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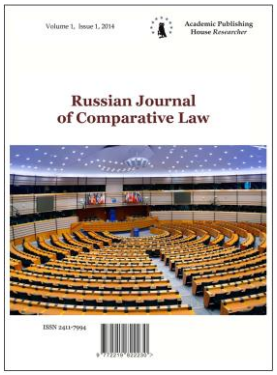

Articles

Seeking the Civilizational Ghosts: Some remarks on Chinese and Russian Approaches to International Law through Civilizational Values

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Abstract

This article seeks to examine the rigor of civilizational values in modern international law as a crucial factor and how historically different civilizational values have inculcated different approaches to international law. While critiquing the civilizational rhetoric built by European nations in creating Eurocentric international law, this article brings how international law has been perceived by China and Russia following their historical complexities as unique states. Results emerging from this paper will demonstrate the different diversity in international law in different countries.

Keywords: civilization, colonialism, pragmatism, Russia, China, identity, hegemony, international law.

1. Introduction

The key question of civilization in the realm of international law is vague and a complicated question that gives no exact clue. Yet, the phrase "civilization" has been a crucial term which has upheld its relevance in parallel to the historical development of international law. In tracing the most outrageous and dubious history of international law filled with bias narratives and many other inexplicable anomalies, one can easily comprehend the decisive role played by the phase "civilization "in constructing some of the ironies of international law. The interplay between the importance of civilization and the construction of international law has been mainly imbued with the idea of glorifying one civilization or culture and vanquishing the other. This formula stands as an irrefutable logic since the days of yore of world civilizations.

When Greeks excelled themselves after defeating Persians and even prior to that, their attitude towards non Greeks were taken a pessimistic, crude and darker one as their understanding of civilization was confined to Greece. Hence, citizens from outside world became barbarians. When Rome began its growth from being a tiny city near river Tiber to become a world conqueror after their successful victory over Carthage in Punic wars, their attitude towards the other nations in diplomacy was predominantly based on their feeling of superiority which eventually culminated in their victory over King Antiochus IV in 164BC resulting Rome's unparalleled hegemony over both Western and Eastern nations. Since then till Rome reached its ebb, the mechanism of international diplomacy between Rome and all other nations was based on Rome's superiority over

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the other. As a matter of fact, these historical elucidations make our understanding much easier about analyzing the gravity of civilization in international law since its very primary stage and furthermore it indicates how fascination towards civilizational values filled with the sense of superiority over other leading to outnumber other nations.

In appreciating and critically evaluating the historiography of modern international law, it becomes an evident factor that the values standing in modern day international law are the creations of European Christian civilization. Francisco Vittoria, Alberico Gentili and Hugo Grotius are usually regarded by students of international law as the holy trinity of constructing modern European narrative of international law and it is a fact beyond dispute that all three had emerged within the Christian civilization of post medieval Europe despite their ideological differences. From this three great stalwarts of the development of international law, Spanish Jesuit jurist Vitoria remained a champion of preserving natural rights as his opinion on native Indian tribes under Spanish expansion was driven by apotheosizing the idea of natural law as the very foundation of international legal order (Meerills, 1968: 189).

He was known for his partial view on native Indian tribes in America as he regarded them to be a nation in their own system of governance. Prior to this revolutionary exclamation of Vitoria, it was asserted that the human affairs were governed by divine law and papal authority was held in high esteem and Christian monarchs in Europe sought papal authority to legitimize their territorial invasions beyond Christendom as a justified spread of Christianity over heathens. The religious decree played a real importance of validating the acts of the sovereign. As an example Pope Alexander VI's papal bull divided the known world between Portuguese and Spanish empires. However, Vitoria liberated application of international law from extreme religious dogma, yet, his reluctance to admit native Indians as equal states of Christian Europe clearly denoted his civilizational standards.

The pervading picture of the historiography in international law is not other than a civilizational clash and a complex discourse emerged from the superior civilizations that would legitimize their claims under some legal guise. Especially in western world order that was flourished after the peace of Westphalia, European picture of law of nations depended on the reception of traditional Christian values and their common civilizational values stood as a set of constitutive norms that governed the relationship among the family of nations which was sometimes depicted as "*ius publicum Europaeum"* and it excluded non-Christian, non-European nations from their domain of law of nations.

2. Materials and methods

In this article I attempt to trace the civilizational roots that had culled the understanding and reception of international law in Russia. Especially this paper will suggest that the different approach to international law from China and Russia throughout their historical encounters with the West and my contention in this paper will prove that the idea of Eurocentric construction of international law is no different from what both China and Russia perceived as international legal system from their civilizational perspectives. The purpose of this paper is to examine the gravity of intrinsic civilizational values of China and Russia in creating their international legal norms and the study of these roots will unveil both countries yearning to aggrandize their position in international legal order. Tracing civilizational values behind the pillars of international law would be rather audacious or perhaps an ambiguous task and consequently scholars cannot exactly claim how many civilizations are there nowadays. Yet, understanding the civilizational perspective from this two unique states will help us to understand their world view better. Because one cannot neglect what David Kennedy wrote about the general nature of international law as he stated it is fundamentally being practiced differently in different places.

3. Discussion

3.1. Philosophical speculation behind Chinese attitude towards an international legal order

Confucian philosophy and his teachings took a leading role in every aspect in Chinse society as a great moral force. Nevertheless, painting Confucian philosophy as a pacifist teaching has been a major myth nowadays. On the contrary, Chinese history has vividly illuminated the rigor of imperial foreign policy grew under Confucian influence in China. The imperial expansion of China

and its central foreign policy towards its neighbors were inherently based on placing China as the superior state. If the expansion of china was simply driven by mere cultural assimilation, it would have been an illusionary vison to explain how Chinese power since Quin dynasty (221-206 BC) began to grow till the time of *Quing* empire (1644–1911). The historical statistics on Chinese involvements in interstate warfare are the best evidence that simply disrupt the myth of idealizing Confucian pacifism as the cardinal feature in Chinese diplomacy, because the historical references have shown China involved in 3131 wars from Quin dynasty to last *Quing* dynasty that proved China had been violent in the same intensity as how Europe violent was with their interstate wars (Yin, 2017: 1012). Victor Hui has stated "War, not Confucian ideals, explains how China expanded from the Yellow river valley in the Warring states era to the continental empire in the *Quing* dynasty" (Tin-bor Hui, 2008: 58).

Also, Chinese emperors were well aware of the repercussions of being more pacifist in their diplomacy as they considered it an act of timidity. As an example during Han dynasty in the period of Emperor *Xuan*, his son (future Emperor *Yuan*) was keen in appointing many Confucian pacifists in key positions of the imperial court which finally exasperated the emperor himself, who regarded it as a manner of weakening the statecraft. This simple story reveals the flare held by Chinese rulers in preserving their hegemony rather than idealizing pacifism.

The Chinese conception of considering themselves superior was always an inherent part of interstate relations, which later transformed into their vision of international law. In examining the Chinese maritime expansion in *Ming* dynasty, the salient principle carried out by *Ming* mariners was to explore distant seas and it was further strengthened by creating commercial avenues for China. However, during one of treasure voyages of Ming dynasty, it's famous admiral Zheng He and his fleet were attacked by the hostile Sinhalese ruler in Kotte kingdom of Sri Lanka around 1410 whish caused to return of Zheng with a large Chinese troop and it easily defeated Sinhalese army, which resulted in taking Kotte ruler and other Sinhalese officials as captives to China (Elleman, 2019: 23).

The historical reports have narrated the waging war against Kotte was mainly agitated by the disrespectful and hostile behavior of Sinhalese towards Chinese fleet. Even after presenting Kotte ruler as a Chinese prisoner, Chinese emperor granted him pardon after receiving the meek apology and complete obedience. This is just an example that we can trace the Chinese perception on small nations. As China located herself as the middle kingdom or omnipotent cultural, political authority, Chinese attitude towards less powerful states always took a paternal bent as it was duly portrayed in concept of *Le*.

Gift giving has been another intrinsic feature in Chinese mode of international legal and state practices, which dates back to the original teachings of China's ethical guru Confucius, whose notion of uplifting a state was not essentially attributed law and it was rather based on virtue. According to Confucius "Law is necessary, when virtue fails. In contrast, if a ruler leads first with law, the populace will not have a conscience and will only fear punishment" (Turner, 1993: 287).

In emulating the principle of virtue, the importance given to ritual has played rather significant one, because in the Chinese ancient book of rites, the governance and giving were linked to ritual. It was believed that gift giving as a ritual was filled with reverence and sense of generosity and also it was expected to receive blessings from receiver. This ideal of gift giving continues even today as an important principle in Chinese approach to interstate relations. In Chinese world view, China being the central state of the earth continues its influence towards smaller states in a poignant way through gift giving. As a matter of fact, this Confucian ideal has aptly worked in most of the states where China upholds its influence.

Particularly, in Sri Lanka the pro Chinese governments of Sirimavo Bandaranaike and Mahinda Rajapaksa were frequently blessed with Chinese gifts grants as country's only international convention center and theater were builds by Chinese government as tokens of comity (Amarasinghe, Jayawardane, 2018). It clearly indicates how fervently Chinese Confucian ideal of gift giving works in modern Chinese view on interstate relations, which always has been an inexplicable dilemma to Western world to understand.

3.2. Direction of international law after the formation of People's Republic of China

The disbandment of Chinese imperial order and the permanent end of traditional Chinese social order through the Communist upheaval raised a new question of seeking a new legal identity as it wiped out the Confucian influences prevailed in pre-revolutionary China. The entire

revolutionary discourse in China was not akin to the Bolshevik idea of revolution in Russia though China was heavily influenced by Marxist –Leninist thoughts. Nevertheless, the revolutionary efforts in China were predominantly mixed with Chinese nationalism that persisted even after the establishment of People's Republic of China. Especially, since the death of Stalin, China began to diverge from Soviet ideological hegemony in pursuit of its own unique place in world that was motivated by chairman's Mao's political ideology.

China's ambition of locating herself in her destined unique position in world became the paramount feature of Chinese attitude towards international law since 1949. As I stated above, Chinese nationalism appeared to be the overarching principle of this broad project and by all means it could be aptly understood why nationalism became a greater concern for Chinese vision of international law through tracing its colonial encounters with West and its decay of power at the hands of European nations.

The treacherous usage of international law by European powers in favor of their power expansion such as forcing imperial China to entering into unequal treaties paved the path to create a suspicion among Chinese elites towards international law. For them still China held the helm in civilized world and European international law was nothing more than an oppressive tool. The skepticism on universalized international law continued to exist in post-revolutionary China and Communist party's astute mechanism of placing China in its unique place was very much aligned with its nationalism. Secondly, these bitter experience China learnt from its past encounters with Western nations enabled China to believe in its physical strength rather than believe in an international legal order. In fact, it was not just an expression when chairman Mao stated "power grows out of the barrel of a gun ". He meant among other things that China had to face the reality that political and legal authority presupposes international physical power. In an article written by an American attorney named Daniel J. Hoffheimer titled "China and the International Legal Order; An Historical Introduction ", he states:

"Pragmatism is the most important theme that parameters China 's ever changing practice of international law. It possesses a dialectical capacity to turn adversity to advantage and weakness to strength. Despite the continuities in the past and China's bitter distrust of Western international legal rules and ideals, China has, in some important ways, become a zealous believer in some of the basic assumptions of the Western legal order" (Hoffheimer, 1979: 264).

However, the changes primarily occurred in Chinese legal academia in post-revolutionary China has treated international law as a unique system which should not make any conflict with domestic law. As an example, Wang Tang China's premier jurist in post-revolutionary era advocated for the mutual harmony and conspicuous separation of international law from domestic law. The academic discourse intensively grew in China caused some profound changes in their attitude toward international law and most of Chinese scholars were enthusiastic in brining Confucian philosophy to narrate modern international legal disputes.

In particular, the reluctance of Chinese government to approach International Court of Justice as a method of settling international disputes could be perhaps understood as an issue arises from China's civilizational attitude towards *Li*. In its Confucian culture the prevalence of *Li* always encouraged the disputants to solve their problems through mutual dialog rather than seeking justice from litigation, because in Confucian philosophy, minimum order was characterized by the absence of litigation.

Chinese pragmatism on international legal order took a massive shift in 1978 when the Chinese government decided to open China to the world and to shift the work priority from class struggle to economic development. The rapid changes took places in China for past few decades in transforming itself to a modernized economic boomer affected its systematic adoption of international law as a realist project. Chinese scholars primarily accepted and affirmed the priority of states in this paradigm shift of their attitude towards international law. Especially, Wang Tang was one of key proponents who made a crucial empathy upon states. He states "The sum total of principles, rules, regulations and systems which are binding and which mainly regulate interstate relations. while states are subject to the binding force of international law, they are also the makers of international law. Therefore, the basis for the legal effect of international law can only be attributed to states themselves, that is, the will of states" (Wang, Wei, 1981: 1).

The bottom line of any inquiry exploring the civilizational features of Chinese attitude towards international law would be based understanding China's political changes of transforming

herself from a decadent imperial feudal state to a revolutionary state. Also it requires to understand how Chinese have assimilated Confucian order interpret international law and relations as their civilizational legacy. It is true that certain changes like pragmatism and flexibility entered Chinese perception on international law, yet the core element of Chinese legal thought Li still plays a paramount role in shaping China's global vision of international law as an influential factor of Chinese value system. Regarding the civilizational legacy predominantly appearing to be important in China, Prof. Pan Juwu states:

"In the Chinese mind, international law and international Li are generally inseparable and before the establishment of international Li, international law cannot be called a real law. In that case, priority should be given to the work of establishing or revisiting Li at the international level" (Junwu, 2011: 238).

3.3. Modernity of Peter the Great and Russia's entry into international law

Russian position on international law prior to Peter the Great's herculean task of modernizing Russia remained much obscure. But, this twilight position does not affirm Russia was totally alienated from understating international legal practices during its initial stage as a community of principalities consisted of Rus tribe in 10th century. Rus nobility was known to medieval Europe and their relations were extended to Germany, Poland and considered Byzantium to be their spiritual shrine. Nevertheless, Russian geopolitical space became completely obsolete and deviated from Western Europe when Kiev Russ principalities were crushed by Mongol invaders. Even, after Moscow Grand Duchy upheld its power over Mongol Tartars, the consequences of isolation from Latinized Western Europe continued to be visible in the Russian state apparatus.

In ascertaining the intrinsic civilizational position of Russia on international law, one has to obviously look at its medieval dark political anarchism filled with catastrophic events. The influence of Russia's alienation from Western European states made the biggest impact of its entire history. From an international legal point of view, its effects were visible in 18th century Russian diplomacy, even after Russia embraced Western modernity under Peter the Great.

The Peter's victory over Swedish empire in Battle of Poltava was an iconic moment in Russian history in many ways. Politically, it proved Russia's position as a newly awakened giant from a long slumber as Peter's victory was followed by Russian entry into the Baltic region resulting in the Swedish decline. But, Peter's victory over Swedes became more decisive in Russian ideological history as the reforms implemented by Peter the Great in the aftermath of Poltava created a new space for Russia in Western geopolitical map. A prominent scholar in Western academia on Russian approach to international law William E Butler states

"Peter the Great's reign sharply accelerated what theretofore had been a gradual reception of European ideas. His keen interest in tapping Russia's natural resources, securing its frontiers, strengthening its military power, and reforming its antiquated institutions meant that western technology and learning were sought actively rather than tolerated passively. Agents were dispatched abroad to purchase libraries and re- cruit personnel. Facilitated by the introduction of a new civil script in 1708, the translation of European books into the Russian language increased, and young Russians were sent to study in European centres of learning" (Butler, 2002: 6).

As Peter accelerated the modernizing process of Russia as a European state, the attitude towards international legal practice became more coherent from its old twilight form and under Peter's instruction European international law literature written by scholars like Grotius and Pundufft were translated into the Russian language. However, the attempt to assimilate Russia into Christian European nations who practiced international law was attributed to Peter Shafirov who served as a minister in the Court of Peter the Great.

Shafirov and his role in creating international law scholarship in Russia in a systematic way have been viewed from a different perspective in modern academia. The view expressed by Buttler towards Peter Shafirov has painted Shafirov as a less significant jurist who cannot be compared with the 17th century canonical jurists in international law like Grotius, because Buttler viewed Shafirov's effort as a mere panegyric attempt to glorify Peter the Great and his victory over Swedes. But, I argue Shafirov's attempt of introducing international law to Tsarist Russia was more than an act of a panegyrist or rewriting the existing international legal practice. Because, he explicitly showed his claim of Russia as a civilized country that can be on par with Western European states even though Russia stumbled upon *ius publicum europaeum* as a late comer. By the time Peter

started his modernizing process in Russia, international law in Europe was relatively in a stable and advanced position. Especially, the reception of international law in Western Europe was considered a privilege and it was never regarded as a universalized law applicable to all the nations equally. The notion of "Civility" was the main yardstick that opened the gate for international law and civilized status was only confined to Latinized Europe, whereas the Ottomans, Africans and other nations outside Europe were excluded from this prestigious club.

The situation with Russia was rather peculiar and indeed, its legacy with Western Europe did not allow Russia to be completely isolated from Christian Europe, yet its domination under Mongol yoke for a longer period and the great schism with Rome made Russia's position incompatible with Western European nations. Also, the rift between Moscow and Latin Europe was not completely attributed to Western arrogance: rather, it was mutual (Malksoo, 2008: 216). In such a historical context, the attempt of Shafirov in his scholarly work was akin to an act of yielding to gain acceptance in European club of international law. But, the trajectory developed in Pre Peterite Russia had disdained Latinized Europe as a heretic civilization which dwelled in the wrong faith. On the other hand, Constantinople, being the paragon held by Moscow as Second Rome fell into the hands of Ottomans in 1453, moreover it's union with Latinized Florence before its decline had already displeased Russians. Orthodox monk Filofei's letter to Moscow grand prince Vassilij III and Ivan the Terrible in 16th century had appealed both of Tsars to accept Moscow as Third Rome. The "Third Rome doctrine" developed by Filofei in 16th century seemed to have emboldened Russian Tsars to consider Russia's position the rightful place for Christianity and their attitude towards Latin nations took a sceptic approach (Klimenko, Yurtaev, 2019: 235)**.** In the backdrop of such a grim historical background, Peter Shafirov made his contribution of vitalizing international law in conformity with Western European standards. It is quite interesting how Shafirov was lamenting about the fact that Western ambivalence towards Russia and he struggled to prove Russia as a civilized, normal, European country. In writing his magisterial work, that happened to be the first Russian text on international legal practice, Shafirov stated

"For several decades the Russian people and state have been discussed and written about in other European States as are the Indians and the Persians and other peoples which have no communication with Europe except some trade. Russia was not seen as participant in European matters of peace and war and was even rarely counted among the European nations" (Shafirov, 1973: 2).

This paragraph indicates Shafirov`s infatuation with the system of civilized nations and notion of sovereign equality emerged after Westphalian order and more importantly his text denotes how ardently he determined to place Russia in the elite club of "law of nations "which was exclusively limited to the set of civilized nations in Europe. However, the irony of Shafirov's greatest desire of admitting Russia to this elite club was not compatible with what Russian state interests stood for. In fact, this anomaly was one key feature that portrayed the conspicuous civilizational difference from Europeans.

For instance, sovereign equality was one of the enshrined principles of the law of nations that Shafirov reverently adored. Yet, it was not a mere principle arose out the blue as the acceptance of civilized Christian nations in Europe was rooted in the legacy of Thirty Years War, which affirmed the system of *ius publicum europaeum*. But, this was not the system that Russia had adhered to practice. Filofei's "Third Rome" doctrine had imbued with Russian consciousness that urged Tsars and citizens to see Russia as a universalist state rather than another equal sovereign with Latinized Europe.

Peter the Great and his reforms could largely sweep off the archaic state apparatus in Russia, but it could not completely obliterate Russian cultural and ideological difference from Latin Europe regardless how fervently Peter persuaded to Europeanize Russia. In such a context the attempt made by Peter Shafirov to depict Russia as a normal civilized state that could be on par with Latin states in Europe was an act against odds. Although he portrayed Russia as a state accustomed to international law, obliging to preserve sovereign equality, Peter the Great himself still regarded Russia as an imperial power. Shafirov being a panegyric to Peter legitimized Russian victory over Swedes and the legality of the disputed territory as a province under Russia's domination from the ancient time. The conclusion of Shafirov's "Discourse "was written by Peter himself, where Tsar made some remarks completely contrary to Shafirov's idealistic vision of locating Russia in the family of international law. In conclusion, Peter states

"By the assistance of almighty God, Russia is now become formidable that we now see a nation who were the terror of almost of all Europe, vanquished by Russians. And I dare say, thanks to God alone. They dread no power whatsoever so much as Russia."

Peter Shafirov's work has left a significance in ascertaining Russia's civilizational value and the salient way it remained distinguished itself from European understanding of international law. From one hand it was an effort of a Russian jurist to justify the eligibility of his country to be a part of international law practised by Latinized Europe, but from the other hand, his self-claim on Russia's modernization as a normal Western state maintaining the required standards on preserving sovereign equality principle was refuted by Shafiriov's arguments that affirmed the omnipotence of Russian imperial policy, in particular, the views he shared in "The Discourse" about previous treaties Russia concluded with Sweden were completely written from his disdainful perspective towards Sweden and dismissed the validity of them as he viewed them as unjust to Moscow. In fact, his position of dismaying the previous treaties with Sweden was another notable factor which discloses civilizational legacy Russia revered, because the yardstick to determine a treaty in Russia had been completely a different practice from the West.

In Latin Europe the concept of a contract was based on reciprocity and the international legal maxim "*Pacta sunt servenda*" had its genesis from European practice. At the same time, the place of a treaty in Russia had a traditional approach which regarded entering into a contract as merely a humane matter. The disrespect for contracts as humane matters continued till the modernization of Peter, but even after Peter unveiled international law and European style statehood to Russia, it's old medieval attitude towards treaties and interstate relations remained prevalent.

3.4 Twisted Identity

After the publication of Discourse by Shafirov, the next turning point of the Russian approach to international law appeared in the second half of the 19th century with the works of Fyodor Fyodorovich Martens. As Lauri Malksoo aptly described "Martens' ideas were strongly influenced by who he was: a man from the border" (Malksoo, 2008 : 221). Being an ethnic Estonian, his legal acumen was sharpened by the Germanic influence which was not strange at that time as Baltic region and St. Petersburg were under the Germanic intellectual influence. In Martin's case, his obsession of westernizing Russia's international law discourse was a project that he persisted with the solid faith that international law would play a role a "gentle civilizer of Russia "from its archaic roots. Indeed, Martin portrayed himself as a strong proponent of the idea of international law as an elite tool that applies only to civilized nations. But, his position cannot be merely regarded as a racist tendency. It was rather based on the sincere conviction of Martin regarding the liberality of Western attitude to international law as a more coherent and organized system that may grant more rights to its subjects. In his vision old Russia before Peter I was seen as an uncivilized country, his approach to revitalizing international law under Europeanization was sort of a civilizing project. He argued:

"It would be erroneous to consider Muscovy as member of international exchange and to maintain that the Russian people and its government already at that time understood the necessity of international communication with Western powers. The foreign relations of Russia of that time were factual: in terms of its cultural conditions, social and political structure. Muscovy could not possibly have entertained steady legal relationships on the basis of equality and reciprocity. Such relations started only in the time of Tsar Peter the Great and only in the time of Catherine II received a firm basis" (Malksoo, 2008: 221).

Nevertheless, Martin's effort was not adequate to liberate Russia from its aged old "otherness" and its different notion of international law. The real titillating position about Russia's identity had always imbued with its discontent with Western Europe and Russian understanding of the world has derived its legitimacy through Byzantium. It is not an exaggeration that tracing Russia's historical ties with Byzantium church illuminates understating her approach to international law. Martin's student Barron Michael Taube disrupted Martin's school and its ardour on Europeanizing the international law academia in Russia. Being Prof. Martin's own student, he further looked into the historiography of international law in Russia and argued the paramount of role of Byzantium ideology in Russian history as an epoch-making factor. As an example, Taube has taken how *bellum justum* doctrine developed in the West in parallel to the separation of powers of the Pope and King which further indicated waging a war against another Christian state was

essentially evil. But this was not the doctrine professed by Byzantium relating war and its notion on war was determined by the will of the ruler (Malksoo, 2017: 123).

In Taube's account, this civilizational difference between Latin Europe and Byzantium played a crucial position in filtering international law and diplomacy to Russia. Historically Russia was a confederation of an alliance of many independent principalities before the rise of Muscovy grand duchy in the 15th century. Taube regarded those principalities such as Kiev, Vladimir and Moscow upheld their own medieval system akin to regional international law. Taube ignored Martin's argument of describing Russia as an uncivilized country prior to Peter the Great's reforms and his narrative on Russian history shows Russia continued its own standards in interstate relations and international law despite its antagonism with the West. However, Russia's relations with the West essentially began to wane by Mongol-Tarter invasion. He pointed out the main cause that rendered the separation of Russia from *Republica Christiana* as the two hundred years' domination of Mongol-Tarter rule in Russia and this rule left a despotic legacy in Russian state system even after Mongol-Tartar rule was defeated in 1481. Taube states:

"The old confederation of Russian principalities and republics with more or less internationalist tendencies were absorbed in a new Empire with Moscow as political center, in a unitary and despotic state, oriental in foundation and half way Tartar, half way Byzantium, with orthodox mysticism and arrogant and aggressive nationalism. It is evident that these political changes in the political stricture of Eastern Europe did not remain without influence in the domain of international law and results could only be negative" (Malksoo, 2017: 123).

The Tarter legacy transformed into a military state with an apish vison personality dwelled in a vision to lead Russia as true Christian guardian. In fact, a letter written by papal delegate to Moscow during the rule of Ivan IV had stated "These people think that the whole world is subordinated to their sovereign and that all people are but his slaves ".

Perhaps, Taube's view can create a certain uproar for international law theorists today as his views on the scope of international law apotheosized its European superiority and he lamented Russia lost its greater opportunity to be a part of *Republica Chritiana* as a result of Tartar domination which resulted in exposing Russia to oriental despotism and Asiatic practices. At a lecture in Kiel University in 1927, Taube stated:

"There were two Russia's. The pro-European upper class and the enormous half-Asiatic Slavic-Finnish-Tatar mass of the people that was unfortunately also very barbarian" (Malksoo, 2017: 126).

Byzantium upbringing upon Russia's national consciousness as a paramount factor continued albeit Russia's exposition to Western Europe. The authority of Tsar as divine representative on earth and Russia's persistent claim for the authenticity of its Christian heritage further deviated its affinity with Europe. The reforms carried out by Peter the Great and his successors in modernizing Russia in accordance with Western European traditions could not completely abandon Russia's Byzantium heritage and in examining its role in international law that one needs to understand Russian imperial policy at that time was much eager to preserve its otherness from Latin Europe. It's part of European concert in Vienna in 1815, its cultural fascination towards France such as a speaking French like as a language of elegance or its intellectual debt to Germany in academia played less significant roles pushing Russia exclusively towards Western international law.

The civilizational difference of considering themselves unique was not entirely diminished when Russia was engulfed by a massive chain of events in early 20th century which finally produced the world first socialist state USSR based on Communist ideology. International legal scholarship existed prior to 1917 revolution was strongly affected by the Bolshevik regime as Marxian ideology inherently loathed law as an oppressive tool. Lenin's own position depicted in State and Revolution was similarly applicable towards international law as well in a disdainful way, but gradually Soviet Union began to realize the inevitability of dealing with international law despite their ideological abhorrence on it (Amarasinghe, 2019: 73).

In particular, the international legal scholarship bloomed after 1917 negated themselves from considering universality of international law in accordance with any international legal thought, instead their concern on state sovereignty as a cardinal argument took an adamant approach. Even though the state was rejected by Marxian doctrine, the Soviet jurists secured state centrism as they opposed to individual-centrism. The greatest dilemma loomed before Soviet jurists were to locate

international law following Communist ideology, in doing so they placed international law's validity under the guise of Soviet state interests. Prominent early generation Soviet jurist Yevgeni Korovin initially argued that the Soviet Union should create their own discourse on international law and denied the universality principle, but later he modified his coarse criticism on international law by replacing it with a phase called "International law in a time of transition" (Snyder, Bracht, 1958: 62). Having consolidated such a pretext, the Soviet Union continued to promote the concept of socialist international law as an intrinsic form of international law applicable between the USSR and other socialist states. On the other hand, it is important to note that the Soviet attitude to international law throughout the Cold War era was based on the foreign policy of Moscow. The intensity of changes took place in Kremlin always made its impacts upon the changes in Soviet interpretation of international law. Maliksoo has aptly given a vivid picture on the susceptibility of Soviet international law doctrine under their changing political principles. He states:

"To the extent that Soviet foreign policy changed from Stalin to Khrushchev, for instance-international legal doctrine changed as well, and instead of the more hostile Korovin, the more conciliatory Tunkin became more prominent" (Malksoo, 2016: 260).

All in all, the central tenants of Soviet reception of international law was akin to their political principles, yet, the traditional aged long Muscovy's routine of sate centrism remained static as a Tsarist ghost from Imperial Russia and it was rather paradoxical as Soviets painted state as the devil incarnate.

3.5. Civilizational thinking in Post-Soviet international law

Many anticipated with some sanguine hopes Russia would return to Europe after the collapse of their communist empire and this hope was fueled by a sense of optimism shown by Boris Yeltsin when Russia officially joined European Court of Human Rights in 1998. Many pundits described it as an act symbolizing Russia's yearn to embrace European values as she did under Peter the Great in the 18th century. Nevertheless, the Russian position of international law in Post-Soviet space did not entirely transform into a lenient one. Especially, the crisis erupted after the annexation of Crimea and the constant reports on human rights abuses have raised a big question mark before international legal practice in contemporary Russia. It seems to indicate that Russia's historical uniqueness of being away from Latin Europe still shapes its legal thinking. For instance, Russia's denial of admitting individuals as a subject of international law stands as a pivotal feature in post-Soviet confrontation with western international law. The abundant attention upon state sovereignty over any other rights has not been forsaken in the post-Soviet era and perhaps in examining Russia's role in the aftermath of Crimean crisis that one can regard Russia has fervently deviated from European liberal values. President Putin's remarks at Federal Assembly in 2002 on upholding its state supremacy can be regarded as Russia's state policy on maintain their vastness as it was preserved under Tsars and Communists unchanged. Putin stated:

"All our historical experience testifies: such a country as Russia many live and develop in the existing borders only if it is a powerful state. Maintenance of the state in a vast space, preservation of the unique community of the people while keeping strong positions of the country in the world-that is not only enormous work" (Malksoo, 2016: 271).

Given statement of Russian leader denotes why Russia eagerly strives for protecting territorial sovereignty while keeping low enthusiasm over issues such as individual rights, human rights and non-state actors. The civilizational difference between Russia and the West has become double edged sword as Russia's real civilizational position in international law appears ambiguous. In fact, we cannot entirely exclude Russia from European civilization and its intellectual influences. This twisted dilemma has perhaps sharpened Russia as a unique civilization and the *sui generis* practice Russia upholds in international law can be regarded as an offshoot of this civilizational uniqueness.

The argument I illustrated above regarding the reluctance of Russia throughout its history in denying to accept individuals as subjects of international law shows the country's dogmatic views inevitably clashing with Western values and ironically this position has undergone some fewer changes in the annals of history since Tsarist regime to present Russian federation. During the period of Soviet Union that any effort to uplift individual rights or admitting individuals as subjects of international law got nipped in the bud with vehement opposition of Soviet jurists.

Soviet opposition pointed out brining individuals as a subject of international law would lead to undermine state sovereignty and propagate western liberal values. However, the staunch state

centrism prevails in Russian international law scholarship even after the fall of communism convinces the continuity of Soviet tradition as an inherent part of modern Russian international law. A distinguished Russian Jurist Prof Yuri M Kolovos once affirmed that removal of Marxist Leninist ideology has not completely changed the main features of Russian international legal theory and it remained essentially the same as it was in the USSR with strong emphasis on state sovereignty and legal positivism (Fabri, Jouannet, Tomkiewicz, 2008: 169).

In seeking the civilizational roots of Russian approach to international law, we need to further investigate the puzzling debate remains unanswered about Russia's destined position in civilizational order. Contemporary Russia keeps one foot in European space and its institutional legacies reminding of Peter's Europeanization, but simultaneously it keeps other foot in its own unique civilization as a critique of European liberal values. The old aged antagonism between Orthodox Russia and Latin Europe seems to have resurrected from a different way as Russia still adheres to its Muscovy tradition of orthodoxy while Europe reciprocates it with sense of skepticism. It is a fact and not even a conjuncture that notion of civilization has solidly made some strong impacts in Russia's attitude to international law. The argument developed by Russian scholar Safronova proves the crucial importance of civilizational difference in ascertaining some of the features Russia determines to uphold in its approach international law. She states

"Values that have primary importance in Europe and American civilization, are less important to other people. Thus, many Western ideas such as individualism, liberalism, democracy and separation of church and state and so on are not reflected in Orthodox, Muslim, Buddhist and Confucian cultures. The nature of the categories of freedom, justice and equality is understood differently. Different civilizations, for example do not reject human rights or human freedom, but understand and evaluate it differently. Unfortunately, current legal standardization takes place based on West European legal culture" (Safronova, 2013: 43).

4. Results

As I stated at the beginning of this paper, the evaluating process of civilizational values and its contributions to international law is a horrendous task that brings detrimental results. Yet, the above mentioned unique two civilizations China and Russia have proven the utter importance of their own civilizational values in embracing international law. The Confucian model and its deeper influence upon Chinese history set the cause of transform Chinse psyche into a mind of a recluse who shared nothing except the contempt for other civilizational values. The Chinese notion of the middle kingdom and their lack of understanding on equal treaties never sprang out of the blue as those principles were completely excluded from Chinese civilizational thinking. Also, the intrinsic political and cultural legacy in Russia has galvanized its own system of international law with little bit of an exposition to European intellectual influences. The civilizational distance of Russia from Europe has always shown Russia's own heritage in many spheres and I attempted to illustrate the anomaly born out of Muscovy tradition and its constant clash with Latin Europe. This confrontation has stood throughout the history regardless of Russia's internal changes and it still stands form today.

Nevertheless, the fact we need to understand is that concept of "civilization" in international law should not be taken with veneration as how European colonizers relied upon in 19th century by creating a distinction between Europe and rest of the world. Mainly, the general scope of modern international law deals with states and not with different civilizations. But, analyzing the civilizational values in particular countries widen the gaze to appreciate and understand their stances properly regarding some of the key issues in international law.

5. Conclusion

In this paper in assessing the historical approaches maintained by China and Russia towards international law, I described how both states showed a cynical tendency in certain features in international law which were deeply admired by the West. In tracing their lethargic position over those issues such as principle sovereign equality and admitting the individual rights, I aptly described the solid influence laid down by both Chinese and Russian civilizational values over their legal acumen. The given example of Russian Orthodox ideology nourished by Byzantium heritage of admitting the authority of ruler's supremacy and its deep influence upon state centrism of

Russian attitude to international law further proves connectivity between civilizational values and international law in modern Russia.

The saga of modern international law has been deeply rooted in modern European history and its contributions. The desire of Europeans to seeks common unity of their civilizational values in the political-legal sphere was escalated after the defeat of Napoleon and their ardent motivation to uplift social, political and cultural values common to all European nations became the fundamental inspiration for the great creation of international law. Author Guizot states

"Civilization is a sort of ocean, constituting the wealth of the people, and on whose bosom all the elements of the life of that people, all the powers supporting its existence, assemble and unite. It is evident that there is a European civilization; that a certain unity pervades the civilization of the various European states" (Guizot, 1997: 11).

The civilizational values Europeans adored became arch pillars of their standards of international law and their claim over its legitimacy was frequently boasted by this civilizational rhetoric. The 19th century European international law scholars could not imagine universalizing international law beyond European geo political space as their concept of international law was a unique product of the special civilization of modern Europe. This created the dilemma of extending international law to the nations outside Europe as Europeans hesitated whether they were privileged to be a part of this elite club. Some Victorian commentators believed that states that did not fall under European civility will be admitted to international law gradually, in particular when a state is brought by increasing civilization within the realm of law. Their civilizational superiority often excluded Non-European states from entering into the shrine of international law. Even Ottoman empire and its legal practice were seen by European scholars as semi-civilized mechanism despite European states had been making treaties with Ottoman sultans since the 16th century. The humiliation envisaged by Chinese at European hands in accepting unequal treaties was more or less a part of this civilizational haughtiness.

Nevertheless, the two historical approaches of two unique countries on international law that I analyzed in this paper have clearly shown the notion of civilizational arrogance was not only an aggrandizement confined to Europe. On the contrary Chinese pride of their position as the middle kingdom or only civilization in the word and Russia's ambivalence of accepting Latin Europe and its values with its Orthodox dogma show us the importance of civilizational role in carving international law. A plethora of historical, religious and philosophical roots pervaded in both Chinese and Russian societies played a vast role in emboldening them to consider themselves unique. It becomes rather conspicuous those roots played a dominant role in emboldening their modern-day practices such as a strict sense of state centrism.

The duty that appears before modern international law historians or scholars is not to persist the retrospection of the civilizational rhetoric as the 19th century European scholars did. But understating the regional difference based on civilizational legacies in different places is vitally important fact to fathom how international law functions. The entire saga of international law may stand as a quest to seek the universality and unity for all the states. But it will never get rid of the civilizational differences that have painted different colours in the history of international law.

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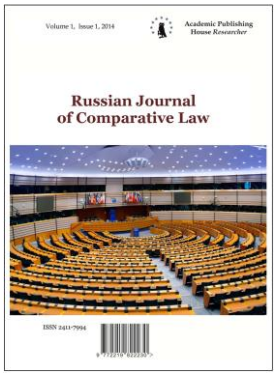

The Doctrine of Preventive Self-Defense: Where are the Limits of Reasonable?

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Abstract

The realities of the modern world brought the concept of preventive self-defense into the forefront of international law. The new doctrine of the "preventive" war as a way of eliminating international threats comes to replace the legal prohibition of war. The spread of terrorist activity together with the development and spread of weapons of mass destruction forced international community to change its views in favor of preventive self-defense. A certain operations were carried out by the West that created dangerous precedents and revealed the inconsistency of preventive self-defense with the concept of sovereignty of states. Terrorist activity started to be used as an excuse for changing the regime in sovereign countries, mainly by the US.

Keywords: self-defense, international law, terrorist.

I. Introduction

In the current century, terrorist groups operating on the territory of another state came to the forefront as a new challenge and threat, which required the use of force by one state against another state, from which a threat of non-state actors is taking place. Therefore, in the doctrine of international law attention is especially drawn to armed terrorist acts of non-state entities. This raised the issue of using pre-emptive self-defense against non-state actors. This is especially true in connection with the fact that there is a serious danger of getting of weapons of mass destruction, such as biological, chemical weapons and radiological bombs into the hands of various terrorist organizations.

Today, in conditions of returning to the "cold war", the problem of pre-emptive strikes becomes extremely urgent. The "US National Security Strategy" of 2002 (The National Security Strategy) provides for military operations outside their borders, including without the sanction of the UN Security Council. The concept of preventive self-defense (called the "Bush Doctrine") provides unilateral action as a preventive self-defense against a potential danger. During his first term, US President G. Bush introduced a new category of self-defense - preemptive or preventive self-defense, which he claimed to be legally justified in the world after September 11th. President Bush first mentioned the importance of preemptive self-defense in addressing the UN General Assembly on September 12, 2002 (Statement by President Bush).

It is sad that the world community in recent years began to get used to the idea of using military force in a preventive manner. But in fact, the preventive war against Iraq under the Bush doctrine became a huge mistake in the history of American foreign policy. And the fact is that now, fifteen years later, many Americans can not allow even the idea of repeating such a mistake about Iran, as it is horrifying.

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2. Materials and methods

International law textbooks published in Russia and the United States were used as a research basis in writing the article. Russian school of international law is more fundamental and systematic, it is represented by dozens of textbooks in which, on one hand, the place and the role of international law in the international system is present, but, on the other hand, there are different views on some aspects the system of international law and specifics of its implementation. In the analysis of the doctrines formal-legal, systemic-historical and comparative-legal methods of research were used.

3. Discussion

3.1. Principle of non-use of force in the UN Charter

The principle of non-use of force and the threat of force, which places war and other forceful methods of foreign policy outside of law, began to be formed only in the twentieth century. For the first time the principle of non-use of force or threat of force was legally enshrined in 1945 in the UN Charter. The UN Charter introduced into international law an imperative principle of prohibiting the use of force and the threat of force that encompasses all types of violence: armed, economic, political, etc. The formation in international law of the principle of prohibition of an invasive war, and later, the principle of non-use of force, institute of international legal responsibility. A state that has committed such a serious crime as aggression is responsible for it not only to the victim of aggression, but also to the entire international community. The threat to peace and security must be seen as an encroachment on the rights of all states.

Paragraph 4 of Art. 2 of the Charter reads: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

The principle of non-use of force or the threat of force is of a clearly expressed universal character. This provision of the Charter applies to all states, since the need to maintain international peace and security requires that all states, and not only members of the United Nations, adhere to this basic principle of international law in their relations with each other. In the Millennium Declaration, adopted at the UN Summit in 2000, the international community is faced with the task of increasing respect for the rule of law in international as well as domestic life.

According to this concept, self-defense (Article 51 of the UN Charter), together with the collective measures taken by the UN Security Council to restore and maintain international peace and security (Chapter VII of the UN Charter), are an exception to the principle of non-use of force or the threat of force (Article 2.4 of the UN Charter).

These foundational concepts contain different legal content, although the boundary is often difficult to distinguish:

1. Putting a pre-emptive strike in turn involves the imposition of an armed strike in the presence of a clear, imminent threat. There is a concept close to the notion of "preventive striking", namely "preemptive force" or "preemptive striking".

2. A preventive war is started to prevent the enemy from changing the balance of power in his favor. Because of the threat of speculation by preventive wars, classical international law considers these wars as acts of aggression. Sometimes it is difficult to understand whether war is an aggression or a preventive action. Preventive strike involves a blow to the sources of imminent danger.

Terry Gill uses the notion of "preemptive self-defense" to refer to the exercise of self-defense in connection with the sheer threat of an armed attack that is being triggered in the process or at the point. "Preventive measures" against "preventive self-defense" refer to the exercise of self-defense in connection with attack threats, which are somewhat more remote in time, but nevertheless are, or at least are likely, in the current circumstances that have developed at the moment. Phrases "preemptive self-defense" or "pre-emptive actions" apply to both options. None of these terms is intended to describe actions taken in response to a simple possibility of attack at some uncertain future time in response to a threat that has not yet manifested itself in any significant sense. "Efficiency" is the concept of an immediate or immediate threat of attack in the context of pre-emptive self-defense, although secondary attention will be paid to the term as one of the conditions for exercising self-defense in a more general sense (Gill, 2007: 114).

The new doctrine of the "preventive" war as a way of eliminating international threats comes to replace the principled prohibition of war. In the doctrine of international law, a new form of the institution of self-defense, namely, preventive self-defense, is widely discussed.

3.2. Expansion of the meaning of the concept of "pre-emptive war" by the Bush administration

The administration of President George W. Bush tried to impart the new meaning of the concept of "preemptive war" and expand it so much that the difference between the pre-emptive war (for the purpose of self-defense) and the preventive war has practically disappeared, in order to justify his senseless invasion of Iraq in 2003 (the White House's official position was to allegedly prevent Saddam Hussein from gaining possession of weapons of mass destruction) – not caused by necessity and leading to catastrophic consequences. Due to the irresponsible actions of the US administration, events took place, which in no way were desired. Iraq being dissolved, the regional puppet war between Sunnis and Shiites has begun, and the "Islamic state" has arisen.

It seems that the notion of a "preemptive strike" is introduced into international law from the military regulations of the armed forces, which regulate the tactics of conducting military operations. At the same time, there is a fine line between the concepts of "anticipation" and "prevention". Evidence of positions regarding the extent to which the actions of states that have used force or the threat of force were lawful will depend on the degree of their credibility and would be interpreted subjectively. And in this case, it is highly likely that not the force of law, but the law of force, will act.

Prior to the arrival of President George W. Bush, the use of preventive war as a means of preventing the spread of nuclear weapons was considered illegal by the United States. The Bush doctrine of preventive self-defense was originally designed to significantly expand the already blurred and uncertain criteria of imminent threat. Here is the very place for saying by Inis Klaud-Jr.: "almost any government program, from military supply to construction of highways and education, can be justified in part as the protection of national security" (Inis, 1990: 36).

It is difficult to disagree with this. Any national security doctrine, unfortunately, brings the problem to the sphere of the rule of law, since claims related to national security often do not fit into the generally accepted legal framework. The principle of government under the rule of law is under pressure, since the need to protect the vital interests of the state presupposes the use of a brute force. In Matthews's opinion, the danger that such doctrines contain is that a temporary withdrawal from the rule of law tends to acquire a fairly permanent character (Mathews, Albino, 1966: 37-38).

It should be noted that all states, and especially the hegemons of the planet, have national security doctrines and approach the problem of the correlation of law and power in different ways. On the issue of national security doctrines, most states have two priorities: on the one hand, the protection of national security, and on the other, the protection of the dignity and freedom of every person. This is so, since in a democratic society, striving for freedom and security, there is no other choice except for creating a balance between the freedom and independence of the individual, the state and overall security (Nagan, 2004: 390-400).

October 26, 2015, in an interview to the CNN, former British Prime Minister Tony Blair acknowledged that one of the causes for the formation of the Islamic State was the invasion of Iraq by NATO countries in 2003. Tony Blair actually apologized for the chaos that swept the country after the overthrow of Saddam Hussein (Former UK Prime Minister). Let's add: Iraq has become an academy of global terrorism, from where the skillful terrorists spread all over the world. The actual situation that has developed in Iraq after March 2003 is unlikely to fit into any satisfactory theory of imminence. Life has convincingly proved that terrorist threat is used by US as an instrument of geopolitics for establishing an unipolar world.

The overthrow of the Hussein regime in Iraq was only one destroyed support during the breakdown of the Greater Middle East, the underbelly of Eurasia. The next victim of the Bush doctrine of preventive defense was Libya, Tunisia, Egypt, Yemen, Syria... There is a firm opinion that if there were no terrorist attacks on September 11, 2001, then neoconservatives, who gave birth to the doctrine of preemptive strikes allegedly for self-defense purposes, would simply have invented them.

Official Washington during the years of Bush's rule provoked an outburst of broad interpretation of the right to use of force or threat of force. According to his doctrine, the question

of the extent to which a particular situation corresponds to the lawful use of force in self-defense is left not only at the discretion of the UN Security Council, but, in essence, the states themselves.

The essence of Obama's foreign policy in general remained the same as that of Bush, except for the introduction of a limited number of offensive operations. In the course of his seven-year presidency, the US president reiterates that foreign policy, "smart power", as Hillary Clinton calls it, should help strengthen American global leadership. The concept of "smart power" is aimed at separation of Obama's foreign policy from the similar policy of Bush. But it failed. The US national security strategy for Obama advocated the need to "redefine" the security of the United States.

What changed after the coming to power of Donald Trump? Indeed, it remains as it was: the central element of Washington's foreign policy concept is a pre-emptive/anticipatory strike, justifying the right of the US to strike such a blow against anyone who will be considered at least potentially dangerous. The new US doctrine of preventive self-defense under President Barack Obama also placed the superpower state in a special position, as President Bush loudly announced it at the time, and under Donald Trump it still calls for a unipolar world. According to American researcher Harold D. Lasswell, such a claim presupposes the existence of a "state of national security" or "garrison state" for an indefinite period of time (Lasswell, 1941).

Acts of pre-emptive self-defense in the past decades have generated varying assessments from the international community as a whole, and the United Nations in particular. In some cases, there was a tacit permission for this problem from the United Nations. For example, when Israel conducted a "preventive" attack on Egypt in 1956, the UN did not criticize its actions, but in fact authorized the deployment of UN peacekeepers in Sinai. This universal international organization did not allocate any blame for the outbreak of hostilities and specifically refused to condemn the exercise of Israel's self-defense.

The decision of the International Court of Justice in Nicaragua in 1986, which had a great influence on the behavior of States regarding the meaning of Art. 51 of the UN Charter, not only happened during the final stage of the decolonization era, but also during a period of growing awareness of the threat of international terrorism. One of her first symptoms was the adoption by the United States of the so-called Schulz doctrine, two years before the International Court of Justice session concerning the *Nicaragua* case. This teaching was aimed at protecting the Israeli doctrine of self-defense. According to the latter, the state, which does not want to prevent terrorist attacks from its territory, will be responsible from the point of view of international law.

3.3. From passive intimidation to preventive self-defense: the inflation of legal principles

If we retrospectively look at US foreign policy, it is clear that Bush's doctrine replaced the passive concept of intimidation of the Cold War era, which relied heavily on preemptive action and active defense. The new doctrine of preventive self-defense serves two purposes of American geopolitics aimed at establishing a unipolar world. Initially, it provided a political justification for the use of force to overthrow the political regimes that threaten peace and security, as it appears to the United States. Further, it could help the US to expand the initial framework that defines the parameters of lawful self-defense of states (Sapiro, 2003: 600).

After September 11, 2001, when international terrorists attacked the United States, the international community agreed that even under the limited reading of Article 51, American self-defense was justified. The UN Security Council, for the first time in its history adopted a resolution, confirming the inalienable right to self-defense of the state in response to terrorist attacks. The Security Council unequivocally described the September 11 attacks as an "armed attack" in accordance with Article 51 of the UN Charter. But the UN Security Council has not expanded the range of states' application of the principle of the use of force and the threat of force, since it is limited by the requirements of immediacy, necessity and proportionality (Cohan, 2003: 241).

On the other hand, R. Wadgewood is also right in that the restrictive treatment of Article 51 of the UN Charter, which requires waiting for an attack to take place before responding, fetters effective actions to prevent a tragedy, does not correspond to the new circumstances in connection with the possible use of weapons of mass destruction by terrorists (Wedgwood, 2003: 583).

Until October 7, 2001, when the United States began bombing Afghanistan, interference in the affairs of a sovereign state, according to American researchers W. Nagan and C.Hammer, claimed more than self-defense in international law. In general, it was a claim to the right to intervene and change the composition of the state within the framework of the international regulatory system. This claim required an extensive interpretation of the right to self-defense in a

situation where the enemy is not the state itself, but a significant group of terrorists in that state (Nagan, Hammer, 2004: 380).

The author of these lines noted earlier that according to the statements of the American researcher M. Hakimi, the question of the use of a protective force is still unresolved, and thus military operations in Syria against international terrorists have not resolved, but rather aggravated the existing contradictions. The assertion that international law categorically prohibits defensive use of force against non-state actors loses legal power, but has not yet perished. The fact is that many states that have strategic reasons for supporting the operation against the so-called Islamic state did not themselves participate or put forward a legal justification for this operation (Hakimi, 2015 : 30).

American officials who made such decisions and wanted to solve the Afghanistan problem "inflated" the principle of self-defense in such a way that international law was not limited by any time frame for the inevitability of future attacks or the need for urgent action to repel an attack, say Nagan Winston and Hammer Creig. At the same time, the United States, intruding into Afghanistan, set itself the task of destroying all the characteristics of the "terrorist state" in it and substituting them with a new concept of statehood and sovereignty, which, according to the apologists of the "Bush doctrine", seemed more in line with the UN Charter (Nagan, Craig, 2004: 380).

Unfortunately, violence, terrorist attacks, the threat of further spread of terrorism as the consequences of US mindless foreign policy, still remain a serious problem in Afghanistan, as well as in Iraq, Syria, Libya ... As it is said in Russia, "they wanted it better, but it turned out as always."

The US doctrine of preventive self-defense is sometimes seen as a strategic goal of humanitarian intervention. It includes a claim to use force unilaterally, to which legitimacy has clearly been added since NATO troops bombed, for example, Serbia and Kosovo in 1999. Various international commissions established to consider the legality of these actions came to conclusions that although such actions were not lawful, given the circumstances, this was the right decision (House of Commons, 2000).

In fact, the expansion of the US geopolitical zone of influence has nothing to do with humanitarian and liberal goals. The US is trying to fill the emerging geopolitical vacuum in the Caucasus, Central Asia and throughout the world, which appeared after the collapse of the USSR, pursuing its economic and geostrategic goals.

Meanwhile, refraining from the threat of force or its use in international relations is a universally binding rule of conduct for states. However, in accordance with the doctrine of preventive defense, the US continues to be flagrantly trampled under art. 51 of the UN Charter, as well as the basic principles and norms of international law in general.

3.4. Bush doctrine: paradox of national and international security

The war in Afghanistan provided the necessary justifications for those officials who for a long time interpreted the UN Charter as a limited concept of self-defense, necessary to legitimize US security interests (Karon, 2003). National security parameters are not static. For example, technological advances in the field of weapons of mass destruction strengthen both the degree of protection and the sense of insecurity. The fact that one state includes in the sphere of its national security can be a cause for concern for another state. Moreover, claims aimed at ensuring the security of one state can pose a threat to the security of the entire world community. Thus, this strange neighborhood, enshrined with the help of law, consists in the fact that the claims of both state and collective national security are legally valid (Nagan, 2004: 381).

The concept of preventive self-defense began to be developed by M. McDougal, the classic of the American school of international law, who called attempts to construct Article 51 of the UN Charter as limiting the inherent right to self-defense historically unfounded and logically unsupported: “There is no conclusive evidence that the founders of the UN Charter (...) had the intention to impose new restrictions on the traditional right of states to self-defense” (Mc Dougal, 1963 : 599). He is echoed by modern authors: "Article 51 of the Charter of the United Nations recognizes and confirms, but does not limit this inalienable right... Article 51 simply expresses in part the right that exists independently of the Charter." (Yoo, 2003: 571).

The question arises: should the unilateral actions of the United States in the light of the doctrine of preventive self-defense be consistent with certain legal principles and norms of US domestic law, in particular constitutional law, as well as international law? In other words, is the

doctrine of the United States on preventive self-defense not inconsistent with their national legislation and interstate treaty obligations of both a multilateral and bilateral nature?

Alas, violations in this area are evident. Therefore, the doctrine of preventive self-defense put forward by the Bush administration has met strong opposition from many scholars. Moreover, most of the American scientists also rejected this doctrine. For example, the American researcher Mary O'Connell called the Bush doctrine of preventive self-defense a myth (O'Connell, 2002).

This is also eloquently demonstrated by a symposium organized by the American Journal of International Law on the legality of the invasion of American-British troops in Iraq. Of the nine authors who appeared on the pages of this authoritative publication, only three expressed their support for the doctrine of preventive self-defense, two of them authored by US government officials: the State Department's legal adviser William Taft and the Attorney General of the Ministry of Justice John Yu (in 2001–2003). The rest pointed to the discrepancy of this doctrine with international law, its dangerous character as precedent (Agora, 2003: 553-642).

In particular, Richard Gardner explicitly called the doctrine of Bush to be "counterproductive." For the same reasons, the American scholar sees a danger in using the doctrine of preventive self-defense at the present stage: if the Bush doctrine attributes the right to preventive self-defense only to the United States, this is "obviously unacceptable." If the Bush doctrine is positioned as a new legal principle for universal application, then it "tacitly deserves universal condemnation".

Such a doctrine can legitimize, for example, the pre-emptive attacks of Arab countries against Israel, China against Taiwan, India against Pakistan, North Korea versus South – these are the most obvious examples. It can even serve as an excuse for the post-facto Japanese attack on Pearl Harbor. As a result, R. Gardner concludes that "by expanding the right to prevent imminent attacks before the right of preventive war against potentially dangerous enemies, the Bush administration is charging a gun that can be used against the US and against the fundamental interests of a stable world order."

Of course, there were also troubadours of Bush's doctrine. For example, John Yoo, a professor of law at the University of Berkeley, along with other authors, suggested perhaps the most "weighty" excuses for a preventive war in an essay entitled "The Bush Doctrine: Can Preventive War Be Justified?", published in the Harvard Journal of Law and Public Policy in 2009 (Delahunty, 2009). The author of the essay tried to erase the differences between the concepts of "preemptive war", "preventive war" and "preventive strategy".

By the way, John Yoo was one of the main authors of the notorious and now canceled "CIA Interrogation Allowance Handbook" (notorious as a torture manual) stating that the president has the legal right to issue orders for torture by drowning imitation, sleep deprivation , inconvenient posture and other types of physical and psychological torture.

A significant number of scientists oppose any notion of pre-emptive self-defense before the actual launch of an armed security attack (Brownlie, 1963: 275-278; Bothe, 2003: 227; Randelzhofer, 2002 : 803). Another group of scientists assumes that preemptive self-defense is allowed only within the strict framework of the Caroline criteria (Greenwood, 2004; Bowett, 1958: 185-86; Franck, 2002: 97; Waldock, 1952: 451). The second opinion raises the question of whether self-defense will be permissible in response to potential threats of attack and, more specifically, whether the notion of an immediate threat for reconsideration in the UN Security Council needs in the light of changed circumstances such as terrorist threats and the possible use of weapons of mass destruction by terrorist organizations and so called rogue states.

Well-known Russian scholar R.B. Tuzmukhamedov does not include the right to self-defense provided for in the Charter of the United Nations to categorical exceptions to the principle of non-use of force. Article 51 recognizes the inherent right to self-defense, and from the legal point of view, a law can not be an exception. This, of course, does not mean that Article 51 prevails over other provisions of the Charter. He is convinced that it certainly acts in conjunction with them. As for Article 2, paragraph 4, which prohibits the threat or use of force, it includes actions aimed, firstly, against the territorial inviolability of states, secondly, against the political independence of states, and thirdly, incompatible with the purposes of the United Nations (Tuzmukhamedov, 2002).

What is the immediate threat of an armed attack, what is the correct interpretation of the relationship between the provisions of the UN Charter and customary law relating to self-defense,

and what is the relationship between the necessary defense and the rest of the law governing the use of force?

As the preemptive strikes against Iraq showed, all these debates are not exclusively theoretical. Paradoxically, the neocons assumed that there was no evidence that the Israeli attack of 1981 was ineffective and could not stop Saddam Hussein's weapons program for a long time. And they justified the war in Iraq in 2003 as a preventive – a kind of second and more massive attack on the Osirak nuclear reactor, which was supposed to destroy the still existing threat in the form of Iraqi weapons of mass destruction. That weapon, which, as it turned out after the invasion and capture of Iraqi territory, did not exist.

At the same time, it should not be forgotten that after the June 7, 1981, when Israeli aircraft launched an unprovoked attack on the Osirak nuclear reactor in Iraq, the Reagan administration supported a unanimously adopted UN Security Council resolution condemning Israel's actions. The United States representative in the United Nations, Jean Kirkpatrick, compared the "shocking" attack of Israel to the invasion of the USSR into Afghanistan. British Prime Minister Margaret Thatcher, friendly with Israel, like Reagan, condemned the raid of Israeli aviation (The Bush doctrine). Even then, Anthony D'Amato, for example, used this interpretation to justify Israel's attack in 1981 against the Iraqi nuclear reactor in Osirak. Israel would like to prevent Iraq from developing nuclear weapons. The attack was allegedly aimed at securing Israel's long-term security. According to D'Amato, the Israeli attack did not jeopardize the territorial integrity or political independence of Iraq, and was not incompatible with the purposes of the UN, as it did not violate article 2 (4) (D'Amato, 1983).

But once again, the international reaction to the Israeli blow to Iraq, however, was evenly negative. The Security Council adopted a unanimous resolution condemning this as a violation of the UN Charter. This condemnation helped strengthen the common understanding that article 2 (4) is a general ban on the use of military force. But, alas, times have changed, and the rules of the game on the international arena have changed with them.

So, the threat of international terrorism, especially in the face of weapons of mass destruction, is a powerful justification for the triumph of national security forces over the rule of law in international relations. Moreover, even in the absence of an armed attack against them, on the basis of its own unilateral decision and without the sanction of the UN Security Council. That is, they go against the norms of modern international law, based on attempts to legitimize the concept of preventive and pre-emptive strikes, "preventive self-defense" and military operations around the world under the slogan of "humanitarian intervention" bypassing the UN. As a result, the concepts of the preventive use of force were formed as a natural development of the concept of self-defense.

"We will not permit the world's most dangerous regimes and terrorists to threaten our Nation and our friends and allies with the world's most destructive weapons," George W. Bush said categorically in his report on the US situation in 2002 (The White House). These concepts were expanded in a document created in September 2002, which reflects that the new concept of deterrence is strikingly different from previous concepts. According to the head of the White House, there are three principles for countering the proliferation of nuclear weapons: deterrence under the new rules, defense and mitigation. Defense and mitigation are applied if it can not be restrained. The special nature of the threat of weapons of mass destruction makes this exception justified, which means the introduction of three more doctrinal steps: the prevention, detection and destruction of weapons of mass destruction before their use.

3.5. Bush doctrine: a respond to the post-Soviet threats

During the Cold War, the United States had only one enemy: the Soviet Union. The Bush Jr.'s doctrine was an attempt to respond to the new threats that America faced. It completely rejected the long-standing doctrine of deterrence, since it is of little use for a world of boundless economic systems and aggressors that do not have a state.

So, Bush's doctrine is a modern national security strategy of the United States, which later formed the basis for the foreign policy of Barack Obama, and then Donald Trump. The doctrinal statements of the top officials of the state play a big role in US foreign policy. The emerging doctrine is the response of official Washington to some external events that hurt American national interests. Foreign policy doctrine has no legal force. The doctrine in the American sense represents

a system of views of the country's leadership, primarily the president, concerning the place and role of the US in world politics, the interests of the country and ways to achieve them.

Beginning with President Truman, a special place for such statements is assigned to military components. The Bush Jr. Doctrine is a collection of public speeches that are arranged thematically, not chronologically. It contains an overview of the international strategies of the US: the nation as a champion of human dignity, strengthening the alliance against terror and renewed cooperation to disperse the regional conflict. Part 5 also discusses what Bush called the "Axis of Evil" regimes, as they have weapons of mass destruction. In his report on the US situation in 2002, President George W. Bush pointed to Iraq, Iran and North Korea as terrorist states that together with their terrorist allies form the axis of evil that threatens world peace (The President's State).

UN Security Council Resolution № 1373, adopted unanimously on September 28, 2001, declared the invasion of Afghanistan a counter-terrorism measure in response to the September 11 terrorist attacks on the United States. Such a decision meant that the Security Council expanded the interpretation of the notion of "armed attack", extending it to large-scale terrorist acts committed not by the state but by an international terrorist organization clearly supported by the state power of a country or acting with its connivance against another state.

Thus, the use of preventive self-defense in Afghanistan has shown that regime change is an important element of the emerging national security doctrine. The situation in Afghanistan made the concept of regime change an important element of the new concept of national security of President George W. Bush. His administration clearly saw an acceptable option for the future policy in Iraq in the regime change.

Operation "Freedom for Iraq" became a test drive of the version of preventive self-defense developed by the US administration (Kritsiotis, 2004: 246). In view of the uniqueness of the situation with Security Council resolutions on Iraq in the future in similar cases with regard to rogue states possessing weapons of mass destruction and supporting terrorism, the United States and its allies may be forced to rely solely on the right of preemptive self-defense to use force against such states.

The adoption by the United States of the doctrine of preventive or even preventive self-defense as part of its national security strategy, as a partial support to justify the war against Iraq, has sparked many discussions. It was about the admissibility of early or preventive self-defense on the eve of an armed attack. But many international lawyers generally hold the view that self-defense will be permissible in response to a direct attack or when there is a threat of attack.

The invasion of Iraq by coalition forces in 2003 was motivated by the fact that Iraq possesses weapons of mass destruction and their means of delivery, continues to actively develop them, and also maintains links with international terrorist organizations, primarily Al-Qaeda, harboring, training and financing terrorists.

However, these allegations, at the time of the invasion, were assumptions, and after the occupation of Iraq were not confirmed. The argument of the United States regarding self-defense from the imminent threat that Iraq posed was unconvincing from the point of view of facts, since there was no factual situation on which the United States relied in its theoretical constructs. "Despite the power of intelligence, the United States has not been able to demonstrate the imminence of the threat. Linkages with Al-Qaeda or rudimentary nuclear capabilities would be very serious ways to tie Iraq to an imminent threat to the United States, but intelligence on these issues turned out to be mildly inconclusive," notes Miriam Sapiro (Sapiro, 2003: 603).

Meanwhile, the protection of the sovereignty of the state is clearly reflected in the UN Charter: para. 2 of Art. 1 of the UN Charter ("On Equal Rights and Self-Determination of Peoples"), Art. 55 ("On the equality and self-determination of peoples"), para. 7 of Art. 2 (prohibition of UN intervention "in matters essentially falling within the internal jurisdiction of any state").

Even if the weapons of mass destruction attributed to Saddam Hussein would pose a threat to the security of the United States and Britain, there is no certainty that the armed invasion was the most reasonable means of protecting US and British national security. But in principle such measures could not be successfully undertaken by the UN Security Council. The claims of Western countries are particularly vulnerable in the critical examination of the principle of self-defense in international law. It is in this area that the Bush doctrine is the most controversial (Nagan, Hammer, 2004: 414).

3.6. Regime change as a goal of American doctrine

The new US doctrine, as mentioned above, is aimed at expanding the policy of self-defense based on the threat of non-state terrorist groups and "rogue states" sponsoring such groups. The key sanction of the doctrine is the concept of regime change. However, if these principles to a large extent affect the behavior of the state, they can be established as new rules within the international legal system, even if they are actively challenged. The main issue is that if any political regime is to play the role of a potential "rogue state" and this regime is involved in possessing weapons of mass destruction that can be detected, this regime risks. This means that the principle of non-interference in the sovereignty of the state may be less binding than it was in the established practice (Nagan, Hammer, 2004: 428-433).

In accordance with Article 51 of Chapter VII of the Charter of the United Nations, a UN member state can use force only in response to an armed attack that has occurred. However, the unilateral, preemptive use of military force is beyond the scope of this formulation.

The modern approach to self-defense, according to Bert V.A. Rolling, is that Article 51 clearly allows at least one type of appeal to force, namely the use of armed force to repel an armed attack (Roling, 1986). It is true, since Article 2 (4) does not establish a general ban on force, but only a ban on forces aimed at territorial integrity and political independence of states or incompatible with the purposes of the United Nations.

The broad interpretation of the concepts of "armed attack" and "the right to self-defense", undertaken by the Security Council, is in accordance with the definition of the International Court of Justice. Thomas Frank states: "The Security Council's interpretation in specific cases of the rule prohibiting the use of force, with the exception of self-defense, in practice, defines the notion of "armed attack" as including cases of imminent attacks." (Franck, 2002: 97).

The strategic doctrine of any state provides for the possibility of using force in certain circumstances in relations with other states to protect its interests and contains justification for such use of force (Kotlyar, 2007: 45). The US attack on Iraq, Libya, and indirectly Syria required a more explicit expression of the structured doctrine of national security. It required a significant reassessment of the borders of self-defense in an age when terrorists have access to weapons of mass destruction and can use it.

Moreover, the question of changing the regime in the light of the abuse of sovereignty typical for the "rogue state" requires experts to assess the issues of national sovereignty and the state of international law in its modern sense. Such an approach can help us assess the relationship between national security doctrines and modern practice in the international sphere. It can also help to adequately assess the challenge that the doctrine presents for the rule of law, as well as its legal reflection in the protracted bloody Syrian crisis.

Applying his theory of preventive self-defense towards Iraq, the following conclusion is drawn: "The use of a reformulated test of the use of force as a preemptory self-defense ... against Iraq shows that the threat of Iraqi attacks using weapons of mass destruction, either directly or indirectly through Iraq's support for terrorism, was unavoidable enough to address the force needed to protect the United States, its citizens and its allies. The use of force was in proportion to the threat posed by Iraq; in other words, it was exactly what was needed to eliminate the threat, including the destruction of Iraq's capabilities to create weapons of mass destruction and the removal of the source of Iraqi hostile intentions and actions - Saddam Hussein." (Yoo, 2003: 574).

In fact, it turned out that the American troops did not have any sense in entering Iraq, they did not achieve anything. The very course of this war and the subsequent development of events indicate the weakness of the strategic planning of the US military and political leadership. Because they well planned the beginning of the war, everything was correctly and beautifully held, but it turned out later that they did not envisage the solution of neither interethnic issues, nor interreligious issues of relations with other states, nor envisaged overlapping borders with Syria or Iran.

Of course, the weakness of strategic planning is a common problem. When a preventive war is planned, it often seems that it is quick enough to conduct a "blitzkrieg", and all tasks will be immediately solved. And then it turns into a bloody war for many years, it turns out that everything is not so simple. This is a typical situation for American foreign policy.

The doctrine of preventive self-defense regarding the use of a preventive military strike against Iraq allowed its supporters to single out three factors on which the use of force for the purpose of preventive self-defense against terrorist groups and their rogue states supporting them depends.

First, the regime has weapons of mass destruction and hostile intentions, and the assessment should be based primarily on intelligence.

Second, there is a limited convenient response time: "If the United States were waiting for rogue states to transfer weapons of mass destruction to terrorist groups, it would be extremely difficult to determine where and when weapons of mass destruction would be used based on the sporadic nature of terrorist attacks and terrorists tactic "to dissolve" among the civilian population."

Thirdly, the catastrophic degree of damage from weapons of mass destruction: "The combination of the enormous potential destructive power of weapons of mass destruction and the latest means of their delivery makes it more threatening than the armed forces of many states. Chemical weapons of mass destruction and biological agents can be easily hidden, and even its small number can have a tremendous effect on the civilian population."

Thus, even if the likelihood that a rogue state will attack the United States directly with the use of weapons of mass destruction is uncertain, exceptionally high degree of damage that can be caused, coupled with a limited time frame for a response and the likelihood that if the United States will not act, the threat will increase, can lead the state to the conclusion that military actions are necessary as self-defense." (Nagan, Hammer, 2004: 575-576)

4. Results

International terrorism continues to be a serious threat to peace and security on the planet, but looking at the foreign policy of Donald Trump, this situation will be used by official Washington to advance expansive US policy in the countries of the Middle East, North Africa, Eurasia in the whole.

By the preventive blow, American strategists presuppose a kind of preventive war, rather than a precedent of international law or contractual practice. The doctrine's authors suggest that a preventive war, even if unprovoked, against an ascending adversary is preferable to an inevitable war later, when the balance of power is no longer in their favor. Trump administration justifies this expanded definition of a preventive strike based on today's circumstances. Meanwhile, the line between preventive and preemptive self-defense is as thin as human hair. The nature of modern weapons of mass destruction, ranging from long-range missiles to information warfare, excessively complicates a situation.

5. Conclusion

Thus, in the XXI century the problem of interpreting the principle of self-defense from an unavoidable or real armed attack by non-state factors was extremely topical. Meanwhile, the obligation to refrain from the use of force or threat of force is recognized as the basic principle of international law.

The new doctrine of the "preventive" war as a way of eliminating international threats comes to replace the legal prohibition of war. In addition to the established criteria of extreme necessity and proportionality, when deciding on the unilateral preemptive use of military force, it is necessary to take into account the provision of a minimum invasion of the scope of application of the principle of territorial integrity, as well as the limited purpose of the strike, which can only be the source of the threat, and the contiguity of the territory, where this source is located.

According to classical international law, there is a difference between a preemptive strike (with the goal of self-defense in the presence of an obvious and imminent threat) and a preventive (anticipatory) blow to the sources of the threatening threat. In the first case, military actions by international norms are allowed, and in the second case they are their violation. Strictly following Article 51 of the UN Charter, preventive strikes are a violation of international law, although this is not stated explicitly.

Until recently, there were two points of view on the content of this right: a literal interpretation of Art. 51 of the UN Charter, which excludes any self-defense if it is not carried out in response to an armed attack, and an extensive interpretation allowing self-defense in the face of the threat of an armed attack looming over the state.

International legal measures to use protective force against non-state actors are still debatable. The ongoing military operations in Syria did not resolve, but rather exacerbated the ambiguities and contradictions in this area. For many international lawyers, as the American

expert Monika Hakimi concludes, a meaningful interpretation of the legal norms has come to replace the initial instinctive reaction. Since the states did not unite to establish a legal standard for regulating the parameters of self-defense, each of the legal positions "is still in play and could plausibly be invoked or applied in future cases" (Hakimi, 2015: 30).

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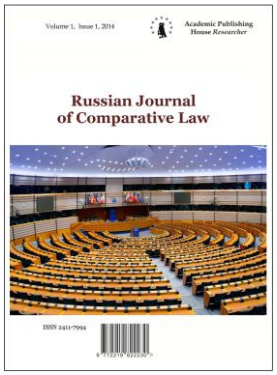

Criminal Responsibility of Personnel of Private Military and Security Companies Under the Uniform Code of Military Justice

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Abstract

In 2007 employees of the private military and security company (PMSC) «Blackwater» killed 17 civilians and wounded 18 civilians, firing randomly on them while guarding the US diplomatic corps in Baghdad. Later on this incident, the US Congress raised the subject of the criminal responsibility of PMSC`s personnel for criminal offenses committed during an armed conflict. Despite numerous claims filed by victims in US federal courts, they managed to deflect responsibility for illegal actions.

The presence of gaps in the regulation of PMSCs and lack of control by military commanders adversely affected the credibility of the US armed forces. In this regard, the US Congress adopted amendments to The Uniform Code of Military Justice (UCMJ) expanding its jurisdiction over PMSC`s personnel. This decision caused a wave of criticism because in the United States employees of PMSCs are treated as civilians, and the extension of the jurisdiction of military courts for them substantially affects their constitutional rights.

This article deals with the rules of criminal prosecution of PMSC`s employees in US military courts.

Keywords: private military and security companies, The Uniform Code of Military Justice, armed conflict, the USA, criminal responsibility.

1. Introduction

Civilian contractors play a significant role in modern armed conflicts, often taking part along with the armed forces. They provide military and security services to the armed forces, including direct participation in hostilities.

Due to the growing use of PMSCs in armed conflicts and taking into account the «Blackwater» activities in Iraq between 2003 and 2005, the US Congress attempted to increase control over them by amending the UCMJ. The amendments introduced in 2006 related to the expansion of powers of military commanders in relation to PMSC employees.

The first contractor to be tried under the amended provision was charged with stabbing a co-worker and pleaded guilty on June 24, 2008 (Huskey, 2010).

2. Materials and methods

The materials include the analysis of the text of the UCMJ, and scientific, political and legal publications. The article uses a benchmarking approach of Russian and US legal doctrines.

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The research was done on the basis of general and specific scientific methods of cognition (dialectical method, analysis and synthesis, deduction and induction, comparative legal and historical-legal methods).

3. Discussion

3.1. Private military and security companies

PMSCs provide a variety of services in armed conflicts. Employees of such companies are often called «contractors», referring to their position on a federal contract with the state.

American PMSCs dominate the worldwide services market, earning between $20 and $100 billion a year. The entire number of contractors contracted by the US government in 2009 was 244,000. Mostly PMSCs were used in military operations in Iraq and Afghanistan. Today, PMSCs in the United States are gradually moving beyond the traditional provision of logistical support and intelligence. For a long time, logistics services have retained their popularity and relevance. The U.S. Department of Defense has introduced into contracts with companies for the supplying of transit services for food, cooking, washing, and the construction of lodging and food facilities in Iraq.

Under US domestic law, PMSC employees are civilians, as they follow the US armed forces. Nevertheless, their activity or location may entail mortal risk, even if they do not directly participate in hostilities, for example, providing communication services, transporting equipment and food. Some of their tasks under the contract are inherently close to military operations – for example, collecting and analyzing intelligence, managing weapons systems or supporting the main response forces. Such activities may entail active participation in armed conflict. That is why the US government has focused on the fact that in most cases the Ministry of Defense contractors can hardly be called civilians.

According to Department of Defense Manual No. 3-100.21, PMSC employees are not combatants, they are civilians, as they follow the US armed forces. US Department of Defense Instruction No. 3020.41 establishes a mechanism for interacting with them. PMSC employees are not in the military command chain, but are subordinate to their employers. The Manual contains rules for the planning, management and use of PMSCs in military operations. According to paragraph 1-39 of the Manual, contractors can be employed to endorse the US armed forces, including abroad. The list of services and deadlines are defined in the contract. Former US Secretary of Defense R. Gates in the Memorandum on Combating International Terrorism in connection with the increase in the number of civilian contractors working for the Department of Defense, noted that these persons should be under the control of the military commander.

The mechanism of command and control of PMSC personnel is completely different from the mechanism of the command in the regular army. The main issues of command and control are not resolved individually and directly by the commander in the zone of armed conflict, but are regulated by the terms of the federal contract. During the performance of tasks under the contract, contractors are required to comply with all guidelines, comply with all instructions and general instructions that are given by the commander and relate to power protection, safety, health, and relations with the local population. They must also comply with US laws, state of residence, international agreements.

Despite the bans, PMSC employees defended military installations in the war zone. The US Congress pointed out that since 2005 the «Xe company» (Blackwater) employees have been involved in 200 cases of escalation of the conflict that entailed the use of firearms. Under the terms of the contract, PMSC employees do not have the right to use firearms for assault purposes, while in 80 % of cases it was used in such circumstances.

Some PMSCs conduct acts of torture of prisoners and murder of civilians abroad. The Government and the US Congress took measurements to control the activities of PMSCs and criminalized crimes committed by PMSC employees working under contract with the USA overseas. The Armed Contractor Oversight Division (U.S. Department of Defense), has investigated the cases related to the use of force by contractors in Iraq.

On June 2003 the Coalition Provisional Authority Order No. 17 (CPA 17) provided immunity for PMSCs. The Order established general provisions on immunity and the conditions under which immunity would not apply. The immunity rule states: «Contractors shall not be subject to Iraqi laws or regulations in matters relating to the terms and conditions of their Contracts, including licensing and registering employees, businesses and corporations; provided, however, that

Contractors shall comply with such applicable licensing and registration laws and regulations if engaging in business or transactions in Iraq other than Contracts. Notwithstanding any provisions in this Order, Private Security Companies and their employees operating in Iraq must comply with all CPA Orders, Regulations, Memoranda, and any implementing instructions or regulations governing the existence and activities of Private Security Companies in Iraq, including registration and licensing of weapons and firearms» (CPA 17). The norm is that the scope of immunity is wide enough, but immunity can be limited. In case of abuse of the rights granted by the contract to a contractor, immunity will not apply to him. US law has established a presumption that the provisions of the federal contract should not be read in such a way as to allow illegal activities of contractors. Moreover, immunity applies not merely to the contractor as an individual, but also to the United States.

CPA No. 17 expired on December 31, 2008, together with the expiration of the mandate established in accordance with UN Security Council Resolution № 1511 on October 16, 2003. By the end of 2008, a new agreement on the status of the US armed forces was concluded between Iraq and the US, which ratified by the Iraqi parliament. The agreement revoked the immunity. The United States has taken measures to extend the immunity to all military personnel and contractors working in Iraq, but the Iraqi government has insisted on the lifting of immunity in the light of the participation of the American company «Blackwater» in the Nisour Square massacre.

Article 12 of the Agreement reads as follows: «Iraq has priority over the exercise of jurisdiction over US private military and security companies and their employees», which are defined as «non-Iraqi individuals or companies not registered in Iraq, as well as their employees who are citizens of the United States or a third country and who deliver food on the territory of Iraq provide security either on the side of the US military or on a contract basis (subcontract to) with the US armed forces.» The exception is legal entities and individuals who are residents. Despite the annulment of the immunity, not a single lawsuit filed against American contractors who violated the law, has not been considered by Iraqi courts.

The United States Force Status Agreement is in force in Afghanistan, according to which the Government of Afghanistan recognizes the right of the United States to control US military and civilian personnel and allows the US government to exercise criminal jurisdiction over American citizens. The governments of both states confirm that these individuals cannot be transferred to an international tribunal or other institution without the appropriate consent of the US government. Thus, the Government of Afghanistan does not prosecute US troops and contractors during their stay in Afghanistan.

Employees of «Titan» and «CACI» provided translation services and interrogations to the U.S. Department of Defense in the Iraqi prison of Abu Ghraib. Iraqi citizens held there accused company employees of causing bodily harm, deprivation of food and water. According to numerous lawsuits by the victims, «Titan» and «CACI» employees turned on loud music, forced prisoners to walk naked, threatened to kill, exposed them to low temperatures, prevented sleep, forced them to testify against other prisoners, and committed abuses sexual in nature, they used an electric chair for violation of the regime and forbade religious worship. Based on an investigation by the U.S. military intelligence team regarding incidents at Abu Ghraib prison, a Fay Report was prepared that concluded that the use of PMSC personnel during interrogations and prison guards led to numerous problems.

Iraqi nationals detained at the Abu Ghraib military prison Haidar Mushin Saleh and others filed a lawsuit against «Titan» and «CACI» in the United States Court of Appeals for the District of Columbia Circuit. The district judge concluded that Titan's employees were «fully integrated into [their] military units» (Saleh et al. v. Titan Corporation & CACI International). Although «CACI» employees were also integrated with military personnel and were within the chain of command. «CACI» said that it did not adequately protect the federal interest implicated by combatant activities. «Titan» and «CACI» can be considered as state actors and they enjoy the sovereign immunity.

Other charges against PMSCs and their personnel were related to criminal negligence. An example was given of cases of injury to health of servicemen as a result of traffic accidents caused by the fault of PMSC employees, as well as cases of injuries when working with equipment that was serviced by company employees. PMSC employees themselves charged their colleagues with fraud and criminal negligence.

In the USA, the following can be applied to PMSCs and their employees who have perpetrated a criminal offense: Special Maritime Territorial Jurisdiction (SMTJ), Military Extraterritorial Jurisdiction (MEJA), War Crimes Act 1996, Uniform Code of Military Justice (UCMJ).

3.2. The Uniform Code of Military Justice before 2006

As early as 1866 the Supreme Court of the USA in the «Milligan» case concluded that in exceptional cases civilians could be convicted by a military court (Ex parte Milligan, 1866). It is observed that civil proceedings are preferable to military proceedings, and military jurisdiction over civilians should be circumscribed to the situation of military operations. In addition, military jurisdiction «to be exercised in time of foreign war without the boundaries of the United States, or in time of rebellion or civil war within states or districts occupied by rebels treated as belligerents; ... distinguished as military government, superseding, as far as may be deemed expedient, the local law, and exercised by the military commander under the direction of the President, with the express or implied sanction of Congress» (Underhill, 1924: 159).

The UCMJ was adopted in 1950 and applied to soldiers as well as civilians accompanying the armed forces only in time of war. Later the US Congress introduced an amendment altering the words «in time of war» to «in time of declared war» (Pearlman, 2016: 3). For purposes of Art. 2a(10), «time of war» means a war formally declared by Congress (United States v. Avarette, 41 C.M.R. 363).

The UCMJ provides for three types of courts-martial: summary, special and general courts-martial. Unlike their civilian counterparts, military courts are differentiated mainly by the severity of the sentences they are authorized to impose. Summary courts-martial, which are composed of a single officer who needs not be a military judge, may impose sentences of confinement that cannot exceed thirty days, along with a reduction in rank and forfeiture of pay. Special courts-martial are additionally empowered to impose sentences that include confinement for a period of up to one year and a bad conduct discharge. A bad-conduct discharge is an unfavorable characterization of service, which can impinge upon veterans benefits to which the service member would have otherwise been entitled. A general court-martial can impose any sentence authorized up to and including death. In addition, it is the only type of court-martial that can impose a dishonorable discharge upon enlisted personnel and its legal equivalent for officers, a dismissal.

The military justice system has been updated and revised several times since 1951. In the Military Justice Act of 1968, Congress amended the UCMJ to require military judges. In 1984 the Federal Rules of Evidence were repurposed with very few adjustments as the Military Rules of Evidence and mandated for courts martial.

3.3. Amendments

The active participation of PMSCs in armed conflicts employed by the US Department of Defense led to the creation of a special regulatory framework governing their activities (Memorandum, 2007). In accordance with the US Department of Defense Instruction № 3020.41 employees of PMSCs are civilians accompanying the armed forces (DoD Instruction, 20.12.2011). Thus, they are not allowed to take direct participation in hostilities.

The consequences of the use of firearms against civilians, torture of prisoners and other crimes committed by personnel of PMSCs during their participation in military operations in Iraq and Afghanistan have a wide resonance.

In 2005 the US Congress amended the Military Extraterritorial Jurisdiction Act (MEJA). According to the amendment the MEJA applies to employees of PMSCs employed by the US Department of Defense in a situation of committing a crime abroad. Due to the problems with collecting evidence in a foreign country where an armed conflict is taking place, this legislative initiative did not lead to effective administration of justice for employees of PMSCs, who committed crimes. In addition, often employees of PMSCs avoided criminal liability because of an agreement on the status of the armed forces concluded by the US government with the host state, under which they enjoyed exemption from criminal prosecution. In order to eliminate the gaps, in 2006, the US Congress expanded the application of the UCMJ to employees of PMSCs contracted by the US Department of Defense.

Before the amendment the UCMJ was applied only to soldiers and civilians accompanying the armed forces in time of declared war. The new provision changed the paragraph a (10) of

Article 2 to read: «In time of declared war or a contingency operation, persons serving with or accompanying an armed force in the field.»

The term «contingency operation» means a military operation that —

«(A) is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force; or

(B) results in the call or order to, or retention on, active duty of members of the uniformed services under section 712 of title 14, or any other provision of law during a war or during a national emergency declared by the President or Congress.»

By virtue of the amendment, it became possible to bring employees of PMSCs contracted with the US Department of Defense to criminal responsibility.

As P. Singer was saying about new provision: «It gives officers in the field a new tool, that they have asked for a long time, to actually do something about contractor crimes. It also takes away an excuse that is often made to Congress as to why action is not have been taken against a contractor crime, i.e. that military has no authority over such civilians or only has a "coordinating" relationship with contractors in the field» (Isenberg, 2010).

3.4. Criminal responsibility under the UCMJ

In accordance with the UCMJ, a person can be brought to criminal responsibility by a military court. The UCMJ distinguishes three links of US military courts: a general, special, and disciplinary military court. General courts-martial consider criminal cases according to the UCMJ, including capital cases. Criminal prosecution for crimes such as murder, assault is also carried out against civilians, but the UCMJ stipulates the punishment for committing such crimes that are not peculiar to civilians: 10 US Code § 904 - Art 104 Aiding the enemy (Art. 104 UCMJ), 10 US Code § 915 – Art. 115 Malingering (Art. 115 UCMJ).

The application of the UCMJ to civilians accompanying the armed forces was justified by the US Supreme Court in the «United States v. Rubinstein» (United States v. Rubinstein, 1948). The manager of the club in the US air base near Tokyo Mr. Rubinstein was recognized as a civilian who performed his services in accordance with the US military legislation. The US Supreme Court said that his activity was «directly connected with or dependent upon, the activities of the armed forces or their personnel» rather than an incidental to such activities.

At the same 1957 the US Supreme Court awarded the opposite judgment in «Reid v. Covert» pointing out that it was illegal to bring civilians to the criminal responsibility of a military court (Reid v. Covert, 1957). The application of military legislation to them violates the constitutional rights provided by the Fifth (Amendment V) and Sixth Amendments (Amendment VI) to the US Constitution.

The Fifth Amendment of the US Constitution mandates a pre-trial grand jury investigation in federal criminal suits, but does not afford the same blanketed safeguard in military proceedings. The Fifth Amendment provides that «no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger» (Amendment V). The Sixth Amendment states that contractor «shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district where in the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence» (Amendment VI).

Meanwhile, the application of the UCMJ to employees of PMSCs participating in military operations of the US Department of Defense is justified by the fact that they provide services that are essentially similar to military activities. In order to strengthen control and discipline on the staff of PMSCs the provisions of the UCMJ apply to them as to military personnel.

As noted the UCMJ applies to employees of PMSCs if they participate in a contingency operation, but the very term «contingency operation» can be interpreted broadly because there are no specific criteria to qualify the situation as such. Such ambiguity leads to violation of the constitutional rights of employees of PMSCs.

The UCMJ was applied to an employee of PMSC once in the «US v. Alaa Muhammad Ali» (United States v. Mr. Alaa Mohammad Ali, 2012). Being a citizen of Iraq, he was hired to provide

translation services to the US Department of Defense (Hammond, 2008: 33). Executing the contract, he committed an armed attack against his colleague and was sentenced by the US military court to five months in prison.

In such cases as the use of torture against prisoners in Abu Ghraib, murder of civilians in Iraq by the «Blackwater», the UCMJ was not applied, because the PMSCs were employed by the U.S. Department of State and the CIA, not by the U.S. Department of Defense.

Experts of the UN Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of people to self-determination found the amendments made by the US Congress to the UCMJ contradicting to the US Constitution (Report of the Working Group, 2012). In this regard, they expressed doubts about the effectiveness of bringing PMSC to court-martial.

Chapman K. supposed that the UCMJ can be effectively applied to contractors: «In order to be placed firmly within the constitutional guidelines set forth by the Supreme Court, several restrictions on the application of the UCMJ should be implemented:

(1) the application of the UCMJ should be limited to quasi-military PMCs;

(2) the applicable provisions of the UCMJ should be limited to those with civilian analogues and

(3) the government should begin to incorporate these changes and acknowledgments of them in the contracts signed by the providing firms and the individual PMCs.

With these limitations, military prosecutors will be able to wield the tool provided by Congress and bring the Untouchables within the grasp of criminal law» (Chapman, 2010: 1074).

Pearlman A. said that the amendments to the UCMJ will allow to prosecute PMSC employees working for the US Department of Defense abroad. However, he believes that exercise of court-martial jurisdiction over them concurrent jurisdiction with MEJA (Pearlman, 2016: 11).

The Russian head of the garrison military court V. Sivov notes that the UCMJ contains «undefined sanctions, providing for the imposition of punishment at the discretion of a military court» (Sivov, 2011). In addition, the author notes the possibility of applying the criminal law by analogy. As an example, he explains article 134 of the UCMJ, according to which a military court is entitled to consider a case involving «all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces» (Art. 134 UCMJ).

On March 10, 2008, Secretary of Defense issued guidance on UCMJ jurisdiction over contractor personnel and other civilians supporting contingency operations (Guidance). The clause requires all contractor personnel not only to comply with U.S. laws and host country laws, but also orders, directives, and instructions issued by combatant commanders relating to force protection, security, health, safety, and relations with local nationals. The clause specifically states that contractor personnel are subject to the UCMJ. Although only the contracting officer has the actual authority to change a contract, contractor personnel have a legal obligation to follow the directives of military commanders when they are accompanying armed forces. In this regard, the US Secretary of Defense said that the UCMJ would apply in case of «military necessity» and «alleged misconduct that may jeopardize good order and discipline or discredit the armed forces and thereby have a potential adverse effect on military operations» (US Defense Secretary, 2008).

In 2016, Congress passed a new Military Justice Act (MJA), calling for a review and reorganization of the UCMJ. The MJA made important structural changes that align the court-martial process more closely with those of federal district courts. For example, military judges have the authority to act on cases before referral to a court-martial.

4. Results

The amendments were supposed to allow constitutionally exercising judicial jurisdiction over contractors from the US Department of Defense involved in armed conflicts abroad, simultaneously with the federal criminal authority under MEJA. There are, however, a few problems associated with the application of the UCMJ to civilian contractors.

5. Conclusion

The application of the UCMJ can be effective in cases where PMSC employees provide paramilitary services similar to military activities. In such a situation, it is possible to take into account the specifics of the activities of PMSC in armed conflicts. In cases where the US Department

of Defense has contracted with PMSC to provide logistical services, such as cooking, cleaning, the UCMJ should not be applied. In addition, the possibility of applying the UCMJ should be provided in a federal contract, which is concluded by the US Department of Defense with a PMSC.

The studying of US criminal law on this issue makes it possible to assess legal consequences for the citizens of the Russian Federation in the case of their employment under a contract with American PMSCs. In addition, the State Duma of the Russian Federation is considering the issue of the prospects for legalizing the activities of national PMSCs. So that the studying of the foreign experience of the United States, as a state with the most developed special regulatory framework on this issue, seems necessary for effective regulation in Russia.

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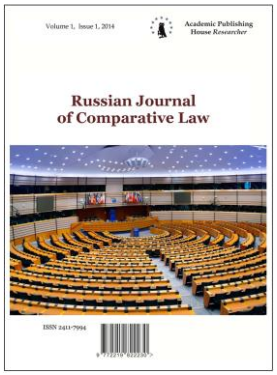

International Legal Status of Child Soldiers as participants of Armed Conflicts

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Abstract

The article discusses the issues of the international legal status of child-soldiers as one of the gaps in modern international law. Children are forced to participate in armed operations through violence. Voluntary enrollment of children into the armed forces is because the children do not see any other alternative livelihood, except participation in the wars. The primary and universal guarantee of the enjoyment of children's rights in armed conflict is international law. Individual state officials and their officials cannot guarantee rights, as they are required to act within the framework of national law. Only cooperation between States on the basis of the Charter of the United Nations can guarantee the implementation and protection of the rights of children in armed conflicts.

The rights of children in international humanitarian and national law represent legally secure opportunities to satisfy their interests. Moreover, children's rights in international law consist of the ability to perform their own actions and the ability to require other participants in international relations to take actions prescribed by law or to refrain from taking certain actions.

The primary and universal guarantee of the enjoyment of children's rights in armed conflict is international law. Individual states and their officials cannot guarantee rights, as they are required to act within the framework of national law. Only cooperation of States on the basis of the Charter of the United Nations can guarantee the realization of the rights of children in armed conflicts.

One of the important guarantees of protecting the rights of children during armed conflicts should be the right to peace, which implies strict observance of the ban on wars by states in international relations.

Keywords: child-soldiers, armed conflict, international law, United Nations Charter.

1. Introduction

One of the gaps in international law is the legal status of child-soldiers. In this regard, starting to study the rights of children during armed conflicts, it should be noted that the abduction and recruitment of children for military or auxiliary operations is a phenomenon that remains relevant for the modern world. Due to the unlawful nature of the participation of children in armed conflicts, there are no reliable statistics on this phenomenon.

2. Materials and methods

In situations of instability in some countries or regions, clear violations of international law in the field of children's rights and international humanitarian law are not uncommon among the entire civilian population, but it is with respect to minors that they occur most often.

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In various parts of the world, thousands of children, in addition to the lack of basic rights, such as education or health, are killed, maimed, abducted the victims, sexually abused, arbitrarily detained, tortured, ill-treated and separated with their relatives.

3. Discussion

In some cases, armed conflicts affect the rights and interests of children. However, one of the main problems in the area of children's rights during armed conflicts is the lack of evidence (International Review, 2007: 785). This situation is associated with many circumstances, including the fact that children often do not report about crimes committed against them.

Currently, according to the United Nations Children's Fund, there are about 300 thousand child soldiers in the world. The recruitment of minors occurs both as a result of the actions of the Armed Forces of some countries and of irregular armed groups. Since the emergence of new types of conflicts faced by regular armies and partisans, children have played a role in resistance movements (Ruiz, 2013: 2).

It must be borne in mind that the combatants are obliged to take measures to ensure that they can be distinguished from the civilian population at the time when they take part in hostilities. If they do not, then if captured, they do not receive the right to prisoner of war status (Customary International Humanitarian Law, 2005: 384). Children participate as combatants in armed conflicts for various reasons. On the one hand, they are forced to participate in hostilities through violence. On the other hand, the "voluntary" enrollment of children into the armed forces is because the children do not see any other alternative livelihood, except participation in the war. The reasons for this "volunteering" is the absence of children prospects for finding work, education or just a desire to leave the unfavorable environment habitat.

The phenomenon of child soldiers is observed in different regions of the world. Currently, the African continent, on which numerous armed conflicts are occurring, is most exposed to this undesirable practice. The conditions of military training to which they are exposed are absolutely unacceptable: in many African countries, children, when abducted, are forced to return to their villages and kill their families and friends to prove their loyalty. A large number of recruits were reported in countries such as the Democratic Republic of the Congo, Somalia, Sudan, the Central African Republic, Uganda and others.

The situation of child soldiers in the Middle East is similar to the situation of other children involved in armed conflicts, such a practice is observed in countries such as Pakistan, Afghanistan, Iraq, Lebanon, Syria, Palestine and Israel.

The South American region is not free from this situation, in Colombia, in the midst of the conflicts that plague the country, knowledge has been gained about the recruitment of children, mainly from sectors such as indigenous people or Afro-Colombian descent. Parties to conflicts use children for the manufacture and installation of landmines, to carry out intelligence tasks and suicide attacks.

At the international level, it seems possible to note two types of legal norms that relate to the protection of children in armed conflicts: international human rights law and international humanitarian law (Biriukov, Galushko, 2020). The first focuses on the promotion and protection of the rights of children in peacetime. Despite the fact that international humanitarian law is trying to regulate and limit methods and means of warfare, its main goal is to protect children who are not involved in hostilities.

It is appropriate to clarify that, despite the fact that there is a difference between international human rights law and international humanitarian law, the distance between them should be reduced. Thus, the use of the former only in peacetime should be gradually expanded so that recognition of children 's rights is not limited solely to this context.

In many modern conflicts, minors are directly and actively involved in collisions usually carry weapons, perform military intelligence tasks or use camping as a disguise for terrorist acts. In practice, children are not only involved in armed conflicts as soldiers, but also perform a variety of tasks in support of the combatants, and working as an accompanying digits together, messengers, cooks, carriers of heavy weapons, and so on.

At the same time, children remain one of the main victims of armed conflict. Tens of thousands of them become participants in hostilities. Children are often turned into suicide bombers.

Armed conflicts, the escalation of military situations, the new dynamics of conflicts and new tactics of warfare, combined with widespread non-compliance with international humanitarian law, including the inadequate application of the principles of selectivity, proportionality and military necessity, had disastrous consequences for children. The number of cases of killing and mutilating children in the modern world has reached record levels, with an unprecedented number of such cases attributed to states . Air and ground operations, especially in urban and populated areas, have created complex challenges in terms of protecting the rights of children. Armed groups continued to have a significant number of casualties among children, which was associated with exacerbation of clashes, intensified military operations or cross-shelling; children, as before, were victims of war.

In today's world, children often become victims of recruitment and use, sexual abuse or forced marriage and punishment for belonging, or being perceived to belong to the family side of the conflicts. Vulnerability and poverty remain the driving force behind the recruitment and use of children, with confirmed violations being committed in the vast majority of cases by armed groups that sometimes even recruit children of eight years of age.

During military actions children used as an 'a lives shields', cooks, porters, guards or sexual purposes, as "living bombs" and for moving and actuating the IEDs. In some cases, recruitment, there is tons of in schools and orphanages.

Children are still not adequately protected from armed conflict, and violence continues to leave an indelible mark on their lives. Taking long-term and sustained responses to violations remains a challenge. Children have no choice but to cope on their own and try to survive without the necessary assistance programs that would allow them to receive full treatment. Even when appropriate medical and reintegration programs exist, they are still insufficient to meet all the needs of each affected child.

Violations of children's rights during hostilities in many cases remain hidden. Restrictions on access to this information significantly impede the documentation and verification of violations.

Children's rights are of particular importance for the reintegration of child soldiers into civilian life and the prevention of their participation in criminal or terrorist activities.

One of the significant problems is the high mortality of children in war zones. During armed conflicts, children are often forced to leave their areas of residence in order to free themselves from attacks.

The issue of legal protection of children was raised after the World War II. The international community has witnessed the emergence of new types of conflict. Methods and means of warfare have become increasingly complicated. More frequent are conflicts in which regular armed forces oppose combatants from irregular units. Now during the hostilities, more serious casualties are suffered by the civilian population, including children. Many provisions of international humanitarian law to institute and develop the principle of special protection of children's rights during armed conflicts (Plattner, 1995: 87).

Children, as the most vulnerable group of the population, who should not take part in wars, enjoy special protection of international law. Parties to conflicts should provide them with protection from any kind of abuse in connection with their age and for any other reasons.

Children should enjoy protection from the effects of hostilities. At the same time, during armed conflicts, states should preserve cultural traditions and the system of parenting, as well as contribute to the preservation of families. For arrests, detentions or internment, children must be detained separately from adults.

It should be noted that it is not possible to completely exclude the participation of children in hostilities. In this regard, it should be borne in mind that the survey on the protection of children's rights was raised in international humanitarian law after the Second World War. It is pretty difficult to determine to what age people are children and when they become adults. International humanitarian law does not provide an accurate definition of the concept of a child, but in certain provisions it establishes that 15 years is the age to which children should receive special protection (Dutli, 1995; 64-80).

By virtue of Art. 38 of the 1989 Convention on the Rights of the Child, States must respect and ensure compliance with international humanitarian law applicable to them in the event of armed conflict and relating to children.

States should take all possible measures to ensure that persons under the age of 15 do not directly participate in hostilities. The international community is increasingly confronted with the recruitment and exploitation of children by various terrorist and violent extremist groups.

So, in 2015, the United Nations found 274 cases of child recruitment by the Islamic State of Iraq and the Levant organization in the Syrian Arab Republic and the existence of military training centers for 124 boys aged 10-15 years was revealed. Cases of the use of children as executioners were confirmed by video recordings.

It must be borne in mind that one of the pressing problems in the modern world is the participation of child soldiers in armed conflict. In the course of modern conflicts, the number of children voluntarily adjoining armed groups or being forcibly attracted is increasing.

The issues of determining the legal status of children during armed conflicts are complex and include several different aspects related to children who have become parties to conflicts.

Protecting the rights of children, involved in armed conflict s, it is one-quarter in the most pressing problems of our time. Worldwide, more than 240 million children live in countries affected by conflicts. Many face violence, displacement, hunger and exploitation by armed forces and groups.

Efforts to ensure the implementation and protection of the rights of children in times of armed conflict should be undertaken on the basis of various international legal instruments relating to the situation of children in armed conflicts.

Thus, according to paragraph 4 of the Declaration on the Protection of Women and Children in Emergency Situations and during the Period of Armed Conflict of 1974, the states participating in armed conflicts must take all possible efforts to protect women and children from the devastating consequences of war.

In particular, child soldiers in the theoretical literature on international law are understood to mean persons from 15 to 18 years old participating in the state armed forces, regardless of whether these children are used in battle or not (Westhues, 2018) .

In the recent history of the twentieth century, the civil war in Sierra Leone has drawn the attention of the world community to perfect extreme cruelty. In particular, children recruited as soldiers attracted attention.

The 1996 report on the effects of armed conflict on children defines child soldiers as boys and girls under the age of 18, who are compulsory and voluntarily included in the armed forces, paramilitary groups, civilian self-defense units, or other armed groups (Machel, 2000: 9).

Article 38 of the Convention on the Rights of the Child in 1989 includes a provision stating that Mr. States countries should be taking be all feasible measures to ensure that persons who have not attained the age of 15 do not take direct part in hostilities.

They should refrain from recruiting any persons under the age of 15 to serve in their armed forces. When recruiting from persons over the age of 15 but not yet 18, States should seek to give preference to older persons.

These provisions allow children to participate in armed conflicts. The second protocol to the Geneva Conventions raises this age to 18 years.

The crime of children traditionally occupies a special place in the science of international law. This is due to the fact that children's crime is a future "adult" crime. In this regard, it is important to pre-empt, identify and suppress the improper behavior of children (Korsakov, 2019: 12-13).

S.S. Alekseev wrote that it was in childhood that a person should be convinced of the need to observe social norms of behavior so that in the future he would not be forced to do this through law (Alekseev, 1991: 9).

By participating in armed conflicts, children can commit war crimes, often without realizing it. International tribunals have the right to hold child combatants accountable. However, there is no practice of holding children accountable for war crimes.

The general position formulated by the International Tribunal for the Former Yugoslavia is that children can be prosecuted only in extreme cases.

The Truth and Reconciliation Commission is currently operating, which acts as an element of post-conflict justice. Children, as special subjects of international law, must understand that they can be held accountable for war crimes.

By virtue of Art. 4 of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict in 2000, armed groups other than the armed forces of a State should under no circumstances recruit or use children in hostilities .

By virtue of Art. 17 of the Geneva Convention for the Protection of Civilian Persons in Time of War of 1949, parties to the conflict must enter into agreements for the evacuation of children from besieged or surrounded areas.

According to Art. 23 of the Geneva Convention for the Protection of Civilian Persons in Time of War of 1949, states must provide free admission of all parcels with medical and sanitary materials, as well as items necessary for religious cults intended only for civilians.

Children during wars are entitled to various types of assistance. So, by virtue of Art. 50 of the Geneva Convention for the Protection of Civilian Persons in Time of War of 1949, the occupying Powers should, with the help of national and local authorities, provide assistance to institutions entrusted with the care and upbringing of children in order for their work to proceed successfully.

In the event that local institutions are not able to perform these functions, the occupying powers must take measures to maintain and educate orphans or children separated as a result of war with their parents.

In this regard, the IV Geneva Convention of 1949 on the Protection of Civilian Persons in Time of War was adopted, which enshrined the provisions that apply to children as part of the civilian population.

Since the Second World War, a large number of new types of conflicts have appeared. Complicated methods and means of warfare, new types of weapons. The number of armed conflicts is growing, in which the official armed forces of states confront combatants of irregular formations and private military companies.

The greatest losses during armed conflicts are suffered by the civilian population, especially children. In this regard, in 1974-1977 a diplomatic conference was held, which supplemented and developed international humanitarian law in the field of protecting the rights of children during armed conflicts.

International humanitarian law enshrines provisions on the protection of children as persons not participating in hostilities and special protection as the most vulnerable. International humanitarian law also protects children involved in hostilities.

During armed conflicts, children fall into the category of persons who are protected by the provisions of the IV Geneva Convention for the Protection of Civilian Persons in Time of War. In this regard, states should ensure respect for the lives of children, their physical and mental integrity, as well as the prohibition of coercion, corporal punishment, torture, etc.

All norms of international humanitarian law that are relevant to the conduct of wars should be extended to children. In particular, during armed conflicts, children have the right to humane treatment. Attacks on their life and physical integrity should not be allowed.

To facilitate the return of children to their families and countries, the authorities of the host countries must fill out photo cards for each child that they send to the Central Information Agency of the International Committee of the Red Cross.

Point 3 of Art. 4 of Protocol II provides that children should be provided with the necessary care and assistance. So, children should receive education, including religious and moral education, according to the wishes of their parents.

One of the important issues children during armed conflict is the preservation of the integrity of their families. The desire of children for adventure helps children overcome fear during armed operations. Children are not aware of the threat of hostilities if there are relatives near them who personify security. However, the loss of family ties, familiar surroundings and way of life has n and children, the most negative impact.

In this regard, according to Art. 82 of the Geneva Convention for the Protection of Civilian Persons during the 1949 War, during internment, parents and their children should be kept in the same places of internment, unless work or health make temporary separation necessary. Parents and children interned may require that their children, who are free without parental care, be interned with them.

In all possible cases, interned family members should be kept in the same premises and live separately from other internees. They must also be provided with the necessary opportunities to lead a family life.

Moreover, Art. 50 of the Geneva Convention for the Protection of Civilian Persons in Time of War of 1949 established the provision that the occupying powers, with the help of national and local authorities, should provide assistance to institutions entrusted with the care and upbringing of children in order for their work to proceed successfully.

All measures necessary to facilitate the identification of children and the registration of their family ties should be taken.

Internees should provide opportunities for exercise, sports and outdoor sports. In all places of internment of children for these purposes should be allocated free space for children and adolescents.

One of the new problems that needs to be addressed is the participation of children in hostilities. In practice, it can be difficult to draw a line between civilians and combatants.

With according n. 2 tbsp. 77 of Protocol I parties in conflict should take all possible measures to ensure that children under the age of fifteen are not directly involved in hostilities, and to refrain from recruiting them into their armed forces. When recruiting from among persons over the age of fifteen, under the age of eighteen, the parties to the conflict should endeavor to give preference to older persons.

It is necessary to pay attention to the fact that by virtue of the Convention and the Rights of the Child of 1989 states are obliged to respect the norms of international humanitarian law applicable to them in the event of armed conflict and relating to children, and to ensure their observance.

In accordance with their obligations under international humanitarian law to protect civilians during armed conflict, States are required to take all possible measures to ensure that children affected by armed conflict are protected and cared for.

Children who are living in areas of conflict with their parents or without them are potential candidates for being recruited as soldiers. Deprived of parental protection, and access to education and prepare for independent adult life, these child soldiers are almost can not imagine my life outside of armed conflict, participation in which mills and the way for them to earn a living. Participation in the activities of armed groups is for them to ensure their own survival.

In situations of armed conflicts, children in every way help their parents fighting with weapons in their hands, but, as a rule, direct all their children's efforts to be like them (Aleshin, 1998: 132).

Children involved in hostilities are at risk and their behavior, often thoughtless and impulsive, is a threat to everyone around them.

The many contradictions that exist between the provisions of the law of armed conflict and what actually happens in war are often explained by such reasons as obedience to orders, abuse of alcohol and drugs, as well as the young age of combatants.

Child soldiers are often not only victims. They do not know how to calculate their strength and, opening fire for no reason, they too often do not think about the consequences of their actions and the suffering inflicted on the victims.

How child soldiers fall into the ranks of the armed forces remains a difficult question, the answer to which must be sought taking into account the characteristics of each specific situation. In this regard, this question does not have a simple and unambiguous answer.

International humanitarian and national law are the same subjects, and the first part protrudes with respect to the second higher-level system. International law is most often one step ahead and serves as a factor in improving national legal systems: states, as a rule, use more advanced international norms as models and patterns for future national norms (Bezborodov, 2019: 3).

International humanitarian law and national law in the field of children's rights operate in various fields and are independent legal systems between which there is a certain interaction.

National Board to determine the extent and terms of access provisions of international law on the rights of children in the national legal system. It should be borne in mind that the norms of international law on the rights of children cannot be included in national law, bypassing the constitution.

Many norms of international humanitarian law on the rights of children have been transformed or implemented into Russian national law. Moreover, the transformation of international humanitarian law on children 's rights can be general, individual, direct and indirect.

The general transformation of international humanitarian law on children 's rights implies that all or certain types of accepted international legal norms are part of the country's law.

The individual transformation of international law provides that each norm or group of norms is introduced into the law of states by special acts.

A direct transformation of international humanitarian law on the rights of children is that the rules of treaties give rise to identical rules in national law by virtue of the adoption of treaties. In order for the norms on children 's rights to be applied as part of the rights of the country, they must be suitable for direct application.

The indirect transformation of the norms of international law on children 's rights means that, on the basis of treaties, national normative acts are issued that reproduce the content of treaties.

The interaction of international humanitarian law and national law in the field of children's rights is carried out to satisfy social interests.

In this regard, it seems necessary to agree with the statement of S.V. Chernichenko that international and domestic law are independent systems of law (Chernichenko, 1999: 130-131).

International humanitarian law and national law in the field of children's rights mutually influence each other. The implementation of the provisions on the rights of children enshrined in international agreements also cannot be adequately ensured without the participation of domestic law. The rights of children, enshrined in national law, also cannot be fully realized without the assistance of international law.

Of interest is the issue of protecting the rights of children . Nobody has the right to decide , what methods of implementation of international legal norms in the sphere of the rights of children should be taken by States for the most effective implementation of international humanitarian law.

It should be noted that by virtue of Part 2 of Art. 61 of the Constitution, Russia guarantees its citizens protection and patronage beyond its borders. We can agree with the assertion that this provision contains an international legal norm on the right of states to protect their citizens in other countries. In this regard, it should be borne in mind that in the 19th century “the lawful use of force was widely used to protect the life and property of its citizens (Brownlie, 1950: 121).

One of the challenges in the implementation and protection of children's rights is the need to intensify efforts to eradicating all forms of violence. In this regard, it should be noted that before the outbreak of World War I, the number of children actually participating in hostilities was insignificant; there was no need for their international legal protection. Children enjoyed the general protection of international humanitarian law. When injured, children enjoyed protection in accordance with the provisions of the Geneva Convention of 1864 on improving the fate of wounded and sick warriors during the land war (Krill, 1999: 47).

States should take all possible measures to ensure that persons under the age of 15 do not directly participate in hostilities.

It is necessary to refrain from the call of any persons under the age of 15 to serve in the armed forces. When recruiting from persons over the age of 15 who are not yet 18 years old, States should endeavor to give preference to older persons.

In accordance with their obligations under international humanitarian law to protect civilians during armed conflict, States undertake to take all possible measures to ensure the protection and care of children affected by armed conflict.

One of the important problems of modern international humanitarian law is the involvement of child soldiers in armed conflict.

So, more than 250 thousand children today are fighting on the side of government troops and in the ranks of rebels around the world. The average age of child soldiers is 10–12 years. Handling AK-47 children can be taught in 40 minutes. Somali child soldiers talk about training at bases in Uganda under the leadership of the US military.

By the number of warring children, Africa is the leader – in the central and western parts of which – every tenth child is a soldier. Their average age is 10-12 years, often in armed groups can meet and eight years. The bitter conflicts the more minors are involved.

In this regard, it should be borne in mind that children living in conflict zones with or without their parents are potential candidates to be recruited into the army. Deprived of parental protection, and the opportunity to get an education and prepare for an independent adult life, these

young soldiers can hardly imagine their life outside armed conflicts, participation in which becomes for them a way to earn a living. Participation in armed groups is their way of survival.

Many contradictions between the provisions of the law of armed conflicts and what is actually happens in the wars are often explained by factors such as obedience to orders, alcohol and drug abuse, and the young age of combatants.

Children are particularly vulnerable. In this regard, children who do not take part in hostilities should enjoy special protection from the effects of hostilities.

In particular, according to Art. 14 of the Geneva Convention for the Protection of Civilian Persons during the 1949 War, after the outbreak of hostilities, parties to the conflict may establish sanitary and safe zones and areas on their own territory, and if necessary in occupied territories, in order to protect against actions of war of children under the age of 15 years, pregnant women and mothers with children under 7 years of age.

By virtue of Art. 17 of the Geneva Convention for the Protection of Civilian Persons in Time of War of 1949, parties to the conflict must enter into agreements for the evacuation of children from besieged or surrounded areas.

According to Art. 23 of the Geneva Convention for the Protection of Civilian Persons in Time of War of 1949, states must provide free admission of all parcels with medical and sanitary materials, as well as items necessary for religious cults intended only for civilians.

Children during wars are entitled to various types of assistance. So, by virtue of Art. 50 of the Geneva Convention for the Protection of Civilian Persons in Time of War of 1949, the occupying Powers should, with the help of national and local authorities, provide assistance to institutions entrusted with the care and upbringing of children in order for their work to proceed successfully.

She must take all necessary measures in order to facilitate the identification of children and the registration of their family ties. In no case should she change their civil status, nor should they be credited to formations or organizations dependent on her.

In the event that local institutions are not able to perform these functions, the occupying powers must take measures to maintain and educate orphans or children separated as a result of war with their parents.

In this regard, the IV Geneva Convention of 1949 on the Protection of Civilian Persons in Time of War was adopted, which enshrined the provisions that apply to children as part of the civilian population.

Since the Second World War, a large number of new types of conflicts have appeared. Complicated methods and means of warfare, new types of weapons. The greatest losses during armed conflicts are suffered by the civilian population, especially children. In this regard, in 1974–1977. A diplomatic conference was held, which supplemented and developed international humanitarian law in the field of protecting the rights of children during armed conflicts.

The provisions on children's rights are enshrined in the Additional Protocol to the Geneva Conventions of August 12, 1949, concerning the protection of victims of international armed conflicts (Protocol I) and the Additional Protocol to the Geneva Conventions of August 12, 1949, concerning the protection of victims of armed conflicts of a non-international character (Protocol II) of 1977.

International humanitarian law enshrines provisions on the protection of children as persons not participating in hostilities and their special protection as the most vulnerable. International humanitarian law also protects children involved in hostilities.

4. Results

To improve the legal status of children in international humanitarian and national law, it seems advisable to adopt the Convention on the Protection of the Rights of Children in Armed Conflict within the United Nations , which would provide basic guarantees for the protection of rights and an effective international system for monitoring and enforcement of their rights.

Convention on the protection of the rights of children during armed conflicts could include definitions of basic concepts, such as trafficking in children, sexual and labor exploitation, the responsibility for crimes committed in the area of trade of children, trafficking countermeasures children, international cooperation in the field of trade of children, measures to prevent trafficking in children, etc.

5. Conclusion

The primary and universal guarantee of the enjoyment of children's rights in armed conflict is international law. Individual states and their officials cannot guarantee rights, as they are required to act within the framework of national law. Only cooperation of states on the basis of the Charter of the United Nations can guarantee the realization of the rights of children in armed conflict.

One of the important guarantees of protecting the rights of children during armed conflicts should be the right to peace, which implies strict observance of the ban on wars by states in international relations.

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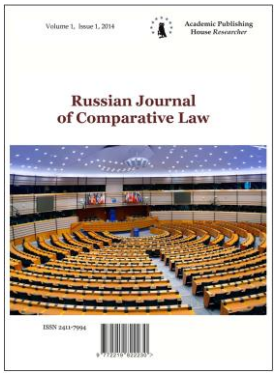

The Court of Arbitration for Sport Positions on Fault or Negligence of Anti-Doping Regulation Violations in Football

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Abstract

Scientific researches on the legal regulations of the fight against doping are carried out mainly in the Western doctrine within the framework of International law, Sports law, human rights, and European Union law. In post-Soviet legal science there is an intensive growth in the number of sports research, mainly sectoral (administrative, constitutional, labor, criminal law). However, there is practically no research on FIFA Anti-Doping Regulations. There is a difference between the two forms of anti-doping rule violation: the first form is the presence of a prohibited substance in an athlete's sample, the second form is the use of a prohibited substance by an athlete.

In this study, we will analyze the practice of the Court of Arbitration for Sport (hereinafter – CAS, arbitration) in cases of anti-doping regulation violations on issues of fault or negligence in football and draw conclusions, what facts can be accepted by the arbitration.

Keywords: fault or negligence in anti-doping cases, significant fault or negligence anti-doping cases, football anti-doping regulations, FIFA Anti-Doping Regulations, Court of Arbitration for Sport (CAS), practice of CAS.

1. Introduction

According to article 19 of the FIFA Anti-Doping Regulations (hereinafter – the Regulations), an anti-doping rule violation caused by finding a substance that WADA prohibits only during a competition period, is not considered intentional (without fault) if a player can prove that this substance was used outside of sports competition for purposes not related to sports activities (FIFA Anti-Doping Regulations). Not applying or reducing the standard sanction, in accordance with articles 21, 22 of the FIFA Anti-Doping Regulations, is possible only if the player can prove that (1) there was no fault or negligence (not the application of the sanction, article 21), (2) there was no significant fault or negligence (reduction in the size of the sanction, article 22).

Article 3.2 of the WADA Code (hereinafter – the Code) provides that the use of a prohibited substance can be established by any reliable means. Thus, the absence of adverse analytical results in the analysis of the athlete does not prevent the body considering the dispute from relying on any other reliable means to establish a violation of anti-doping rules.

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The difference between the two types of violations and the evidence required to prove each is well illustrated by CAS 2004/O/645, where it was found that the former world-record holder at 100 meters violated the provisions on the availability and use of doping of IAAF Anti-Doping Rules (CAS 2004/O/645). The athlete was not charged with availability – no prohibited substance was found in his "sample". The CAS decision was based on one piece of evidence – an indication of the athlete by another athlete as the person who used such a substance.

Unlike the evidence necessary to establish the presence of a prohibited substance, the use of it can be established by other reliable means, such as

(1) witness testimony,

(2) documentary evidence, or

(3) other analytical information that otherwise does not meet all the requirements for establish the presence of a prohibited substance.

2. Material and methods

This study is based on the FIFA Anti-Doping Regulations, WADA Code, and relevant CAS cases on disputes in football, as well as a few researchers of the problem (Chetyrnova, 2017).

In the process of conducting the study, the formally dogmatic method, the problem method, the legal modeling method, and the system method were used, which are not the first time the authors are involved in studying the sports law.

3. Discussion

To determine the extent to which a violation affects a sanction, the CAS considers both objective and subjective elements.

With regard to the objective element, the CAS believes that, in theory, almost all anti-doping rule violations related to the consumption of a product containing a prohibited substance can be prevented (CAS 2015/A/4059: para. 153). The athlete should always read the label of the product used or otherwise check the ingredients, compare all the ingredients on the label with the list of prohibited substances, search the Internet, and consult with the relevant specialists on these issues (primarily the club doctor or the national team doctor). Thus, an athlete must exercise "utmost caution" in order to warn himself against anti-doping rule violations.

With respect to the subjective element, arbitration assumes that the athlete cannot always reasonably follow all the above steps in all circumstances. CAS refers to its practice: youth or inexperience of an athlete (CAS 2008/A/1490: para. 38; CAS 2010/A/2107: para. 54); language or other problems faced by an athlete (CAS 2012/A/2924: para. 62), a low level of anti-doping education (CAS 2012/A/2822: paras. 8.21, 8.23), any other personal problems that prevent a person from maintaining an objective element of responsibility (CAS 2011/A/2515: para. 73), stress (CAS 2012/A/2756: para. 8.45), an athlete whose level of awareness has been reduced by a careless but understandable mistake (CAS 2012/A/2756 : para. 8.37).

Whilst each case will turn on its own facts, the following examples of matters which can be taken into account in determining the level of subjective fault can be found in CAS jurisprudence.

In CAS 2008/A/1490, arbitration placed substantial weight on factors such as an athlete's lack of experience in doping matters as a national or international athlete, lack of any formalized drug education training at the national or international level, lack of guidance and support from his coaches and others, and lack of any intention to enhance athletic performance in determining the existence of an athlete's significant fault or negligence under the Code article 10.5.2.

In reaching this conclusion, the CAS has noted that at the relevant time a sportsman was relatively young. But the arbitration does not believe that this factor on its own is relevant and this factor does not give rise to any automatic exception. In this case it was a series of factors:

(1) complete lack of experience in doping matters and as a national or international athlete;

(2) lack of guidance and support from his coaches or others;

(3) lack of intention to influence or enhance his performance at the relevant time;

(4) his relatively young age.

All of mentioned factors taken together in the factual context, which gives rise to the exceptional nature of the case (CAS 2008/A/1490: para. 38). Applying these factors, CAS determined that the subject athlete's period of ineligibility should be no more than 50% of the maximum sanction provided by the applicable Code provisions.

In CAS 2010/A/2107 the arbitration does not agree with USADA's assertion that sportsman`s "fault for failing to take adequate steps to ensure that a product marketed as a stimulant does not contain any banned performance enhancing substances" should be considered in determining whether she can prove her lack of an intent to enhance sport performance. Sportsman's "degree of fault" is only relevant in determining whether her period of ineligibility should be reduced (CAS 2010/A/2107: para. 32). Sportsman's degree of fault, in light of her lack of experience in doping matters as a national or international athlete and any formalized drug education training at the national or international level, is less than that of the subject athlete in the prohibited substances cases cited by USADA in support of its argument that the CAS should impose a two-year period of ineligibility on sportsman for ingesting a specified substance (CAS 2010/A/2107: para. 54).

In CAS 2011/A/2515 in the arbitration view, the circumstances favorable to sportsman`s position include the following. Firstly, she had already bought products, and received free samples, from the online retailer that provided her with the Supplement and she had used such products and samples in the past over many years without incident or any positive anti-doping control. Secondly, she did not buy the supplement, but received it as a free sample. Thirdly, MHA was directly mentioned on the packaging of the Supplement but only under an associated name. Fourthly, she indicated the use of the Supplement in the doping control form. Sixthly, sportsman's personal history and clean anti-doping record spanning many years shows that she had always paid attention to anti-doping issues (CAS 2011/A/2515: para. 73).

In CAS 2012/A/2822 the arbitration deems it appropriate to reduce the sanction imposed on the appellant for the reason that he never received any education or information in anti-doping matters by his federation or the anti-doping agency of his country. This explains that the appellant's awareness of the dangers of prohibited/specified substances being contained in food supplements was not as high as it should have been. The CAS further finds that the case at hand cannot be compared to cases where an athlete uses prohibited/specified substances deliberately and intentionally. A reduction of the standard sanction of 2 years seems therefore mandatory (CAS 2012/A/2822: para. 8.23).

In CAS 2012/A/2924 among the several circumstances which speak for maintaining a three month period of ineligibility the following facts and circumstances are underlined by the arbitration:

(1) A sportsman indicated the use of "Rhinofluimicil" on the doping control form;

(2) She submitted on 12 August 2012 a detailed account of the circumstances of her positive test;

(3) The sportsman has a clean anti-doping record over her long career;

(4) It has not been disputed by UCI that she advised the pharmacist at the pharmacy located one block from the team hotel in Rome that she was an athlete and subject to doping controls. The pharmacist confirmed that her use of the medication would not result in a doping violation;

(5) The sportsman informed the team's assistant coach that she had obtained a medication from a local pharmacy;

(6) She could not benefit from the same support as normal professional athletes and was not accompanied by medical staff when she committed the anti-doping violation;

(7) The warning and contents label on the medication was written in Italian, a language that is not sportsman`s native tongue, nor was there evidence she had any knowledge of the language (CAS 2012/A/2924: para. 62). In view of the above elements, the arbitration has reached the conclusion that the sportsman has committed a minor anti-doping rule violation which justifies a reduced sanction. A period of ineligibility of 3 months is therefore appropriate in the circumstances (CAS 2012/A/2924: para. 63).

In CAS 2012/A/2756 the arbitration recognizes that the appellant was in a state of emotional stress which led him to ignore the level of care which he would otherwise have observed. The CAS also wishes to add that during the hearing the appellant came across as an honest man who regrets the error committed (CAS 2012/A/2756: para. 8.46).Taking into account all of the circumstances mentioned above, the Panel determines that a period of six months suspension is a sanction proportionate to the Appellant's degree of fault (CAS 2012/A/2756: para. 8.47).

In CAS 2012/A/2756 the arbitration mentioned that the appellant cannot be blamed for not reading the patient's information leaflet for Tamoxifen as due to his own negligence he thought he

was taking his own medication and not Tamoxifen (CAS 2012/A/2756: para. 8.37). The CAS reasoning is parallel in particular to those cases where athletes were successful in demonstrating that – like in the case at hand – they were completely unaware that they were ingesting material which was or which contained a prohibited (specified) substance. These are the cases where the absence of intent to enhance performance is obvious since logically the athlete cannot have had intent if he did not know he was ingesting the substance (CAS 2012/A/2756: para. 8.49).

The arbitration finds support for this conclusion in CAS 2010/A/2107, where the athlete was able to establish that she was unaware of the presence of a specified substance in a dietary supplement: this was sufficient to prove the absence of intent to enhance performance, but the reasons for her failure to know were the crucial element in assessing the degree of fault and thus the extent of the sanction 18 months. Because the sportsman was an elite level athlete and a professional cyclist at the time of her first positive test rather than an intercollegiate or high school athlete, the CAS concludes that her period of ineligibility should be more than 50 % of the maximum for her first doping offence; specifically, it should be 75 % of the maximum sanction – eighteen months. The Panel finds that the facts relevant to sportsman`s degree of fault are similar but not identical to those in CAS 2005/A/847, in which a CAS panel imposed an eighteen month period of ineligibility on a professional skier who tested positive for the prohibited substance from ingesting a contaminated nutrition supplement (CAS 2010/A/2107: para. 52).

In CAS 2006/A/1025 the athlete had mistakenly drunk from his wife's glass of water in which she had poured – unbeknownst to the athlete – her medication containing a specified substance. The CAS determined that the athlete was not without fault or negligence but that he was entitled to a sanction of two years for a second violation which for reasons of proportionality was even below the minimum established in the rules.

The arbitration submits that he cannot be expected to exercise "utmost caution" when he has no knowledge that he has ingested anything at all. In the view of the CAS, he is overstating his position. Water is ingested just like any other liquid, be it coffee or orange juice. It is not unreasonable to expect of the sportsman, who had been aware for several years of his wife's regular use of colorless, tasteless and odorless "Effortil" and the manner in which she administered it (10 to 20 drops in a glass of water), to be aware also that residues of the substance could be found in a used glass, even if the glass appears to be empty. Athletes must be aware at all times that they must drink from clean glasses, especially in the last minutes before a major competition (CAS 2006/A/1025: para. 41).

It has been said many times by CAS that it is an athlete's responsibility to ensure that what goes into his body does not contain a prohibited substance. It is not open to an athlete simply to say "I took what I was given by my doctor who I trusted". At the very least, an athlete who has been given medicines by a doctor should:

1. Specifically ask to be informed of what are the contents of those medicines;
2. Ask whether the medicines contain any prohibited substance;
3. Attempt to obtain written confirmation from the doctor that the medicines do not contain any prohibited substances.

It will no doubt be objected that to require an athlete to ask such questions and to obtain such confirmation would be to place too heavy a burden on the athlete. The CAS rejects such an objection. It rarely, if ever, is the case that medicines are given to an athlete in circumstances in which it would not be possible for him to ask such questions or to obtain such confirmation.

In CAS 2016/A/4512, the respondents appealed to the fact that the application of article 19 of the FIFA Anti-Doping Regulations referred to by WADA is incorrect as it indicates "intentional" use of doping (CAS 2016/A/4512: para. 25). As it is known, the term requires a person to know that his behavior is a violation of the anti-doping rules, or to know that there is a significant risk that the behavior could lead to a violation of the anti-doping rules and clearly ignored this risk. In his defense, the player provided medical records confirming his testimony before the disciplinary authorities of the national football federation, namely that he took medications for the infertility treatment and cited some studies proving the probability that taking these drugs caused the presence of a prohibited substance in his sample after five and a half months. The footballer believed that he had fulfilled his burden of proving that he had no intention of improving his athletic ability, and explained how the prohibited substance had entered his body (CAS 2016/A/4512: para. 27).

Rigid approach of WADA does not allow the differentiation that justice requires when it comes to delimiting a player who intends to improve athletic performance from someone who mistakenly uses a substance not for the purposes of athletic competition. Therefore, the use of substance, when a football player knew that it was prohibited by WADA, was extremely reckless. The period of disqualification can be reduced only if there was no significant fault or negligence. This situation is not applicable in the CAS 2016/A/4512 dispute due to the fact that the player was aware of the prohibited nature of the substance and, nevertheless, decided to accept it, making his fault clearly significant (CAS 2016/A/4512: para. 25). In this case, the player had the opportunity to re-apply for therapeutic use, but he decided not to do this, realizing the risk. Thus, the player's behavior is considered intentional within the meaning of article 19 (3) of the FIFA Anti-Doping Regulation, and shall be subject to disqualification for four years (FIFA Anti-Doping Regulations).

Special attention to the objective and subjective elements of the violation should be drawn when the prohibited substance has entered the body of a football player as a result of taking the medicine prescribed by a doctor. An athlete who has been given medicines by a doctor should:

(1) ask to be informed about the content of these medicines;

(2) ask if the drugs contain any prohibited substances;

(3) obtain written confirmation from the doctor that the drugs do not contain prohibited substances.

If an athlete wants to convince CAS that he has a prohibited substance in his body, but there is no fault or negligence, he must do more than just rely on his doctor (CAS 2015/A/4059: para. 154).

For example, in CAS 2013/A/3262 a player did not challenge the scientific conclusion on the identification of "Methylhexanamine" and its metabolites in his "sample" (CAS 2013/A/3262). He said that he worked with a nutritionist to improve his diet and thereby improve his physical characteristics in football. The player explained that his nutritionist focused on weight loss and developed a diet plan for the player, which included, among other things, eating a product called "Hemo Rage Black" (CAS 2013/A/3262: para. 20). As a result, the football player was disqualified for two years for violating article 6 of the FIFA Anti-Doping Regulations (FIFA Anti-Doping Regulations).

The arbitration in CAS 2013/A/3262 notes that the player does not refute the violation of anti-doping rules, in particular, article 6 of the FIFA Anti-Doping Regulation. Consequently, he was reasonably applied a standard sanction in the form of a disqualification for two years. However, a football player has the right to prove the need to reduce or not use such a standard period of disqualification (CAS 2013/A/3262: para. 65).

Since the arbitration concluded that the disqualification cannot be canceled on the basis of article 21 of the Regulations, the question of reducing the sanctions was considered in accordance with article 22 of the Regulations. This rule applies only to special substances, by determining how the substance enters his body, as well as evidence supporting his statements, and establishes the absence of intent to improve his athletic performance.

But in CAS 2013/A/3262 the player could not prove the absence of significant fault or negligence. Taking a product as part of a weight loss plan, and actually causing weight loss, it cannot entail any other result than improving the player's health, and hence his physical and athletic performance. Moreover, the expert witness explained that a prohibited substance affects pressure, heart rate, mental clarity and physical performance, and its primary effect is a stimulant, and weight loss is only a secondary effect (CAS 2013/A/3262: para. 65). In particular, the CAS noted: the player must prove that the use of a special substance, and not the product itself, was not intended to enhance its athletic performance, and also provide supporting evidence in addition to its statement, which confirms the absence of fault (CAS 2010/A/2107: para. 53). In accordance with the practice of the CAS and the Code, a player must establish the facts that he claims were in accordance with the "balance of probabilities", which means that the accused athlete bears the burden of proof that the occurrence of the circumstances to which he refers is more likely than their absence or more likely than other possible explanations for the violation of the Regulations (CAS 2013/A/3262: para. 99).

4. Results

The fight against doping is difficult and this may require strict rules. Therefore, CAS concludes that every participant in the sports industry must start by being strict with themselves. The provisions of the anti-doping regulatory framework must be properly applied when appointing sanctions to the athlete.

The anti-doping regulation in football impose on each sportsman a personal duty guaranteeing that the prohibited substance does not enter the body of the player, which necessarily means that the player must take all possible precautions in "utmost caution" to avoid any anti-doping rule violations. Accordingly, the fact that this is a personal obligation means that the player cannot escape responsibility simply by claiming that another person has been negligent.

Thus, the presence of fault or negligence, their degree in the actions of an athlete, considered in the totality of circumstances, have a direct impact on the application and the size of the sanction.

According to the CAS, the player who is a professional football player, knows about the risks connected with acceptance of nutritional supplements concerning doping and, thus, it was reasonable to expect from him, at least, consultations with the team doctor, but not with the nutritionist who does not work in the world of soccer (CAS 2005/A/847: para. 103). This fact demonstrates considerable negligence of the player. If an athlete wants to persuade an anti-doping tribunal, or the CAS, that he has been found to have a prohibited substance in his body, but that he was not at fault or negligent, or that he was not substantially at fault or negligent, he must do more than simply rely on his doctor.

In any case, the fact that the sportsman allegedly did not know that the product contains a prohibited substance does not prove the absence of fault or negligence. A football player can only claim that there is no intent to increase his effectiveness when his behavior was not reckless, that is, due diligence was shown. Therefore, the player's arguments that increase in sports characteristics has no relation to the products which were a part of its diet and that he was never going to use a product for direct increase in its sports results are most often insolvent.

To establish whether the sportsman without significant fault or negligence acted, it is required that the behavior of the athlete was compared to the standard of responsibility which can be expected from "the reasonable person" in the athlete`s situation (CAS 2016/A/4416: para. 66). Practice of the CAS shows that it can be proved when the football player observes "accurate and obvious precautionary measures which any person will accept" in specific circumstances (CAS 2005/A/847: para. 7.3).

5. Conclusion

According to CAS positions, the following factors should be mentioned in qualification of fault or negligence (especially, in investigating the significant fault or negligence):

1) The sportsman has not received education in the field of anti-doping regulation.
2) The sportsman has not has used the WADA hotline or any other hotline.
3) The sportsman has not conducted an online search for the supplement or made any other requests for its elements or properties, including not asking the doctor about the supplement, although everyone signed the consent form for its introduction.
4) The risk of using a medicine without consulting not only with the manufacturer, but also the team doctor existed and was intentionally ignored by the sportsman. A nutritionist cannot be considered an expert in anti-doping issues, and it is a matter of negligence on the part of the player to rely solely on the advice of a nutritionist when he could easily consult with the team doctor.
5) It was completely unreasonable to rely on the unfounded assumption about the knowledge of the club`s doctor about the introduction of additional injections under the program, especially when the player did not seek, although it did not require much effort, to check the validity of the assumption. In a statement of consent to the introduction of additional injections, it was stated that the substance is not a prohibited. The fact that a specific substance was indicated in the form should have been the reason for requesting the properties of such a substance, and not an excuse for non-observance of the anti-doping rules.
6) To rely on the knowledge of the created program for football players and its approval by high-ranking officials at the club, who have no relation to medicine, was absolutely not reasonable. Being in a team, namely in a football team, does not justify the inability to take steps that are mandatory for an athlete in sports.

7) The sportsman has not conducted any research on the Internet about medication due of the language or other problems faced by an athlete. There is no evidence that the player was looking for additional information by phone, online or in person. The fact that the product label contains a warning in English, which is said to have not been understood by the athlete, is not an excuse. Indeed, the product contains a warning that it contains ingredients that may be banned by some sports organizations. In addition, it is noted that the description (in foreign language) of the product, provided on the web page that the nutritionist was testing, describes the typical effects of taking the drug associated with improving athletic performance. Therefore, the CAS reasonably believed that by adopting minimal efforts, the player had to come to the conclusion that a prohibited substance could be found in the medication.

8) Despite early age or inexperience of an athlete, from the sportsman the corresponding duty of due discretion at intake of any medicines is not removed.

9) The sportsman knew or should have known about the anti-doping procedures in accordance with the anti-doping regulations and had experience playing at the international level. Anti-doping rules impose a personal obligation on each sportsman to ensure that the prohibited substance does not fall into the body of the player, which means the sportsman must take all due diligence measures to avoid any violations of the anti-doping rules (exercise "utmost caution"). Accordingly, it is an obligation, and the player cannot escape responsibility, simply by asserting that the other person has been negligent.

10) The sportsman has not reported in the form of a doping control that he was taking medication. Here, the facts demonstrate a situation that goes beyond simple ignoring, since the player did not exercise due diligence ("utmost caution") to comply with applicable anti-doping rules.

11) The level of awareness has been reduced by a careless but understandable mistake.

12) Any personal problems (including the stress) that prevent a person from maintaining an objective element of responsibility.

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