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CONTENTS

LEGAL ASPECTS OF PROSECUTION FOR WAR CRIMES: THE PROBLEM OF APPLİCATİON OF LEGAL NORMS

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Abstract

When studying the problems related to the application of international law in the prosecution of war crimes, the relationship between international and domestic law in general should be clarified. This issue is a key element in solving the problem of law enforcement as a whole. It should be noted that there is an approach in jurisprudence that an international norm of a criminal nature can be applied both directly and indirectly. In the case of indirect application, it is intended to be applied through the relevant norm of national law. The direct application of a norm of international criminal law means the application of this norm by a national or international law enforcer independently, without any reservation or restriction.

One of the key issues in the application of international law is the provision of a system of punishment for activities prohibited by that act. According to the already established general rules of international and domestic law, if the norm of national law does not comply with or contradicts the norm of international law, then the norm of international law must be applied. All civilized countries of the world follow this rule. A criminal law introduced or amended in accordance with an international obligation shall not initially contradict the provisions of an international legal act. However, this issue is within the competence of the legislator.

Keywords: *war crimes, international law, indirect application, direct application, national criminal law, trend, Rome Statute, International Criminal Court, UN International Court of Justice, criminal code.*

The problem of the relationship between international and domestic law is relevant both in theory and in practice. The coherent development of international and national law, globalization and integration processes are among the factors determining this urgency. As for the prosecution of war crimes, it should be noted that the effective fight against the prevention of such crimes is carried out against the background of the interaction of international and national law. No state can effectively fight crime without the help of international law.

In studying the problems associated with the application of international law in the prosecution of war crimes, we consider it expedient to take a brief look at the relationship between international and domestic law in general.

Consideration of the relationship between international law and domestic law requires the study of historically formed and currently studied theories in this area [1, p.20]. International and domestic laws are legal systems that operate independently, but are interconnected and interact with each other. However, this approach is not unequivocally accepted in the science and practice of international law. There are three main theories that explain the relationship between international and domestic law - dualism, monism and coordination.

According to the theory of dualism, international and domestic law is not only different areas of law, but also different rules of law [8, p.289], individuals are subjects of domestic law, and states are subjects of international law, if the will of the state is the source of domestic law.

Thus, without deviating from the topic of research, it should be noted that although many authors consider dualism and monism to be outdated and do not correspond to modern realities, it is these theories that express the position of most states on the application of international law to national law.

One of the current problems of international criminal law is related to the application of international legal norms on liability for war crimes.

It should be noted that there is an approach in jurisprudence that an international norm of a criminal nature can be applied both directly and indirectly. Indirect application means application through the relevant norm of national legislation [4, p.74-80]. In accordance with this approach, we also consider it expedient to study the application of international norms on liability for war crimes in the above-mentioned ways.

First of all, let's start with indirect application. Because indirect application is more typical for international criminal law, that is, international criminal law is applied in compliance with the requirements of national criminal law. In case of indirect application, the regulation of liability for war crimes is also determined.

The distinguishing feature of many international acts is that they set out the requirement of national law for liability for international crimes. This was done to facilitate the exercise of their national jurisdiction over criminals by States.

Such a tradition is still reflected in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. Under the Convention, States Parties must adopt the necessary legislation in accordance with their constitutional procedures to give legal effect to the provisions of this Convention (art. 5) [11, p.402].

In essence, this trend has become increasingly common. States have already begun to bear specific obligations under the international acts to which they are parties, and they have begun to adopt separate norms in their national legislation that criminalize and punish relevant acts. For example, under the 1968 Convention on the Non-Applicability of Limits to War Crimes and Crimes against Humanity, States Parties to the Convention, in accordance with their constitutional procedures, ensure that the statute of limitations does not apply to the prosecution and punishment of war crimes and crimes against humanity undertake to take any legislative and other measures (art.4) [7, p.323].

In some cases, international law provides an instruction in national criminal law that requires an act to be declared a crime. For example, under the Convention on the Prohibition and Destruction of the Development, Production, Collection and Use of Chemical Weapons of 13 January 1993, each State Party shall, in accordance with its constitutional procedure, take the necessary measures to fulfill its obligations under the Convention. In particular, it prohibits legal entities and individuals in its territory or in its jurisdiction from engaging in any activity prohibited by this Convention, and also establishes criminal liability for such activity (art. 7) [9, p.470].

One of the key issues in the application of international law is the provision of a system of punishment for activities prohibited by that act. The requirement in national criminal law to penalize an act implies that such an act is automatically criminalized in national criminal law, because it is impossible to imagine an abstract punishment without defining the criminal act itself. In addition, current sources of international criminal law, in essence, prefer the substantive and legal significance of changes in national legislation. Thus, there is a tendency to expand the possibility of indirect application of international criminal law in international criminal law.

Thus, the expanded possibility of indirect application of the norms of international criminal law is provided for in the Rome Statute. Under the Rome Statute, the International Criminal Court complements the national criminal justice system. According to the preamble of the Rome Statute, it is the duty of every state to exercise criminal jurisdiction over those responsible for international crimes [3, p.214].

Many national criminal laws, including the AR, provide that criminal law is exercised in strict accordance with criminal law. In this case, the national criminal law of many countries (France, Russia, Austria, etc.) contains an instruction that this legislation is based on the norms and principles of international law. At the same time, the constitutions of most countries include

provisions on the priority of international law over national law (for example, Article 151 of the Constitution of the Republic of Azerbaijan (AR)).

The national court, as a rule, applies the norm of national criminal law, determines the responsibility and punishment, as well as in accordance with the requirements of national criminal law. For such an application of a domestic law, its conformity to international criminal law is characteristic.

According to the already established general rules of international and domestic law, if the norm of national law does not comply with or contradicts the norm of international law, then the norm of international law must be applied. All civilized countries of the world follow this rule. A criminal law introduced or amended in accordance with an international obligation shall not initially contradict the provisions of an international legal act. However, this issue is within the competence of the legislator.

Many national criminal laws provide for the possibility of referring to an international instrument when determining whether an act is a crime under international law at the domestic level. In other words, national criminal law norms are usually summarized as blanket norms. This issue implies the indirect application of the norms of international criminal law on war crimes.

According to the Criminal Code of the AR, the use of weapons, means and methods of warfare prohibited by interstate agreements to which the AR is a party is a violation of international humanitarian law, is a war crime. Thus, the indirect application of the norms of international criminal law on war crimes is possible through the reference of national criminal law to an international act.

Let us note another trend in the indirect application of international criminal law. According to this trend, the applicant of international law can apply the norm of international criminal law through national law. Such an opportunity is enshrined in Article 21.1 of the Rome Statute of the International Criminal Court. Pursuant to this article, the Court shall apply the national law of States which, under ordinary circumstances, may exercise its jurisdiction over the offense [10, p.525].

Indirect application of the norms of international criminal law by the International Criminal Court is possible subject to the following conditions - the impossibility of applying the substantive norms of the Rome Statute and the impossibility of applying the norms, principles and treaties of international law.

The expansion of the possibility of indirect application of international law through their inclusion in national criminal legislation, as a result, leads to the universalization of the concept and legal nature of war crimes in the national criminal justice systems of different countries. Indeed, if the principle of priority of international law prevails for the vast majority of States, then the national legislature is obliged not only to commit this act and to establish criminal liability in domestic law, but also in accordance with the act of international law. Otherwise, national law should not be applied. The result of this process is the convergence of the material and legal bases of liability for crimes recognized in international criminal law as war crimes in the domestic legislation of states with different legal systems.

It should be noted that international criminal law is one of the important factors in the universalization of national criminal law on a global scale [2, p.510].

The direct application of a norm of international criminal law means the application of this norm by a national or international law enforcer independently, without any reservation or restriction.

The direct application of international criminal law is not widespread. This is due to the fact that most of the norms of international law of a criminal nature require national legislation to recognize this or that act as a crime.

The possibility of direct application of the norm on war crimes is provided in the documents of the Nuremberg tribunal. Thus, according to Principle II of the Charter of the Nuremberg Tribunal, the failure to impose a domestic law penalty for any act recognized as a crime under international law does not release the perpetrator from criminal liability and punishment [5, p.375].

At present, the possibility of direct application of international law on war crimes is limited, as the national legislation of most countries has implemented the relevant provisions of international criminal law in one form or another. However, there is such an opportunity.

Let us consider the methods of direct application of modern international criminal law on liability for war crimes.

First, the norm of international criminal law on war crimes can be applied by an international law enforcement agency (is an international judicial body). Such an opportunity is provided for in most international conventions when determining the rules for resolving legal disputes. Although the direct application of the norms of international conventions is possible, controversial moments are inevitable, especially in matters of a procedural nature (extradition, criminal prosecution, etc.). However, at the time of the substantive dispute, it is also possible to apply the norm of international law directly, as these documents do not stipulate otherwise. This means that the act can be directly recognized as a war crime under international criminal law, without any reference to national criminal law.

This issue is confirmed by Article 38 of the Charter of the UN International Court of Justice. This article states that the Court, who must resolve disputes in accordance with international law, first of all applies international conventions, those conventions that are recognized by the disputing states and establish rules on them [6, p.94]. Accordingly, it is possible to refer to international documents that characterize the act as a war crime.

Second, a national court may apply a rule of international criminal law that is important to a state, unless there is a relevant provision in the national law of that state. This rule is due to the fact that the constitutions of most countries, including the AR, recognize the norms of international law as an integral part of the national legal system of the country (for example, Article 148.2 of the Constitution of the AR).

Issues related to the possibility and necessity of direct application of international acts on war crimes have been repeatedly emphasized in the legal literature.

Thus, from what we have seen in this paragraph on the application of international law in the prosecution of war crimes, it can be concluded that there are two ways to apply the rules of international criminal law on liability for war crimes: a) indirect is applied or the national norm is a reference to an international legal instrument); and b) directly (a national law enforcement or international body directly applies the norm of international criminal law itself).

In case of conflict of norms of international and national criminal law, priority should be given to the current norm of international criminal law. This is a rule generally accepted by all civilized nations of the world.

The fact of the expanded possibility of indirect application of the norms of international law on war crimes through national legislation objectively brings together the national criminal law systems of different states.

References:

1. Aliyev A.I. International Public Law. Methodical book. Baku, 2004, 2008 p. (in Azerbaijani)

2. Fletcher J., Naumov A.B. Basic concepts of modern criminal law. Moscow, 1998, 510 p. (in Russian)

3. Bartram S. Brown. Research Handbook on International Criminal Law. Edward Elgar Publishing, 2011, 544 p.

4. Bassiouni M. Cherif. International Criminal Law: Sources, Subjects and Contents. Martinus Nijhoff Publishers / Brill Academic Publi; 3rd ed. edition, 2008, 1086 p.

5. Christine van den Wyngaert, Steven Dewulf. International Criminal Law: A Collection of International and Regional Instruments. Fourth Revised Edition. Martinus Nijhoff Publishers, 2011, 2200 p.

6. Evans D.Malcolm. International Law. Oxford University Press, 2014, 873 p.

7. Jacobs L.Steven. Confronting Genocide: Judaism, Christianity, Islam. Lexington Books, 2009, 350 p.

8. Klabbers Jan. International Law. Cambridge University Press, 2013, 350 p.

9. Michael Bothe, Natalino Ronzitti, Allan Rosas. The New Chemical Weapons Convention: Implementation and Prospects. Martinus Nijhoff Publishers, 1998, 613 p.

10. Schabas A.William. The International Criminal Court: A Commentary on the Rome Statute. Oxford University Press, 2016, 1589 p.

11. Schabas William. Genocide in International Law: The Crime of Crimes. Cambridge University Press, 2009, 741 p.

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INTERNATIONAL MECHANISMS FOR ENSURING ENVIRONMENTAL SAFETY

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Abstract

The purpose of the article is to analyze the mechanisms of international environmental security. Scientific novelty of the work is due to the fact that the peculiarities of the International Court of Justice consideration of territorial disputes have not yet been the subject of dissertation or monographic study in domestic science, and the achievements of the Soviet and modern foreign authors in this field cannot meet the needs of the present day. There are still disputable problems of recognition of the decisions of the International Court of Justice as sources of law, there is a debate about the legal nature of the decisions of this court.

An understanding of the category of proof in the international judicial procedure as the activity of the parties to a dispute to establish the existence or absence of circumstances concerning their claims and defenses, and other circumstances relevant to the resolution of the dispute in accordance with the rules of international law, with the participation of an international judicial institution and under its control, has been developed. There are three main directions of international legal regulation in the field of environmental protection: 1) limitation of harmful anthropogenic impact on the environment; 2) ensuring sustainable development of mankind by establishing a rational regime of nature management; 3) international environmental cooperation.

The judicial form of limiting harmful anthropogenic impacts on the environment is ineffective. The UN Court is limited in its resolution of environmental problems by the limits of jurisdictional authority, excessive formalism, and indecision. In addition, its jurisprudence is plagued by errors related to the lack of scientific certainty of evidence and the failure to adequately evaluate and weigh complex scientific data. But since judicial practice develops in the course of consideration of specific cases, reference to international judicial instances is an important factor in its improvement.

The practical significance of the results is that the provisions and conclusions formulated in the work can be used by public authorities, which represent the interests of the state in international judicial bodies, primarily in the UN ICJ, as well as to determine the nature of international legal policy of the country in the protection of its environmental security; in law enforcement activities the findings of the article can be used to interpret the convention norms on environmental issues and practice.

Keywords: *International Court of Justice, United Nations, The Global Risks Report 2020, ecological safety, environment.*

At the end of 2019, UN Secretary General Antonio Guterres warned of the danger of climate change and the proximity of the «point of no return» [1]. In the annual report on the main risks the world may face in 2020, the The World Economic Forum in Davos identified five major threats: slowing economies and social tensions, climate change, declining species biodiversity, cybersecurity issues, and new health challenges. One of the most negative factors affecting climate change and the environment was identified as a failure to prevent serious human-caused damage and disasters, including environmental crimes that harm human life and health [2].

Global environmental problems are associated with climate change, loss of biodiversity, desertification and other negative processes for the environment, increasing environmental damage from natural disasters, anthropogenic impact on the environment and man-made disasters, nuclear weapons tests, pollution of atmospheric air, surface and groundwater, as well as the marine environment. Now it is possible to distinguish three basic directions of international legal regulation in this sphere of international relations: 1) limitation of harmful anthropogenic impact on the environment; 2) ensuring sustainable development of mankind by establishing a rational regime of nature management; 3) international environmental cooperation [3, p.472].

The purpose of the article is to analyze the mechanisms for ensuring international environmental security and the constitutional right to a safe environment for life and health. Why will the practice of the UN Court of Justice on the issues of technogenic impact on the environment be considered?

The authors plan to assess the effectiveness of solving the problems of technogenic impact on the environment in the UN Court, to form a definition of the concept of «proof in international judicial procedure».

The second half of the 20th - the beginning of the 21st centuries are marked by an ever-increasing volume of production and use of hydrocarbons, widespread use of atomic energy for military and peaceful purposes. A specific factor for nuclear technologies is the formation and accumulation of artificial radionuclides, which, under certain circumstances, can enter the environment. The main sources of radioactive contamination are: global fallout of radioactive substances from the atmosphere after nuclear weapons tests, releases of radionuclides due to the activities of nuclear power facilities, radiation accidents.

Among the urgent problems in the use of nuclear technologies are: analysis and prediction of the radioecological consequences of radiation accidents, management of contaminated areas, analysis of risks to humans and the environment in handling radioactive waste. The solution of these problems requires a systematic approach to the analysis of radiation ecological safety, which should comprehensively consider the sources of radioactive contamination of the environment, the migration of radionuclides in the biosphere, radiation doses to humans and biota, possible radiobiological consequences of exposure to ionizing radiation [4, p.3]. It is also extremely important to anticipate and prevent man-made accidents, counteract legal activities that either usually entail environmental pollution due to objective factors (nuclear weapons testing), or carry out gradual pollution due to technological activities, or contains a potential threat of a man-made disaster.

Some states tried to solve the problem of protecting the environment from radioactive contamination caused by nuclear weapons testing in the International Court of Justice, which on December 20, 1974 considered: «The Nuclear Tests Case (Australia v. France)» and the «Nuclear Tests Case (New Zealand v. France)». So, Australia, in its Application, requested the Court to adjudge and declare that further testing of nuclear weapons in the atmosphere in the South Pacific is incompatible with international law, and also to order that the French Republic not conduct any further such tests. New Zealand requested the Court to adjudge and declare that further atmospheric nuclear weapons testing in the South Pacific, leading to radioactive fallout, constitutes a violation of New Zealand's interests under international law, and that such will be

violated if any further similar tests. After the commencement of the consideration of this case by the UN Court and the issuance of an order on interim protection on June 22, 1972, in which the Court indicated that the French government should refrain from conducting nuclear weapons tests that cause radioactive fallout on the territory of Australia, New Zealand, Cook Islands, Niue, Tokelau. France announced its intention to end nuclear testing in the atmosphere of the region [3, p. 485-486], and therefore the cases were removed from consideration by the court, and decisions on the merits were not made.

However, the problem with nuclear weapons tests in this region was later continued in connection with the statement published in the media on June 13, 1995 about the decision of the President of the French Republic to conduct the final series of eight nuclear weapons tests in the South Pacific starting in September 1995. New Zealand filed an application for an examination of the situation on August 21, 1995 in accordance with the judgment of the Court of December 20, 1974 in the aforementioned nuclear weapons test case.

New Zealand stated that the rights to protect are covered by the requirements set out in its 1973 statement and that it is currently seeking recognition only for those rights that would be impaired by the release of radioactive material into the marine environment as a result of new tests to be held in the atolls of Mururoa or Fangatauf. New Zealand requested the Court to adjudge and declare: «i) that the proposed nuclear weapons tests would constitute a violation of the rights of New Zealand, as well as of other States; ii) that it is illegal for France to carry out such nuclear weapons tests before the environmental impact assessment is carried out according to recognized international standards. Unless in the course of such an assessment it is established that the tests will not lead, directly or indirectly, to radioactive contamination of the marine environment ...» [5] By the decision of September 22, 1995 the UN Court indicated that when analyzing its 1974 decision, it concluded that this decision concerned exclusively nuclear tests in the atmosphere; that, therefore, the Court is currently unable to take note of issues related to underground nuclear testing. Finally, the Court notes that its decision is without prejudice to the obligations of States to preserve and protect the natural environment, obligations to which both New Zealand and France have reaffirmed their adherence in the present case. Thus, the Court held that the basis of the 1974 preliminary judgment was not affected; that, therefore, New Zealand's petition does not fall within the scope of the provisions of that judgment; and that this petition should be rejected [5]. Judge Oda fully upheld the ruling rejecting New Zealand's motion. But he said that as a member of the Court, representing the only country that has experienced the destructive effects of nuclear weapons, he considers himself obliged to express on his own behalf the hope that in the future, under no circumstances will any further tests of any type of nuclear weapon be carried out [5].

In this case, the non-military activities of states related to the use of nuclear weapons were considered and, although it can be argued that a partial result took place, no decision as such was taken, which means that the legal position of the Court on the merits of the case has not been formulated. This circumstance diminishes in a great extent the significance of the above-mentioned proceedings, since no precedent has been set on the legality of testing nuclear weapons. In addition, the rule of subparagraph d) of paragraph 1 of Art. 38 of the Statute of the UN Court means that it has the legal ability to determine the existence of legal norms by identifying them, that is, to declare a norm that was previously absent in international law, in the formulation announced by the Court. Also, establishing the existence of a customary legal norm and formulating it, the UN Court gives it positive properties [6].

However, the UN Court is cautious about determining the existence of a customary rule: in its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons of July 8, 1996, it refused to do so. In particular, the UN Court has held that neither customary nor conventional international law contains any comprehensive or universal prohibition of the threat or use of nuclear weapons as such. And given the current state of international law, as well as the factual

circumstances known to the Court, it cannot conclude whether the threat or use of nuclear weapons is legal or illegal in the extreme circumstances of self-defense, when it comes to the very survival of one or another state [7]. Judge V.S. Vereshchetin stated in his statement: «The Court clearly recognizes that the threat or use of nuclear weapons would be subject to the prohibitions and severe restrictions established by the Charter of the United Nations and a number of other multilateral treaties and specific provisions, as well as customary rules and principles of the law of armed conflict. Moreover, the Court has found that the threat or use of nuclear weapons would generally be contrary to international law applicable in times of armed conflict, and in particular to the principles and norms of humanitarian law. It is likely that, through an assumption, conclusion or analogy, the Court (and this is what some states in their written and oral reports called for it) could deduce from the above some general rule that completely prohibits the threat or use of nuclear weapons, leaving no room for any gap in the law, even if it is of an exceptional nature» [7].

But the very states that called on the Court to show courage and fulfill its historic mission, insisted that the Court remain within the framework of its judicial function and not act as a legislator, asked the Court to state the law as it is, and not it should be. Secondly, the Court could not fail to note the fact that in the past all existing prohibitions on the use of other types of weapons of mass destruction (biological, chemical), as well as special restrictions on nuclear weapons, were established by means of specific international treaties or separate treaty provisions, which undoubtedly points to the course of action chosen by the international community as the most suitable for resolving the issue of the complete prohibition of the use of weapons of mass destruction and their final elimination. And thirdly, the Court must take care of the credibility and effectiveness of the general rule drawn up concerning the issue on which the opinions of States diverge so significantly [7].

The authors fully agree with the position of the UN Court, although, of course, it would be very good to have one document - with the help of the advisory opinion of the UN Court, to get rid of nuclear weapons altogether. But this is the catch, which the Court noticed and pointed out that all the current prohibitions, in particular in relation to nuclear weapons, were established with the help of certain treaties, the coordination of the positions of states on which was always extremely difficult. Therefore, the Court really took care of the authority and effectiveness of its rule - it did not formulate a deliberately "dead" rule, which first of all supported its authority, since otherwise the countries possessing nuclear weapons would simply ignore its opinion [8, p. 104-105].

Further, on April 20, 2010, UN Court rendered judgment in the case concerning Pulp Mills on the Uruguay River (Argentina v. Uruguay). The dispute arose over the construction of pulp mills on the Uruguay River. The border between Argentina and Uruguay on the Uruguay River is defined by the bilateral treaty concluded for this purpose in Montevideo on April 7, 1961. Article 7 of this treaty provides for the establishment by the parties of a «regime for the use of the river», which covers various aspects, including the conservation of living resources and the prevention of water pollution in the river.

On 4 May 2006, Argentina filed an Application instituting proceedings against Uruguay concerning alleged breaches by Uruguay of obligations incumbent upon it under the Statute of the River Uruguay, a treaty signed by the two States on 26 February 1975 (hereinafter “the 1975 Statute”) for the purpose of establishing the joint machinery necessary for the optimum and rational utilization of that part of the river which constitutes their joint boundary. In its Application, Argentina charged Uruguay with having unilaterally authorized the construction of two pulp mills on the River Uruguay without complying with the obligatory prior notification and consultation procedures under the 1975 Statute. Argentina claimed that those mills posed a threat to the river and its environment and were likely to impair the quality of the river’s waters and to cause significant transboundary damage to Argentina. As basis for the Court’s jurisdiction, Ar-

gentina invoked the first paragraph of Article 60 of the 1975 Statute, which provides that any dispute concerning the interpretation or application of that Statute which cannot be settled by direct negotiations may be submitted by either party to the Court.

The first pulp mill, which gave rise to the dispute, was planned by Celulosas de M'Bopicua S.A. (hereinafter CMB), which was established by the Spanish company ENCE (Spanish abbreviation for «Empresa Nacional de Celulosas de España» was to be built on the left bank of the Uruguay River in the Uruguayan department of Rio Negro opposite the Argentine city of Gualeguaychu. The second industrial project, which served as the basis for the dispute, was carried out by Botnia S.A. and «Botnia Fray-Bentos S.A.» (hereinafter «Botnia»). This second pulp mill, called Orion (hereinafter Orion (Botnia)), was built on the left bank of the Uruguay River a few kilometers downstream of the site planned for the CMB mill (ENCE) and near the town of Fray Bentos. It was put into operation and has been in operation since November 9, 2007.

Although Argentina in claiming noise and «visible» pollution allegedly caused by the pulp mill, invokes the provision of Article 36 of the 1975 Statute the Court sees no basis for such claims. The clear language of Article 36, which provides that «the parties shall coordinate through the Commission the necessary measures to avoid any change in the ecological balance and to control noxious factors in the river and its dependent areas» leaves no doubt that the Article does not govern the alleged noise and visible pollution claimed by Argentina.

The Court acknowledges that in terms of the technologies employed, and judging from the documents submitted by the parties, particularly the December 2001 Integrated Pollution Prevention and Control Reference Document on Best Available Techniques in the Pulp and Paper Industry (hereinafter IPPC-BAT), there is no evidence to support Argentina's claim that the Orion (Botnia) mill is not in compliance with IPPC-BAT as regards emissions. This conclusion is supported by the fact that Argentina has not provided any clear evidence of Orion (Botnia)'s non-compliance with the requirements of the 1975 Statute.

The Court notes that the data collected after the plant's commissioning, which are contained in various reports, do not indicate that the Orion (Botnia) plant's emissions exceed the emission standards prescribed by the relevant Uruguayan regulations or in the original environmental permit issued by the MVOTMA (Ministerio de Vivienda y Ordenamiento Territorial), except in the few cases where concentrations exceeded the maximum allowable values.

The impact of the emissions on river water quality. Based on the evidence before it, the Court finds that the Orion (Botnia) plant has so far met the standard for total phosphorus in its emissions. The Court notes that the total amount of phosphorus in the river that can be attributed to the Orion (Botnia) plant is a small fraction compared to the total amount of phosphorus in the river from other sources. The Court therefore concludes that the mere fact that the concentration limits for total phosphorus in the river, which are set by the Uruguayan law with respect to water quality standards, were exceeded cannot be considered as a violation of the 1975 Statute. As the Court further notes, it has not been established to its satisfaction that the February 4, 2009, water bloom invoked by Argentina was caused by emissions of nutrients from the Orion (Botnia) plant. In addition, based on the record and the data presented by the parties, the Court concludes that there is insufficient evidence that the alleged increase in phenolic concentrations in the river was caused by the Orion (Botnia) plant.

On the issue of the effects on biodiversity, the Court is of the opinion that, as part of its obligation to preserve the aquatic environment, the parties are obliged to protect the fauna and flora of the river. However, the Court did not find sufficient evidence to conclude that Uruguay had violated its obligation to preserve the aquatic environment, including the protection of its fauna and flora.

With respect to air pollution, the Court is of the opinion that if the emissions from the factory pipes introduced substances having a harmful effect into the aquatic environment, then such indirect pollution of the river falls within the provisions of the 1975 Statute. But the Court

finds that there is no clear evidence in the record that substances having a harmful effect entered the aquatic environment of the river through the Orion (Botnia) plant's emissions into the atmosphere.

Judges Al-Khasawneh and Zimma, in criticizing the Court's decision, emphasize the extremely fact-rich nature of the case, which raises serious questions for them about the role scientific evidence can play in international judicial disputes. They believe that the Court itself is incapable of adequately evaluating and weighing such complex scientific evidence as was presented by the parties. They disagree with the Court's decision to adhere to its traditional rules on the burden of proof and to require Argentina to substantiate claims on issues that they believe the Court cannot fully understand without recourse to expert analysis.

Judge Cançado Trindade sets forth considerations relating to the collateral aspects of the present case which do not relate to inter-State relations and to which he attaches particular importance, namely: (a) the requirements for the protection of human health and the welfare of peoples; (b) the role of civil society in protecting the environment; (c) the objective nature of the obligation (to protect the environment) beyond reciprocity; and (d) the legal personality of the Administrative Commission on the River Uruguay (ACRU). Attention to the protection of human health and the well-being of peoples, as the judge recalls, has been a recurring theme at the recent United Nations world conferences.

Judge ad hoc Vinuesa notes that the lack of scientific certainty in the evidence is of particular concern. This uncertainty undermines the validity of the Court's conclusions. Judge Vinuesa expresses the view that the Court should have sought external expert opinion. On the basis of these conclusions, Judge ad hoc Vinuesa considers that, by failing to apply the precautionary principle, as required by the 1975 Statute and general international law, the Court incorrectly found a violation by Uruguay of its substantive obligations.

The case of Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia) is now pending before the UN Court. Nicaragua filed on November 26, 2013, the application to initiate proceedings against Colombia for «a dispute concerning violations of Nicaragua's sovereign rights and maritime zones announced in the Court's judgment of November 19, 2012 [in the case concerning the Territorial and Maritime Dispute (Nicaragua v. Colombia)] as well as the threatened use of force by Colombia to commit those violations». Colombia asserted four counterclaims. The first was based on an alleged breach of Nicaragua's due diligence duty to protect and preserve the marine environment in the southwestern Caribbean Sea; the second concerned an alleged breach of Nicaragua's due diligence duty to protect the San Andrés Archipelago residents' right to a healthy, benign and sustainable environment. In its order of November 15, 2017, the Court concluded that Columbia's first and second counterclaims were inadmissible as such [9].

As we can see, the UN Court is limited in resolving environmental problems because there are certain jurisdictional conditions that make it impossible to appeal to it in certain categories of cases [10, p.37], as well as excessive formalism and hesitation. In his practice, there are errors associated with the lack of scientific certainty of evidence, the inability to adequately evaluate and weigh complex scientific data. And the decisions themselves are dispositive, not always enforced, and do not guarantee the protection of the rights of the parties. Therefore, it is ineffective to apply to the UN Court for the resolution of environmental problems at the current level of jurisprudence. But since jurisprudence evolves in the course of specific cases, recourse to international judicial bodies is an important factor in its improvement. In addition, as could be seen, the very appeal to the Court may force some states to change their position on a disputed issue. In addition, the opportunity to speak to the world from the official tribune of the UN, which is the International Court of Justice in The Hague, about the real situation and the perpetrator can be beneficial.

In the practice of the UN Court we have considered only the judicial form of the first area of international legal regulation of environmental protection - limitation of harmful anthropogenic impact on the environment. To increase its effectiveness, we consider it necessary (1) to introduce into international treaties, related both directly and indirectly to environmental impact, appropriate provisions for the mandatory recognition of the jurisdiction of a court (UN Court, UN International Tribunal for the Law of the Sea, arbitration ad hoc or other); (2) to determine the issue of the potential environmental impact of a treaty to establish a mandatory examination by independent experts, given the increased risks associated with anthropogenic impact on the environment; 3) consider creating a special international Environmental Court of Arbitration with compulsory jurisdiction for UN member states. The latter is quite controversial, but necessary. Indeed, the International Court of Justice has been and remains the most authoritative and recognized judicial institution for the resolution of international disputes [11, p.12]. It has become an important tool for the resolution of international disputes, both by the Court as a whole and by the permanent chambers for environmental and maritime disputes, as well as by the Chambers ad hoc [12, p.44-46].

Nevertheless, the increase in the number of international judicial institutions indicates that international law is vividly responsive [13, p.7]. M. Koskenniemi and P. Leino say that in order to minimize the contradictions associated with the increasing number of judicial bodies, other international courts should be given the right to request advisory opinions of the International Court of Justice on questions of international law [14, p.554]. According to O. R. Duel, a hierarchical system of legal resolution bodies contributes to the development of a more orderly and coherent system of international law [15, p.23], since international judicial institutions are charged with the task of adapting existing international law to contemporary international life [16, p.72].

As A.S. Ispolinov writes, modern international courts not only apply and interpret the law, but also create new norms of law [17, p.79]. R.V. Alyamkin says that the decisions of the UN Court influence the formation of modern international law and ensuring the international legal order [18, p.83]. The decisions of the UN Court of Justice acquire a precedential character [19, p. 149], and international judicial procedure realizes the potential inherent in international law [20, p.472]. The difficulty of proving its position and the Court's ambiguous approach both to the process of proof and to the evidence itself do not diminish the importance of the judicial procedure itself. Evidence in this case is the activity of the parties to a dispute, with the participation of an international judicial institution and under its control, to establish the existence or absence of circumstances justifying their claims and defences and other circumstances relevant to the resolution of the dispute, in accordance with international law [21, p.177]. As a general rule, a judgment is valid only in respect of a particular case submitted to the court, and does not bind states that are not parties to the case. But the growth of the authority of international courts and, consequently, of their acts, as well as the tendency to recognize the precedential nature of their decisions is gradually changing the categorical nature of this rule [22, p.298].

C.Campbell-Mohn points out that national security depends on a steady supply of natural resources. As national security becomes an environmental issue it is already difficult to assess the likelihood of war over natural resources [23, p.117]. And so we have a vicious circle: economic and military activities lead to environmental degradation, and the reduction of natural resources in turn requires more and more intensive technological methods of extraction, which are mostly dangerous for the environment, or extensive approaches – covering new territories, displacing competitors [24, p.219]. In accordance with Art. 39 of the Constitution of the Republic of Azerbaijan, everyone has the right to live in a healthy environment. As you can see, the emphasis is shifting from a dignified and prosperous life to life in general (in a healthy environment). This applies not only to Azerbaijan, in its Constitution it only consolidated the general trend. This means that the settlement of interstate disputes by peaceful means through international courts is a guarantee of peace and international security [25, p.325-326].

One of the most negative factors affecting climate change and the environment is the failure to prevent serious anthropogenic interventions and disasters, including environmental crimes that harm human life and health. There are three main directions of international legal regulation in the field of environmental protection: 1) limitation of harmful anthropogenic impact on the environment; 2) ensuring sustainable development of mankind by establishing a rational regime of nature management; 3) international environmental cooperation.

The judicial form of limiting harmful anthropogenic impacts on the environment is ineffective. The UN Court is limited in its resolution of environmental problems by the limits of jurisdictional authority, excessive formalism and indecision. In addition, its jurisprudence is plagued by errors related to the lack of scientific certainty of evidence and the failure to adequately evaluate and weigh complex scientific data. But since judicial practice develops in the course of consideration of specific cases, reference to international judicial bodies is an important factor in its improvement. Also to increase the effectiveness of judicial enforcement of international environmental security and the constitutional right to a safe environment for life and health we consider necessary: 1) to introduce into international treaties, related both directly and indirectly to the impact on the environment, appropriate provisions on compulsory recognition of the jurisdiction of the court (UN Court, UN International Tribunal for the Law of the Sea, arbitration ad hoc, etc.); 2) to establish compulsory examination by independent experts to determine the issue of the potential environmental impact of the treaty, taking into account increased risks associated with anthropogenic impact on the environment; 3) to consider the creation of a special international arbitration with compulsory jurisdiction for UN member-states.

It should also be noted that there is no common position on the causes of global climate change: different opinions are expressed both about anthropogenic and natural impacts, as well as about their combination. And if you look at the problem of global warming from a fundamentally different side - economic and political, you can notice a certain connection between them, which closes in a new category that describes the actions of the most developed countries - political ecology.

These countries, taking advantage of the situation of the "global ecological crisis", exercise significant political and economic pressure on the producing and developing countries, which express their categorical "concern" about the state of the planet's environment, demanding the earliest possible replacement of hydrocarbon energy sources with alternative ones. It should be noted that the environmental safety of such sources also raises concerns that are ignored.

References:

1. Manzanaro, S.S. 2019. “COP25 in Madrid: UN Secretary-General Guterres Says Planet Is ‘Close to a Point of No Return.’” Euronews. 3 December 2019. https://www.euronews.com/2019/12/02/live-un-leaders-anddelegates-arrive-in-madrid-for-the-climatechange-summit

2. The Global Risks Report 2020 / Insight Report 15th Edition. In partnership with Marsh & McLennan and Zurich Insurance Group. 94 p. https://www.marsh.com/uk/insights/research/global-risks-report-2020.html

3. Kononenko V.P., Tymchenko L.D. International Law: Text Book. Kyiv: Znannia, 2012. 631 p. (in Ukrainian)

4. Kryshev A.I. Dynamic modeling of the transfer of radionuclides in hydrobiocenoses and assessment of the consequences of radioactive contamination for biota and humans: Referat of PhD thesis. Obninsk: 2008. 50 p. (in Russian)

5. Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court S Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case, I. C. J. Reports. 1995. P. 288.

6. Kononenko V.P. Settlement of territorial disputes by the International Court of Justice: Theory and practice. Kiev-Odessa: Feniks, 2017. 608 p. (in Russian)

7. Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, I. C. J. Reports. 1996. P. 66.

8. Kononenko V.P. Settlement of territorial disputes by the International Court of Justice: Theory and practice. Kyiv-Odesa: Feniks, 2018. 438 p. (in Ukrainian)

9. Report of the International Court of Justice 1 August 2018–31 July 2019. United Nations. New York. 2019. P. 27/69.

10. Kononenko V.P., Tymchenko L.D. International legal protection of Ukraine's maritime spaces in the conditions of Russia's aggression against Ukraine. Pravo Ukrainy. 2020. N 12. P. 22-41 (in Ukrainian)

11. Guzey S.V. Development of International Law by the International Court of Justice of the United Nations: On the Example of Territorial Disputes: Referat of PhD thesis. Moscow: 2006. 27 p. (in Russian)

12. Kalshoven F. Essays on the development of the international legal order. In memory of Haro F. van Panhuys (ed. by F. Kalshoven, J.G. Lammers, P.J. Kuyper). Netherlands: Kluwer academic publishers, 1980. 237 p.

13. Charney J.I. Is International Law Threatened by Multiple Regimes. Leiden/Boston: Martinus Nijhoff Publishers, 1998. 382 p.

14. Koskenniemi M. Leino P. Fragmentation of International Law? Postmodern Anxieties. Leiden Journal of International Law. 2002. N 15. P.553–579.

15. Poyedinok O.R. Dimensions of fragmentation of international law: functional, regional, institutional aspects: Scientific report. Kyiv: T. Shevchenko Kyiv National University. 2013. 35 p. (in Ukrainian)

16. Oellers-Frahm K. Multiplication of International Courts and Tribunals and Conflicting Jurisdiction – Problems and Possible Solutions. Max Planck Yearbook of United Nations Law. 2001. Vol. 5. P.67–104.

17. Ispolinov A.S. Precedent in international law (on the example of the UN International Court of Justice, ECHR, WTO and the EAEU Court). Zakonodatelstvo. 2017. N 1. P. 78-87 (in Russian)

18. Alyamkin R.V. The role of the UN International Court of Justice in ensuring international law and order: the practice of settling international territorial disputes. Naukovi zapysky Institutu zakonodavstva Verhovnoy Rady Ukrainy. 2010. N 4. P. 83-87 (in Ukrainian)

19. Kononenko V., Tymchenko L. The legitimacy of acquisition of state territory. Juridical Tribune Journal. Vol. 10. N. 1. 2020. p. 149-161.

20. Kononenko V.P. Judicial precedent in international and national law: monograph. Odesa: Feniks. 2013. 512 p. (in Russian)

21. Kononenko V.P. Evidence in the International Court of Justice. Pravova derzhava. 2018. N 32. P. 176-182 (in Ukrainian)

22. Kononenko V.P., Tymchenko L.D. The growing role of international court decisions among sources of law. Mizhnarodnyi yuridychnyi visnyk: aktualni problemy suchasnosti (teoriya ta praktyka). Seriya: pravo. Vol. 3-4 (12-13). 2018. P. 293-298 (in Ukrainian)

23. Campbell-Mohn C., Breen B., Futrel J.W. Environmental Law. St. Paul, 1993. 994 p.

24. Kononenko V.P., Novikova L.V. The impact of regional armed conflicts on international environmental security. Almanah mezhdunarodnogo prava. 2020. N 24. P. 214-221 (in Ukrainian)

25. Rosca V. International case-law on the use of force or threat of it in Internationalt law. Revista Moldovenească de Drept Internațional și Relații Internaționale. 2016. Nr. 3 (Vol. 11). P. 325-339

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KEY INTERNATIONAL AND REGIONAL LEGAL INSTRUMENTS, INTERNATIONAL COURT PROTECTION IN THE FIELD OF HUMAN TRAFFICKING

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Abstract

This article deals with the international and regional legal documents that primarily cover the fight against Trafficking in Human Beings (THB) and cover International court protection by highlighting the role of the European Court of Human Rights (ECtHR). Article discuss main international and regional documents which provide essential norms for the criminal prosecution and the concept of protection of human rights, in particular the protection of and assistance for the victims, including children, based on a gender dimension, and the need to strengthen and facilitate regional and international cooperation. Article also analyzes the complexity of the Trafficking in Human Beings which requires different approaches that include holistic, human rights and gender - based approach to victim protection and assistance, increase of successful prosecutions, adequate sentencing of the perpetrators, and ensuring proper and timely compensating of the victims, but in parallel to increase of successful prosecutions, adequate sentencing of the perpetrators and to integrate the fight against trafficking into the broader efforts against transnational organized crime.

Keywords: *Trafficking in Human beings, Human rights, transnational organized crime, UN Palermo Protocol, International Court Protection, EU Directive.*

Introduction

Nowadays, with the process of globalization, development of IT and communication technologies, the increasing power of the internet, the speediness of dissemination of information and data through the social networks, the economic imbalances and the worldwide migration movement coming from the war conflicts and the crises areas, have resulted in increasing the trafficking in human beings, both in perpetrators and victims and in occurrence of new phenomenological forms.

Trafficking in human beings is a human rights violation and a heinous crime. The classical forms of exploitation purposes, that is the sexual exploitation of woman and children, as main target groups, which are usually marginalized even before becoming victims of trafficking, have new and complex forms of means for recruitment [1]. In parallel, there is a trend of increasing of various forms of trafficking for labor purposes, as well as related crimes, such as domestic servitude, forced marriages, trafficking of human organs, mostly targeted at irregular migrants and misusing their vulnerability, and which forms have escalated in the most severe forms of human exploitation and resulted in revival of the modern slavery. These crimes are difficult for revealing, detecting and securing the evidences that impose more closely national and international cooperation, exchange of evidences, information and intelligence data towards detecting suspicious financial transaction that may be indicative for money laundering and human trafficking.

Complexity of the Trafficking in Human Beings (THB) requires different approaches that include holistic, human rights and gender- based approach to victim protection and assistance, increase of successful prosecutions, adequate sentencing of the perpetrators, and ensuring proper and timely compensating of the victims, but in parallel to increase of successful prosecutions,

adequate sentencing of the perpetrators and to integrate the fight against trafficking into the broader efforts against transnational organized crime.

International documents provide for the criminal prosecution and the concept of protection of human rights, in particular the protection of and assistance for the victims, including children, based on a gender dimension, and the need to strengthen and facilitate regional and international cooperation.

The European Commission clearly stresses the necessity for progress e.g. development of new and updating the current international documents and actions aimed at all aspects of THB. The THB modus operandi is constantly evolving. The links between THB and other crimes are becoming stronger, including the links with migrant smuggling, terrorism, corruption, drug trafficking, cybercrime and online sexual exploitation, production of materials involving sexual abuse of children, financial crimes, document fraud, credit card fraud and benefit fraud. All this provides for considerable profits and a very complex interplay of supply and demand. Trafficking involves a complex chain of actors who are knowingly or unknowingly involved. Perpetrators and abusers exploit people's vulnerabilities, exacerbated by the existing but also new factors such as poverty, discrimination, gender inequality, male violence against women, lack of access to education, conflict, war, climate change, environmental degradation and natural disasters, for the purposes of sexual or labor exploitation, begging, criminal activities etc., since globally, there are regular changes of the sociopolitical context. The economic and social impact of the global financial crisis, the migration crisis and the security threats posed by organized crime groups further exacerbate vulnerabilities and therefore require stronger action at both national and EU levels. Such actions must continue to pursue a human rights based, gender specific and child sensitive approach, and their implementation needs to be coordinated within the EU and externally, as well as across various policy fields.[2]

UN Palermo Protocol

The Trafficking or the so-called Palermo Protocol was the first document where the international community agreed on an internationally binding definition on trafficking in human beings. The Palermo Protocol laid down the foundations for international action on trafficking and it defines and standardizes the counter-trafficking terminology. The implementation of this Protocol is explained in the Legislative Guide for the UNTOC and the Protocols thereto, especially, in the Legislative Guide for the implementation of the Protocol to prevent, suppress and punish trafficking in persons, especially woman and children. [3]

Related to the monitoring of the implementation and pursuant to Article 32 of UNTOC, the Conference of the Parties to the Convention was established to improve the capacity of the member states to combat transnational organized crime and to promote and review the implementation of this Convention and it is still in the process of establishing a mechanism for the review of its implementation.

Article 1 of the Palermo Protocol and Article 37 of UNTOC establish the basic principles governing the relationship between the two instruments. They ensure that any criminal THB offences as required by Article 5 of the Protocol, will automatically be included within the scope of the basic provisions of the Convention related to the international cooperation, money laundering, liability of legal persons, prosecution, adjudication and sanctions, confiscation, jurisdiction, special investigative techniques, obstruction of justice, witness and victim protection, law enforcement cooperation, training, technical assistance and implementation of the Convention. The states should establish a similar link in their national legislation regarding the implementation of the Protocols. In particular, although Article 34, paragraph 2 of the UNTOC provides that states have to establish the existence of some degree of trans nationality or involvement of an organized criminal group, their prosecutors do not have to prove either of them in order to obtain a conviction. This means that the domestic offences are applicable and assistance to victims is provided even when there is no presence of a trans-national element or involvement of an organized

criminal group and shall apply in cases of internal trafficking and situations where a single person acts as the perpetrator. [4, p.12, 17]

In the recent period, the European Union has established a comprehensive and consistent legal and policy framework for combating trafficking in human beings. Directive 2011/36/EU 11 on preventing and combating trafficking in human beings and protecting its victims ('the Directive') sets out the legal framework and the Commission continues to monitor the implementation of the Directive by the Member States and to report on the progress made. The EU Strategy towards the Eradication of trafficking in human beings ('the Strategy') has been the main instrument for developing, coordinating and implementing EU actions in this area.[5] The Strategy lists five key priorities relating to prevention, prosecution, protection of victims, partnerships and improving knowledge, out of which three are aimed towards stepping up the fight against organized criminal networks, through disrupting their business models and untangling the trafficking chains, providing better access to and realizing the rights of victims of trafficking and fostering a coordinated and consistent response in all actions.

Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, replacing Council's Framework Decision 2002/629/JHA

According to Articles 1 and 2, trafficking in human beings is a serious crime, often committed within the framework of organized crime. It is a gross violation of fundamental rights and explicitly prohibited by the Charter of Fundamental Rights of the European Union. [6] This Directive is part of the global action, approved by the Council on 30 November 2009. In this context, actions should be taken in third countries of origin and countries where victims are being transferred, aimed towards raising awareness, reducing vulnerability, supporting and assisting victims, fighting the root causes of trafficking and supporting those third countries in developing appropriate anti-trafficking legislation.

Council Directive 2004/81/CE on the residence permit issued to third country nationals who are victims of trafficking in human beings (2004)

In the framework of the EC politics to deal with the illegal migration, this Directive introduces a residence permit intended for victims of THB or third-country nationals who have been involved in actions aimed towards facilitating illegal immigration. For these individuals, the residence permit offers a sufficient incentive to cooperate with the competent authorities. This Directive lays down the criteria for issuing a residence permit, the conditions of stay and the grounds for non-renewal and withdrawal. The third country nationals concerned should be informed of the possibility of obtaining this residence permit and be given a reflection period to reach a well-informed decision as to whether to cooperate with the national authorities freely and hence more effectively. They should also be granted assistance for recovering and relief of any influence by the perpetrators of the offences, as well as medical treatment, which might include, where appropriate, psychotherapeutic care. A decision on the issue of a residence permit for at least six months or its renewal has to be taken by the competent authorities, who have to consider if the relevant conditions are fulfilled or not.

Council of Europe Convention on Action against Trafficking in Human Beings (CETS 197)

The primary concern of the Council of Europe is the safeguarding and protection of human rights and human dignity in the fields such as sexual exploitation of women and children, protection of women against violence, organized crime and migration. The CE Convention on action against trafficking in human beings (hereinafter referred to as CETS 197) is a legally binding instrument that is geared towards the protection of victims' rights and the respect for human rights, but aimed at striking a proper balance between matters concerning human rights and prosecution (p. 10, 11, 29 and 30 of the Explanatory Report of CETS 197). The Convention recognizes trafficking in human beings as a violation of human rights. It places special emphasis on the assistance to victims and on the protection of their human rights and recognizes the need for specific measures for guaranteeing gender equality and a rights oriented approach for chil-

dren. The Convention has a comprehensive scope of application, covering all forms of trafficking; national/transnational linked/not-linked with organized crime; all trafficked persons, women, children or men, in the case of transnational trafficking. The Convention applies both to victims who legally entered the country or are legally present on the territory of the receiving Party and to those who entered or are present in the country illegally.

The Convention sets up a comprehensive legal framework for the protection of victims and witnesses, as well as on criminal law measures designed for effective prosecution and conviction. The implementation of the Convention is monitored by the Group of Experts on Action against Trafficking in Human Beings (GRETA). The second GRETA evaluation round was launched in May 2014 and its reports contain a detailed analysis of the legislation and practice in each country, identifying gaps, needs and good practices, and providing suggestions to strengthen the implementation of the Convention.[7]

International court protection

In its Article 7, the Rome Statute of the International Criminal Court states the following: "For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: Enslavement; which "means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children".

The International Criminal Tribunal for the Former Yugoslavia (ICTY) concluded that the traditional concept of "enslavement" has evolved to encompass various contemporary forms of slavery, based on the exercise of any or all of the powers attaching to the right of ownership. They observed that the definition may be broader than the 'traditional and sometimes apparently distinct definitions of slavery, slave trade and servitude or forced or compulsory labor found in other areas of international law. The Appeals Chamber does not accept the premise that lack of consent is an element of the crime since, in its view, enslavement flows from claimed rights of ownership; accordingly, lack of consent does not have to be proved by the prosecutor as an element of the crime". [8]

The role of the European Court of Human Rights (ECtHR)

The case law of the ECtHR contains clear indications in favor of the applicability of the ECHR and its protective role in respect of the individuals. The Court stated that "Under Article 1 (art. 1) of the Convention, each Contracting State "shall secure to everyone within its jurisdiction the rights and freedoms defined in the Convention"; hence, if a violation of one of those rights and freedoms is the result of non-observance of that obligation in the enactment of domestic legislation, the responsibility of the State for that violation is engaged". [9]

The increasingly high standards required in the area of protection of human rights and fundamental freedoms, correspondingly and inevitably require greater firmness in assessing breaches of the fundamental values of democratic societies. The ECtHR notes that trafficking in human beings as a global phenomenon that has widespread significantly in recent years. In Europe, its growth has been facilitated in part by the collapse of the former Communist bloc.[10] The ECHR prohibits slavery and forced labor in its Article 4: "No one shall be held in slavery or servitude and no one shall be required to perform forced or compulsory labor" and specifically in relation to "slavery".

According to the Guide on Article 4 of the ECHR, updated on 31.12.2017, Article 4 makes no mention of trafficking, proscribing "slavery", "servitude" and "forced and compulsory labor" (Rantsev v. Cyprus and Russia, § 272). Trafficking in human beings, by its very nature and aim of exploitation, is based on the exercise of powers attaching to the right of ownership. It treats human beings as commodities to be bought and sold and put to forced labor, often for little or no payment, usually in the sex industry but also elsewhere. It implies close surveillance of the activities of victims, whose movements are often circumscribed. It involves the use of violence

and threats against victims, who live and work under poor conditions. It is described in the explanatory report accompanying the Anti-Trafficking Convention as the modern form of the old worldwide slave trade (§ 281; M. and Others v. Italy and Bulgaria, § 151). There can be no doubt that trafficking threatens the human dignity and fundamental freedoms of its victims and cannot be considered compatible with a democratic society and the values expounded in the Convention (Rantsev v. Cyprus and Russia, § 282). Having regard to its obligation to interpret the Convention in the light of present-day conditions, considers it unnecessary to identify, in the specific context of human trafficking, whether the treatment about which an applicant complains constitutes "slavery", "servitude" or "forced and compulsory labor" (ibid., § 282). It considers that trafficking itself, within the meaning of Article 3(a) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children supplementing the United Nations Convention against Transnational Organized Crime and Article 4(a) of the Council of Europe Convention on Action against Trafficking in Human Beings, falls within the scope of Article 4 of the Convention (ibid.; M. and Others v. Italy and Bulgaria, § 151).

Even though the Convention does not make an express reference to trafficking, in its interpretation as a living instrument, which must be interpreted in the light of the present-day conditions, the Court has established clear concepts in this matter. Court, having regard to its obligation to interpret the Convention in the light of present-day conditions, considers it unnecessary to identify, in the specific context of human trafficking, whether the treatment about which an applicant complains constitutes "slavery", "servitude" or "forced and compulsory labor" (ibid., § 282). It considers that trafficking itself, within the meaning of Article 3(a) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children supplementing the United Nations Convention against Transnational Organized Crime and Article 4(a) of the Council of Europe Convention on Action against Trafficking in Human Beings, falls within the scope of Article 4 of the Convention (ibid.; M. and Others v. Italy and Bulgaria, § 151). The Court noted that, "together with Articles 2 and 3, Article 4 enshrined one of the basic values of the democratic societies, making up the Council of Europe. Article 4 imposes on the States a series of positive obligations on two counts: first, to put in place an appropriate legal and administrative framework to combat trafficking; duty to prevent persons being subjected to trafficking; and to protect the applicants as potential victims." The Court also considers whether the national criminal legislation related to the definition of THB is in line with the definition provided in the Palermo Protocol and the CETS 197. The Court considers whether the relevant legislation in force is capable of providing the victim with practical and effective protection. In other decisions, the Court held that "there had been a violation of Article 4 § 2 (prohibition of forced labor) of the Convention, finding that the applicants had not received effective protection from the State". The Court, in particular, specified that "exploitation through labor was one aspect of trafficking in human beings". The Court also found that "the State had failed in its positive obligations to prevent the situation of human trafficking, to protect the victims, to conduct an effective investigation into the offences committed and to punish those responsible for the trafficking". The cases tackling human trafficking are examined under Article 4 (prohibition of slavery and forced labor) solely, or in combination with Article 2 (right to life; "the failure of the authorities to investigate the victim's trafficking and subsequent death and to punish those responsible for these crimes and failure to take steps to protect the victim from the risk of trafficking"), Article 3 (prohibition of torture, inhuman or degrading treatment; usually it is alleged that the victim will be at risk of being subjected to such treatment or forced to re-trafficking, if deported in the country of origin), Article 6 (right to a fair trial within a reasonable time), Article 8 (right to respect for one's private and family life) and Article 13 (right to an effective remedy) of the Convention. The Court has emphasized the obligation of the states to "fulfill their international obligations for prosecuting THB and protection of the victims on its territory. The Palermo Protocol of 2000 and the Anti Trafficking Convention of 2005 demonstrate the increasing recog-

nition at international level of the prevalence of trafficking and the need for measures to combat it." In one of the cases, the Court was satisfied that "the authorities had complied with their duty to identify, protect and support the applicants as (potential) victims of human trafficking. The legal and administrative framework in place concerning the protection of (potential) victims of human trafficking had been sufficient, and the national authorities had taken all steps which could have reasonably been expected in the situation." In another case, the Court noted that "at the relevant time, the provision of the Criminal Code defined trafficking in human beings in line with the definition provided in the Palermo Protocol and the Council of Europe Convention on action against trafficking in human beings. The Court considered that the relevant legislation in force was capable of providing the applicant with practical and effective protection". [11]

The nondiscrimination principle enshrined in Article 3 of the CETS 197, means that the implementation of the provisions of this Convention, in particular, the enjoyment of measures to protect and promote the rights of victims, shall be secured without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. These principles are reinforced by the ECtHR case law on Article 14, Prohibition of discrimination and Protocol 12 to the Convention (that provides for a general prohibition of discrimination). It should be noted that the Convention mainly places positive obligations on the parties (assistance to victims, residence permit). According to Article 3, these measures must be applied without discrimination, i.e. without making any unjustified distinctions. [12]

Definition of THB in the Palermo Protocol, CETS 197 and the Directive 2011/36/EU

The Trafficking in persons' crime is directly linked to its definition and is made up of three constituent elements (action for perpetration, means and purpose of exploitation) and each of them must be present cumulatively, and not taken in isolation. There is an exemption when it comes to children (child trafficking will be discussed in another part).

The THB definition of the Palermo Protocol has been taken over by the Council of Europe's Convention along with the term of "trafficking in persons". Articles 4(b) to 4(d) of the Convention are identical to the Articles 3(b) to 3(d) of the Palermo Protocol. Both instruments contain a non-discrimination clause. Article 14 of the Palermo Protocol states that the measures set forth in the Protocol shall be interpreted and applied in a way that is not discriminatory to persons, on the ground that they are victims of trafficking in persons and Article 3 of CETS 197 as explained above. Both instruments provide for minimum standards and the domestic measures may be broader in scope or more severe than those required, as long as all obligations specified in the Protocol have been fulfilled (Article 34, paragraph 3 of UNTOC). The definition of THB in these documents is very similar to the one in the Directive 2011/36/EU. IOM uses the same definition in its 2004 glossary. [13, p.65]

The Constituent elements of the THB are as follows:

(a) Action - what has been done. The act of: recruitment, transportation, transfer, harboring, or receipt of persons.

(b) Means - how it was done. By means of: threats or use of force or other forms of coercion, abduction, fraud, deception, abuse of power or a position of vulnerability, or by giving or receiving payments or benefits to a person in control of the victim (CETS 176 uses the terms "giving or receiving of payments or benefits to achieve the consent of a person having control over another person" and by the means of recruiting, transporting, transferring, harboring and receiving a person.

(c) Purpose - why was it done. The purpose of exploitation: at a minimum, includes the exploitation of prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude and the removal of organs.

This is the subjective element of a crime and reflects the fact that the person committed the actual crime(s) with the intention that the victim be "exploited" in line with the country's

domestic anti-trafficking legislation). [14, p.8] Trafficking in persons occurs if the implicated individual or entity intended for the action, through one of the stipulated means, to lead to exploitation and thereby, it is considered as a crime of specific or special intent (dolus specialis). Thus, any conduct that involves lower standards, such as negligence, need not be criminalized, although the states could allow for more strict measures than those provided for in the Convention. The interpretation of the word "intentionally" is left to domestic law. It is nonetheless necessary to bear in mind that Article 4(a) provides for a specific element of intention in that the types of conduct listed in it are engaged in "for the purpose of exploitation". Nevertheless, practitioners will need to determine the causality between the intent and the purpose of exploitation. In one case, the court has explained that "the factual circumstances did not disclose the commission of a crime due to the lack of evidences that the perpetrator recruited and transported the alleged victims from state A to B state, for cleaning restaurants, with a specific intent of forced labor as required by the definition of the THB crime". The necessity for proving causality causes problems in cases where judges and prosecutors restrictively interpret this notion. On the other hand, in another case, the court has determined that the "duration of the period of exploitation that was full 7 years and the number of workers involved are indicators of the fact that the accused were aware of this precarious situation and that they unscrupulously abused the dependence that the situation of the victims had created for them. The events clearly constitute a habitual activity, since they took place during approximately 7 years and concerned different foreigners". In another case, the element of intent was determined through the elements of the connection between the employment companies from different states. During the raid, 11 illegal workers were found and 100 passports and 70 identity cards. There is causality between the acts, means and the purposes of exploitation. The defendant was aware of this causality and willfully performed the acts. In another case, the defendant was found guilty of THB for slavery, due to the fact that according to the expert examination, the victim had a passive dependent personality and was constantly materially exploited and treated in inhumane and humiliating manner, as well as injured. The defendant knew exactly what kind of a person he was dealing with and much aware of the actions he was taking, which were intentional." In many cases, the specific circumstances, especially the systematic reoccurrence of the acts, performed during a longer period of time or performed as part of a profession are an indicator of the presence of intent. As it is clearly stated in the Trafficking Protocol, actual exploitation need not occur provided there is a manifestation of intention to exploit the individual, as well as some concrete action in furtherance of that intent. [15, p.32]

The acts of perpetration

The actions are: "recruitment, transportation, transfer, harboring or receipt of persons".

The act of recruitment encompasses recruitment by whatever means (direct, through press or via the Internet, use of family relations and friendships, colleagues and acquaintances, intermediaries, directly or through organized groups and agencies. Recruiters often gain the trust of the victims because they come from the same country or have worked together in the source country and the recruitment usually takes place in the country of origin of the victim. Any recruitment through the Internet, especially for child trafficking, necessarily includes referral to the international cooperation arrangements in the Council of Europe Convention on Cybercrime (ETS No.185) applicable to THB. Law enforcement and prosecutors in most countries have little training or experience in detecting this crime, conducting online investigations, obtaining evidence from internet service providers and presenting relevant evidence in court. Enhanced mechanisms of encryption by the offenders, such as networks of technologies and platforms that obfuscate traditional IP addresses, have also delayed or complicated investigations. [16]

In most of the countries, the act of trafficking through the exchange or transfer of control over persons is not explicitly stated in the legislation (it is mentioned in only 10 EU Member States). There is more specificity in some of the criminal laws. For example, in the UK, the of-

fence covers the action of arranging or facilitating the arrival of a person, his or her travel within or departure from the state with either the intention to exploit the person or with the belief that somebody else is likely to exploit him or her in the UK or abroad. According to the British authorities, in prosecuting perpetrators of human trafficking, the act of arranging or facilitating arrivals, movements or departures of other persons will include those responsible for the recruitment, transport, transfer, harboring or receipt of the persons. [17]

Transportation needs not to be international (transport across borders). In the case of transnational trafficking, the Convention applies both to victims who legally entered or are legally present in the territory of the receiving Party (tourists, future spouses, artists, domestic staff, au pair girls or asylum seekers, depending on the law of the particular country) and those who entered or are present illegally. The CETS 197 applies to both types of situations, but certain specific provisions (Articles 13 and 14 related to the recovery and reflection period and residence permits) apply only to victims that are illegally present in the country. [18] Most EU states seem to have neither emphasized the cross-border nature of trafficking, nor explicitly criminalized internal trafficking. This is in line with the recommendation of UNDOC, according to which national legislations should adopt the broad definition of trafficking prescribed in the Palermo Protocol, which should be dynamic and flexible so as to empower the legislative framework to respond effectively to trafficking that occurs both across the borders and within countries (i.e. internal trafficking). Some of the countries use the concept of "within or outside the territory" (Greece) or trafficking of a person (to enter or leave the state or to travel within the state" (Ireland) or "arranging or facilitating the arrival in or the entry of an individual, with the intent to exploit the person in the UK or elsewhere" (UK).

Means of perpetration

THB can be perpetrated through means of: "threats or use of force or other forms of coercion, abduction, fraud, deception, abuse of power or a position of vulnerability or by giving or receiving of payments or benefits to get the consent of a person or to establish control over another person". In many of the court cases, it has been determined that the perpetrators used, in combination, various means such as coercion, abuse of power and the vulnerability of the victim, as well as fraud, which led to exploitation in the context of trafficking.

Coercion means use of force or threats thereof, and some forms of non-violent or psychological use of force or threat thereof, including but not limited to: (i) Threats of harm or physical restraint of any person; (ii) Any scheme, plan or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint of any person; (iii) Abuse or any threat linked to the legal status of a person; (iv) Psychological pressure. [19]

The courts have difficulties in defining the indirect forms of coercion, i.e. the psychological coercion and abuse as a form of manipulation with people. These forms are becoming less violent without any obvious physical evidence or injuries, and more hidden through the use of more sophisticated psychological forms that are difficult to be identified and proven (keeping victims awake, in chains, without food, exhausting them, confining them in isolated spaces without windows, with no light, threatening their families, especially if they resist). These actions may relate to a victim's relationships with other people, threats of rejection, disapproval, anger or blackmail. Victims can even be taken abroad by their husbands and boyfriends and then sold to traffickers for exploitation. ILO has developed four operational indicators for adult and child victims of trafficking for labor or sexual exploitation. These are relevant to several dimensions of trafficking, including deception and coercion and provide guidance on how they can be interpreted by prosecutors and judges to identify potential victims of trafficking. [20, p.28-36]

Economic coercion is a situation where the victim is forced to pay excessive amounts of money, has significant salary deductions, or is not paid at all. Debt bondage is difficult to prove since it does not always involve violence or deprivation of freedom of movement. A trafficker may assist the victim in arranging travel, finding employment and accommodation and then

require him or her to "work off" the debt in combination with unlawfully low wages and unlawfully high interest rates where the victim is incapable of even earning enough to pay back the debt. Their travel documents are taken away and they are subjected to violence and threats of violence against themselves or their families. [21, p.8]

Fraud and deception are most frequently used whenever victims are led to believe that they can expect an attractive job, salary and working and living conditions. Abduction is the act of leading someone away by force or fraudulent persuasion. The definition of fraud includes acts of deception that include misleading a person by words or conduct about the nature of the work or services that are to be provided (i.e. promises of legitimate work, proper working conditions, the extent to which the person will be free to leave his or her place of residence, or other circumstances involving exploitation of the person. [21, p.8]

Deception includes any conduct that is intended to deceive a person. It includes any deception by words or by conduct [regarding facts or law], [as to]: (i) The nature of work or services to be provided; (ii) The conditions of work; (iii) The extent to which the person will be free to leave his or her place of residence; or (iv) Other circumstances involving exploitation of the person. Deception includes giving false or inaccurate or misleading information i.e. when recruiting workers into forced labor or offering fake jobs for the purpose of sexual exploitation. The Court always needs to consider these means from the potential victim's perspective and especially, the impact that these means have on the particularly vulnerable categories such as minors, virgins, disabled persons and persons with intellectual and emotional deficiencies. For example, in one characteristic case, the defendant was accused of THB, human smuggling, falsification of documents and fraud, where the victim, who was regularly accompanied to work by the accused, was forced to work without being given any freedom, without resources, left to the good will of the accused, using the identity of the accused or given false identity and was never paid directly, but the wage was paid on an account linked to the false identity, with a promise by the accused that the person will be paid after 6 months. In this case, it is important that the court stressed that the previous consent of the victim to accept this job was irrelevant, along with the normal working environment, since the accused has abused the vulnerable position of the victim, given his illegal residence, lack of social protection and means, and the victim had no other reasonable choice then to accept to be abused. This is a flagrant case that confirms that the existence of illegal workers working without any documents, or even existing under a false identity, creates a dangerous situation where these persons actually do not effectively exist and the perpetrators and the organized groups can easily manipulate their lives. These persons can simply disappear without anybody being held responsible for that.

In case of abuse of power, the court has established very important legal concepts on the meaning of this concept. Abuse of power is any "positive action or behavior of a person whose power is unequal to the power of the victim, which forces the victim (or the victim has no other choice) to submit to the abuse. Abuse of a position of vulnerability means abuse of any situation in which the person involved has no real and acceptable alternative, other than submitting to the abuse". [22]

The key vulnerabilities for forced labor, but also for almost all of the purposes of exploitation are: poverty in the home country; persons coming from poor rural communities; need to support their families; no financial means to survive (dependency on the traffickers to survive); low level of education (difficulties in reading or writing, or safeguarding their interests); psychological and social disabilities; poor psychological state; unemployment / unable to find other employment; deaf victims; unfavorable social circumstances; poor health; alcohol dependence; advanced age; and low esteem.[22, p.57] The vulnerability may be of any kind, be it physical, psychological, emotional, family-related, social or economic. For example, it may involve the insecurity or illegality of the victim's administrative status, economic dependence, difficulties in understanding/speaking the local language, lacking finances, restrictions on their

movement or fragile health. It can be any state of hardship in which a human being is impelled to accept being exploited. This corresponds to the explanation provided for the preparatory activities (travaux preparatoires) in relation to Article 3 of the Palermo Protocol. The UNODC guidance note states the following: the "abuse of position of vulnerability" refers to situations in which the trafficker deliberately abuses the personal situational or circumstantial vulnerability of the victim. [23]

The existence of vulnerability is best assessed on a case-by-case basis, taking into consideration the personal, situational or circumstantial situation of the alleged victim. Personal vulnerability for instance, may relate to a person's physical or mental disability. Situational vulnerability may relate to a person being irregularly in a foreign country in which he or she is socially or linguistically isolated. Circumstantial vulnerability may relate to a person's unemployment or economic destitution. Such vulnerabilities can be pre-existing and can also be created by the trafficker. Prosecutors will need to prove the "existence" and "abuse" of that vulnerability with credible evidence, having in mind that the mere existence of proven vulnerability is not sufficient. The UN Trafficking Protocol definition establishes a clear link between the 'act' and the 'means'. Accordingly, where this situation is being alleged as the 'means', an offender should be shown to have abused the victim's vulnerability in order to recruit, transport, transfer, harbor, or receive that person. [24, p.26-27] Specific positions of vulnerability, such as illegal or uncertain immigration or residency status, minority status, or conditions such as illness, pregnancy, or physical or mental disability are underlined. (Belgium). The person believes that submitting to the will of the abuser is the only real or acceptable option available and that belief is reasonable in light of the victim's personal, situational or circumstantial characteristics. Romanian law defines it as "the inability of victims to defend them or to express their will. The French Criminal Code qualifies the position of vulnerability as "being due to age, illness, physical or psychological deficiency or pregnancy". The Italian Criminal Code describes vulnerable instances as "those arising from as situation of physical or psychological inferiority or from a situation of necessity, or through promises or giving sums of money or other advantages to those having authority over a person to allow entry or a stay or to leave the territory of the state or internal transfer". The court, in one case determined that "taking into account the working and living conditions - without identity documents, no resources, working 14 hours per day, with no breaks, hidden in caves in a case of a police raid, with a lack of knowledge of the local language, one may say that these are a particularly vulnerable conditions that are contrary to the human dignity". [25]

Payment or receipt of a benefit to person with control of another is a situation whereby the trafficker has given another person payment, of some kind, for the use of the victim. For example, a trafficker may pay an impoverished parent for their child or a smuggler may sell a person to a trafficker. [26]

Mechanisms of control over the potential victims

In the process of trafficking (trafficking cycle, trafficking schemes), the perpetrators of THB crimes employ various control mechanisms that can be different and adapted to the concrete type and circumstances of the particular situation, e.g. the vulnerability and background of the potential victims, location, victim profile and the stage of the trafficking process. Although it may appear that the means of perpetrating THB crimes are confused with the control mechanisms, the main difference is that once the perpetrator takes over the control of the victim through the means of THB, the trafficker employs variety of differing control methods which ensure that the he/she will have constant control over the victim, making sure that the victim has no way out of the trafficked situation. The practitioners need to know the basic concepts of the control mechanisms, especially because of the character of these crimes that are not concluded with only a single act, but last a long period of time and in continuation (they belong to the category of the so-called [in the substantive criminal law] permanent crimes). Actually, the term

"exploitation" essentially refers to the action or fact of treating someone unfairly in order to benefit from his/her work ("exploitation of migrant workers"), synonyms: taking advantage, making use of, abuse, ill treatment, unfair treatment etc. 9.

Judicial practitioners should be able to recognize the different control methods as they are the starting point in establishing the required evidence for various elements of the THB, irrespective of whether one searches for material evidence or takes verbal evidence - interviewing defendants and victims or witnesses of trafficking. The prosecutors should take appropriate measures to reduce the negative effects of the control measures on the credibility and procedural validity of the evidence gathered and presented before the court, so as for the judge to be able to understand them and make appropriate decisions. These mechanisms can be utilized autonomously or combined so as to multiply their value. The control over the victims can be maintained through methods of violence, threats of violence, deception, imprisonment, collusion, debt bondage, isolation, religion, culture and belief. [27, p.73]

Violence or threats of violence can be used at any stage of the trafficking process to control a victim. It is to be considered that the victim believes that the violence can be carried out, regardless of whether it can actually happen or not. Violence and threats in trafficking cases may be very obvious, but in many cases they can be subtle and concealed. Possible injuries are not the sole evidence of violence due to the fact that the victims do not allege that they have been assaulted, or threatened because they are very scared.

Controlling the victims through deception can be complete or partial. Traffickers may tell victims that the authorities are always corrupt, that they will be prosecuted and arrested, sent back if they are discovered or decide to go to the authorities. Unfortunately, the potential victims are very well aware of the fact that the offered conditions are not realistic, but these kinds of deception techniques are commonly used by misusing the poverty and naivety of the population, in the context of a specific political or economic crises in the respective state or region. [28, p.13-14]

Traffickers may use direct imprisonment - brothels where victims are held in locked buildings; agricultural and construction workers kept in secure camps, under guard and domestic servants who are not allowed to leave their houses, or are always accompanied by the owner or a guard. Giving a small amount of money to the victims has the psychological effect of making them feel "guilty" because they also benefit from the trafficking.

Victims may have entered the country illegally or entered legally but violated some of the immigration laws by overstaying or working outside the terms of their visa. Victims are usually involved in illegal acts such as pick pocketing, petty thefts and credit card fraud. They start using drugs and are then exploited for drug transport, possession and use of false documents. They can become recruiters themselves, or escorts, or work as maids and cooks in the brothels. Collusion is difficult to investigate as the victims involved in the criminal offences or misdemeanors are kept under various, more or less violent or aggressive and more or less hidden forms of control by the traffickers (force, coercion, threats, blackmailing). From the aspect of detecting the element of "consent", it is important to consider the situation from the victim's perspective. The victim believes that he or she has committed a crime or is constantly reminded that he or she is a criminal, which is a form of psychological control over the victim. The law enforcement agencies should always bear this in mind when collecting further evidence necessary to prove the elements of the "non-punishment principle." Victims should be protected from prosecution or punishment for criminal activities such as the use of false documents, or offences that fall under the under legislation regulating prostitution or immigration, since they have been compelled to commit those crimes as a direct consequence of being subjected to trafficking. In such a case, one needs to collect evidence of the compulsion and also for determining the causality between the compulsion and the existing direct consequence of the trafficking". The victim cannot be compelled to commit a murder, or a rape, or a terrorist act, as a direct consequence of the THB. The presence and expertise of psychologists could be very useful. Non-liability provisions ensure

that victims of trafficking are not being prosecuted or punished for the offences committed. Countries follow two main models when establishing the principle of non-criminalization of the illegal acts committed by victims of trafficking: the duress model and the causation model. In the duress model, the person is compelled to commit the offence. In the causation model, the offence is directly connected or related to the trafficking. [29]

Prosecuting a victim for offences he or she may have committed as a direct consequence of being trafficking may destroy the relationship and prevent the gaining of the best possible witness testimony and directly and significantly weaken the witness testimony and contribute to the victim's decision not to cooperate with the criminal justice system.

Victims may be in a personal relationship with one or more of their traffickers (parents-children, spouses, boyfriend - girlfriend relations and the emotional control can be manipulated and used as a control mechanism. The Stockholm syndrome is where victims associate themselves with their captors and exploiters as an apparently irrational bond or because they have made a rational decision that compliance is required to survive.

Conclusion

As a respective member of the international community, each state should implement the international standards on the different aspects of prevention and fight against trafficking in human beings. According to the Council of Europe's Convention on Action against Trafficking in Human Beings, there are four letter "p" words detected in the action against human trafficking that is prevention, protection, prosecution and partnership. In this respect, the role of the criminal prosecution authorities acting independently and ethically in the process of prosecution and adjudication of THB cases is of predominant importance for the successful fight against human trafficking. All national efforts put in creation and implementation of the legislative, organizational and institutional policies and measures will be meaningless, if there is no adequate number of valid and enforceable judicial convictions, if no compensation is awarded to the victims and criminal assets and property are not forfeited from the defendants. Most of the problems in the judicial practice occur due to the socio-cultural background and the existing stereotypes in the specific state, but also as a result of the attitude of disrespect for the human dignity and the values of the victims and generally for the weak and powerless persons, lack of empathy, discriminatory approach, hate speech and hate crime related to the gender dimension (prejudice that all victims that are sexually exploited are prostitutes or homosexuals), for the poverty of foreign workers and for the migrants who are seen as criminals and intruders in the peaceful neighborhoods. Thus, any conduct that involves lower standards, such as negligence, need not be criminalized, although the states could allow for more strict measures than those provided for in the Convention.

The states should establish a similar link in their national legislation regarding the implementation of the international and regional legal instruments and ensure the application of ECHR standards in judicial processes.

References:

1. EUROSTAT P.10.11. https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12012E/TXT

2. Communication from the Commission to the European Parliament and the Council, reporting on the follow up to the EU Strategy towards the eradication of trafficking in human beings and identifying further concrete actions-Brussels, 4.12.2017 COM (2017) 728 final.

3. https://www.unodc.org/unodc/en/treaties/CTOC/legislative-guide.html; https://www.unodc.org/pdf/crime/legislative_guides/03%20Legislative%20guide_Trafficking%20in%20Persons%20Protocol.pdf.

4. Legislative Guide to the Palermo Protocol – hereinafter referred to as LG to the Palermo Protocol.

5. EU anti trafficking action at a glance: https://ec.europa.eu/antitrafficking/publications/eu - anti - trafficking – action - 2012-2016-glance_en.

6. Article 5 of the Charter of Fundamental Rights of the European Union, Article 79 TFEU and Article 83 TFEU

7. https://www.coe.int/en/web/anti-human-trafficking.

8. ICTY judgment in Kunarac et al. (IT-96-23& IT- 96-23/1-A, more in the definition of Slavery).

9. ECtHR, case of Young James and Websters v. The United Kingdom, judgment of 13 August 1981, Series A, no. 44, paragraph 49.

10. ECtHR Factsheets on trafficking in human beings, June 2017.

11. Paragraphs 43 and 44 of the ER CETS 197 – Action against Trafficking in Human Beings, p. 8. /LA v. Greece (71545/12 /Chowdury and Others v. Greece (Rantsev v. Cyprus and Russia, judgment of 7 January 2010, §§ 277-278); J. and others v. Austria (no.58216/12)

12. ER CETS 197, paragraph 47 Abdulaziz, Cabales and Balkandali v. the United Kingdom, judgment, Rasmussen v. Denmark, Series A, No. 87, paragraph 40

13. IOM (2004), Glossary on Migration, available at: http://www.iomvienna.at/sites/default/files/IML_1_EN.pdf.

14. UNOTC, Module 1

15. ER CETS 197, p.36, Study on EU case-law, BE, study 3 and 4, Legislative Guide to the Trafficking Protocol

16. Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography and the Directive on combating sexual abuse, sexual exploitation of children and child pornography; see the Trafficking in persons Report, 2017 U.S. Department of state, Online Sexual Exploitation of Children: An alarming trend, page 32.

17. Study on EU Case Law

18. ER CETS 197, paragraph 62

19. IOM Handbook p.26-36; The UNODC Model Law against Trafficking in Persons 5(1)(e), https://www.unodc.org/.../UNODC_Model_Law_on_Trafficking_in_Persons.pdf. for the notions of "serious harm" physical and non-physical types of harm and a threat of serious harm see the cases of United States v Bradley, 390 F.3d 145 (1st Cir. 2004), The SNEEP Case – Aimelo District Court, the Netherlands, Sentence date: 11/07/2008, the IOM Handbook, p.27 and 29

20. https://www.ilo.org/forcedlabour, see also IOM Counter trafficking Handbook, 2016

21. OSCE 2011 Trafficking in Human Beings: Identification of Potential and Presumed Victims - A Community Policing Approach.

22. Study on case-law, Study 2 CY 002.

23. UNODC, Guidance Note on "abuse of a position of vulnerability" as a means of trafficking in persons in Article 3 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime available at: http://www.unodc.org /documents/congress//background-information/Human_Trafficking/Guidance_Note_-_Abuse_of_a_Position_of_Vulnerability_E.pdf.

24. ER CETS, paragraphs 82-83; Legislative Guide A/55/ 383/Add.1, paragraph 63, LG

25. Case of The Public Prosecution Service v. The Accused No. 07.976405-06, District Court of Zwolle, and the other cases related to the problems in detecting the element of state of vulnerability, p. 68 (29 April 2008).

26. Human Trafficking Information and Resources for Emergency Healthcare Providers. https://www.humantraffickinged.com

27. Module 4 UNODC, ION Counter trafficking Handbook

28. The cases on forced labor "Terra Promessa, USAID 2010 Trafficking of Adult Men in Europe and the Eurasia Region.

29. GRETA compendium of good practices on the implementation of the CETS 197 - Casebook, the good practices of non-prosecution for certain crimes in Cyprus and issuing binding guidelines for the prosecutors in Denmark.

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MAIN FACTORS DRIVING TO INTERNAL DISPLACEMENT

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Abstract

The article is devoted to the problem of mass displacement of people and one of the most socially dangerous types of it - forced. This phenomenon has had a global significance both in the humanitarian sphere and in the field of development at all stages of the legal development of the state and society, nowadays this problem is becoming more and more urgent. This is primarily due to the fact that such relocation is a consequence of serious human rights violations. So, in the past, this problem has taken particularly acute forms since the end of the 80s of the last century due to the aggravation of interethnic relations in a number of countries. Subsequently, due to the emergence of hotbeds of ethno political and regional conflicts, political instability and violations of human rights, there was a sharp increase in the number of forced relocations. In this regard, many countries are actually not ready to properly regulate the processes of "involuntary resettlement" of people, as well as the shortcomings of the complex of administrative, legal and socio-economic measures that ensure the implementation of both domestic and international legal norms in the field of respect, implementation and full protection of the rights of this group of people.

This phenomenon is a complex and multi-faceted process that includes a number of terms, which primarily include "internally displaced persons" (hereinafter - IDPs).

Keywords: *displacement, migration processes, conflict, persecution, equality, responsibility, security, asylum, cooperation, return to the Homeland.*

The movement of people across the borders of various states has been carried out continuously since ancient times. At present, due to the increasing economic and demographic differences between states, the number of movements is increasing. Migration processes are a multi-sectoral social phenomenon that reflects the state of the world community and individual countries in a complex form. The growing scale of these processes, the protection of the rights and interests of its participants are one of the most acute problems of our time. Currently, a number of international documents and national legislation have been adopted in this area, which are aimed at protecting the rights of displaced persons, as well as new governance structures have been created.

Despite that factors such as the length of time in displacement or the number of people affected are not a primary consideration in determining whether a situation is protracted, a condition that have stretched over extensive periods of time without an end in sight compounds humanitarian and development challenges for refugees and IDPs [1, p.20].

In 1880 the British cartographer and geographer Ernst Georg Ravenstein created the theory of population migration, which is the basis of modern migration theory. [2, p.14] In the future, new scientific approaches appeared in this area: demographic, economic, legal, social, historical, psychological, historical and biological. Now, with modern trends of international migration making: the increase of scale of irregular migration and forced displacement (as a result of armed conflicts in Africa, in the countries of the Middle East), increasing the demographic factor, international migration, globalization flows of global migration, changing the qualitative indicators of migration flows (USA, France, Canada). [3, p.196]

However, as Romanian foreign Minister Lazar Comanescu noted at the UN General Assembly, "Migration is as old a phenomenon as human civilization, but the processes of

movement of people within countries and across borders have significantly increased and will continue to increase in a world living in an increasingly globalized world".[4]

Today, there is a need to create the necessary living conditions in countries with large-scale displacement of people and decent return of IDPs to their homeland. Forced migration, involving the displacement of individuals, families and entire communities from their homes and lands, is one of the most devastating consequences of persecution, armed conflict, general violence and other types of mass human rights violations. [5] The complexity of this phenomenon is often the cause of contradictions between the interests of the state, including the entire world community as a global mechanism of social organization, and the rights of the individual, nation, and ethnic group.

Scholars such as Roberta Cohen, Frances M. Deng, Thomas G. Weiss, Catherine Brun, Erin D.Mooney, and Donald Steinberg clearly state that IDPs, as well as refugees, leave their homes for very similar reasons. Meanwhile, IDPs often remain in their country and do not receive sufficient protection from national governments and, as mentioned by K.Brun, "they often face greater threats than refugees". [6] R.Cohen argued that "these individuals are expelled for the same reasons as refugees, they remain under the jurisdiction of their governments and, therefore, they are excluded from international protection provided to refugees".

Researchers are mainly interested in the issues of granting refugee status, access to the procedure for determining this status, and the rights and obligations of persons who have received this protection are not disclosed clearly enough.

On the other hand, IDPs are repeatedly exposed to potential psychological violence and lose their family members, loved ones, and, worst of all, children. They are deprived of their homes, property, livelihoods, communities and social security systems, and suffer extreme hardships at all stages of the displacement process, which leads to a chronic increase in the risk of victimization, physical illness and mental disorders. In other words, during abrupt and forced displacement, these people lose their homes, land, real estate, assets and personal belongings on the one hand, and their identity, social status, support network and communities on the other, and the intensity of the loss is often compounded by trauma. They are forcibly removed from their homes, often by acts of extreme cruelty.

It should be noted that this group of individuals collectively goes through six stages of the "path": threats and vulnerability to expulsion in the society of origin; an event that accelerates the process leading to inclusion; movement in search of a safer environment; transition and adaptation during initial relocation; long-term relocation (the end point for most of them) and return to their homeland (the adoption of relevant laws and programs).

In the case of mass internal displacement, human rights problems often arise, and sometimes international peace and security may be threatened. In this regard, the international community should be sensitive to situations that are directly related to the internal displacement of people, especially in places where the mass forced movement was caused by armed conflict, in particular bloody violence and large-scale violations of rights. But this should not be limited to the fact that in all situations of internal displacement, international assistance and assistance must be provided.

On the other hand, today the world community is striving to understand that not wars, armed conflicts with the extermination of innocent people, but the educational, intellectual level, the perception of universal values - the desire for peace, mutual understanding, and cooperation-will lead humanity to the path of sustainable progressive development of a society of people with equal rights and equal opportunities.

However, when people are displaced, the lack of food and drinking water, resulting in the development of infectious and other diseases, the low level of food and medicine provision, as well as the provision of medical and social services, are the main problems of these processes. All of the above causes mass illness of more vulnerable people, especially children, women, the elderly, people with disabilities, as well as the inevitable consequences of a kind of social crisis.

To solve all these strategically important problems, it is necessary to demonstrate humanity, humanism and an objective attitude not only on the part of the government, but also on the part of every member of society. At all stages of permanent placement and return (reintegration), IDPs are usually mixed with the local population.

In particular, this issue is one of the most pressing issues in the field of development and requires long-term consideration and solutions, especially with regard to ensuring their well-being. Otherwise, this crisis can become a heavy burden for IDP countries and communities, causing a new unstable situation, conflict and mass displacement. On the other hand, this problem sometimes poses a real threat to the achievement of development goals at the national level and can negatively affect the situation in these regions, including the following: and in conflict or post-conflict situations. But if a long-term solution to this problem is developed and implemented, this category of population can adapt to the new environment and new sources of income, as well as contribute to the development of entire communities.

As Secretary-General of the UN Antonio Guterres noted in his message on world refugee day 2018, " ... in today's world, no community or country that provides shelter to people fleeing war and persecution should act alone, without support" [7].

Former UN high Commissioner for human rights Zeid Ra'ad Al Hussein at the 37th session of the human rights Council in 2018 stated that: "States have promised to support equality and the inalienable rights of every human being… Access to social guarantees and economic opportunities is the strongest antidote to the spread of extremism… The Vienna Declaration expanded the fundamental concept of universality by recognizing the indivisibility of all human rights. All States have recognized that human rights are inalienable, interdependent and interrelated. Civil and political rights; economic, social and cultural rights, as well as the right to development, are based on each other and contribute to mutual realization".

In 1998, former UN Secretary-General Kofi A.Annan stated that the problem of internal displacement is one of the greatest humanitarian tragedies of our time and that IDPs should be considered among the most vulnerable people. UN Secretary-General A.Gutteres correctly stated that "there are serious flaws in our methods of solving this problem and the effectiveness of the international refugee protection regime should be restored". He also confirmed that "we have a common responsibility to take measures to end this mass suffering. The immediate provision of protection and assistance to IDPs is one of the most important humanitarian tasks. As long as there are wars and persecution, there will be refugees".

On the other hand, human rights, which are enshrined in international instruments, confirm the view that caring for people who have lost their livelihoods due to circumstances beyond their control, is one of the highest universal values. However, according to these documents, the obligation to respect the right to social security does not depend on the origin. Every individual, including IDPs, who is under the jurisdiction of their state, has the right to protection on an equal basis with the citizens of the country [8, p.481]. Violation of this principle leads to serious negative consequences. This may also be the result of increasingly frequent situations where the state is unable or unwilling to protect its citizens from ill-treatment or when it is unable to help them during disasters. For example, half of the countries where IDPs are present have failed to protect them, and reports for these countries refer to forced labor and sexual exploitation.

At the same time, many States refuse to accept the specific protection measures offered by the international community for IDPs, on the grounds that this violates their sovereignty. However, it is important to note that international law supports the concept of national sovereignty, and IDPs remain under the jurisdiction and protection of their own state, which is responsible for regulating their situation and ensuring the rights of these individuals.

Articles 55 and 56 of the UN's Charter of 1945 provide for the obligation of member States to ensure stability and well-being on the basis of universally recognized principles of respect for equal rights and self-determination of peoples, thereby contributing to improving living standards, attracting people to work, and economic and social progress. This commitment

also applies to the issue of IDPs, which creates a real need to include this issue in the 2030 Agenda.

In the Declaration on the right to development of 1986 (General Assembly resolution 41/128, Annex) it is stated that the right to development is an inalienable right of everyone. The document also notes that "States have the right and duty to determine appropriate national development policies that should be aimed at continuously improving the well-being of the entire population and all individuals, with active, free and constructive involvement in the process of improving the efficiency of activities and the distribution of all benefits." However, the problem of IDPs is often not included in development strategies and programs, and there is no special mechanism for solving the problem.

The first statistics on IDPs were made in 1982, and at that time 1.2 million people were registered. In total, IDPs lived in 11 countries. Further, their number increased significantly and by 1986 reached from 11 to 14 million in 20 countries. Their numbers continued to grow, and by 1995 there were between 20 and 25 million people in 40 countries. This is almost twice the number of refugees. However, statistics only apply to IDPs displaced as a result of conflict, violence or human rights violations, and therefore the actual number of IDPs is significantly higher.

Thus, between 1980 and 1990, the number of IDPs and refugees almost tripled to 22 million from 23 countries and approximately 17 million from 50 countries. Statistics are important for assessing the scale and dynamics of the problem [9, p.27]. Since 2003, there has been a tendency to increase the number of IDPs in the world. In 2011 Somalia, Sudan, Colombia, Pakistan, the Democratic Republic of the Congo (DRC) and Iraq had at least 1 million IDPs. In the Middle East alone, 4.8 million people were displaced, which also indicates a further increase in forced displacement [10, p.7].

The dynamics of the IDP population has been observed since the mid-1990s in most regions of the world, but the rate has increased over the past 5 years. It was from this time that the international community began to show interest in understanding and defining IDPs as a vulnerable group of people with special needs. Although the concept of "vulnerability", as a rule, is closely related to such phenomena as "sacrifice", "deprivation", "social dependence", which contradict idealized ideas about the legal protection of the individual, who is the core of the world community [11, p.3-4].

According to the UNHCR, the reason for this was, first, the crises that lead to the Exodus of people, which have now become longer in time, a typical example of this is the conflicts in Somalia and Afghanistan, which entered the third and fourth decades, respectively, and secondly, the outbreak of crisis situations began to occur quite often. Along with the Syrian refugee and IDP crisis, many other conflicts have been "generating" in recent years, including in Ukraine, Iraq, Yemen, South Sudan, and the Central African Republic. Third, there is a tendency to reduce the effectiveness of solutions to prevent the flow of refugees and IDPs .If 10 years ago every minute the number of these people increased by 6 people, now this figure is four times higher.

In recent years, there has been a large-scale growth and expansion of the geography of forced displacement as a result of ongoing and new hotbeds of political tension, wars, ethno-political conflicts, and environmental disasters. [12, p.12] In 2008-2014 alone, 184.4 million people were displaced as a result of environmental disasters. The specific nature of the rights and obligations of these individuals raises a number of questions for national and international human rights structures.

Although UNHCR does not have the right to work with IDPs, it helps several million people affected by various crises, and all of them need to be treated with internationally recognized approaches [13].

UN Resolutions (No. 3454 of 2004, No. 31/35 of 2005, No. 34/60 of 2006, and No. 40/118 of 2007) use the term "displaced persons" when referring to assistance to refugees, returnees, and

IDPs. In this situation, it is considered appropriate to exercise control by the UNHCR, and, if necessary, to protect these individuals.

Meanwhile, UNHCR annually prepares a report on Global Trends, based on information from governments, non-governmental partners from NGOs, and its own data. This report is released in parallel with its annual Global Report, which reports on actions UNHCR is taking to address the needs of all who are forced to flee, as well as the world's known stateless populations. It is noteworthy that in January 2019, a new global campaign in support of displaced people "2 Billion Kilometers to Safety" was launched. So, according to the UNHCR estimates, if you add up the kilometers of the path that each of the hundreds of thousands of displaced people overcomes, it turns out that in total they pass 2 billion kilometers in one year.

There is no doubt that the problem of forced displacement itself should be attributed to one of the most acute and urgent phenomena in the entire history of mankind, the number of which is approximately 260 million people worldwide, or 3% of the world's population (compared to 175 million in 2000 and 154 million in 1990) affects all spheres of activity (since 2000, this number has increased by 49%). Of these, about 70.8 million have been forcibly displaced, and more than 25.9 million have refugee status. Meanwhile, the mass movement of people affects the structure and dynamics of the population in many countries. The number of IDPs reached more than 41.3 million by 2019, 45,7 million by 2020, which is slightly less than in 2016 (40.3 million) and in 2015 (40.8 million) [14, p.1]. In addition, by the beginning of 2019, 13.6 million new displacements due to conflict, violations or natural disasters had occurred as a result of armed conflicts and disasters. By 2020, this figure has reached 50.8 million.

Thus, the number of people who were forced to leave their homes is now comparable to the population of countries such as Great Britain, France or Italy.

This is roughly equivalent to the population of New York, London, Paris, and Cairo combined. Of these, the mass displacement of 8.6 million people in 28 countries is related to conflict and violence, while natural disasters that have occurred in 113 countries in recent years have displaced 19.2 million people. There is no doubt that the number of forced displacements in countries will increase if due attention is not paid to the main causes of crises and some efforts are made to protect their rights.

Thus, the number of IDPs worldwide is almost twice the number of refugees. Today in the world there are serious gaps in addressing the problem of IDPs at the international level from a legal point of view. Therefore, a common, unified, all-binding Convention should be adopted and the legislative framework in this area should be improved.

Instability and conflicts, including those that occurred in the 1990s, have become the main cause of displacement within Europe. However, sometimes displacement is a consequence of global climate change and an increase in the number of natural disasters, in particular due to the earthquakes that occurred in Italy in 2016, as well as in Bosnia and Herzegovina due to floods in 2014.

In 2015 alone, some 12.4 million people were displaced, including 8.6 million internally displaced, while 1.8 million refugees and 500,000 new refugees also left their countries in the first half of 2016. This figure is likely to continue to increase if the circumstances causing displacement continue, or if groups currently in enclaves or under siege as a result of deliberate tactics used by the parties to the conflict are able to move in search of safety.

Between January 1 and June 30, 2020, the Internal Displacement Monitoring Centre (IDMC) registered 14.6 million new movements in 127 countries and territories. Conflict and violence have caused 4.8 million new displacements, mostly in Africa and the Middle East, a million more than in the first half of 2019. The largest increases were observed in Syria, the Democratic Republic of the Congo and Burkina Faso. Sudden and slow-moving disasters caused 9.8 million new displacements in the first half of 2020. Cyclone Amphan, which led to the preemptive evacuation of 3.3 million people in India and Bangladesh, was the largest event.

The COVID-19 pandemic has had serious consequences for countries and communities around the world, including for IDPs. The lack of accurate and timely data has limited full understanding of the impact on IDPs and host communities, but it has become clear that this has increased their vulnerability and created new risks: increasing poverty and food insecurity, lack of social support, and greater exposure to health risks.

Although measures have been taken to recognize the growing scale of the problem and to take appropriate decisions and develop response mechanisms, the majority of IDPs lives in extremely dangerous conditions and can be classified as the most vulnerable group, particularly in Europe. On the other hand, the scale and complexity of situations of forced displacement, the lack of commensurate solutions, and the rapidly changing global environment in which displacement occurs create unprecedented signals to adapt to and respond to urgently.

However, if they remain within the territory of their countries, including cases where they have been forced to flee under various circumstances, they are classified as IDPs, and in most cases they do not have access to the entire protection and security system provided to refugees. In legal terms, this category of persons is under the "protection" of their home country, if it is acceptable that it may have been the main reason for their flight from violence or showed complete indifference to the fate of their citizens.

In some States, there may be an urgent public need to protect public order and the rights of IDPs from unpleasant and humiliating comments and attitudes. Such behavior is likely to cause social tension and undermine faith in democratic institutions. Thus, it is justified for the state to take measures in such situations to reduce the harmful impact of racist and xenophobic statements.

References:

1. THE WORLD BANK, 69322, Khartoum, Sudan, February 2011

2. Dighbe Bob. Global challenges. Student's Book. Per Le ScuoleSiperiori. Oxford. Heinemann, 2001

3. Aliyev A.I. Human rights. Textbook. Second edition, revised and supplemented. Baku, 2019

4. Report of the 6th plenary meeting of the UN General Assembly, 19.09.2016, 13/29 https://digitallibrary.un.org/record/845419/files/A_71_PV-6A-RU.pdf

5. Brun.C. (2003) ―Local Citizens or Internally Displaced Persons. Dilemmas of Long term Displacement in Sri Lanka‖. Journal of Refugees Studies, Vol (16)

6. Cohen. R. and Deng, F. (1998a) Masses in Flight, the Global Crisis of Internal Displacement Washington DC: Brooking Institution Press, p. 7-10

7. https://www.un.org/sg/ru/content/sg/statement/2018-06-20/secretary-generals-message-world-refugee-day-scroll-down-french

8. Guy S. Goodwin-Gill and Jane McAdam"The Refugee in International Law", (Third edition), Published by Oxford University Press Inc.New York, 2007, 481 p.

9. Hampton, Janie (1998) İnternally Displaced People, A Global Survey, London, Earthscan Publications

10. Global Report ON INTERNAL DISPLACEMENT May 2016

11. Martha Albertson Fineman, Jonathan W.Fineman Vulnerability and the Legal Organization of Work (Gender in Law, Culture, and Society).Routledge, Firstedition (June 23, 2017).

12. The migration crisis and the formation of Muslim communities in Europe: trends and consequences. M.: (ISPR FCTAS RAS), 2016

13. Assistance to internally displaced persons // Refugees, M., 2005. № 141.

14. Global Reporton Internal Displacement 2020 https://resourcecentre.savethechildren.net/node/18400/pdf/2020-idmc-grid.pdf

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THE LEGAL NATURE OF THE RIGHT TO GOOD ADMINISTRATION

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Abstract

Some of the norms included in the right to good administration are considered binding, even if they were not recognized at the time of the initial drafting of the contracts. An example is the rule that individuals must have access to documents held by government agencies. When clarifying the legal nature of the right to good administration, it is considered expedient to clarify the violation of this right, its judicial review, and the role of the individual in these processes. What are the aspects of judicial review? First, it is necessary to support the rule of law and provide an effective means of legal protection. It is also important to ensure the legitimacy of the decision-making process. Explanations of the EU Charter on Fundamental Rights emphasize the direct impact of the right to good administration. In addition, the EU Court has recognized it as a general principle of law. There have been a number of changes in the implementation of the right to good administration in modern times. These changes have led to the emergence of new approaches and trends in this right. Such trends have led to a number of new perspectives on the right to good administration.

Keywords: *the right to good administration, legal nature, legal content, fair trial, EU Court, EU Charter of Fundamental Rights, bad governance, bad administrative decisions, procedural norms, case law, future prospects.*

The fundamental human rights recognized in EU law are enshrined in a single document, the EU Charter of Fundamental Rights. There is an opinion in the legal literature that the right of a citizen to good administration is completely new and may even be a revolutionary right, because it was first proclaimed by a legal system and then constitutionalized [3, p.840].

The legitimacy of the EU is determined by the member states. This means that all measures at the European level are only valid if they have the consent (approval) of the citizens of the member states [10, p.45].

Follow to the rule of law is the most important principle of the EU. This includes fair and impartial administrative procedures. Procedural norms can be defined as a means of ensuring fundamental rights and protecting the individual. Compliance with procedural norms is mainly monitored by the courts referred to in Article 230 of the Treaty on European Union. In accordance with this article, the EU Court has always raised the issue of the lack of actio popularis. It is always a balance between ensuring legal certainty and good administration.

The rule of law determines the right to a fair trial, the right to defense, professional privileges and the right to good administration.

The Court of First Instance has the power to consider the issue of "punishing" the Commission for "procedural violations". However, the concept of administrative responsibility is less developed in European law. The Commission operates collectively and is collectively responsible for all decisions made at the political level. In such cases before the Court of First Instance, for example in claims for damages, EU authorities are held accountable.

First of all, it should be noted that the characteristics of the right to good administration are not mentioned in only one document. They can be detected only if the behavior of the administration does not meet the appropriate standards. This standard varies by time and circumstances. The individual rules, which are based on the principle of good administration, have different status and are not equally important in the hierarchy of rules of the Union. While some

of them are ordinary rules of conduct, others have a degree of legal obligation. For example, a rule that requires an immediate response by the authorities is only valid under certain conditions.

Some norms included in the right to good administration are considered to be binding, even if they were not recognized at the time of drafting the contracts. An example is the rule that individuals must have access to documents held by government agencies. It has evolved from an unenforceable right into a binding right enshrined in the Treaty on European Union.

When clarifying the legal nature of the right to good administration, it is considered expedient to clarify the violation of this right, its judicial review, and the role of the individual in these processes. What are the aspects of judicial review? First, it is necessary to support the rule of law and provide an effective means of legal protection. It is also important to ensure the legitimacy of the decision-making process. Explanations of the EU Charter on Fundamental Rights emphasize the direct impact of good administration. In addition, the EU Court has recognized it as a general principle of law. The Treaty establishing the European Union establishes the following grounds for European courts:

- Lack of authority,
- Violation of significant procedural requirements,
- Violation of constituent acts
- Violation of any legal norm related to its application or
- Abuse of power.

Follow to good administration principles will help prevent violations in any of these situations. This means that the violation of the right to good administration is subject to all grounds for reconsideration, and in the event of a violation of its legally recognized elements, it creates grounds for recourse to the courts [9, p.45].

The Council of Europe has described the trial as "the ultimate guarantee of individual rights, as well as the rights of administrative bodies".

We can look at the role of the individual in the judicial process from two perspectives. The first is to protect the interests of this individual. The second is to force the administrative authorities to carry out their activities properly. It is almost impossible to control individual decisions without the person's participation. This is an area where good administration principles can be seen as a mechanism for expanding judicial oversight.

It is also important to note that those for whom no decision has been made can sue when it affects their personal interests [5, p.245].

The Court of First Instance offered another interpretation of the individual's concern in the case of Jego Quere, but it was rejected by the court on appeal. In this resolution, the Commission claimed that the explanation of the individual grievance adopted by the Court of First Instance in the appealed decision was so broad that in fact the requirement of individual grievance was eliminated. The EU Court agreed with this argument and stated that:

Unlike the Court of First Instance, the EU Court favors a relatively limited approach to individual participation. It is believed that the function of the Court of First Instance is to "protect individuals or legal entities from any illegal actions or omissions of Union institutions [6, p.14]. The main purpose of the establishment of this Court is to improve the quality of judicial protection [4, p.145].

Interestingly, the number of appeals to the EU Court is small. The development of the principles of administrative law has left the resolution of such issues to the discretion of the Court of First Instance.

As we have already mentioned, the commitment to the right good administration is not new to the EU legal system. As an early precedent, the EU Court has begun to examine the administrative process in detail. The main criterion was the effect of the work to be done by the institutions of the Union.

In Meroni's case in 1961, we can find the criteria for effective action by the institutions of the Union (then the Union), in particular the following criteria: to act within a reasonable time, access to information, obtaining the necessary evidence, giving the party a chance to be heard [9, p.145].

In 1997, the Court of First Instance sought to enforce the principle of good administration in the context of the exercise of broad discretionary powers. It was stated that the guarantees of administrative rights under the law of the Union were "more substantial". The court identified three categories of guarantees:

1. The task of looking carefully and impartially at all relevant aspects of a particular case,
2. The right of a person to express his or her views;
3. The right to an adequately reasoned decision [1].

At the beginning of the 21st century, the EU Court did not define the right to good administration as a general principle of law. This is important because the EU Court at the time stated that the right to good administration "in itself does not give rights to individuals" [2].

Later, in 2006, the EU Court ruled that the only exception would be "the expression of specific rights, such as the duty to hear, hear access or justify decisions in an impartial, fair and reasonable manner". This is a very narrow interpretation. J.Wakefield notes that "the general right to good administration is not recognized; however, some specific rights are recognized in the legislation as separate rights. These rights are enforceable without reference to right to good administration [9, p.126].

In our opinion, this situation can be compared with the principle of "rule of law". When the courts found important elements of this principle, such as lex retro not agit or proper vacatio legis, there was no need to give the principle of the rule of law as the legal basis for a claim. The right to good administration regulates the exercise of constitutional, administrative and regulatory powers. In addition, the right to good administration requires that the body act with caution and in accordance with operational rules.

For a long time, the EU Court refused to recognize the general right to good administration. This was due to potential conflicts of interest between the Union and individuals. However, this conservative approach changed after the EU Charter on Fundamental Rights enshrined the right to good administration.

New research in the field of the right to good administration creates the conditions for different phenomena to occur [8]. Different events mean the use of behavioral sciences to increase the effectiveness of regulation. The United Kingdom and the United States are very active in this area, creating special units for the development of research in this area. A good example of this trend is the September 2015 decision by former US President Barack Obama to "use behaviorist scientific ideas to best serve the American people."

In this sense, good administration, administrative procedures and cognitive constraints are issues that will be realized in the future and are of particular interest today. Cognitive limitations combine cognitive psychology and law [7, p.549-615].

According to some experts, poor management and poor administrative decisions can be the result of mistakes in people's minds and in the choice between the subjects of power. The basic premise of cognitive psychological theory is that the human brain is a limited information processor that is unable to successfully manage all the stimuli that go beyond it. In order for government officials to make the right decisions, it is necessary to learn how to properly allocate the (deficit) cognitive resources. This is complicated by two main strategies that people (including civil servants) use to make the most of their cognitive abilities: mental (heuristics) and organizational principles (schemes).

When decisions are made in an organizational setting, institutional forms can impede the effectiveness of cognitive constraints. A government that seeks to avoid bad governance and bad decisions must be careful and structured. For example, the participation of the public and the judiciary may be a useful tool for an administrative body to perform its mandate in good faith in the public interest, but it is a weak predictor for the expert's short-sightedness and self-confi-

dence. Effective judicial review forces public authorities to look for alternative ways of doing what they consider important for their decision.

In several decisions, the EU Court has denied the right to be heard at the time of drafting the rules as a component of the right to good administration. In this regard, the EU Court has shown that the right to good administration that emerges from this situation does not cover the process of adopting dimensions of general application. The Resolution of 12 June 2015 states that "within the framework of administrative procedure, the right to be heard of a particular person cannot be considered in the context of the legislative process resulting in the adoption of general laws.

It is believed that a tough approach requires large material costs. Proponents of this approach argue that the new judicial requirements have made rule-making more laborious and expensive, but that costs have been made possible not only in terms of democratic advantages, but also in terms of increasing the effectiveness of outcomes. Faced with compliance with court requirements for transparency and participation, the administrator will almost automatically perform a normative analysis of costs and benefits in terms of efficiency.

The example of the United States shows that judicial control is important and necessary to ensure the right to good administration, but at the same time, paradoxically, it can be a factor in the emergence of bad governance. Thus, it is necessary to regulate the fairness and efficiency of the procedure, avoiding unnecessary delays and costs, but guaranteeing protection and good management. This should be an important issue for the legislature and the courts.

Thus, good administration issues can also be found in legal documents adopted prior to the formation of the European Union. Improving management is an ongoing responsibility of any state. Today's decisions make it possible to identify the correct vector for the further development of the system of state and municipal government. The consistent implementation of the idea of "good administration" is, of course, a priority for the development of states and demonstrates the authorities desire to establish clear and harmonious relations within the framework of the system of legislative acts.

For many years, the European Law School of Public Administration has been among the basic principles of administrative activity "the right to good administration" reflecting such governance that meets the requirements of an open, democratic and fair society.

The concept of "the right to good administration" consists of the following components: participation; the rule of law; transparency; sensitivity; orientation to consent; justice; effectiveness and efficiency; accountability; strategic vision.

The recognition and legislative reflection of the right to good administration in the Charter of the European Union on Fundamental Rights and the draft Constitution of the European Union was the highest achievement in the evolution of the citizen's right to participate in the management of state affairs. It should be noted that the implementation of the idea of "good administration" has certain constitutional traditions; in one form or another, it was embodied in the texts of the existing constitutions of European states.

The experience of the constitutional development of European countries shows that the implementation of this idea will enrich human rights with the quality of participation in government, expand the mutual obligations of the parties to create an open and democratic state.

The right to good administration set forth in the Charter of Fundamental Rights is a clear and open confirmation of the existence of the obligation of state bodies to be in the best position to make the necessary decisions. Thus, this task provides significant support for procedural issues, which currently occupy a higher position.

References:

1. Case T-167/94 Detlef v. Council and Commission, ECR II-2589, para. 73.

2. Case T-196/99 Area Cova v. Council and Commission, ECR II-3597, para. 43.

3. Craig P. The Constitutionalisation of Community Administration // European Law Review, N 28/6, 2003, p. 840-864.

4. Fairhurst J. Law of the European Union. (Foundation Studies in Law Series). London: Pearson Longman, 2008, 622 p.

5. Foster Nigel. EU Law Directions. 6th edition, Oxford: Oxford University Press, 2018, 560 p.

6. Lenearts K. Procedural Law of the European Union. 2nd Edition, London: Sweet & Maxwell, 2006, 1056p.

7. Rachlinski A, Farina. Cognitive Psychology and Optimal Government Design // Cornell Law Review, 2002, N 87 p. 549-615.

8. Thaler R.H., Sunstein C.R. Un pequeño empujón (nudge), Taurus, 2009.

9. Wakefield J. The Right to Good Administration. (European Monographs). Kluwer Law International, 2009. 328 p.

10. Weiler J. The Construction of Europe. Cambridge: Cambridge University Press,1999. 420p.

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FEATURES OF THE LEGAL REGULATION OF RELATIONS IN THE CARRIAGE BY RAIL

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Abstract

Economic development is impossible without efficiently rendered services for the transportation of manufactured products to serve the needs of individuals and legal entities. In this regard, the problem of legal regulation of transportation relations continues to remain relevant. Regulatory regulation of transportation by rail in different countries is very specific. In this regard, the authors set a goal to establish and analyze certain features of the legal regulation of transportation relations and their impact on the efficiency of the transportation market. The extensive nature of the normative legal regulation of the carriage of goods by rail and its unsystematic nature are noted. It is substantiated that the procedure for concluding a contract for the carriage of goods and the peculiarities of protecting the violated rights and responsibilities of participants in transportation relations indicate an unfair distribution of rights and obligations between the parties to the contract for the carriage of goods.

The regulation of relations from the contract for the carriage of goods is archaic. The current normative legal regulation testifies to the extraordinary support of carriers by the state, which negatively affects the quality of their services to the population. According to many authors, the very model of regulation of transportation relations needs to be changed.

Keywords: *transport agreement, international norms, real damage, transportation of goods, rail transportation, carrier's responsibility, rights protection, natural monopoly.*

The social significance and public significance of the carriage of goods and passengers by rail, as well as a limited number of carriers and the presence of barriers to entry into the market of carriage by rail, along with the specifics of transport and cargo, determined the features of the regulatory legal regulation of transport relations by this mode of transport.

Various specific features of the regulatory regulation of transportation relations can be distinguished. The first feature is the extensive nature of legal regulation. Thus, many developed countries have adopted a large number of normative legal acts specifying the regulation of cargo acceptance for transportation, operation and maintenance of non-public railway tracks, transportation of dangerous goods, transportation of freezing cargo, transportation of goods in open rolling stock, etc.

The second feature is associated with a real model of concluding a contract for the carriage of goods by rail, which leads to a complication of the procedure for the emergence of civil rights and obligations between legal entities. To conclude a contract for the carriage of goods by rail, it is necessary either to conclude an agreement on the organization of carriage, or to agree on an application (therefore, liability is differentiated into liability for non-fulfillment of the application and for violation of obligations from the contract for the carriage of goods by rail).

The specifics of any type of contract is predetermined by the moment of rights and obligations. This issue in relation to the contract of carriage of goods by rail is quite relevant, because at the present stage among the civilists there is no consensus on this problem. This is largely due to different interpretations of the norms of the civil legislation relating to the regulation of transportation, as well as the provisions of special legislation.

An important feature of the contract of carriage of goods by rail is the obligation to draw up an application for the carriage of goods by rail. Thus, the legislator provides not only the necessity of its compilation, but also subordinate legislation defined by its content. To date, this

application is considered by some scientists as an independent contract, by others as a preliminary contract concluded for the purpose of subsequent agreement of the terms of the railway-contract, by others as a certain mandatory component of the contract of carriage, which does not have autonomy in relation to the main contract of carriage, but at the same time and is not subject to the rules on the preliminary contract [5, p.37-41].

The legal qualification of the application for the carriage of goods by rail is important to determine the nature of the contractual relationship for the carriage of goods by rail.

Despite the long development of the institute of railway transportation, there are many issues in the scientific literature on which researchers cannot form a unified view.

So, you can find different positions on the issue of the moment of occurrence of the obligation in the course of transportation by rail. Many eminent civil scientists have spoken out on this issue. At the same time, some of them believed that the contract for railway transportation was real [6, p.695], others - consensual [7, p.48], while others suggested combining both previously stated points of view and, depending on the circumstances, believed that the contract could be both real and consensual [3, p.58].

Of course, to a certain extent, the emergence of such a discussion is associated with the specifics of the legislative technique and the content of the corresponding norms. Thus, the prevalence in Soviet historiography of the position on the consensual nature of the transportation of goods by rail is associated with the presence in the Charter of Railways of the provision on the obligation to submit a special application prior to the transportation process (for transportation outside the plan), or to include transportation in the corresponding plan.

At present, the legal relationship between the shipper and the carrier is subject to settlement in the agreement on the organization of the carriage of goods, which is supplemented by the preparation of a special application of a certain form. The set of norms governing the drafting of the above documents makes it possible to more clearly form an idea of the nature of the contract for rail transportation.

In accordance with the civil legislation of many CIS countries, the carrier is obliged to d-liver the cargo transferred to him and hand it over to the authorized consignee. In this case, the issuance of a bill of lading indicates the conclusion of a contract for the carriage of goods.

These legal provisions make it possible to qualify the contract of carriage as real, although some sources still maintain a position about the duality of such an agreement and its possible consensual nature, at least if the carrier undertakes to provide transport before the transfer of goods occurs [9].

The situation is complicated by the fact that in the Model Statute of the CIS Railways the legislator proposed a consensual nature of the contract for rail transportation. In particular, Art. 32 of the Model Charter stipulates that, in accordance with this agreement, the railway undertakes to timely and safely deliver the cargo to the destination station, observing the conditions for its transportation and issue it to the consignee, and the consignor to pay for the transportation [10].

In such circumstances, in essence, we can say that today the nature of the contract within the framework of CIS transportation is made dependent on the territory on which the corresponding services were provided, which, of course, is irrational. It seems that the national legislator should develop a unified approach to the organization of railway transportation.

Of course, within the framework of the current legislation, the preparation and approval of an application for the carriage of goods is an integral element of railway transportation, which is quite logical, based on the nature of the contract itself and the actual actions to be performed by the carrier.

Rail transportation involves the coordination of many details, so even some supporters of the approach about the real nature of this type of contract believe the consensual model is more acceptable for participants in civil turnover.

The specificity of rail transportation is that the actual actions for the carriage of goods are preceded by the preparation of a special application form. In relation to this fact, the position is

expressed that the legal relations arising from the preparation and signing of such an application are of a contractual nature.

Many authors supplement this point of view with a statement about the lack of independence of such an agreement. It is very doubtful, from the position of the author, to speak, if there is one, about the possibility of the emergence of full-fledged contractual relations for the carriage of goods by rail.

In this case, it is appropriate to say that a contractual obligation only makes sense if there is an economic and legal result that suits both parties.

The statement of the contractual conditions in the application for rail transportation does not allow reaching an agreement of ultimate interest for the parties to the transaction. It is obvious that loading and filling a wagon by itself has no economic value for the shipper and carrier. In this context, the application for the carriage of goods by rail can be regarded as a preliminary contract. However, such a qualification of legal relations would be, in our opinion, incorrect. In this regard, it should be noted that the design of the preliminary contract is essentially a superstructure and contractual legal relations may well develop without prior agreement on the terms of the final transaction.

In the case of railway transportation, the movement of goods in the absence of an application is impossible. At least from a legal point of view, such a transaction will lack an important formal element, which significantly increases the legal risks of each of the parties to the agreement in the event of a discrepancy in their position regarding its conclusion and proper execution.

But an equally important objection to the issue of qualifying an application for rail transportation as a preliminary contract is the fact that the specified document does not determine the conditions of the transportation itself, since the participants in legal relations only determine the procedure for loading, and this is why the purpose of drawing up the application is fulfilled. Expansion of the terms of the application seems to be highly doubtful in terms of the approval of its form by the executive authority.

In addition, the sanctions for non-fulfillment of the application for the carriage of goods by rail are also specific. The provisions on a preliminary contract embody a different concept of liability for non-performance.

In the scientific literature, it is also customary to distinguish between the application for railway transportation and the contract for the supply and cleaning of wagons due to the difference in the subject of regulation in each of these documents [8, p.253-288].

Meanwhile, despite the above circumstances, an application for the carriage of goods by rail, as already indicated above, cannot generate an independent obligation, and therefore, according to A.Dovgopolova, cannot be considered as an independent contract, but is one of the important components to the contract of carriage [1, p.30-38].

The totality of the above circumstances is given by A.Sokolova concluded that within the framework of the current legal regulation, the contract for the carriage of goods by rail is a consensual one, but such a design cannot be recognized as successful and needs to be adjusted.

Summarizing the above, it should be noted that today there is no consensus among civil scientists about the nature of the contract for the carriage of goods by rail and its integral component - applications for the carriage of goods by rail.

In our opinion, an application for the carriage of goods is a constituent and necessary element of railway transportation, however, it does not have the characteristics that would qualify it as an independent contract or a preliminary contract.

Having some features characteristic of a preliminary contract, an application for the carriage of goods, nevertheless, from a legal point of view, has obvious features, therefore such a qualification is possible only conditionally, in the presence of a significant number of reservations determined within the framework of special legal regulation of the relevant legal relationship.

Essential features are inherent in liability for violation of obligations in transportation relations. As D.Karkhalev, persons engaged in entrepreneurial activities in the field of transportation are responsible for non-fulfillment or improper fulfillment of an obligation, regardless of fault, i.e. the increased responsibility of carriers has been established.

In addition, a characteristic feature of the liability of carriers in transport relations is also that it is limited. Only real damage is subject to compensation in the event of loss, shortage or damage to the transported cargo or baggage. Thus, the principle of full compensation for losses in transport relations has its limitations. The third specific feature of liability in the field of railway transportation of goods is the normative consolidation of the grounds for exemption of the carrier from liability (for example, in connection with the natural loss of goods) [4, c. 35–36].

Liability in the field of transportation by rail includes some measures that are not inherent in civil law regulation, which include a fine for exceeding the carrying capacity of a wagon or container by the consignor; a fine for distorting the weight of cargo luggage in the application (in case of wagon shipment), for sending items that cannot be transported as luggage; the right not to execute the accepted application for carriage if the consignor has not paid the carriage charges for the previous carriage of goods. Such punishment for violation of the obligation to pay for the carriage of goods is unnecessary, since the use of other civil law instruments provided by law is not excluded (retention of cargo, payment for the use of wagons during idle time, interest for the use of other people's funds).

It is not quite typical for civil liability to calculate a penalty based on the minimum wage in case of violation of transport obligations. In this case, it is the carrier who records the violation of the obligation. The fee for not presenting goods for carriage is not a measure of property liability and is subject to write-off regardless of the presentation of a fine for failure to comply with the submitted application.

In addition, the features of the protection of rights in transport relations are highlighted. Among them, D.Karkhalev calls the existence of a mandatory claim procedure for the protection of violated rights and the specifics of the course of the limitation period (claims are filed within a year from the date of the events that served as the basis for the claims). With the introduction of a mandatory claim procedure in the settlement of disputes arising from civil legal relations by arbitration courts, it is unfair to assess the claim procedure as a feature of relations from transportation. The limitation period in transportation relations is shortened, since is equal to a year not from the moment when the violation was learned or should have been found out, but from the moment of the very legal fact underlying the claim.

The subject composition of transportation relations and the way in which rights and obligations are allocated during transportation also cause discussion in the scientific community. According to E.S. Phelps, the state continues to be a participant in public transport relations through budgetary financing of projects for the modernization of railways, subsidies for unprofitable directions of railway transportation, intergovernmental agreements on international freight traffic on specific lines, etc. All of the above is alien to civil law with its legal equality of business subjects and may indicate some return of the Soviet system of interaction with distributive justice [2, p.205]. Many authors are also of the opinion that carriers are still perceived by the state as a state structure, which contributed to the formation of a natural railway monopoly.

The regulation of transportation to the maximum extent by means of the imperative method excludes the application of the principle of equality of civil law, which results in greater protection of the interests of the carrier. We believe that the imperativeness of regulation cannot serve as a reason for the priority protection of the carrier, although, in our opinion, it is beyond doubt.

The above features are the basis for assessing the method of regulation of railway transportation as administrative and legal. In our opinion, the civil legal branch of rail transportation should not be in doubt. The regulation of transportation relations is distinguished by significant specificity due to the peculiarities of liability for violation of obligations by parti-

cipants in transport relations, the peculiarities of protecting violated rights, the public nature of the contract of carriage, as well as the actual structure of the conclusion of a contract for the carriage of goods.

References:

1. Dovgopol A.A. The contract for the carriage of goods by rail: legal nature, conclusion and subject composition // Transport law. 2007. No. 1. p.30-38.
2. Felps Je.S. Distributive equity // Economic theory / ed. by Dzh. Itujella, M. Milgejta, P. N'jumena; V.S. Avtonomov. M.: INFRA-M, 2004. p.205-210.
3. Gyula Eorsi, Attila Harmathy. Law and Economic Reform in Socialist Countries. Akadémia Kiadó, 1971, 224 p.
4. Karhalev D.N. Protection of civil rights in transport relations // Digest of arbitration practice. 2016. № 3. p.34–39.
5. Lucash M. Legal regulation of the contract of carriage of goods railway transport // Vestnik of Putilin Belgorod Law Institute of Ministry of the Interior of Russia. 2019. № 1. p. 37-41.
6. Malcolm A. Clarke, David Yates. Contracts of Carriage by Land and Air. CRC Press, 2013, 720 p.
7. Schwartz H.I. Legal regulation of road transport. Legal Literature, 1966, 262 p.
8. Sokolov A.M. Features of the contract of railway transportation / Experiments of civil law research: collection articles. Statute, 2016. p. 253-288.
9. http://center-yf.ru/data/ip/konsensualnyy-dogovor-perevozki.php
10. http://docs.cntd.ru/document/901856732

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LEGAL DIRECTIONS AND DEVELOPMENT PERSPECTIVES OF COOPERATION WITHIN OPEC IN THE FIELD OF OIL PRODUCTION AND EXPORT

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Abstract

The article analyzes in detail legal directions and development perspectives of cooperation within OPEC in the field of oil production and export based on disagreements in the legal literature and international documents. It is noted that OPEC plays a significant role in world oil supplies, serving mainly the interests of the member states and in accordance with the principle of ensuring energy security when supplying energy resources. Such an important role of OPEC in the international arena creates the basis for the participation of non-member states in this Organization. The author concludes that, the need for cooperation between oil-producing OPEC member states and non-member oil-producing states is due to the fact that interstate relations in the era of globalization are possible only on the basis of mutual benefit. The fact that oil exporting countries defended their interests as a result of joint activities within the framework of OPEC served as a legal guarantee in regulating relations with the main oil exporting countries of individual entities occupying unequal positions (large oil companies, countries with developed economies).

Keywords: *oil production, income, oil market prices, member states, exporting countries, cooperation, taxation, international energy law, oil companies, crude oil, OPEC.*

In the context of international energy law, OPEC is the most important international organization capable to influence the oil sector. This impact encompasses not only energy, but also related environmental issues, including oil production and trade, as well as investments in this area. Currently, OPEC member States control 75% of the world's oil resources and 40% of oil production. At the same time, the cheapest crude oil is produced in the OPEC member States. As a result, there is a drop in oil prices and an increase in the market share of the OPEC member States, which has been increasingly manifested in recent years. Nonetheless, geopolitical tensions and abnormally high oil demand in 2004 and 2005 pushed oil prices to their highest levels [11, p.190].

In general, during its existence, within the framework of OPEC, many achievements have been achieved, mainly not related to the regulation of market oil prices. During the first decade of its existence, the Organization sought to increase the revenues of oil-producing countries through collective bargaining to raise the mineral extraction tax and other taxes, despite the fall in crude oil prices. Reducing incomes of large oil companies, which were considered inviolable at that time, and increasing incomes of producing states per barrel of oil were achievements that no other economic organization could achieve [7, p.5]. In the 1960s, the OPEC member states could not influence the oil market prices. And international oil companies tried to preserve the concessions signed in the 1920s and 1930s, which, with the exception of tax collection, nullified the role of local authorities in oil production and determining oil market prices. In accordance with the agreements concluded in Tehran in 1971 and in Tripoli in 1973, OPEC achieved an agreement between the member states to increase oil market prices by transferring its members from the consumer market to the producer market, as well as through nationalization and participation as holders of shares in various consortia providing direct control over the oil production of their members. Despite the choice of different national strategies, cooperation within OPEC was of paramount importance to strengthen the capacity of member states to

control and monitor all aspects of their oil sector. Since 1973, OPEC member states have been able to control market oil prices. However, during the 1979-1980 oil crises, OPEC was unable to influence the sharp rise in oil prices, which led to unpleasant consequences. Thus, in 1982, OPEC established quotas for oil production for its member states in order to prevent a fall in oil prices. However, in the mid-1980s, OPEC lost control over the oil markets. Due to tensions within OPEC over different quotas between member states, national oil companies tended to compete rather than cooperate [8]. Only in the late 1990s, the growth in demand from China and other Asian countries as the main consumers ensured the growth of OPEC oil exports. The transformation of China, which became an oil-exporting country in the 1980s, into the world's largest oil consumer in 2015, affected its relations with OPEC not only economically, but also politically and ideologically [16, p.133-140].

The reality is that, despite serious attempts and even successes of the OPEC member states, changes in the oil market are much more important for oil-producing countries than for oil consumers. Oil exporting countries are considered more vulnerable than oil consumers and may benefit more from cooperation than from competition. Thus, when prices fall, the economies of oil and gas countries are threatened with destruction; this, in turn, can lead to a change in the political regime in the country and even to a social and economic downturn. On the other hand, when prices rise, consumer states are forced to radically change their energy policies, but crude oil prices act as a small factor influencing the development of the complex economies of industrialized countries in a positive way. Cooperation within the framework of OPEC has helped to establish new states such as Nigeria and the UAE as important members of the international community and strong states in their region. Despite being one of the poorest countries in Latin America in the 1920s, Venezuela had become the richest country in the region in terms of per capita income by the mid-1970s [19, 33-53].

Thus, from the point of view of coordinating the activities of the member states within the framework of OPEC, the following objective law is manifested: when cooperation between the member states increases, the well-being of their populations increases, however, when competition and anarchy prevail between the member states, governments are forced to apply tough economic measures and the country's population suffers from economic hardship and political instability. In this sense, cooperation within the framework of OPEC is essential for the development and economic stability of the member states.

In general, OPEC plays a significant role in world oil supplies, serving mainly the interests of the member states and in accordance with the principle of ensuring energy security when supplying energy resources. Such an important role of OPEC in the international arena creates the basis for the participation of non-member states in this Organization. So, since 1998, Mexico and Oman, having received observer status in OPEC and participating in its sessions, coordinate their oil strategies with the decisions adopted by this Organization. And, since the end of 2008, due to a sharp drop in prices on the world oil market, oil-exporting countries that are non-OPEC members (Russia, Azerbaijan and other CIS countries) have been taking part in OPEC sessions on quotas [2, 84]. These states participating in OPEC sessions as observers, in accordance with Article 7 of the Statute, are called associate members and they are not considered full members and do not have the right to vote at meetings [32].

Taking into account the current state of the world oil market, in order to coordinate the market, reduce the level of reserves and ensure the stability of the oil market in December 2016, a Declaration on Cooperation was adopted between the OPEC member states and 10 non-member oil exporting countries. In 2019, the Cooperation Charter was adopted, which is considered a long-term platform dedicated to cooperation, exchange of views and information within the framework of OPEC [31]. Later, on June 6, 2020, a Declaration of Cooperation was adopted at a ministerial meeting of OPEC and non-OPEC member states. According to the Declaration, all major oil-producing countries (OPEC member states and non-member oil exporting countries) agree on a proportional contribution to the stability of the world oil market.

At the same time, the mandate of the Joint Monitoring Committee of Ministers and its members was approved. The Monitoring Committee, with the support of the Joint Technical Committee and the OPEC Secretariat, should carefully consider the general conditions of the energy market and other related factors, study the activities of the member states and non-members on the basis of this Declaration. To this end, it was planned to hold a monthly meeting of the Joint Monitoring Committee of Ministers by December 2020. In accordance with the methodology applied by the OPEC Secretariat, compliance by OPEC and non-OPEC member states with a Declaration of Cooperation should be monitored, taking into account the production of crude oil, based on information obtained from secondary sources [9].

Since decisions on production and export quotas are made collectively within the framework of OPEC, this testifies to the Organization's unique status in the global energy market. Such decisions made by OPEC, and the way they are implemented, have a serious impact on oil market prices. Undoubtedly, since stable prices themselves are of decisive importance for both consumers and exporters, this activity was also enshrined in the OPEC Statute adopted in 1961. Consequently, the adoption of such decisions allows OPEC to monitor the situation in the oil markets and, if necessary, make new necessary decisions. The OPEC agreements set maximums for total oil production distributed among member states through a quota system. For example, on June 3, 2004, at a Ministerial Conference in Beirut, it was noted that for OPEC-10 (all members except Iraq), production should be increased in a maximum of 2 stages – from July 1 to 2 million barrels, an increase of 25.5 million barrels, and from August 1, up to 26 million barrels. The purpose of this decision was that the conference was to "provide adequate supply, demonstrate commitment to OPEC's intentions to achieve market stability and maintain prices for both miners and consumers, and maintain a stable and stable global economy" [18].

The high production threshold is specified by the Conference from time to time based on the fundamental indicators of the world oil market. The frequency of such revisions depends on price changes and innovations that affect the market [17, p.209].

With the independent determination of group and individual maximum oil production quotas in order to maintain the stability of the international oil market under certain market conditions, important requirements can be put forward for countries that are significantly dependent on oil incomes for their national development. That is why OPEC, always pointing out the stability of the oil market, assigns this responsibility to all parties, including exporting states, consumer states that are not members of OPEC, as well as multinational oil companies and international financial institutions [22]. When analyzing oil data, it turns out that most of them are uncertain and require revision [14].

It should also be noted that Iraq was excluded from the OPEC quota system in 1998. Thus, compliance with OPEC quotas mainly implies actual production versus previously set high limits. In the literature, sometimes the phrase "compliance" is used in different meanings, and the accrued interest on such a match differs from each other. The reasons for the difference may be the lack of accurate production data, as well as the different indicators for determining compliance [15].

Taking into account the issues of technical and technological support of cooperation between the member states within the framework of OPEC, as well as the regulation by the member states within the Organization of quotas for oil production and prices, one can see how important the role of the cartel is in the world oil market. At the same time, the important role of OPEC in the development of international energy law determines the interaction of international energy law with other branches of international law (international trade law, international economic law, international environmental law, international competition law, international sustainable development law) [23, 560].

OPEC's activities in this direction are directly expressed in the Statute of the Organization. Thus, according to the OPEC Statute, the Organization must seek stability and harmony in the oil

market between oil producers, consumers and investors (Article 2(A)(B)(C)). To this end, the OPEC member states coordinate their oil policies to ensure stability in the international oil market, focusing on fundamental market factors. The limitation of production is the most important measure determined by the Member States in this direction. When demand rises or some oil-producing countries produce small amounts of oil, OPEC raises oil production quotas to prevent a sudden rise in prices. In other cases, the entity reduces oil production quotas in accordance with market conditions in order to prevent price declines. It is in this form that the process of regulation of the world oil market by OPEC takes place [5, p.12-13].

If in the 1970s and 1980s the market prices for crude oil were determined by OPEC, now the situation has changed dramatically. Of course, in order to stabilize the oil market and prevent sharp price fluctuations, the OPEC member states voluntarily limit the production of crude oil, which meets the interests of not only the OPEC member states, but also the consumer states and investors.

Currently, the price of crude oil in complex world markets is driven by the mobility that occurs across three major oil exchanges: the New York Mercantile Exchange (NYMEX) [29], the London International Petroleum Exchange (IPE) [28], and the Singapore International Currency Exchange (SIMEX) [34].

The current role of OPEC in the development of international energy law stems from two main problems. First, the Organization was formed on the basis of the natural interests of the member states in the "lease of natural resources" subject to increased income and maintenance of stability, as well as preservation of sovereignty over oil and gas resources. These interests are still considered the main pillars of the Organization's existence. The general idea is that a balance must be maintained within the Organization between short-term price and production optimization and long-term strategy. Long-term strategies are aimed at maintaining a high share of OPEC in the oil market compared to competing countries that are not members of OPEC. At the same time, there is a division of interests between the OPEC policy and high rates of excise taxes on oil and oil products from Western states, in particular Great Britain [25, 363]. For example, in the UK, a high excise tax of 4 times the price of gasoline is justified by environmental factors in terms of the impact of gasoline on the environment and road infrastructure. However, this justification appears to be a justification used to offset the perceived reduction in income tax rates [27]. In this sense, the conflict between OPEC and consumer countries is not based on high oil prices, but on who gets more oil incomes [24]. In a sense, the European Union and the United States tried to present the rise in oil prices as a result of the work of OPEC [26]. In the 2000s, these states did not want to admit that OPEC was interested in maintaining stable oil prices [13]. In this sense, as A.I.Sadigov noted, OPEC members are concerned about "green" taxes on oil in developed countries [1, p.143].

And in the context of global problems of the 21st century, claims against OPEC began to be justified by the amount of carbon emissions generated by burning fuel derived from oil. Already in 2020, a tendency was formed that if low or zero carbon emissions in the oil industry are not achieved, the participants in the oil market will lose their "social license" [12, p.346]. So, in January 2020 in Aberdeen, the chairman of the UK Department of Oil and Gas, Tim Eggar, speaking to the heads of the oil departments of the oil exporting countries, noted that the existence of an industrial license for the extraction, export and import of oil is under threat; the oil and gas industry has a leading role to play in addressing a range of climate change issues [30].

A number of participants in the oil industry have already begun to respond to this issue to some extent after the six largest European oil and gas companies (BG Group, BP, ENI, Shell, Statoil and Total) sent an open letter to the UN in June 2015. The letter said that the governments of states involved in the extraction, export and import of oil should implement systems for estimating carbon emissions at the national and regional levels, as well as form an international plane that will ultimately unite national systems [33]. These companies have developed an

internal carbon footprint to influence investment agreements of oil exporting countries [6]. And in May 2020, executives from a number of major energy companies, including BP and Royal Dutch Shell, prepared a new appeal stating that in the wake of the COVID-19 pandemic, government stimulus measures should be aimed at creating a healthier and more resilient economic network [3]. In addition, Repsol, BP, Royal Dutch Shell, Total, Equinor and ENI have announced plans to reduce the intensity of carbon emissions, which will be reduced to zero by 2050. Unlike major European oil companies, US oil companies have generally not disclosed any plans [12, p.347].

In addition, one of the most important challenges facing OPEC today is preventing global warming. The OPEC Fund for International Development [21, p.879-890], founded in 1976, is currently implementing important projects aimed precisely at solving this problem. This is due to the fact that at present the main problem facing the states of the world is no longer a colonial regime that exploits natural resources, or a cartel of international companies limiting incomes from natural resources in the host state, but a global crisis related to climate change. ... The threat of global climate change has pushed OPEC to the fact that at present the Organization prefers to conduct the international struggle to mitigate the effects of global warming, rather than to exercise control over the management of the oil market since the 1970s [10]. In the coming years, in the event of a tightening of national and multilateral international climate rules and a decrease in oil demand, it will be impossible to maintain oil prices at the desired level through any production quotas. This will lead to the fact that in the future more and more OPEC members will leave the cartel, and oil-producing countries will remain in the cartel with minimal costs. As an alternative, a number of opinions are put forward on the prospects for further development and cooperation of OPEC:

- it is necessary to inform the countries of the world, especially the developed countries with a high level of income, that climate change will lead to more severe consequences for the population of countries with a low level of income;

- despite the fact that oil will remain the most important source of energy for a long time to come, the goals of the 2015 Paris Convention on Climate Change can only be achieved if most of the oil reserves are not being produced. Currently, a number of large oil companies have recognized this need and have begun to significantly reduce their oil reserves [35];

- Member States should be assisted in assessing the possibilities of using renewable energy sources in petroleum operations, thereby reducing oil consumption and carbon emissions by Member States. From this point of view, Norway has some experience in the production, transportation and processing of oil [4, p.300-311];

- OPEC should encourage oil saving, carbon reduction and carbon pricing among its member states. A number of large oil and gas companies have benefited from this experience over the years [20, p.83-87];

- OPEC should implement programs that provide for mutual assistance in diversifying the economies of its member states, encourage cross-border direct investment between member states, instruct the Secretariat to study the potential for diversifying the economies of member states;

- The Organization should include and publish in the World Oil Outlook or in the annual OPEC statistical bulletin information reflecting the internal capabilities and activities of member states towards economic diversification and shared access to energy.

The adoption of these measures is possible only at OPEC summits, regardless of the will of the governments of the member states [12, p.351-352]. By implementing these measures, the OPEC member states can ensure the long-term sustainable development of their economies and the existence of OPEC as an Organization for Economic Cooperation.

OPEC is also making efforts to expand dialogue on a number of issues with interested structures and states in the field of oil exports. In recent years, these have included the International Energy Agency, the European Union, as well as China, Russia and other non-OPEC states.

Legal regulation of interaction with international organizations in the context of OPEC's involvement in issues related to oil and energy, resolved on high-level political platforms, such as the G20, is one of the main intentions of the OPEC member states. The need for such cooperation between oil-producing OPEC member states and non-member oil-producing states is due to the fact that interstate relations in the era of globalization are possible only on the basis of mutual benefit.

Thus, summing up what has been said about cooperation between oil companies, consumers and investors within OPEC, a number of important points should be noted. So, if the 20th century was considered the oil century, then already in the 21st century the importance of alternative energy sources, in particular, "green energy" that does not affect the environment, is highlighted. However, a significant drop in demand for oil on world markets does not look realistic in the next few decades. During the evolutionary period from the creation of OPEC to the present, there have been two important achievements and two major bankruptcies of the organization. The first achievement was the regulation of market oil prices to ensure a sufficient level of profitability for the member states as a goal set when the organization was created by setting production quotas. During the oil crises, OPEC held full power in this sense. However, after 1983, this force became relative. At present, OPEC, by regulating the total oil exports by its member states (by determining production quotas), indirectly affects oil prices on the world market. The second achievement during the existence of OPEC was the development of the national economies of the member states at the expense of incomes from oil exports. Despite the obvious differences between the levels of economic development of the member states, undoubtedly, as a logical result of cooperation within the framework of OPEC, the economies of the member states reached a sufficiently high level than 50 years ago, which can be expressed as a result of the satisfactory activity of OPEC in the field of production and export of crude oil.

As for the failures that the organization relied on during the period of its activity, the first of them is the weak diversification of the economies of the OPEC member states (economic diversification). The economies of the member states continue to be heavily dependent on oil exports, which lead to their weakening in the event of a fall in oil prices. At the same time, it can be assumed that with the depletion of oil reserves, a number of member states will fall to the level of economic development that they had before obtaining the status of an oil exporter. The UAE and Venezuela may be listed as an exception. Thus, both states, at the expense of oil incomes, have diversified the country's economy, which will allow maintaining a stable level of economic development in the region where they are located. The second setback is that the Organization, as a common platform for action by member states, has failed to end serious historical, political and economic divisions among oil-exporting countries. Sometimes even such conflicts led to military clashes.

However, in our opinion, the overall balance in OPEC activities continues to be a positive trend and can be assessed by two main criteria: the approach of the member states and from the point of view of the world oil market. Joint activities within the framework of OPEC allowed member states to advance personal interests, and control over oil prices in the world market led to significant income growth and further economic development. Consequently, at present, cooperation within the framework of OPEC is essential for the development and economic stability of the member states.

With regard to the world oil market, we believe that OPEC provides a balance of power between exporting and importing states. The fact that oil exporting countries defended their interests as a result of joint activities within the framework of OPEC served as a legal guarantee in regulating relations with the main oil exporting countries of individual entities occupying unequal positions (large oil companies, countries with developed economies). Thus, tensions between oil exporting states and oil importing states were resolved at the negotiating table (through oil export and sale agreements). In the absence of OPEC, numerous oil wars and oil crises could have erupted.

References:

1. Sadigov A.I. International energy law. Textbook. Baku, Adventa Group, 2013, 312 p. (in Azerbaijani)
2. Sadigov A.I. International institutions of energy security (international legal issues). Baku, "Baku University" Publishing House, 2009, 202 p. (in Azerbaijani)
3. 7 Priorities to Help the Global Economy Recover / Energy Transition Commission, May, 2020.
4. Batruch C. Facing the Energy Transition // Journal of World Energy Law and Business, 2020, Vol. 13, pp.300-311.
5. Botchway F. International trade regime and energy trade // Syracuse Journal of International Law & Commerce, Vol. 28, 2001, pp. 12-13.
6. BP's Looney Says Fossil Fuel Subsidies Should Go / International Oil Daily, 4 June, 2020.
7. Claes D.G., Garavini G. OPEC and the global energy order. Past, present and future challenges / In: Handbook of OPEC and the Global Energy Order. Past, Present and Future Challenges. Ed. by D.G. Claes & G. Garavini. London & New York, Routledge, 2020, pp. 1-12.
8. Counter-Shock: The Oil Counter-Revolution of the 1980s. Ed. by D. Basosi, G. Garavini, M. Trentin. London, Tauris, 2018, 400 p.
9. Declaration of Cooperation. 11th OPEC and Non-OPEC Ministerial Meeting, 6 June 2020, 2 p.
10. Dobson M. Revisiting OPEC's Democratic Roots in the Age of Climate Emergency // E-International Relations, 17 January, 2020, 7 p.
11. Garavini G. The rise & fall of OPEC in the twentieth century. Oxford, Oxford University Press, 2019, 420 p.
12. Gault J., Ait-Laoussine N. OPEC: Still an 'Instrument of Change'? // Journal of World Energy Law and Business, Vol. 13, 2020, pp. 343-352.
13. Green paper: towards a European strategy for security of energy supply. Luxembourg, European Union, Office for Official Publications of the European Community, 2001, 105 p.
14. Lynch M. C. Causes of oil price volatility // 8th International Energy Fo¬rum, Osaka, 21-23 September, 2002.
15. Mabro R. On oil price regimes and price volatility // 8th International En¬ergy Forum, Osaka, 21-23 September, 2002.
16. Maohong B. China and OPEC: From ideological support to economic cooperation / In: Handbook of OPEC and the Global Energy Order. Past, Present and Future Challenges. Ed. by D.G. Claes & G. Garavini. London & New York, Routledge, 2020, pp. 133-140.
17. Mazraati M., Tayyebi Jazareyi S.M. Oil price movements and production agreements // OPEC Review, 2004, pp. 207-226.
18. Press release no. 12/2004, OPEC Secretariat, 22 July, Vienna, OPEC, 2004.
19. Ramady M., Mahdi W. OPEC in a Shale Oil World. Where to Next? London & New York, Springer, 2015, 269 p.
20. Roberts P. tCO2e—a new pricing model for LNG? // Journal of World Energy Law and Business, 2020, Vol. 13, pp. 83-87.
21. Shihata F.I. İntroductory note. Organization of the Petroleum Exporting Countries: Agreement Establishing the OPEC Fund for International Development / International Legal materials, 1980, pp. 879-890.
22. Stocks interaction with crude oil prices and supply/demand balance. OPEC Secretariat, Research Division, Vienna, OPEC, 2001.
23. Walde T.W. Organization of the Petroleum Exporting Countries / In: Encyclopaedia of Hydrocarbons. Rome, Marchesi Grafiche Editoriali, 2007, pp. 559-573.
24. Who gets what from imported oil. Annual Statistical Bulletin. Organization of the Petroleum Exporting Countries, 2019.
25. Zarilli S. Domestic taxation of energy products and multilateral trade rules: is this a case of unlawful trade discrimination? // Journal of World Trade, Vol. 37, 2003, pp. 359-394.
26. http://www.economist.com/agenda/displayStory.cfm?story_id=4077933
27. http://www.europa.eu.int/comm/environment/env-act5/chapt1-3.htm
28. http://www.ipe.uk.com
29. http://www.nymex.com
30. https://www.ogauthority.co.uk/news-publications/news/2020/oga-chairman-challenges-the-sectorto-respond-to-the-energy-transition-challenge/
31. https://www.opec.org/opec_web/en/about_us/24.htm
32. https://www.opec.org/opec_web/en/about_us/25.htm
33. https://www.shell.com/media/news-and-media-releases/2015/oil-and-gas-majors-call-for-carbon-pricing
34. http://www.simex.com.sg
35. https://www.theguardian.com/environment/2017/dec/20/france-bans-fracking-and-oil-extraction-in-all-of-its-territories

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THE PROBLEM OF DUAL (OR MULTIPLE) CITIZENSHIP IN INTERNATIONAL LAW AND WAYS TO SOLUTION

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Abstract

Differences between the legislation of the states on the rules of acquisition and loss of citizenship play an important role in the emergence of problems of citizenship (bipatrism, apartheid, etc.). For example, the existence of conflicts between "blood law" and "land law", as well as differences of opinion on naturalization, etc. can be noted. In addition, the reasons for the emergence of dual citizenship and statelessness are insufficiently regulated territorial changes that lead to a change in the jurisdiction of states, population migration, the influx of refugees, and so on. need to be attributed. Although dual citizenship can have some negative consequences, there is a growing trend in most European countries to encourage the institution of dual citizenship due to the intensification of integration processes around the world. At the same time, the problems in this area are being successfully resolved..

Keywords: *dual citizenship, blood law, land law, place of birth, state sovereignty, population migration, naturalization, 1997 European Convention, effective citizenship, legal status*.

Introduction.

Citizenship law has a complex internal structure. The norms of civil law are united in different groups, creating a sub-institution related to the institution of citizenship as a whole. Such sub-institutions include, for example, the acquisition and termination of citizenship, the citizenship of children and parents, the citizenship of the subjects of the federation, dual citizenship, and so on. can be attributed.

By its nature, citizenship is directly related to state sovereignty, territorial structure, and the legal status of the individual, as it is a prerequisite for citizens to have rights and responsibilities.

The problem of citizenship is considered one of the most difficult issues in the institution of citizenship. The approach of states to the problem of citizenship is mainly based on the population of the state, ethnographic situation, geographical position, political and cultural characteristics, etc. is determined depending on a number of factors such as.

The main causes of the problem.

The main reasons for the emergence of dual citizenship are changes in the territory and population migration [5, p.15-20]. Under the conditions of feudal formation, especially during the period of dictatorship, population migration was minimal due to the settlement of peasants, and in some countries even the death penalty was imposed for leaving the land. For this reason, the emergence of dual citizenship was a rare occurrence, and in most cases, the impossibility of such a situation manifested itself in the treatment of the lower classes. Among those belonging to the upper class, dual citizenship was common. This is because such individuals often entered into mixed marriages and owned land in various countries to which they were bound by the oath of allegiance.

Active economic and political migration of the population had already begun during the development of capitalism. Today, due to the rapid development of international relations, the migration process has an objectively strengthened trend and is considered the main source of bipatrism (dual citizenship). In modern society, the rapid development of international relations expands the migration process, and therefore states face new challenges, such as the settlement of issues related to dual citizenship.

Another major reason for the emergence of dual citizenship in the modern world is the existence of differences in the legislation of different countries regarding the acquisition and loss of citizenship. Legislation in different countries applies two principles in this regard: "right to blood" (ius sanquini) and "right to land" (ius soli) [3, p.197]. In other words, in the first case, the acquisition of citizenship is determined on the basis of the citizenship of the parents (or one of them). That is, in this case, citizenship is associated with the origin of the person. In the second case, the acquisition of citizenship is related to the fact of birth in the territory of the state concerned. For example, in Latin America, the United Kingdom, and the United States, the principle of "land law" is used to obtain citizenship, and in Germany, Switzerland, Japan, and most other European countries, the principle of "right to blood" is used in matters of citizenship [8, p.21].

Peter J.Spiro, a well-known scholar on citizenship, notes that dual citizenship has gained an unspoken status after globalization, but is no longer supported by states. In any case, dual citizenship must be protected as a human right. In practice, there are cases when dual citizenship hinders stability between states and does not have a positive effect on the solidarity of states. However, for the sake of the rights and interests of the people, legal regulation of such cases is a must [6, p.111].

Thus, a child born to a citizen of a state that exercises "right to blood" will have dual citizenship if he or she is born in the territory of a state that enforces "right to land." Under the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations, "land rights" do not apply only to the children of foreign diplomats and consuls.

Bipatristism also occurs regardless of the child's place of birth, if the legislation of the relevant country allows the transfer of citizenship of a citizen of a country with two or more nationalities to a child on the basis of "blood rights". Dual citizenship is also possible when entering into a marriage with a foreigner, provided that the laws of this country automatically grant the citizenship of the husband (or wife) and do not deprive him of the original citizenship under national law.

In order to reduce the incidence of dual (multiple) citizenship, many countries have abolished the automatic granting of citizenship due to marriage, and the concept of independent citizenship for those who marry foreigners is increasingly supported. Since the 1957 Convention on the Citizenship of Married Women abolishes the principle of automatic change of citizenship of a woman marrying a foreigner, it reduces the likelihood of women being granted dual (multiple) citizenship at the time of marriage.

The Problem of Naturalization.

In most cases, dual citizenship is the result of naturalization: one person acquires the citizenship of another country without losing the citizenship of the country of birth [1, p.26-28].

Sometimes the basis of dual citizenship is the policy of any state aimed at strengthening political influence and trying to "gather" citizens of certain nationalities under one roof. Some authors emphasize that the most pressing problem of the institution of dual citizenship is the difficult legal status of a person holding the citizenship of two or more states, because a citizen has both dual rights and double obligations.

Dual citizenship can also arise for various objective and subjective reasons. The objective reasons for the emergence of dual citizenship can be attributed to the differences in the laws of the states related to the acquisition and loss of citizenship, as well as territorial changes that led to the change of jurisdiction, population migration and refugee flows. As an example of the emergence of dual citizenship, we can cite the uncoordinated actions of the ruling circles (China-Taiwan, Moldova-Transnistria) in the regions, which are formally united, but in fact divided into two or more places.

At the same time, there are international agreements that allow for the establishment of dual citizenship. For this reason, we can say that bipatrism arises both on the basis of the norms of national legislation of different countries, as well as international agreements.

In scientific literature and practice, the term "dual citizenship" is used in at least two senses. According to some experts (Conway W. Henderson, Alfred M. Ball)[2, pp.13-14; 4, pp.135-137], "dual citizenship" is a set of legal norms governing the acquisition of citizenship of another state by a person with the consent of the country of citizenship (on the basis of a permit, agreement or mutual agreement) is an institute. Another group of scholars concludes that bipatristism is a social phenomenon that embodies the state of an individual having two or more nationalities without the knowledge (permission or consent) of the state of his or her citizenship.

Attitudes of states towards the issue of dual citizenship have changed over time. This attitude has gradually changed from attempts to abolish dual citizenship to its regulation and strengthening in international treaties. We can see this trend in the example of agreements adopted by European international organizations.

In the 1960s, Western European member states of the Council of Europe agreed that dual citizenship was undesirable and should be avoided as much as possible. A person who acquires the citizenship of another Member State and is a national of one of the Member States under the 1963 Convention on the Reduction of Citizenship and on Military Service in Cases of Citizenship loses his previous citizenship. In addition, the parties to the Convention undertake to provide information on the acquisition of the citizenship of another Member State by the nationals of the Member States [11]. Clearly, without such an exchange of information, it would be impossible to implement the terms of the Convention.

At present, a number of European countries believe that dual citizenship is appropriate due to the increase in population mobility, the development of migration processes and the relocation of refugees. Refugees are, as a rule, naturalized more often and faster than other migrants, and are rarely required to renounce their previous citizenship as a prerequisite for naturalization. Even countries that have officially declared the abolition of dual citizenship as a target, in practice, are positive about it, highlighting the advantages of this process.

In 1997, European countries adopted the European Convention on Citizenship, preferring a more liberal approach to the issue of citizenship. This Convention contains provisions that will be applicable to most European countries, and in this regard it is important to note the maximum flexibility of the document. Thus, the Convention does not create barriers to citizenship, nor does it require states to recognize citizenship as a general principle.

In some countries, it is believed that a person's citizenship of another country makes it difficult for him or her to fully integrate into the society in which he or she lives. However, there are a number of states that think that this is not a problem and do not oppose the retention of citizenship by the country to which they belong. Member States shall not view the loss or renunciation of the citizenship of another country as a condition for the acquisition or protection of their citizenship. Because in many cases it is impossible to carry out such a procedure. Under the Convention, persons of other nationalities also have equal rights in the country of residence.

The Convention also stipulates that member states in some cases guarantee the protection of different nationalities: children who have acquired several nationalities automatically at birth [10, p.379].

Thus, as mentioned above, the legal regulation of citizenship is the exclusive right of the state to provide opportunities for both its citizens and others to acquire and lose citizenship.

State Sovereignty and Dual Citizenship.

Most post-Soviet countries strongly oppose the introduction of dual (multiple) citizenship and are not interested in obtaining a second citizenship by a significant portion of the population. Most of the countries of the former Soviet Union consider the existence of dual citizenship as an attempt to strengthen the presence of other states (mostly Russia) in their countries. Unilateral recognition of dual (multiple) citizenship by countries leads to conflicts in the future between states on issues of citizenship, as each state prefers to regulate this area within the framework of national legislation.

The complexity of the issue of dual (multiple) citizenship does not allow different states to form a common approach to the issue. For this reason, different approaches to this issue have emerged in international practice.

First, the recognition of dual (multiple) citizenship - dual (multiple) citizenship is freely allowed by the state (Albania, Liechtenstein, Yemen, Canada).

Second, the possibility of dual (multiple) citizenship: when obtaining a new citizenship, a person is not required to renounce the previous citizenship (England, Italy, USA, France).

In Italy, there is no need to renounce previous citizenship during naturalization. However, if a person has dual citizenship from birth, only one of these nationalities is required to be retained when he or she reaches adulthood. If a person chooses Italian citizenship, there is no need to provide evidence of renunciation of the second citizenship. However, the choice of citizenship of another state automatically leads to the loss of Italian citizenship [12].

There is an interesting case in Spain on the issue of allowing dual citizenship. Thus, according to Article 11 of the Spanish Constitution, the state has the right to conclude dual citizenship agreements with Latin American countries and countries with special relations with Spain [9, p.6]. The strictest measures to restrict dual (multiple) citizenship are taken by Germany and Switzerland. The main condition for naturalization here is the renunciation of previous citizenship.

It should be noted that the issue of dual (multiple) citizenship has a number of negative consequences for both states and persons with dual citizenship. As we know, citizenship means a stable political and legal relationship between the state and the citizen, and maintaining loyalty to two or more states at the same time is quite a difficult task.

In international legal practice, there is a rule based on the principle of state sovereignty that in all cases, the state applies to a citizen of another country the relations directly related to its citizens, regardless of the fact of citizenship of another state. Another factor complicating the legal status of a person with dual citizenship is that any state that considers a person to be its own citizen may require him or her to fully perform his or her citizenship duties. In addition, the provision of full citizenship to persons with dual citizenship in the countries of which they have citizenship also leads to a number of undesirable consequences for states.

One of the most undesirable consequences of dual citizenship for states is that the exercise of rights to persons with dual citizenship is not always possible for both states and third countries. Bipatristism also poses a number of challenges to espionage control. For this reason, in some cases, even the presence of dual (multiple) citizenship in the state is considered a serious threat to national security.

In addition to the negative aspects of dual citizenship, there are at least two other serious problems that require international legal regulation in the field of dual citizenship. These are issues of diplomatic protection and military service for persons with dual (multiple) citizenship.

Issues related to the fulfillment of military obligations by bipatrids in both peacetime and martial law have often become the main topic of interstate disputes. A situation may arise in which a person with dual (multiple) citizenship may be called up for military service in the countries of which he is a citizen, in which case the person must serve in the military only in one state. Such persons may be prosecuted by other States of their nationality for evading military service or for military service in a foreign state if they are within the jurisdiction of the State concerned.

States seek to agree on bipartisan military obligations by concluding bilateral and multilateral international agreements that restrict, facilitate or allow dual citizenship. Examples of such agreements are the 1963 Convention on the Reduction of Multi-Citizenship and Conscription in the Case of Multi-Citizenship, the European Convention on Citizenship of 7 November 1997, and many bilateral agreements.

International Legal Framework.

Without going into specifics on each of these international agreements, let us consider the general points emphasized in them.

First of all, it should be noted that all the above-mentioned agreements stipulate that citizens of each of the contracting states must serve in the military in only one of these states. For example, the 1963 Convention on the Reduction of Citizenship and Conscription for Citizenship gives bipatrids the right to serve in one of the countries of their citizenship until they reach the age of 19, otherwise they are called up for military service in the country of their permanent residence [7, p.121]. Similar provisions are reflected in the 1997 European Convention on Citizenship.

Second, if a person with dual citizenship has served in one of the Contracting States under the above-mentioned treaties in accordance with the national law of that State, he shall be deemed to have completed his military service in the other State of which he is a national.

Third, most of these treaties stipulate that a military service performed by one of the Contracting Parties to which the bipatrid is a national is also valid for the other party to which he is a national until the treaty or convention enters into force.

In some cases, the problem of compulsory military service for persons with dual (multiple) citizenship can be partially resolved through domestic legislation. Thus, in most countries, conscription applies only to citizens living in the country, and exceptions are made for citizens permanently residing abroad.

The most difficult situation for an individual in terms of military service may arise in the event of a war between the states of which he is a citizen. From the point of view of international law, it is impossible to give an unequivocal answer to this question. It is possible that due to the fact that he was in the territory of the state where he did not live permanently during the mobilization, this duty will be imposed directly on the citizen.

This approach is explained by the provision in a number of agreements on dual citizenship that the declaration of mobilization in any of the Contracting States in accordance with the principle of "effective citizenship" eliminates the need for that State to fulfill its obligations. However, in such a situation, it is inevitable that after the end of hostilities, the person who fought against the state of which he is a citizen will have negative consequences, even though he fought on the side of the other state of which he is a citizen.

If the obligation to serve in peacetime can be settled on the basis of effective citizenship or the voluntary election of one of the states, in the event of a military conflict, bipatrids may be considered traitors by another state for military service in one of their states and may even be deprived of citizenship. can be deprived.

The ability of persons with dual (multiple) citizenship to participate in the political life of the state and to serve in public administration has often been the subject of various internal disputes. The regulation of these issues is within the competence of the states, and the issue of what rights and freedoms to grant to bipatrids is determined by the states themselves. Thus, in addressing these issues, it is important to take into account a number of factors such as the state's policy on citizenship, economic and political independence, population and ethnographic situation. In almost all countries, the right to public and civic services is enforced. Provisions on the right to serve in the State are enshrined in both the 1948 Universal Declaration of Human Rights and the 1966 International Covenant on Civil and Political Rights. However, in some countries the exercise of this right is restricted due to national security.

As it is known, the main subject that ensures the security of an individual, society and the state is the state itself. There are different approaches in countries regarding the admission of persons with dual (multiple) citizenship to the civil service. For example, there are countries that do not allow people with dual citizenship to be civil servants (Sweden, Greece). Bipatrids who want to become civil servants in Israel must serve in the army of that state, even if they have served in another state. In some Latin American countries, people with dual (multiple)

citizenship automatically lose their citizenship from the moment they are admitted to the civil service.

Conclusion.

In order to objectively assess the institution of dual (multiple) citizenship, it is necessary to take into account the various possible negative consequences, as well as the positive aspects of this institution. There is currently ample scientific analysis highlighting the benefits of dual citizenship. Acquisition of dual (multiple) citizenship by a person usually serves to achieve greater freedom and liberty, although this situation ultimately reduces the level of state control over the actions of bipatrids. Among the positive consequences of dual citizenship are additional guarantees for the protection and exercise of personal rights and freedoms, retention of citizenship in mixed marriages, simplification of residence, re-immigration and mitigation of repatriation. Also, the high proportion of people with dual (multiple) citizenship can help intensify existing interstate relations.

Recognition of dual citizenship has a number of advantages for people who are not in a "superior position" in the country. Thus, in addition to having all the rights in the area where they currently live, this group of people has unimpeded access to the "historical homeland", contact with relatives living there, free education at any time, free medical care, entrepreneurship and the need to if it arises, they have a number of advantages, such as moving there permanently. In a complicated situation created by the disintegration of a once unified state, the prohibition of dual citizenship can create a number of difficulties. For this reason, allowing dual citizenship, even under certain conditions, is a more democratic step than a complete ban on dual citizenship.

When addressing the issue of recognition of dual citizenship, it is necessary to pay attention to the optimal balance of the pros and cons of the institution of dual citizenship in the appropriate context. That is, to be able to jointly resolve all existing difficulties related to citizenship and eliminates the harmful consequences. In this context, it is necessary to encourage the adoption of effective measures to address the problem effectively and, at a later stage, to achieve the establishment of a single legal framework governing the institution of dual (multiple) citizenship.

At the same time, in order to create such a single legal framework governing the institution of dual (multiple) citizenship, it is important, first of all, to have a coordinated and purposeful policy based on a common universal outlook, moral values and moral principles. It is also necessary to try to bring the existing legal systems of states in this area as close as possible. It should be noted that in practice we are witnessing an increasing number of citizens of several countries. As noted above, most states either allow or formally promote dual (multiple) citizenship, as well as successfully address problems in this area. In short, finding a legal solution to this problem based on the expansion of human rights and freedoms should be considered the right way.

References:

1. Aleinikoff, T. Alexander. Citizenship Policies for an Age of Migration. Washington: Carnegie Endowment, 2011, 122 p.

2. Alfred M.Boll. Multiple Nationality and International Law. Martinus Nijhoff Publishers, 2007, 626 p.

3. Bosselmann, K. The Principle of Sustainability: Transforming Law and Governance. New York: Routledge, 2016, 252 p.

4. Conway W.Henderson. Understanding International Law. John Wiley & Sons, 25 нояб. 2009, 488 p.

5. Harpaz, Y. Citizenship 2.0: Dual Nationality as a Global Asset. Princeton: Princeton University Press, 2019, 216 p.

6. Peter J. Spiro. Dual citizenship as human right. International Journal of Constitutional Law, Volume 8, Issue 1, 1 January 2010, p. 111–130.

7. Plender Richard. Basic Documents on International Migration Law: Third Revised Edition. Martinus Nijhoff Publishers, 2007, 850 p.

8. Satzewich Vic, Lloyd Wong. Transnational Identities and Practices in Canada. UBC Press, 2006, 360 p.

9. Spanish Yearbook of International Law 2001-2002: Vol. 8. Asociación Española de Profesores de Derecho Internacional y Relaciones Internacionales Martinus Nijhoff Publishers,2004, 540 p.

10. Vermeulen Gert, Ellen Desmet. Essential Texts on European and International Asylum and Migration Law and Policy (2nd revised edition). Gompel&Svacina, 2019, 1491 p.

11. https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/0900001680077972

12. http://www.mylawyerinitaly.com/wp-content/uploads/2017/11/Law-n.-555-of-1912-1.pdf

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