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SOVEREIGNTY, JURISDICTION AND RESPONSIBILITY IN THE ERA OF CLIMATE CHANGE

Climate change means a ‘change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods’¹.

Climate change not only alters the composition of the global atmosphere: it brings changes to certain established patterns of general international law, such as responsibility, sovereignty and jurisdiction. Climate change causes legal disruption in that it has led to the creation of new legal regimes at all levels of government².

As Phillip Sands puts it, ‘climate change transcends the classical structure of an international legal order that divides our planet into territorially defined areas over which States are said to have sovereignty’³. Strong influence and considerable participation of private corporations and individuals in environment and climate change related matters, the recognition of their respective rights, duties and responsibility (liability), gradually erode the territorial borders between states. These factors along with physical influence of climate change on the state territories lead to changes in traditional perceptions of sovereignty, jurisdiction and responsibility. The aim of this article is to analyze such changes and responses thereto. Indeed, policy-makers need to build synergies at the transnational levels, since ‘it is inherent in the nature of climate change that responses will be multi-scalar and multi-jurisdictional, raising profound issues of governance’⁴.

The issue of international climate change regime was studied by the following foreign scholars: S. A. Khan, R. Rayfuse, Sh V. Scott, W. Boyd, H. van Asselt, F. Sindico, M. A. Mehling, K. W. Abbott, Th. ETTY, V. Heyvaert, C. Carlarne, D. Farber, J. Scott, E. Fisher, E. Scotford, E. Barritt, L. Rajamani, A. Huggins, M. S. Karim and many others. The study of the impact of climate change on the notions of responsibility, sovereignty and jurisdiction has recently become the subject of special attention of such scholars as S. Willcox, E. Doig, A. Boyle, M. Mason, P. G. Ferreira, E. Fisher, E. Scotford, E. Barritt, B. Ohdedar, J. M. Smith, M. W. Allen, Ch. A. Craig, etc. However, recent trends in international climate change regime require an individual research.

As polar ice melts and sea level rises as a result of climate change, low-lying small island states face the danger of disappearance from the political map of the world and total loss of sovereignty. There is a risk of lacunae in solving a number of issues arising in respect of such small island states. Responsibilities of such states towards their citizens, their treaties, national debt, diplomatic posts, economic exclusion zone, and so forth – all of which would typically be assumed by the successor state(s) – risk falling into a legal vacuum: in this context, the existing international law on state extinction, understood in terms of succession, is therefore not particularly helpful in this case⁵. National borders of a territory, which is one of the necessary attributes of statehood, may become irrelevant in determining its sovereignty and jurisdiction, thus, demanding new modes of political governance.

The governments of such states as Tuvalu, Kiribati and the Maldives have elaborated different options for tackling the impacts of climate change on their sovereignty. First, they engaged in talks with other states to secure the relocation of their population, should the need arise⁶. Second, artificial islands have been proposed as a means of transferring the territory – and the accompanying rights of possessing territory – both of which island states will lose when the sea level rises (e.g. an artificial island of the Maldives *Hulhumalé*)⁷. Third, there are various legal pathways to acquire land, such as cession, purchasing land, or acquiring land as a gift⁸. Fourth, there is a proposal to recognize a new category of a state – a ‘deterritorialized state’, which cannot exercise its sovereignty over the new land, but can represent a state at the international arena as well as in relations with a host state(s)⁹. Still, these projects are not able to settle all the challenges posed before sovereignty of low-lying small island states to the full extent possible, since some problems remain unresolved, for example, a lot of them depend on the political will of the host state, not to mention the need in considerable monetary resources.

The climate change forces to revisit the notions of jurisdiction and responsibility. For example, traditional international human rights treaties generally require state parties to secure relevant rights and freedoms for everyone within their own territories or subject to their jurisdiction¹⁰. Today, '[b]uilding on the general obligations on, and between, states to prevent transboundary environmental harm, a pragmatist perspective widens out this space to include obligations to extraterritorial affected publics'¹¹.

Responsibility of a state for transboundary pollution of the territory of another state is properly addressed by international law at an interstate level, but not at the level of human rights law¹². There are gaps when it comes to the application of human rights protection regime to trigger the responsibility of a state for the violation of human rights by inflicting transboundary damage, including damage in the result of the climate change. Alan Boyle suggests that 'it is entirely plausible to conclude that the victims of transboundary pollution fall within the 'jurisdiction' of the polluting state – in the most straightforward sense of legal jurisdiction'¹³.

The jurisdiction of national courts to hear cases involving transboundary harm to extraterritorial plaintiffs is recognized in private international law and in environmental liability conventions¹⁴. Such opportunities, based on the principle of non-discrimination in access to justice and participation in environmental impact assessment, are also envisaged by several UNECE conventions which list some human activities contributing to climate change, namely the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (1998) (Art. 9(3)) and the Espoo Convention on Environmental Impact Assessment in a Transboundary Context (Art. 2(6)). Due to the definition of 'impact' in Article 1 of the Espoo Convention, list of activities provided in Appendix I of the Espoo Convention and Annex I of the Aarhus Convention, we may conclude that victims of extraterritorial damage inflicted by 'climate change' activities may reckon on the availability of a respondent state's national remedies irrespective of their citizenship, nationality or domicile and, in the case of a legal person, without discrimination as to where it has its registered seat or an effective center of its activities (Article 9(3) of the Aarhus Convention). Nevertheless, some problems seem to remain unresolved, for example, the establishment of obvious cause-effect relationships between activities under one or more states jurisdiction contributing to climate change and individual damage suffered by transboundary claimants.

The *Urgenda* case is usually recalled when it comes to illustration of how climate change impacts state responsibility. On 24 June 2015, the Hague District Court rendered the decision in the case of *Urgenda v. Government of the Netherlands* (Ministry of Infrastructure and the Environment) establishing that, in order to meet its standard duty of care towards the plaintiffs (the Urgenda Foundation, represents current and future generations of Dutch citizens threatened by the risks of the climate change), the Dutch government was ordered to 'limit the joint volume of Dutch annual GHG emissions, or have them limited, so that this volume will have reduced by at least 25–40 % at the end of 2020 compared to the level of year 1990'¹⁵. The judgment marks the first occasion on which a national court expressly used the international environmental legal principle of common but differentiated responsibilities as a complementary tool to interpret the scope of a state's climate obligations under domestic law¹⁶, the standard of the duty of care and, respectively, its responsibility.

Notwithstanding the fact that practical application of state responsibility and human rights mechanisms for climate change-induced damage is rather problematic, the increasing amount of adjudication in national courts indicates transnationalizing character of climate change regime. The 'legally disruptive nature' of climate change, manifested in the highly polycentric, uncertain, socio-politically charged and dynamic nature of the climate change challenging legal orders and adjudication, is demonstrated by the fact that climate change generates disputes, specifically legal disputes in different jurisdictions leading to responsibility of states. From 2013 to early 2015, there were over 394 cases relating in some way or another to climate change in the UK, US, Australia and Canada. All of them considered such jurisdictional and substantial matters as valid statutory interpretation, control of discretion, due process, liability and state responsibility (for example, *Massachusetts v. EPA*, *Friends of the Earth v. Minister of the Environment and Governor in Council*, *R (People and Planet) v. HM Treasury*, *Native Village of Kivalina v. Exxon Mobil Corporation*, *Connecticut v. American Electric Power*, *Utility Air Regulatory Group v. EPA*, *Taralga Landscape Guardians v. Minister for Planning*)¹⁷.

Some aspects of responsibility (liability) are not properly addressed in the climate change regime. For a state to be responsible for a breach of an international obligation, there must be a causal nexus between the actions of a state and damage, but climate change presents 'a variety of impacts caused by a variety of actors and a variety of actions', thus, by its nature, it is impossible to link emissions of a specific country to specific damage¹⁸. Although Article 8 of the Paris Agreement (2015) recognizes the importance of averting, minimizing and addressing loss and damage associated with the adverse effects of climate change and establishes Warsaw Mechanism (one of its tasks is strengthening dialogue, coordination, coherence and synergies among relevant stakeholders¹⁹), paragraph 52 of the 2015 Conference of the Parties' Decision stipulates that article 8 does not involve or provide a basis for any liability or compensation. This delicate question omitted by the United Nations Framework Convention on Climate Change (1992), the Kyoto Protocol (1997) and the Paris Agreement, is yet to be decided.

Another urgent issue related to climate change and responsibility is the evolving concept of corporate climate change responsibility, which is a new dimension of transnational climate change governance²⁰. Climate change challenges present organizations (e.g., companies, corporations, nongovernmental organizations), communities, and citizens with the need to redefine current views on corporate social responsibility from a voluntary luxury as being a necessity²¹. Corporate social responsibility is often used as an umbrella term that encompasses a range of ethical discourses and practices including business ethics, corporate philanthropy, and corporate citizenship²². Since change in

the Earth's climate and its adverse effects are 'common concern of humankind' as stated in the preamble of the UN Framework Convention on Climate Change, it's natural that not just states but also corporations, different organizations, communities and citizens must be responsible for preserving climate equilibrium and dealing with negative consequences of anthropogenic activities on Earth climate.

In conclusion, we have to admit that the climate change challenges traditional understanding of sovereignty, jurisdiction and responsibility, as it gradually erodes and blurs national borders of sovereign states and influences inter-state relations. As polar ice melts and sea level rises as a result of climate change, low-lying small island states face the danger of disappearance from the political map of the world and total loss of sovereignty. National borders of a territory, which is one of the necessary attributes of statehood, may become irrelevant in determining its sovereignty and jurisdiction, thus, demanding new modes of political governance.

There are also gaps when it comes to the application of human rights protection regime to trigger the responsibility of a state for the violation of human rights by inflicting transboundary damage, including damage in the result of the climate change. Some other problems seem to remain unresolved, for example, the establishment of obvious cause-effect relationships between activities under one or more states jurisdiction contributing to climate change and individual damage suffered by transboundary claimants.

The 'legally disruptive nature' of climate change is demonstrated by the fact that climate change generates disputes, specifically legal disputes in different jurisdictions leading to responsibility of states. The *Urgenda* case is a vivid example of invoking state responsibility for climate change before the present and future generations. Another urgent issue related to climate change and responsibility is the evolving concept of corporate climate change responsibility. There are instances of lacunae in relevant regulatory regimes that have to be overcome by virtue of building efficient integrated transnational models with the participation of different stake-holders including corporations, different organizations, communities and citizens.

¹ United Nations Framework Convention on Climate Change, 9 May 1992. – Available at: <https://unfccc.int/resource/docs/convkp/conveng.pdf>

² Fisher E., Scotford E. and Barritt E. The Legally Disruptive Nature of Climate Change // *Modern Law Review*. – 2017. – Vol. 80, No. 2. – P. 173–201, P. 174.

³ Sands Ph. Climate Change and the Rule of Law: Adjudicating the Future in International Law // *Journal of Environmental Law*. – 2016. – Vol. 28. – P. 19–35, P. 22.

⁴ Etty Th., Heyvaert V., Carlarne C., Farber D., Lin J. and Scott J. Transnational Dimensions of Climate Governance // *Transnational Environmental Law*. – 2012. – Vol. 1, No. 2. – P. 235–43, P. 235.

⁵ Willcox S. Climate Change and Atoll Island States: Pursuing a 'Family Resemblance' Account of Statehood // *Leiden Journal of International Law*. – 2017. – Vol. 30. – P. 117–36, P. 120.

⁶ Doig E. What Possibilities and Obstacles Does International Law Present for Preserving the Sovereignty of Island States? // *Tilburg Law Review*. – 2016. – Vol. 21. – P. 72–97, P. 72.

⁷ Ibid. – P. 81.

⁸ Ibid. – P. 83.

⁹ Ibid. – P. 85, 90.

¹⁰ Boyle A. Human Rights or Environmental Rights? A Reassessment // *Fordham Environmental Law Review*. – 2007. – Vol. 18. – P. 471–511.

¹¹ Mason M. Transnational Environmental Obligations: Locating New Spaces of Accountability in a Post-Westphalian Global Order // *Transactions of the Institute of British Geographers, New Series*. – 2001. – Vol. 26, No. 4. – P. 407–29, P. 418.

¹² Boyle A. Human Rights and the Environment: Where Next? // *The European Journal of International Law*. – 2012. – Vol. 23, No. 3. – P. 613–42, P. 634.

¹³ Ibid. – P. 638.

¹⁴ Ibid.

¹⁵ Ferreira P. G. Common but Differentiated Responsibilities in the National Courts: Lessons from *Urgenda v. the Netherlands* // *Transnational Environmental Law*. – 2016. – Vol. 5, No. 2. – P. 329–51, P. 330.

¹⁶ Ibid. – P. 331.

¹⁷ Fisher E., Scotford E. and Barritt E. – P. 182, 183–93.

¹⁸ Ohdedar B. Loss and Damage from the Impacts of Climate Change: A Framework for Implementation // *Nordic Journal of International Law*. – 2016. – Vol. 85. – P. 1–36, P. 25–6.

¹⁹ Report of the Conference of the Parties on its twenty-second session, held in Marrakech from 7 to 18 November 2016, Addendum, Part two: Action taken by the Conference of the Parties at its twenty-second session, FCCC/CP/2016/10/Add.1, 31 January 2017.

²⁰ Smith J. M. Climate Change Justice and Corporate Responsibility // *Journal of Energy and Natural Resources Law*. – 2016. – Vol. 34, No. 1. – P. 70–4.

²¹ Myria W. A. and Christopher A. C. Rethinking Corporate Social Responsibility in the Age of Climate Change: A Communication Perspective // *International Journal of Corporate Social Responsibility*. – 2016. – Vol. 1. – P. 1–11, P. 1.

²² Ibid. – P. 3.

Резюме

Медведєва М. О. Суверенітет, юрисдикція та відповідальність в еру зміни клімату.

Стаття присвячена аналізу деяких проблемних питань, перед якими постає міжнародне право внаслідок зміни клімату. Автор доводить, що зміна клімату кидає виклики традиційному розумінню суверенітету, юрисдикції та відповідальності. Внаслідок зміни клімату малі острівні держави постають перед небезпекою зникнення з політичної карти світу та повної втрати

суверенитету. Існують прогалини у застосуванні механізмів захисту прав людини для реалізації відповідальності держави за зміни клімату. Залишаються невирішеними питання встановлення причинно-наслідкового зв'язку між діяльністю однієї або декількох держав, що сприяє зміні клімату, та індивідуальною шкодою, спричиненою позивачам в межах юрисдикції іншої держави. Стрімкі кліматичні зміни сприяють виникненню численних спорів, які вирішуються національними судами та призводять до відповідальності держав. Іншою актуальною проблемою, пов'язаною зі зміною клімату, є розвиток концепції корпоративної відповідальності щодо зміни клімату.

Ключові слова: суверенітет, юрисдикція, відповідальність, зміна клімату, міжнародне право.

Резюме

Медведева М. А. Суверенитет, юрисдикция и ответственность в эру изменения климата.

Статья посвящена анализу некоторых проблемных вопросов, перед которыми сталкивается международное право в результате изменения климата. Автор доказывает, что изменение климата бросает вызов традиционному пониманию суверенитета, юрисдикции и ответственности. Вследствие изменения климата малые островные государства стоят перед опасностью исчезновения с политической карты мира и полной потери суверенитета. Существуют пробелы в применении механизмов защиты прав человека для реализации ответственности государства за изменения климата. Остаются нерешенными вопросы установления причинно-следственной связи между деятельностью одного или нескольких государств, способствующей изменению климата, и индивидуальным ущербом, понесенным истцами в пределах юрисдикции другого государства. Стремительные изменения климата способствуют возникновению многочисленных споров, решаемых национальными судами и приводящими к ответственности государств. Другой актуальной проблемой, связанной с изменением климата, является развитие концепции корпоративной ответственности в сфере изменения климата.

Ключевые слова: суверенитет, юрисдикция, ответственность, изменение климата, международное право.

Summary

Medvedieva M. Sovereignty, Jurisdiction and Responsibility in the Era of Climate Change.

The article is devoted to the analysis of some urgent issues international law faces in result of climate change. The author draws to the conclusion that climate change challenges traditional understanding of sovereignty, jurisdiction and responsibility. As a result of climate change, small island states face the danger of disappearance from the political map of the world and total loss of sovereignty. There are also gaps when it comes to the application of human rights protection regime to trigger the responsibility of a state for the climate change. Some other problems seem to remain unresolved, for example, the establishment of cause-effect relationships between activities under one or more states jurisdiction contributing to climate change and individual damage suffered by transboundary claimants. Climate change generates disputes, specifically legal disputes in different jurisdictions leading to responsibility of states. Another urgent issue related to climate change is the evolving concept of corporate climate change responsibility.

Key words: sovereignty, jurisdiction, responsibility, climate change, international law.

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ОСНОВНЫЕ ПРИНЦИПЫ ОБЕСПЕЧЕНИЯ ПРАВА НА ОБЪЕДИНЕНИЕ

Как известно, обеспечение права на объединение выступает в качестве главного условия развития гражданского общества и укрепления принципов демократии в обществе. Более всестороннее рассмотрение этих принципов позволяет иметь четкое представление об обеспечении права на объединение и понять общую суть природы права на объединение. Для этого также важно рассмотреть основные моменты проблемы обеспечения прав человека. Прежде всего надо отметить, что в современных правовых государствах существует определенная гарантия для обеспечения прав и основных свобод человека. А под гарантией обеспечения прав и основных свобод человека понимаются конкретные шаги и условия, направленные на обеспечение прав и свобод человека.

Государственная гарантия на обеспечение права на объединение

Отметим, что на современном этапе государства мира, которые присоединились к международным конвенциям по правам человека, берут на себя определенные обязательства. Как раз эти обязательства государств свидетельствуют о существовании гарантий на обеспечение прав и свобод человека. Конкретно можем сказать, что если государство дает гарантию на обеспечение права на объединение, это связано с обязательствами этого государства по международным договорам. Государства также берут на себя обязательства по региональным договорам¹. Естественно, важно отметить, что обязательства не могут быть односто-