Countries democratic system although until enumerated time most case hearing submitted by democratic states. These 29 heard cases, alongside the six cases that are still pending as of May 2007, come from a broad range of geographic existence and political governs. This consisted of geographic separation that mentions below:

- Europe: 13 (37.1%)
- Western Hemisphere: 9 (25.7)
- Sub-Saharan Africa: 6 (17.1)
- Middle East and North Africa: 4 (11.4)
- Asia and Oceania: 3 (8.6)

As obvious from the graph on case division on submission to court, International Court of Justice is not called "World court" purposely. The main purpose is mentioned in the Charter of International Court of Justice:

"The Court shall be composed of a body of independent judges, elected regardless of their nationality from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law".

Recognizing the sovereignty of country is not about its history, tradition or customs. The other jaw dropping element on this matter is maritime and territorial immunities of de-facto and de-jure recognized states. Border management still is in the focal point of world settlers namely countries. However, there are some cases on mixed characterized meanly territorial and maritime. On the contrary of Russian vs Ukraine case, there is one of the most important case as can be example this mixed characterized specification. If we compare these two main cases between stipulated four

countries, it will be obvious that there are so varied differences (source, legal validities of laws, case hearings)[6].

On this approach, it is good timing to analyze the case between Nicaragua and Colombia. It is really eye-catching to know what happened between two close bordered countries and what was the reason they become the enemies throughout this chronology.

Everything started with the "democracy lie" of Spain that initiated to keep under control of region lands. They apprehended colonilization of territories is prohibited according to the International Public Law Provisions and solution of this problem was hidden behind the great quote: Divide and Govern". As a result of democracy attack by superpower, region countries started to establish confederations, local typed communities.

However, life of these local confederations was not long since not being sustainable on the view of legality. Fate made U turn against for the both countries since jointly lived countries became an enemy after law reform of Nicaragua, and as every sovereign country they have demanded their rights on the lands that belonged to them in past. For that purpose, Nicaragua sued Colombia to the court on bases of the various provisions and demands of International Public law. The main request of Nicaragua from ICJ was:

"Nicaragua claims with the ICJ over the disputed maritime boundary involving 50,000 km² in the Caribbean, which included the islands of San Andrés and Providencia. Colombia had claimed that the ICJ had no jurisdiction over the matter and had increased its naval and police presence in the islands. In a preliminary decision the Court sided with Colombia on the question of sovereignty

[6] Venzke, I., "The International Court of Justice During the Battle for International Law (1955-1975): Colonial Imprints and Possibilities for Change" (March 23, 2018), in J. von Bernstorff and P. Dann (eds.), The Battle for International Law in the Decolonization Era , Forthcoming; Amsterdam Law School Research Paper No. 2018-08; Amsterdam Center for International Law No. 2018-02

over the islands (47 km²) and agreed with Nicaragua that the 82nd meridian (West) is not a maritime border".

If we handle this dispute not only from morality but also legal matters, claim of Nicaragua did not limited with decision making of belonging the islands, they also wanted from court to decide the political perspective meanly withdraw of Colombian government from region. After eleven years of investigations and hearings Court came to conclusion as follow: the ICJ decided this case by upholding Colombia's sovereignty over San Andres y Providencia, and other disputed islands. These included Quitasueño and Serrana, around which the court established territorial zones of 12 nautical miles in radius. The ICJ also expanded Nicaragua's maritime territory, thereby surrounding both island banks. The ICJ found that only one of 54 features identified by Nicaragua within Quitasueño Bank is an island at high tide. The ICJ considered that the use of enclaves achieved the most equitable solution. Fishermen worried that the court "had created 'enclaves' around Quitasueño and Serrana that could restrict the fishermen's longtime access there. Alongside of this case, term of "fishermen rights and maritime activities" matter came to court round.

As continuous of the range mentioned above, there are special "maritime cases" that were submitted by countries to the cases. Due to control "world seas" and private legal activities these water areas, it was adopted "law of the seas" as convention and "maritime law". At first glance, it is distinctive due to form of law: public and private law. However, there was lawsuit between People's Republic of China, Philippines and Vietnam on the deciding the future perspective of ownership on South China Sea. That was the best example of crashing or crossing the laws in one lawsuit due to dispute roots[7].

[7] Odermatt, J., "Patterns of Avoidance: Political Questions Before International Courts" (March 7, 2018), iCourts Working Paper Series No. 120; International Journal of Law in Context, 14(2), Forthcoming

Nowadays, every single country admits that People's Republic of China is the superpower not only about political view but also economically. China trades with countries via various ways: air, land, sea; the crashing point from the approach of private law came to scene in this period. South China Sea is one the route of China in order keep the trade with region countries. All the cases together "South China dispute" is large scaled problem that consist of six parties jointly. However starting from case there were only two parties namely People's Republic of China and Philippines, follow up the dispute enlarged its provisions and as result of that number of parties reached at six. The parties were: People's Republic of China, Philippines, Vietnam, Taiwan, Malaysia, Brunei

While analyzing the claims, we can observe the common wish from countries for court; Spratly island.

As a claimant of lawsuit, I would like to start China's claims first:

"Chinese government gives name of Nansha Islands for the Spratly Islands, and Xisha Islands for the Paracel Islands. It claims all the islands of Nansha Islands and large part of SCS for historical reasons, claiming Xisha Islands as part of its Hainan Province. It states that early in the Han dynasty and Ming Dynasty, Chinese navy has expeditions to Nansha Islands, and since then there are archaeological evidence proving that Chinese fishermen and merchants have been conducting activities there. It's been China's claim in the 19th and early 20th centuries until the World War II, when the islands were under Japan's claim. After Japan was defeated, China published a map with nine dotted lines, claiming all the islands inside in 1947. Besides, China also enhanced its claim by codifying it in the law in 1992. The Xisha Islands (Paracel Islands) were taken by China from Vietnam in 1974. However, for all its claims, no exact coordinates have been given"

Range follows with the expectations of Philippines from the court:

"It claims the Spratly Islands and has given clear coordinates on the basis of the proximity principle and also resulted from

the an exploration in 1956. It was in the 1971 that the Philippines clamed eight islands and named them Kalayaan Island Group (KIG) officially. It argued that the eight islands didn't belong to the Spratly Islands, and they were open to be claimed since they didn't belong to any country. And next year they were officially taken as part of the Palawan Province. In the year of 2012, the Philippines published its position on Scarborough Shoal (Bajo de Masinloc) officially and also brought its maritime entitlements in the West Philippine Sea (WPS) to the Permanent Court of Arbitration (PCA) in 2013.

As the face of third party joined country Vietnam claims as follow:

"Vietnam claims large part of SCS including the whole Spratly Islands as part of Khanah Hoa province as well as the Paracel Islands despite being seized by China in 1974. It's claim based on the principle of historical with archaeological evidence"

Three of external countries that joined the case afterwards as followed as below:

Malaysia:" Based on the continental shelf principle, Malaysia has occupied three islands within its continental shelf with specific coordinates. Also it has tried to build up an atoll with soil from mainland.

Brunei: "It claims part of the CSC as its Exclusive Economic Zone (EEZ) and continental shelf for under United Nations Convention on the Law of the Sea (UNCLOS) 1982. Thus it declared its EEZ in 1984, which included Louisa Reef".

Taiwan: "Taiwan officially exercised sovereignty over Taiping Island (as known as Itu Aba), the largest one in the Spratly Islands after the World War II. It was the first to establish its presence after the Japanese withdrawal in 1946 (Japan failed in World War II). The claim to the SCS is on the basis of discovery and occupation principles.

The award of case was eye-catching even jaw dropping due to its formation. I have used resume format of award in order draw

attention to focal points that reasoned for crossing between private and public law:

"China's claims to historic rights, or other sovereign rights or jurisdiction, with respect to the maritime areas of the South China Sea encompassed by the relevant part of the 'nine-dash line' are contrary to the Convention and without lawful effect to the extent that they exceed the geographic and substantive limits of China's maritime entitlements under the Convention. The Convention superseded any historic rights or other sovereign rights or jurisdiction in excess of the limits imposed therein".

Basically, court has considered the modern legal demands within the frame of legal validity and applicable law for enumerated case.

The other form of water disputes namely river claims by states towards each other still in the core point of legislative matter of International Court of Justice. However, wider understanding on river claims is not about clarifying the borders of the states, it is generally about the activities alongside the river mentioned. As an example for river claims, we can handle again Nicaragua's claims against Costa-Rica also known as "Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)". As a result of two years investigations and hearings court came to decision to provide the claims of Nicaragua as follows:

"Court found that the construction of the road by Costa Rica carried a risk of significant transboundary harm and, therefore, it found that Costa Rica had not complied with its obligation under general international law to carry out an environmental impact assessment (EIA). Since Costa Rica had not complied with its obligation to perform an EIA, however, the Court could not determine whether Costa Rica was required to notify, and consult with, Nicaragua. Turning to the reparation requested by Nicaragua, the Court concluded that a declaration of wrongful conduct in respect of Costa Rica's violation of the obligation to conduct an EIA was the appropriate measure of satisfaction".

As obvious from the examples, judgments, definitions, International Court of Justice still continue being “last hope” of independent states not considering their power of policy, economy, army. At all the cases states can submit their concerns on all matters (in the provisions of ICJ charter) to the court and request the demands for opposite country. On the other hand, it is the best way to hinder the wars amidst the countries. For example, spying activities in the opposite region is the alternative way to provocation. Whether we can handle, case between Pakistan vs. India on the reason of Kulbushan Jadhav’s spying activites in Pakistan, it is a reason of making a war. However, Pakistan acted as civil country and sued India to the court since they believe the excellence of International Court of Justice. Core point in this case was Pakistan’s emotional action, and local court’s death sentence towards stipulated man. Now cards were against Pakistan since they have to prove Jadhav’s spying activities and stop application of death sentence. Considering all the measures taken by International Court of Justice, we can unanimously emphasize that, ICJ is one of the best dispute solution way.

THE CRISIS OF WTO APPELLATE BODY AND DEVELOPMENT OF REGIONAL INTERNATIONAL COMMERCIAL COURTS

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The WTO Appellate Body is facing the biggest crisis in its 23 years of existence: the US has been blocking appointments and reappointments of its members for over a year and a half. As a result, it has shrunk from its normal seven members to four members. On 1 October 2018, this will go down to three. The Dispute Settlement Understanding ("DSU") requires three members to serve on a case, selected by rotation. In a matter of months, therefore, rotation will have become meaningless, placing an almost impossible workload on the remaining members. The next vacancies, for the US and Indian members, occur in December 2019, at which point the appeals process would be crippled. A lone Chinese Appellate Body member would remain[1].

The projected paralysis of the dispute settlement mechanism has led to different solutions being suggested. The most aggressive voices call for treaty making outside the WTO. However, this would be cumbersome and most are exploring options within the four corners of WTO law itself. So far, these talks and discussions are taking place informally, outside the WTO, and although calls for addressing the crisis have been made by the current Chair of the Appellate Body, WTO members are yet to commence any initiative.

One early proposal has been for the Appellate Body to use its powers under Article 17.9 of the DSU, to amend the Working Procedures so as to prevent the Appellate Body from taking on any

[1] Gantz, David A. "An Existential Threat to WTO Dispute Settlement: Blocking Appointment of Appellate Body Members by the United States." (2018).

appeal if the membership is reduced to four or less (as it is currently). This would mean that panel reports could be adopted automatically by the dispute settlement body ("DSB"), sidestepping the impasse (Charnovitz 2017)[2]. However, this proposal is now looking unfeasible, given that the Appellate Body is already down to 4 members and there is no political consensus in the DSB in its favour.

Majority voting, provided for in Article IX:1 of the WTO Agreement, for appointing new Appellate Body members has been proposed by Pieter Jan Kuiper, a former Director of the WTO's Legal Affairs Division (which administers the dispute settlement process apart from appeals). This proposal found resonance within the trade law community. However there is doubt as to whether this is compatible with the DSU's requirement for positive consensus within the Dispute Settlement Body for such matters. The wording of the two provisions provides scope for different interpretations.

Another widely advocated alternative is taking the arbitration route provided in Article 25 of DSU. Binding arbitration could be used for appeals instead of the Appellate Body. A subset of WTO Members could commit to this in respect of future disputes amongst themselves, using a plurilateral agreement; alternatively, the parties to a specific dispute can always agree, during the initial phase of the dispute settlement process, to resort to arbitration in case either or both parties want to appeal a Panel decision. Arbitration does seem to offer a solution within the four corners of the DSU itself and the working rules for the Appellate Body provide an already existing template for procedure. Despite this, reaching an agreement on the appointment of arbitrators, funding, and other issues can be challenging. More problematically, arbitration is not compulsory: WTO Members cannot be forced to use it.

[2] Fukunaga, Yuka. "The Appellate Body's Power to Interpret the WTO Agreement and WTO Members' Power to Disagree with the Appellate Body." (2018).

The options elaborated above reflect ways to keep dispute settlement functional to the exclusion of US demands. This could further distance the US from the WTO. Perhaps the membership could seek to address the US's reasons for blocking appointments in the first place? The immediate US concern is that Appellate Body members continue serving on cases they have been assigned to after their terms have expired (Rule 15, Working Procedures for Appellate Review). Making adjustments to the procedural rules could be easier than the other options surveyed above, even if it would reward one member holding the DSB hostage[3].

Time will tell whether the WTO weathers this storm. Rescuing an Appellate Body by caving in to the demands of one member may set a dangerous precedent. This could well be the 'do or die' moment that propels the WTO membership into action.

At the same time, regional international commercial courts develop very fast. Over the past four decades, the PRC has undergone a legal modernization program at breakneck speed, with results that are impressive but uneven.

Whereas the PRC's legal institutions have been primarily oriented toward servicing domestic disputes, and, secondarily, those following inbound investment from foreign investors and overseas Chinese investors, the "Belt and Road Initiative" (BRI) marks a change of direction. In 2013, General Secretary of the Chinese Communist Party and President of the PRC Xi Jinping announced the BRI, a multi-trillion dollar effort to link China's economy with those of countries throughout the world, from Hungary to Vanuatu, through infrastructure and energy projects in what is widely seen as the most ambitious development project in history. It firmly cements China as a major source of outward international investment.

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[3] Petersmann, Ernst-Ulrich. "How should the EU and other WTO members react to their WTO governance and WTO Appellate Body crises?." Robert Schuman Centre for Advanced Studies Research Paper No. RSCAS 71 (2018).

The BRI is broadly viewed as a commercial and geo-political project to enhance China's international status and to export the products of its excess capacity.

One dimension of the BRI that has received less media attention over the past five years relates to legal and regulatory concerns. The BRI covers most of the world's major legal systems—including Anglo-American common law, European civil law, Islamic law, various hybrids of the foregoing, and a dizzying collage of customary and local rules. The PRC has turned to bilateral investment treaties (BITs) to shield its outward investors from liability under foreign law.

However, BITs and their associated dispute resolution provisions may not provide complete coverage, especially over commercial disputes. Given the complex nature of project finance and construction deals, the BRI will generate an abundance of disputes, some of which will fall within the ambit of traditional BIT investor-state dispute settlement clauses, but many of which would be subject to a number of domestic and transnational jurisdictions and rules. The CICC is meant to streamline and control the flow of these disputes.

China International Commercial Court develops very fast in recent years. On July 1, 2018, the Supreme People's Court, pursuant to its power to set up "tribunals", issued the "Supreme People's Court Regulations on Certain Issues in Establishing an International Commercial Court" (Regulations)[4]. The Supreme People's Court is establishing three such tribunals – in Shenzhen, Beijing, and Xi'an. Opening ceremonies have already been held in Shenzhen and Xi'an, although it is unknown when the courts will start accepting cases.

According to the Regulations, the core concept of the CICC is a "one stop shop" for international commercial dispute resolution

[4] Bell, Gary F. "The New International Commercial Courts-Competing with Arbitration-The Example of the Singapore International Commercial Court." Contemp. Asia Arb. J. 11 (2018): 193.

services, including mediation, arbitration, and litigation that are "organically integrated." The CICC features eight judges – all from the PRC – who have been selected for their experience in handling international commercial disputes, their knowledge of conflicts of law, and their bilingual Chinese-English capability. A bench, comprised of three or more judges, hears cases. Unlike most Supreme People's Court decisions, CICC judgments may include dissenting opinions. The CICC also features an International Commercial Expert Committee, comprised of twelve Chinese and twenty non-Chinese legal professionals who will further provide expert knowledge on mediation, arbitration, and litigation. The CICC only hears commercial disputes and not state-investor disputes. More specifically, the Regulations define "international commercial disputes" as those whereby:

i. one or both parties are foreign,

ii. the domicile of one or both parties lies outside the PRC,

iii. the object of the dispute lies outside the PRC, or

iv. legal facts producing, changing, or destroying commercial relations in dispute occur outside the PRC.

The Regulations establish groundwork for the CICC, but leave a number of questions unanswered:

Jurisdiction. As an initial observation, it is clear that the Supreme People's Court did not follow the approach of the DIFC Courts in creating a special jurisdiction for the CICC. There was no constitutional or legislative reform and it seems the Regulations were issued in advance of the Forum on the Belt and Road Legal Cooperation, held by the Ministry of Foreign Affairs from July 2–3 2018, in Beijing. Unlike the DIFC Courts (or, Singapore International Commercial Courts, for that matter) that are a product of constitutional amendments, the jurisdiction of the CICC is still constrained by existing PRC law. Moreover, since the PRC ope-

rates on a modified civil law system, the CICC will have less discretion to develop its jurisdiction through its own judicial decisions[5].

Second, it is uncertain whether the CICC has exclusive jurisdiction over all disputes falling under the BRI, itself a nebulous category. Article 2 of the Regulations specify that parties shall, in accordance with Article 34 of the PRC Civil Procedure Law, agree that, for any commercial dispute valued at RMB 300 million or more, the CICC has jurisdiction over "first-instance international commercial cases." This statement of jurisdiction raises several issues. First, it is unclear whether parties, going forward, must specify in their contracts that the CICC has exclusive jurisdiction for deals for the specified amount or if the CICC will be the default forum for such cases. Second, it is uncertain whether parties have the right to opt out of the CICC jurisdiction in their choice of forum clause.

This question has implications for Hong Kong, Singapore, and Dubai, where international commercial courts and international arbitration centres have been advertising their dispute resolution services for BRI-related deals. Third, a question remains as to whether host states can opt out of the CICC altogether. In regards to these issues, it is likely that the CICC will not radically alter existing practices in terms of venue for dispute resolution. The outcome will likely vary depending on the parties involved, the Chinese investors' relative bargaining power, and the relationship of the host country with the PRC.

The vision of establishing the SICC was first mooted by the Honourable Chief Justice of Singapore, Sundaresh Menon, during his speech at the Opening of the Legal Year 2013, on 13 May 2013, the Singapore International Commercial Court Committee ('the

[5] Sooksripaisarnkit, Poomintr, and Sai Ramani Garimella. "Harmonisation of choice of law rules in commercial contracts in the One Belt One Road countries: Will the Hague principles on choice of law in international commercial contracts serve as a good model?." China's One Belt One Road Initiative and Private International Law. Routledge, 2018. 39-56.

Committee') was constituted to study the viability of developing a framework for the establishment of the SICC[6]. On 29 November 2013, the Committee released its report and recommendations'. Thereafter, between 3 December 2013 and 31 January 2014, public consultation on the Committee's report was conducted by the government of Singapore.

In November 2014, the Parliament of Singapore passed several bills to amend the Constitution of the Republic of Singapore, key legislations and subsidiary legislations to establish the SICC. For example, the Constitution of the Republic of Singapore was amended to give the President of Singapore the power and discretion to appoint international judges to the SICC. The Supreme Court of Judicature Act was amended to establish the SICC as a division of the High Court of Singapore and its jurisdictions. The Rules of Court was amended to provide for procedural rules applicable to proceedings before the SICC[7]. The Legal Profession Act was also amended to allow foreign lawyers to participate in proceedings before the SICC. On 5 January 2015, within two years from its conception, the SICC was officially launched.

The crisis of Appellate Body have affected WTO dispute settlement – and not in a positive way. Members do consider how to tactically game disputes against certain parties in order to favorable precedents in later disputes. For example, it's what China appears to be doing with the NME cases presently. Rather than take on the EU and US simultaneously, it has focused on the EU first, assuming it is a "softer" target. The development of the Regional International Commercial Court of Justice will promote the resolution of international disputes.

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[6] MacArthur, Elizabeth. "Regulatory Competition and the Growth of International Arbitration in Singapore." Appeal: Rev. Current L. & L. Reform 23 (2018): 165.

[7] Hwang, Michael. "The Future of Arbitration in Singapore." Sing. Comp. L. Rev. (2018): 123.

INTERNATIONAL PROTECTION OF HUMAN RIGHTS

GLOBAL PROTECTION OF HUMAN RIGHTS. WHO CAN SEE THE WOOD FOR THE TREES?[1]

*Nico Schrijver**

This chapter describes in a nutshell the development and codification of human rights at a global level. As part of that development, a multiple of international procedures to monitor and supervise compliance with the provisions of human rights treaties has arisen. Unfortunately, these monitoring procedures often work independently of each other. However, ideas to achieve an integrated international monitoring system within the framework of the United Nations, preferably with effective enforcement mechanisms, have, until now, not been warmly received by the international community.

The Universal Declaration of Human Rights as the communal TV aerial

As a response to the barbaric acts and disregard of human rights by Germany and Japan during the Second World War, the founders of the United Nations sought international recognition of general human rights that may not be violated by national states. This aim had not been achieved in the Covenant of the League of Nations, the forerunner of the United Nations; for

[1] This chapter was earlier published in S. van Hoogstraten (ed.), *New Challenges to International Law. A View from The Hague*, Leiden: Brill, Nijhoff, 2018, pp. 115-125.

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example, Japanese proposals for the recognition of racial equality foundered at the Versailles Peace Conference. The founders of the United Nations declared in 1945 that they were determined to reaffirm 'faith in fundamental human rights' and they accepted as a purpose of the new world organisation the need to achieve international cooperation 'in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion' (art.1 para. 3 UN Charter).

In order to achieve this goal, the General Assembly of the United Nations (UNGA) adopted the Universal Declaration of Human Rights on 10 December 1948. This declaration, which was set up by the UN Commission on Human Rights, chaired by Eleanor Roosevelt and René Cassin, included civil rights and political freedoms of citizens as well as social rights. The declaration was solemnly formulated as a resolution of the UNGA and is hence not legally binding. However, the essence was quickly integrated for the most part in human rights conventions and moreover regarded as customary international law. The provisions of the Universal Declaration are accepted everywhere today as the touchstone for the behaviour of states. Theo van Boven has colourfully described the declaration as the 'communal TV aerial of humanity'[2].

The development of international human rights law

From the 1960s, a large number of human rights treaties based on the Universal Declaration came into being. In 1966 two fundamental covenants were agreed: the first on economic, social and cultural rights (ICESCR) and the second on civil and political rights (ICCPR). Both covenants came into effect after ratification

[2] On his life and work, see Fons Coomans et al (ed.), *Rendering Justice to the Vulnerable: Liber Amicorum in Honour of Theo van Boven*, The Hague, Kluwer Law International 2000.

by 35 states in 1976; the Netherlands did not accede to the covenants until 1978. After these two important human rights treaties, many others quickly followed. Often they elaborate upon the rights that are laid down in the Universal Declaration and the covenants of 1966. Sometimes they focus upon a specific subject, sometimes upon a specific group of people. Examples of the first are the International Convention on the Elimination of All Forms of Racial Discrimination (1965), the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) and the Convention for the Protection of All Persons from Enforced Disappearance (2006). Examples of treaties focusing on certain groups include the Convention on Elimination of All Forms of Discrimination Against Women (1979), the Convention on the Rights of the Child (1989), the Convention for the Protection of the Rights of All Migrant Workers and Members of Their Families (1990) and the Convention on the Rights of Persons with Disabilities (2006)[3].

In 1993, at the World Conference on Human Rights the Vienna Declaration and Programme of Action was adopted in which it was declared that all human rights are universal, indivisible and inter-dependent[4]. This was consistent with the policy position of the United Nations in discussions of this subject after the end of the Cold War.

International monitoring and supervisory procedures

The monitoring of compliance with human rights treaties takes place at the global level principally in the supervisory committees that have been set up by the different human rights treaties. These treaty committees consist mostly of independent

[3] See Olivier de Schutter, *International Human Rights Law: Cases, Materials, Commentary*, Cambridge, CUP, second edition, 2014.

[4] See the Declaration and Action Programme of the World Conference on Human Rights in Vienna, in *UN Doc*. A/CONF. 157/23. 1993.

experts who are appointed for fixed terms. Their task consists of the following:

Reporting duty: States usually have the duty to report every five years on the efforts they have made to improve the human rights situation in their country, as laid down in the relevant treaty ('self-reporting'). On the basis of this report, the treaty body can ask questions of the state and make comments. Non-governmental organisations can also be consulted ('shadow reports'). Besides 'naming and shaming', sanction options are minimal as the conclusions and recommendations of the treaty committee on the basis of the reports are not binding.

State complaint procedure: States can submit a complaint regarding the human rights situation in another state. The state complaint procedure is mostly only applicable if both the complainant state and the accused state have explicitly recognised the authority of the treaty body to deal with the complaint. This procedure is barely used due to the inherent political sensitivity. States usually choose for more diplomatic methods or for economic sanctions. Furthermore, human rights violations rarely affect the other treaty party directly which means there is less urgency and need to make use of this procedure.

Independent inquiry: In some cases, the treaty body can decide to institute an inquiry into the human rights situation in a state from the perspective of the provisions of the relevant treaty. This method occurs in only a limited number of treaties including the UN conventions against torture and for women's rights as well as within the framework of the Council of Europe (also in reference to torture). In the Anti-Torture Convention (Articles 20 and 28) a state can choose to opt out of granting this power to the committee. The UN women's rights treaty and the new optional protocol to the ICESCR (in force since 2013) also allow an independent investigation by the relevant treaty committees. A treaty committee can usually institute an investigation if there are sufficient indications that there is a question of systematic and flagrant violation of human rights, for example, the practice of torture.

The report, which is drawn up on the basis of such an investigation, is in principle, not binding nor made public. This usually occurs in situations in which the state concerned does not respond, or not respond satisfactorily, to the investigation.

Individual complaint procedures: Some treaties allow an individual to submit a complaint against a state that violates his or her human rights. At the present time, this procedure applies to the European Convention for the Protection of Human Rights (ECPHR), the convention against racial discrimination, the ICCPR, the UN convention against torture, the convention against the discrimination of women and also, since 2013, the Protocol to the ICESCR (which has still not been ratified by the Netherlands). The individual complaint procedure is optional in all these cases. Consequently, an individual can only submit a complaint if the national state has authorised the treaty committee to deal with complaints of subjects. Furthermore, there are, in general, conditions attached to individual complaint procedures. Firstly, the complainant him or herself must be the victim of the violation. A complaint on behalf of another or in the general interest, the so-called *actio popularis*, will be declared inadmissible. Secondly, recourse to national law must be exhausted before the procedure is accepted by the committee. This means that there must be no single procedure still available at the national level to the complainant. Thirdly, there are usually time limits for the submission of a complaint and the response of the relevant body to the complaint. Fourthly, after the committee has declared the complaint admissible, it must first request a response from the state. This is followed by a procedure in which both sides present their cases. The UN committee then gives its 'view' which is not a formal pronouncement in a dispute but a formulation of the findings of the relevant treaty committee. These procedures are hence referred to as quasi-judicial. Even when they formally have the status of a recommendation, these views are nevertheless usually described as an authoritative interpretation of the relevant treaty which is still adhered to by the national government. The proce-

dures of the UN committees have clearly been inspired by the European Convention on Human Rights and Fundamental Freedoms that came into being in 1950.

Charter and Charter-based organs for human rights protection

In addition to the ten treaty committees, the High Commissioner for Human Rights, the UN General Assembly, the Human Rights Council and the Security Council also play a role in the monitoring of human rights treaties. Since 1993 a High Commissioner for Human Rights heads the UN Office for Human Rights; the current incumbent is the former Jordanian UN Ambassador, Prince Zeid Ra'ad Al Hussein. Every autumn, the Third Committee (for Social, Humanitarian and Cultural Affairs) of the UNGA discusses the state of human rights in the world. This discussion focuses on both certain difficult human rights situations (in for example Cuba, Iran, Venezuela, the occupied Palestinian territories and Yemen) and on certain themes such as blasphemy, the rights of sexual minorities and the right to food.

In 2006, the UN Human Rights Council replaced the UN Commission on Human Rights as the specialised body to advise the UNGA due to continual criticism of the latter's double standards and politicisation. In contradistinction to the now defunct Commission, the Council enjoys an improved organisational position as it falls directly under the UNGA. Furthermore, the longer duration and increased frequency of its sittings reflect the greater importance of human rights within the UN system[5]. Another innovation is the Universal Periodic Review (UPR), a sort of global human rights examination that all member states – whether or not they are parties to human rights treaties – must

[5] See Nico Schrijver, 'The UN Human Rights Council: a new 'society of the committed' or just old wine in new bottles?', in *Leiden Journal of International Law*, vol. 20 (2007), no. 4, pp. 809-823.

take once every four and a half years. This takes place, however, in the presence of their peers - not independent experts. Consequently, the UPR has a political character in contrast to the work of the treaty committees which are expected to consist of independent experts (although this is not always the case). Moreover, the UPR procedure is much more succinct with less documentation than is usual for the treaty committees. Furthermore, the UPR has virtually no formal complaint procedures available for individual citizens. Nevertheless, in the ten years of its existence, the UPR has developed into an important means of regularly assessing the adherence of each member state to global human rights standards and of asking pertinent questions about the domestic observance of human rights treaties[6]. This process makes use not only of the reports of the government concerned itself but also of information gained from UN institutions and non-governmental organisations. A colourful collection of NGOs also attempts to attend the sittings of the Council in Geneva and lets its voice be heard through an array of various demonstrations. The sittings of the Council are hence becoming increasingly global rallies in favour of human rights.

Moreover, the Council for Human Rights can avail itself of a variety of so-called special procedures, in particular the appointment of independent country rapporteurs (currently totalling 14) and thematic rapporteurs (currently 41) who provide the Council with their reports of comprehensive information and recommendations on an annual basis.

Finally, the Security Council, particularly after the end of the Cold War, has started to give more attention to the connection between respect for human rights and peace and security. The Council now does this invariably as part of its country resolutions

[6] See Hilary Charlesworth and Emma Larkin (eds), *Human Rights and the Universal Periodic Review, Rituals and Ritualism,* Cambridge, Cambridge University Press, 2015.

(for example, on Syria, Myanmar, Iran and Yemen) but also in thematic resolutions or declarations, for example, on the protection of citizens during armed conflict, the prosecution of war criminals, respect for human rights during UN peace operations and the responsibility to protect[7].

Conclusion and possible paths towards reform

Anyone surveying all these developments will, on one hand, be impressed by the enormous efforts that have been made since 1945 to firmly establish respect for human rights and to advance a great number of international procedures to monitor these rights. No state today would any longer dare to claim that human rights are purely a domestic matter. On the other hand, as a result of the proliferation of all these separate and specific procedures, it is often difficult to see the wood for the trees[8]. It is clear that we are very far removed from the ideal that was so alive shortly after the foundation of the UN, namely a Bill of Rights in the form of a trinity consisting of the Universal Declaration, one worldwide treaty and one monitoring committee. In practice, a maze of different and partly overlapping procedures has grown. Despite all the differences between, for example, the ten treaty committees, their mandates coincide to a degree, for instance for the right to equal treatment of men and women, the right to freedom of expression or the right to form a trade union. They also have similar complaint procedures[9]. Some small improvements have also been achieved when the treaty committees have been able to work together. The secretariats of all treaty

[7] See the Advisory Council on International Affairs, *The Netherlands and the 'Responsibility to Protect: The responsibility to protect people from mass atrocities,* report no. 70, The Hague, 2010.
[8] Surya Subedi, *The Effectiveness of the UN Human Rights System. Reform and the Judicialisation of Human Rights*, Oxon/New York, Routledge, 2017.
[9] Wouter van den Hole, *The Procedures Before the Human Rights Treaty Bodies. Divergence or Convergence*, Antwerp, Intersentia, 2004.

committees, for example, operate under the aegis of the High Commissioner and they are housed in the same building (Palais Wilson, Geneva). Incoming complaints and petitions are first screened there by one common body – the joint petition unit. For several years now, all treaty committees allow the treaty states to submit a common basic report, called the common core document, on the human rights situation in their country to which they can then add per treaty a specific report on their compliance with the provisions on the rights contained in that treaty. In 2014, the committees on women's rights and children's rights also experimented with the publication of a joint General Comment on harmful practices of violations of the rights of women and girls including genital mutilation, child marriages and polygamy. However, the establishment of a single treaty body with joint complaint procedures lies very far in the future[10]. Arguments in favour of streamlining the existing treaties and of eventually transforming them into one single global treaty have largely fallen on deaf man's ears[11]. Similar treatment can be expected for proposals to establish a World Court for Human Rights in place of the existing ten treaty committees[12]. In reality, the States parties are a long way from establishing such a World Court. It could even be counter-productive and undermine the universality of human rights as it is certain that a considerably smaller number of

[10] On this issue, see the Advisory Council on International Affairs, *The UN Human Rights Treaty System: Strengthening the system step by step in a politically charged context,* report no. 57, The Hague, 2007.

[11] Nico Schrijver, 'Paving the Way Towards…One World Wide Human Rights Treaty', in *Netherlands Human Rights Quarterly*, vol. 29 (2011), no.3, pp. 257-260.

[12] See several contributions by Manfred Nowak, including 'World Court of Human Rights. Utopia?', in I. Lintel, A. Buyse and B. Gonigle Leyh (eds), *Defending Human Rights: Tools for Justice: Volume in Honour of Professor Fried van Hoof*, Cambridge, Intersentia, 2012, pp. 161-9; Jan Lhotsky, 'The UN Mechanism for Human Rights Protection: Strengthening Treaty Bodies in Light of a Proposal to Create a World Court of Human Rights', in *Journal of Eurasian Law*, year 9 (2016), no. 1, pp. 109-22.

states would sign up to such a World Court than the 170 states which are now party to the ICCPR, the 167 to the ICESCR or the impressive 196 to the Children Rights convention. It is even unlikely that the number of 123 member states that have joined the International Criminal Court would be repeated for a World Human Rights Court. The colourful, multi-track system of international monitoring by means of recommendations and a little 'naming and shaming', which is embodied in the current treaty system, is simply not yet ready to be replaced by a World Court that has sole monitoring competence and can employ coercive measures. But these distant views are sometimes necessary to create a climate that enables an array of further small steps to facilitate better interaction and cooperation between the treaty committees themselves and between the treaty committees and the relevant UN political bodies such as the Third Committee of the UNGA, the UN Human Rights Council and the Security Council[13]. If in 2018, the 70 year commemoration of the adoption of the Universal Declaration can be grasped to promote these steps, it would be a useful contribution to the attainment of the ideals of 'freedom, justice and peace in the world' first proclaimed in 1948.

Universality is not uniformity. Leave a margin of appreciation to States.

Domestic application is now the key challenge as well as the biggest opportunity to apply human rights.

Embed human rights domestically.

Have a bottom-up approach, with a complementary international supervisory system.party to a HR treaty means that as a State you agreed to accept the authority of the relevant supervisory bodies to have a viw on your human rights eprformamce.

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[13] See various proposals in this regard in Nico Schrijver, 'Fifty Years of International Covenants. Improving the Global Protection of Human Rights by Bridging the Two Covenants', in *NJCM Bulletin. Netherlands Journal of Human Rights*, vol. 41 (2016), no. 4 (December 2016), pp. 457-64.

THE 'HUMANIZATION OF INTERNATIONAL LAW' ARGUMENT THROUGH THE LENS OF INTERNATIONAL INVESTMENT LAW

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Summary: 1. Introduction 2. The 'humanization of international law' argument. 3. 'Humanization of international law' and investor-state arbitration. 4. Conclusion.

1. From an international legal perspective, it is hardly questionable that human rights are everywhere, i.e. they increasingly cut across all fields of public international law: from international criminal law to international environmental law; from the law of international adjudication to international investment law and so on. Unsurprisingly, much – maybe too much – has been written on the subject, and even more on one of the theoretical arguments that has proved to be the most intriguing to the legal doctrine, the so-called 'humanization of international law' (HIL) argument[1].

2. Over the last few years several scholars, both inside and outside Europe, have been emphasizing the profound impact of human rights on the international legal order's structure, going so far as to determine its transformation in terms of subjectivity and sources[2]. As regards subjectivity, this argument focuses on the potential role of individuals as persons of international law; a role – it is argued – which has undergone significant changes over time precisely as a result of the progressive emergence of human

[1] T. Meron, *The Humanization of International Law*, Leiden, 2006.
[2] For an insightful analysis of the HIL argument see V.P. Tzevelekos, *Revisiting the Humanization of International Law: Limits and Potential*, in *Erasmus Law Review*, 2013, p. 62 ff.

rights law. Still, even though the issue whether individuals possess legal personality remains contentious, the argument at hand brings about a more general and preliminary question: that is, what rights and duties individuals are entitled and obliged to under contemporary international law.

The HIL perspective gives some insights especially as far as the rights of individuals are concerned. Indeed, for a long time individuals did not have rights on the international level and were precluded from bringing claims before international courts and tribunals. The turning point from this *status quo* was precisely the shift towards human rights, i.e. the adoption of a series of universal and regional human rights treaties (like the UN Covenants of 1966 and European Convention of Human Rights of 1950) providing individuals with effective protection in terms of both substantive rights and procedural rights. Predictably, a kind of individual personality, at least *sui generis*, is no longer questioned by legal scholars.

Such a conclusion is of course symptomatic of the plausibility of the HIL argument, but the situation completely changes if we move to the very essence of this theory, i.e. the supposed impact of human rights on the normative dynamics of the international legal order. And indeed, to borrow the words of Alain Pellet, the impression one gets is that in this regard many scholars confuse the *lex ferenda* with the *lex lata*: 'One may (and should) want to change the law, but as long as this is not the case the lawyer can only describe legal norms as they are and not as she/he would like them to be, though she/he may judge them severely'[3]. This proves to be the case in a number of normative fields, such as immunities and diplomatic protection.

As to immunities, for example, the idea was put forward whereby the right to access to justice should prevail over state immunity, especially where a gross violation of human rights is

[3] A. Pellet, *'Human Rightism' and International Law*, in *Italian Yearbook of International Law*, 2000, p. 3 ff., p. 4.

involved and the need to protect such rights is particularly urgent. But this view has been rejected by both the International Court of Justice in the *Jurisdictional Immunities of the State* case[4] and, in its wake, by the European Court of Human Rights (ECtHR) in *Jones v. UK*[5]. According to the ECtHR, in particular, it would be proportionate to derogate from the right to access to justice in order to give room to a rule promoting 'comity and good relations between states through the respect of another state's sovereignty' (para. 188). Still, immunities are not the only case where the *humanization of international law* has been undermined.

The same trend of *counter-humanization* may be observed with regard to another area of law: diplomatic protection, i.e. a means for a state to take action against another state on behalf of its nationals, whose rights/interests have been injured by that state. Indeed, for some years, the International Law Commission called for a progressive development of this area, for example advancing the idea whereby states should be obliged to resort to it in case of *jus cogens* violations, but in the end none of these ideas has turned into positive law and the sole result to have been reached was the adoption of mere recommendations, lacking, as such, any binding force.

In brief, as has been rightly observed, '[w]hat these instances all have in common is that the humanization of international law has proven to have limits. The perception of an order giving unconditional priority to human rights, which have, according to that view, led to the drastic erosion of the classical foundations of voluntarist sovereignism and have completely displaced bilateralism to the benefit of community interests, belongs in all these cases to the world of the normative 'ought'[6].

Now, regardless of the extent to which a so conceived HIL argument is really taking place, no doubt this argument fosters the role of the individual as the bearer of interests contrasting

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[4] *Germany v. Italy (Greece Intervening)*, 3 February 2012.
[5] 14 January 2014.
[6] V.P. Tzevelekos, *supra* note 1, p. 65.

with those of the state: in a nutshell, what can be called an *individual-centric perspective*. But indeed there is another way the same argument may be resorted to; and international investment law offers a significant instance in this respect.

3. Let us start with a remark which is indeed self-evident: from the very beginning, international investment law has been perceived as *asymmetric* in both substantive and procedural terms.

In terms of substance, investment treaties are conceived as legal instruments aimed at guaranteeing specific rights to investors (and to investors only) in the enjoyment of their investment within the territory of the host state. In terms of procedure, the same treaties, at least the large majority of them, provide the investor with the right to claim a treaty violation before an arbitral tribunal, whereas the opposite is not the case, so that a state may not start an investment claim. Accordingly, the investor-state dispute settlement (ISDS) system is affected by a manifest asymmetry: as appropriately pinpointed by Martti Koskenniemi 'when one of the parties, and only *one of them*, may say to the other "if you do not agree with my conditions, then see you in the court" then the balance of power has shifted decisively in favour of that party'[7].

In this light, both states and arbitral tribunals have increasingly developed some antibodies, one of them being precisely the use of the HIL argument, but from a *state-centric perspective*. This is altogether clear if one looks once again at the question concerning individual subjectivity and the normative dynamic behind international investment law.

As regards subjectivity, the decision in *David Aven v. Costa Rica* is worth being mentioned[8]. According to a passage

7 Martti Koskenniemi, *It's not the Cases, It's the System*, in *Journal of World Investment & Trade*, 2017, p. 343 ff., p. 251. See also G. Zarra, *International Investment Treaties as a Source of Human Rights Obligations for Investors*, in M. Buscemi, N. Lezzerini, L. Magi and D. Russo (eds), *Legal Sources in Business & Human Rights. Evolving Dynamics in International and European Law*, The Hague, 2019, forthcoming.

8 ICSID Case No. UNCT/15/3, Award, 18 September 2018.

of the decision, 'it can no longer be admitted that investors operating internationally are immune from becoming subjects of international law' (para. 737). By doing so, the Tribunal clearly affirms the international personality of investors, but with the view to saying that they are recipients not only of rights (for example the right to due process of law), but also of obligations, like those stemming from measures adopted by the host state to protect its population's fundamental rights, including the right to a safe environment, the right to health and so on. In other words, in the Tribunal's reasoning, the HIL argument, and the personality of individuals which this argument unavoidably presupposes, serve the purpose of defending the state power to regulate in the public interest, that is 'the legal right exceptionally permitting the host state to regulate in derogation of international commitments it has undertaken by means of an investment agreement without incurring a duty to compensate'[9].

As to the relevance of the same argument with regard to the normative dynamics of international investment law, both states and tribunals have once again relied on this argument in order to rebalance the ISDS system. In detail, states increasingly include in investment treaties clauses setting forth human rights obligations for investors. For example, Art. 15.1 of the 2012 BIT of the Southern African Development Community states that 'investors and their investments have a duty to respect human rights in the workplace and in the community and state in which they are located', and further provides that 'investors and their investments shall not undertake or cause to be undertaken acts that breach such human rights'; Art. 18 of the 2016 Nigeria-Morocco BIT recognizes the investors' obligation to respect the environment, to comply with human rights duties and to fulfil labour law obligations; Art. 10 of the 2016 Iran-Slovakia BIT expressly says that investors should strive to make the maximum feasible contributions to

[9] A. Titi, *The Right to Regulate in International Investment Law*, Baden-Baden, 2014, p. 33.

the sustainable development of the host state and local community through appropriate levels of social responsible practices.

As to investment jurisprudence, one may refer to the recent practice in matter of counterclaims. Traditionally, in the terms of investment treaties, only claims directly related to investments may be brought before an arbitral tribunal. Accordingly, human rights disputes between the investor and the home state are subjected to arbitration only insofar as they are part of the 'investment dispute'; one of the means by which the latter may be extended to the former is the use of counterclaims by the host state and the *Urbaser v. Argentina* case offers a significant exemplification[10]. In that case, moving from the alleged violation of human rights, in particular the right to water, the host state brought counterclaims against the foreign investor. And the Tribunal accepted jurisdiction over such claims: in its view, the broad formulation of investor-state arbitration clause allowed Argentina to present any claim (against the investor) in connection with an investment. In other words, the Tribunal 'accepted not only the procedural possibility for the host state to bring a counterclaim, but also the applicability of a legal regime other than the treaty itself – domestic and contract law – on which to ground the cause of action of the counterclaim'[11].

4. In conclusion, whereas the HIL argument has been originally conceived as a tool to strengthen the individual's position *vis-à-vis* that of the state, the argument has proven to be ineffective, as in the case of state immunities and diplomatic protection, or even to serve the opposite purpose of strengthening the state's position, as it occurred in international investment law. Regardless of whether this tendency is considered positive or negative, it remains a fact revealing that sometimes, also in the realm of public international law, *everything must change so that everything can stay the same*.

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[10] ICSID Case No. ARB/07/26, Award, 8 December 2016.

[11] E. De Brabandere, *Human Rights Counterclaims in Investment Treaty Arbitration*, 2018, in https://oxia.ouplaw.com/page/723.

30TH ANNIVERSARY OF THE CONVENTION ON THE RIGHTS OF THE CHILD (1989) AND 60TH ANNIVERSARY OF THE DECLARATION OF THE RIGHTS OF THE CHILD (1959): THE PRESENT AND THE FUTURE OF INTERNATIONAL PROTECTION OF CHILDREN'S RIGHTS

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This year 2019 marks the anniversary of two important international documents in the field of children's rights: the 30th anniversary of the UN Convention on the rights of the child and the 60th anniversary of the Declaration of the rights of the child. Both instruments are universal and specifically addressed the rights of children in the system of universal human rights instruments.

The milestone reached by the international instruments, the Declaration and the Convention, allows us to sum up the results of their application, to note current trends and problems related to the international obligations and the establishment of international standards for the protection of children's rights.

A progressive task in the analysis of the Convention and the principles of the Declaration is to determine their future application, taking into account the emergence of new risks and problems in the field of children's rights. What are the prospects for the Declaration of the rights of the child and the Convention on the rights of the child?

It is important to determine whether the Convention and the principles of the Declaration are in line with the new chal-

lenges of modern society and new relationships affecting the rights and interests of children.

It is important to understand how these international instruments will be effective in the future, in the next 30 and 60 years.

Several important points should be highlighted.

1) THE FIRST THESIS

The binding force of the Declaration and the Convention; the problem of the relationship between the provisions of the Convention and the Declaration.

It is generally accepted in international law that obligations are created only by international treaties. Among the international treaties is the Convention.

The Declaration does not impose obligations on States Parties, it is a recommendation act in which States have defined only the objectives of their policies in a certain direction, main principles.

The first approach on this issue.

Experts in the field of international law and the protection of children's rights note that not all principles of the Declaration of the rights of the child 1959 are reflected and enshrined in the Convention on the rights of the child 1989. Accordingly, when countries created the Convention 30 years after the adoption of the Declaration, the rights of children were better secured in the Convention and not all the principles of the Declaration formed the basis for the provisions of the Convention.

The second approach on this issue.

There is a different view of the continuity of the Convention and the Declaration. The adoption of the Convention underlined the importance of the work of states around the world to protect the rights of children. Such protection should be reflected in the activities of all public or private social welfare institutions, courts of law, administrative authorities or legislative bodies (Article 3 of the Convention). The purpose of the Convention was to establish the rights of children and the positive obligations of

states parties to ensure and protect them, but not merely to set goals, as it was in case of the Declaration.

In addition, the 30-year period preceding the Convention allows professionals to consider the principles defined in the Declaration as customary international law. A similar position is expressed in the science of international law with regard to the norms of the universal Declaration of human rights, 1948, the 70th anniversary of which we celebrated last year.

Conclusion on the first thesis.

The practice of international courts has recognized the binding value of the principles of the Declaration, together with the provisions of the Convention, which is an international Treaty.

In particular, principle 6 of the Declaration gives priority to the right of the mother to a young child. A child of tender years shall not, save in exceptional circumstances, be separated from his mother. While the Convention is based on the equality of the rights of parents and defines the principle that both parents have common responsibilities for the upbringing and development of the child (article 18 of the Convention).

Modern decisions of the European Court of human rights confirm the priority of principle 6 of the Declaration over the provisions of the Convention on equality of parental rights. Thus, this principle is given a mandatory value. This confirms that, over time, the principles of the Declaration acquire the force of customary international law. It is important to understand in interpreting differences between the text of the Declaration and the Convention.

2) THE SECOND THESIS

The Declaration and the Convention formed the basis for the development of public international law and private international law.

In public international law the Declaration and the Convention create the basis of the institution of children's rights law in the human rights law branch. At the same time, these acts contributed to development of international private law and set the

basis for the unification of family law and legislation on parental responsibility in transnational families.

At the same time, the norms of public international law and private international law have a different approach to the consolidation of the rights of the child and the mechanism for their implementation. Such differences in practice could lead to the problem of a “public order” and block the operation of international treaties in the field of private international relations.

According to Article 7 of Convention *the child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.*

The institution of citizenship is given special importance in public law; that’s why the right of the child to acquire a nationality is secured in the Convention.

Citizenship provides all the guarantees and support measures of the state, which is why national legal systems often have simplified procedures at the legislative level for the acquisition of citizenship for children in order to reduce the cases of stateless minors. Of course, we know the basic principles of acquiring citizenship by the right of blood (jus sanguinis) and the right of soil (jus soli).

According to scientists, prof. Abashidze and A. Solntsev, the principle of jus soli "citizenship based on place of birth" has become an international norm governing the citizenship of children born to non-citizen parents, especially if they are otherwise stateless. Children of non-citizen parents whose legal status has not been determined should be protected from any difficulties in acquiring citizenship[1].

[1] Abashidze A., Solntsev A. Legal content of the rights of non-citizens under international law // Scientific and analytical journal Observer. 2013. No. 10. P. 059-063.

Citizenship itself is a special institution for the protection of rights and guarantees for minors. This follows from Principle 3 of the Declaration.

Of course, article 6 of the Universal Declaration of Human Rights has the following provision: *Everyone has the right to recognition everywhere as a person before the law*. And in Article 15 is fixed the right of everyone to a nationality. However, this is not enough to protect the rights of the child, so the right of the child to acquire a nationality from birth is specifically established in the Convention on the rights of the child. Moreover, the Convention enshrines the right of the child to an identity, including in this category the nationality of a minor. According to article 8 of the Convention, *States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity*.

At the same time, in protecting the rights of the child, the rules of private international law - the Hague Convention on the civil aspects of international child abduction, 1980 - deviate from the category of citizenship, using another main criterion for choosing the most effective national law for the protection of the children rights - the criterion of residence (place of habitual residence) – articles 3 and 4 of the Hague Convention.

The Hague conventions on parental responsibility and parental relations, in particular in situations of abduction of children by a parent in transnational families, have abandoned the institution of nationality of children in order to ensure their best interests. The starting point in situations of child abduction is the child's place of habitual residence.

The provisions on the protection of children from illegal movements along with the Hague Convention as secured in the Convention on the rights of the child, Article 11 according to

which *States Parties shall take measures to combat the illicit transfer and non-return of children abroad. To this end, States Parties shall promote the conclusion of bilateral or multilateral agreements or accession to existing agreements.* However, the protection criteria in these conventions differ. The Convention on the rights of the child was adopted later than the Hague Convention.

The practice of disputes over the return of children under the Hague Convention (including the practice of the European court of human rights) illustrates this contradiction. There is a tendency for national law enforcement agencies to apply the criterion of nationality on the basis of a "public order" clause instead of the Hague Convention or on the basis of the public component of the Convention on the rights of the child.

Conclusion: thus, there should be consistency of positions in the acts of public and private international law in the field of children's rights.

3) THE THIRD THESIS

The definition of the child and the age at which a person is given special protection as a child

There is no uniform definition of the child's age in international instruments. Here are some examples.

The Convention defines who is the child (Article 1). For the purposes of the present Convention, *a child means every human being below the age of eighteen (years) unless under the law applicable to the child, majority is attained earlier.*

In article 38 of the Convention, we find the age limit for child combatants. According to the Convention *States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities*.

The Hague Convention on the civil aspects of international child abduction applies to children up to the age of 16. Thus, it is assumed that from this age children become old enough to make their own decisions and not to be protected from abduction or illicit transfer abroad and non-return by their parents. Howev-

er, this does not mean that they should not be given assistance as minors in the situation of abduction in which they were involved by their parents or other persons as a result of a family conflict. The rules of international law do not offer a special mechanism for such protection.

In the Declaration of the rights of the child we find the term *"a child of tender years"*. At the same time, the age to which a child is considered a minor (a child of tender years) is not defined in international instruments. This makes it difficult in practice to apply principle 6 of the Declaration, which excludes the separation of a child of tender years from the mother. This problem of determining the tender age is faced with the rules of private international law. The Hague Convention provides the mechanism of the child's return in the event of abduction by a parent, including his mother. At the same time for the return of the child his age is not considered.

In modern conditions the question whether the definition of the child in article 1 of the Convention remains universal is relevant.

It follows from the Convention that the age of majority may be reduced under applicable national law. However, there is no age reduction limit. This state of affairs does not correspond to modern approaches in international law to combat gender discrimination and to protect the rights of women and girls from early marriage and childbirth, to secure children from labor exploitation. Indeed, in national law, the earlier attainment of majority is associated precisely with such circumstances as marriage, childbirth, and labor activity.

Also, taking into account the possibility of reducing the age of majority, the problem of the age of criminal responsibility for minors becomes urgent. The age of criminal responsibility has been significantly reduced in a number of States Parties. But it is necessary to take other adequate measures to prevent juvenile delinquency.

The Convention aims to protect the rights of the child, but it does not set a limit for reducing the age of majority. At the same time, the problems of early marriage and juvenile delinquency are very substantial.

The next problem is the protection of vulnerable children, who need additional support and socialization, such as children with disabilities and orphans. Their age as children should be higher. This approach is confirmed by the practice of States Parties, where governmental support is provided to young people who have reached the age of 18, but because of their vulnerability they require the protection up to 21-23 years.

Taking into account the spread of local armed conflicts in the world, it is proposed to raise the age of young combatants from 15 years, as established in the Convention, to 21-23 years. In this regard, it should be taken into account that the common practice is not compulsory military service, but contract service.

However, the Convention on the rights of the child does not provide for a higher age of majority than the age of 18.

4) THE FOURTH THESIS

The right to know one's parents VS the birth of children by means of cell donation and assisted reproductive technologies (in vitro fertilization).

The Convention provides that *a child should have, as far as possible, the right to know his or her parents* (Article 7).

When a child is born by means of reproductive technologies and cell donation, there may be a serious problem in realizing the child's right to know his or her parents.

Modern assisted reproductive technologies allow children to be born from more than two parents. In this case, the biological method of childbirth is split between several parents. The division of biological parenthood is based on two criteria: the method of birth (gestation) and the genetic creation of the embryo (donor cells).

The multiplicity of parents affects the child’s right to know his or her parents (Article 7 of the Convention) and the

child's right to preserve his or her individuality (Article 8 of the Convention).

In practice, there are cases of impersonal donation and donation with the personal information about donors.

In the case of an impersonal donation, the question of the child's right to receive information about his biological parents may arise in the future.

Judge of the European court of human rights, elected from Russia, Dmitry Dedov, in his scientific publications notes that in many ways the problem of multiple parents and the identity of the child is far-fetched and can be effectively solved by clarifying the status of donation (exemption from parental responsibilities and confidentiality)[2].

In the Convention the right to know the parents is put into dependence on as far as it is possible to know the parents. With the achieved level of science, anyone can make a genetic examination and determine his or her genetic identity. This genetic analysis allows a person to find his close relatives, including biological parents. At the same time, the confidentiality of information about donors, which is preserved by medical clinics for reproduction, does not solve this problem. These issues require new solutions in the future.

In the second case, when the donation is not impersonal, the risk that the donor will present his parental rights to the child in the future is not excluded (such examples already exist). Thus, the problem of the child's identity, his or her right to individuality and his or her right to know his parents is not artificial.

5) FIFTH THESIS

Protection of children in a virtual environment VS the child's right to access to information

The convention enshrines the child's right to access to information and material from a diversity of national and interna-

[2] Dedov D. The Beginning of life: from Evans to Parrillo // Russian Yearbook of the European Convention on human rights. 2016. Issue 2.

tional sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health (Article 17 of Convention).

The Convention very broadly defines the child's right to access to information, including the development of media content. Even more broadly defined is the right to freedom of expression. This right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally in writing or in print, in the form of art, or through any other media of the child's choice (Article 13 of Convention).

Measures to restrict and prohibit access to the Internet for children under a certain age are being discussed at the national and international levels. But a new generation of children is a generation of technology and Internet. Thus, the ban on Internet is faced with the Conventional right of children to information from any sources. The child's rights to information and the limits of its implementation in the Internet era require their clarification at the international level, universal for all states parties.

In this article we have tried to outline only some of the problems and perspectives of the Declaration and Convention on the rights of the child.

The Declaration and the Convention have established principles and international standards for the protection of children's rights, but societies and States Parties are evolving and facing new challenges and risks.

International instruments should be adequate to the new risks and adapt not only to their application but also to the content of the rules. This is the task of the common efforts of the States parties.

IMPLEMENTATION OF THE HUMAN RIGHTS TREATY BODIES' RECOMMENDATIONS AT THE NATIONAL LEVEL. THE PERSPECTIVE OF THE RUSSIAN FEDERATION

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Introduction

At this stage of the development of the international human rights law there is a growing tendency of strengthening States' cooperation with international human rights mechanisms with an aim to ensure greater implementation of international human rights norms at the domestic level. This tendency is clearly visible with regard to the universal and regional human rights mechanisms.

While significant attention is given to the cooperation of States with UN intergovernmental human rights mechanisms, primarily with the Human Rights Council, including the Universal Periodic Review (UPR)[1], States are also increasingly engaging in the work of the non-governmental (expert) element of the universal human rights machinery represented by the human rights treaty body system formed by the human rights treaty bodies. These bodies are created in accordance with the nine core international human rights treaties with each treaty establishing one such body. Today there are in total 10 treaty bodies functioning as 9 committees and one subcommittee[2], who consist of 172 independent experts.

[1] Abashidze A.Kh., Goltyaev A.O. Universal human rights mechanisms [Universal'nye mekhanizmy zashchity prav cheloveka]. M.: YUNITI-DANA, 2013.
[2] Official webpage of the human rights treaty bodies. URL: https://www.ohchr.org/EN/HRBodies/Pages/Overview.aspx.

These mechanisms provide States with authoritative guidance on bringing their national policies and practices in the field of protection of human rights in line with the provisions of these treaties. This guidance is provided to the States through the adoption of recommendations by the treaty bodies. The committees adopt different types of recommendations resulting from various activities they undertake. The committees tend to name these recommendations in the same way with little differences among them. The treaty bodies adopt the following recommendations: 1) "concluding observations", which are adopted as a result of the consideration by the committees of the periodic reports of States in the form of the constructive dialogue; 2) "views" or "opinions" adopted as a result of the examination of communications from individuals and groups of people on the alleged violations of human rights; 3) "recommendations" or "conclusions" or "recommendations and conclusions" adopted as a result of conducting inquiries; 4) "general comments" or "general recommendations" clarifying the content of the international obligations of States under the relevant human rights treaties.

One of the most important areas of interaction of States with the human rights treaty bodies is building a dialogue between them on the implementation at the national level of their recommendations. This problem becomes particularly important in frames of the UN process of strengthening the treaty body system[3], since the effectiveness of this system is determined through the level of their implementation at the national level.

Taking aforementioned into account, the present article will focus on the examination of the factors that inhibit compliance with the treaty bodies' findings by States, including the lack of mechanisms at the national level, that allow them to take legal effect.

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[3] UN General Assembly resolution 68/268 "Strengthening and enhancing the effective functioning of the human rights treaty body system". 9 April 2014 // UN Doc. A/RES/68/268; Geneva Academy of International Humanitarian Law and Human Rights. Optimizing the UN Treaty Body System, Academic Platform Report on the 2020 Review. 2018. P. 31-32. URL: https://www.geneva-academy.ch/joomlatools-files/docman-files/Optimizing%20UN%20Treaty%20Bodies.pdf.

The author will analyse different approaches taken by States to implement the treaty bodies' recommendations and consider the approach of the Russian Federation in that regard, paying particular attention to the legal status of the committees' recommendations in the Russian legal system and the practice of application of these recommendations by the Russian higher courts. Finally, the author will determine the perspectives of ensuring a more effective implementation of the treaty bodies' recommendations in Russia.

Factors inhibiting States' compliance with the treaty bodies' recommendations

Today the level of implementation of the committees' recommendations leaves much to be desired[4]. In accordance with the most recent statistics of the compliance of States with the treaty bodies' views on communications around 24 % of satisfactory responses were received from all the committees with regard to the measures taken by States to implement their views[5].

There is a view that it is the non-legally binding nature of the treaty bodies' recommendations that States often refer to as a justification for the lack of their legal obligations to implement these recommendations[6].

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[4] See this assessment in: The Open Society Justice Initiative. From Judgment to Justice. Implementing International and Regional Human Rights Decisions. NY, Open Society Justice Foundations, 2010; Heyns Ch., Viljoen F. The Impact of the United Nations Human Rights Treaties on the Domestic Level. Kluwer Law International, 2002.

[5] See Principi K.F. Implementation of decisions under treaty body complaints procedures – Do states comply? How do they do it? Sabbatical leave report. January 2017. URL: https://hr.un.org/sites/hr.un.org/files/editors/u4492/Implementation%20of%20decisions%20under%20treaty%20body%20complaints%20procedures%20-%20Do%20states%20comply%20-%202015%20Sabbatical%20-%20Kate%20Fox.pdf. P. 9.

[6] Alebeek R. Van, Nollkaemper A., The Legal Status of Decisions by Human Rights Treaty Bodies in National Law / Keller H., Ulfstein G., UN Human Rights Treaty Bodies: Law and Legitimacy. Cambridge University Press, 2012. P. 373.

However, such argumentation not always leads to the lack of compliance since there are cases when the States implemented the recommendations, while pointing to the lack of legal obligation to do it[7].

It seems that the international legal status of the treaty bodies as quasi-judicial mechanisms[8] and the recommendatory nature of their acts are fully consistent with their main goal–providing authoritative guidance to States on the most effective ways to bring their national policies into compliance with the treaties[9].

In that sense the non-binding legal nature of the findings of the treaty bodies is not the key explanation of the low level of compliance with the committee's recommendaitons by the States. It may rather hide other relevant factors.

The low level of compliance, as the assessments by the committees reveal, may be explained by the fact that the committees started to monitor the implementation of their recommendations on a systemic basis only sometime after they began to consider communications[10]. Furthermore, there might be difficulties in the mechanism of collecting the information in frames of the follow-up procedure as well as the lack of information presented to the committees by the States and the authors of the communica-

[7] The Open Society Justice Initiative. From Judgment to Justice. Implementing International and Regional Human Rights Decisions. NY, Open Society Justice Foundations, 2010. P. 131.

[8] Buergenthal T. The UN Human Rights Committee / Frowein J., Wolfrum R. (eds). Max Planck Yearbook of UN Law. 2001. Vol. 5. PP. 341-398.

[9] Abashidze A., Koneva A. The Process of Strengthening the Human Rights Treaty Body System: The Road towards Effectiveness or Inefficiency? // Netherlands International Law Review. 2019. Vol. 66. PP. 360.

[10] Von Staden A. Monitoring Second-Order Compliance: The Follow-Up Procedures of the UN Human Rights Treaty Bodies // Czech Yearbook of International Law. 2018. Vol. 9. PP. 329-356.

tions. The recommendations themselves may contain vague provisions, which makes it more challenging for States to understand their content and the particular action they are expected to do[11].

Against the background of the aforementioned factors it is necessary to mention one very important factor that is been widely discussed today[12] – the lack of proper mechanisms at national level to implement the recommendations of the treaty bodies and to allow them to take legal effect. Today the majority of States follow "largely an ad hoc process"[13] in this regard, which is understandable, since it is the discretion of States to determine the approach towards implementing their international human rights obligations and decide on the need to establish the relevant mechanisms. Still some States have developed particular implementation mechanisms.

Such implementation mechanisms established in these countries may have the following variations:

1) creation of a coordinating and/or decision-making mechanism at the level of state bodies tasked with cooperation with international human rights bodies and implementation of recommendations of these bodies, including treaty bodies. A sort of such a mechanism could be single "national mechanism for reporting and follow-up" that the States are encouraged to establish through the support of the Office of the UN High Commissioner for Human

[11] Principi K.F. Implementation of decisions under treaty body complaints procedures – Do states comply? How do they do it? Sabbatical leave report. January 2017. P. 10. https://hr.un.org/sites/hr.un.org/files/editors/u4492/Implementation%20of%20decisions%20under%20treaty%20body%20complaints%20procedures%20-%20Do%20states%20comply%20-%202015%20Sabbatical%20-%20Kate%20Fox.pdf.

[12] The Open Society Justice Initiative. From Rights to Remedies: Structures and Strategies for Implementing International Human Rights Decisions. NY, Open Society Justice Foundations, 2013.

[13] Ibid.

Rights (OHCHR)[14]. This mechanism is a national public (ministerial, interministerial or institutionally separate) mechanism or structure "that is mandated to coordinate and prepare reports to and engage with international and regional human rights mechanisms (including treaty bodies, the Universal periodic review and special procedures), and to coordinate and track national follow-up and implementation of the treaty obligations and the recommendations emanating from these mechanisms"[15]. Today around 30-40 States have established such a mechanism[16].

2) adoption of the legislation fixing the legal status of the decisions of international human rights courts and views of treaty bodies.

3) the development of the national court practice regarding the application and enforcement of the treaty bodies recommendations.

This is not an exhaustive list of the different mechanisms States may establish[17]. There could be a combination of 2 or all 3 of these variations in a State, or just one.

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[14] Office of the UN High Commissioner for Human Rights (OHCHR). National mechanisms for reporting and follow-up. A Practical Guide to Effective State Engagement with International Human Rights Mechanisms. New York and Geneva, 2016. HR/PUB/16/1. https://www.ohchr.org/Documents/Publications/HR_PUB_16_1_NMRF_PracticalGuide.pdf (accessed April 5, 2019).

[15] Ibid.

[16] Universal Rights Group. Global Human Rights Implementation Agenda: The Role of International Development Partners. Report of the informal meeting of development partners on international support for the national implementation of human rights obligations and commitments. Held at the Ministry of Foreign Affairs of Norway, Oslo, 20 April 2018. https://www.universal-rights.org/urg-policy-reports/global-human-rights-implementation-agenda-the-role-of-international-development-partners/ (accessed April 5, 2019).

[17] For more information on such mechanisms see, for example: The Open Society Justice Initiative. From Judgment to Justice. Implementing International and Regional Human Rights Decisions. NY, Open Society Justice Foundations, 2010; The Open Society Justice Initiative. From Rights to Remedies: Structures and Strategies for Implementing International Human Rights Decisions. NY,

Like many other countries, Russia develops its own approach in this regard, which has certain commonalities with the aforementioned variations, particularly first and third.

The approach of the Russian Federation towards implementing the recommendations of the treaty bodies

Russia has developed a long-standing tradition of participating in the international human rights treaties and cooperating with the treaty bodies due to inhering the participation in the six core international human rights treaties as a successor of the USSR.

Today Russia is a party to seven out of nine core international human rights treaties[18]. Unlike the USSR, since its formation Russia opened a new page of accepting the competence of the treaty bodies to consider communications and conduct inquiries[19]. Today four committees (CAT, HRC, CEDAW, CERD) may consider individual communications against Russia and two committees (CAT, CEDAW) may initiate inquiry procedure with regard to Russia.

Open Society Justice Foundations, 2013; Principi K. F. Implementation of decisions under treaty body complaints procedures – Do states comply? How do they do it? Sabbatical leave report. January 2017. https://hr.un.org/sites/hr.un.org/files/editors/u4492/Implementation%20of%20decisions%20under%20treaty%20body%20complaints%20procedures%20%20Do%20states%20comply%20%202015%20Sabbatical%20%20Kate%20Fox.pdf.

[18] 1965 International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), 1966 International Covenant on Civil and Political Rights (ICCPR), 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR), 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), 1989 Convention on the Rights of the Child (CRC) , 2006 Convention on the Rights of Persons with Disabilities (CRPD).

[19] Abashidze A.Kh., Koneva A.E. Dogovornye organy po pravam cheloveka: uchebnoe posobie [Human Rights Treaty Bodies: handbook]. 2nd ed. Rev. M.: RUDN University, 2015. (In Russ.). P. 337.

The domestic legal system of Russia demonstrates openness to the international law norms. The basis for this approach is provided by the Constitution. Under article 15 (4) of the Constitution, the international agreements to which the Russian Federation is a party and the generally recognized principles and rules of international law are forming part of the Russian national legal system and take precedence in the application over domestic laws.

The Supreme Court of Russia provided important clarifications on the status of international law in its decision of 2003 № 5 (with amendments of 5 March 2013)[20], stating that the constitutional provisions of Art. 15 (4) oblige and simultaneously provide the State authorities, including the courts, with an opportunity to directly apply the international treaties of the Russian Federation.

There are plenty of examples when courts invoke treaties as a justification of their decision and indicate that they are not only compulsory for Russia, but also that they are in effect[21].

Thus, the norms of seven core international human rights treaties are directly enforceable in Russia as part of its national legal system. Many provisions of these treaties were integrated in the Russian Constitution and legislation and are applied by courts.

Importantly, Art. 46 of the Constitution guarantees the international dimension of the right for the judicial protection, as everyone has a right to appeal to international human rights bodies in accordance with the international treaties of the Russian Federation in case of exhaustion of the national remedies.

Surely, such an approach facilitates the more effective implementation of the treaties. With regard to the implementation of

[20] Opinion of the Supreme Court of the Russian Federation N 5 "On the application by courts of general jurisdiction of generally accepted principles and norms of international law and international treaties of the Russian Federation." 10.10.2003.

[21] Marochkin S. Yu. A Russian Approach to International Law in the Domestic Legal Order: Basics, Development and Perspectives / The Italian Yearbook of International Law, Vol. XXVI, 2016. P. 23.

the treaty bodies' recommendations the following deserves attention.

Since 2003 the Russian Federation has established a mechanism of distribution of the responsibilities of the Russian governmental bodies with regard to cooperation with the treaty bodies in line with the 2003 Decree of the Government of the Russian Federation[22]. In accordance with this Decree the relevant ministries and governmental bodies (minimum two, maximum five) were appointed as responsible for cooperation together with the Ministry of Foreign Affairs as a coordinating body for each of the committees.

Apart from regulating the process of the preparation of reports, the aforemementioned Decree provides the basis for the interaction of Russian autorities with the relevant committee during the consideration of communication. As an example, in the case of the HRC or CAT receiving communication against Russia, after the committee transmits communication to the Russian Federation, the communication is forwarded by the Ministry of Foreign Affairs to the Ministry of Justice of the Russian Federation, which is responsible for the cooperation with these committeees. The Ministry of Justice prepares its position on the admissibility and merits of the communication. Within the preparation of the position the Russian Ministry of Justice sends requests to the competent state authorities (the Supreme Court of the Russian Federation, the General Prosecutor of the Russian Federation, the Investigative Committee of the Russian Federation and the Federal Penitentiary Service). On the basis of materials received from these bodies and their conclusions, the Ministry of Justice formulates its position on the communication and sends it to the Russian Ministry of Foreign Affairs, which forwards it to the committee.

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[22] Decree of the Government of the Russian Federation N 323 "On approval of the interdepartmental distribution of responsibilities for ensuring the participation of the Russian Federation in international organizations of the UN system." 03.06.2003.

However, the procedure for the implementation of the recommendations, including the committees' views, is not clearly established by law. The implementation process is organised on an *ad hoc* basis. One of the most positive examples of implementing the concluding observations of the treaty bodies is a Plan of activities on the implementation the concluding observations of the Committee on the Rights of Persons with Disabilities that was developed by the Government[23] and that includes a set of concrete measures to be undertaken by responsible authorities within concrete deadlines.

Still at the legislative level, the legal status of the recommendations of the treaty bodies is not regulated, and the mechanism of giving them legal effect has not yet been established. In the Russian Federation, in accordance with the Civil Procedure Code and Criminal Procedure Code, only the decision of the European Court of Human Rights may be the basis for revising the court decisions that have entered into legal force.

The described picture is changing due to the recent progressive practice of the Russian higher courts in applying the views of committees as a ground for revisiting the case, despite the absence of a corresponding provision in the Russian legislation. There are three significant cases that should be mentioned in that respect.

The first case that opened a door for such a shift in the approach of the Russian courts was the judgement of the Constitutional court No. 1248-O of 28 June 2012 on the complaint of Mr. Khoroshenko who was seeking a retrial of his criminal case on the

[23] Plan of activities on the implementation of the recommendations contained in the concluding observations of the Committee on the Rights of Persons with Disabilities on the initial report of the Russian Federation on the implementation of the Convention on the Rights of Persons with Disabilities. 28 December 2018. No. 11011 p-P12. URL: https://rosmintrud.ru/uploads/magic/ru-RU/Document-0-8537-src-1547799349.338.pdf.

basis of the view of the HRC revealing violations of his rights by Russia[24].

The Constitutional court allowed for such a possibility to review a case due to absence of possibility for the Russian Federation to avoid "conscientious and responsible implementation of the considerations of the Human Rights Committee"[25] in accordance with the principle *pacta sunt servanda*. The Court also referred to the position of the Supreme Court in ist decision No. 5 of 10 October 2003, that "improper application by the courts of the international treaties may be the grounds for annulling or amending a judicial ruling." And the finding of the HRC points to such improper application.

Thus, the Constitutional Court found that the HRC's Views are considered sufficient grounds for a procurator to issue an order to institute proceedings in view of new circumstances, if the violations of the Covenant identified by the Committee could not be corrected by any other means.

Mr. Khoroshenko tried to institute proceedings and in 2014 the appellate court decided to sent the materials of the complaint to the new judicial review[26].

The next step was the decision of the Supreme Court in 2017 on the complaint by Ms. Medvedeva[27] about the annulment of the rulings of the first and second instance courts who did not satisfy her claim for revising the previous court decisions on the basis of the opinion of the CEDAW. This opinion, adopted in 2016, indicated gender discrimination of Ms. Medvedeva due to the company's refusal to conclude an employment contract with her at the

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[24] Human Rights Committee. Communication No.1304/2004. UN Doc. CCPR/C/101/D/1304/2004 of 29.04.2011.

[25] Decision of the Constitutional Court of the Russian Federation N 1248-O. 28.06.2012.

[26] Appellate decision of the Moscow City Court of 09.06.2014. Case No. 10-7574\14.

[27] Decision of the Judicial Chamber on Civil Cases of the Supreme Court of the Russian Federation N 46-КГ17-24. 24.07.2017.

helm of a boat on the grounds that the job she had applied for was listed as one of the 456 occupations banned for women in accordance with the Order of the Ministry of Labor and Social Protection[28].

When considering a complaint, the Supreme Court applied the aforementioned legal position of the Constitutional Court on the legal consequences of the views of the HRC by analogy to the views of the CEDAW due to the similar legal nature of their mandate.

Thus, the Supreme Court found that CEDAW's opinion should be enforced in the Russian Federation and may be regarded a new circumstance in relation to the provisions of the Code of Civil Procedure for revising a court decision.

On the basis of this Decision, the court of first and second instance reviewed the case and found the fact of discrimination of the abovementioned citizen, however did not oblige the company to conclude an employment contract with the claimant, since the legislation does not provide for such an obligation for the company and also due to the absence of the relevant vacant position in the company at that time. Furtheremore, the Russian legislation does not allow for the position listed among the banned professions to be offered to the women, unless the safe working conditions are created by the relevant company.

This situation may change in the near future, since in August 2019 the Ministry of Labor and Social Protection has revised and adopted the new version of the list, which is limited to 100 positions (4.5 times shorter). This step was clearly a result of the cumulative effect of the recommendations addressed to Russia by different international mechanisms – the CEDAW, the CESCR, the International Labour Organisation bodies, however it seems

[28] Committee on the Elimination of Discrimination against Women. Communication No. 60/2013. Views adopted by the Committee at its sixty-third session. 25.02.2016. UN Doc. CEDAW/C/63/D/60/2013.

that the case of Ms. Medvedeva has become a triggering factor in that regard.

Another most recent example of the new tendency in the Russian court practice is the decision of the Presidium of the Supreme Court №128-П18ПР of 10.10.2018 that agreed with the legal position of the HRC in the case of I. Kostin[29] on the violations of his right to defence during cassation proceedings of his criminal case due to failure to inform the author of his right to legal aid and decided to transfer the case to a new cassation hearing, as was recommended by the Committee.

Conclusion

Therefore, while some experts admit that specific implementation mechanisms are not the only single solution to all problems of compliance with treaty bodies' recommendations[30], their establishment and effective application may still significantly enhance the implementation processes in the State. Meanwhile, it is important to remember that the question of determining the approach towards implementing international human rights obligations, including implementation of the recommendations of the treaty bodies, is the discretion of States.

Taking into account the fact that Russia has introduced a procedure for the distribution of responsibilities between the relevant authorities for the cooperation with treaty bodies, above that it seems useful to create a coordinating structure, that would be responsible for the distribution of the responsibilities between relevant executive bodies as well as legislative authorities for the implementation of concluding observations and treaty bodies' views.

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[29] Human Rights Committee. Views concerning communication No. 2496/2014. Igor Kostin. 21 March 2017. UN Doc. CCPR/C/119/D/2496/2014.

[30] As an example, see Principi K. F. Implementation of decisions under treaty body complaints procedures – Do states comply? How do they do it? Sabbatical leave report. January 2017. P. 50.

Furthermore, noting that the Russian legislator is not yet ready to regulate the legal status of the views of the committees, it appears that this issue will be eventually clarified in the course of judicial practice. The current practice demostrates a positive tendency of finding legal grounds for revising judicial acts on the basis of the view of a treaty body. This rule applies not only to the HRC views, but to the CEDAW, which in principle gives grounds to state that the view of any treaty body whose competence to consider communications was recognized by Russia may be a reason to appeal to judicial authorities for the revision of the court decision. Thus, it is worth expressing hope that the legal positions of the Constitutional and the Supreme Courts of the Russian Federation will be confirmed and developed in the subsequent judicial practice, specifically with regard to the obligation of Russia to enforce the views of the committees and their application as grounds for revising the court decision on new circumstances.

THE APPLICATION OF THE PRINCIPLE OF SUBSIDIARITY IN THE PRACTICE OF CONSIDERING COMMUNICATIONS AGAINST RUSSIA BY THE HUMAN RIGHTS TREATY BODIES

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The definition of «the principle of subsidiarity» in terms of its place and role in the sphere of protection of human rights and freedoms could be interpreted as «one of the branch principles of the international human rights law, distributing resources of national legal systems of Member States to international human rights treaties and international law in the way that States independently fulfil their commitments under the treaties, inter alia, through the implementation of international law into national legislation. The exercise of jurisdiction by international treaty bodies for the protection of human rights and freedoms supplements the capability of Member States to fulfil the commitments».

International treaty bodies for the protection of human rights and freedoms[1] applicate the principle of subsidiarity exactly when considering individual communications (complaints). It's important not only that the treaty body, having exercised control over the fulfillment of legal commitments by the State, decide on an individual communication (complaint), but also that such a

[1] These bodies are established in accordance with the particular international human rights treaty and monitor the respect by the States parties for rights and freedoms, provided in the treaty // International Law [Electronic resource] / senior editor S.A. Egorov. – Moscow: Statut, 2014. URL: https://textbook.news/mejdunarodnoe-pravo_696/114-dogovornyie-vnedogovornyie-organyi-108265.html (date of access – 10.04.2019).

decision to be implemented at government level. Otherwise, a decision remains in a form of a declaration. Therefore, the implementation of decisions of international treaty bodies on individual communications (complaints) is an inseparable sphere of the application of the subsidiarity principle.

It's logical to analyse the realization of the principle of subsidiarity by international treaty bodies for the protection of human rights and freedoms through the «strict» and the «broad» sense. The «strict» sense provides for the control of how the States honour the commitments under the international treaties on human rights which is completed with a final decision of treaty bodies on individual communications (complaints), and the «broad» includes also implementation by States of such decisions.

It seems that after the international treaty body made a decision, which states the violation of human rights or freedoms, the mechanism of the «quasi-participation» of such bodies in the protection of human rights and freedoms will be triggered, which includes two moments: 1) implementation by States of the decisions of the human rights treaty bodies; 2) international control over the implementation of such decisions by States.

The question is - what legal conditions exist for the application of the principle of subsidiarity by international treaty bodies for the protection of human rights and freedoms in the legal relations regarding the implementation of decisions of these bodies on individual communications (complaints) adopted in respect of the Russian Federation?

At the universal level of human rights and freedoms protection there are four international treaty bodies of the United Nations (hereinafter - UN)[2] which are authorized to consider individual communications regarding Russia, and at the regional level the European Court of Human Rights considers individual complaints.

[2] The UN Human Rights Committee, the UN Committee on the Elimination of Racial Discrimination, the UN Committee against Torture, the UN Committee on the Elimination of Discrimination against Women.

The UN international human rights treaties and optional protocols to them do not contain a norm that would oblige the States parties to comply with decisions of the UN international treaty bodies on individual communications. Therefore, individuals may never achieve the restoration of their violated rights or freedoms.

With regard to the judgments of the European Court of Human Rights the situation with their implementation differs significantly from that of the implementation of the decisions of the UN Human Rights Treaty Bodies. The guarantees of the implementation of these judgments are enshrined in Article 46 of the Convention for the Protection of Human Rights and Fundamental Freedoms of the Council of Europe, which establishes their binding force and international legal responsibility of States parties for their non-execution[3].

Of the four UN Human Rights Treaty Bodies authorized to consider individual communications with respect to Russia the UN Human Rights Committee in its general comments draws attention to the failure of the Russian Federation to comply with its considerations on individual communications.

In the concluding observations on the seventh periodic report of the Russian Federation, adopted in 2015, the UN Human Rights Committee continued to be concerned at non-implementation by the State of the UN international human rights treaty body views[4].

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[3] European Convention on Human Rights, as amended by Protocols Nos. 11 and 14, supplemented by Protocols Nos. 1, 4, 6, 7, 12, 13 and 16. [Electronic resource] – URL:https://www.echr.coe.int/Documents/Convention_ENG.pdf. P. 26 (date of access – 10.04.2019).

[4] Concluding observations of the UN Human Rights Committee, taken on 31 March 2015 during the 113 session (16 March – 2 April 2015) after considering the 7th periodic report of the Russian Federation [Electronic resource] – URL:https://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=ru&TreatyID=8&DocTypeID=5 (date of access – 10.04.2019).

In doing so the Committee pointed out two important moments in terms of the designated situation: 1) resolution of the Constitutional Court of Russia of 28 June 2012 № 1248-O «On the complaint of citizen Khoroshenko Andrey Anatolievich concerning the violation of his constitutional rights by paragraph 5 under Article 403, part 4 of Article 413 and parts 1 and 5 of Article 415 of the Code of Criminal Procedure of the Russian Federation», aimed at the support for the implementation of the Committee views on individual communications; 2) Russia did not provide the clear information about the existence of the effective mechanisms and legal procedures for the ensuring of the comprehensive implementation of the views of the Committee on individual communications and about their practical implementation.

In light of the prevailing situation the UN Human Rights Committee recommended to the Russian Federation: 1) to take all institutional and legal measures to provide the existence of mechanisms and proper procedures for the comprehensive implementation of the Committee views. The main objective of this the Committee sees in the guaranteeing of the right of victims on the effective remedy in case of violation of the International Covenant on Civil and Political Rights, as provided for paragraph 3 under Article 2 of the Covenant; 2) to provide immediately the realization of all the views, formulated on the subject[5].

The question is - what is the legal force of the considerations of this Committee on individual communications for the Russian Federation?

It appears that this issue should be considered in terms of the official position of Russia, which should be contained in decisions of competent State authorities.

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[5] Concluding observations of the UN Human Rights Committee, taken on 31 March 2015 during the 113 session (16 March – 2 April 2015) after considering the 7th periodic report of the Russian Federation [Electronic resource] – URL:https://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=ru&TreatyID=8&DocTypeID=5 (date of access – 10.04.2019).

The Constitutional Court of Russia in the resolution of 28 June 2012 № 1248-O on the complaint of citizen Andrey Khoroshenko stressed that the Russian Federation has no right to shrink from an adequate response to the considerations of the UN Human Rights Committee primarily because of the generally recognized principle of international law «pacta sunt servanda» (treaties must be respected) as well as the International Covenant on Civil and Political Rights, within the meaning of which Russia is obliged to provide that any person whose rights and freedoms, recognized in the Covenant, are violated, has an effective remedy[6].

Another approach, according to the Constitutional Court of Russia, arouses doubts whether our country complies with the commitments made under the International Covenant on Civil and Political Rights and the Optional protocol to it, is proof that our country fails to comply with the obligation to recognize and guarantee rights and freedoms of individual and citizen in accordance with generally recognized principles and norms of international law, and also makes meaningless the right of individuals to apply to the UN Committee on Human Rights under the condition that all available domestic remedies were exhausted.

Thus, according to the position of the judicial body of the constitutional control of the Russian Federation, the considerations of the UN Committee on Human Rights are legally binding for our country.

A similar finding can be assumed from the practice of the Supreme Court of the Russian Federation. This is judgment dated 24 July 2017 № 46-KG17-24 in the case on the suit of Svetlana Medvedeva to the limited liability company «Samara river passenger company». The Supreme Court concluded that the opinion

[6] Resolution of the Constitutional Court of the Russian Federation of 28 June 2012 № 1248-O on the complaint of citizen Andrei Khoroshenko on violation of his constitutional rights by paragraph 5 under Article 403, part 4 of Article 413 and parts 1 and 5 of Article 415 of the Code of Criminal Procedure of the Russian Federation]. Moscow: Konsul'tant Plyus.

of the UN Committee on the Elimination of Discrimination against Women, adopted on the basis of a written communication from a Russian citizen and containing recommendations for our country on eliminating violations of the UN Convention on the Elimination of all Forms of Discrimination against Women, is mandatory for implementation by Russia[7].

Therefore, in Inter-State relations, within the legal system of the Russian Federation have been created the necessary conditions for effective implementation of the UN treaty bodies for the protection of human rights and freedoms decisions taken on the basis of the results of consideration on written individual communications.

Nevertheless, there are some ambiguous issues on the application of the principle of subsidiarity by the European Court of Human Rights in legal relations of the implementation of its judgements in the Russian Federation. It's about judgements of the Court, which in terms of the Russian Constitution cannot be enforced. The report of the Ministry of Justice of Russia on the results of the monitoring of law enforcement in the Russian Federation in 2015 draws attention to the fact that the European Court of Human Rights when takes decisions allows itself to go beyond its jurisdiction and subsidiary role[8]. These decisions contradicted the Constitution of Russia and questioned the possibility of their implementation.

Theoretically, this trend could lead to a situation in which Russia, indeed, would fail to implement the judgments of the European Court of Human Rights on individual complaints, since as at 2015 and the present there are no legal conditions in the Rus-

[7] The Supreme Court of the Russian Federation demanded to reconsider the ban for women to work on river vessels [Electronic resource] – URL:https://adcmemorial.org/www/13207.html?lang=en (date of access – 10.04.2019).

[8] The report of the Ministry of Justice of Russia on the results of the monitoring of law enforcement in the Russian Federation in 2015 [Electronic resource] – URL:https://minjust.ru/node/280947 (date of access – 10.04.2019).

sian Federation for implementation of the European Court of Human Rights judgments which are contrary to the Basic Law of the State.

On 14 July 2015 the Constitutional Court of the Russian Federation pronounced the judgment № 21-P[9], within the meaning of which the application of the principle of subsidiarity by the European Court of Human Rights in the sphere of implementation of its decisions in the Russian Federation depends on how these decisions are consistent with the Russian Constitution. Consequently, the limits of application by the European Court of Human Rights of the principle of subsidiarity during implementation of its judgments are limited by the national legal system of Russia.

This conclusion is based on the postulate that judgments of the European Court of Human Rights, which contradict the Russian Constitution, cannot serve as promoting the effective protection of the rights and freedoms of individuals. If the requirements of the European Court of Human Rights judgments arises from the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms and, at the same time are consistent with the norms of the Russian Constitution, the principle of subsidiarity is respected by ensuring the guarantees of the international protection of human rights and freedoms in practice.

In accordance with the designated tendency by the Federal Constitutional Law of the Russian Federation № 7-FKZ of 14 December 2015 into the Federal Constitutional Law «On the Constitutional Court of the Russian Federation» were made amendments, providing for the authority of the Constitutional

[9] Client Update Ruling of the Constitutional Court of the Russian Federation on Enforcement of ECHR Judgments [Electronic resource] – URL: https://www.debevoise.com/~/media/files/insights/publications/2015/08/english%20%20ruling%20of%20the%20constitutional%20court%20of%20the%20russian%20federation%20on%20enforcement%20of%20echr%20judgments.pdf (date of access – 10.04.2019).

Court of the Russian Federation to decide whether it would be possible to implement the decision not only of the European Court of Human Rights, but any other international treaty body on the protection of human rights and freedoms[10].

An example of the realization by Russia of a new approach concerning implementation of its State authorities of the judgments of the European Court of Human Rights is the judgment of Constitutional Court of the Russian Federation of 19 April 2016 № 12-P «In the case of the settlement of the question on the possibility of implementation in accordance with the Russian Constitution of the judgment of the European Court of Human Rights on the case Anchugov and Gladkov v. Russia»[11].

According to the European Court of Human Rights on the part of national courts of Russia took place the interpretation of law contrary to the Convention for the Protection of Human Rights and Fundamental Freedoms. On this basis the Court ruled that the Russian Federation is obliged to restore the violated human rights. However, in view of the controversy of the position of the European Court of Human Rights to the Russian Constitution the Constitutional Court of the Russian Federation declared as unable the implementation of the international court judgment.

In light of the foregoing it's feasible to talk about the next. The Russian Federation allows the implementation of the deci-

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[10] Federal Constitutional Law of December 14, 2015 № 7-FKZ «On Amendments to the Federal Constitutional Law «On the Constitutional Court of the Russian Federation» [Electronic resource] – URL: http://ivo.garant.ru/#/document/71278766/paragraph/1:0 (date of access – 10.04.2019).

[11] Judgment of the Constitutional Court of the Russian Federation of 19 April 2016 No. 12-P/2016 in the case concerning the resolution of the question of the possibility to execute in accordance with the Constitution of the Russian Federation the Judgment of the European Court of Human Rights of 4 July 2013 in the case of Anchugov and Gladkov v. Russia in connection with the request of the Ministry of Justice of the Russian Federation [Electronic resource] – URL: http://www.ksrf.ru/en/Decision/Judgments/Documents/2016_April_19_12-P.pdf (date of access – 10.04.2019).

sions of the international human rights treaty bodies if this process takes place within the framework of the interaction of the States and treaty bodies. If the implementation of the decision of the treaty body runs counter to the provisions of the Russian Constitution it is unreasonable to talk about such interaction. Thus, the novel of the Russian legislation which allows the possibility of the implementation only of those decisions of international human rights treaty bodies, which do not contradict the Russian Constitution, exclude the possibility of introduction into the legal system of the Russian Federation of the conflicting with it foundation of the protection of human rights and freedoms. It follows that the legal procedure of the implementation in Russia of the human rights treaty bodies decisions taking into account the discussed above legislative innovations is the second, along with the exhaustion of domestic remedies, expression by Russia of its sovereignty over the international protection of human rights and freedoms and also the second indication of the subsidiary (additional) character of the international human rights treaty bodies activity.

So, in the Russian Federation were established legal conditions necessary for the full-fledged application of the principle of subsidiarity by international treaty bodies for the protection of human rights and freedoms. This is evidenced by the existence in the Russian legal system created by the Constitutional Court of the Russian Federation and the Supreme Court of the Russian Federation mechanism for the effective implementation of judgements of international treaty bodies on the protection of human rights and freedoms on individual communications (complaints), providing for the equal interaction between the Russian Federation and treaty bodies when implementing the rules of international human rights treaties.

DOMESTICATING INTERNATIONAL HUMAN RIGHTS TREATIES IN INDONESIA: WHERE DO THE LOCAL GOVERNMENTS STAND?

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1. Introduction

It is undeniable that international human rights treaties are located under the corpus of international treaty law, thus, in accordance with the *pacta sunt servanda* and *bona fides* principles[1], all members of international human rights treaties are obliged to perform its obligations enshrined under such treaties with good faith.

In Indonesia, the exalted nature of international human rights treaties is manifested from its supremacy over municipal law. This was clearly affirmed in the Law No. 39 of 1999 on Human Rights (**"UU HAM"**) which dictates the provisions of international law on human rights that have been accepted by the Republic of Indonesia become its national law[2].

As per 2019, Indonesia has ratified in eight out nine-core international human rights treaties[3]. This places Indonesia as one of the leading country in Southeast Asia, in term of its commitment to adopt the universal values of human rights under those treaties. To fully decipher Indonesia's commitment in ratifying such instruments, it can be generated from its obligations to '*respect, protect, and fulfil*' the fundamental rights of every individu-

[1] Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, art.26.
[2] Law No. 39 of 1999 on Human Rights, art.7(2) [UU HAM].
[3] These eight core international human rights treaties encompass ICERD, ICCPR, ICESCR, CEDAW, CAT, CRC, ICRMW and CRPD.

al.[4] This tripartite division of obligations are extremely important to prevent state for abusing its power.

Unlike such tripartite obligations, the 1945 Constitution of Indonesia (**"UUD 1945"**) has translated Indonesia's human rights obligations into the duties to '*protect*', '*promote*', '*enforce*' and '*fulfil*' human rights[5]. These obligations were later expanded by UU HAM as to include the duty to '*respect*' human rights as an addition to the other obligations guaranteed in UUD 1945[6].

Despite such discrepancies conception, both the UN Human Rights Committee and the fourth generation of the Indonesian National Action Plan on Human Rights (*Rencana Aksi Nasional HAM* or **"RANHAM"**) have acknowledged the importance of central and local governments' role, as the duty bearers, to ensure the enjoyment of human rights[7].

Having this in mind, this article is present to analyse the institutionalisation of human rights under Indonesia's decentralised governmental system. Furthermore, this article also examines the role of Indonesian local governments in exercising its human rights obligations under the applicable international human rights treaties.

2. Institutionalisation of human rights under decentralised governmental system of Indonesia

Pursuant to its constitution, the Republic of Indonesia has acknowledged itself as a unitary state (*eenheidsstaats-vorm*[8] with a dynamic form, which allows the formulation of a federalist reg-

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[4] OHCHR, Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies, U.N. Doc. HR/PUB/06/12 (2006) para.48.

[5] Constitution of the Republic of Indonesia, (1945) art.28I(4) [UUD 1945].

[6] UU HAM, *n.*2, arts.8,71.

[7] H.R. Comm., General Comment 31: Nature of the General Legal Obligation on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004) para.13; Presidential Decree No. 75 of 2015 on National Action Plan on Human Rights 2015-2019, art.1(2)-(3).

[8] UUD 1945, *n.*5, art.1(1).

ulation concerning central and local government relationship[9], as reflected in Articles 18, 18A and 18B of the UUD 1945. Hence, local administration is permitted to develop an autonomous policy with pluralistic character. Currently, this special autonomy (*otonomi khusus* or **"*otsus*"**)[10] status is only applicable in the provinces of Aceh, West Papua and Papua[11].

Moreover, the works of local governments in Indonesia are guarded by the principles of decentralisation, deconcentration and co-administration tasks with the central government (*medebewind*)[12]. Pursuant to these principles, the Law No. 23 of 2014 on Regional Government (**"UU Pemda"**) has therefore classified three forms of governmental affairs between local and central governments, namely, absolute governmental affairs (*urusan pemerintahan absolut*), concurrent governmental affairs (*urusan pemerintahan konkuren*) and general governmental affairs (*urusan pemerintahan umum*)[13].

The absolute governmental affairs are described as the matters that are fully entrusted by the central government, such as, foreign policy, defence, security, judicial system (*yustisi*), national fiscal and monetary, as well as religion[14]. Meanwhile, the concurrent governmental affairs and general governmental affairs are present as a legitimation for local government to execute their mandates.

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[9] Asshiddiqie, *Konstitusi dan Konstitusionalisme Indonesia* [*Constitution and Constitutional-ism of Indonesia*], (rev. ed., 2005) at 275.
[10]UUD 1945, *n.*5, art.18B(1).
[11]See TAP MPR RI No. IV/MPR/2000 on the Policy Recommendations for implementing Regional Autonomy; Law No. 18 of 2001 on the Special Autonomy of the Province of Aceh Special Territory as the Province of Nanggroe Aceh Darussalam (as amended by the Law No. 11 of 2006 on the Government of Aceh); Law No. 21 of 2001 on Special Autonomy for the Province of Papua [UU Otsus Papua].
[12]UUD 1945, *n.*5, art.18(2); Law No. 23 of 2014 on Local Governance, art.5(4) [UU Pemda].
[13]UU Pemda, *n.*12, art.9(1).
[14]*Ibid*, arts.9(2),10(1).

As stipulated in UU Pemda, the concurrent governmental affairs are defined as the affairs that are shared between central government and local government, both at the provincial and regency/city levels[15]. In this context, the local government is authorised to govern the mandatory governmental affairs (*urusan pemerintahan wajib*) and the optional governmental affairs (*urusan pemerintahan pilihan*)[16]. Under the mandatory governmental affairs, UU Pemda distinguishes the capacity of local government to carry out its functions relating to basic services and non-basic services[17]. Meanwhile, the optional governmental affairs can only be taken in accordance with the situations surrounding that particular region[18]. To fully understand this notion, the following table expresses the classification of subject areas covered under local governments' mandate.

Table 1

Classification Subject Areas for Local Governmental Affairs

No.	Mandatory Governmental Affairs		Optional Governmental Affairs
	Basic Services	Non-Basic Services	
1.	Education	Labour/employment	Marine and fisheries
2.	Health	Women empowerment and children protection	Tourism
3.	Public works and spatial planning	Food	Agriculture
4.	Public housing and residential areas	Land	Forestry
5.	Tranquillity, public order, and protection of society	Environment	Energy and mineral resources

[15] *Ibid*, art.9(3).
[16] *Ibid*, art.11(1).
[17] *Ibid*, art.11(2).
[18] *Ibid*, art.1(15).

6.	Social	Population administration and civil registration	Trade/commerce
7.	-	Community and village empowerment	Industry
8.	-	Population control and family planning	Transmigration
9.	-	Transportation	-
10.	-	Communication and informatics	-
11.	-	Cooperative (*koperasi*), small and medium enterprises	-
12.	-	Capital investment	-
13.	-	Youth and sports	-
14.	-	Statistic	-
15.	-	Encryption	-
16.	-	Culture	-
17.	-	Library	-
18.	-	Archives	-

This table demonstrates that the work of local administration is inseparable from the notion of human rights itself. UU Pemda implies that local government is expected to ensure the realisation of civil, economic, social and cultural rights of its people, *inter alia*, right to education, health, an adequate standard of living (food and housing), work, nationality, land and environmental right, freedom of movement, expression and information, to the protection of vulnerable groups, such as, women, children, persons with disabilities, and ethnic minorities.

In ensuring the realisation of these rights into the domestic legislative frameworks, thus the Minister of Law and Human Rights (**"MoLHR RI"**) and the Minister of Home Affairs'

(**"MoHA RI"**) have issued a Joint Decree No. 20 of 2012 and 77 of 2012 on the Parameter of Human Rights in the Formulation of Local Law Products. This Join Decree is present as a guideline for local governments to utilise human rights-based approach (**"HRBA"**) in formulating their human rights friendly policies and programmes. The importance of HRBA in every policy making process at domestic level can be inferred from the perambulatory clause of the said Joint Decree that stated, "*in formulating the local law products, the drafters of such instruments shall consider the values of human rights*"[19]. Substantively, both the MoLHR RI and MoHA RI have at least identified 31 sectors that should be governed under the framework of human rights, which in line with the division of governmental affairs under UU Pemda.

Conclusively, the dynamic decentralisation policy of Indonesia could be a strategic landscape in developing the universal values of human rights due to its reachability with the society. This is supported by the existed legislative framework that provides the guidelines for local government to take positive contributions in ensuring the enjoyment of human rights, as mentioned *supra*.

3. Local governments' dilemma to institutionalise Indonesia's human rights obligations under various international human rights treaties

Notwithstanding of the existed legal framework that sufficiently mainstreaming human rights at domestic level, the author observes that the dilemma for local governments to fully commit with Indonesia's human rights obligations under various international human rights treaties was influenced by the applicability of federalist arrangement, in a form of *otsus*, in Aceh, West Papua and Papua provinces. Under this federalist arrangement, these

[19]Joint Decree No. 20 of 2012 and 77 of 2012 on the Parameter of Human Rights in the Formulation of Local Law Products, Preamble "Considering" (c).

regions are thus possessed a residual power to fully govern any matters that is not allocated to the central government[20].

In Aceh, the local administration has enacted Qanun of Aceh No. 6 of 2014 on *Jinayat* Law. Substantively, this Islamic Criminal Code Bylaw criminalises consensual intimacy or sexual activity outside marriage (*ikhtilath*)[21]. This provision is indeed contrary with human rights standard as such conduct should be protected on the basis of their right to privacy[22]. Furthermore, *Qanun Jinayat* also utilises caning as an applicable form punishment[23]. The invocation of such corporal punishment is indeed amounted to an act of torture, and cruel, inhuman and degrading treatment that is prohibited by the Constitution[24] and various international instruments where Indonesia is a party to it[25].

Meanwhile in Papua and West Papua provinces, the commitment of local governments to empower *mama-mama pasar* (indigenous women traders) for lifting up their economical condition is worth to be questioned. Tug of war between ci-ties/districts government and provincial government, coupled with lack of financial resources within local governments budge-tary system, and local government's failure to counter the invasion from non-Papuan natives in competing with *mama-mama pasar* at traditional market are all together seen as the barriers for local government to fully realise the enjoyment of socio-economic rights for *mama-mama pasar* itself[26].

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[20] Watts, *Comparing Federal Systems*, (3rd eds., 2008) at 89.
[21] Qanun of Aceh No. 6 of 2014 on Jinayat Law, art. 3 (2) [Qanun Jinayat].
[22] Amnesty International, "Indonesia: Criminalization of Consensual Intimacy or Sexual Activity for Unmarried Couples in Aceh Must End", Public Statement, ASA 21/5039/2016 (2016).
[23] Qanun Jinayat, *n.*21, art.4(4)(a).
[24] UUD 1945, *n.*5, arts.28G(2),28I(1).
[25] International Covenant on Civil and Political Rights, 999 UNTS 171 (1966) art.7; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85 (1984) art.1.
[26] Viviana, et al. (eds.), *Bunga Rampai Pendokumentasian Situasi HAM di Tanah Papua: Seri 1* [*Anthology Documentations of Human Rights Situation in Papua: Series 1*], (2016) at 1-12.

Another aspect that could discourage the realisation of human rights in West Papua and Papua is seen from the non-existence of the Truth and Reconciliation Commission in Papua (**"KKR Papua"**), as mandated by the Law No. 21 of 2001 on Special Autonomy for the Province of Papua[27]. Presently, KKR Papua is just merely a legal administrative archive. Despite the on going violence acts against the indigenous Papuans (*Orang Asli Papua*), there is no discourse between the central and local government to initiate the establishment of this commission[28], as a proper forum in resolving this matter.

Furthermore, the challenge for local government in adopting the values of international human rights treaties into their works and programmes is manifested from the application of the principle of co-administration tasks with the central government (*medebewind*). The failure of local governments to exercise its concurrent tasks with the central government in ensuring the values of human rights on its domestic legal products, as suggested by the MoLHR RI and MoHA RI in their Joint Decree No. 20 of 2012 and 77 of 2012, is also manifested from the reports of numerous Indonesian National Human Rights Institutions **("NHRI")**.

For example, the Indonesian National Human Rights Commission's (**"Komnas HAM"**) finding revealed that from 2012 to 2016 local government have been placed in the third place, after police officers and corporations, as a party that is being allegedly reported to Komnas HAM for violating human rights, as demonstrated in the following table[29].

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[27] UU Otsus Papua, *n.*11, arts. 45-47.

[28] Robet, *Politik Hak Asasi Manusia dan Transisi di Indonesia: Dari Awal Reformasi Hingga Akhir Pemerintahan SBY* [*Politic of Human Rights and Transition in Indonesia: From the Beginning of Reformation to the End of SBY Government*], (2014) at 174.

[29] See Komnas HAM, "Laporan Data Pengaduan", <https://www.komnasham.go.id/ index.php/data-pengaduan/>.

Table 2

Report of Komnas HAM on Amount of Complaints (2012-2016)

No.	Respondents	Amount of Complaints Received				
		2012	2013	2014	2015	2016
1.	Police	1,938	1,845	2,483	2,734	2,290
2.	Corporation	1,126	958	1,127	1,231	1,030
3.	Local government	569	542	771	1,011	931
4.	Central government	483	488	499	548	619
5.	Judicial institution	542	484	641	640	436

In a similar vein, the Indonesian National Commission on Anti-Violence against Women's (**"Komnas Perempuan"**) has conducted a monitoring until August 2016. According to the report of Komnas Perempuan in 2017, they have identified 421 local regulations in Indonesia that are discriminatory against women and other minority groups[30].

In accordance with numerous NHRI's reports above, it can be concluded that the constitutional guarantees for applying the principle of co-administration (*medebewind*) is on itself unable to fully ensure Indonesia's international commitment on human rights.

4. Conclusion

The centrality of local government's hand under the cloak of special autonomy and co-administration (*medebewind*) could ideally be used as a modality for them to strengthen human rights locally. Unfortunately, the application of the said principles is not congruent with Indonesia's international obligations to respect, protect, fulfil, promote and enforce human rights. There are sev-

[30] Komnas Perempuan, "Mengenali Krisis Kebangsaan dari Pengalaman Perempuan: "Negara Harus Serius pada Penghapusan Kebijakan Diskriminatif"", Press Release, 2017, <https://www.komnasperempuan.go.id/siaran-pers-komnas-perempuan-mengenali-krisis-kebangsaan-dari-pengalaman-perempuan-negara-harus-serius-pada-penghapusan-kebijakan-diskriminatif-jakarta-11-juli-2017/>.

eral instances where these principles altogether became the primary sources of local governments non-compliance with Indonesia's international commitments under eight core international human rights treaties, where Indonesia is a party to it.

Accordingly, it is necessary to redefine the balance between such principles and Indonesia's international human rights obligations respectively. The participation from the Indonesian central government to monitor and guide local bureau, regardless the privileges belong to the latter, is also equally important in order to ensure the domestication of international treaties on human rights is properly executed in such territories.

AFRICA AND INTERNATIONAL LAW

THEORY OF LAW AND ECONOMICS: RATIONAL CHOICE

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When law and economics was a new field in the legal curriculum and just becoming a regular part of academic legal discourse, the use of microeconomic theory to discuss traditional legal topics aroused interest but also suspicion and hostility. Prominent among the reasons for this suspicion and hostility was the feeling that the economist's account of human decision making - rational choice theory - was so deeply flawed that conclusions derived from that account ought to be taken with a very large grain of salt, if not rejected outright. To take one example, the economic theory of the decision to commit a crime asserted that the potential criminal evaluated the expected costs and expected benefits of the criminal act and committed the crime only if the expected benefits exceeded the expected costs. Many traditional legal scholars, judges and practitioners to whom such examples of law and economics were given felt that the root of their unhappiness with the conclusions of the new discipline lay with the economist's contention that all decisions (like that to commit a crime) are the result of rational deliberation. The rational utility- or profit-maximizers of microeconomic theory seemed to bear very little correlation to the flesh-and-blood human beings with whom the law dealt. Therefore, to the extent that law and economics used rational choice theory as its principal theory of human decision making, the field had a difficult time in convincing traditional legal scholars that it should be taken seriously.

1. Rational Choice Theory

Rational choice theory is at the heart of modern economic theory and in the disciplines contiguous to economics, such as

some parts of political science, decision theory, sociology, history and law, that have adopted the theory as their model of decision making.

2. Definitions of Rational Choice

There is no widely accepted definition of rational choice theory, but there is one important senses in which the term is used. The informal sense: Rational choice is said to be rational when it is deliberative and consistent. The decision maker has thought about what he or she will do and can give a reasoned justification for the choice. And taking choices over time or focusing on their choices about particular things, such as food or class choices in college, one expects rationality to lead to consistent (and relatively stable) choices. That is, one expects that there will be no wild and inexplicable swings in the objects of their choices and that the means chosen to effectuate the goals of the decision maker will be reasonably well-suited to the attainment of those goals (Nozick, 1993).

3. The Uses of Rational Choice Theory in Economics

These problems notwithstanding, economists have found rational choice theory to be a very useful model for forming hypotheses about market behavior. There are five principal reasons for this. First, the theory allows economists to make predictions about economic behavior and, by and large, those predictions are borne out by the empirical evidence. For example, rational choice theory predicts and empirical work confirms, that when the wage rate rises, all other things held equal, the supply of labor increases and the demand for labor decreases; when the price of alcohol rises, relative to that of other goods and services, the quantity demanded goes down (if not by much); when the price of a good or service rises, again, relative to that of other goods and services, productive effort tends to shift into the supply of that good or service; and when the price of an input rises relative to that of its substitutes, producers tend to use less of that input and relatively more

of the substitutes. These sorts of results are so widespread, so familiar to professional economists and so central to the tenability of modern microeconomic theory that it is not surprising that rational choice theory forms such an important part of the canon of modern micro economics. Second, whenever there are seeming deviations from the predictions of price theory, economists can usually explain those deviations without having to assume that the decision makers involved are irrational.

4. The Application of Rational Choice Theory in the Law

The most important, but not the only, characteristic of law and economics is its use of rational choice theory to examine legal decisions. In this section describe the general reasons why rational choice theory may be appropriate for the description and prediction of legal decision making and give examples of the use of the theory in the analysis of private law rules of contract and tort law and in the analysis of criminal law.

5. Why Rational Choice Theory is an Appropriate Model of Legal Decision Making

Rational choice theory is one of three distinguishing characteristics of law and economics. In light of the general criticism of the applicability of rational choice theory to non-market choices given above, one is entitled to ask why rational choice is appropriate for the discussion of legal matters, most of which are non-market choices. The answer is that many legal decisions are indeed market-like choices.

They may be said to be so on the ground that legal rules create implicit prices on different behaviors and that legal decision makers conform their behavior to those prices in much the same way as they conform their market behavior to the relative prices there. For example, the law imposes a monetary sanction (called

'compensatory money damages') on those who unjustifiably interfere with another's property, breach a contract, or accidentally injure another person or his property.

6. Implications of the Criticisms of Rational Choice Theory for the Economic Analysis of Law

As we have seen, law and economics has premised much of its scholarship on rational choice theory. Therefore, the implications of the literature critical of that theory for law and economics are profound. In this part I want to focus on four of those implications - on the relationship between transactions costs and the law, on the choice between mandatory and default rules in the law, on the best means of dealing with risky decisions by consumers and on some issues in tort law.

7. Conclusion

We have seen how important rational choice theory is to law and economics. Before we make policy pronouncements on the basis of these anomalies, we need to know much more. The implication of some of the experimenters is that their findings apply to all decision makers in all circumstances. But that seems highly unlikely. Surely there are important differences among circumstances and among people. There may be some people who always obey the predictions of rational choice theory; there may be some circumstances in which no one obeys those predictions. And there may be more subtle differences.

Someday, perhaps soon, we shall have a complete account of human decision making than that provided by rational choice theory. And when we do, that account will greatly enhance our understanding of the law and our ability to draft the law for desirable ends.

THE PROTOCOL ON THE ESTABLISHMENT OF THE EAST AFRICAN COMMON MARKET ON FREEDOM OF MOVEMENT, THE RIGHT OF ESTABLISHMENT AND THE RIGHT OF RESIDENCE OF INDIVIDUALS

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The East African Community (hereafter the EAC) is an internationally recognized sub regional organization also known as a Regional Economic Community in the African Continent[1]. The history and formation of the EAC[2] dates back to the Pre colonial era whose reestablishment in 1999 marked the signing of the Treaty for the establishment of the East African Community (hereafter EAC Treaty). The main pillars of integration in the EAC are namely Customs Union[3], Common Market[4], Monetary

[1] The African Union (AU) recognises eight Regional Economic Communities (REC) in the Continent, the: Arab Maghreb Union (UMA), Common Market for Eastern and Southern Africa (COMESA), Community of Sahel–Saharan States (CEN–SAD), East African Community (EAC), Economic Community of Central African States (ECCAS), Economic Community of West African States (ECOWAS), Intergovernmental Authority on Development (IGAD), Southern African Development Community (SADC).

[2] *Njenga L.N* . The legal Status of the East African Community //RUDN Legal Journal. – 2018 № 22(3).

[3] The first Regional Integration milestone and critical foundation of the East African Community (EAC), which has been in force since 2005, as defined in Article 75 of the Treaty for the Establishment of the East African Community. https://www.eac.int/customs-union Accessed on 29.4.2019.

[4] The Common Market is the second Regional Integration milestone of the East African Community (EAC), which has been in force since 2010, in line with the provisions of the EAC Treaty. https://www.eac.in/common-market Accessed on 29.04.2019.

Preamble of the Treaty for the Establishment of the East African Community - "Common Market" means the Partner States' markets integrated into a single market in which there is free movement of capital, labour, goods and services.

Union and a Political Federation. The treaty for the establishment of the East African Community defines the common market as markets of partner states integrated in to a single market with the guarantee of free movement of capital, labor, goods and services. Further under the operational principles of the Community that shall govern the practical achievement of the objectives of the Community shall include "the establishment of an export oriented economy for the Partner States in which there shall be free movement of goods, persons, labor, services, capital, information and technology"[5]. In comparison with the EAC Treaty, the protocol on the establishment of the East African Common market protocol clearly outlines the partner states legal obligation to guarantee the freedom of movement of not only persons but also labor.

Accordingly, article 7 hence states that "The Partner States here by guarantee the free movement of citizens of the other Partner States, within their territories". The partner states guarantee non discrimination of citizens of other partner states based on their nationalities by allowing these citizens entry and stay into the partner state territories without visa as well as allowing them to move freely within the member states territory without restriction. These freedoms however do not take precedence over the national laws of the individual partner states in cases of citizens committing a crime in a host member state[6].The Protocol on the establishment of the East African Common Market clearly states that the freedom of movement granted to citizens of member states does not exempt from prosecution or extradition a national of a partner state who commits a crime in a host partner state. In the European Union for example Freedom of movement and right of residence is defined as freedom of movement and residence for persons in the European Union in accordance with the Treaty of Maastricht of 1992. The freedom of movement of

[5]Article 7 (1,c) of the treaty for the establishment of the East African Community of 1999.

[6] Article 7(4) of the Protocol on the establishing the East African Common Market.

individuals in the European Union was initiated under the Schengen agreements as a gradual process of phasing out of internal borders of member states. The Schengen agreement however put a limit of this freedom to just a few Member States of the European Union. As a result, this fundamental freedom gained a classification of the cornerstone of Union citizenship in accordance with Maastricht Treaty which in a broader sense made provisions to include not only workers but also members of their families and later any individual who was a citizen of the European Union even if not necessarily relocating to a host EU country for Economic reasons[7]. In accordance with article 45 of the Treaty on the functioning of the European Union, freedom of movement for workers is guaranteed to nationals of European Union member states. Further, equal rights regarding employment, remuneration as well as work conditions are guaranteed to all nationals of EU member states and should not be discriminated against due to the nationality of the worker. The existing similarities between the EAC and the EU in matter freedom of movement of persons, right to establishment and right to residence shall only apply to workers of employment in the public service. The freedom of movement of persons in the East African Community is important for effective integration in terms of economic growth and strengthening friendly ties between member states. Such persons may also be refugees whose movement according to the protocol shall also be governed by the relevant international conventions. The partner states, according to article 7(3) of the protocol, undertake to guarantee protection of the nationals of other partner states in accordance with their national laws while in their territories. In practice however, these freedoms and rights are infringed by the states themselves. In the East African Community, the judiciary organ of the community is

[7] See *Armin Cuyvers* Free Movement of Persons in the EU // East African Community Law Institutional, Substantive and Comparative EU Aspects. 2017- pg. 354.

obliged to determine the cause of action in such matters. Case law practice in the EAC that clearly interprets the community's free movement laws is seen in *In Mohochi v. Attorney General of Uganda*[8]. Samwel Mohochi, a Kenyan attorney and human rights defender, as part of a delegation traveled to Uganda in April 2011 from the Kenyan chapter of the International Commission of Jurists. On arrival at Entebbe Airport however, immigration officials denied him entry into Uganda. The immigration officials permitted the rest of the delegation to enter the country. The officials detained Mohochi for several hours and arranged his deportation back to Kenya. In connection with this incident, Mohochi filed a suit against the Attorney General of the Republic of Uganda with the East African Court of Justice (hereafter, EACJ) alleging violations of free movement of persons as provided for in the EAC Treaty and the Common Market Protocol. He also claimed that he had been denied due process of law which contravened the fundamental principles enshrined in the EAC Treaty among which include good governance, adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities. The degrading manner in which he was detained at the airport with no explanation or warning was total disregard to recognition, promotion and protection of human and people's rights in accordance with the provisions of the African Charter on Human and Peoples' Right[9]. The claimant asserted multiple violations of the African Charter, including discrimination, freedom from arbitrary arrest and detention, the right to a fair and just administrative action, the right to information and freedoms of assembly, association and movement. To remedy these breaches, Mohochi asked the EACJ to declare that denying him entry without a hearing or providing Treaty based reasons was

[8] http://eacj.eac.int/?cases=samuel-mukira-mohochi-vs-the-attorney-general-of-the-republic-of-uganda last accessed 30.04.2019.

[9] Article 6(d) of the treaty for the establishment of the East African Community of 1999.

unlawful. He also asked for a declaration that Uganda's Citizenship and Immigration Control Act, pursuant to which the government had designated him as a "prohibited immigrant," contravened the EAC laws listed above. The EACJ established its authority to hear the suit and turned to determine the following: whether the EAC Treaty limits Uganda's sovereignty to deny entry to nationals of other member states on security grounds; whether immigration officials were required to explain to Mohochi why they denied him entry; and whether the claimant's arrest, detention and expulsion violated his right to freedom of movement. The Court's findings were as follows: Uganda had breached multiple provisions of EAC law, including the human rights commitments in the Treaty's fundamental principles clause.

The Court recognized that Uganda, as a sovereign nation, has the "power to deny entry to citizens of EAC Partner States but it must exercise this power in accordance with the law including Community rules guaranteeing the right to freedom of movement and hence the EAC Treaty and Common Market Protocol are binding in this respect. Uganda also accepted that her sovereignty to deny entry to persons, who are citizens of the Partner States, becomes qualified and governed by the same and, therefore, could no longer apply domestic legislation in ways that make its effects prevail over those of Community law. Sovereignty, therefore, cannot not take away the precedence of Community law, cannot stand as a defense or justification for non[-]compliance with Treaty obligations and neither can it act to exempt, impede or restrain Uganda from ensuring that her actions and laws are in conformity with requirements of the Treaty or the Protocol. In conclusion, the government failed to provide sufficient evidence that the "Applicant indeed constituted a real threat to regional security." The EACJ hence concluded that Ugandan officials were required to explain to Mohochi the basis of his denial of entry. The adherence to the rule of law and observance of human rights must be observed according to the fundamental principles of the community under article 6 of the Treaty.

AN ANALYSIS OF THE COMPLEMENTARITY PRINCIPLE IN LIGHT OF THE ONGOING PROSECUTIONS BEFORE THE INTERNATIONAL CRIMINAL COURT (ICC)

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Analysing Complementarity in Light of On-going Prosecutions before the ICC

It is undisputed that States were careful not to grant the ICC, as an international organization, the power to supersede their sovereignty over territories and citizens[1]. This is so because the

Rome Statute states that the ICC is to be complementary to national criminal jurisdictions[2]. The principle of complementarity represents the express will of States to create an institution that is global in scope while recognizing the primary responsibility of States themselves to exercise criminal jurisdiction. It is against this background that the complementarity regime of the Rome Statute is said to strike a balance between safeguarding the sovereign rights of states and the goal of ending impunity for the most heinous of crimes. The complementarity regime proceeds from the premise that - while the exercise of criminal jurisdiction by a state over its territory is an expression of sovereignty[3], all states have the right to prosecute the perpetrators of crimes committed within their borders and interference by external bodies is prohibited. However, in respect of international crimes the *right* of states to

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[1] M. CherifBassiouni, "The ICC- Quo Vadis" (1 July 2006) 3 *Journal of International Criminal Justice* , 423.
[2] Rome Statute, *supra*, preamble, and Article 1.
[3] FredricaGioia, 'State Sovereignty, Jurisdiction, and 'Modern' international Law', (2006) 19 *LJIL* 1095, p. 1096.

prosecute is also an *obligation* under international law[4]. The commission of such crimes is considered a threat to the peace, security and well-being of the world, and the punishment of those responsible is of concern to the international community as a whole.

Against such background, the Preamble and Article 1 of the Statute provide that the ICC shall be complementary to national criminal jurisdiction, meaning the ICC is intended to function as a court of last resort. Unlike the international ad hoc tribunals, then, the ICC functions as a secondary court, and does not supplant or replace national jurisdictions. At all times, the ICC must defer to a nation and its courts if the State is able and willing to prosecute an individual for a crime covered by the Statute. However, what remains unalterable is the fact that the complementarity principle allows the ICC to intervene where a State refuses to prosecute those who commit the most serious of crimes.

The Libyan Referral vis-à-vis Complementarity and the basis of the ICC intervention in Libya

Libya has challenged the admissibility of the International Criminal Court's (ICC) case against Saif al-Islam Qaddafi and Abdullah al-Senussi on charges of crimes against humanity on the grounds that the State is capable of conducting a fair trial according to its domestic law and is in the process of building a case against both men[5]. The May 2012 motion submitted on behalf of the government of Libya requested an oral hearing on the admissibility challenge pursuant to Article 19 of the Rome Statute by arguing that the case against the former officials in the government of Muammar Qaddafi should be deemed inadmissible because domestic investigations and prosecutions are underway in Libya. If

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[4] Jann K Kleffner, *Complementarity in the Rome Statute and National Jurisdictions,* (Oxford University Press, Oxford, 2008), p. 9-25.

[5] Article 19 allows a State to challenge admissibility if that State is actively investigating and prosecuting the defendant for the crimes alleged by the Prosecutor of the ICC.

the Court allows Libya to carry out the trials of both defendants domestically, the result would strengthen the ability of States to challenge admissibility and make it more difficult for the ICC to bring international criminals to justice. Under Article 5 of the Rome Statute, the ICC has jurisdiction over serious crimes that concern the international community as a whole, including genocide, crimes against humanity, and war crimes. Prosecutors charged both Saif al-Islam Qaddafi and al-Senussi with two counts of crimes against humanity in connection with the murder and persecution of Libyan civilians during the 2011 popular uprising.

Conversely, as is the practice of the ICC – its jurisdiction is complementary to that of the national courts[6]. Therefore, the question that comes to mind is the basis on which the ICC intervened if the Libyan Courts were already pursuing the suspects already. What is prudent is that – the obligation to prosecute perpetrators of international crimes vests with the states, as agents of the international community, to try and punish such persons. Therefore, If Libya, though not a member to the Rome Statute, was already trying the perpetrators – on what basis did the ICC intervene? The above submission is constructed on the credence that the ICC jurisdiction exists alongside national criminal jurisdictions and must defer to on-going national prosecutions and investigations[7]. The veracity is that Libya has held Qaddafi in custody since November 2011, and Mauritania recently extradited al-Senussi to Libya after capturing him in March 2012. Libyan officials have stated repeatedly that the two men will be tried in Libya under Libyan law with the possibility of facing the death penalty if convicted.

In response to Libya's challenge, the ICC Office of the Prosecution noted that under Article 17 of the Rome Statute, admissibility-challenge determinations are made using a two-step

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[6] Article 17 of the Rome Statutes of the ICC.
[7] Preamble and also Article 1 of the Rome Statute.

process. First, national investigation and prosecution must be ongoing. Second, those proceedings must be "genuine." The challenging State must demonstrate that the proceedings are "genuine" within the meaning of Article 17(1)(a) by showing that the proceedings are not merely a pretense designed to shield the accused or guarantee impunity, and under Article 19 that the State is able to advance the proceedings in accordance with Article 17(3). Under Article 17(3) the Court will examine whether there has been a substantial collapse of the judicial system and if the State is unable to conduct investigations and trials. The prosecution ultimately agreed that Libya has taken genuine steps toward investigating the charges against

Qaddafi and al-Senussi but also expressed concern about Libya's ability to advance the case in domestic courts. The prosecution thus requested more information from Libya about its ability to advance the case domestically. The Pre-Trial Chamber responded in October 2012 and requested public hearings in order to make a final decision on Libya's ability to advance domestic prosecution.

To some extent, the ICC made sense of the situation in that the Libyan justice system was not capable of carrying out a free and fair trial, so a domestic trial would have resulted in further human rights violations and a delay in justice for the civilian victims of the Libyan uprising. The

ICC's questionable jurisdiction over Qaddafi and al-Senussi highlights one of the biggest challenges the ICC has faced in its few years of existence: the difficult task of balancing state sovereignty with accountability for human rights abuses. If Libya submits both men to the ICC, it would be a symbolic milestone for the Court's authority and would bolster or perhaps legitimize that authority in the eyes of the international community. What is rather factual is the fact that the Libyan judicial system was unable to try the perpetrators. This is further substantiated by the UN Commission Report (March 2011) on Libya which also found that:

"The Jamahiriya system of government instituted by the Gaddafi regime is a very particular one involving one-man rule using fear, intimidation and incentives based on loyalty. By its very nature, it has not been susceptible to governance based on the rule of law and the protection of human rights".

Therefore, it was this absence of an effective rule of law system and the existence of a judiciary that is not independent, and the dominance of a number of paramilitary and security apparatuses, which also led to the consolidation of a climate of fear and oppression – which triggered the ICC jurisdiction based on complementarity. It is admitted that investigations were being carried out by the Libyan government in the realm of its obligation to prosecute and punish international crimes perpetrators. However, the genuineness of the proceedings is what remains to be questioned.

While complementarity requires that domestic courts be permitted to try international crimes if they are 'willing and able' to do so, even States that are willing may not necessarily have the capacity to ensure that due process rights are respected. This is especially true in post-conflict societies such as present-day Libya. Moreover, the inability beheld in the Libyan judicial system is also what ensured the solicitation of the complementary jurisdiction of the ICC. This is even exacerbated by the fact that Saif has been held for over 3 months without access to a lawyer and without being brought before a judge[8]. The current situation in Libya makes it extremely unlikely that Saif-al-Islam Gaddafi would receive a fair trial, especially in circumstances where the clamour for vengeance drowns out demands for due process protections. Using a Libyan judge would also place that judicial officer under unbearable overt or covert pressure to return a guilty verdict. Furthermore, Libya's political and legal system is in a state of extreme

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[8] http://www.guardian.co.uk/world/2011/nov/22/saif-al-islam-gaddafitrial-libya?newsfeed=true, accessed 10 October 2013.

flux. This is not normal of any judicial or law enforcement systems of any country and thus the Libyan authorities were not competent to try the perpetrators. The ICC was spot-on when it interfered in the Libyan situation as the principle of complementarity does not only ask if the national courts are willing to prosecute – but complementarity is a doubleedged sword[9] which also seeks to investigate ability to genuinely carry out the prosecutions.

Complementarity and the Kenyan situation. The basis of ICC intervention in Kenya

On 31 March 2011, the Government of the Republic of Kenya submitted an application to challenge the admissibility of two cases concerning crimes committed within Kenyan territory[10]. This was the first occasion on which a state had challenged admissibility under Article 19, and therefore represents the first true test of the complementarity regime. Both the Pre-Trial Chamber and Appeals Chamber held that the Kenyan case was admissible on the basis that Kenya had not demonstrated sufficiently that it was carrying out national investigations, as required to render the case inadmissible. However, such reasoning by the Pre- Trial Chamber is far from reality because by that time in Kenya there was recent judicial reforms they had made to assist with domestic prosecutions. The Kenyan authorities have also referenced their new constitution which contained a bill of rights including protections for fair trials. They represented Kenya's national courts as newly empowered. They also highlighted the appointment of a new Chief Justice and High Court judges. Additionally, when they filed their

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[9] Melbourne Law School, Criminal Law Forum, Vol. 17, 2006.

[10] *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey, Joshua Arap Sang* and *Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta And Mohammed Hussein A*li, 'Application On Behalf of the Government of the Republic of Kenya Pursuant to Article 19 of the ICC Statute', State Representatives, ICC-01/09-01/11 and ICC01/09-02/11, 31 March 2011, (hereafter: 'Kenya: Article 19 Application').

application they said that the investigation would continue over the coming months though they were unable to submit that it had already started. All the above seem to demonstrate at least some sort of willingness on the part of the Kenyan authorities to try the perpetrators.

However, the reality of the complementarity principle is that it is a dual investigation. There is also a determination of inability to prosecute which, inter alia, also looks at whether the State is able to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings. It was against this background that the ICC intervened because the

Kenyan authorities failed totally to try the *same person for the same conduct*. The Kenyan Government instead sought to argue that they only needed to prosecute the same conduct and not the same person, provided that the person they did prosecute was at the same level in the political hierarchy. As such, this was an attempt to water down the complementarity test. It was on this basis that the Court dismissed the application. The decision of the Pre-Trial Chamber was then confirmed on appeal.

The DRC authorities and the prosecution of international crimes

In the DRC referral, the ICC Prosecutor and then the Pre-Trial Chamber adopted a realistic position, considering the DRC as not having taken action regarding the crimes the ICC has been investigating. The DRC authorities arrested Lubanga and accused him of crimes allegedly committed by FPLC in or after military attacks from May 2003 onward. It became apparent that though the Congolese national authorities indicted him for crimes committed from May 2003, the ICC Prosecutor was not concerned or

rather did not focus on the crimes committed during that period[11]. The DRC authorities issued an arrest warrant on 19 March 2005 against Thomas Lubanga charging him with the crime of genocide[12] and crimes against humanity[13], in addition to the ordinary crimes of murder and illegal detention. However, the definitions of some of these crimes were different from internationally documented definitions as embodied under the provisions of the Rome Statute. The reality was that the crimes against humanity in Article 166 of the Military Criminal Code are within Article 8 of the Rome Statute subsumed under war crimes[14].

Conclusion

In conclusion, the chapter analysed the principle of complementarity in practice through shedding light on the ICC practice mainly in the case of Kenya, Libya, Uganda, DRC, and in the case of Sudan with some reference to the cases of the CAR, Ivory Coast. The basic question which was asked in relation to the above situation was the basis on which the ICC intervened in all those situations. It has also been analysed from the perspective of complementarity whether the ICC in all those situations is justified or not. A nearer examination of all these cases before the ICC, particularly the Darfur situation, reveals how the ICC interprets the principles of complementarity and admissibility differently based on whether the case is self-referred or referred by the Security Council. The Ugandan case was a self-referral – but nevertheless

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[11] Prosecution's Submission of Further Information and Materials, *the Prosecutor v Thomas Lubanga Dyilo*, Pre Trial Chamber I, ICC-01/04-01/06 (25 January 2006) at para.18 and 20.

[12] Article 164 of the DRC Military Criminal Code.

[13] Articles 166-169 of the DRC Military Criminal Code.

[14] M. Wetshokondo Kosos,"Human Rights and Justice Sector Reform in Africa: Why Congo need the ICC? Date?, Open Society Justice Initiative, 60-61. Available from: www.justiceinitiative. org/db/resource2/fs?..&rand= 0.849487244243 (visited 24 April 2007).

the ICC invoked complementarity to determine the basis of its jurisdiction. It was determined that though the Ugandan authorities were willing to try perpetrators of international crimes, the Ugandan judicial system was unable to try such persons. The Kenyan situation reflects a true test of complementarity and it has been discovered that the Kenyan authorities failed totally to try the *same person for the same conduct* and thus it was unable to try all the perpetrators of international crimes.

The Darfur situation is based on a UN Security Council referral, and the ICC intervened on the basis that the Sudan authorities was totally unable to try the perpetrators and the establishment of the Special Court was merely a tactic used by the Sudanese government to thwart ICC jurisdiction over its nationals. It was this situation which triggered the ICC intervention in the Darfur situation. In the Libyan situation, it was due to the collapse of the judicial system that the ICC decided to intervene after it was discovered that the Libyan judicial system was in a state of absolute flux. The Libyan system of government instituted by the Gaddafi regime was a very particular one involving one-man rule using fear, intimidation and incentives based on loyalty. By its very nature, it has not been susceptible to governance based on the rule of law and the protection of human rights. Saif was not face a fair trial and thus there was no impartiality on the Libyan courts. Thus, Libyan was in a status of total inability to try the perpetrators of international crimes committed in their territory. However, given the weakened state of the justice system in the DRC caused by the conflict, the DRC was unable to prosecute these crimes. Thus, since there was irrefutable evidence that the DRC lacked the capacity to adjudicate cases involving serious human rights crimes, the situation of DRC surely qualified precisely as one of the scenarios the ICC intends to address.

However, the Darfur and DRC situations postulate that the ICC in reality does not support its complementarity regime. Instead of establishing a clear framework for determining admissibility and complementarity, the Court's handling of the cases show

that the Court either: (a) accepts almost any unwillingness or inability factors in order to take jurisdiction of a case, or (b) refuses to accept any able-ness or willingness factors in order to prevent losing jurisdiction over a case. Understandably, the ICC needs to hear cases in order to establish itself as a legitimate court. The Court should be extremely careful, however, to only take cases that clearly adhere to the jurisdictional elements laid forth in the Rome Statute. By doing so, the ICC can prove its credibility and solidify its place as the new global court. Furthermore, the allegations of biased against the ICC (i.e. the ICC is biased against Africa) do not per se hold water and the ICC thus only persuaded by its complementarity regime to try international crimes. It is not wise to generalize and unconvincingly hold that the ICC is biased against Africa. The ICC's jurisdiction is guided by the complementarity regime and thus investigations by the ICC in Africa are triggered by the unwilling, inability to prosecute and sometimes inactions on the part of the national judicial systems.

THE INTERNATIONAL LEGAL FRAMEWORK FOR THE PROTECTION OF PERSON WITH DISABILITIES

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Introduction

Persons with disabilities often are excluded from the mainstream of the society and denied their human rights. Discrimination against persons with disabilities takes various forms, ranging from invidious discrimination, such as the denial of educational opportunities, to more subtle forms of discrimination, such as segregation and isolation because of the imposition of physical and social barriers. Effects of disability-based discrimination have been particularly severe in fields such as education, employment, housing, transport, cultural life and access to public places and services. This may result from distinction, exclusion, restriction or preference, or denial of reasonable accommodation on the basis of disablement, which effectively nullifies or impairs the recognition, enjoyment or exercise of the rights of persons with disabilities.

Despite some progress in terms of legislation over the past decade, such violations of the human rights of persons with disabilities have not been systematically addressed in society. Most disability legislation and policies are based on the assumption that persons with disabilities simply are not able to exercise the same rights as non-disabled persons. Consequently the situation of persons with disabilities often will be addressed in terms of rehabilitation and social services. A need exists for more comprehensive legislation to ensure the rights of disabled persons in all aspects - political, civil, economic, social and cultural rights - on an equal basis with persons without disabilities. Appropriate measures are

required to address existing discrimination and to promote thereby opportunities for persons with disabilities to participate on the basis of equality in social life and development.

There also are certain cultural and social barriers that have served to deter full participation of persons with disabilities. Discriminatory practices against persons with disabilities thus may be the result of social and cultural norms that have been institutionalized by law. Changes in the perception and concepts of disability will involve both changes in values and increased understanding at all levels of society, and a focus on those social and cultural norms, that can perpetuate erroneous and inappropriate myths about disability. One of the dominant features of legal thinking in twentieth century has been the recognition of law as a tool of social change. Though legislation is not the only means of social progress, it represents one of the most powerful vehicles of change, progress and development in society.

Legislation at country level is fundamental in promoting the rights of persons with disabilities.[1] While the importance - and increasing role - of international law in promoting the rights of persons with disabilities is recognised by the international community, domestic legislation remains one of the most effective means of facilitating social change and improving the status of disabled persons. International norms concerning disability are useful for setting common standards for disability legislation. Those standards also need to be appropriately reflected in policies and programmes that reach persons with disabilities and can effect positive changes in their lives.

Before the adoption of the CRPD, the UN had promulgated human rights conventions, none of which specifically included disability as one of the "suspect forms of classification that are explicitly listed in their non-discrimination and equality clauses." refer to these as the prohibited grounds of discrimination. Theoretically, though, core human rights conventions adopted before the

[1] https://fra.europa.eu/en/theme/people-disabilities/eu-crpd-framework

CRPD also apply to persons with disability, but they have been rarely applied in practice. The attempts by the Committee on Economic, Social and Cultural Rights(CESCR), for example of issuing the General Comment No. 5 (Persons with Disabilities) to clarify the application of the ICESCR to persons with disability appeared to have been hampered by definition issues and lack of clarity when it came to the specific interests of person with disability and their relationship to human rights structures. Other reasons for the limited success of the human rights conventions adopted before the CRPD[2].

While the first binding convention for persons with a disability had to wait until 2006, there have been a number of resolutions addressing disability issues. The General Assembly and the Economic and Social Council (ECOSOC) adopted a number of resolutions from the 1950s onwards, dealing in the main with prevention and rehabilitation, but it is from the 1970s, the UN started to adopt more significant resolutions with respect to persons with disability, ushering the era of "soft laws" in the area of disability rights. The year 1971 saw the first UN instrument directed to persons with disability, – the Declaration on the Rights of Mentally Retarded Persons (DRMRP).

Although this was not a declaration of general application to all persons with disability, it was soon followed, in 1975, by the first Declaration on the Rights of Disabled Persons(DRDP).

Six years following the DRDP, the UN proclaimed 1981 as the International Year of Disabled Persons and embarked upon the development of a World Program of Action, which restructured disability policy into three distinct areas: prevention, rehabilitation, and equalization of opportunities. [3]The implementation would entail long-term strategies integrated into national policies

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[2] https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html

[3] https://www.un.org/development/desa/disabilities/resources/world-programme-of-action-concerning-disabled-persons.htm

for socio-economic development, preventive activities that would include development and use of technology for the prevention of disability, and legislation eliminating discrimination regarding access to facilities, social security, education, and employment. At the international level, Governments were requested to cooperate with each other, the UN and NGOs.

In order to provide a time frame during which Governments and organizations could implement the activities recommended in the World Programme of Action, the General Assembly proclaimed 1983-1992 the UN Decade of Disabled Persons. Together, the Programme and the International Year had launched a new era-- one that would seek to define disability as the relationship between persons (with the disability) and their environment, and the imperative to remove societal barriers which impede the full participation by persons with a disability became increasingly recognized. The definition of "equalization of opportunities" by the World Program of Action marked the beginning of a significant shift away from an individual approach to disability. The term was defined as: - the process through which the general system of society, such as the physical and cultural environment, housing and transportation, social and health services, educational and work opportunities, cultural and social life, including sports and recreational facilities are made accessible to all.

The implementation of this long-term strategy at national, regional and global levels also coincided with the adoption of the Standard Rules on Equalization of Opportunities for Disabled Persons (Standard Rules) in 1993. The rules have been viewed as 'compensatory alternative' since "the proposal to adopt a UN Convention on the Elimination of All Forms of Discrimination Against Disabled Persons had failed in 1987 supposedly because of 'treaty fatigue because Member States are already burdened by and unable to fulfill their existing reporting obligations[4]. Despite the lack of

[4] European Union – EU Disability Policies and their Coordination, URL https://rm.coe.int/16800cde11, Policy DOC 2009 (access date: 02. 03.2019).

binding force, the Standard Rules could attain the binding character as international customary rules if applied by a great number of States with the intention of respecting a rule in international law, and they had served as a strong moral and political commitment on behalf of States to take action for the equalization of opportunities.

Since the International Year of Disabled Persons and the introduction of the Standard rules, more and more States had introduced anti-discriminatory legislation. Nevertheless, not being legally binding was still a major downfall of the previous disability rights mechanisms; and also was the fact that the old mechanisms were still influenced by limited (individual) approaches to disability, which meant that they could not address the specific barriers faced by persons with disability in the realization of their human rights, for example, regarding discrimination in the workplace". Consequently, prior to the adoption of the CRPD, the human rights of persons with disabilities were in theory covered by human rights treaty obligations and addressed in non-binding resolutions and declarations, but in practice were protected by neither. These weaknesses necessitated the thematic (disability) convention. Light gives a "summary" of reasons legitimizing the need for a new convention. These were: - First, tangible acknowledgement of humanity [of persons with disability]…. Second, it would [have been] iniquitous to allow abuse to continue unchecked…. Finally, whatever political horse-trading is necessary to achieve a convention, the process of elaborating such a convention has intrinsic value The CRPD brings a human rights dimension to disability issue by re-stating the existing human rights (appearing in general human rights convention) and then creating incidental rights to ensure that existing rights are realised. It also creates a disability rights discourse in the way in which it empowers persons with disability to be formally involved in the convention process. It is the first internationally binding human rights instrument of the twenty-first century in the area of disability rights, and is therefore a significant instrument for persons with disability around the world. It was adopted by the UN General Assembly on December 13, 2006.

As of 24th February 2014, the CRPD acquired 158 Signatures, and ratifications/accessions. The Convention signifies a shift emphasis from "the most urgent needs", towards more right-based approach, in which disability is viewed as a human rights issue, thereby elevating the importance of disability in international human rights, and providing an excellent opportunity to inquire into the protection accorded to persons with disability The shift is also with respect to the institutional changes which States are to undertake in order to facilitate its implementation: The CRPD is said to be a "potential catalysts" for progressive change, for its ability to trigger expressive value, prompt national level action, and advance the social integration of persons with disability.

African Union African States have signed and/or ratified several international and regional instruments, including the CRPD the Banjul Charter and several ILO Conventions, such as the Discrimination (Employment and Occupation) Convention, 242 and the Vocational Rehabilitation and Employment (Disabled Persons)[5]. These international instruments are intended to be implemented domestically, irrespective of various ways through which international law operates within individual states. Therefore, the development of disability rights in Africa should be discussed within the context of development of human/disability rights under both the UN and the African Union (AU) (successor to the Organization of African Unity - OAU).

In its earlier years, the OAU prioritized the struggle against oppression (in particular colonialism and apartheid), and other matters related to the preservation of territorial integrity and non-interference in the internal affairs of States, rather than the prioritisation of human rights. This position changed with the subsequent transition to the AU, because human rights and democratic

[5] African Union- Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa, URL https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-rights-persons-disabilities-africa, Protocol DOC 2016 (access date: 25. 03.2019).

values are now more clearly articulated as the foundational principles of the AU. However, when it comes to disability rights, AU seems to have a slower pace, compared to European and Inter-American counterparts. Gross human rights violations occurring in Central African Republic, Equatorial Guinea and Uganda in the 1970s pushed the OAU towards focusing on human rights, and in 1981, for the first time Africa adopted the continental human rights charter – the Banjul Charter. Although the Banjul Charter is the "Africa's Bill of Rights", it has only one "cursory" reference to the rights of persons with disability.

The Banjul Charter came into force in 1987, the same year in which the African Rehabilitation Institute, a specialized agency of the OAU was established. Matters concerning human rights of persons with disability in Africa began to feature in 1990s, as several human rights instruments adopted after this period paid some attention on disability rights[6]. Disability issues also started to feature in the agenda of treaty bodies and in the activities of some regional economic communities. It is unfortunate that most of the earlier measures, just like in the UN mechanisms before the CRPD, did not receive the needed attention in binding human rights instruments.

The Grand Bay Declaration and Plan of Action of 1999 (Grand Bay Declaration), which is said to have "elevated human rights to a cross-cutting height in African affairs, recognized, inter alia, the rights of persons with disability, and affirmed the principle of universality, indivisibility, interdependence and inter relatedness of rights, which are crucial to persons with disability's realization of human rights. Almost a year after the Grand Bay Declaration, the Labor and Social Welfare Commission adopted a Declaration of the African Decade of Disabled Persons (1999-2009) (African Decade), which was later endorsed by the OAU's Council of Ministers and Assembly of Heads of State and Government respectively, in July 2000. This was done with a view to giving fresh

[6] ibid

impetus to the implementation of the World Programme of Action concerning persons with disability in Africa beyond 1992 and strengthening regional cooperation to resolve issues affecting the achievement of the goals of the World Programme of Action, especially those concerning the full participation and equality of persons with disability, as well as those contained in the Standard Rules which relates to education, training and employment. Thus the African Decade was essentially a reaction to the perceived failure of the UN Decade to deliver tangible gains for persons with disability on the continent. States were urged review the situation of persons with disability with a view to developing measures that enhance the equality and their full participation as well as their empowerment. It was noted that throughout the continent, opportunities for full participation, equality and empowerment for persons with disability, especially in the fields of rehabilitation, education, training and employment, continued to decrease - largely because negative social attitudes leading to exclusion of persons with disability from an equal share in their entitlements as citizens.[7] The African Decade was predominantly founded on a social welfare perspective, but its three principles of equality, full participation and empowerment of persons with disability had a human rights tinge.

In 2002, the OAU Assembly of Heads of State and Government adopted a Plan of Action for the African Decade", which was generally intended to provide guidance to African States in achieving the goal of the Decade – the full participation, equality and empowerment of persons with disability in Africa. Matters related to employment were covered in several parts of the Plan of Action. Objection of the Plan was to promote the participation of persons with disability in the process of economic and social development This could be achieved through, inter alia, development

[7] United Nation- Convention on the Rights of Persons with Disabilities (CRPD), URL https://www.un.org/disabilities/documents/convention/convoptprote.pdf, Convention DOC 2006 (access date: 23. 02.2019).

and implementation of a strategy to promote he recruitment of women and men with disabilities by employers of all kinds; Objective No. 5 recognised the precarious situation of persons with disability likely to be "doubly jeopardized." The objective was for the promotion of special measures for children, youth, women and elderly persons with disability through, inter alia, implementation of special measures to facilitate full and equal participation of youth with disabilities in training, employment, science and technology. Objective No. 6 was on improving access to, inter alia, employment. Under this objective, States were urged to:- a) Ratify and implement the ILO Convent ion No.159 concerning Vocational Rehabilitation and Employment (Disabled Persons) to ensure entry to the labour market of persons with disability;[8] b) Promote learnerships or apprenticeships to facilitate the employment of youth with disabilities; c) Develop and implement strategies to promote employment of persons with disability, including tax rebates and incentives.

For the goal of the African Decade to be achieved, the Plan of Action called for its implementation not only by governmental institutions, but also a range of other entities, such as persons with disability organizations, non-governmental organizations, organizations of employers and workers, and other organizations. Disability issues gained further support from the Kigali Declaration of 2003, which not only re-iterated the principle that all human rights are universal, indivisible, inter-dependent and interrelated, but also urged Member States to provide adequate support to the African Rehabilitation Institute, and to develop a Protocol on the protection of the rights of persons with disability and the elderly persons. In 2008, the Windhoek Declaration on Social Development extended the African Decade to 2019 (Second African Decade), and called

[8] United Nation – Optional Protocol to the Convention on the Rights of Persons with Disabilities, URL https://www.ohchr.org/en/hrbodies/crpd/pages/optionalprotocolrightspersonswithdisabilities.aspx, Protocol DOC 2006 (access date: 17. 03.2019).

for the evaluation of the first African Decade and its Plan of Action (1999-2009), among others.

The Continental Plan of Action for the extended African Decade was adopted by the African Union in 2013. In binding instruments, fragmented provisions with respect to some aspects of persons with disability appear in several treaties of the AU[9]. The first of these is the Constitutive Act of the African Union, which despite not being a human rights treaty itself, lists protection of human and peoples' rights as one of its objectives. The AU functions in accordance with a number of principles, including promotion of social justice to ensure balanced economic development. Furthermore, the Executive Council of the AU coordinates and takes decisions on policies in areas of common interest to the Member States, such as social security; including the formulation policies relating to the persons with disability, (the phrase used in the Constitutive Act is "disabled and the handicapped"). In performing its functions, the Executive Council may delegate any of its powers and functions mentioned above to the Specialized Technical Committees. Policy matters related to disability are assigned to the Committee on Health, Labour and Social Affairs. In addition to the Banjul Charter, AU inherited all human rights treaties adopted by its pre predecessor, the OAU, and has itself adopted several human rights documents with provisions related to persons with disability. These include the African Charter on the Rights and Welfare of the Child (ACRWC), the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, (Maputo Protocol) African Youth Charter (AYC) and the African Charter on Democracy, Elections and Governance (ACDEG).

The principal human rights instrument in the AU is the Banjul Charter, whose nondiscrimination Article provides[10]:

[9] https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4.
[10] ibid

- Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status. Despite the fact that disability is not expressly stated as a prohibited ground of discrimination, the words "or other status" may be interpreted to cover disability, considering the fact that it is now acceptable in international human rights that discrimination on grounds of disability is illegal. The only provision in Banjul Charter which directly mention persons with disability is Article 18(4), according to which "[t]he aged and the disabled shall also have the rights to special measures of protection in keeping with their physical or moral needs." Surely, the provision seems to be learning towards the welfare approach to disability.

In 1990, the ACRWC became the first regional binding instrument (in Africa) with more detailed disability rights provisions than those stipulated in the Banjul Charter. Nevertheless, the application ACRWC is limited only to children. Article13 Provides: - 1. Every child who is mentally or physically disabled shall have the right to special measures of protection in keeping with his physical and moral needs and under conditions which ensure his dignity, promote his self-reliance and active participation in the community. 2. States Parties to the present Charter shall ensure, subject to available resources, to a disabled child and to those responsible for his care, of assistance for which application is made and which is appropriate to the child's condition and in particular shall ensure that the disabled child has effective access to training, preparation for employment and recreation opportunities in a manner conducive to the child achieving the fullest possible social integration, individual development and his cultural and moral development. 3. The States Parties to the present Charter shall use their available resources with a view to be achieving progressively the full con-

venience of the mentally and physically disabled person to movement and access to public highway buildings and other places to which the disabled may legitimately want to have access to

Concultion

The rights of people with disabilities have been at the heart of a series of international conferences that have produced significant political commitments to the rights of people with disabilities and equality. The United Nations has a long history of addressing the rights of people with disabilities. One of the important legal documents is The Convention on the Rights of Persons with Disabilities and its optional protocol (A/RES/61/106) was adopted on 13th December, 2006 as an effective tool in ensuring the rights of people with disabilities are safeguarded. As of October 2017, it has 160 signatories and 175 parties, which includes 172 states and the European Union (which ratified it on 23 December 2010 to the extent responsibilities of the member states were transferred to the European Union).

PROTECTION OF ENVIRONMENT: INTERACTION BETWEEN INTERNATIONAL AND NATIONAL LAW

INTERNATIONAL ENVIRONMENTAL LAW: SOME REFLECTIONS

Jutta Brunnée

One long-time observer of international environmental law divides the evolution of the field into three stages: the "traditional era," from its early beginnings to about 1970; the "modern era," spanning the period from the 1972 United Nations Conference on the Human Environment (the Stockholm Conference) to the 1992 United Nations Conference on Environment and Development (the Rio Summit); and the "post-modern era," since the Rio Summit[1]. I rely on this scheme to offer brief reflections on the state of international environmental law some 25 years into the post-modern era.

The Traditional Era

The earliest manifestations of what, today, we might think of as international environmental law involved efforts to curb over-exploitation of flora and fauna perceived to be "useful" to humans, both in Europe and in a colonial context[2]. Fisheries protection figured prominently, as did bird protection. Attention also turned to transboundary impacts, such as water use or pollution issues. For example, the 1941 award in the *Trail Smelter* arbitration[3], concerning transboundary air pollution emanating from a Canadian smelter located just north of the US border, gave rise to the first articulation of the no harm rule, which remains the core principle of customary international environmental law to this day. The *Trail Smelter* award illustrates that the conceptual framework of international environmental law originates in the application of general principles related to state sovereignty to environmental issues. But, gradually, environmental

[1] Peter H Sand, "The Evolution of International Environmental Law" in Daniel Bodansky, Jutta Brunnée & Ellen Hey, eds, *The Oxford Handbook of International Environmental Law* (Oxford: Oxford University Press, 2007) 29.
[2] See e.g. Philippe Sands & Jacqueline Peel, *Principles of International Environmental* Law, 3rd ed (Cambridge: Cambridge University Press, 2012) at 23–24.
[3] *Trail Smelter Arbitration (United States v Canada)* (1941), 3 RIAA 1905.

concerns began to transcend transboundary questions, emerging as regional or even global in scope. As a result, customary law receded in relative importance, supplanted by treaty-based regimes, which were better able to cater to the features of the problems at hand.

The Modern Era

The shift in focus toward regional and global issues, and toward regime-based approaches picked up pace with the 1972 Stockholm Conference and the rise of modern international environmental law. The conference, attended by 114 states, marked the beginning of a concerted effort to develop international environmental law and policy. The Stockholm Declaration on the Human Environment sought to articulate the key principles of international environmental law, and put the spotlight on the connections, and tensions, between environmental and developmental concerns[4]. The following two decades saw the rise of a series of multilateral environmental agreements (MEAs), on a wide array of topics, including air pollution, marine pollution, chemical pollution, biodiversity protection and climate change. The second major UN environmental conference, the 1992 Rio Summit, marked the end of the modern era. The meeting produced another declaration on principles of international environmental law and policy[5]. It also spawned the UN Framework Convention on Climate Change (UNFCCC)[6], which remains the hub of the global climate regime today, and to which I turn in more detail below.

The Post-Modern Era

The Rio Summit marked the height of global environmental policy optimism, and, in the eyes of many observers, a preceded a retreat from international environmental law, especially from environmental treaty making[7]. I want to offer two sets of brief reflections on these assessments.

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[4] Declaration of the United Nations Conference on the Human Environment, reprinted in (1972) 11 ILM 1416.

[5] Rio Declaration on Environment and Development, reprinted in (1992) 31 ILM 874.

[6] UN Framework Convention on Climate Change, reprinted in (1992) 31 ILM 851 [UNFCCC].

[7] Stacy D VandeVeer, "Green Fatigue" (2003) Wilson Q 55.

First, when it comes to the development of principles of international environmental law, which the Stockholm and Rio Declarations each sought to promote, I would say that ambitious norm building or norm consolidation projects are meeting with far greater skepticism today. Suffice it here to point to the French effort to promote the elaboration of a binding *Global Pact for the Environment* that, *inter alia*, would enshrine the key principles of international environmental law[8]. While there is support for the initiative, it seems unlikely that a binding document will emerge at the end of the day[9]. Many observers have also cautioned that, rather than advance the project of strengthening international environmental law, the initiative could lead to stagnation or even retrenchment from the existing stock of principles[10]. One of the main challenges may well be that, since the adoption of the Rio Declaration in 1992, the practice of states has been exceedingly cautious in embracing, as a matter of customary law, newer principles like precaution, sustainable development or common but differentiated responsibilities. It will be interesting to see, then, what version of the *Global Pact* idea will end up being endorsed at the planned global conference to mark the fiftieth anniversary of the Stockholm Conference[11].

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[8] See UN Secretary-General, *Gaps in international environmental law and environment-related instruments: towards a global pact for the environment*, UN Doc. A/73/419 (30 November 2018); available at: https://undocs.org/A/73/419.

[9] See "Summary of the Second Substantive Session of the *Ad Hoc* Open Ended Working Group towards a Global Pact for the Environment (18-20 March 2019)," *Earth Negotiations Bulletin*, Vol. 35/2, 22 March 2019; available at https://enb.iisd.org/vol35/enb3502e.html.

[10] See e.g. Louis Kotzé and Duncan French, "A critique of the Global Pact for the environment: a stillborn initiative or the foundation for *Lex Anthropocenae*?" (2018) 18 *International Environmental Agreements: Politics, Law and Economics* 811.

[11] See France Diplomatie, "Environment – global pact project (24 May 2019)"; available at https://www.diplomatie.gouv.fr/en/french-foreign-policy/climate-and-environment/sustainable-development-environment/events/article/environment-global-pact-project-24-05-19.

Meanwhile, it is worth noting that the post-modern era has also seen an upswing in recourse to international environmental adjudication, with the International Court of Justice deciding important transboundary impact cases involving the no harm rule[12]. Thus, on the one hand, international environmental law is still revolving around the same principles that evolved during the traditional era, rather than newer principles like the ones mentioned above. Indeed, it was not until 1996, that the ICJ finally confirmed the existence of the harm prevention rule in customary international law[13]. But, on the other hand, the ICJ has had the opportunity to concretize the requirements of due diligence that attach to the harm prevention obligation, and to confirm the emergence in general international law of important ancillary obligations, such as the obligation to assess transboundary environmental impacts[14]. The harm prevention obligation, in my view, is a potentially powerful proactive tool, since the invocation of its due diligence obligations does not require proof of harm, but merely that there is a risk of harm[15]. A recent Advisory Opinion of the Inter-American Court of Human Rights suggests that the due diligence dimension of the harm prevention rule might even provide

[12] See *Pulp Mills on the River Uruguay (Argentina v Uruguay)*, Judgment 20 April 2010, *ICJ Reports 2010*, p. 14; *Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica)*, Judgment of 16 December 2015, *ICJ Reports 2015*, p. 665.

[13] See *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, *ICJ Reports* 1996, p. 226.

[14] See Jutta Brunnée, "The Rule of International (Environmental) Law and Complex Problems" in Heike Krieger, Georg Nolte & Andreas Zimmermann, eds, *The International Rule of Law: Rise or Decline?* (Oxford: Oxford University Press, 2019), 211.

[15] See Jutta Brunnée, "Harm Prevention", in Jacqueline Peel and Lavanya Rajamani, eds, *The Oxford Handbook of International Environmental Law*, 2nd ed. (forthcoming 2020).

an anchor for proactive, individual complaints about extraterritorial human rights violations[16].

Turning, secondly, to the alleged treaty-fatigue, it is perhaps more accurate to say that, rather than adopt major new MEAs (although there have been some), much of the lawmaking activity now occurs under the auspices of existing regimes, through protocols, amendments and decisions of their plenary bodies[17]. In the context of these brief reflections, I can give only one example – the evolution of and regulatory activity under the auspices of the UN climate regime. In 1997, the parties to the UNFCCC adopted the Kyoto Protocol[18], which contained binding GHG emissions reduction commitments of developed countries and countries with economies in transition. However, the protocol's commitment regime was limited to developed countries and countries with economies in transition, accounting for only 24% of global GHG emissions[19]. It proved politically impossible to amend the protocol to include all states[20]. An amendment that is limited to creating a new commitment period for the existing parties was adopted in 2012, but has not entered into force[21].

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[16] See *Environment and Human Rights (State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity – Interpretation and Scope of Articles 4(1) and 5(1) of the American Convention on Human Rights),* Advisory Opinion OC-23/17 of 15 November 2017, Inter-American Court of Human Rights, Series A No. 23*,* available at: http://www.corteidh.or.cr/docs/opiniones/seriea_23_esp.pdf (Spanish only). For a discussion see Christopher Campbell-Duruflé and Sumudu Anopama Atapattu, "The Inter-American Court's Environment and Human Rights Advisory Opinion", (2018) 8 *Climate Law* 321.

[17] See Brunnée, note 14.

[18] Kyoto Protocol to the Framework Convention on Climate Change, reprinted in (1998) 37 ILM 22.

[19] See Daniel Bodansky, Jutta Brunnée, and Lavanya Rajamani, *International Climate Change Law* (Cambridge: Cambridge University Press, 2017), 108, 173.

[20] For an overview, see *ibid.*, 108-115.

[21] *Ibid*., 88-90, 202-206.

Given the US rejection of the Kyoto Protocol and the refusal of developing countries to expand it to include emission reduction commitments for all states, it became increasingly clear that an alternative approach to a long-term, genuinely global mitigation regime had to be found. The Paris Agreement is the result of the efforts, over several years, to find a formula that would be acceptable to all states[22]. Although the (unamended) Kyoto Protocol remains in effect for the time being[23], the Paris Agreement, for all intents and purposes, is its successor. And it did bring a dramatic shift in approach.

While some observers have warned about the softening and proceduralization of international environmental agreements that the Paris Agreement signals[24], its structure does address some of the major challenges of crafting a genuinely global, and long-term, approach to climate change. Since the rules of treaty law require state consent to all changes to the original agreement, negotiating a formally binding set of new commitments, let alone updating these commitments as needed, seemed a virtual impossibility. Indeed, even simple decisions of the treaty's plenary body require consensus, making it possible for a small number of states to stall progress.

The Paris Agreement evidences the increasing willingness of states to combine a range of approaches to maximize the potential for and scope of collective standard-setting. The Paris 'Outcome' consists of the Paris Agreement – a treaty – and a COP decision, which adopts the treaty text and supplements it in many key

[22] Paris Agreement to the United Nations Framework Convention on Climate Change, reprinted in (2016) 55 ILM 740.

[23] On the likely future of the Kyoto Protocol, see Bodansky, Brunnée & Rajamani, note 19, pp. 204-206.

[24] See e.g. the description of the 2019 summer seminar hosted by the Helsinki Faculty of Law's Erik Castrén Institute, entitled "International Environmental Law: Process as Decline," and focused in part on the Paris Agreement: available at: https://www.helsinki.fi/en/erik-castren-institute/helsinki-summer-seminar-on-international-law-2019.

respects[25]. The "Paris Rulebook", adopted in December 2018 at Katowice, provides an additional set of COP decisions, designed to flesh out obligations and other terms contained in the Paris Agreement[26]. However, the perhaps most experimental aspect of the Paris package is that, instead of enshrining binding emission reduction obligations, it relies on parties' non-legally binding nationally determined contributions (NDCs). Since they are nationally determined, the NDCs are not part of the agreement but simply recorded in a public registry, accessible at the UNFCCC website[27]. Furthermore, since the NDCs are not part of the Paris Agreement, they can be adjusted unilaterally by each Party, with the proviso that a new NDC must represent a "progression" over the preceding one[28]. Thus, although each party is free to decide how to mitigate its greenhouse gas emissions, its successive NDCs must be compatible with the Paris Agreement's objective to keep global temperature increases to less than 2 degrees (ideally 1.5 degrees) above pre-industrial levels[29], and must meet the agreement's normative expectations that NDCs reflect a party's highest possible ambition, and become increasingly more ambitious over time[30].

In short, the Paris Agreement represents a new approach to making international environmental law. It marks a shift from the Kyoto Protocol's more common "top-down" approach (of enshrining negotiated, binding emission reduction targets) to a "bottom-

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[25] See Paris Agreement, note 22; and UNFCCC, COP, *Adoption of the Paris Agreement*, Decision 1/CP.21, UN Doc. FCCC/CP/2015/10/Add. 1 (29 January 2016), p. 2 (hereinafter *Adoption of the Paris Agreement*), available at: https://undocs.org/en/FCCC/CP/2015/10/Add.1.

[26] The full set of decisions is available at https://unfccc.int/process-and-meetings/the-paris-agreement/paris-agreement-work-programme/katowice-climate-package.

[27] See Paris Agreement, note 22, Art. 4.12.; and UNFCCC, NDC Registry (Interim); available at https://www4.unfccc.int/sites/NDCStaging/Pages/Home.aspx.

[28] *Ibid.*, Art. 4.3.

[29] *Ibid*., Art. 3.

[30] *Ibid.*, Art. 4.3.

up" architecture, built around non-binding national pledges[31]. The very point of the Paris Agreement is to galvanize and guide – rather than ordain – genuinely global, long-term climate action. To these ends, the agreement relies upon non-binding substantive parameters to frame an obligation to undertake domestic mitigation measures, along with binding procedural obligations[32], and a set of transparency and performance review procedures[33].

It is too soon to know whether the Paris Agreement's blend of binding and non-binding, and procedural and substantive, elements will succeed. Similarly, it is too soon to know whether the agreement is indicative of broader trend in treaty-based international environmental law, or whether it represents simply a unique approach to a unique problem. It does seem safe to say, however, that a more 'traditional', formally binding, approach is neither more likely to succeed nor more likely to be more resilient in the face of withdrawal by key states.

In conclusion, the post-modern era in international environmental law has revealed two apparently contradictory trends. One involves the increasing reliance on an established principle of customary international law that dates from the 'traditional era', and at least a tentative upswing in recourse to traditional judicial dispute settlement. The other involves increasing experimentation with formal and informal approaches to shaping treaty-based commitment regimes. What the two developments have in common is, first, that both ultimately are contextual in their approach – be it through the harm prevention rule's due diligence standard or the Paris Agreement's NDC approach – and, second, that both intertwine substantive and procedural requirements to promote harm prevention. Perhaps these are the very features that make both approaches quintessentially post-modern.

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[31] See Gabriela Iacobuta, *et al.*, "National climate change mitigation legislation, strategy and targets: a global update", *Climate Policy*, Vol. 18 (2018), p. 1114 at p. 1115.
[32] See Paris Agreement, note 22, Arts. 4.2, 4.13.
[33] See *Ibid.*, Arts. 13-15.

LANDSCAPE PROTECTION IN INTERNATIONAL LAW

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We live in a world where the Earth's natural capital, such as water, soil, and biological diversity, which is a part of our cultural heritage, are under constantly growing threat. It is mostly caused by the general ignorance of the value of the existing natural resources and traditional knowledge, and by their physical depletion. Protection of nature and landscape is an essential part of environmental protection because a human being cannot exist without nature.

Landscape is one of the most important objects that the states protect and preserve for the benefit of present and future generations. States have the responsibility towards the international community for protecting landscapes of special value, they are also responsible before their own citizens for providing access to information and participation in making decisions regarding the use and preservation of landscapes. If we perceive the landscape as a living space and not as a separate abstract landscape, it has a number of legal implications in the areas of human rights, democracy and access to justice.

Comparing the development of environmental protection between countries, we can identify several stages related to the international landscape protection.

The first period is associated with the conference in Bern (Switzerland) which was held in 1913 and was devoted to international nature conservation in general. It was the period when the

foundation of cooperation between countries in the field of nature conservation was laid[1]. This period lasted from 1913 until 1961.

During the second period, the landscape was enshrined in the legal acts as one of the objects of cultural heritage. In the period from 1962 to 1971, the UNESCO document Recommendation concerning the Safeguarding of Beauty and Character of Landscapes and Sites (1962)[2] was adopted. According to this document, human is a part of nature and their main task is to preserve its beauty as a heritage for future generations. Moreover, modern development has accelerated the process of aggravating the position of nature, and this must be stopped.

Legal interpretation of the concept of landscape started to change by the end of the 20th century. In the 1990s, the concept of "world heritage" under the 1972 UNESCO World Heritage Convention was expanded to include "cultural landscapes"[3].

The Guidelines for Treatment of Cultural Landscapes define a cultural landscape as a geographic area (including both cultural and natural resources) that is associated with a historic event, activity or person, or exhibiting any other cultural or aesthetic values[4].

This research directly addresses the problem of the relationship between human being and nature in the context of sustainable

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[1] Abashidze A.Kh., Solntsev A.M. The first international environmental conference - the Conference on International Conservation of Nature (Bern, 1913) // Environmental Law. – M: Lawyer, 2006, №4. - p. 2-4 (Абашидзе А.Х., Солнцев А.М. Первая международная экологическая конференция – Конференция по международной охране природы (Берн, 1913 г.) // Экологическое право. – М: Юрист, 2006, № 4. – С. 2-4).

[2] Recommendation concerning the Safeguarding of Beauty and Character of Landscapes and Sites, UNESCO, 11 December 1962. URL: http://portal.unesco.org/en/ev.php-URL_ID=13067&URL_DO=DO_TOPIC&URL_SECTION=201.html (accessed 10 January 2019).

[3] The World Heritage Convention, UNESCO, 16 November 1972. URL: https://whc.unesco.org/en/convention/ (accessed 05 December 2018).

[4] Save Our Heritage Organization (SOHO). URL: http://www.sohosandiego.org/reflections/2007-1/cultural.htm.

development and implementation of The Sustainable Development Goals (SDGs)[5].

In 2015, the UN adopted the Sustainable Development Agenda until 2030. The program consists of 17 goals aimed at eradicating poverty, conserving the resources of the planet and ensuring well-being. Each goal contains a series of indicators that must be achieved within 15 years. Their achievement requires joint efforts by governments, civil society and business.

According to the UN, sustainable development means that the development of the current generation does not go against the interests of future generations.

SDG 15 aimed at improving the management of forests, combating desertification, reversing land degradation and preserving biodiversity illustrates how the SDGs intend to integrate environmental, economic and social issues. There is a monitoring system that includes 12 goals and 14 indicators.

Landscape restoration will be a key element in achieving SDG 15 with one-third of all land moderately or severely degraded. The World Resources Institute estimates there are 2 billion hectares of deforested and degraded lands with potential for landscape restoration: 20 per cent through forest restoration and 80 per cent through 'mosaic' restoration which involves integrating forests with smallholder agriculture, agroforestry and other land uses.

To achieve Goal 15, indicators of sustainable development have been created that are intended for information and statistical monitoring of the achievement of SDGs. For example, proper use and management (15.1, 15.2), active restoration, preservation and protection (15.3, 15.4, 15.5), fair and equitable sharing of benefits (15.6), stopping poaching and trafficking in flora and fauna (15.7),

[5] The Sustainable Development Goals, UN, 1 January 2016. URL: https://www.un.org/sustainabledevelopment/sustainable-development-goals/ (accessed 26 September 2018).

preventing and reducing the impact of alien species (15.8); integrating ecosystem values and biodiversity into planning processes (15.9)[6].

At the first regional conference in Florence exclusively dedicated to the landscape, the European Landscape Convention[7] was opened for signature on October 20, 2000 which aroused great interest among the Council of Europe member states. The Convention reconfirms the universal principles of the Rio Declaration and reflects the Council of Europe's main objectives: democracy, extension of human rights to take in the environment, and helping solve the main problems of contemporary European society. It also gives practical effect to the joint Council of Europe-United Nations Environment Program "Pan-European Strategy for Biological and Landscape Diversity", which was approved by the ministers of environment of 55 European countries in Sofia on 25 October 1995.

In accordance with the Preamble of the European Landscape Convention the landscape

- «has an important public interest role in the cultural, ecological, environmental and social fields, and constitutes a resource favorable to economic activity and whose protection, management and planning can contribute to job creation; ... contributes to the formation of local cultures and ... is a basic component of the European natural and cultural heritage, contributing to human well-being and consolidation of the European identity;

- is an important part of the quality of life for people everywhere: in urban areas and in the countryside, in degraded areas as well as in areas of high quality, in areas recognized as being of outstanding beauty as well as everyday areas;

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[6] UN (2017) Resolution adopted by the General Assembly on 6 July 2017. A/RES/71/313. URL: https://undocs.org/en/A/RES/71/313 (accessed 02 February 2019).

[7] European Landscape Convention, The Council of Europe, 20.10.2000. URL: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/176 (accessed 10 September 2018).

- is a key element of individual and social well-being and ... its protection, management and planning entail rights and responsibilities for everyone».

One of the most important contributions of the European Landscape Convention is, without doubt, that landscape planning, management and protection issues, as part of regional planning, must be seen holistically, without separating the different dimensions of the landscape, be they economic, social or ecological.

The European Landscape Convention has introduced a Europe-wide concept centering on the quality of landscape protection, management and planning and covering the entire territory, not just outstanding landscapes. Through its ground-breaking approach and its broader scope, it complements the Council of Europe's and UNESCO's heritage conventions.

What, according to the Convention, does the term "landscape" cover?

According to Article 1 of the Convention, "landscape" means an area, as perceived by people, whose character is the result of the action and interaction of natural and/or human factors. "Landscape policy" reflects the public authorities' awareness of the need to frame and implement a policy on landscape. The public is encouraged to take an active part in its protection, conserving and maintaining the heritage value of a particular landscape, in its management, helping to steer changes brought about by economic, social or environmental necessity, and in its planning, particularly for those areas most radically affected by change, such as peri-urban, industrial and coastal areas.

Landscape is not a matter for individual states alone. It also needs to be considered in international policies and programs.

Co-operation between Parties is designed to enhance the effectiveness of the measures taken in each state, provide mutual technical and scientific assistance and facilitate exchanges of landscape specialists and the sharing of information on all matters relating to the Convention.

The Convention also established a Council of Europe Landscape Award, which the Council's Committee of Ministers can award to a local or regional authority, or a group of such authorities (in one country or on a transboundary basis) or a non-governmental organization that has instituted a policy or measures to protect, manage and/or develop their landscape, which have proved lastingly effective and can thus serve as an example to other territorial authorities in Europe.

One of the major innovations of the European Landscape Convention is the definition of "landscape quality objectives", meaning, for a specific landscape, the formulation by the competent authorities of the aspirations of the public with regard to the landscape features of their surroundings. No longer the preserve of experts, landscape is now a policy area in its own right.

Management in line with landscape quality objectives also calls for education and training, including training for specialists, elected representatives and the technical staff of local, regional and national authorities, and school and university courses dealing with values attached to the landscape and its protection, management and planning.

The Convention sets great store by identifying and assessing landscapes through field research by professionals working in conjunction with local inhabitants. Each landscape forms a blend of components and structures: types of territories, social perceptions and ever-changing natural, social and economic forces. Once this identification work has been completed and the landscape quality objectives set, the landscape can be protected, managed or developed.

It has been possible to define one problem. Russia, as a member of the Council of Europe, has not yet signed and ratified the Convention. The current Russian legislation does not contain sufficient legal norms to ensure proper protection. Certain legal norms that consider aesthetic value as one of the reasons for the protection of landscapes are contained in the Federal Law "On Environmental Protection", the Land Code of the Russian Federation and other regulatory legal acts. Landscape definition at the legislative level differs from the conventional one, and does not affect the cultural aspect. In accordance with the Federal Law No. 7 "On Environmental Protection" dated January 10, 2002, natural landscape is understood as "a territory that has not been altered as a result of economic and other activities and is characterized by a combination of certain types of terrain, soil, vegetation formed in uniform climatic conditions"[8].

Consequently, in order to properly protect the landscapes, Russia needs to implement this document and amend the current legislation.

[8] Art. 1 of Federal Law dated January 10, 2002 No. 7-FZ "On Environmental Protection". URL: http://www.consultant.ru/document/cons_doc_LAW_34823/ (accessed 15 September 2018).

PLASTIC POLLUTION: A CENTENARY VICTIM OF MINUTE USE

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Today I would like to touch upon the problem, which is becoming more dangerous every minute, and therefore more urgent – plastic pollution. Modern society has achieved great heights in scientific and technical field. However, every development has its reverse side, entailing negative consequences. At this stage, humanity has come to a number of problems that it will have to solve for centuries. One of these problems is plastic: its use, as well as the result of its decomposition.

Plastic causes serious damage to the environment, from its production to disposal. Factories producing plastic products emit up to 400 million tons of carbon dioxide per year and about 800 species of animals today are threatened with extinction due to eating and poisoning by plastic. Disposable bags clog the sewage systems of cities and create flood threats, plastic garbage clogs the banks and coastal areas intended for recreation, causing damage to the tourism industry.

Decomposing and falling into the ground plastic breaks down into small particles and begins to emit into the environment chemicals added to them during production (chlorine, toxic anti-inflammatories and others). Getting into groundwater microgranules of plastic seep into groundwater, contaminating natural water resources with chemicals. All these phenomena lead to the degradation of the planet's ecosystems for many centuries.

Drawing attention to the marine environment, I would like to note that according to UN environmentalists, every year about 13 million tons of plastic waste gets into the ocean, and by 2050 the mass of waste will be higher than the total mass of fish. Experts believe that pollution caused by the dumping of waste and debris

into the sea is a major cause of degradation of both the coastal and coastal strip in all regions of the world. The most problematic place in this area is the Large Pacific garbage spot, in which this phenomenon occurs due to the North ocean current system.

Also, scientists have proved that the stomachs of 90% of seabirds are filled with plastic, because the garbage that did not decompose under the influence of sunlight and leave persistent toxic substances in the water attracts animals that either die from suffocation or accumulate in their stomachs indigestible plastic, which further leads to their death as well. One of the most striking examples is the death of a black Dolphin on the eve of world environment day in southern Thailand. The animal washed ashore at the end of May, and experts tried to help him. A few days later, the Dolphin vomited five plastic bags, after which he died. During the autopsy, 80 plastic bags weighing eight kilograms were found in his stomach. They did not allow the Dolphin to eat normal food.

The death of marine animals is no less important, but not the only problem related to health and life – Spanish ecologists have found microplastics in two dozen samples of table salt. Most often they found in them polyethylene terephthalate, a polymer used in the production of plastic bottles. Another international team of scientists found in salt and other types of plastic, such as polyethylene and polypropylene. In other words, plastic is now absolutely everywhere, which causes genuine concern for the state of the Earth and its inhabitants.

However, the problem is compounded by the long absence of effective regulatory and control mechanisms in all States, which was stressed by experts of the UN Environment Programme (UNEP), who recognize that the problem has been exacerbated by prolonged inaction. At this stage, the most stringent law on the use, sale, production and import of packages exists in Kenya, it provides for a minimum fine for violation of the ban – 19 thousand dollars, the maximum – 38 thousand dollars, the law also provides for a penalty of imprisonment up to four years.

Only in 2015, the UN General Assembly adopted the Sustainable Development Agenda, according to which by 2025 it is necessary "to ensure the prevention and significant reduction of any pollution of the marine environment, including as a result of land-based activities, including marine debris pollution"[1]. However, the realization of this goal seems very difficult, given that at the national level, waste management systems and relevant legislation vary greatly.

Initially, international law did not consider the issue of plastic pollution as such, that is, plastic was included in the category of all other waste that can be dangerous to marine ecosystems. For example, back in 1982, the UN Convention on the Law of the Sea obliged States to develop a legislative framework for the prevention, reduction and control of pollution of the marine environment as a result of the disposal of waste from structures or ships at sea[2]. However, according to the Convention, a state may authorize the dumping of wastes into the sea within its territory if this has been previously agreed with other countries that may be affected by such activities. But given that pollution of the world's oceans by waste, and especially plastic, is very difficult to control, and to determine the source of this pollution, the measures provided by the Convention to address this problem, it seems ineffective.

Already, many countries of the European Union are making efforts to prevent and minimize the formation of plastic waste, including by increasing the durability and further repair, restoration and re-manufacture of plastic products. Try to ensure environmentally sound management of plastic waste by improving the collection, treatment and processing of plastic waste, improving or creating markets for recycled plastic waste materials, improving other ways of recovery and reducing the loss of plastic waste, including

[1] Resolution adopted by the General Assembly on 25 September 2015 “Transforming our world: the 2030 Agenda for Sustainable Development” (Goal 14).
[2] United Nations Convention on the Law of the Sea 1982 (st. 194).

plastic microparticles, in the transboundary movement of waste and waste disposal facilities.

Looking at more modern international instruments, in addition to the above-mentioned sustainable development Agenda of 2015, a Draft resolution on marine debris and plastic microparticles has also been prepared within the framework of the United Nations. A special working group was created to deal with the study of obstacles to dealing with marine debris and microplastics, the definition of response, as well as various economic, social and environmental costs of the selected response strategies. At the last meeting of the working group in May 2018 the important role of both public and private initiatives in pollution control was stressed.

However, private initiatives in this area are not uncommon. For example, in 2017, an Interprofessional agreement was signed to prevent the release of microplastics into the water environment during the washing of synthetic fabrics. In addition, the world's major trade brands also make environmentally friendly decisions: McDonald's plans to abandon plastic tubes in its restaurants in Ireland and the UK until 2019, and IKEA is going to withdraw from sale disposable plastic in its stores and restaurants by 2020. Such initiatives are very important, as microplastics and larger disposable plastics enter rivers and through them into the ocean. The more large retailers give up plastic, the less plastic eventually gets into the ocean.

Within the framework of the UN, there are many important projects engaged in the fight against plastic, one of them is the world campaign against marine debris, which was launched in Bali, where the World Ocean Summit takes place. It is aimed at the government to pursue a policy of reducing the use of plastic, plastic packaging, changing the requirements for industrial products. One of the proposals is to prohibit the use of cellophane bags or to impose high taxes on goods in plastic packages. Experts warn that without such measures, the effects of marine pollution will be irreversible. Also in the framework of the fight against plastic pollution, many States are trying to invent an analogue of plastic; the

main solutions: to make plastic dishes from avocado bones, to create a waste-free and sustainable material that can compete with conventional plastics, as it will be durable and durable, but much easier to process.

Mankind for many years the development of "messed up" the planet, but fortunately, with time are aware of the scale of the disaster and trying all sorts of ways to stop it.

In order to change the behaviour of individual and professional consumers and in waste prevention strategies, public awareness, education and exchange of information on this issue play an important role.

Given the scope of the Basel Convention partnership on plastic waste and the work of the United Nations Environment Programme and other agencies to maximize impact, measures were proposed to raise public awareness, educate and exchange information at the national level on plastic waste and the importance of improving its management, including through the promotion of behavioural changes to prevent their formation and to ensure their collection and processing to address marine plastic debris and plastic microparticles.

It should be understood that not only government is responsible for providing environmentally sound waste disposal solutions to the public, but changes in the behaviour of individual and professional consumers are also important in addressing this problem.

PROBLEMS OF LEGAL REGULATION OF COMPENSATION OF LAWFUL ENVIRONMENTAL DAMAGE

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Compensation for damage to the environment is one of the most important problems of environmental law. The problem of compensation for environmental damage is the subject of long-term scientific research in Russian and foreign legal science. Unfortunately, even as a result of numerous legal studies, a unified approach to the understanding of the legal institution of compensation for damage has not yet been developed. Much less attention in the legislation and legal practice is paid to such kind of damage to the environment as lawful environmental damage. Moreover, there is a point of view that lawful damage in the field of environmental protection does not exist, and any damage to the environment implies a violation of environmental requirements. At the same time, the question of the need to formulate such a legal structure as "lawful damage to the environment" is raised not only by legal scientists, but also by practitioners, representatives of other branches of scientific knowledge. This article discusses the concept of lawful damage to the environment, its difference from damage to the environment caused by the commitment of an environmental offence.

The category of "environmental damage" in legal literature is traditionally defined as a result of violations of legislation in the field of environmental protection. In legal literature, compensation for environmental damage is traditionally recognized as a form of legal liability for an environmental offence, along with criminal, administrative and disciplinary liability. As a result, the

elements of a civil offence include details inherent to any elements of an environmental offence: an unlawful act (act or omission); the fact of causing damage to the environment; the cause-and-effect connection between the act and causing damage; the fault of the perpetrator.

At the same time from the system analysis of the term "damage to the environment" in the Federal law of 10.01.2002 № 7-FZ "On environmental protection", it can be concluded that in the Federal legislation the damage caused to the environment is not a consequence of solely the commitment of an environmental offence.

A systematic analysis of the terms used in the Federal law "On environmental protection" ("negative impact", "environmental pollution", "objects that have a negative impact on the environment"), Chapter XIV allows us to conclude that negative activities within the established standards cannot be qualified as an offence and cannot entail legal liability. However, any negative change in the environment is recognized as environmental damage. Are economic entities obliged to compensate for such environmental damage? And if so, to which extent?

In legal literature in this regard, it is noted that environmental legislation allows for a negative impact on the environment within the established standards. Compliance with these standards is a sign of legitimate behavior. In accordance with the environmental legislation, lawful actions do not entail the obligation of compensation for damage caused to the health and property of citizens[1].

According to item 3 of Art. 1064 of the Civil code of the Russian Federation, the damage caused by lawful actions is sub-

[1] Androsov, M.V., Bazykin A.L., Bortnik, I.Y. Brinchuk M.M., Mete N.D., Did T.A., Dubovik O.L., Zozulya V.V., Kalinchenko, M.M., Kalinichenko, V.T., Kudelkin N., Kuznetsova O.N., G.A. Misnik, T.V. Rednikova, Semenikhin V.A., Stepanenko V.S., Colten L.N. The commentary to the Federal law of 10 January 2002 № 7-FZ "On environmental protection" (ed. by D. Yu.N., Professor O. L. Dubovik). – Specially for GARANT system, 2016.

ject to compensation in the cases provided by the law. According to item 2 of Art. 77 of the Federal law "On environmental protection", damage to environment inflicted by a legal entity or an individual entrepreneur including the activity covered by a positive state ecological examination statement, including the activity on withdrawal of components of natural environment is subject to compensation by the customer and (or) legal entity or the individual entrepreneur.

This provision, in our opinion, applies to cases of compensation for lawful environmental damage, in contrast to item 1 of this article, which establishes the obligation of full compensation for environmental damage. However, we should note an unfortunate error of the Federal legislator, who has put this provision in the Chapter on liability for violation of environmental legislation and has not clearly expressed in the wording of the law the purpose of adoption and the range of regulated public relations.

Thus, the Federal legislation does not contain a clear and unambiguous regulation in respect of compensation for lawful damage to the environment, but does not reject such a possibility. In the legal literature, lawful damage to the environment is included in the composition of environmental damage by certain scientists. Prof. Zhavoronkova proposes to include the following types of environmental damage in the complex concept of "environmental damage":

- damage caused to the environment as a result of its pollution;
- damage caused to individual components of the natural environment, compensated in accordance with the approved fees and methods of compensation;
- damage caused to health and property of citizens as a result of violation of the legislation in the field of environmental protection;
- past (accumulated) environmental damage;

- damage to the environment arising from the lawful actions of the subject of economic activity (having an non-delictual character)[2].

In connection with the above, the question arises about the ratio of lawful environmental damage and environmental damage caused as a result of the offence. In this regard, D.S. Velieva indicates that Art. 77 of the Federal law "On environmental protection" establishes the principle of full compensation for damage caused by environmental offences, which means that compensation for environmental damage is possible only in the order of liability for environmental offence and does not include a mechanism for compensation for damage caused by lawful activities, i.e. pollution within the limits of standards[3].

It is impossible not to agree with this conclusion, as, according to Art. 42 of the Constitution of the Russian Federation, everyone is guaranteed the right to compensation for the damage caused to his health or property by an environmental offence.

It should be noted that lawful environmental damage, as a kind of environmental damage in general, is allocated in foreign legislation. L.I. Broslavsky notes that environmental damage can occur: first, as a result of non-compliance or violation of legislative and other normative acts regulating production, economic and other activities, including regulatory and technical acts that reinforce requirements for the quality of objects (components) of the environment; secondly, as a result of lawful actions of the economic entity and (or) the natural user[4].

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[2] Zhavoronkova N.G. Compensation for environmental damage: the legislative innovations // Journal "Lex Russica". No. 8. 2016. P. 130-140.

[3] Veliyeva D. S. system of constitutional environmental rights and obligations in the Russian Federation. – Especially for the GARANT system, 2011.

[4] Broslavskiy L. I. Compensation for environmental damage in the US / Legal problems of compensation of damage caused to the environment: proceedings of the International scientific-practical conference (Moscow state University of geodesy SISP, 23 March 2017) / ed. edited by S. A. Bogolyubov, N.R. Kamynina, M.V. Ponomarev. – Moscow: MIIGAiK, 2017. P. 60.

Let's try to distinguish the commonalities and differences between lawful environmental damage and environmental damage caused by offence. These types of environmental damage combine the actual result of lawful and unlawful activities: the fact of causing environmental damage and the need for its compensation, as one of the basic principles of environmental protection in the Federal law "On environmental protection". The amount of lawful and unlawful environmental damage must be justified and determined.

Let us now turn to the characterization of the differences between lawful and environmental damage resulting from an unlawful act. First of all, the difference lies in the legal qualification of the action (inaction) that led to environmental damage. Unlawful environmental damage is caused by the commitment of an offence (crime or misdemeanor). Lawful environmental damage is a consequence of the implementation of the planned or current economic activities carried out in a normal manner, in compliance with established standards and environmental restrictions.

As a result, causing "undue" environmental damage entails the involvement of legal liability, while the fact of causing lawful environmental damage does not entail imposing legal liability on the company.

For the assessment of most types of unlawful environmental damage, the state has approved special fees or methods, and even though they are imperfect, they allow for an approximate assessment of environmental damage. For the assessment of lawful environmental damage, with a number of exceptions, the relevant methods are not developed at all, therefore, the costs for its compensation can only be assessed on the actual costs for the restoration of the environment provided for by the project of restoration of the disturbed natural object.

Environmental legislation is based on the principle of full compensation for unlawful environmental damage. According to item 1 of Art. 77 of the Federal law "On environmental protection", the legal entities and physical persons which caused dam-

age to environment as a result of its pollution, exhaustion, damage, destruction, irrational use of natural resources, degradation and deterioration of natural ecological systems, natural complexes and natural landscapes and other violation of the legislation in the field of environmental protection are obliged to compensate for it in full according to the legislation. In this case, actual caused damage, lost profits, as well as moral damage caused to citizens is subject to compensation[5].

With regard to lawful environmental damage, the principle of full compensation for environmental damage has not been established. Moreover, as already mentioned above, compensation for damage caused to human life and health, in the case of lawful environmental damage, is not provided for by the current legislation. In connection with the above, when it comes to compensation for lawful damage to the environment, in can only be a question of compensation for actually caused environmental damage.

Environmental legislation establishes the offender's obligation to compensate for the unlawful damage to the environment in kind or in cash. The procedure for the compensation of such environmental damage needs to be improved but allows for efforts to compensate it at the present time.

In the current legislation, the mechanism of compensation for lawful environmental damage, with a number of exceptions, is not regulated at all. In particular, there is no procedure for fixing the fact of causing such damage, since there are no grounds for carrying out measures for state environmental supervision in the absence of a violation of mandatory requirements.

The legal literature provides the following example of lawful environmental damage to be compensated: lawful damage caused by the military forces during exercises, maneuvers and

[5] Vukolova N.V. Problems of compensation for moral damage caused by environmental crimes // Lawyer. 2015. № 7.

other activities of military formations in peacetime[6]. However, the legislation does not provide for the procedure for fixing such damage, the procedure for filing claims for its compensation. As in the given example, since the Ministry of Defense of the Russian Federation is not the violator of the current legislation, to the extent established by the legislation procedures of compensation of environmental damage for the commitment of an environmental offence, are not applicable to it.

Another significant difference between lawful and unlawful environmental damage is the ratio of the fee for a negative impact on the environment. The previous wording of article 16 of the Federal law "On environmental protection" (item 4) revealed that the introduction of charges for negative impact does not exempt the subjects of economic and other activities from the implementation of measures for the protection of the environment and compensation of damage to the environment. However, the Federal law of 29.12.2015 No. 404-FZ "On amendments to the Federal law "On environmental protection" and certain legislative acts of the Russian Federation" excluded this legislative requirement.

In our opinion, this decision is controversial, since the infliction of unlawful environmental damage should not take into account the payments for negative impact made by the nature user. Payment for the negative impact on the environment within the standard or temporarily agreed limit, as an element of the economic mechanism of environmental protection, is aimed at compensating for the negative consequences of the lawful economic activity and should not be correlated with environmental damage caused as a result of an environmental offence.

In return, the legal damage to the environment should take into account the amount of payment for the negative impact on the environment. In other words, the lawful damage to the envi-

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[6] Scientific-practical commentary to the Federal law "On environmental protection" (article by article) (edited by doctor of law Anisimov A.P.). – Moscow: Business yard, 2010.

ronment shall be compensated in the part exceeding the amount of the payment for the negative impact on the environment paid by the nature resource user. The question of the payment timeframes, which also must be considered in the reimbursement of lawful damage to the environment, still remains debatable.

In the implementation of large-scale projects of economic activity, environmental damage is caused, which is manifested not only in environmental pollution as a result of emissions, discharges, waste disposal, but also as a result of the death of animals and plants, in reduction of areas and deterioration of the quality of habitats, deterioration of the food supply and other negative consequences. Unfortunately, it is impossible to completely eliminate the negative impact on wildlife, especially in the implementation of large investment projects. Therefore, it is necessary to implement preventive and ongoing measures at all stages of the project aimed at the preservation and restoration of populations of wildlife and flora species diversity.

It should be recognized that in the environmental legislation the issue of compensation for damage to objects of the fauna is regulated mainly from the point of view of eliminating the consequences of committed environmental offences. Thus, according to Art. 56 of the Federal law of 24.04.1995 № 52-FZ "On fauna" there has been established the responsibility of legal entities and citizens for damage caused to objects of the fauna and their habitats. Legal entities and citizens who have caused damage to objects of the animal world and their habitat, compensate for the damage voluntarily or by a court decision or arbitration court in accordance with the taxes and methods of calculation of damage to the animal world, and in their absence - at the actual cost of compensation for damage caused to objects of the animal world and their habitat, taking into account the losses incurred, including lost profits.

According to Art. 53 of the Federal law 20.12.2004 No. 166-FZ "About fishery and preservation of water biological resources", compensation of the damage caused to water bioresources is performed on a voluntary basis or on the basis of the

judgment according to the taxes approved in accordance with the established procedure and methods of calculation of the size of the damage caused to water bioresources, and in the absence of those, proceeding from the cost restoration of water bioresources.

In our opinion, these norms, on the basis of their content, should not be applied to the relations in which in the exercise of authorized, legitimate economic activities, e.g. construction of a road, damage is caused to the environment, especially flora and fauna. Meanwhile, in practice, to assess the damage to the objects of flora and fauna it is necessary to use taxes and methods, which assess the environmental damage caused by violations of the law. Thus, persons engaged in lawful activities are automatically equated with violators of the law.

The analysis of the legislation on flora and fauna allows us to conclude that it does not clearly distinguish cases of damage upon the implementation of legitimate activities and as a result of violations of the current legislation. Almost all compensation methods and rates for damage to objects of flora and fauna provide for compensation for damage caused as a result of an offence[7]. As a result, any planned economic activity, from the point of view of the legislator, is considered as illegal and entails imposing the appropriate type of legal liability.

First of all, the above problem is manifested in the implementation of the procedure for assessing the impact of planned economic and other activities on the environment in the Russian Federation (EIA) in accordance with the order of the State Committee of Ecology of Russia from 16.05.2000 № 372, in which the impact of the planned activities is provided, including the objects of flora and

[7] See, for example, the order of the Ministry of natural resources of the Russian Federation of 28.04.2008 № 107 "On approval of the Methodology for calculating the amount of harm caused to objects of fauna listed in the Red book of the Russian Federation, as well as other objects of fauna not related to hunting and fishing and their habitat"; the Decree of the Government of the Russian Federation of 08.05.2007 № 273 "On calculating the amount of harm caused to forests due to violation of forest legislation".

fauna. In addition, similar difficulties arise in the preparation of project documentation for the construction and reconstruction of capital construction projects, since the RF Government decree of 16.02.2008 № 87 "On the composition of sections of project documentation and requirements for their contents" in section 7 "environmental protection measures" provides for the preparation of a list and calculation of costs for the implementation of environmental protection measures and compensation payments.

However, the current legislation practically does not provide for special fees and methods for calculating compensation payments. As a result, the cost of compensatory measures in the planning of lawful activities should be assessed on the basis of taxes and methods provided for violators of the law. Thus, law-abiding users of natural resources are equated to violators of the law.

Therefore, it seems appropriate task to amend the environmental legislation, legislation on flora and fauna in terms of differentiation of approaches to the definition of lawful and unlawful environmental damage, which will distinguish the consequences of actions committed by the violator of the legislation from the lawful actions of economic entities. On the basis of these changes, it is advisable to develop special fees and methods for assessing the legal damage caused to objects of flora and fauna caused by the implementation of legitimate activities.

In the legal literature with regard to the protection of aquatic biological resources, it is noted that special legal regulation of compensation for lawful environmental damage is necessary[8].

[8] Belousov A.N., Voronkov V.B. Some features of the assessment and redress of lawful environmental damage / Constitutional and legal bases of responsibility in the field of ecology: materials of the International scientific-practical conference "the Constitutional principles of legal regulation of environmental relations: from ideas to implementation (the 25th anniversary of the Constitution of the Russian Federation" (MIIGAiK, December 20, 2018) and "the Ratio of types of legal liability in environmental sphere" (SISP, MIIGAiK, SISP, 14 March 2019) / ed. edited by S.A. Bogolyubov, N. R. Kamynina, M.V. Ponomarev, N.V. Kichigin-M.: MIIGAiK, 2019. P. 267-270.

It seems that the priority in the compensation of damage to animals and plants should be given to natural forms of compensation before compensation in monetary terms. Unfortunately, the current legislation has the opposite situation: on the contrary, priority is given to the monetary form of compensation for environmental damage, calculated on the basis of taxes and methods.

One of the reasons for this situation is that in addition to the absence of appropriate taxes and methods of compensation for lawful environmental damage, including damage from the planned economic activity, there is no regulation of the order of environmental protection measures designed to minimize damage or compensate it in kind at the stages of placement, design, construction of economic objects. This problem is particularly relevant for the protection of wildlife (with the exception of aquatic biological resources) and flora, including red book species of plants and animals.

For instance, in the case of red book species of animals and plants, there may be situations in which it is not possible to change design decisions, for example, the route of a linear object or the location of an area object, due to technical, economic and other reasons or natural conditions. At the same time, in the course of engineering and environmental surveys or studies in the framework of EIA, it may become clear that the populations of red book animals or plants will be affected as a result of the implementation of project decisions. On one hand, the environmental legislation prohibits the encroachment on the red book species, on the other hand, if it is still will be decided to implement the planned economic and other activities, the project of the planned activities must ensure the highest possible level of minimization of negative consequences and environmental damage.

This requires the preparation of a special program of activities that involves, i.a. the capture and transfer of organisms, the relocation of endangered plant species to other places, the search and arrangement of a new undisturbed habitats. Meanwhile, in the legislation any encroachment over the red book spe-

cies is considered as violation of the legislation entailing criminal or administrative liability, and mechanisms of damage minimization are practically absent.

Environmental legislation provides for the possibility in exceptional cases of obtaining permits for the extraction of red book species of fauna or flora[9]. However, there are no methods or guidelines that describe in detail the procedure, the sequence of such activities, providing for the preparation of the necessary documentation and reporting, the participation of environmental authorities and the public in this procedure.

This gap in the legislation was particularly evident during the preparations for the Olympic and Paralympic games in Sochi in 2014. Apparently, in order to overcome the existing legal gap, the order of the Ministry of natural resources of Russia of 28.04.2010 № 10-p approved the methodology of rehabilitation of resettled plants, animals exposed to the danger of direct negative impact in the mountainous and flat part of the territory of the XXII Olympic winter games and XI Paralympic winter games 2014 in Sochi.

The methodology defines the general principles and methods of rehabilitation of relocated plants, endangered animals, and of direct negative impact in the mountainous and flat part of the territory of the XXII Olympic winter games and XI Paralympic winter games 2014 in Sochi. The aim of the methodology is to

[9] In relation to the red book objects of fauna the procedure is regulated by the government of the Russian Federation from 06.01.1997 № 13 "On approval of the rules of extraction of objects of fauna belonging to the species listed in the Red book of the Russian Federation, except for aquatic biological resources" and the Order of the Ministry of natural resources of Russia from 18.02.2013 № 60 "On approval of the Administrative regulations of the Federal service for supervision of natural resources of the provision of public services for the issuance of permits for the extraction of objects of fauna and flora, listed in the Red book of the Russian Federation"; in relation to the red book water biological resources: Decree of the Government of the Russian Federation of 24.12.2008 № 1017 "On the extraction (catch) of rare and endangered species of aquatic biological resources".

provide scientific support for the resettlement of rare and endangered species of plants and animals exposed to the danger of direct negative impact during the construction of Olympic facilities.

The system of rehabilitation of resettled species, local populations (species) of plants and animals includes several blocks: scientific and practical. The scientific block (program) includes:

- identification of protected species specified for the construction zone;
- identification of limiting factors of protected species;
- development of methods and techniques for species conservation.

The practical block (program) includes the following activities:

- inventory of plant and animal species at risk of direct negative impact in the mountainous and flat part of the territory of the XXII Olympic winter games and XI Paralympic winter games 2014 in Sochi;
- removal of species from habitats;
- collection of reproductive material;
- selection of cites for replanting and relocation of animals;
- translocation;
- reproduction of species outside their natural habitats (ex situ);
- repatriation, reintroduction, rehabilitation;
- comprehensive status monitoring of rehabilitated plant and animal species and disturbed habitats.
- protection of planted plants and resettled animals, protection of the habitats disturbed as a result of negative impact from introduction of adventive species of flora and fauna.

It is unfortunate that the programme was limited and only temporary. In addition, the results of its practical implementation are unclear. Taking into account the relevance of the problem under consideration, it is obvious that there is a need to develop and

approve the regulatory and methodological framework at the Federal level, which applies to any cases of transfer, resettlement of red data book species of flora and fauna.

Examples from law enforcement practice were discussed above. Judicial practice on the compensation of lawful damage to the environment is not numerous. However, a very interesting court decision should be cited that directly addresses the issue of compensation for lawful damage to the environment. The decision of the Supreme Court of the Russian Federation of 29.03.2018 № АКРІ18-3[10] rejected the administrative claim of the joint-stock company "Group Ilim" on the recognition of a number of provisions of the Methodology for calculating the amount of damage caused to hunting resources, approved by the order of the Ministry of natural resources and ecology of the Russian Federation of December 8, 2011 № 948, partially void.

The method determines that it is used to calculate the amount of damage caused to hunting resources, including damage as a result of violation or destruction of the habitat of hunting resources, if due to such violation hunting resources have permanently (or temporarily) left the habitat, which led to their death, a reduction in the number in this territory, decrease in the productivity of their populations, as well as the reproductive function of certain species.

The joint-stock company "Group Ilim" (the Company) addressed to the Supreme Court of the Russian Federation with the administrative claim for recognizing a number of provisions of the Methodology partially void to the extent that they allow bringing the persons performing lawful logging activity to civil liability for the damage caused during such activity to hunting resources, and define rules of calculating the size of damage for this category of cases, stating that the disputed provisions contradict article 1064 of the Civil code of the Russian Federation, articles 77-78 of the Federal law "On environmental protection", ar-

[10] http://legalacts.ru/sud/reshenie-verkhovnogo-suda-rf-ot-29032018-n-akpi18-3/

ticle 56 of the Federal law of 24.04.1995 No. 52-FZ "On fauna", articles 57-58 of the Federal law of 24.07.2009 No. 209-FZ "On hunting and preservation of hunting resources and on amendments to certain legal acts of the Russian Federation" according to which the necessary condition for applying measures of civil liability is illegality of violator actions.

In support of its claims, the administrative plaintiff pointed out that the Company, as a commercial organization engaged in logging activities on the territory of operational forests located in the Irkutsk region, including the territories with the status of public hunting grounds, on the basis of lease agreements of forest plots granted to the Company for a period up to 31 December 2057 for the compensated use and for the implementation of a priority investment project in forest development for the purposes of wood preparation in carrying out lumberjacking of mature and over-mature stands, due to judicial decisions has been brought to civil liability for the damage caused to the hunting resources as a result of economic activities, with the use of the disputed provisions of the Methodology.

The Supreme Court of the Russian Federation refused to satisfy the claim. The court considered that the disputed provisions of the Methodology don't establish the grounds and conditions of civil liability for the damage caused to hunting resources and their habitats, and don't regulate the questions connected with proving the fact of violating current legislation. In the disputed matters there are no provisions allowing establishing causal relationship between actions of the economic entity and the caused damage. The disputed provisions are suitable for the quantification of damage, the infliction of which, as well as the presence of fault of the violator in the application of the Methodology has already been proven.

Thus, this judgment of the Supreme Court of the Russian Federation allows to draw a conclusion that in judicial practice cases of compensation of damage to environment as a result of commitment of an offence and lawful activity are not differenti-

ated. In these cases, the same method of compensation for damage caused to hunting resources is used. It is difficult to agree with this approach in judicial practice.

It should be noted that the legislation on fisheries provides for mechanisms for the participation of nature users in the conservation and restoration of aquatic biological resources. In accordance with Art. 50 of the Federal law "On fisheries and conservation of aquatic biological resources", the Russian Government decree of 29.04.2013 № 380 "On approval of the Regulations on measures for the conservation of aquatic biological resources and their habitat" provides for the measures of biological resources and their habitats conservation. These include measures to eliminate the consequences of the negative impact on the status of biological resources and their habitats through artificial reproduction, acclimatization of biological resources or fishery irrigation of water bodies, including the creation of new, expansion or modernization of existing production facilities that ensure the implementation of such measures.

These measures, including the maintenance and operation of production facilities, are carried out by legal entities and individuals, including individual entrepreneurs, in full until the termination of such impact on biological resources and their habitats at their own expense or with the involvement on a contractual basis of legal entities and individual entrepreneurs engaged in artificial reproduction, acclimatization of biological resources and fishery irrigation of water bodies.

Despite the existing regulatory framework for the implementation of measures for the protection and restoration of aquatic biological resources intended to improve the efficiency of regulation of social relations, it is necessary to approve the forms of relevant agreements, the methods and guidelines to determine the volume and cost of compensation measures.

Experts note the preference of the natural form of executing compensatory measures by fisheries management organizations in the framework of contractual relations with economic

entities in accordance with regional (basin) programs for the conservation of aquatic biological resources[11].

In order to optimize the existing mechanism for the conservation of aquatic biological resources and their habitat, as well as to improve the efficiency of its work, it is proposed to use regional (basin) programs for the conservation of aquatic biological resources as the basis for the management of the compensation measures system[12].

Thus, in the Federal legislation it is necessary to distinguish compensation of the caused damage to environment from compensation of the planned ecological damage which will be caused as a result of the implementation of the corresponding project. It is important to provide in the legislation that the initiators of economic and other activities are obliged to carry out periodic monitoring of the project and fix the environmental damage in the framework of industrial environmental control. The environmental user is obliged to inform the authorized bodies of executive power about the results of this monitoring.

It is obvious that the compensation of lawful environmental damage requires special legal regulation. This aspect of social relations is practically not regulated in the environmental and natural resource law, except for the compensation for damage to water biological resources. At the same time, legal environmental

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[11] Belousov A.N., Voronkov V.B. on natural and monetary forms of compensation for damage caused to aquatic biological resources / Legal problems of compensation for harm caused to the environment: proceedings of the International scientific and practical conference (MIIGAiK, ISSP, March 23, 2017) / resp. edited by S.A. Bogolyubov, N.R. Kamynina, M.V. Ponomarev. – Moscow: MIIGAiK, 2017. P.146.

[12] Voronkov V. B., Tortsev A. M. On the regional (basin) programme for the conservation of aquatic biological resources as the basis for the planning of compensatory measures / Legal problems of compensation for damage caused to the environment: proceedings of the International scientific and practical conference (MIIGAiK, ISSP, March 23, 2017) / resp. edited by S.A. Bogolyubov, N.R. Kamynina, M.V. Ponomarev. – Moscow: MIIGAiK, 2017. S. 152 – 155.

damage is also not a homogeneous legal category. When developing project documentation, the initiator of the activity should assess the future environmental damage that will be caused during the construction (reconstruction) of the facility. In this regard, there are two problems: first, the lack of methods for assessing such damage, so in practice, designers have to take as a basis the methodology for determining the amount of illegal environmental damage. Secondly, the law, with a number of exceptions (compensation for damage to aquatic bioresources), does not provide for the procedure of compensation of damage in the planning of economic activities.

Such a procedure cannot be universal, but must be conditioned by the peculiarities of compensation for environmental damage to a particular natural resource (natural object). A similar situation exists with regard to the lawful environmental damage that may be caused in the course of operation of objects of economic and other activities.

In the context of the study of legal problems of compensation for lawful damage to the environment, it is interesting to analyze the approaches used in the Russian legislation and Directive 2004/35/CE of the European Parliament and of the Council on environmental liability (Environmental Liability Directive) in relation to the issues of compensation for damage to the environment.

It should be noted that the approaches used are different. The legislation of the Russian Federation practically does not regulate the application of preventive measures aimed at preventing damage to the environment. In turn, the Environmental Liability Directive aims at preventing environmental damage (article 5, 8). This approach can be used to improve the legislation of the Russian Federation. It can be assumed that compensation for damage caused to the environment is regulated at the level of national legislation of the member States of the European Union.

The concept of "environmental damage" in Art. 2 of the Environmental Liability Directive is revealed more widely than in

the Russian legislation. Features of ecological damage in relation to the damage to protected species, habitats, water objects, lands are separately revealed. In addition, the environmental damage in the Environmental Liability Directive is widely understood as a professional activity, corresponding the established criteria (article 3). It does not matter whether this activity is a violation of the law or a lawful activity. This approach seems to be fair for the purposes of prevention of damage compensation, but for the purposes of assessment and compensation of damage it is important to distinguish the damage to the environment caused by the offence from the lawful damage to the environment.

Conclusions:

Lawful damage to the environment can be considered as a negative change of the environment and its components as a result of planning or implementing lawful economic activities. The need to identify in the legislation and law enforcement practice the category of "lawful damage to the environment" is vital due to the fact that such a demand objectively exists in law enforcement practice, in particular in the field of protection of aquatic biological resources, and is reflected in judicial practice.

The Federal law "On environmental protection" needs to be improved in terms of regulation of compensation for lawful damage to the environment. It is necessary to correct the name of Chapter XIV of the specified Federal law in such a manner that the requirements for compensation of lawful environmental damage would not enter into conflict with the name of the Chapter establishing types of legal liability for violating the environmental legislation. In this Chapter it is necessary to distinguish cases of causing lawful and unlawful environmental damage and to define features of compensation of lawful damage to the environment.

Recovery of lawful environmental damage from the nature user caused in the course of economic activity is not regulated in the legislation, there are no methodological documents, fees and methods. The calculation of lawful damage to the environ-

ment should be carried out at the stage of the planned activity, in the development of project and other supporting documentation. This is explained by the fact that often the vast amount of the negative impact on the environment is inflicted in the process of construction or reconstruction of the relevant objects of economic activity. As we know, any damage is easier to prevent or minimize than to compensate later. Therefore, the problem of compensation of lawful environmental damage at the stage of planning of economic activity is very relevant and important.

For the purpose of optimal legal regulation, it is necessary to delimit legally the procedures of compensating future lawful environmental damage in the planning or design of objects for economic and other activities and compensation for actual environmental damage that may be caused at the stage of the current operation of the relevant facilities.

When analyzing environmental legislation and Environmental Liability Directive, it should be noted that the approaches used are different. The legislation of the Russian Federation practically does not regulate the application of preventive measures aimed at preventing damage to the environment. In turn, Environmental Liability Directive is aimed, among other things, at preventing damage to the environment (articles 5, 8). This approach can be used to improve the legislation of the Russian Federation.

SOME ASPECTS OF ENVIRONMENT PROTECTION IN THE EAST AFRICAN COMMUNITY

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Introduction

The rising economic activities in the community are contributing to adverse environmental damage for example, packaging and production industries have doubled the use of non-biodegradable plastic bags[1] whose disposal has proved to be a great challenge and a menace in various ways including polluting clean water, causing the risk of life on land and under water, drainage blockages, and street littering as well as lowering the quality of soil hence affecting agriculture among other effects. The damage caused by plastic bags alone has been declared a global disaster. Studies have shown that about 4 billion tones of plastic have been produced since 2004 with only insignificant percentage recycled and a staggering 79% of plastic waste ends up in landfill. The same study shows that one third of plastic waste globally, is left uncollected. For more, see (Roland Geyer 2017) (Stahel 2016). Generally, plastic bags waste problem is acute especially in densely populated areas like India where in the 1990's the work of scholars on the issue of the negative impact of plastic bag waste gave way to anti-plastic bag awareness and saw the introduction of laws to curb production and introduce restrictions on the use of plastic bags (Robert and Rachel 2000). In more developed countries like the Republic of Ireland levies that were imposed on the use of plastic bags discouraged people and

[1] The term 'plastics' (synthetic polymers) broadly includes five main commodity plastics: polypropylene, polyethylene, polyvinyl chloride, polystyrene and polyethylene terephthalate See more on (Andrady and Neal 2009).

this led to a drastic drop in the circulation of plastic. This shows that commendable efforts are being been made mainly at national levels[2].

In the African continent Rwanda became the first member state of the East African Community to tackle this problem by banning the manufacture, retail distribution & importation of these plastic bags in 2008 under its vision to "Maintain a clean, healthy and wealthy environment". This move was commended and applauded by UN Habitat which officially declared Kigali as the cleanest city in Africa[3]. Rwanda's success story lies in introducing effective policies by the environmental regulatory body of the country as well as sensitizing the communities[4]. Currently plastic bags in Rwanda have long been replaced with environmentally friendly and sustainable bags which are re-usable and made from bio-degradable materials like banana fiber. Rwanda's approach towards solving the problem caused by plastic bags needs to be borrowed by the community state members. The active participation and contribution of every member state is crucial in addressing environmental concerns at a regional level. If focus is placed at the regional level, in the case of East African Community the question hence is, are there policies in place within the East African Community to tackle environmental issues if yes, which are they and how effective are they and What steps has the community taken to assert its position in solving the

[2] See Countries with national regulations on plastic bags-figures pg 12 // Legal Limits on Single-Use of Plastics and Microplastics: A global review on National laws and Regulations URL: https://wedocs.unep.org/bitstream/handle/20.500.11822/27113/plastics_limits.pdf?sequence=1&isAllowed=yAccessed 06.05/2019.

[3]URL: https://www.un.org/africarenewal/magazine/april-2016/kigali-sparkles-hills.

[4]A monthly national cleanup day called *Umuganda* was designed and implemented. Rwanda's President Paul Kagame took part in the first event which helped make many Rwandans aware of the problem of plastics and other waste.

rapid rise of negative effects of environmental issues? Taking into account the legally binding provisions in the Treaty for the establishment of the East African Community regarding environmental conservation, the community has not adopted a general legal document to regulate issues related to the protection of the environment and natural resources (Njenga 2018). For example the East African Community polythene materials control bill, 2011 and the EAC Protocol on environment and natural resources management remain as bills and are yet to be signed into law by the heads of state which explains the gaps in addressing environmental concerns in this region[5]. Collective measures by the member states in implementing environmental policies, on the ban of plastic bags proves to be a great challenge based on various reasons. According to a publication on a comparative study on why the implementation of the ban on plastic bags in some East African countries namely Kenya Uganda and Rwanda varies, the author (Pritish 2019) states that the 'success rate' of the implementation of environmental policies in a given state is highly influenced by "the different ways in which business influences politics". For example investors including those on the manufacture of plastics and their products, are known to be generous with campaign donations, certain privileges on membership associations and lobbying activities while on the other hand investors contribute significantly in creation of employment opportunities as well as sustaining growth. This would mean that governments would have to find ways in which to solve the environmental concerns revolving around the manufacture and use of plastic bags without 'severing ties' with the investors by avoiding introducing policies that may "go against the interests of firms which may encourage firms to disinvest". Further the author adds that,

[5]Although the community parliament actively pushes bills into the house to address environmental issues,these important these efforts remain crashed as the bills are pending assenting into law because heads of state remain reluctant to sign them.

taking into account the fact that plastics manufacturing provides a potential source of employment, as well as revenue gained from success in plastics manufacturing, this business has grown into diversified business groups which would make it difficult to 'eliminate' should the government consider banning the manufacture of plastics (this is the case with Kenya and Uganda). Thankfully the pressure from persistence of the Rwandan government upon the East African Community to ban the use of plastic bags is proving to yield some results despite Uganda's resistance in signing the EAC Polythene Materials Control Bill which was to prohibit the manufacturing, sale, importation and use of polythene materials. The rising pressure from international community as well within the region has without a doubt motivated discussions on the ban of plastic bags across the region, showing how "regional organizations are influential in diffusing environmental norms". Kenya and Tanzania have since then introduced the ban of plastic bags in their states.

The positive aspect of the conservation and protection of water bodies, in this case Lake Victoria, the EAC member states have adopted a Protocol for the sustainable development of the Lake Victoria Basin which binds the partner states to cooperate in the sustainable development of the lake Victoria Basin in the following spheres as stipulated in Article 3.

a. Sustainable development, management and equitable utilization of water resources;

b. Sustainable development and management of fisheries resources;

c. Promotion of sustainable agricultural and land use practices including irrigation;

d. Promotion of sustainable development and management of forestry resources;

e. Promotion of development and management of wetlands;

f. Promotion of trade, commerce and industrial development;

g. Promotion of development of infrastructure and energy;

h. Maintenance of navigational safety and maritime security;

i. Improvement in public health with specific reference to sanitation;

j. Promotion of research, capacity building and information exchange;

k. Environmental protection and management of the Basin';

l. Promotion of Public participation in planning and decision-making;

m. Integration of gender concerns in all activities in the Basin;

n. Promotion of wildlife conservation and sustainable tourism development.

The Convention for the establishment of the Lake Victoria Fisheries Organization signed on 30th June 1994 and entered into force on 24th May 1996.This Convention addressed the need and brought about the establishment of regional strategies for sustainable management of shared water resources[6]. The East African Community has a vast wealth of natural resources. Current threats to the preservation and conservation of natural resources include activities of citizens of member states in building and construction of infrastructure to speed up economic development. Some member states have shown negligence and total disregard to the environmental impacts at the cost of achieving development agendas through building and construction of infrastructures. In the recent past, member states of the East African Community have dared to assert their authoritative power and 'maneuver' situations to work towards their selfish politically motivated ends at

[6] URL: https://www.lvfo.org/sites/default/files/field/Convention.

the expense of infringing existing laws. Kenya in this case[7] failed to comply with Article 111 of the Treaty for the establishment of the East African Community on environmental issues and natural resources whereby partner states agree to "undertake, through environmental management strategy, to cooperate and coordinate their policies and actions for the protection and conservation of the natural resources and environment against all forms of degradation and pollution arising from developmental activities".

Conclusion

It is right to conclude that environmental global issues can be addressed at three different levels namely; regional level[8], national level[9] and at a grassroots level which is the local level[10].

[7] The building and construction of the controversial standard gauge railway in Kenya, triggered reactions and protests from environmentalists who expressed concerns on the interference of a major wildlife migration route as the railway was proposed to run through the Nairobi national park. Whereas there would be no doubt as to how the railway would boost regional economy, the project would cause irreversible damage as it would disrupt a natural existing ecosystem of nature that is unique to the country and East Africa as well. The diverse effects of the construction of the proposed railway were that the elephant's migration route would be disrupted and the natural habitat to giraffes, African buffalo, vast bird species, and lions would be destroyed. Despite the protests in stopping the construction of the railways across the national park, the railway was constructed and completed in May 2017 see URL.

[8] The treaty for establishing the East African Community is a legally binding document which calls for adherence to the provisions concerning environmental issues; Competitive organs of the community for example the East African Court of Justice should assert their authority by making decisions that will favor and promote environment conservation official website **URL**: www.eac.int.

[9] At national level, individual member states can amend national laws to be in line with the regional legally binding laws in the sphere of environment as well as implement the provisions of the EAC Treaty I their countries.

[10] At the local level, it is highly commendable that both private and public activist engage the community in sensitization forums that will enhance active and individual participation in solving the problems of environmental problems.

However, the united Nations Environmental Program regretfully notes that even with a general increase in environmental laws the implementation and enforcement of such regulations falls far short of what is required to address environmental challenges. "To ensure that environmental law is effective in providing an enabling environment for sustainable development, environmental rule of law needs to be nurtured in a manner that builds strong institutions that engage the public, ensures access to information and justice, protects human rights, and advances true accountability for all environmental actors and decision maker"[11]. The UN environment recommends "the seven key elements in building more effective environmental institutions as follows:

- Clear and appropriate mandates
- Coordination across sectors and institutions
- Capacity of personnel and institutions
- Collection, Use and Dissemination of Reliable Data
- Independent Audit and Review Mechanisms
- Fair and Consistent Enforcement of Law
- Strong Leadership and Management Skills

The East African Court of justice has also played a significant role in shaping the future of the protection of the environment when the court ruled in favor of preserving natural resources by stopping the construction of a highway across a national park[12].

[11] See more URL: https://www.unenvironment.org.

[12] See African Network for Animal Welfare v. The Attorney General of the United Republic of Tanzania 20 June 2014, EACJ First Instance Division, Ref. No. 9 of 2010. URL: http://eacj.org/?cases=african-network-animal-welfare-anaw-vs-attorney-general-united-republic-tanzania.

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INTERNATIONAL LEGAL PROBLEMS OF MEDICAL WASTE MANAGEMENT: RUSSIAN EXPERIENCE

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Medical waste contains potentially dangerous microorganisms that can infect patients, health workers and other people, in addition, such waste can contribute to the spread of drug-resistant microorganisms from medical organizations to the environment.

According to the World Health Organization (WHO), the typical composition of medical waste includes approximately 85% of household waste, commonly referred to as "non-hazardous" or "General medical waste". They are formed as a result of administrative activities, kitchen work and cleaning of premises in medical institutions, include packaging waste and debris generated during the construction and repair of medical buildings. The remaining 15% are "dangerous" and may pose a threat to human life and health and the environment[1].

Medical waste management now is an important element of the international and national environmental and health agendas.

Medical Waste: International Legal Regulation

International legal standards of medical waste management, which should be taken into account in the development of appropriate national legal regulation, are reflected in:

[1] URL: https://www.who.int/ru/news-room/fact-sheets/detail/health-care-waste (date of access: 08.04.2019).

1. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (adopted in 1989) – medical waste is on the top of the list of substances covered by the Convention;

2. Stockholm Convention on Persistent Organic Pollutants (adopted in 2001) - medical waste incineration plants are sources of formation and emission of persistent organic pollutants into the environment; reduce of generation of medical waste is one of the main direction of prevention of the formation of chemicals listed in Convention;

3. Minamata Convention on Mercury (adopted in 2013) - it includes the phase-out of certain types of medical devices containing mercury (thermometers etc.);

4. Documents of World Health Organization (WHO): UNICEF/WHO WASH (Water, Sanitation and Hygiene) Programme (includes the safe disposal of medical waste, including its sorting, collection, transportation, treatment and disposal);

5. Other United Nations (UN) documents – for example, Sustainable Development Goals (SDGs) (Resolution 70/1 of the UN General Assembly "Transforming our World: the 2030 Agenda for Sustainable Development" ("2030 Agenda")).

Legal status of medical waste

Medical waste – a very specific type of waste generated, as a rule, as a result of various types of medical and pharmaceutical activities, as well as the functioning of medical institutions. Currently, there is no clarity in the ratio of the concepts of "waste of medical organizations (institutions)", "waste of medical (health-care) activities", "medical (health-care) waste", which are often used in Russian legislation.

There are 3 main views on what should be included in "medical waste" in according to Russian legislation and law enforcement practice:

1. all types of waste generated during the implementation of medical and pharmaceutical activities, activities for the production of medicines and medical products[2];

2. all waste generated as a result of economic and other activities of medical organizations[3];

3. not all types of waste generated by a medical organization can be recognized as medical waste[4].

In our opinion, not any waste generated in the activities of medical organizations can be automatically recognized as medical, as in the course of the activities of medical organizations can be formed and solid municipal, and biological, and radioactive waste.

Legal regulation of medical waste management

Obviously that medical waste is currently outside the framework of comprehensive legislative regulation in Russia – in particular, remain unresolved at the legislative level such important issues of medical waste management as the regulation of waste generation;

a) accounting of waste produced in health-care institutions (hospitals, clinics etc.);
b) licensing and permitting;
c) waste reporting;
d) payment for negative impact on the environment;
e) medical staff training etc.

The norms of the Federal legislation contain the definition of "medical waste" and their classification[5] in accordance with

[2] Point 1 of article 49 of Federal Law dated 21.11.2011 № 323-FZ "About bases of protection of health of citizens in the Russian Federation".
[3] Letter of Federal Service for Supervision of Nature Management (Rosprirodnadzor) dated 22.04.2015 № AA-03-04-36/6554.
[4] Determination of the Supreme Court of the Russian Federation of 27.04.2016 № 306-KG16-3171.
[5] Article 49 of the Federal Law of 21.11.2011 № 323-FZ "On the basics of public health in the Russian Federation".

the Criteria, approved. decree of the Government of the Russian Federation, from 04.07.2012, № 681; Sanitary rules and regulations (SanPiN) 2.1.7.2790-10 "Sanitary and epidemiological requirements for the treatment of medical waste", approved the resolution of the Chief state sanitary doctor of the Russian Federation of 09.12.2010 № 163. However, these sanitary norms actually replace the missing norms of the legislation.

Problems of medical waste management: positions of state bodies

Over the past decade, the Federal Executive authorities (in particular, the Ministry of natural resources and environment of the Russian Federation and Federal Service for Supervision of Nature Management (Rosprirodnadzor)) have adopted a lot of important and very contradictory explanations in the field of medical waste management, the diametrically opposite of the positions set out in which does not contribute to the creation of consistent law enforcement practice. According to these explanations:

1. the rules of the Federal Law "On production and consumption waste", as well as regulatory legal acts of the Ministry of natural resources and environment of the Russian Federation in the field of waste management do not apply to medical waste[6];

2. all classes of medical waste (except radioactive), as well as biological waste, neutralized accordingly for the possibility of placement at the landfill (disposal), are regulated by the Federal law "On production and consumption waste"[7];

3. the Federal law "On production and consumption waste" and regulatory legal acts of the Ministry of natural re-

[6] Letters of the Ministry of natural resources and environment of the Russian Federation from 16.12.2011 № 12-46/18775; from 25.01.2012 № 05-12-44/832; from 29.02.2016 № 12-47/4056 letters of Rosprirodnadzor from 14.01.2014 № AA-03-03-36/306; from 21.03.2014 № OD-06-01-31/4116; from 22.04.2015 № AA-03-04-36/6554.

[7] Letter of Rosprirodnadzor dated 04.12.2017 № AA-10-04-32/26588.

sources and environment of the Russian Federation in the field of waste management do not apply to medical waste, except for waste of class "A", passed in accordance with the procedure established by law disinfection and (or) disposal, and waste generated after disposal of medical waste[8];

4. the granting of permission for the treatment of medical waste is illegal[9];

5. the duty of economic entities engaged in activities for the treatment of medical waste, to develop draft standards for waste generation and limits on their placement and submit them to the authorized Executive body is not established[10];

6. requirements for obtaining licenses for the treatment of medical waste, registration of passports for them, draft standards for the generation of medical waste and limits on their placement, reporting in the field of treatment are not established[11];

7. economic entities, in the process of economic and other activities of which waste is generated, including medical waste, subsequently sent to the disposal, are obliged to pay a fee for the negative impact on the environment in terms of waste disposal[12];

8. issuance of environmental permits for medical waste and collection of fees for negative impact on the environment when they are placed is illegal[13].

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[8] letter of Rosprirodnadzor dated 08.07.2016 № AA-03-03-332/13510.

[9] letters of the Ministry dated 16.12.2011 № 12-46/18775; dated 25.01.2012 № 05-12-44/832; letter of Rosprirodnadzor 14.01.2014 № AA-03-03-36/306.

[10] letter of Rosprirodnadzor dated 21.03.2014 № OD-06-01-31/4116.

[11] letter of the Ministry dated 29.02.2016, № 12-47/4056; letters of Rosprirodnadzor dated 04.12.2017, № AA-10-04-32/26588; dated 22.04.2015 № AA-03-04-36/6554.

[12] letter of Rosprirodnadzor dated 21.03.2014 № OD-06-01-31/4116.

[13] letter of the Ministry of Natural Resources and Environment of the Russian Federation dated 01.10.2014 № 05-12-44/22301

Legal liability for violations of the rules of medical waste management

Special attention should be paid to the problem of attracting violators of requirements in the field of medical waste management to administrative and other types of legal liability. In accordance to article 8.2 of the Code of the Russian Federation of administrative offenses dated December 30, 2001 № 195-FZ noncompliance with environmental and sanitary-epidemiological requirements in the management of production and consumption waste, substances that destroy the ozone layer, or other hazardous substances shall not apply to violation of requirements in the field of medical waste management.

However, given the fact that it provides for administrative liability for non-compliance with these requirements when handling not only production and consumption waste, substances that destroy the ozone layer, but also "other hazardous substances", the list of which is currently not defined, this allows the state environmental supervision bodies and bodies carrying out Federal state sanitary and epidemiological supervision to attract violators of requirements for the treatment of medical waste to administrative responsibility under this article.

In our opinion, the qualification of offenses related to violation of sanitary and epidemiological requirements in the field of medical waste management under article 6.3 of the Code of administrative offenses "Violation of legislation in the field of sanitary and epidemiological welfare of the population" is more legally correct.

In accordance to the law enforcement, in particular, judicial practice, there were repeated cases of bringing to administrative responsibility for violation of the requirements in the field of medical waste management and according to point 2 of article 14.1 of the Code of administrative offenses for carrying out business activities without a license, if such a license is required. It seems that such a position in the absence of a legally enshrined need for licensing activities for the treatment of medical waste, is

fundamentally wrong, and bringing to administrative responsibility under this article – illegal.

Judicial practice on bringing to legal responsibility for violations of the requirements for the treatment of medical waste

Currently there are a lot of different and sometimes contradictory positions of the courts on issues of management of medical waste, such as:

1. the absence of medical waste passports can serve as a basis for bringing medical institutions to administrative liability[14];

2. fee for negative impact on the environment for the disposal of medical waste is collected from medical institutions[15];

3. medical institution refuses to return voluntarily paid fees for the negative impact on the environment for the generation of medical waste[16];

4. not all types of waste generated by a medical institution can be recognized as medical waste[17].

Directions and trends of improvement of legislation on medical waste management

For solving all these existing problems, it is required now to adopt either a special Federal law of medical waste manage-

[14] resolution of the Fifteenth arbitration court of appeal dated 13.12.2012 № 15AP-12997/2012 in the case № A32-49225/2011.

[15] the determination of the Supreme Court of the Russian Federation dated 15.12.2015 № 307-ES-15-16840 in the case № A05-326/2015 and dated 17.06.2015 № 301-ЭС15-6321 in the case of № A43-20864/2013; the decision of Arbitration Court of Volgo-Vyatsky district dated 15.01.2016 № Ф01-5517/2015 in the case of № A43-33153/2014.

[16] the decision of the Arbitration Court of Volgo-Vyatsky district dated 15.01.2016 № A43-33153/2014.

[17] determination of the Supreme Court of the Russian Federation dated 27.04.2016 № 306-KG16-3171.

ment, or to amend the existing federal laws on waste. Obviously that at present there is an urgent need to ensure a comprehensive legislative regulation of relations on the treatment of medical waste.

For these purposes, it is necessary to consolidate an independent conceptual apparatus, to extend to the activities for the treatment of medical waste most of the existing public legal requirements similar to the requirements for the treatment of waste production and consumption, in particular, regulation, licensing, accounting, maintenance and reporting, and should provide for the possibility of bringing to administrative responsibility for violation of the requirements in the field of treatment of medical waste.

THE UN WATERCOURSE CONVENTION AS A COMPLEMENTARY LEGAL INSTRUMENT OF THE WEST AFRICAN TRANSBOUNDARY WATERCOURSE'S MANAGEMENT LEGAL FRAMEWORK

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Africa as a whole is a continent of transboundary rivers, transboundary basins cover about 62% of the surface of the continent[1]. This particular hydrographic aspect requires that watercourses, especially international ones, be subject to transnational management, which is unfortunately not the case. In fact, many of these rivers do not have no legal framework or adequate institutions, able to ensure their equitable utilization by each of the riparian countries.

This is the case in West Africa, where only 6 out of the 25 transboundary rivers are the subject of agreement between riparian countries. international watercourses in the region, which are the subject of an inter-state agreement are governed by an inadequate legal framework for an efficient international management, Moreover, the countries in the region have shown themselves reticent to adopt the UN Watercourses Convention.

In a context of global warming and water scarcity, a concerted and equitable management of the resource, especially when it is shared, is of paramount importance, as Niasse points out. ***«In a context shared resource management can lead to peace as to war, it is the political will that will decide the direction to give it»***[2].

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[1] JONATHAN LAUTZE* & MARK GIORDANO Transboundary Water Law in Africa: Development, Nature, and Geography - Natural Resources Journal 2005.

[2] Madiodio Niasse, Preventing conflict and promoting cooperation in transboundary river management in West Africa in Vertigo - The environmental science journal, Vol 5, No 1, at 5-6. (May 2004).

To date, two types of instruments govern the shared management of trans-national watercourses between riparian states in West Africa: These are the various West African interstate agreements on international waters, and the United Nations Watercourse convention of 1997.

West African interstate agreements on international waters:

These are all agreements between States whose object is a shared watercourse.

According to Jonathan Lautze and Mark Giordano, in all of Africa, 90% of such agreements provide for joint management, and 75% - provides for development projects related to the shared resource (Water Development)[3].

To reach the goals formulated in these different agreements, about 3/4 of these agreements provide for the establishment of a water management institution, which may be called according to the name, institution, organization, or authority of the basin or river, in order to facilitate decision-making on the shared management of the river.

Six agreements of this type exist in West Africa, and will be the subject of a deep comparative analysis in the following lines.

The United Nations Watercourses Convention of 1997:

Adopted in 1997, the UN Convention on Transnational Watercourses is a flexible and overarching global framework for the management and the protection of international watercourses. The convention entered into force on August 17, 2014 and counted 36 contracting states as of January 2015.

To date, only six West African countries out of sixteen have ratified the convention. It must be said that the West African countries' mistrust of the text is all the more serious as they fear a loss of sovereignty over a resource as important as water. This problem, however, is not a West African peculiarity, but rather an international one, given that the Convention has only been ratified by 36 countries since its adoption in 1997.

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[3] Transboundary Water Law in Africa: Development, Nature, and Geography JONATHAN LAUTZE and MARK GIORDANO, 2005 p.

However, it is important to note that the 1997 Convention itself is a major step forward in the field of water law, not only the convention enshrines provisions of customary law on water management, but also sets out fundamental rules for a concerted and mutually beneficial international watercourse management.

Two fundamental principles are stated in the Convention:

• The principle of equitable and reasonable use and participation

• The obligation to prevent significant transboundary harm (or – no-harm rule).

Procedural rules enable the implementation of the 2 substantive principles above. Such rules include the general obligation of co-operation between watercourse states, the exchange of information and data, as well as special procedures applicable in the cases of planned measures and emergencies.

In addition, the convention focuses on the protection of the environment, which is not an area in which West African agreements shine. Thus, the agreement obliges riparian states to prevent, reduce and control the pollution of watercourses, and they must therefore be careful to prevent the introduction of foreign or exotic species likely to have negative impacts on watercourses. aquatic environments and affect other states[4].

In the end, the convention establishes a framework for the resolution of conflict flexible and adapted to the susceptibility of the issue of water. Who advocates the use of direct negotiation first in the event of conflict[5], and in case of failure, the Convention provides parties with political mechanisms (for example, the good offices of a third party, or mediation or conciliation services) and legal remedies (procedure for arbitration or recourse to the International Court of Justice)[6].

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[4] Articles 20 à 23, 27 à 28 UN Watercourses Convention 1997.

[5] Article 33. UN Watercourses Convention 1997.

[6] UN WATERCOURSES CONVENTION: APPLICABILITY AND RELEVANCE IN WEST AFRICA - Dr. Amidou Garane - Center for water law policy and science 2008 p. 12.

The legal contribution of the United Nations Convention on International Watercourses of 1997 to the legal-institutional framework of West African transnational watercourses:

1987 Revised Convention Pertaining to the Creation of the Niger Basin Authority

This convention, although it is instrumental in coordinating the different national policies of the riparian countries of the Niger River, in water development and other related development projects, makes no mention in these texts of equitable and reasonable utilization of the river by each of the riparian countries. Principle however stated in the UN Convention of 1997 (Article 5-6).

The obligation not to cause harm is stated in the text, but remains limited to the case of water pollution and possible negative impact on fauna and flora. While Article 7 of the 1997 Convention generalizes the No-harm Rule to any possible negative effect that may arise from the use of water by one of the riparian states.

The 1987 text establishing the authority of the Niger Basin does not mention the sharing of information, which is crucial in a concerted and participative management, so the text is silent on matters of great importance such as the suspension of activities. during the consultation period and the negotiations. Which provisions are enunciated by the 1997 UN Convention in Articles 9 and 17-3.

In 2004, the NBA Member States, by signing the Paris Declaration, have remedied some of the shortcomings of the Convention which incorporates the principle of reasonable and equitable use of shared waters, but does not guide its application[7].

1972 Conventions Relating to the Statute of the Senegal River & Pertaining to the Creation of the Organization for the Management of the Senegal River:

Like the text governing the Niger River, the Convention on the Status of the Senegal River suffers from numerous shortcomings, as is the case of the lack of a standard for the fair and

[7] UN WATERCOURSES CONVENTION: APPLICABILITY AND RELEVANCE IN WEST AFRICA - Dr. Amidou Garane -Center for water law policy and science 2008 p. 12.

reasonable use of the waters of rivers, the detailed obligations on the environmental protection, lack of emergency provisions and cross-border negative impacts. We can add that the text fails to include important obligations and procedures[8], while these provisions are all set out in the 1997 UN Convention.

1978 Conventions Relating to the Status of the Gambia River & to the Creation of the Gambia River Basin Development Organization

The Gambia River Status Convention is no exception to the rule of the inadequacy of West African legal framework on the management of transboundary rivers. Thus the text as the previous has a lot of shortcomings compared to the UN Convention of 1997, the text does not bother and does not detail the question of the information sharing, it is also to note a total absence of provisions relative to the protection of the environment, the provisions on emergency measures are too generic. In addition, the text does not apply to groundwater connected to the Gambia River, and does not have any fact-finding procedures, in the absence of agreement[9].

1964 Convention and Statutes relating to the Development of the Chad Basin

The shortcomings of this convention are, first of all, in the definition of "Lake Chad". Although it is to mentioned tha "groundwaters" are mentioned for purposes of use and exploitation, the definition of " Chad basin " does not seem to include aquifers.

The Convention omits the two fundamental principles of the 1997 United Nations Convention, namely, obligations relating to the no-harm rule and equitable utilization. The text also does not include any provision related to information sharing, environmental protection, and emergency.

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[8] THE 1997 UNITED NATIONS CONVENTION ON THE LAW OF THE NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES: Role and Relevance in Africa, Transboundary River Basins in Africa. P. 20.

[9] Voir THE 1997 UNITED NATIONS CONVENTION ON THE LAW OF THE NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES: Role and Relevance in Africa, Transboundary River Basins in Africa. P. 21.

2007 Convention on the Statute of the Volta River and Setting Up the Volta Basin Authority

Despite its recent adoption and subsequent adoption of the 1997 United Nations Convention on Transboundary Watercourses, the Convention on the Volta River and Setting Up the Volta Basin Authority is no more advanced than the other texts, just like the previous ones, the convention fails to set clear rules on equitable and reasonable participation in the protection of the Volta River, so the text gives no direction as to the equitable and reasonable use of the waters of the River. It is the same for the no-harm rule. In addition, the text is also silent on the protection of the environment, and emergencies situation, or risks.

Protocol of the Agreement on the Management of the Koliba-Korubal River

Adopted in 1978 between Guinea and Guinea-Bissau, the protocol of 8 articles, apart from affirming the willingness of both states to cooperate in the management of the Koliba-Korubal River, does not mention any specific rule. Therefore, all the provisions of the United Nations Watercourses Convention are to be taken into account in order to remedy the shortcomings of this protocol.

Conclusion:

The particular hydrographic situation of West Africa make the region subject to, as we have seen, risk of conflict if the management of rivers shared by the States of the region, are not framed by rules guaranteeing that each country benefits in a fair and equitable way from the common resource. With this in mind, the adoption of the UN Convention on Watercourses would be instrumental and beneficial to both governments and water users, and the provisions of the Convention will fill the legal void left by the gaps in the current agreements in force but also govern the many international watercourses that are not subject to any agreement. Similarly, the widespread adoption of the UN Convention on Watercourses rules could provide an impetus and a springboard for the harmonization of water law in West Africa, but also in the world.

SYSTEMATIZATION OF THE PRINCIPLES OF INTERNATIONAL LAW IN THE FIELD OF TRANSBOUNDARY WATER RESOURCES

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The development of theoretical and generally accepted legal principles for the distribution of international water resources has led to several significant attempts to systematize these principles. Since the beginning of the twentieth century, lawyers, scientists and diplomats have tried to develop a mechanism for regulating international water resources. In 1910, the Institute of International Law proposed a structure for regulating international water resources. The following year, the Institute adopted the Madrid Decision on the use of international rivers. In the 1920s. The League of Nations adopted two multilateral agreements that exist today on the use of international water resources.

In 1966, the International Law Association undertook the most complete systematization of the principles of international law in the field of transboundary water resources, as a result of which the Helsinki Rules on the Use of Transboundary Water Resources were developed. The Helsinki Rules are based on the fact that every state within the international drainage basin is entitled to a reasonable and fair share of the beneficial use of the basin's water resources. According to the Association, this idea is a "development of rules of international law that prohibit states

from causing any significant damage to another state or region located outside the limits of national jurisdiction"[1].

The Helsinki Rules for the first time put forward the idea of equitable use, arguing that "every basin state has the right, within its territory, to a reasonable and fair share of profitable use" of the water resources of the drainage basin[2].

One of the universal documents containing principles for the use of transboundary water resources is the UN Convention on the law of the non-navigational uses of international watercourses in 1997 (further the 1997 Convention)

The 1997 Convention established four principles for the use of international watercourses: a) equitable and reasonable use; b) not causing significant damage; c) cooperation; d) regular exchange of data and information[3].

Among the regional international treaties in the field of the issue under consideration is the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes of United Nation's European Economic Commission (further the 1992 UNECE Convention). According to paragraph 5 of Article 2 of the 1992 Convention, the activities of the parties in the use and protection of transboundary water objects are based on the following three principles: a) precautionary measures; b) the polluter pays; c) sustainable development[4].

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[1] Report of the fifty-second conference held at Helsinki from August 14th to August 20th, 1966. London: publ. by the International Law Association, 1967. URL: http://www.law.edu.ru/book/book.asp?bookID=1545117 (date of reference April 10, 2019).

[2] The Helsinki Rules on the Uses of the Waters of International Rivers from August 20th 1966. URL: http://www.cawater-info.net/library/eng/helsinki_rules.pdf (date of reference April 10, 2019).

[3] Convention on the Law of the Non-navigational Uses of International Watercourses. 21 May 1997. № 51/229. URL: http://legal.un.org/ilc/texts/instruments/english/conventions/8_3_1997.pdf (date of reference April 10, 2019).

[4] Convention on the Protection and Use of Transboundary Watercourses and International Lakes. 17 March 1992. URL: https://www.unece.org/fileadmin/DAM/env/water/pdf/watercon.pdf (date of reference April 10, 2019).

The principle of equitable and reasonable use is part of the theory of limited territorial sovereignty. This principle means that all states bordering a watercourse are obliged to use its resources rationally. Under the resources refers to the amount of water, aquatic biological, mineral, vegetable and other resources[5].

Currently, this principle is enshrined in Article 4 Helsinki Rules of 1966, in Article 2 of the Salzburg Resolution of the Institute of International Law of 1961, in Article 5 of the Convention of 1977, in Article 1 of the Seoul Rules of the International Law Association of 1986, in the Berlin Rules on Water Resources of 2004[6].

The principle of equitable and reasonable use was more specific in the Draft Articles on the Law of Transboundary Aquifers 2008.

Equitable and reasonable use is based on shared sovereignty and equal rights, but this does not necessarily mean an equal share of water. In determining the equitable and reasonable share, important factors such as the geography of the basin, hydrology of the basin, population dependent on water, economic and social needs, existing water use, potential future needs, climatic and environmental factors and the availability of other resources are taken into account. This entails a balance of interests that take into account the needs and uses of each coastal state. This is a well-established principle of international water law, which has substantial support in state practice, judicial decisions and international codification[7].

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[5] Bekyashev K.A. Pravovoy rezhim mezhdunarodnykh vodotokov / Mezhdunarodnoye pravo. URL: http://lexrussica.ru/netcat_files/493/657/lexrussica-2-2009-19010.pdf (date of reference April 10, 2019).

[6] Vinogradov S. Pravovoye regulirovaniye transgranichnykh vodotokov: Istochniki, instrumenty i osnovnyye printsipy. URL: http://www.cawater-info.net/bk/water_law/pdf/vinogradov_presentation_6.pdf (date of reference April 10, 2019).

[7] Rahaman M.M. Principles of Transboundary Water Resources Management and Ganges Treaties: An Analysis // Water Resources Development. March

The principle of not causing significant damage. The 1997 Convention states that waterway states, when using an international watercourse on their territory, take all appropriate measures to prevent significant damage to other watercourse states. In the case that another state is still seriously damaged by a watercourse, a state which by its use causes such damage, in the absence of an agreement on such use, takes all appropriate measures to eliminate or reduce such damage and, if necessary, to discuss the question of compensation[8].

This principle is also part of the theory of limited territorial sovereignty. According to this principle, no state in an international drainage basin is allowed to use watercourses on its territory in such a way as to cause significant harm to other states of the basin or their environment, including harm to the health or safety of people, to use water for useful purposes or for living organisms of watercourse systems. This principle is widely recognized by international water and environmental legislation and is often expressed as sic utere tuo ut alienum non laedas. However, there remains the question of the definition or degree of the word "significant" and how to define "harm" as "significant harm". This principle is included in all modern international treaties, conventions, agreements and declarations on the environment and water resources. It is currently considered part of customary international law[9].

2009. Vol. 25, No. 1, 159–173. URL: https://www.internationalwaterlaw.org/bibliography/articles/general/Rahaman-Ganges-Water_Res_Devel.pdf (date of reference April 10, 2019).

[8] Convention on the Law of the Non-navigational Uses of International Watercourses. 21 May 1997. № 51/229. URL: http://legal.un.org/ilc/texts/instruments/english/conventions/8_3_1997.pdf (date of reference April 10, 2019).

[9] Rahaman M.M. Principles of Transboundary Water Resources Management and Ganges Treaties: An Analysis // Water Resources Development. March 2009. Vol. 25, No. 1, 159–173. URL: https://www.internationalwaterlaw.org/bibliography/articles/general/Rahaman-Ganges-Water_Res_Devel.pdf (дата обращения 10 апреля 2019 г.).

Each state is obliged to make a preliminary notification of the intention to implement projects that may have a significant impact on changing the regime of the transboundary watercourse.

S.A. Gureev and I.N. Tarasov noted that "such a duty does not mean the need to obtain their consent to carry out the planned work. In practice, this would represent to neighboring states a kind of veto right, using which they could achieve significant advantages for themselves in exchange for giving their consent. Such a right would contradict the principles of territorial sovereignty, equality and common interests. In case of objections to the planned works, the states should resolve their disputes by peaceful means in accordance with the UN Charter"[10] .

The principle of cooperation of the states. According to Article 8 of the 1997 Convention watercourse states cooperate on the basis of sovereign equality, territorial integrity, mutual benefit and good faith in order to achieve optimal use and adequate protection of international watercourse[11]. In determining ways of such cooperation, watercourse states may consider creating, depending on what they consider necessary, joint mechanisms or commissions to facilitate cooperation on relevant measures and procedures, taking into account the experience gained from cooperation joint mechanisms and commissions available in different regions.

As noted by the UN International Law Commission in the comments to the Draft Articles of 1994, states have no obligation to conclude agreements on the use of watercourses. Setting such a requirement would mean giving the coastal states the right to veto the use of watercourses by avoiding the conclusion of cooperation agreements on their use. The argument that a

[10] Gureyev S.A., Tarasova I.N. Mezhdunarodnoye rechnoye pravo: uchebnoye posobiye. M.: Yurid. lit., 2005. S. 350.

[11] Convention on the Law of the Non-navigational Uses of International Watercourses. 21 May 1997. № 51/229. URL: http://legal.un.org/ilc/texts/instruments/english/conventions/8_3_1997.pdf (date of reference April 10, 2019).

transboundary water object cannot be used in the absence of a treaty between the riparian states does not find support either in state practice or in decisions of international courts and arbitration[12].

According to Article 9 of the Convention, watercourse states regularly exchange easily accessible data and information on the state of the watercourse, in particular, data and information of a hydrological, meteorological and economic nature, also data and information regarding water quality, as well as relevant forecasts. Watercourse states make every effort to collect and, if necessary, process data and information in such a way as to facilitate their use by other watercourse states to which they are provided[13].

The main purpose of the principle of taking precautions is to prevent undesirable events in conditions of uncertainty. As rightly states V.K. Babayan, "according to this principle, any reasonable suspicion that a specific production or industrial technology is a danger to human health or life, is a sufficient basis for the immediate closure of the enterprise or the prohibition of this technology. At the same time, the absence of comprehensive scientific data that unequivocally confirms this danger cannot serve as a reason for postponing the ban"[14].

The cautious approach is associated with the problem of the conservation of living natural resources in conditions of their increasing exploitation.

A.N. Vylegzhanin believes that the historically cautious approach emerged as a principle in the sphere of procedural

[12] Yearbook of the International Law Commission. 1994. Vol. II. Part 1. P. 95.
[13] Bekyashev K.A. Pravovoy rezhim mezhdunarodnykh vodotokov / Mezhdunarodnoye pravo. URL: http://lexrussica.ru/netcat_files/493/657/lexrussica-2-2009-19010.pdf (date of reference April 10, 2019).
[14] Babayan V.K. Predostorozhnyy podkhod k otsenke obshchego dopustimogo ulova (ODU). M., 2000. S. 15–16.

law[15], and then spread to a wider sphere, in particular, its provisions were subjected to detailed elaboration in international maritime law. E.Yu. Kuzmenko included this principle in the list of sectoral principles of international environmental law[16].

Thus, the scope of the cautious approach includes not only transboundary stocks, but also the species associated with them, and even the environment. The interdependence of elements of nature requires an appropriate integrated approach in the activities of states, and this approach is increasingly finding support in law. The agreement also states that if the status of the stocks and the species listed above is a concern, the states will subject them to enhanced monitoring in order to review their condition and the effectiveness of conservation and management measures.

Article 23 of the Berlin Rules obliges states to apply a cautious approach to all types of water resources, including transboundary ones. "States take all appropriate measures to prevent, eliminate, reduce and limit harm to the aquatic environment when there is a serious risk of significant adverse effects, or sustainable use of water, even without conclusive evidence of a causal link between action or inaction and the intended effect"[17].

The 1992 Convention established that water resources are managed in such a way that the needs of the current generation are met without compromising the ability of future generations to meet their own needs[18].

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[15] Vylegzhanin A.N. Morskiye prirodnyye resursy (mezhdunarodno -pravovoy rezhim) M. SOPS. 2001.

[16] Kuz'menko E. YU. Kodifikatsiya i progressivnoye razvitiye mezhdunarodnogo ekologicheskogo prava. Avtoreferat diss. na soisk. uch. stepeni kand.yur.nauk. M. 2006.

[17] Berlin Rules on Water Resources / International law Association. Berlin Conference. Water resources law Committee. 2004. URL: http://www.cawater-info.net/library/eng/l/berlin_rules.pdf (date of reference April 10, 2019).

[18] Convention on the Protection and Use of Transboundary Watercourses and International Lakes. 17 March 1992. URL: https://www.unece.org/fileadmin/DAM/env/water/pdf/watercon.pdf (date of reference April 10, 2019).

As a rule, this principle is designated in foreign literature as the principle of sustainable development. It comes from one of the central in our time concepts of international environmental law, which appeared in the 1972 Stockholm Declaration, and has been developed in other international documents. In the Declaration of Principles of International Law Concerning Sustainable Development, this concept was developed in several principles – justice and the eradication of poverty, common but differentiated responsibility, a cautious approach, public participation and access to information and justice and the principle of integration. In this regard, it is placed here first, as a kind of concept, and at the same time as a principle that has received normative expression, including in the area of transboundary natural resources, and which requires content disclosure.

The meaning of the principle of sustainability in the field of transboundary water resources is the need to achieve a harmonious balance between the use of these resources and the satisfaction of human needs. Economic development, being closely linked to the exploitation of natural resources, nevertheless, should not lead to their depletion, degradation and other deterioration in quality, since this will inevitably affect the health and quality of life of future generations.

These principles of using and protecting transboundary waters do not have any hierarchy, do not conflict with each other, harmoniously complement each other and, ultimately, are aimed at achieving common goals – establishing equality of states when using water resources, maximizing the benefits from their use and minimizing environmental, economic and other losses.

Summing up, it is necessary to emphasize that with regard to transboundary water resources, the implementation of all the listed principles is associated with joint efforts of states interested in the use and protection of resources.

SPECIAL APPROACH TO ENVIRONMENTAL LITIGATION AND ACCESS TO JUSTICE

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All over the world and in Europe in particular we are witnessing a dynamic development towards broader protection of environment, from which flows and which predetermines a better knowledge of environmental law. Still there are countries that, although are aware of the need for environmental protection and the importance of this issue, still prefer to close their eyes to this question for economic interests.

But mostly the interest grows up. It happens because the fact is that we loose most of the important global environmental benefits, resources and good quality of our life itself. There's no more stable climate, diversity genetic resources, quality of our water is lower, just the same as air quality. What happens?

At present, there are so many laws that are not being complied or are not enforced, and rules of law prescribed in them haven't been enforceable. For example, the Paris Agreement (concluded in Paris 12.12.2015)[1]. Even in the event that all its parties begin to comply with its norms fully, there are countries that did not sign the Agreement, it is such giant countries (in terms of air pollution) as the United States. The situation in the field of environmental protection will not improve, it will continue to deteriorate, but not as fast as before after the signing. Unfortunately, as a percentage, the amount of pollution been introduced by the signatories is not much more than that are been infused by the same non-signatories.

[1] https://unfccc.int/process/the-paris-agreement/what-is-the-paris-agreement

But we do see and understand that we need consume less, dispose of waste, recycle it, comply with legislation on environmental protection. And one of the forms of such protection is the extension of judicial control to object of environmental law and the widening of court access that is one of the key factors for the effect of protection of those collective environmental goods and our better future in respective environmental laws.

Earlier court reviews were mostly confined to the individual interests and matters of subject concern to individuals instead of previous litigation which mostly concerned to environmental impact of large and small organizations. Now we see a trend towards public interest litigation and judicial enforcement including that of merely "objective" environmental laws – with non-governmental organizations. Now such reviews show that individual interests take part in the mass of environmental cases but not the greatest one[2], instead cases with organizations. And those non-governmental organizations are playing now and even stronger role as litigators and trustees of the environment.

How to protect our rights in a court? I mean our capacity and the procedure because there are a lot of questions that are steel opened and there are no answers for them. Sometimes there are questions how far can get investors, litigators, administrations and judges to protect our common future.

The process of developing access to environmental justice is ongoing process and far from being completed we are also provide some insight into global development beyond the process[3] (Unfortunately search direction is less seen in the Russian Federation, it is due to short-sightedness, closing eyes to common problems, interests in economic gain than in environmental protection and lobbying the interests of the economic elite). Europe has positioned itself as a frontrunner in terms of procedural envi-

[2] Statistics of the supreme court of the Russian Federation for the 2015 – 2018.

[3] Alekseeva N.A. International environmental justice. Periodical scientific journal "Judge". 2017. No. 9 (81). P. 52. [Alekseyeva N.A. Mezhdunarodnoye ekologicheskoye pravosudiye. Sud'ya. 2017. № 9 (81). S. 50-53].

ronmental right through the adoption of the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (the Aarhus Convention)[4]. Convention or access to information, public participation in decision making and access to justice in environmental matters. This convention was adopted as early at 1998 and entered into fours in October 2001 point the conventional has a compliance mechanism which has some distinctive features making it different from the compliance mechanisms of other international environmental agreements. The compliance committee is composed of different experts serving in a personal capacity and the procedure can triggered by communications from the public. Although it is not a court, it provides an Authoritative interpretation of the provisions of the convention. The Aarhus Convention names as such a mean not a court and not a judicial authority but non- judicial one.

If we list The Aarhus convention we see that it is not the best under-developed in terms and clarity. The construction of paragraphs two and three of article 9 provides a basis for many interpretations, which increasingly interfere with the traditional approaches used in the respective legislation of almost all parties. This has resulted in an increasing number of legal dispute concerning the way these rules are implemented, both of the national and the EU level.

The need for legal guarantees of public involvement is increasingly being reflected in international environmental law and in the number of instruments adopted after 1990 which have mentioned the necessary necessity of assuring access to information and public participation and in environmental decision-making. the key role in this respect has no doubt being played by Principal 10 of the Rio declaration on Environment and Development (1992)[5]. Sometimes these declaration is called the instrument of

[4] https://www.unece.org/env/pp/treatytext.html

[5] https://www.jus.uio.no/lm/environmental.development.rio.declaration.1992/portrait.pdf.

"soft law" (it has no bending legal force but merely constituting recommendations or political declarations), but it considered to be a significant global expression of the developing concepts of the role of the public in relations to the environment. Soon after its adoption it was acknowledged as an international benchmark against which the compatibility of national standards could be compared and as at forecast of the creation of new procedural rights which could be granted to individuals through international law and exercised at the national and possibly international level.

The strongest support for access to justice in environmental matters we can see in the human rights regimes rather than in multilateral Environmental agreements. Thus, the access to justice in environmental matters was traced back to such generally recognized principles as the right to be heard and to appeal decisions as is guaranteed by human rights conventions. The development in national legislation were not immediately followed at the international level and access to environmental justice was relatively really addressed in international environmental law outside the context of liability regimes and assuring equivalent access to justice in the transboundary context.

The role of this convention is recognized as focusing on excuse either late or obligations of the nations to the citizens and non-governmental organizations and addressing issues of citizens environmental rights. However, it is only guidelines and have no binding legal force. Also there is no consensus in the international community that human rights obligations specific to the environment have been established in any globally applicable binding instrument or as a matter of customer international law. That's why regions have initiatives aimed at following the example of UNECE and they develop their own legal instruments to implement some principles of it.

Still environmental lawyers have been putting pressure on the court to change its approach and it seems that practice has been changing.

ACTIVITIES OF THE IMPLEMENTATION COMMITTEE OF CONVENTION IN ENVIRONMENTAL IMPACT ASSESSMENT IN A TRANSBOUNDARY CONTEXT

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One of the biggest challenges of our modern world is environmental quality issue. This is due to many factors and the key one among them is probably the human impact on nature. Solution to this problem requires joint participation of the international community. One of the ways to reduce harmful effects on the environment due to human activity is environmental impact assessment (EIA). For the first time EIA was applied in 1969 in the United States (US) of America after the oil spill in Santa-Barbara[1]. The US congress passed the National Environmental Policy Act. The Act was signed by the President of the US Richard Nixon in 1970. This marked the beginning of the practice of the EIA procedure, which was later widely available throughout the world. However, environmental threats don't respect national borders and frequently became a problem for the neighboring states, so this fact leads to an appearance of transboundary harm. That's why the Convention on Environmental Impact Assessment in a Transboundary Context[2] was adopted in the framework of the United Nations Economic Commission for Europe (ECE).

This Convention was signed in Espoo (Finland) in 1991 and entered into force in 1997. The Espoo Convention sets out

[1] Los Angeles Times. How the 1969 Santa Barbara oil spill led to 50 years of coastal protections in California. 31.01.2019 // URL: https://www.latimes.com/local/lanow/la-me-oil-spill-santa-barbara-retrospective-20190131-story.html (10.04.2019).

[2] Convention on Environmental Impact Assessment in a Transboundary Context adopted in Espoo (Finland), on 25.02.1991.

the obligations of Parties to assess an environmental impact assessment of certain activities, listed in Appendix 1 of the Convention, at an early stage of planning[3]. The party of origin shall, after completion of the EIA documentation, enter into consultations with the affected Party concerning the potential transboundary impact of the proposed activity and measures to reduce or eliminate its negative impact. Moreover, the Parties of origin shall provide an opportunity to the public in the areas likely to be affected to participate in relevant environmental impact assessment procedures[4]. The ratification of the Convention is based on the incorporation of its provisions into the national legislation. Currently, the convention was ratified by 45 states[5].

What is interesting, Russian Federation has signed The Espoo Convention in 1991, but did not ratify it. However, Russia fulfills the commitments of the Convention in its projects, such as Nord Stream 1 and 2, through its national legislation. According to art. 11 of the Convention the Parties shall meet in connection with the annual sessions of the Senior Advisers to ECE governments on environmental and water problems[6].

The Implementation Committee was established by the second meeting of the Parties in February 2001[7]. The Committee's objective is to review compliance by the Parties with their

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[3] Eike Albrecht. Implementing the Espoo Convention in transboundary EIA between Germany and Poland // Environmental Impact Assessment Review. Volume 28, Issue 6. August 2008. P – 359-365.

[4] Convention on Environmental Impact Assessment in a Transboundary Context adopted in Espoo (Finland), on 25.02.1991.

[5] United Nations Treaty Collection // URL: https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-4&chapter=27&clang=_en (11.04.2019).

[6] Convention on Environmental Impact Assessment in a Transboundary Context adopted in Espoo (Finland), on 25.02.1991.

[7] ECE/MP.EIA/4, «DECISION II/4 REVIEW OF COMPLIANCE» // URL: https://www.unece.org/fileadmin/DAM/env/documents/2001/eia/decision.II.4.e.pdf (10.04.2019).

obligations under the Convention with a view to assisting them fully to meet their commitments. The Committee comprises eight members, nominated by Parties that are elected by the meeting of the Parties.

In my opinion, the part of the Committee cannot be overemphasized, because the existence of such a body helps countries to pursue their industrial and commercial interests without damaging the border-states. Furthermore, its uniqueness lies in the fact that information that is taken into account is not only from the governments of the Parties, but also from the local authorities and general public.

The Committee considers any submission made by one or more Parties that have concerns about another Party's compliance with its obligations under the Convention. Such a submission must relate specifically to those concerns and be backed up by supporting information. What is more, the Committee also considers any submission made by a Party that concludes that, despite its best efforts, it is or will be unable to comply fully with its obligations under the convention. As I mentioned before, information from the public, non-governmental organization or a local government body can form the basis of Committee initiative. The Committee shall report on its activities at each meeting of the Parties through the secretariat and make such recommendations as it considers appropriate, taking into account the circumstances of the matter, regarding compliance with the Convention. The Meeting of the Parties may, upon consideration of a report and any recommendations of the Committee, decide upon appropriate general measures to bring about compliance with the Convention and measures to assist an individual Party's compliance[8].

The Meeting of the Parties has agreed a series of conditions or criteria to help the Committee to decide whether to begin

[8] ECE/MP.EIA/4, «DECISION II/4 REVIEW OF COMPLIANCE» // URL: https://www.unece.org/fileadmin/DAM/env/documents/2001/eia/decision.II.4.e.pdf (10.04.2019)

a Committee initiative, because it has only limited resources. The list of the conditions includes:

- the source of the information is known and not anonymous;
- the information relates to an activity listed in Appendix 1 to the Convention likely to have a significant adverse transboundary impact;
- the information is the basis for a profound suspicion of non-compliance;
- the information relates to the implementation of the Convention's provisions, committee time and resources are available.

Further, the Committee may oversee country-specific performance reviews and technical assistance in drafting legislation[9].

On the basis of the activities of the Committee, I came up with an idea that there is an interesting legal phenomenon about this body. We can classify this Committee as a quasi-judicial body, though the Committee itself claims to be the coordinating one. The Committee has some advantages over the courts:

- the process for making a submission is much easier than in courts;
- it has a monitoring mechanism on its recommendations;
- during the proceedings might be detected other violations by third parties.

There is an opinion that such a quasi-judicial bodies are even more effective than the courts[10]. The committee has conducted 43 sessions and gave lots of helpful recommendations.

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[9] United Nations Economic Commission for Europe, September 2009, «What UNECE does for you» // URL: https://www.unece.org/fileadmin/DAM/env/eia/documents/ImplementationCommittee/0923749_Espoo_ENG.pdf (10.04.2019).

[10] Солнцев А.М. Разрешение международных экологических споров в международных квазисудебных органах // Творческое наследие Казанских юридических школ и совеременные тенденции юридической науки / под ред. И.А. Тарханова. – Казань: КФУ, 2016. – С. 310-314.

There are 6 interstate cases from the Parties, such as 1) Submission on 26 May 2004 by Romania having concerns about Ukraine's compliance with its obligations under the Convention with respect to the Danube-Black Sea Deep-Water Navigation Canal in the Ukrainian Sector of the Danube Delta, 2) Submission on 23 January 2007 by Romania having concerns about Ukraine's compliance with its obligations under the Convention, with respect to the Bystroe Canal Project and in the light of the opinion of the inquiry commission on the environmental impact of the project, 3) Submission on 6 March 2009 by Ukraine having concerns about Romania's compliance with its obligations under the Convention, with respect to inland waterways in the Romanian Sector of the Danube Delta which permit the passage of vessels of over 1,350 tons, 4) Submission on 5 May 2011 by Azerbaijan having concerns about Armenia's compliance with its obligations under the Convention, with respect to the planned building of a nuclear power station in Metsamor, Armenia, 5) Submission on 16 June 2011 by Lithuania having concerns about Belarus's compliance with its obligations under the Convention, with respect to the planned building of a nuclear power station in Belarus. And the newest one is 6) Submission on 31 August 2011 by Armenia having concerns about Azerbaijan's compliance with its obligations under the Convention, with respect to six named oil and gas projects developed in Azerbaijan[11]. So, I decided to review the last one to find out how the Committee works with the submissions.

Submission by Armenia was received 31 August, 2011. During the 5th session of the meeting of the Parties in 23 June, 2011, Deputy Minister of Ecology and Natural Resources of Azerbaijan mentioned in his speech that Azerbaijan has developed such global oil and gas projects as Azeri-Chirag-Gyuneshli, Shah Deniz, as well as Baku-Novorossiysk pipeline, Baku-

[11] UNECE. Submissions // URL: https://www.unece.org/env/eia/implementation/implementation_committee_matters.html (10.04.2019).

Tbilisi-Ceyhan pipeline, South-Caucasus pipeline, Sangachal oil Terminal. Armenia considers itself as an affected party and claims, that Azerbaijan has breached a number of provisions of the Convention and Decision III/2. Azerbaijan has not taken any steps to notify the Republic of Armenia of the projects to be carried out. Moreover, Azerbaijan did not bring a submission to the Committee that it is unable to comply fully with its obligations under the Convention. Armenia concludes that Azerbaijan has breached Articles 2 (4) and 3 (1) of the Convention, and para. 5(b) of the Decision III/2[12].

Azerbaijan replied 29 November, 2011. The reply says that Armenia won't be an affected country due to its geographic location and it excludes the notion of the transboundary impact[13].

25.04.2012 the Committee sent the Letter from the Chair of the Committee to Armenia and Azerbaijan. Where Armenia was asked to present more detailed information concerning its submission, including possible transboundary environmental impact of each of the six projects; and Azerbaijan was asked to present all relevant information concerning the EIA procedure and decision-making for each of those projects. And both of the parties were friendly invited at the session of the Committee[14].

During the twenty-fifth session the Committee considered the submission by Armenia and reviewed the additional information and clarifications provided by Armenia and Azerbaijan.

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[12] Ministry of nature protection of the Republic of Armenia, №1/11/11595, 31.08.2011 // URL: https://www.unece.org/fileadmin/DAM/env/documents/2019/ece/Restart/Azerbaijan/submission_by_Armenia_recd_31.8.11.pdf (10.04.2019).

[13] Ministry of ecology and natural resources of Republic of Azerbaijan, №4/2610-03-08, 29.11.2011 // URL: https://www.unece.org/fileadmin/DAM/env/documents/2019/ece/Restart/Azerbaijan/Reply_by_Azerbaijan_received_29.11.11.pdf (10.04.2019).

[14] Implementation Committee, EIA/IC/S/5, 25.04.2012 // URL: https://www.unece.org/fileadmin/DAM/env/documents/2019/ece/Restart/Azerbaijan/Letter_to_Armenia_eia.ic.s.5.pdf.

The Committee drafted its questions to the two Parties and asked them to be prepared with their replies. Further, after the twenty-fifth session the Committee sent the letters to the Parties once again, where the Parties were invited to provide written replies to the Committee's questions through the Convention secretariat by 9 November as well as to be prepared to answer questions at the sessions. Armenia and Azerbaijan sent their replies with the answers to the Committee's questions. As an example, one of the questions to Azerbaijan was «Please indicate whether each of the projects mentioned has been subject to national EIA and transboundary EIA procedures, and if yes, please describe briefly each of these Procedures»[15].

During the twenty-sixth session the Committee agreed to consider the matter further and to prepare its draft findings and recommendations at its twenty-seventh session (12–14 March 2013) on the basis of a revised version to be prepared by the curator by 12 December 2012[16].

During the twenty-seventh session the Committee, the Committee finalized its draft findings and recommendations further to the submission by Armenia and agreed to send the draft findings and recommendations to the two Parties and to invite them to submit to the secretariat, by 31 May 2013 at the latest, their comments or representations, which were to remain confidential at that stage. In parallel, the Committee agreed to gather further information regarding the likely significant adverse transboundary impacts of, and the transboundary EIA procedure for, two of the activities by Azerbaijan vis-à-vis the other Caspian

[15] ECE/MP.EIA/IC/2012/4, 5.10.2012. Report of the Implementation Committee on its twenty-fifth session. URL: https://www.unece.org/fileadmin/DAM/env/documents/2012/eia/ic/ece.mp.eia.ic.2012.4.e.pdf (10.04.2019).

[16] ECE/MP.EIA/IC/2012/6, 19.12.2012, Report of the Implementation Committee on its twenty-sixth session. URL: https://www.unece.org/fileadmin/DAM/env/documents/2012/eia/ic/ece.mp.eia.ic.2012.6.e.pdf (10.04.2019).

Sea coastal State that was a Party to the Convention, namely Kazakhstan[17].

Finally, in the report of the Meeting of the Parties on its sixth session the Parties endorse the findings of the Committee that, in accordance with the information provided to the Committee, Azerbaijan was not in non-compliance with its obligations under article 2, paragraph 4, article 3 paragraphs 1 and 8, article 5, and article 6, paragraph 1, of the Convention, with respect to the projects: Azeri-Chirag-Gyuneshli, Shah Deniz, Baku-Novorossiysk pipeline, Baku-Tbilisi-Ceyhan pipeline, South-Caucasus pipeline, Sangachal oil Terminal[18].

To sum up, I should state that the Committee is a necessary mechanism that helps the Parties to implement their conventional obligations and resolve their legal issues. What is more, the Committee helps to find out the real situation associated with new projects of the Parties that will affect the environment of the neighboring states and to establish a dialogue of these states. It also provides control measures on its decisions and recommendations. The Espoo Convention wouldn't be so effective without this kind of Committee.

[17] ECE/MP.EIA/IC/2013/2. 15.04.2013, Report of the Implementation Committee on its twenty-seventh session. URL: https://www.unece.org/fileadmin/DAM/env/documents/2013/eia/ic/ece.mp.eia.ic.2013.2e.pdf (10.04.2019).

[18] ECE/MP.EIA/20.Add.1 – ECE/MP.EIA/SEA/4.Add.1, Decision VI/2 Adopted by the Meeting of the Parties to the Convention on Environmental Impact Assessment in a Transboundary Context at its sixth session // URL: https://www.unece.org/fileadmin/DAM/env/eia/meetings/Decision_VI.2.pdf (10.04.2019).

TO THE QUESTION OF STRENGTHENING INTERNATIONAL COOPERATION IN THE SPHERE OF FIGHT AGAINST PLASTIC GARBAGE AND MICROPARTICLES OF PLASTIC THE WORLD OCEAN

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Recently international legal ecological cooperation has considerably amplified. This can be explained by the desire of states to strengthen and develop cooperation in the field of environmental protection. Environmental has to be protected for the sake of health and wellbeing of increasing population of Earth. Sustainable development of economy demands ecologically reasonable management of natural resources andeffective legal regulation by means of international law.

The increasing level of anthropogenic influence suffers large-scale and long-term damage to the environment on national, regional and in general at the global level that creates threat to wellbeing and the existence not only the certain states, but also to all mankind. In article the pollution problem is considered by plastic waste of the World Ocean. Special attention is paid to the analysis of sources of pollution and also international legal bases of fight against plastic waste.

In the resolution adopted by the General Assembly on 6 July 2017, goals and targets from the 2030 Agenda for Sustainable Development are designated[1]. In goal №14 «Conserve and

[1] Resolution adopted by the General Assembly on 6 July 2017. Work of the Statistical Commission pertaining to the 2030 Agenda for Sustainable Development. A/RES/71/313. URL: https://undocs.org/ru/A/RES/71/313.

sustainably use the oceans, seas and marine resources for sustainable development» paragraph 14.1, in which it is required by 2025, prevent and significantly reduce marine pollution of all kinds, in particular from land-based activities, including marine debris and nutrient pollution is noted. And also Subparagraph 14.1.1 where indicators are described – index of coastal eutrophication and floating plastic debris density.

The most part of garbage getting to the ocean is made by plastic waste. According to the UN, every year about 13 million tons of plastic waste get to the ocean – it is 80% of all garbage in the World Ocean[2]. A huge number of plastic waste arises because of standards of modern life which means frequent use of disposable goods, such as plastic tableware and plates, ear sticks, straws for drinks, etc. The main advantage of many types of plastic as material, is that they are very durable. Practically all produced plastic still exists in this or that form after it ceased to be used for designated purpose. So, by assessment the Greenpeace, «less than for century of plasticity extended on all planet from equatorial forests to the Arctic seas»[3]. The ocean is called by right «plastic»: according to the estimates of UNESCO in it 150 million tons of plastic and 23 million tons of chemical additives to it «float»[4]. Unlike other pollutants, plasticity does not sink, it is not dissolved, does not decay, it, getting to the World Ocean, it is picked

[2] News European Parliament // Plastic Oceans: MEPs back EU ban on throwaway plastics by 2021 (Press Releases 24.10.2018). URL: http://www.europarl.europa.eu/news/en/press-room/20181018IPR16524/plastic-oceans-meps-back-eu-ban-on-throwaway-plastics-by-2021.

[3] Website international public organization Greenpeace // article: «microparticles of plastic found in the sources of drinking water in Saint-Petersburg». Date on 13.09.2018. URL: https://greenpeace.ru/news/2018/09/13/v-evrosojuze-zapretjat-mikroplastik-i-biorazlagaemye-plastmassy/.

[4] Website UNESCO // Intergovernmental Oceanographic Commission // World Oceans Day 08.06.2016 // Plastic Pollution // MARLISCO: Stopping marine litter together p. 7. URL: http://www.unesco.org/new/en/unesco/events/prizes-and-celebrations/celebrations/international-days/world-oceans-day-2016/resources/plastic-pollution/.

up by ocean currents and are transferred to areas with quiet water where plastic congestions, the largest of which – «a great plastic spot» – is recorded in a northern part of the Pacific Ocean, are formed. Currents carry away plastic garbage in the remote waters, including Arctic and waters of Antarctica[5]. It means that the most vulnerable areas of the World Ocean are under the threat of environmental disaster.

The management of plastic waste is a global problem, but it lacks a global legal framework. In particular, the ubiquitous transboundary movement of plastic waste is of major concern; gaps in environmentally sound waste management, and often the insufficient capacity of importing States to deal with the plastic they receive, is a significant factor contributing to vast amounts of plastic making its way into oceans across the world[6].

An international legal instrument regulating the movement and management of waste is the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel Convention (BC))[7]. The Basel convention is the most comprehensive global nature protection agreement on hazardous waste and is applied also to regulation and movement of plastic waste in the World Ocean. It includes 187 State parties.

Nevertheless, plastic waste is still utilized as municipal solid waste that does not solve a problem. The Basel Convention

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[5] Knvul Sheikh. A huge, floating screen will sift plastic out of the Ocean // Scientific American. On June 24, 2016. URL: https://www.scientificamerican.com/article/a-huge-floating-screen-will-sift-plastic-out-of-the-ocean/.

[6] BBC NEWS // Article: Seven schedules explaining why plastic in the ocean - it is bad. Date of publication: 12.12.2017. URL: https://www.bbc.com/russian/features-42307854.

[7] Website of the Rotterdam, Basel and Stockholm conventions. // Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal // The Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and Their Disposal is not yet in force / p. 54. URL: http://www.basel.int/portals/4/basel%20convention/docs/text/baselconventiontext-r.pdf; / http://chm.pops.int/.

is applied also to regulation and movement of plastic waste in the World Ocean[8]. The Basel Convention is the most comprehensive global nature protection agreement on hazardous waste. She contains 187 State Parties and is called to protect human health and the environment from the adverse effect caused by production, use, cross-border transportation and removal of hazardous and other waste[9]. 187 State parties are among all top plastic waste exporters except the United States.

However, The Convention has notable gaps when it comes to plastic. «Solid plastic waste» is included in the Annex IX list of wastes considered «non-hazardous», and is thus excluded from the scope of the general obligations of the Convention. Therefore, there was a question of modification of Basel Convention for the purpose of expansion of jurisdiction of Convention.

In September, 2018 a meeting of the Convention's Open-Ended Working Group Meeting decided to recommend an amendment to the Convention for adoption at the next Conference of States Parties in May 2019 that would significantly widen the scope of plastic waste covered[10].

Let's consider in details in what the problem consists. The Convention has notable gaps when it comes to plastic. «Solid plastic waste» is included in the Annex IX list of wastes considered «non-hazardous» (article 1 (1a) BC), and is thus excluded from the scope of the general obligations of the Convention, un-

[8] Blog of the European Journal of International Law / EGYL Analysis // Marine Plastic Waste and the Newly Recommended Amendment to the Basel Convention: a Bandage or a Bandaid? URL: https://www.ejiltalk.org/global-marine-plastic-waste-and-the-newly-recommended-amendment-to-the-basel-convention-a-bandage-or-a-bandaid/.

[9] Website of the Rotterdam, Basel and Stockholm conventions. URL: http://www.basel.int/Countries/StatusofRatifications/PartiesSignatories/tabid/4499/Default.aspx.

[10] Website of the Rotterdam, Basel and Stockholm conventions. URL: http://www.basel.int/Countries/StatusofRatifications/PartiesSignatories/tabid/4499/Default.aspx.

less it has one of the following two characteristics. First, if it exhibits specific hazardous properties set out in Annex I, to such an extent that it shows the «hazardous characteristics» set out in Annex III. This is applicable to certain plastics containing persistent organic pollutants, as regulated by the Stockholm Convention, described below. Alternatively, as the general obligations of the Convention apply to both «hazardous waste» and «other waste» (article 1 (2) BC), plastics classified as the latter are also included. Annex II restricts «other waste» to two categories: «wastes collected from households» and «residues arising from the incineration of household wastes»[11], thus only plastic wastes characterised as household waste are covered.

The recommended amendments are twofold; first, the deletion of «solid plastic waste» from the list of non-hazardous waste under Annex IX. Secondly, the addition of plastic waste as a category of «other waste» under Annex II, explicitly «plastic waste: waste and scrap from plastic and mixed plastic materials and mixtures of waste containing plastics, including microplastic beads». These measures would significantly increase the amount of plastic waste regulated by the Convention.

The amendment to include plastic waste as a category of «other waste» under Annex II would subject it to the general obligations of the Convention, which establish a strict regulatory system based on the concept of prior informed consent (article 6, p. 4 BC).

Besides the Basel convention in fight against plastic waste in the ocean the Stockholm convention on the resistant organic pollutants (ROP) which contains 182 member countries can provide substantial assistance. The Stockholm convention secures

[11] Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal // The Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and Their Disposal is not yet in force. URL: http://www.basel.int/portals/4/basel%20convention/docs/text/baselconventiontext-r.pdf.

duties of the Countries - participants on decrease or elimination of resistant organic pollution at the global level[12]. As a certain plastic waste which contain resistant organic pollution are in details regulated by the Stockholm convention therefore it is closely connected with the Basel convention about which it was told above. Because the subject of regulation of these two conventions is rather similar, the states make decisions on improvement of cooperation and coordination between them[13]. The regime established by the Basel and Stockholm Conventions therefore remains the best avenue at present to decrease the impact of plastic waste globally. The newly recommended amendment would undoubtedly represent important progress in plastic waste management.

With its almost exclusive focus on waste management, the Basel Convention does not adequately address the root cause, i.e. the waste generation itself. A holistic approach is needed, from design, to manufacture, consumption and final treatment of plastic. Next year, at its fourth session, the United Nations Environment Assembly will have the possibility to give the mandate to negotiate such an agreement: a new comprehensive framework to address the global plastic pollution problem.

The European Parliament in October 2018 voted to completely ban a variety of disposable plastics in an attempt to stop the pollution of the oceans. The European Commission hopes that the ban will come into force by 2021. One member of the European Parliament said that if decisive action was not taken, «by 2050 there will be more plastic in the oceans than fish in the oceans»[14].

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[12] Bodansky,D. Brunnée, J. Ellen Hey. The Oxford Handbook of International Environmental Law. Bibliographic Information. Print Publication Date: Aug 2008. Published online: Sep 2012.

[13] Solntsev A.M. Main problems of international legal environment protection and way of their overcoming // International law: the textbook for graduate students / edition of A.H. Abashidze. – M: RUDN, 2018. – Page 304-325.

[14] News European Parliament; Plastic Oceans: MEPs back EU ban on throwaway plastics by 202; Press Releases 24-10-2018 – 14:30; http://www.europarl.europa.eu/news/en/press-room/20181018IPR16524/plastic-oceans-meps-back-eu-ban-on-throwaway-plastics-by-2021.

UN Environment launched Clean Seas in February 2017, with the aim of engaging governments, the general public and the private sector in the fight against marine plastic pollution. Over the next five years, we will address the root-cause of marine litter by targeting the production and consumption of non-recoverable and single-use plastic. To do this effectively, we need citizens to be aware, engaged and active in addressing the problem in their daily lives and beyond[15].

Experts of UNEP urged the states to toughen requirements to industrial output, to forbid plastic bags and to impose with high taxes goods in plastic packing.

Russia suggests to create preferential terms for cleaning of the ocean from plastic. Vladimir Putin noted that transition to modern technologies demands additional capital investments which not all of the countries have and that the industry needs to force to be passed to new technologies. Moreover, the head of state also paid attention that environmental friendliness of productions creates additional loading for the industry. The Russian leader noted that the future will come along with progress and modern technologies[16]. The Russian leader noted that the future will come along with progress and modern technologies.

[15] UN environment assembly // Theme of the fourth Session of the UN Environment Assembly. URL: http://web.unep.org/environmentassembly/theme-fourth-session-un-environment-assembly.

[16] RIA NEWS // Preferential terms are necessary for cleaning of the ocean of plastic, Putin said on October 15, 2017. URL: https://ria.ru/20171015/1506880559.html.

INCLUSION OF ENVIRONMENTAL DAMAGE PREVENTION IN THE SYSTEM OF ENVIRONMENTAL LIABILITY IN RUSSIA: ISSUES AND PERSPECTIVES

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Environmental damage prevention is an important function in the system of environmental law. The legal significance of this function includes ensuring the implementation of subjective environmental rights and environmental interests of man and citizen and the prevention of environmental offenses related to the implementation of economic and other human activities.

Despite the fact that the goals and objectives of reparation for the environmental damage are not explicitly enshrined in the legislation of the Russian Federation, Federal Law No. 7-FZ dated January 10, 2002 "On Environmental Protection" (Part 1 of Article 77)[1] indicates that main aim is to fully compensate for environmental damage in accordance with the law.

In contrast to the provisions of the Russian legislation, the EU Directive No. 2004/35/CE "On Environmental Liability with regard to the Prevention and Remedying of Environmental Damage" specifies the prevention of environmental damage and the elimination of its consequences (restoration of the environment) as the objectives of the environmental liability.

According to the Article 5, EU Directive No. 2004/35/CE, the competent authority may, at any time:

- require the operator to provide information on any imminent threat of environmental damage or in suspected cases of such an imminent threat;

[1] Federal Law No. 7-FZ dated January 10, 2002 "On Environmental Protection" // Bulletin of the Legislation of the Russian Federation. 14.01.2002 No. 2. Art. 133.

- require the operator to take the necessary preventive measures;

- give instructions to the operator to be followed on the necessary preventive measures to be taken; or

- itself take the necessary preventive measures.

The competent authority shall require that the preventive measures are taken by the operator. If the operator fails to comply with the obligations, cannot be identified or is not required to bear the costs under this Directive, the competent authority may take these measures itself.

The Russian ecological doctrine considers the prevention of environmental damage as one of the key principles of environmental protection. According to the fair point of M.M. Brinchuk, "the prevention of negative environmental impacts should be in the first place in the hierarchy of tasks"[2].

The legal concept of "environmental damage" should correspond to its economic content as nearly as possible. Taking into account the nature of negative consequences and the form of the environmental damage, it should be divided into real and probable (prevented)[3].

This obvious truth requires the creation of a mechanism for implementation in developing all the basic institutions of environmental law and, above all, when regulating relations for the reparation for the environmental damage.

Noting the importance of taking into account the preventive function of legal regulation of the environmental damage reparation, it should be recognized that the implementation of such a function goes beyond the institution of civil liability and requires a comprehensive legal regulation of these relations based on the

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[2] Brinchuk M.M. Legal protection of the environment from toxic pollution. M.: NAUKA (Science), 1990. P. 92.

[3] Misnik G.A. Reparation of the Environmental Damage in the Russian Law: Abstract of dissertation ... PhD in Law (Doctor in Law): 12.00.06 – Moscow, 2008. – 56 p.

recognition and application of various legal measures to ensure reparation for the environmental damage.

The issue of the relationship between reparation of the damage and its prevention covers not only illegal but also legitimate harm.

The Constitutional Court of the Russian Federation is currently considering the claim of the "Ilim Group" joint-stock company about recognition of the provisions of environmental legislation as unconstitutional to the extent that they, according to the meaning given to them by the law-enforcement practice, allow the persons who carry out logging activities to be held responsible for the damage to hunting resources and their habitat, the damage that the onset of which objectively and inevitably accompanies such activity, despite the compliance by these persons with the preconditions for the lawfulness of its implementation, which is expressed, including, in the exercise of statutory environmental activities.

At the same time, according to the Irkutsk regional court (appeal ruling of July 10, 2017), the reality of harm is determined by the fact of economic activity of the defendant, which is carried out continuous cutting of forest plantations that are the habitat of wildlife.

The courts concluded that the Commission of actions to cut forest plantations in itself is sufficient to bring the culprit to justice, because the resulting decrease in the population of wild animals due to natural causes is inevitable and does not need to be independently established.

Thus, the interpretation of the courts of the current legislation, in our opinion, is based on an indirect presumption, according to the courts, arising from the provisions of article 9 of the Constitution of the Russian Federation, according to which land and other natural resources are used and protected in the Russian Federation as the basis of life and activities of the peoples living in the relevant territory, article 3 of the Federal law "On environmental protection" of 10.01.2002. No. 7-FZ on establishing as a principle of

environmental protection the payment for nature use and compensation for damage to the environment and the above-mentioned part 1 of article 56 of the Federal Law of the Russian Federation on Wildlife (No. 52-FZ of 1995).

Reparation of the legal environmental damage, undoubtedly, requires special legal regulation.

At the stage of planning economic activities it is necessary to provide the following in the legislation:

- taking into account all the risks from the activities, including financial ones, which consist in the valuation of the legal damage caused in the course of economic activity to all components of the ecosystem (for example, assessing the potential damage to hunting resources during the cutting of forests);

- carrying out activities aimed at preventing the lawful harm, and their assessment.

A model legislation of the CIS – recommendatory documents that can be taken as the basis for the development of legislative acts by the CIS Member States, may be taken as definite standard for the improvement of the Russian legislation. At the level of the countries of the Commonwealth, a recommendatory normative legal Act was adopted – the Model CIS Law "On Environmental Responsibility with regard to the Prevention and Elimination of Damage Caused to the Environment"[4], in which the prevention of the environmental damage is the goal of the environmental liability.

In accordance with the Model Law:

- the economic entities provide measures for the prevention of environmental pollution, the use of the best available technologies that contribute to the environmental protection;

- in order to economically promote prevention of environmental damage, the State applies voluntary and compulsory ecological insurance mechanisms, tax concessions, non-tax payments

[4] Resolution of the Inter-Parliamentary Assembly of Member Nations of the Commonwealth of Independent States No. 33-10 dated December 3, 2009.

concessions, as well as the budget subsidies, introduces lower rates of payment for the negative impact on the environment for the economic entities with a voluntary environmental insurance policy;

- the accumulation of funds received in claims for compensation for the environmental damage is being provided for their targeted use for the prevention and elimination of the environmental damage.

Inclusion of environmental damage prevention in the system of environmental liability in Russia:

- Creation of a mechanism for implementation in developing all the basic institutions of environmental law and, above all, when regulating relations for the reparation for the environmental damage.
- Noting the importance of taking into account the preventive function of legal regulation of the environmental damage reparation, it should be recognized that the implementation of such a function goes beyond the institution of civil liability and requires a comprehensive legal regulation of these relations based on the recognition and application of various legal measures to ensure reparation for the environmental damage.

GREEN CLIMATE FUND: SUPPORING THE TECHNOLOGY DEVELOPMENT AND TRANSFER[1]

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As one of focal point of the global climate regime is the technology development and transfer at the national and international levels with the aim of deployment and utilizing the so-called climate technologies that are basis for climate change adaptation and mitigation. The UN Convention on climate change (UNFCCC) in para 1(c) of article 4 states that Parties shall promote and cooperate in development, application and diffusion, including transfer of technologies, practice and processes that control, reduce and prevent anthropogenic emissions of greenhouse gases not controlled by the Montreal Protocol in flowing sectors – energy, transport, agriculture, forestry and waste management sectors.

The technologies ensuring to address climate problems in these sectors are cross-cutting and named climate technologies. These technologies also promote harmonizing three dimensions of development as regards the transition to sustainable development and achieving its goals because the climate change is an integral sector of sustainable development.

Indeed, technological solutions are fundamental to facilitate law-emission and climate-resilient pathways. They help adapt to the adverse impacts of climate change due to renewable energy, energy efficiency or innovative transportation systems and

[1] This work is conducted under financial support of the Russian Foundation for Basic Research (project No 17-03-00400-OGN "International legal regulation of technology transfer in the context of sustainable development strategy: state and perspectives").

innovative agricultural systems. That is why the development and transfer of climate technologies is the subject matter of scientific and expert studies mediating the trends in the international technology transfer in the context of climate change and through lens of achieving sustainable development as such[2]. Furthermore, climate technology development and transfer is a one of focal point of activity of international organizations.

With the adoption of the Paris Agreement in 2015, technology development and transfer has been recognized as a core element enabling to limit further global temperature rise. Parties agreed that shall be supported by the Financial Mechanism of the UNFCCC for collaborative approach to R&D and facilitating access to technology, in particular for early stage of the technology cycle in developing countries (para 5 of art. 10).

As well-known, technology transfer is a complex process. Its success, especially with respect to developing countries, depends on various factors. One of them is a proper funding. At present, developing countries that need in climate technologies may resort not only to funding of Global Environment Facility (GEF)[3] but also – within framework of regime of UNCCC – to utilize Financial Mechanism of UNFCCC and use the funding windows under Green Climate Fund (GCF) that support the climate technology development and transfer.

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[2] Brewer T. Climate Change Technology Transfer: A New Paradigm and Policy Agenda // Climate policy. 2008. Vol. 8. No. 5. P. 516 – 526; Yang Z. An Analysis of Technology Transfer as a Response to Climate Change. Copenhagen, 2008; Craft B. *et al.* Technology Development and Transfer, the Least Development Countries and the Future Climate Regime. Considerations for the post-2020. Climate and Development Knowledge Network, 2015. URL: https://pubs.iied.org/pdfs/g04039.pdf (дата обращения 9 апреля 2019 г.).

[3] Bernard S., Nakhooda S. Financing climate technology transfer. Lessons from efforts under the UNFCCC (Briefing), 2015. P. 3. URL: https://www.odi.org/sites/odi.org.uk/files/odi-assets/publication-files/10053.pdf (дата обращения 10 апреля 2019 г.).

Generally, the GCF has been established in accordance with para 102 of Decision No 1/CP.16 adopted at sixteenth session of Conference of Parties (COP)[4] to be designed as an operating entity of the Financial Mechanism of the Convention under Article 11. Being operating entity, GCF also serves the Paris Agreement and supports State Parties that are developing countries in mitigation and adaptation actions as well as in capacity-building and technology development and transfer. Developing State Parties are eligible to receive sufficient financial resources from this Fund as tools for supporting projects, programmes, policies and other activities in accordance with thematic funding windows.

The organizational background Fund's activity is provided for by paragraphs 103–111 of Decision 1/CP.16. The mission of the Fund has been reaffirmed in para 1 of Decision 7/CP.18[5], that sets out basis of the arrangements between the Conference and Fund. By the way, the arrangements between the COP and GCF (as mentioned in the Annex to decision 5/CP.19) provide that the annual reports of the Fund shall included information on the implementation of policies, programme, priorities and eligibility criteria provided by the COP. The arrangements also state the specific information that GCF has to include in its reports[6].

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[4] UNFCCC. Decision 1/CP.16 "The Cancun agreements" // FCCC/CP/2010/7/Add.1 (15 March 2011). URL: https://unfccc.int/resource/docs/2010/cop16/eng/07a01r.pdf? (дата обращения 22 марта 2019 г.).

[5] UNFCCC. Decision 7/CP.18 "Arrangements between the Conference of the Parties and the Green Climate Fund" (9th plenary meeting, 8 December 2012) // FCCC/CP/2012/8/Add.1. URL: https://unfccc.int/resource/docs/2012/cop18/eng/08a01.pdf (дата обращения 17 марта 2019 г.).

[6] UNFCCC. Decision 5/CP.19 (annex) "Arrangements between the Conferences of the Party and the Green Climate Fund", para 11-15 // FCCC/CP/2013/10.Add.1 (31 January 2014). URL: https://unfccc.int/resource/docs/2013/cop19/eng/10a01.pdf (дата обращения 18 марта 2019 г.).

At the seventeenth session, the COP decided, *inter alia*, to approve the Governing Instrument for Fund[7]. This instrument stipulates that the Fund is to play a key role in channeling the new, additional, predictable and adequate financial resources to developing countries as to promoting the paradigm shift to a new vector of development, namely sustainable development. The Governing Board of Fund includes 12 seats for representatives of developing countries and 12 for developed countries. Eligible organizations are public and private entities.

The objective of Fund is to contribute to the achievement of the ultimate objective of the UNFCCC by providing support to developing countries to limit or reduce their greenhouse gas emission and to adapt to the impacts of climate change. One of task of the Fund is to balance the allocation of financial and technical resources between adaptation and mitigation activities of State Parties. The investment framework of GCF contains subcriteria and/or assessment factors relevant to low-emission or climate-resilient technologies.

The major operating issue of the Fund is the financing on basis grants and concessional loans. This mission is closely connected with other functions, for example, with promoting capacity-building, technical assistant, especially regarding the developing countries so that they can respond to climate challenges. One of other aims of Fund's activity is a mobilizing development and transfer of clean technology to boost efforts to address problem of climate change. Accordingly, the Fund supports infrastructure development and helps to scale up the scientific and technical capabilities and use of technology transfer especially to developing countries.

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[7] Governing Instrument for the Green Climate Fund // UNFCCC. Decision 3/CP.17 "Launching the Green Climate Fund". Annex // FCCC/CP/2011/9/Add.1 (15 March 2012). URL: https://unfccc.int/sites/default/files/resource/docs/2011/cop17/eng/09a01.pdf (дата обращения 3 марта 2019 г.).

Under para 35 of the Governing Instrument, GCF finances the agreed incremental costs for activities to enable and support technology development and transfer along with enhanced action on adaptation and mitigation, capacity building and the preparation of national reports by developing countries. Para 38 also mandates that the Board of GCF ensures adequate resources for capacity-building and technology development and transfer. Additionally, Fund strives to provide adequate financial resources for innovative and replicable approaches. Related Board decisions reaffirm this mandate.

It is important that decisions of COP are the instructive framework of GCF activity, including technology matters. For example, Decision 7/CP.20 in para 8 calls on the Board to ensure adequate resources for capacity-building and technology development and transfer consistent with para 38 of the Governing instrument.

As said in para 2(*k*) of Decision 10/CP.22, COP acknowledged that the "Green Climate Fund's operational modalities enable support for technology development and transfer, including for facilitating access to environmentally sound technologies and for collaborative research and development"[8]. Following decision B.10/04, the GCF has launched a pilot phase of enhancing direct access to the GCF's funding envelope of up to US 2000 million for 10 pilots have been allocated[9]. In decision 7/CP.21, para 22[10],

[8] UNFCCC. Decision 10/CP.22 "Report of the Global Climate Fund to the Conference of the Parties and Guidance to the Green Climate Fund" // FCCC/C/2016/10/Add.1. URL: https://unfccc.int/sites/default/files/resource/docs/2016/cop22/rus/10a01r.pdf (дата обращения 4 апреля 2019 г.).

[9] Fourth report of the Green Climate Fund to the COP of UNFCCC (4 September 2015). P. 13 // FCCC/CP/2015/5 (21 September 2015). URL: https://unfccc.int/sites/default/files/resource/docs/2015/cop21/eng/03.pdf (дата обращения 10 марта 2019 г.).

[10] UNFCCC. Decision 7/CP.21 Report of the Green Climate fund to the Conference of the Parties and Guidance to the Green Climate Fund (11 the plenary meeting, 13 December 2015) // FCCC/CP/2015/10/Add.2 (29 January 2016). URL: https://unfccc.int/resource/docs/2015/cop21/eng/10a02.pdf (дата обращения 11 марта 2019 г.).

COP invites the Board of the GCF to consider ways to provide support, pursuant to the modalities of the GCF, for facilitating access to environmental sound technologies in developing country Parties, and for undertaking collaborative R&D for enabling development country Parties to enhance their mitigation and adaptation action. In response to this, Board by decision B.14/2 confirmed current GCF modalities enabling the support for technology development and transfer, including facilitating access to environmentally sound technologies and for collaborative R&D[11].

Further, Board in para *c)* of decision B.19/02[12] requested the Secretariat to include in the annual report to the COP the section containing the information on project approved by the Board that support the innovation and/or scaling up the climate technologies. This section should address this mandate and provide details on GCF support for facilitating access to environmentally sound technologies, and collaborative R&D for developing countries.

As such, technologies are supported by Fund through programmes and projects in line with national strategic objectives and priorities and help advance ambitious action on adaptation and mitigation in line with national needs.

Firstly, it should be pointed the support for technology development and transfer through the GCF Readiness and Preparatory Support Programme (Readiness Programme)[13]. The

[11] Board of GCF. Decision B.14/02 // Decisions of the Board – fourteenth meeting of the Board (12–14 October 2016) // GCF/B.14/17 (2 November 2016). URL: https://www.greenclimate.fund/documents/20182/409835/GCF_B.14_17_ (дата обращения 1 апреля 2019 г.).

[12] Board of GCF. Decision B.19/02 // Decisions of the Board – nineteenth meeting of the Board (26 February – 1 March 2018) // GCF/B.19/43 (16 March 2018). URL: https://www.greenclimate.fund/documents/20182/953917/GCF_B.19_02 (дата обращения 2 апреля 2019 г.).

[13] GCF's Readiness and Preparatory Support Programme. URL: https://www.greenclimate.fund/gcf101/empowering-countries/readiness-support (дата обращения 18 марта 2019 г.).

Readiness Programme helps countries to access GCF resources and strengthens the institutional capacities to engage with the Fund effectively. It also assist countries in undertaking adaptation planning and the development of strategic frameworks to build their programming with the GCF. Examples of technology support through the Readiness programme are following:

- strengthened drought and flood management through improved science based information availability and management in Myanmar: implementation of vulnerability assessment and adaptation technologies;

- development of Energy Efficiency Master Plan for Tongo: promotion of renewable energy generation energy efficiency improvement, resilient agriculture with enhanced production.

Secondly, support for technology are realizing through projects. Many GCF's projects stimulate the uptake of climate technology. From the first project approved in 2015, this support cuts across the mitigation and adaptation windows of GCF and includes capacity-building and similar enabling activities. As of July 2018, 185 readiness requests from 110 countries have been approved, including request that support developing country efforts to deploy climate technologies.

By decision 9/CP.23, para 18[14], the COP encouraged GCF to report information on projects approved by the Board that support the innovation and/or scaling up of climate technologies. In response to that, information of supporting the technology became a regular section of annual reports of GCF[15] and addendums

[14] UNFCCC. Decision 9/CP.23 Report of the Green Climate Fund to the Conference of the Parties and Guidance to the Green Climate Fund (14th plenary meeting, 18 November 2017) // FCCC/CP/2017/11/Add.1 (8 February 2018). URL: https://unfccc.int/resource/docs/2017/cop23/eng/10a01.pdf (дата обращения 20 марта 2019 г.).

[15] See: Ch. IV "Support of technology" of Seventh report of the Green Climate Fund to the Conference of the Parties // GCF/B.20/15 (8 June 2018) // FCCC/CP/2018/5 (17 September 2018). URL: https://unfccc.int/sites/default/files/resource/cp2018_5_advance.pdf (дата обращения 14 марта 2019 г.).

to these reports[16]. Full list of projects supported is in Annex 3 to the Addendum to Seventh Report of the Green Climate Fund[17].

The some projects with technology component is reflected in section "Examples of support for technology in the GCF portfolio" of Seventh report (2018). Table 2 provides a non-exhaustive, indicative presentation of the type of technology support. The projects and programmes in Table 2 are valued as USD 2,2 billion, of which GCF financing totals USD 699 million. Although not all the committed financing or co-financing can or should be counted as support for technology, this non-exhaustive list indicates that GCF has committed a significant percentage of its resources to supporting the climate technology in developing countries.

So, project "Water Sector Resilience nexus for Sustainability in Barbados (FP060)" supposes the promotion of renewable energy technologies to increase water security via the installant of photovoltaic, solar and backup natural gas power for pumping stations. Project "Business Loan Programme for GHG Emission reduction in Mongolia (FP028)" seeks promotion to energy efficient and renewable energy technologies in Mongolian.

Fund's supporting the technology development and transfer is in closely linkage with promoting the collaborative RD&D (research, development and demonstration) adopted under the UNFCCC as a possible means to assist climate technology development and transfer to developing countries so that to improve

[16] See, for examples, Ch. VII "Support for technology" of Addendum to the Sixth report of the GCF to the Conference of party to the UNFCCC // FCCC/CP/2017/5/Add.1.

[17] Annex 3 to Addendum to the Seventh Report of the Green Climate Fund (14 November, 2018. P. 17–27). URL: FCCC/CP/2018/5/Add.1 (16 November 2018) // https://unfccc.int.sites/default/files/resource/cp2018_5a1.pdf (дата обращения 6 апреля 2019 г.); See also: CGF portfolio. URL: https//www.greenclimate.fund/what-we-do/project-programmes (дата обращения 7 апреля 2019 г.).

low-carbon and climate-resilient development. It sits within the broader context under the Convention's commitments to increase flows and availability of climate technologies for mitigation and adaptation in developing countries. Collaborative RD&D is explicitly recognized in the Paris agreement in relation to the technology framework.

Fund is based on assumption about existing of relationship between collaborative RD&D and climate technology development and transfer to developing countries. Accordingly, Board in para *f* of Decision B.14/02 requested the Secretariat to prepare document for consideration by the Board which would identify concrete options on how the GCF can support collaborative R&D in the context of operational framework for complementary and coherence with climate finance delivery channels.

The prepared document GCF/B.12[18] presents: 1) key lessons to guide the support of the GCF on collaborative R&D; 2) a set of non-mutually exclusive options and modalities for supporting collaborative research, development and demonstrative within GCF business model, which are to be employed by national designated authorities and accredited entities when assessing GCF resources. Addendum to this document provides the additional information on the link between collaborative RD&D and climate technology and transfer[19].

There are some key principles that will impact on the effectiveness of funding for collaboration RD&D. These principles are based on significant lessons learning from international and national support for development and transfer of climate technologies.

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[18] Options for support for technology collaborative research and development // GCF/B.18/12 (19 September 2017). URL: https://www.greenclimate.fund/documents/ (дата обращения 23 марта 2019 г.).

[19] Options for support for technology collaborative research and development – Addendum. P. 2 // GCF/B18/12/Add.01. URL: https://www.greenclimate.fund/documents/ (дата обращения 11 марта 2019 г.).

Lesson 1: to aim to contribute to building innovation system. First key principle is to support the relevance of strong innovation system to diffusion of new technologies.

Lesson 2: to understand and respond to context-specific conditions and needs. Funding demands a diversified approach that can respond to very different local/national capacities, infrastructure, social, cultural and market context that defines the conditions under which climate technologies are developed, transferred and adopted.

Lesson 3: to recognize the role of different actors and sectors in collaborative RD&D. Third key principle is to support more capital intensive sectors, such as hydro and marine power, nuclear and wind because, for example, over 80 per cent of the total seed investment value from cleantech organizations and angel investors.

Lesson 4: necessary to consider the application of diverse financing instruments. There are two types of public collaborative RD&D – direct and indirect financing of chains of innovation cycle as such. The fourth principle is to support the pre-commercial technology development stages, for example commercial-scale demonstration, funded, as a rule, by public sectors, such as research institutes, universities and other public agencies.

In decision B.18/03/ para *a*, the Board took note options outlined in document GCF/B.18/12 to support for technology collaborative research, development and demonstration, in respect of two approaches:

1) supporting the climate technology innovation systems for creation and strengthening of intermediary innovation institutions, and strengthening their ability to serve as a platforms for collaborative RD&D, including technology-pull policies;

2) supporting the targeted climate technology research, development and demonstration support. For this purposes, Fund strives support the technology incubators, technology partnerships, regional and international networks, existing collaborative RD&D programmes of multilateral organizations, such as Inter-

national energy agency, Committee on Energy research and Technology.

The major partner of the Fund in the technological area is the UNCCC Technology Mechanism. The Board in para *d* of the Dec. B.14/02 decided to continue collaboration and coherence engagement with the Technology Mechanism, namely Technology Executive Committee (TEC) and the Climate Technology Center and Network (CTCN). Additionally, the Board decided in para *e* to encourage national designated authorities/focal points to coordinate with the CTCN's national designed entities in order to enhance cooperation.

On this basis, in 2017 the Board also emphasized the importance of continued collaboration with the UNFCCC's TEC and CTCN on implementing the support for technology. In accordance with para *d)* of Board's Decision 18/03, the Secretariat was requested to continue collaboration with TEC and CTCN to enable support for technology development and transfer for facilitating access to environmentally sound technology and for collaborative R&D for developing countries[20]. Strengthening the linkages with Technology Mechanism is provided for by Ch. IX of the above-mentioned Seventh report of GCF. In turn, TEC constantly underlines the perspectives of GCF's funding for climate technology development and transfer, including technology assessments[21]. As result, partnership between GCF and Technology mechanism was been formed.

As example, Secretariat participated in the CTCN Expert meeting devoted to national systems of innovation (21–23 Febru-

[20] Board of GCF. Decision B.18/03 // Decisions of the Board – eighteenth meeting of the Board, 30 September – 2 October 2017 // GCF/B.18/23 (2 November 2017). URL: https://www.greenclimate.fund/documents/20182/820027/GCF_B.18_23 (дата обращения 18 марта 2019 г.).

[21] Financing for climate technology available from GCF – UNFCCC Technology Committee told. TWN info Service on climate Change (Apr17/04) 17 April 2017. Third World Network. URL: https://www.twn.my/title2/climate/info.service/2017/cc170404.htm (дата обращения 13 апреля 2019 г.).

ary 2018, Paris), which featured discussions on National Systems of Innovations and Incubators and Accelerations (I&As). At this meeting, the Secretariat was informed on the wide array of approaches to the topic, while gaining feedback on the GCF RFP mandated by B.18/03 from experts from UNIDO, US's National Renewable Energy laboratory, the Indian Institute of Technology, among others. Further, the Secretariat also co-organized with the TEC and CTCN the thematic dialogue on boosting climate technology I&As in developing countries (Bonn, 14 March 2018)[22], alongside the sixteenth meeting of the TEC. The dialogue addresses three main aspects such as role of I&As as part of country's innovation ecosystem, experience with I&A on the ground and, finally, accelerating investment in climate technology I&As.

Up to sum, GCF taking important role in the climate finance architecture and intending to simplify the low-carbon and climate adaptation investment for developing countries, simultaneously, may be viewed as playing a significant role in the global R&D Governance based on methodological background that no "one-size fits all" exists. Effectiveness of Fund's supporting for development and transfer of climate technologies depends on numerous key elements, such as mobilizing of sufficient finance, avoiding duplicating the activity of GEF and, certainly, adding collaboration with UNFCCC Technology mechanism by collaboration with UN's Technology Facilitation Mechanism.

[22] TT: CLEAR. Thematic dialogue on Incubators and Accelerators (14 March, 2018). URL: http://unfccc.int/ttclear/events/2018_event2 (дата обращения 15 апреля 2019 г.).

ENVIRONMENTAL DAMAGE ASSESSMENT BY THE INTERNATIONAL COURT OF JUSTICE OF THE UNITED NATIONS IN THE CASE CONCERNING CERTAIN ACTIVITIES CARRIED OUT BY NICARAGUA IN THE BORDER AREA (COSTA RICA V. NICARAGUA)

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In February 2018, for the first time in its history, the International Court of Justice made a decision on compensation for environmental damage. In accordance with Article 36 (2) of the Statute of the International Court of Justice, the jurisdiction of the Court concerns the following matters: a) the interpretation of a treaty; b) any question of international law; c) existence of any fact which, if established, would constitute a breach of an international obligation; (d) the nature or extent of the reparation to be made for the breach of an international obligation. The jurisdiction of the Court under Art. 36 (2 d) of the Statute is rarely implemented. It should be emphasized that the analyzed dispute "*Costa Rica v. Nicaragua*" is the third judgment in which the Court fixed a specific amount for compensation for damage[1]. The institution of reparations for violations of international law is increasingly developing within the framework of regional human rights courts[2].

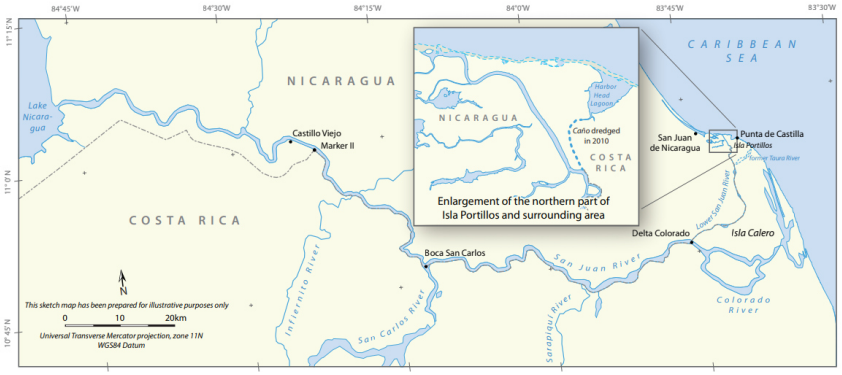
The case is a many-year territorial dispute between Nicaragua and Costa Rica, dating back to the mid-19th century. It was

[1] This was in the first judgment of the Court in 1949 in the "Corfu Channel" case (Corfu Channel (U.K. v. Alb.), Judgment, 1949 ICJ Rep. 4 (Apr. 9)) and in 2012 in the "Case Concerning Ahmadou Sadio Diallo" (Guinea v. Dem. Rep. Congo), Compensation, Judgment, 2012 ICJ Rep. 324 (June 19)).

[2] K.O. Keburia . The right to compensation under international law for violations of human rights by the state. Ph.D. thesis in Law M., RUDN, 2018.

considered in various international courts and arbitration[3]. In the process of considering the dispute, various aspects of international law and international relations were touched upon, which we will omit in the framework of this analysis. We will briefly describe the dispute for general understanding of the international situation to lead us to the problem of interest to us.

Nicaragua and Costa Rica share a 309 km border, which mostly runs along the right bank of the San Juan River: 205 km from Lake Nicaragua to the Caribbean Sea (Map 1).



Map 1

Costa Rica claim of 2010. At the end of 2010, tensions increased on the Costa Rica-Nicaraguan border over the invasion of Costa Rica by military contingent and technical personnel of Nicaragua, who began to work on dredging the San Juan River and digging a canal. It should be noted that the activity took place in the area adjacent to the easternmost section of the land border between the parties. It is a disputed territory (northern part of Portillos island), where a wetland area of about three square kilometers is located (protected under the 1971 Ramsar Convention on Wetlands of International Importance especially as Waterfowl Habitat)

[3] Including the International Court of Justice in 2009 ruled on the dispute "Regarding Navigation and Related Rights" (Costa Rica v. Nicaragua) https://www.icj-cij.org/en/case/133

between the right bank of the disputed canal, the right bank of the San Juan River up to its confluence with the Caribbean Sea and the Laguna los Portillos (Map 2).

The fact is that the San Juan River has physically changed its river bed at the confluence with the Caribbean Sea over more than 150 years, and as a result a disputed territory was formed.

The Costa Rican authorities filed a complaint with the ICJ for the actions of Nicaragua, which they qualified as an "occupation"[4], and accused the Nicaraguan authorities of destroying property in the country. The Costa Rican government argued that Nicaragua: tried to occupy its territory (military units and technical personnel were introduced); attempted to change the river bed of the border San Juan River (work was carried out to deepen the bottom of the river) in order to improve navigation conditions; began to dig a canal (caño) through Costa Rica from the San Juan River to the Laguna los Portillos ("2010 canal" on Map 2). Ultimately, Nicaragua wanted to change the natural border between states, which in turn could lead to significant environmental degradation. Despite the claim, Nicaragua continued to operate in the disputed territory and in 2013 dug two more canals ("Western Canal 2013" and "Eastern Canal 2013" - see map 2).

[4]Along the way, we should note an interesting fact. A Nicaraguan army unit invaded Costa Rica following an incorrectly drawn map on Google Maps. The unit commander explained his actions by the fact that he was guided by a Google Maps map, according to which Isla Portillos (the Calero Island), located in the middle of the San Juan River, belongs to Nicaragua. During the operation, the military built a temporary camp on the island under the flag of Nicaragua, cut down trees in the protected forest, and carried out work to deepen the river bed of the San Juan River. Google representatives were unable to explain the reason for the error, but assumed that outdated sources were used in the compilation of the map. The correct version of the map of this area is offered by one of the main competitors of Google - the search engine Bing owned by Microsoft. The Minister of Foreign Affairs of Costa Rica asked Google to promptly correct the error on the map. It should be noted that Costa Rica does not have a regular army, and therefore the ability to retaliate against Nicaragua.

Map 2

Nicaragua claim of 2011. In December 2011, Nicaragua filed a claim with the ICJ, which stated that the Costa Rican road construction project along the San Juan River violated Nicaragua's sovereignty and caused serious environmental damage (no transboundary environmental impact assessment was carried out).

Consolidation of cases. On April 17, 2013, the ICJ decided to consolidate the proceedings in the case concerning "*Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)"* and the case concerning *"Certain Activities Carried out by Nicaragua in the Border Area" (Costa Rica). Rica v. Nicaragua)*, insofar as it is advisable in accordance with the principle of reasonable administration of justice and the need for judicial economy.

Final Judgment of 2015. The Court ruled on the merits on December 16, 2015. After establishing that it had jurisdiction in this case, the Court concluded that Costa Rica had sovereignty over the disputed territory lying in the northern part of Isla Portillos (Calero Island). Therefore, the activities carried out by Nicaragua in this territory since 2010, including the digging of three canals and the establishment of a military presence in areas of this territory, were committed in violation of the territorial sovereignty of Costa Rica. Nicaragua, therefore, had an obligation to compensate for the damage caused by its unlawful activities in Costa Rica. In its judgment, the Court ruled that Nicaragua was under an obligation to compensate Costa Rica for material damage caused by its illegal activities. If there were no agreement on this issue between the parties within 12 months, the Court would settle this issue in a separate procedure.

Costa Rica claim of 2017. Since the parties were unable to agree on the amount of damage, on January 16, 2017 Costa Rica requested the Court to "settle the issue of compensation due to Costa Rica for damage caused by the illegal activities of Nicaragua". It is precisely this trial that is the subject of our close analysis. Since such cases are a rather rare phenomenon in international law, the question arises on the use of the methodology for assessing environmental damage, since there is no single approach to this issue in international law.

ARGUMENTS OF THE PARTIES

Position of Costa Rica

In their statements, the parties put forward various methodologies for calculating environmental damage in monetary terms. Costa Rica proposed an "ecosystem services" methodology and estimated that the environmental damage was approximately 6.711 million US dollars.

According to Costa Rica's "ecosystem services" approach, some goods and services can be traded on the market and have "direct use value" (eg. timber), while other goods and services cannot

be traded on the market and have "indirect use value "(eg. flood prevention). Costa Rica argued that such an assessment of environmental damage was relevant and applicable, among other things, to Ramsar protected wetlands that had been damaged by Nicaragua.

According to Costa Rica, it is this methodology that allows assessing in full the damage to the environment, especially since it has found support in international and national law enforcement practice.

Position of Nicaragua

Nicaragua believed that Costa Rica was entitled to compensation for the restoration of environmental services that were or might have been lost prior to the restoration of the affected area. This methodology is referred to as "ecosystem service restoration cost" or "replacement cost". Nicaragua estimated the environmental damage to be 188,504 US dollars.

From Nicaragua's perspective, the appropriate method for calculating this value is to take into account the price that is to be paid to maintain an equivalent area until the ecosystem services provided by the affected area are restored. Nicaragua argued that its approach was based on the work of the UN Compensation Commission for the Assessment of Environmental Damage in the First Gulf War[5].

JUDGEMENT OF THE UN INTERNATIONAL COURT

Having examined the parties' proposed approaches, the Court firstly noted that compensation for environmental damage stems from international law, especially in the light of the need to

[5] See the details at: A.M. Solntsev. Compensation for harm caused to the environment as a result of the Iraqi invasion and occupation of Kuwait in the practice of the UN Compensation Commission // Legal problems of compensation for harm caused to the environment: collection of materials of the International Scientific and Practical Conference (MIIGAiK, IZiSP, March 23, 2017) / edited by S.A. Bogolyubov. - M.: MIIGAiK, 2017. - P. 121-126.

ensure full reparation for the damage. According to the ICJ, international law permits the recovery of compensation for both environmental damage and costs and expenses incurred by Costa Rica as a result of the unlawful activities of Nicaragua (for example, monitoring and restoration of the damaged environment). Although the methodology for assessing damages proposed by the parties had precedents in international law, the Court noted that there were also precedents for the use of other methods of calculating compensation. As a result, the Court came to the conclusion that it would not choose between the two proposed assessment methods, but would use in part elements both methods.

Ultimately, the Court decided to assess the damage to the environment on the basis of the "overall assessment" method. Based on this approach, compensation is calculated based on an overall assessment of environmental damage or loss, rather than calculating the cost of specific categories of environmental goods and services, taking into account the time it may take to recover.

In the Court's opinion, this assessment method was used for the following reasons. Firstly, it wanted to adopt an approach that took into account the correlation between Nicaragua's activities and damage to certain environmental goods and services. Secondly, the Court considered its approach more appropriate than others in the light of the specific characteristics of the affected area, namely a protected wetland under the Ramsar Convention. Thirdly, the general assessment of the damage made it possible to take into account the ability of the damaged area to natural recovery.

The Court delivered its judgment one year after the filing of the claim - on February 2, 2018. The Court found that the damage to the environment and the subsequent deterioration or loss of the environment's ability to provide goods and services were compensable in accordance with international law. In determining compensation for environmental damage, the Court assessed the cost of restoration of the damaged environment, as well as the impairment or loss of environmental goods and services from the time

of damage until restoration. The Court found that the total compensation awarded to Costa Rica was US$ 378,890.59 to be paid by Nicaragua by April 2, 2018.This amount included:

- US$ 120,000 for the damage or loss of environmental goods and services (by fifteen votes to one, Judge ad hoc Dugard against);
- US$ 2708.39 to cover the cost of the restoration of internationally protected wetlands (fifteen votes to one, Judge Donoghue against);
- to cover costs and expenses incurred by Costa Rica as a direct result of the unlawful activities of the Republic of Nicaragua on the territory of Costa Rica, in the amount of US$ 236,032.16 (unanimously);
- interest at an annual rate of 4% of the compensation due to the Republic of Costa Rica in the amount of US$ 20,150.04. (however, if the total amount is not paid by April 2, 2018, the interest on the total amount due from the Republic of Nicaragua to the Republic of Costa Rica will increase from April 3, 2018 and will be 6% per year) (unanimously).

By letter dated March 22, 2018, Nicaragua informed the Registry of the Court that on March 8, 2018, it had transferred to Costa Rica the total amount of compensation awarded to the latter.

Overall, the judgment of the Court is innovative with regard to the calculation of compensation for environmental damage. A critical analysis of the judgment shows that the Court's substantiation of the choice of a specific damage assessment was not sufficiently convincing, which led to a lower environmental damage assessment than the applicant claimed. Indeed, the amount awarded was about 5% of the amount in the claim filed by Costa Rica. It is also not clear why the International Court of Justice did not order an examination, although it has such right under Art. 50 of the Statute of the ICJ.

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