Environmental sustainability
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The very idea of sustainable development does not have a very long history. Its first definition has been given in 1987 in the famous report "Our common future" by the World Commission on Environment and Development. Sustainable development has been viewed as "*development that meets the needs of the present without compromising the ability of future generations to meet their own needs*" (para. 27)[1]. Since then environmental problems have been viewed together with economic development (including social development) as a foundation of the concept. Concept of sustainable development also requires sustainability in both spheres: economy and environment.

Judge Weeramantry in its Separate Opinion to the Decision of the International Court of Justice (ICJ) on Gabčíkovo-Nagymaros Project called it a new fundamental principle of the modern international law[2]. It is often viewed as a global objective (New Delhi declaration of principles of international law relating to sustainable development, International law association (ILA) 2002)[3].

Environmental sustainability is the sevenths of the Millennium Development Goals (MDG). It embraces the whole specter of measures taken to make the environment sustainable with the key purpose – "*to include principles of sustainable development to national strategies and to stop the loss of natural resources*"[4].

However, the major attention is paid to the:

- protection of ozone layer;

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[1] Our Common Future. Report of the World Commission on Environment and Development. UN 1987, assessed http://conspect.nl/pdf/Our_Common_Future-Brundtland_Report_1987.pdf on 10.04.2013

[2] Separate Opinion of Vice-President Weeramantry / Gabčíkovo-Nagymaros Project (Hungary v/ Slovakia): Judgment of September 25, 1997 // I.C.J. Reports. – The Hague: I.C.J., 1997 – P. 89.

[3] New Delhi declaration of principles of international law relating to sustainable development, accessed http://www.ila-hq.org/en/committees/index.cfm/cid/25 on 11.04.2013

[4] Millenium development goals. 2012 report, accessed http://www.un.org/millenniumgoals/pdf/MDG%20Report%202012.pdf on 12.03.2013 (P. 46)

- maintenance of biodiversity including fish stocks;
- combat desertification;
- management, conservation and sustainable development of all types of forest
- develop water management including access to safe water and sanitary;
- reduce the number and effects of natural and man-made disasters (UN Millennium declaration, paras. 22-23)[5].

Humans, human rights and human rights protection mechanisms may be viewed both as the purpose or beneficiary of environmental sustainability and useful mechanisms to be used for achievement of this goal.

Current report will focus on principles of environmental development; international legal regulation of the specific areas of environmental sustainability both at the universal and regional levels; make an overview of control mechanisms influencing the observance of relevant international treaties; concentrate on the right to favorable environment as well as environmental human rights and mechanisms of their protection at the international and national levels; present a general characteristics of mechanisms, which may be used for redress for transboundary environmental damage, and finally overview implementation of "environmental" conventions in the legislation of states in the region.

1. Principles of environmental sustainability.

Principles of sustainable development have been developed through the time (after Stockholm conference). After 1992 (Rio conference on environment and development) principles of sustainable development have been embodied and referred to a range of international treaties, soft law documents, decisions of international courts (ICJ; ITLOS; WTO dispute settlement body, etc.).

Draft international covenant on environment and development adopted by the Commission of international law in 1995 sets forth 9 fundamental principles:

- Respect for all life forms;
- Common concern of humanity;
- Interdependent values;
- Intergenerational equity;
- Prevention;
- Precaution;
- Right to development;
- Eradication of poverty;
- Common but differentiated responsibility[6].

[5] United Nations Millennium Declaration // A/res/55/2 UN GA resolution of 8.09.2000, accessed http://www.un.org/millennium/declaration/ares552e.htm on 20.03.2013

[6] International Covenant on Environment and Development (draft), accessed http://www.i-c-e-l.org/english/EPLP31EN_rev2.pdf on 19.07.2012

ILA in its resolution adopted on the work on the Legal aspects of sustainable development in 1992 – 2002 referred to 7 basic principles covering different aspects of sustainable development. They are:

Duty of states to ensure sustainable use of national resources that includes sovereignty of a state over its natural resources; duty to ensure that activities within jurisdiction or control of state do not cause significant damage to the environment of other states or of areas beyond the limits of national jurisdiction; duty to manage natural resources in a rational, sustainable and safe way; duty to pay special attention over the rights and needs of indigenous peoples; duty to protect, preserve and enhance natural environment.

Principle of equity and eradication of poverty refers to intra and inter-generational equity. States are obliged to aim conditions of equity within its population;

Principle of common but differentiated responsibilities means that all states (as well as international governmental and non-governmental organizations and other actors) are under a duty to co-operate in the achievement of global sustainable development and protection of the environment. It also recognizes the special burden of responsibility of developed countries in the preservation of the environment, as well as the need to take into account special needs of developing countries;

Principle of precautionary approach to human health, natural resources and ecosystems includes: - accountability for harm caused (including, where appropriate, State responsibility); - planning based on clear criteria and well-defined goals; - consideration in an environmental impact assessment of all possible means to achieve an objective (including, in certain instances, not proceeding with an envisaged activity); and - in respect of activities which may cause serious long-term or irreversible harm, establishing an appropriate burden of proof on the person or persons carrying out (or intending to carry out) the activity;

Principle of public participation and access to information and justice is embodies in Aarhus convention n Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters of 1998;

Principle of good governance – commits States and international organizations: - to adopt democratic and transparent decision-making procedures and financial accountability; - to take effective measures to combat official or other corruption; - to respect the principle of due process in their procedures and to observe the rule of law and human rights; - to implement a public procurement approach according to the WTO Code on Public Procurement.;

Principle of integration and interrelationship, in particular in relation to human rights and social, economic and environmental objectives reflects the interdependence of social, economic, financial, environmental and human rights aspects of principles and rules of international law relating to sustainable

development as well as of the interdependence of the needs of current and future generations of humankind.[7].

It is remarkable that these principles although relating to the general principles of international law, law of human rights, international environmental and international economic law, have a direct impact over the environment.

2. International legal regulation.

By the present moment a set of international treaties is concluded to ensure different aspects of environmental sustainability. It includes:

Treaties aimed at the direct management and preservation of particular areas – Convention on Biological Diversity of 5.06.1992; Cartagena Protocol on Biosafety of 29.01.2000; Convention on the law of the non-navigational uses of international watercourses of 21.05.1997; Convention on the protection and use of transnational watercourses and international lakes of 17.03.1992; Vienna convention on the protection of ozone layer of 22.03.1985; Montreal protocol on substances that deplete the ozone layer of 16.09.1987 *etc*.

Treaties regulating environmental issues besides other matters – UN convention of the law of sea 1982 (UNCLOS);

Treaties regulating protection of environmental human rights directly (Aarhus convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters of 1998 (Aarhus convention 1998)) or indirectly (International Covenant on Civil and Political rights 1966 (ICCPR); European Convention on human rights and fundamental freedoms 1950 (ECHR));

Treaties regulating civil liability for transboundary harm (liability conventions) – Convention on International Liability for Damage Caused by Space Objects of 29.03.1972; Convention on Long-Range Transboundary Air Pollution of 13.11.1979; Convention on the Transboundary Effects of Industrial Accidents of 17.03.1992; Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment (Lugano convention, opened for signature 21 June 1993) *etc*.

Treaties on the assessment of the negative impact on the environment – Convention on environmental impact assessment in transboundary context of 1991 (Espoo convention); Protocol on strategic environmental assessment 2003 (Kiev protocol).

A range of international treaties has been concluded ***within the CIS***:

Agreement on counteraction in the sphere of environment and environmental protection of 8.02.2002 with protocol of 2002 – provided for coordination of policy in implementation of treaties concluded by the USSR on environmental matters;

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[7] New Delhi declaration of principles of international law relating to sustainable development, accessed http://www.ila-hq.org/en/committees/index.cfm/cid/25 on 11.04.2013

Agreement on information cooperation in the sphere of the environment and environmental protection of 11.09.1998 – concerns information exchange, distribution of information, establishment of special databanks including Interstate environmental information system; enhancement of environmental education.

Agreement on the protection and use of migrating types of birds and mammals and their habitats of 9.09.1994;

Agreement on the book of the rare and being under the threat of destruction types of animals and plants of 23.06.1995;

Agreement on the control of the transboundary transportation of dangerous and other wastes of 12.04.1996;

Agreement on the principles of rational use and protection of transboundary water objects of 6.06.1997;

Agreement on cooperation in the sphere of environmental monitoring of 13.01.1999;

etc.

3. Environmental human rights: notion and mechanisms of protection.

Problem of environmental human rights (hereafter EHR) falls in the focus of international organs and states in the second half of the XX century. In a view of the deteriorating state of environment as well as direct impact of the state of environment over the life of every individual, problem of environmental human rights got into the focus of legal research[8]. Some, although not sufficient, attention has also been paid to the mechanisms of protection of environmental human rights[9].

Notion and content of the right to favorable environment. A range of international legal documents note the role of environment in the promotion and protection of rights of individuals and peoples. For example, the UN General Assembly in its resolution 2398/XXIII of 3.12.1968 "Problems of the human environment" notes the relationship between man and his environment and emphasizes the negative impact of the deteriorating environment over the condition and well-being of men (preamble). African Charter on human and peoples rights of 27.06.1981 sets forth the rights of peoples "*to a general satisfactory environment favorable to their development*" (art. 24)[10]. Protocol of

[8] Nurmukhamedova E.F. Inetrnational Environmental Legal Order and Environmental Human Rights (Нурмухамедова, Э.Ф. Международный экологический правопорядок и экологические права человека) – М.: EDITORIAL URSS, 2004. – 224 p.; Tretjakova A.A. Environmental Human Rights in the EU Member-States (Третьякова, А.А., Экологические права граждан в государствах-членах Европейского Союза), Dissertation – M: 2001. – 158 p.; Vasiljeva M.I. Environmental Human Rights (Theory): Textbook (Васильева, М.И. Экологические права граждан (основы теории): Учебное пособие) – Tverj: TvSU, 1999. – 149 p.

[9] Acevedo, M.T. The Intersection of Human Rights and Environmental protection in the European Court of Human Rights // N.Y.U. Environmental Law J. – 2000. – Vol. 8. – P. 437-496.

[10] African Charter on human and peoples rights of 27.06.1981, accessed: http://www1.umn.edu/humanrts/russian/instree/Rz1afchar.html. on 25.05.2012.

San Salvador of 1989 to the American Convention on Human rights proclaims the right to healthy environment (art. 11)[11].

Stockholm declaration on the human environment 1972 (Stockholm declaration 1972) notes the direct relation between environment and human rights including a right to life in dignity and well-being (principle 1)[12]. The same approach is followed in the UN General Assembly resolution 45/94 of 14.12.1990 (preamble, para. 1)[13]. Rio declaration on the on environment and development of 1992 (Rio declaration 1992) links proper conditions of the environment with the right to development (principle 1)[14].

The World charter of nature of 1982[15] as well as Aarhus convention of 1998[16] focus on guaranteeing of so-called "procedural" environmental rights, in particular, access to information, public participation in decision-making and access to justice in environmental matters.

Series of documents link right to healthy environment and the right to development (Rio declaration, principles 22-23; Universal declaration of the rights of people of 1976, part V [17]; Draft United Nations Declaration on the Rights of Indigenous Peoples of 1994, preamble, art. 26, 28 [18]).

It is notable that Aarhus convention is currently the only international treaty concerned with at least some of the environmental human rights. Therefore, despite the repeated mentioning of environmental human rights, their status and legal regulation is rather indefinite still.

It is also important that status and qualification of the right to favorable environment and environmental human rights is subject for discussion. They may be viewed as a derivative of human rights of the first (civil and political rights) or second (economic, social and cultural rights) generations[19], or as human rights of the third generation[20]. As such they are viewing as supplementary rights securing enjoyment of other rights[21]. Some authors (*e.g.* M.I. Vasiljeva) do not qualify right

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[11] Additional protocol to the American convention on human rights in the area of economic, social and cultural rights (Protocol of San-Salvador) 1989, accessed: www.oas.org/juridico/english/treaties/a-52.html on: 25.05.2012

[12] Declaration of the UN Conference on the Human Environment 1972, accessed: http://www.un.org/ru/documents/decl_conv/declarations/declarathenv.shtml. on 15.04.2012

[13] UN General Assembly resolution OOH 45/94 of 14.12.1990, accessed: http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/569/99/IMG/NR056999.pdf?OpenElement on 25.05.2012

[14] Rio Declaration on Environment and Development of 1992, accessed: http://www.unesco.org/education/nfsunesco/pdf/RIO_E.PDF on 15.04.2012

[15] World Charter of Nature of 28.10.82, accessed: http://www.un.org/documents/ga/res/37/a37r007.htm on 15.04.2012

[16] Aarhus convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters 1998, accessed: http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf on 25.05.2012

[17] Universal Declaration of the Rights of People of 4.07.1976, accessed: http://www.algerie-tpp.org/tpp/en/declaration_algiers.htm on 25.05.2012

[18] Draft United Nations Declaration on the Rights of Indigenous Peoples. UNHCHR resolution 1994/45, accessed: http://www.unhchr.ch/huridocda/huridoca.nsf/%28Symbol%29/E.CN.4.SUB.2.RES.1994.45.En on 25.05.2012

[19] Acevedo, *op. cit.* p. 452

[20] Ibid. p. 454-460; Birnie, P. International Law and the Environment / P. Birne, A. Boyle, 2nd ed. – New York: Oxford University Press, 2002. – p. 252-282)

[21] Kiss, A., Shelton, D. Guide to International Environmental Law / A. Kiss, D. Shelton. – Leiden|Boston: Martinus Nijhoff Publishers, 2007 – p. 238-239

to favorable environment as belonging to a particular category of rights[22]. Some others (E.F. Nurmukhamedova) view these rights as exclusively collective rights – a right of the people for existence[23].

Classification of environmental human rights as well as a place of the right to favorable environment within this group are also subject for dispute in the international legal doctrine. Some authors (*e.g.* A.A. Tretjakova, M.M. Brinchuk) consider right to favorable environment as one of environmental human rights, *e.g.* "fundamental" or "constitutional" environmental rights[24]. Right to favorable environment is often also considered as a special principle or a set of principles of environmental law[25].

Content of the right to favorable environment is rather unclear and vague too. The only document attempting to consider it is Draft principles on human rights and the environment developed by the UN Sub-commission on prevention of discrimination and protection of minorities in 1994[26] has not been adopted still. Draft principles consider the right to healthy, secure and favorable environment as really broads and includes into it right to:

– freedom from pollution, environmental degradation and activities that adversely affect the environment, threaten life, health, livelihood, well-being or sustainable development within, across or outside national boundaries.

– protection and preservation of the air, soil, water, sea-ice, flora and fauna, and the essential processes and areas necessary to maintain biological diversity and ecosystems.

– the highest attainable standard of health free from environmental

– safe and healthy food and water adequate to their well-being.

– safe and healthy working environment.

– adequate housing, land tenure and living conditions in a secure, healthy and ecologically sound environment.

– not to be evicted from their homes or land for the purpose of, or as a consequence of, decisions or actions affecting the environment, except in emergencies or due to a compelling purpose benefiting society as a whole and not attainable by other means.

– timely assistance in the event of natural or technological or other human-caused catastrophes.

– benefit equitably from the conservation and sustainable use of nature and natural resources for cultural, ecological, educational, health, livelihood,

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[22] Vasiljeva, *op. cit.* p. 22

[23] Nurmukhamedova, *op. cit.* p. 122

[24] Tretjakova, *op. cit.* p. 126-127; Brinchuk M.M. Environmental Law (Бринчук М.М. Экологическое право). – M.: Jurist, 1998 – p. 131-132

[25] Kopylov M.N. Introduction to International Environmental Law (Копылов, М.Н. Введение в международное экологическое право) – М.: RUDN, 2007. – p. 194; Balashenko S.A. International Legal Principles of Environmental Protection (Балашенко С.А. Международно-правовые принципы охраны окружающей среды / С.А. Балашенко) // Legal Issues of Environmental Protection – 1998. – No 10. – p. 28-35; International Public Law. Special part. Textbook (Международное публичное право. Особенная часть: учеб. пособие) / ed. by Yu.P. Brovka, Yu. A. Lepeshkov, L.V. Pavlova. – Minsk: Amalfea, 2011. – p. 573

[26] Draft Principles On Human Rights And The Environment, E/CN.4/Sub.2/1994/9, Annex I (1994), accessed: **http://www1.umn.edu/humanrts/instree/1994-dec.htm** on 12.03.2013

recreational, spiritual or other purposes. This includes ecologically sound access to nature.

– preservation of unique sites, consistent with the fundamental rights of persons or groups living in the area.

– information concerning the environment. This includes information, howsoever compiled, on actions and courses of conduct that may affect the environment and information necessary to enable effective public participation in environmental decision-making.

– right to hold and express opinions and to disseminate ideas and information regarding the environment.

– environmental and human rights education.

– active, free, and meaningful participation in planning and decision-making activities and processes that may have an impact on the environment and development. This includes the right to a prior assessment of the environmental, developmental and human rights consequences of proposed actions.

– associate freely and peacefully with others for purposes of protecting the environment or the rights of persons affected by environmental harm.

– effective remedies and redress in administrative or judicial proceedings for environmental harm or the threat of such harm.

In the collective form right to favorable environment also includes right of indigenous people to:

– control their lands, territories and natural resources and to maintain their traditional way of life. This includes the right to security in the enjoyment of their means of subsistence.

– protection against any action or course of conduct that may result in the destruction or degradation of their territories, including land, air, water, sea-ice, wildlife or other resources (parts II-III).

Right to favorable environment belongs to individuals, peoples, mankind. Some authors confer with the this right also civil society[27], embryos[28], animals, plants, mountains, rivers[29] etc. The last approach seems however, to be too idealistic and hardly applicable in reality.

It may thus be concluded that environmental human rights as well as the right to favorable environment are human rights of the third generation belonging to individuals, peoples, mankind.

International mechanisms of protection of environmental human rights including the right to favorable environment.

There are currently no international mechanisms of protection of ECH and the RFE (both judicial and control), in the first hand because of the unclear nature and

[27] Kopylov, *op. cit.*, p. 196

[28] Nurmukhamedova, *op cit.*, p. 110

[29] Cited at Merrils J.G. Environmental Rights // The Oxford Handbook of International Environmental Law / ed. by D. Bodansky, J. Brunnée, E. Hey. – Oxford: Oxford University Press, 2007. – p. 672

content of these rights as well as absence of specific international treaties n this regard.

The only international treaty recognizing the at least certain environmental human rights (in particular, procedural human rights), Aarhus convention, recognizes possibility of application for individuals as representatives of civil society to a special international body – Compliance committee for the review of the compliance with Aarhus convention, – with the non-compliance report (Aarhuss convention, art. 15)[30] in accordance with part VI of decision 1/7(2002) of the Conference of Parties[31]. It shall be taken into account that Aarhus convention regulates only so-called "procedural" environmental rights (access to information, public participation in decision-making and access to justice in environmental matters) and does not provide for the right to favorable environment. Moreover compliance procedure is introduced to push states to comply with provisions of the convention rather than to protect rights of particular individuals.

In particular upon consideration of the case the meeting of parties can decide upon one or more of the following measures, which are concerned with violated rights of specific individuals:

a) Provide advice and facilitate assistance to individual Parties regarding the implementation of the Convention;

b) Make recommendations to the Party concerned;

c) Request the Party concerned to submit a strategy, including a time schedule, to the Compliance Committee regarding the achievement of compliance with the Convention and to report on the implementation of this strategy;

d) In cases of communications from the public, make recommendations to the Party concerned on specific measures to address the matter raised by the member of the public;

e) Issue declarations of non-compliance;

f) Issue cautions;

g) Suspend, in accordance with the applicable rules of international law concerning the suspension of the operation of a treaty, the special rights and privileges accorded to the Party concerned under the Convention;

h) Take such other non-confrontational, non-judicial and consultative measures as may be appropriate. (para. 37 Deision I/7).

Other international bodies empowered to consider individual complaints on violation of human rights, in particular UN Human rights committee (UN HRC) and the European Court of Human Rights (ECHR), are not conferred with powers to consider complaints on the violation of the right to favorable environment, as far as neither ICCPR nor ECHR provide for this right.

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[30] Koester, V. The Compliance Committee of the Aarhuss Convention: an Overview of Procedures and Jurisprudence // Environmental Policy and Law. – 2007. – N.2–3. – P. 83–96; Case law of the Aarhus convention Compliance committee 2004-2008, accessed: http://www.rac.org.ua/fileadmin/user_upload/publications/CL3_en_web.pdf on 12.04.2013

[31] Decision 1/7 Review of compliance of 21-23.10.2002, accessed: http://www.unece.org/fileadmin/DAM/env/pp/documents/mop1/ece.mp.pp.2.add.8.e.pdf on 20.03.2013

However, in a view of the close connection between the right to favorable environment and civil and economic rights both the UN HRC and ECHR have repeatedly considered applications involving violation of environmental rights but only if applicants connected it with violation of rights set forth in the corresponding documents (ICCPR, ECHR). For example, violation of the right to favorable environment was considered as violation of the right to life (ECHR: Powell & Rayner v. United Kingdom 1990[32]; UN HRC: EHP v. Canada 1980[33], Bordes and Temeharo v. France 1995[34]); right to fair trial, right to private and family life, freedom of housing and correspondence (ECHR: Guerra & Others v. Italy 1996[35]), right to property (ECHR: Arrondelle v. United Kingdon 1982[36]), rights of national minorities (HRC: Bernard Ominayak and the Lubicon Band v. Canada 1984[37]).

The UN HRC and ECHR have formulated a set of principles providing indirectly the RFE through obligations of states:

- to guarantee proper quality of environment to guarantee minimal standard of living (ECHR: Powell & Rayner v. United Kingdom 1990);

- to guarantee possibility to protect environmental human rights through the possibility to apply for and obtain compensation of the damage to health, property and living standards (ECHR: Fredin v. Sweden 1990[38]);

- to balance public interests and interests of individuals and groups of individuals in the course of activity able to cause serious / significant damage to the environment (ECHR: Powell & Rayner v. United Kingdom 1990; Fredin v. Sweden 1990; Pine Valley Development Ltd. & Others v. Ireland 1991[39]; Guerra & Others v. Italy 1996);

- to use precautious approach as take all necessary measures to prevent damage in the course of dangerous activity as far as they cause a threat to the right to life (UN HRC: EHP v. Canada 1980, Bordes and Temeharo v. France 1995).

4. Mechanisms of redress in the case of environmental damage.

[32] Powell & Rayner v. United Kingdom 1990: Judgement of 21.02.1990 of the European Court of Human Rights, accessed: http://airportnoiselaw.org/cases/powell-1.html on 25.09.2012

[33] EHP v. Canada 1980: communication No. 67/1980 27 of 27.10.82 of the European Court of Human Rights, accessed: http://www.bayefsky.com/pdf/114_canada67_1980.pdf on: 25.09.2012.

[34] Bordes and Temeharo v. France: communication No. 645/1995 of 26.07.95 of the European Court of Human Rights, accessed: http://www1.umn.edu/humanrts/undocs/html/DEC64557.htm on 25.09.2012

[35] Guerra & Others v. Italy: judgment of 19 February 1998 of the European Court of Human Rights, accessed: http://www.iidh.ed.cr/comunidades/libertadexpresion/docs/le_europeo/guerra%20and%20others%20v.%20italy.htm on: 25.09.2012

[36] Arrondelle v. United Kingdon: judgment of 15.07.80 of the European Court of Human Rights, accessed: http://vlex.com/vid/arrondelle-v-the-united-kingdom-27429190 on 25.09.2012.

[37] Bernard Ominayak and the Lubicon Band v. Canada 1984: communication No. 167/1984 of 26.03.90, accessed: http://www1.umn.edu/humanrts/undocs/session45/167-1984.htm on 25.09.2012

[38] Fredin v. Sweden 1990: Jugdment of 23.02.94, accessed: http://stari.iusinfo.si/EUII/EUCHR/dokumenti/1994/02/CASE_OF_FREDIN_v._SWEDEN_(No._2)_23_02_1994.html on 16.02.2012

[39] Pine Valley Development Ltd. & Others v. Ireland 1991: Judgment of 9.02.1993 // Yearbook of the European Convention on Human Rights, Summaries. – 1996. – P. 156–157

Liability for environmental damage is a rather old phenomenon. It developed from the responsibility for damage caused by riparian States through international watercourses or lakes. The earliest recorded treaty which could today be viewed as relating to environmental damage dates back to approximately 3100 BC. It was concluded between two Mesopotamian States (Umma and Lagash) in the aftermath of a war caused by the unilateral breach of the water supply order[40].

International treaties usually provide for mechanisms of redress for transboundary damage caused in the course of hazardous activity not prohibited under international law.

International treaties which regulate liability for transboundary harm set forth liability for damage arising from particular types of hazardous activities:

- ***oil pollution*** – International Convention on Civil Liability for Oil Pollution Damage of 1969 with Protocol of 1992 (CLC 1992); International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage of 1971
- ***pollution from ships*** – International Convention for the Prevention of Pollution from Ships of 1973 with Protocol of 1978;
- ***carriage and disposal of hazardous wastes and substances*** (International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea of 1996 (not yet in force); Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and Their Disposal of 1999;
- ***nuclear pollution*** – Paris Convention on Third Party Liability in the Field of Nuclear Energy of 1960; Vienna Convention 1963; Supplementary Compensation Convention 1997;
- ***industrial incidents*** – Convention on the Transboundary Effect of Industrial Accidents 1992; Kiev Protocol;
- ***damage caused by outer space objects*** – Convention on International Liability for Damage Caused by Space Objects 1972;
- ***living modified organisms*** – Nagoya—Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Biosafety of 2010 (Nagoya Protocol);
- ***activity in Antarctica*** – Annex VI to the Protocol on Environmental Protection to the Antarctic Treaty 2005 (Annex VI).

Particular norms could be found in treaties aimed at protecting specific territories like the marine environment, watercourses, the air, *etc*. No universal comprehensive convention on the liability for transboundary damage has been concluded by now although the work of the International Law Commission (ILC) has resulted in the ILC's Draft Articles on Prevention of Transboundary Harm from Hazardous Activities of 2001 (Draft Articles) and Draft Principles on the

[40] See *Kersten Ch.M.* Rethinking Transboundary Environmental Impact Assessment // The Yale Journal of International Law – 34 – 2009. – P. 173

Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities of 2006 (Draft Principles).

Currently there is no universal approach to the notion of liability for environmental damage. In treaties, liability is viewed as an obligation to pay compensation for damage caused in the course of either lawful (liability treaties: Vienna Convention of 1963 with Protocol of 1997; CLC 1992; Annex VI; Nagoya Protocol; *etc*) or wrongful acts (*e.g.* Geneva Conventions Additional Protocol I of 1977, art. 91; UNCLOS, art. 139; Annex III to the UNCLOS, art. 4(4)), although primarily it refers to the damage cause in the course of lawful activity.

International liability is always related to the damage caused. Its primary purpose is to provide compensation for harm caused and therefore to prevent the occurrence of harm. Liability treaties, as well as the ILC drafts, provide for the liability of an operator for significant transboundary damage caused in the course of a hazardous activity not prohibited by international law.

Liability treaties do not provide for the possibility of reimbursement for any damage caused. International law based on the principle *pacta sund servanda* implied the responsibility for breach of international law. It was obvious, however, that sometimes there is a need for reimbursement for damage caused without the breach of international legal norms. Therefore liability for any damage caused in the course of activity not prohibited by international law is strict/ absolute/ non-fault (Vienna Convention 1963, art. IV(1); CLC 1992, art. III; Kiev Protocol, art. 4; Outer Space Treaty, art. II; Draft principles, principle 4(2) *etc*).

Draft Principles provide that liability of an operator "should not require the proof of fault" (Principle 4(2)). In the international legal doctrine this situation is often compared to the liability of the owner of dangerous mechanisms in the national law, so called "objective" responsibility[41].

Liability conventions as well as ILC drafts regulate liability for transboundary significant damage resulting from hazardous activities.

International law does not have a single approach to what "transboundary damage" is. Currently it usually refers to damage originating from the territory or under the jurisdiction or control of one State "*to persons, property or the environment in other places under the jurisdiction or control"* of another State (Draft Articles, art. 2(c); Draft Principles, principle, 2(e); UNCLOS, art. 194; Convention on Long-Range Transboundary Air Pollution of 1979, art. 2(e) *etc*). International law prohibits damage to the areas beyond national jurisdiction (Stockholm Declaration, principle 21; Rio Declaration, principle, 2; Annex VI; UNCLOS, art. 139), although the mechanism and forms of liability are not regulated in international law.

Significant damage (may also be "serious", "severe", "significant", "substantial", "wide-spread", "long-lasting", "long term", *etc*. – in liability conventions) is damage which is more than detectable, but it does not necessarily

[41] Bratus' S.N. Legal responsibility and Legality (theoretical overview) (Братусь, С.Н. Юридическая ответственность и законность: (Очерк теории)). – М.: Juridicheskaya Literatura, 1976. – p. 165

achieve the level of "serious" or "substantial"[42]. It shall be established by clear and convincing evidence measured by factual and objective criteria and have a real detrimental effect on human health, life, industry, property, environment, forestry, or agriculture of / in another State[43].

Hazardous activities are those not prohibited by international law but involving the risk of causing significant harm (Draft Principles, principle 2(c); Draft Articles, art. 1).

Liability treaties provide for the possibility to invoke different sorts of damage including: personal injuries, loss or damage to property and environmental damage. Early liability conventions limited themselves to the liability for personal injuries or a loss or damage of property (Vienna Convention on Civil Liability for Nuclear Damage with Protocol of 1997, art. I(k); Convention on International Liability for Damage Caused by Space Objects, art. I(a)). Environmental damage could only be claimed indirectly through personal or economic losses. Documents adopted after 1990 expressly provide for liability for environmental damage (CLC 1992, art. 1(6a); Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and Their Disposal of 1999, art. 2(2c); Protocol on Civil Liability and Compensation for Damages Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters of 2003, art. 2(2d); Convention on Supplementary Compensation for Nuclear Damage of 1997, art. 1(f); Nagoya Protocol, art. 2; UN Security Council Resolutions 687(1991) and 692(1991); Draft Principles, principle 2(2)).

The notion of environmental damage is rather broad. According to the ILC "pure" environmental damage includes: "*(a) loss or damage by impairment of the environment; (b) the costs of reasonable measures of reinstatement of the property, or environment, including natural resources; (c) the costs of reasonable response measures"* (Draft Principles, principle, 2[44]), although the most of liability conventions limit it to the first two categories (Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and Their Disposal of 1999, art. 2(c(iii-v)); Kiev Protocol 2003, art. Art. 2(d(iii–v)); Supplementary Compensation Convention 1997, art. 1 (f(iv–vi)); CLC 1992, art. 1(6); Lugano Convention, art. 2(7(c-d)).

Some other, however, may view it broader and include costs of reasonable monitoring and assessment of the environmental damage, damage to public health, or medical screening (UN Compensation Commission Governing Council, Decision 7 of 17.03.1992, para. 35[45]).

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[42] Draft Articles on Prevention of Transboundary Harm from Hazardous Activities with commentaries// Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10 (A/56/10) // *Yearbook of the International Law Commission, 2001*, vol. II, Part Two – P. 152

[43] Ibid, p. 151 (para. 16); Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising from Hazardous Activities 2006, with commentaries // Yearbook of the International Law Commission,2006, vol. II, part Two – P. 134 (para. 2)

[44] Draft Principles with commentaries, *op. cit.* p. 127-128 (para. 11)

[45] UN Compensation Commission Governing Council 'Criteria for Additional Categories of Claims' of 17.03.1992. Decision 7, accessed: http://www.uncc.ch/decision/dec_07r.pdf on 12.01.2013

Taking into account that it may be rather complicated to find a person responsible for the damage caused and moreover there is usually no one responsible as far as no violation took place, it is commonly agreed that liability lays over a person, who has "*use, control, command, or direction of the object involved in hazardous activities at the time the incident causing transboundary harm occurs*" (Draft Principles, principle, 2(e)), which is usually called "operator".

In the case of a high level of transboundary damage, liability of operators is usually limited to a fixed amount (*e.g.* US $5 million for any one nuclear incident as to the value of the US dollar in terms of gold on 29 April 1963 (Vienna Convention 1963, art. V(1-3)). To guarantee these payments liability treaties often prescribe an operator to provide special guarantees, bonds, or insurance of risks (Vienna Convention 1963, art. VII; Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and Their Disposal of 1999, art. 14; Kiev Protocol, art. 11; CLC 1992, art. VII) or to establish a special fund (International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage of 1971 with protocol of 1992). States under jurisdiction or control of which hazardous activity takes place, are welcomed to provide additional guarantees of compensation (Supplementary Compensation Convention 1997, art. III(1)).

If an operator failed to take these measures in the course of a hazardous activity, limitations of liability will not be applied (CLC 1992, art. V(2); Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and Their Disposal of 1999, art. 12(2)). If a State under jurisdiction or control of which takes place a hazardous activity fails to ensure that these activities do not cause damage to the environment of other States and areas beyond their jurisdiction' it may be held liable for a failure to fulfill this obligation as an obligations from international treaties.

It is believed here, however, that the very fact of existence of mechanisms for reimbursement (even of personal loss or damage to property) is already helpful for the preservation of the environment as well as rights of humans infringed by the fact of incident. This mechanism has a preventive character. This effect is all the more strengthened by the mechanism of fault-based liability, when a breach committed by the operator eliminates the limits of liability and a fault of a state to take all necessary measures to guarantee that no damage will be caused, provides for the possibility to invoke responsibility of this state and to ask for compensation on this ground.

Non-traditional but already existing mechanism of compensation for damage to persons, property and environment caused in the war time (*e.g.* work of the UN compensation commission established by the UN Security Council in the aftermath of the Gulf crisis – resolutions 687(1991), 692(1992)) also has the important constraining and preventive effect.

5. Observance of "environmental" treaties: control mechanisms.

Mechanisms of observance of environmental obligations include non-institutional and institutional mechanisms.

Non-institutional mechanisms involve exchange of information through periodical meetings, notification and consultations.

1) Periodical non-institutional meetings is historically the first mechanism of control;

2) obligation to notify of the possibility of transboundary damage – may be set forth in treaties on particular issues of environmental protection or in special treaties (*e.g.* Convention on early notification of nuclear incidents 1986) in the case of possibility of transboundary damage (Basel convention on the control of transboundary movement of hazardous wastes 1989, art. 13(1))*;* on incident and possible consequences (Convention on early notification of nuclear incidents 1986); on planned dangerous activity (Convention on the Transboundary Effects of the industrial accidents 1992, art. 4(1));

3) consultations may take place on the regular basis as well as in the case of damage or threat of damage (Convention on the Transboundary Effects of the industrial accidents 1992, art. 4(1); Convention on Long-range transboundary air pollution 1979, art. 5), on the shared resources (The Convention on Wetlands of International Importance especially as Waterfowl Habitat 1971, art. 5).

Institutional mechanisms

Specter of institutional mechanisms is rather broad. It includes:

1) periodical meetings of the parties – is usually represented by the Conference of the parties with permanent Secretariat (London Convention for the Prevention of Pollution from Ships 1973/78, Convention on Biodiversity 1992., art. 15-16; Basel convention 1989 г.) or conferring secretariat functions to other organizations (Convention on nuclear safety 1994, art. 24);

2) Permanent commission of the representatives of the parties (Convention on the Conservation of Antarctic Marine Living Resources 1980, art. VI*)*

3) Independent commission with control and quasi-judicial functions – established very rarely (International joint commission of the US and Canada on the Boundary waters treaty 1909).

Both non-institutional and institutional mechanisms fulfill certain control functions including**:** general control and reports, research, fact-finding inspections, non-compliance mechanisms, systems of global monitoring.

1) ***General control and reports*** provides possibility to control periodically implementation of a treaty by member states and well as general efficacy of the treaty through:

- exchange of information (Convention on the long-range transboundary air-pollution 1979, art. 8);
- consideration of reports submitted with established frequency by member state and elaboration of standards and recommendations (Convention on biodiversity 1992, art. 26; Convention on nuclear safety 1994, art. 5; Basel convention 1989, art. 13);

- monitoring of compliance with with treaty obligations (Convention on the long-range transboundary air-pollution 1979, art. 3, 9; Convention on biodiversity 1992, art. 5; ICLOS 1982, art. 204*)*

2) ***Research and fact-finding*** can be conducted by subsidiary bodies, established within the treaty (Convention on biological diversity 1992, art. 25); or international research center (International committee on marine mammal protected areas, Scientific committee on Antarctic research). Research bodies provide scientific, technical and technological consultations; make general assessment of the state of environment in the specific sphere; make expertise of reports and information received from states including inspections.

3) ***Fact-finding*** may be conducted by international organizations, institutionalized bodies and states in specific spheres of environmental protection or in the course of fulfillment of specific treaties. They may be obligatory (taken upon authorizations of the UN Security Council); taken upon the request of states (IAEA inspections as concerns security of nuclear installations); or mutual (Antarctic treaty 1959; London Convention for the Prevention of Pollution from Ships 1973/78).

4) Non-compliance procedure was firstly used in the Montreal protocol 1987 (art. 8). Later it was introduced in the Framework convention on climate change 1992; UN Convention of to combat desertification 1994; Protocol of 1994 to the Convention on long-range transboundary air pollution 1979.

5) Global monitoring system includes monitoring systems in different fields (Global Environment Monitoring System GEMS/ Water; UNEP Earth-Watch programme; INFOTERRA).

6. Implementation

Countries of the region face a range of rather serious problems in the pursuit of the MDGs. One may cite pollution of waste territories (including the consequences of the Chernobyl disaster, which had and still has a significant impact at the territories of Ukraine and Belarus over peoples' health, agricultural lands, mines, economy and environment; severe land, water and air pollution in Donbas region (coal mining area) in Ukraine; Alaverdi Copper Smelter reinstallation in Moldova); insufficient attention to the public opinion and preliminary assessment of the environmental impact (for which construction of the new nuclear power plant at the territory of Belarus is often criticized); unclear impact of the climate change (up and down of the Lake Sevan in Moldova *etc*.

It shall be noted however, that substantial steps are already made. Countries of the region participate actively in the international cooperation in the sphere of environmental protection and environmental sustainability. They become parties of a range of universal and regional treaties in the sphere: Convention on biodiversity

1992 with Cartagena protocol 2000; Basel convention 1989; Convention on long-range transboundary air pollution 1979; Aarhus convention 1998; Vienna Convention for the Protection of the Ozone Layer 1987 with Montreal protocol 1989; Ramsar Convention on Wetlands 1971; Convention on Environmental Impact Assessment in Transboundary Context 1991 *etc*. In order to fulfill obligations arising from international treaties states fulfill their reporting obligations.

In November 2006 general part of the Model Environmental Code has been adopted by the Inter-Parliamentary Assembly of the Commonwealth of Independent States[46]. This document provides for the right to favorable environment, environmental security as well as procedural rights of every individual (art. 16), but does not set however, principles and exact mechanisms of achievement of sustainable development. It is supposed that this document will be used by the CIS country when drafting their own Environmental codes.

It shall, however, be mentioned that the majority of the CIS states still follow the former USSR cautious approach towards the recognition of jurisdiction and the use of international arbitration as well as judicial means of dispute settlement. As a picturesque example of this it is possible to invoke the fact that none of the CIS countries has recognized jurisdiction of the International Court of Justice under art. 36(2) of its Statute[47]. Similar situation may be observed as concerns means of dispute settlement set forth in international treaties. In practice CIS states recognize jurisdiction of any dispute settlement institutions only if it is prescribed as an obligatory mechanism in the treaty without any chance to avoid it (that is less than 10 per cent of treaties in the sphere of the environment).

As noted in the World summit document 2005 every country bears primary responsibility for own development also through national programs and strategies (para. 22). Regional organizations adopt national legislation to implement principles of environmental sustainability, including national strategies of sustainable development, as well as legislation to guarantee environmental human rights.

States also introduce national mechanisms of monitoring, which include monitoring of different areas (earth, water, air, ozone layer *etc*.), monitoring of the radioactivity level, monitoring of emission and drains from industrial and other potentially dangerous objects (see *e.g.* Law on the Environmental Protection of Belarus of 26.11.1992, art. 68-69; Decree of the Council of Ministers of Belarus confirming the order of monitoring in different spheres of 28.04.2004 No. 482).

Right to favorable environment as a constitutional rights set forth in the constitutions of states in the region (Constitution of Armenia, art. 33.2; Constitution of Belarus, art. 34, 45, 46; Constitution of Georgia, art. 37(3-5); Constitution of Russian Federation, art. 42; Constitution of the Ukraine, art. 50).

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[46] Model Environmental Code, adopted by the CIS Inter-Parliamentary Assembly on 16.11.2006, accessed: http://www.licasoft.com.ua/index.php/component/lica/?href=0&view=text&base=1&id=410206&menu=545732 on 15.04.2013

[47] Declarations Recognizing the Jurisdiction of the Court as Compulsory [Electronic resource] – mode of access: http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3 – date of access: 15.04.2013

Right of individuals for favorable environment is set forth in the laws on the environment. For example, Law on the environment of Belarus sets forth the notion of the right to favorable environment (art. 1), sees it as a purpose of Belarusian legislation in the sphere of environmental protection (art. 3), principle (art. 4) and priority of national policy (art. 7).

The law allocates 3 main groups of environmental human rights: right to favorable environment; right to compensation of damage caused by violation of the right to favorable environment; right to "environmental" information (art. 12). Right to favorable environment is seen by the Law on Environment of Belarus as personal non-property right (art. 14). Protection of this right takes place through compensation of damage caused to life, health or property of citizens as a result of harmful effects over the environment (art. 13) and also through compensation of moral damage (art. 14(2)).

Conclusions and recommendations

As follows from the above, there is wide range of mechanisms, which may be used in the pursuit of environmental sustainability and protection of environmental human rights both at the international and national levels.

We may invoke a set of principles of sustainable development, international treaty-making, mechanisms of control over the implementation of treaties and compliance with treaty obligations; mechanisms of redress for damage caused to individuals, property or environment in the case of transboundary damage; international and national institutions able to protect the right to favorable environment; assessment of the impact over the environment; *etc.*

Right to favorable environment for collective subjects (society, peoples, mankind) is implemented through different sorts of activities aimed at the protection of the environment, including compliance with environmental treaties, prior and subsequent assessment of environmental impact of activities taken at the territory, under jurisdiction or control of states; use of precautious approach, development of mechanisms of redress for significant transboundary damage *etc*.

At the present moment there are no special treaties providing for the right of individuals for favorable environment as well as specific control or judicial mechanisms providing mechanisms of protection of rights of individuals or groups of individuals. Protection of this right takes place indirectly through protection of other human rights (including personal and property rights as well as right of national minorities on participation in natural management) by the appeal to international human rights institutions, including HRC and ECHR.

It is believed here that these mechanisms when used *bona fide* are able to help to achieve substantial progress in guaranteeing environmental sustainability. There is thus no need to invent any extraordinary and "unnatural" mechanisms, like transfer of climate change issue to the agenda of the UN Security Council, to qualify it as a threat to international peace and security and to establish special

"peacekeeping climate change forces" (so-called "*green helmets*").[48] It will result in the mass dilution of the foundations of the United Nations (including attempts to extend mechanisms of politico-military security to other spheres), even when these efforts are aimed at the protection of common values, may hardly bring stability and security to the world order, promote the "common good" or ensure observance of the rule of law.

Countries of the region take some efforts to implement their obligations in the sphere of the environment both at the regional and national levels. A series of regional agreements have been concluded in the sphere, CIS Inter-Parliamentary Assembly develops models of acts to be used by CIS member-states in amending its leislation, including the CIS Model Environmental code. Right to favorable environment as well as general obligations on the environmental protection have been introduced in the Constitutions and special legislation of the countries of the region.

As noted above, states introduced guarantees of the right to favorable environment to their constitutions and provided for mechanism of protection in the case of breach of this right through civil procedure as a redress for damage to life, health, property, moral damage.

However, legal regulation in the area is not sufficient still. Regional agreements have rather framework character. National legislation contains certain gaps. For example, National strategy of sustainable development of Belarus to 2020 is adopted by the National commission of sustainable development and does not enjoy the status of the legal act. Therefore it is a non-obligatory document. The majority of countries in the region have not drafted their Environmental codes still. Mechanisms of interaction between states and civil society in the course of legislation and decision-making in environmental spheres are often rather rudimentary.

It is also believed that principles of sustainable development (including principle of sovereignty over natural resources, obligation to take all necessary measures to prevent significant transboundary harm in the course of activity on the territory or under the jurisdiction and control of a state, principle of equity, principle of common responsibility *etc*.) shall be introduced in both program documents as well as corresponding legislation in the sphere of the economy and environment.

As a result the following recommendations for the countries of the region can be made:

- To pay more attention to the principles of sustainable development both in the course of law-making and in practical activity with special attention to the principles of precaution, environmental assessment, prevention of transboundary harm and public participation in the decision-making on environmental issues;

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[48] See UN Security Council Reports, 5663rd Meeting, 17 April 2007, accessed http://www.un.int/wcm/webdav/site/tuvalu/shared/documents/SC/N0730973.pdf on 13.04.2013; UN Security Council Reports 6587th Meeting, 20 July 2011, accessed: http://www.circleofblue.org/waternews/wp-content/uploads/2012/09/UN-Security-Council_climate-change-July-2011.pdf on 14.04.2013

- To adopt environmental codes in accordance to the principles of sustainable development;

- To cooperate more actively in order to ensure environmental sustainability and environmental protection at the regional level, including through drafting of precise and detailed documents;

- To support the need to develop a mechanism of liability for significant environmental harm caused to the territories beyond national territory, jurisdiction or control;

- To insist that environmental sustainability may and shall be achieved through national and international efforts in the sphere of environment and economy. Use of other mechanisms (*e.g.* transfer of the problem to the politico-military area) may involve severe response and aggravate the situation as a whole;

- To recognize jurisdiction and to use therefore more actively judicial and arbitration mechanisms for settlement of disputes in the sphere of sustainable environment;

- To apply in practice provisions of Aarhus convention concerning assess to information participation in decision-making and access to justice.