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BRICS LAW JOURNAL (BRICS LJ)

An independent, professional peer-reviewed academic legal journal.

Aims and Scope

The *BRICS Law Journal* is the first peer-reviewed academic legal journal on BRICS cooperation. It is a platform for relevant comparative research and legal development not only in and between the BRICS countries themselves but also between those countries and others. The journal is an open forum for legal scholars and practitioners to reflect on issues that are relevant to the BRICS and internationally significant. Prospective authors who are involved in relevant legal research, legal writing and legal development are, therefore, the main source of potential contributions.

The *BRICS Law Journal* is published in English and appears four times per year. All articles are subject to professional editing by native English speaking legal scholars. The BRICS LJ is indexed by Scopus.

Notes for Contributors

Manuscripts must be the result of original research, not published elsewhere. Articles should be prepared and submitted in English. The BRICS LJ doesn't accept translations of original articles prepared not in English. The BRICS LJ welcomes qualified scholars, but also accepts serious works of Ph.D. students and practicing lawyers.

Manuscripts should be submitted electronically via the website *www.bricslawjournal.com*. Articles will be subjected to a process of peer review. Contributors will be notified of the results of the initial review process within a period of two months.

Citations must conform to the *Bluebook: A Uniform System of Citation*.

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ARTICLES

EXPERIENCES OF LEGAL INTEGRATION AND RECEPTION BY THE BRICS COUNTRIES: FIVE PASSENGERS IN A BOAT (WITHOUT A DOG)

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This article assesses the problems and prospects of the development of cooperation among the BRICS countries' in the sphere of law and the movement of these countries towards the creation of a common legal framework. The article presents a comparative analysis of the systems of law, including the cultural, historical, social and political contexts of their formation and development as well as the functioning of the systems in the conditions of the modern world.

The article particularly focuses on the subject of a common philosophy of law for the BRICS countries that would allow not only to establish the interaction of such dissimilar partners in the legal sphere, but also to move towards a new model of legal interaction for the whole world that has embarked on the path of globalization. Special means allowing the assessment of the possibility of future legal integration and globalization based on a common philosophy of law are the traditions and values of the civilizations represented by the BRICS countries. The article suggests that the core of the civilizational and value-based identity of each BRICS partner consists in a set of ideas and interpretations of the notion of justice clearly manifested in the controversy with the theory and ideology of justice proposed by the initiators and leaders of globalization – the countries of the West led by the United States. The theory and ideology of justice promoted by the "Atlantists" is concisely formulated in the book "A Theory of Justice" by John Rawls. Therefore, the

reaction to and discussion of such a theory by the philosophers and jurists from Russia, India and China allows determining the contours of the common philosophical and legal position of these countries as well as outlining its significance for the future of the BRICS countries and, perhaps, of the whole system of legal relations in a new globalizing world.

Keywords: BRICS; philosophy of law; theory of justice; legal integration; regional cooperation.

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Introduction

As we may recall, the characters in the well-known book by Jerome K. Jerome "Three Men in a Boat" (1889) ventured on their daring journey one fine day in the late 19th century. This adventure allowed them to escape from the routine of idle daily life and confinement within the city walls, and came as a breath of fresh air full of the promise of change.

In the 21st century, the initiative of the BRICS had to a certain extent similar motives: to provide a new impetus and a favorable current for the development of the relations between the members of the bloc. At the same time, the main drivers for and determinants of creating the bloc of regional leaders were of an economic nature. The term "BRIC" was first introduced by Jim O'Neill, the leading economist and analyst at Goldman Sachs Bank, in November 2001. The term became widely known in 2003, when Goldman Sachs issued an analytical report forecasting that by 2040 the countries of the BRIC group would catch up with – and by 2050 overtake – the USA, Japan and the countries of Western Europe in terms of total GDP.

> Our predictions may seem dramatic. But over a period of a few decades, the world economy can change a lot. Looking back 30 or 50 years illustrates that point. Fifty years ago, Japan and Germany were struggling to emerge from reconstruction. Thirty years ago, Korea was just beginning to emerge from its position as a low-income nation. And even over the last decade, China's importance to the world economy has increased substantially. History also illustrates that any kind of long-term projection is subject to a great deal of uncertainty. The further ahead into the future you look, the more uncertain things become. Predictions that the USSR (or Japan) would overtake the US as the dominant economic power turned out to be badly off the mark.[1]

Later on, at the G20 summit in Seoul on 11 and 12 November 2010, the Republic of South Africa expressed its willingness to join the BRIC group. After the accession of South Africa on 18 February 2011, the BRIC was renamed the BRICS (Brazil, Russia, India, China, South Africa), bringing together the five fastest-growing emerging economies distinguished by high rates of economic development and a high-degree export orientation, which, according to Goldman Sachs experts, had in the long term the potential to become the dominant economic actor in the world.

In many ways, the emergence of the BRICS was the result of a deep crisis in the world economic system of the liberal type. Joseph E. Stiglitz, Nobel laureate economist, made a salient point in this respect when he remarked that

> September 15, 2008, the date that Lehman Brothers collapsed, may be to market fundamentalism (the notion that unfettered markets, all by themselves, can ensure economic prosperity and growth) what the fall of the Berlin Wall was to communism... Today only the deluded… would argue that markets are self-correcting and that society can rely on the self-interested behavior of market participants to ensure that everything works honestly and properly [– let alone works in a way that benefits all].[2]

Certainly, the social and economic initiative could not but affect the evolution of the BRICS countries' legal systems. In this article, we will (a) determine the peculiarities

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1 Dominic Wilson & Roopa Purushothaman, *Dreaming with BRICs: The Path to 2050*, Global Economics Paper No. 99 (October 2003), at 6 (Jun. 6, 2018), available at http://www.goldmansachs.com/our-thinking/archive/archive-pdfs/brics-dream.pdf; Michaël Oustinoff, *Introduction*, 3(79) Hermès, La Revue 13 (2017).

2 *Стиглиц Дж.* Крутое пике: Америка и новый экономический порядок после глобального кризиса [Joseph E. Stiglitz, *Freefall: America, Free Markets, and the Sinking of the World Economy*] (Moscow: Eksmo, 2011) 26 (Jun. 6, 2018), also available at https://archive.org/stream/joseph_e_stiglitz_freefall_america_free_markets_and_the_sinking_of_the_world_economy/Joseph%20E.%20Stiglitz-Freefall_%20America%2C%20Free%20Markets%2C%20and%20the%20Sinking%20of%20the%20World%20Economy-W.%20W.%20Norton%20Company%20%282010%29_djvu.txt.

of the BRICS bloc of regional leaders in the context of legal globalization; (b) assess the legal cooperation among the BRICS countries; and, finally, (c) highlight the facets of the proper and the actual of the BRICS countries' philosophy of law.

1. BRICS Within the Framework of Globalization

Globalization, in terms of global axiology and ontology, is a multi-level, multi-functional and multi-dimensional phenomenon.

Both a wide and a narrow interpretation of this concept can be found in the works on globalization: from designating a certain stage of global history to serving as a name for specific phenomena and trends. One of the most common philosophical definitions of globalization is the approach proposed by David B. Goldman, who points out that globalization is, essentially, "the increasing interconnections amongst things that happen in the world."[3]

Different approaches to the legal equivalent of globalization are put forward in the academic sphere. In his famous work "Profils des mondialisations du droit" ("Profiles of Globalization of Law") Jean-Louis Halpérin explicitly proclaims Roman law to be the first experience of legal globalization in the history of humankind,[4] with regard to the "Bologna Renaissance"[5] – accordingly – a new attempt of social community, to introduce standardized legal formulas into the practices of the medieval states of continental Europe.

Looking at the Roman type of legal globalization, it should be noted that the globalization processes as such had both synchronous and diachronous vectors in relation to the existence of the Roman civilization itself. On the one hand, the integrative network distribution of *jus romanum* was to a large extent driven by the aggressive passional power of the state itself – the promoter of the corresponding ideas and values. On the other hand, the resort by medieval states to the legal past of Ancient Rome was to a large extent due to the problem of the gaps existing in and the insufficiency of the instrumentarium available in Europe for organizing and regulating social relations. A decisive role in the reception of Roman law in medieval Europe was played by the schools of glossators and conciliators. Another promoter of this type of globalization processes was the university community as such. It was the universities that became the centers of the initial introduction of the network patterns of the Roman right into new spatial and temporal sites.

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3 David B. Goldman, *Historical Aspects of Globalization and Law* in *Jurisprudence for an Interconnected Globe* 43 (C. Dauvergne (ed.), Aldershot; Burlington: Ashgate, 2003).

4 Jean-Louis Halpérin, *Profils des mondialisations du droit* 60 (Paris: Dalloz, 2009).

5 This is the name given by Professor Halpérin to the process of Roman law reception in the Middle Ages, led primarily by the universities of Europe and, in particular, by the oldest of them – located in the city of Bologna, Italy.

Certain similarities with the Roman legal globalization of the synchronous type can also be traced in its colonial equivalent. Just like the Roman civilization, the colonial powers relied primarily on forceful political and legal methods to spread their own legal formulas, standards and rules in foreign social environments. The object of globalization experiments was a highly aggregate category of "Western law," which, in terms of comparative law, should be considered in two main directions: the law of continental Europe and Anglo-American law.

The deployment of the modern type of legal globalization brought humankind face to face with a unique social reality. Notably, this uniqueness was determined by both purely quantitative factors (such as the extent of network integration distribution in the aforementioned social sphere – unprecedented in the previous time ladders) and purely qualitative factors (substance-related aspects of actualization).

The qualitative leap in the system integration and in the network interpenetration of multi-vector values, institutions and norms in legal communities began to fully manifest itself in the mid to late 20th century. Undoubtedly, certain "spots" of globalization appeared on the legal maps of the world even earlier – in different time periods. However, the insufficient level of integration of the social systems as a whole did not allow them to acquire a truly universal character. Such a leap in the ontology of legal globalization, in our opinion, was brought about by the following circumstances:

– the intensification of comparative jurisprudence development which resulted in minimizing the number of blank spots on the legal map of the world, while up to the early 20th century the comparative academic research was limited only to the study of the so-called civilized legal communities of the Western legal world;

– a high level of communication links in the global legal space leading to the accelerated diffusion of legal patterns of different qualitative orientation in various geographical areas of implementation;

– the step-by-step institutionalization of universal supra-state, integration-type legal instrumentarium, in particular under the auspices and the jurisdiction of the United Nations as well as international institutions localized and based on various qualitative grounds;

– the interpenetration of globalization processes of different qualitative orientation. In particular, we are referring to the merging of legal, economic and value-related equivalents of globalization in certain functional areas. This merging led to the advent of unique social phenomena unknown in previous social practices, such as internet law (IT law, cyberlaw) or McDonald's law.[6]

To some extent, globalization has also intensified integration along the regional vector. However, the interaction of globalization and regionalization has a more complex structure of relationships. Here we can trace some elements of a contradictory

6 For details *see* Maxim V. Voronin & Maria V. Zakharova, *Convergence and Competition of Legal Systems of the Modern World*, 1 Revista QUID (Special Issue) 1322, 1326 (2017).

unity, meaning the existence of both the time periods when the goals of these processes coincide and the periods when they do not. Andrei Savinskiy was right when he wrote:

> Globalization has a contradictory effect on the processes of regionalization... [O]n the one hand, it reconciles and even aligns the basic characteristics of individual regions, while[,] on the other hand[,] it encourages them to preserve their peculiarity and uniqueness.[7]

The BRICS also faced all these contradictory unity problems on the social map of the modern world. The network connections between objects that D.B. Goldman wrote about, undoubtedly, exist within the framework of the integration of the BRICS countries as well. At the same time, if we regard globalization not just as a total network interconnection, but as a kind of neo-liberal hegemony,[8] regionalism becomes to some extent a counterpoint to such hegemony.[9]

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7 *Савинский А.В.* БРИКС как продукт глобализации // Вестник РУДН. Серия: Экономика. 2011. № 5. С. 57 [Andrei V. Savinskiy, *BRICS as a Product of Globalization*, 5 Bulletin of the Peoples' Friendship University of Russia, Economics Series 55, 57 (2011)].

8 Thus, V. Sorokin believes that modern globalization represents the realization of the hegemonic, pro-American principles. The globalization of the world, he writes, "is an ambitious, historically unprecedented political and legal project of the United States aimed at implementing the strategy of establishing its hegemony over the whole world for the long term, it is a bid to create a global American empire" (*Сорокин В.В.* Юридическая глобалистика. Т. 1 [Vitaliy V. Sorokin, *Legal Globalistics. Vol. 1*] 235 (Moscow: Yurlitinform, 2010)). Continuing further to pursue the general critical line of thought with regard to globalization as a phenomenon of global practice, Sorokin, in particular, points out the following: "Over the recent decade, contemporary international law has been increasingly transforming from a traditional means of peaceful resolution of conflicts between countries into a means of justifying the use of force by the repressive apparatus of the system of global governance and, therefore, has been playing the role of an ideological institution that justifies the legitimacy of the resort to force in international relations. This is especially true with regard to the so-called international human rights standards, which are beginning to perform the function of limiting national sovereignty, turning not so much into international, interstate law, but rather into supra-national law, which bears the seeds of the emerging global law" (*Сорокин В.В.* Юридическая глобалистика. Т. 2 [Vitaliy V. Sorokin, *Legal Globalistics. Vol. 2*] 73–74 (Moscow: Yurlitinform, 2010)).

9 According to David Lane's methodology, the multi-polar configuration of the modern capitalist system of the world includes the following structural elements: (1) the core, uniting the leading Western countries and the regional alliances headed by these countries, such as NAFTA (USA) and the EU; (2) the semi-core, including countries that form their own regional alliances, closely interact with each other and are included in the system of economic exchange with the center of the prevailing neoliberal order, such as the SCO (Shanghai Cooperation Organization) or the BRICS countries; (3) the periphery. The difference between the periphery and the semi-core countries is that the latter have their own transnational corporations and a much greater autonomy from the core, thereby reconstituting themselves as independent economic formations. Therefore, these countries and the corresponding regional alliances may qualify for the role of a counterweight, capable of weakening the influence of the core on the system of the world and becoming the basis for a new order (*Лэйн Д.* Евразийская региональная интеграция как ответ неолиберальному проекту глобализации // Мир России. 2015. № 2. С. 6–27 [David Lane, *Eurasian Integration as a Response to Neo-Liberal Globalisation*, 2 Mir Rossii 6 (2015)]).

A peculiar feature of integration along the BRICS vector is the absence of historical academic platforms for unification. In this respect, the European Union demonstrates the opposite tendency. For example, in France the first political and legal project of creating a "united Europe" was developed, surprisingly, as early as the 14th century. It was the first written project of Europe unification in history. Its author was Pierre Dubois, the Master of the University of Paris and the legist of the French King Philip the Fair.[10] In his treatise "The Recovery of the Holy Land," written in 1305–1307, Dubois puts forward a very specific plan for the unification of Europe.[11] Later on, the ideological background for European integration would be set out in the "Grand Design" by the Duke of Sully (*duc de Sully*) (the Superintendent of King Henry IV of France); in the work of Émeric Crucé, a 17th-century monk, "The New Cyneas, Or Discourse on the Occasions and Means for Establishing General Peace and Free Trade Throughout the World: To the Monarchs and Sovereigns of the Present Day; in the Project for Making Peace Perpetual in Europe" by Charles de Saint-Pierre (1712) and in a number of other works.

Does this complicate integration within the BRICS? On the one hand, it does – as happens every time when the recreation of social reality takes place without hundreds of years of experience in designing and outlining the integration. On the other hand, such a situation necessarily generates the multivariance of the evolution of the BRICS, where practical implementation is sometimes way ahead of theoretical comprehension.

2. Legal Influences and Legal Cooperation Among the BRICS Countries

None of the BRICS countries is of a matrix type (according to the methodology of "Grands systèmes de droit contemporains: Approche comparative" by Raymond Legeais[12]) in the classic sense of comparative law. The exception is Russia, which in the early 20th century put forward a specific political and legal model of social organization based on the ideology of Marxism-Leninism. However, everybody remembers that towards the end of the century Russia itself quit the socialist platform, whose recipients (China, Cuba, North Korea) from that time forward have been left to float freely on their own upon the political waterways of the world.

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10 Право Европейского союза [*European Union Law*] 59 (S.Yu. Kashkin (ed.), Moscow: Yurist, 2009).

11 *See Бида Д.А.* Зарождение и развитие "европейской идеи" во Франции в XIV–XVIII вв.: историко-правовой экскурс // Пробелы в российском законодательстве. 2015. № 3. С. 49–52 [Darya A. Bida, *Origin and Development of the "European Idea" in France in 14th–18th Centuries: Historical and Legal Review*, 3 Gaps in Russian Legislation 49 (2015)].

12 Raymond Legeais, *Grands systèmes de droit contemporains: Approche comparative* (3rd ed., Paris: LexisNexis, 2016).

At the same time, each of the BRICS countries became a recipient of certain external (in relation to national law) legal regulations.[13]

The modern Chinese legal system can be regarded as the most "mosaic" in this respect. According to Pavel Troshchinsky,

> The legal system of the PRC is unique. It embodies the characteristic features of law of the countries of the socialist system,[14] the norms of traditional (ancient Chinese) law as well as certain implemented principles and norms of international law.[15]

H. Patrick Glenn points out that the parts of the "legal mosaic" do not just coexist, but also actively interact, integrate or become a basis for mutual interpretation and reinterpretation.

> Adat law thus represents a particular, Asian exemplification of chthonic law, and its survival in Asia tells us a great deal of the value attached to informal tradition. Another form of chthonic law could be found in Chinese feudalism, which may be seen as the original source of the normativity developed by, and derived form, the man known in the [W]est as Confucius.

He goes on:

> There is a long tradition of formal law and formal sanctions, or [*fa*], in China, though it has played a subordinate role to the [*li*], or persuasion, of the [C]onfucians. In [W]estern discussion those who argued the case for [*fa*] in China are known as legalists (and sometimes realists) and they have been making the case since before Confucius, at least since the eighth century BC, which was about three centuries before the Twelve Tables and around the time of the early [D]harmasutras.[16]

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[13] For details *see* the following works on legal borrowing: Frederick P. Walton, *The Historical School of Jurisprudence and Transplantations of Law*, 9(4) Journal of Comparative Legislation and International Law 183 (1927); Maria V. Zakharova, *Borrowing in Law: To Take or Not to Take, That Is the Question* in *The Interaction of Legal Systems: Post-Soviet Approaches* (W.E. Butler & O.V. Kresin (eds.), London: Wildy, Simmonds & Hill, 2015); Pierre Legrand, *The Impossibility of "Legal Transplants,"* 4(2) Maastricht Journal of European and Comparative Law 111 (1997).

[14] The influence of such transplantation was most pronounced, primarily, in the sphere of public law regulating the framework of the so-called "socialist democracy" in the country.

[15] *Трощинский П.В.* Правовая система Китайской Народной Республики: становление, развитие и характерные особенности // Вестник МГЮА – Сравнительное право. 2015. № 5. С. 101 [Pavel V. Troshchinskiy, *The Legal System of the People's Republic of China: Formation, Development and Peculiar Features*, 5 Bulletin of the Moscow State Law University – Comparative Law 99, 101 (2015)].

[16] H.P. Glenn, *Legal Traditions of the World: Sustainable Diversity in Law* 283 (Oxford: Oxford University Press, 2000).

The uniqueness of the Chinese legal system is also manifested in the fact that, in accordance with the "one state – two systems" policy implemented by the country's leaders, the legislation in effect in Hong Kong and Macao is different from that of mainland China and retains its unique peculiarities which developed before the return of these territories to the "homeland." As a result, we can see different sets and nuances of legal borrowings in each of the subsystems. Thus, for mainland China, such subsystem components will be the law of continental Europe, Anglo-American law, Soviet law, traditional law of China; for Hong Kong – Anglo-American law and traditional law of China; for Macau – the law of continental Europe[17] and traditional law of China.

The legal system of South Africa is also a vivid example of a mosaic structure and, according to the classic work by Vernon V. Palmer "Mixed Jurisdictions Worldwide: The Third Legal Family," along with Scotland, the U.S. state of Louisiana, the Philippines and Israel, is a typical example of a mixed-type legal system. In Palmer's methodology, mixed legal systems (or mixed jurisdictions) display the "common law/civil law" duality and are characterized by the following features: first, they are the result of the coexistence between the traditions of continental law and the common law with their inherent legal features which are represented in the system to a sufficient extent; and, second, they represent the historical superimposition of the fundamentals of the common law on the already existing (legacy) layer of continental law.[18]

The "common law/civil law" duality also exists in the countries of Latin America and, in particular, in Brazil. Its peculiarity is manifested in two important aspects. First, the influence of "common law" (in the American law variant) is more pronounced in the sphere of public law, whereas private law remains the sphere of "civil law." Second, when borrowing from the matrix-type French legal system, Brazilian civil law (just as it happened in a number of other countries of Latin America, such as Colombia, Panama, Argentina, Uruguay and Paraguay) experienced "second-tier" borrowing. We are referring to the famous Civil Code of the Republic of Chile by Andrés Bello through which the aforementioned countries got some kind of the Napoleonic Civil Code version. According to Professor Mauricio Tapia Rodríguez, the reason for the existence of some sort of legal intermediary between the matrix-type French law and the national law of a number of the legal systems of Latin America represented by Bello's code is as follows: the code represented a sort of compromise between the secular origins of private life dictated, among other things, by the maxims of natural law and the religious dogmas of Catholicism.[19] On the one hand – continues Professor

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[17] The legal system of Macao is based on Portuguese law – both in the form of Portuguese codes and in the form of the indigenous laws adopted in Macao modeled after the corresponding Portuguese regulations.

[18] Vernon V. Palmer, *Mixed Jurisdictions Worldwide: The Third Legal Family* 11–12 (Cambridge: Cambridge University Press, 2001).

[19] Mauricio T. Rodríguez, *Le modèle juridique français et l'Amérique latine* in *Quel avenir pour le modèle juridique français dans le monde?* 111, 113 (R. Cabrillac (ed.), Paris: Economica, 2011).

Rodríguez – it became a symbol of the humanist ideas of the Enlightenment, and, on the other hand, the flagship of Chile's independence.[20]

As for the Russian experience in matters of legal influence, as we noted in a previous joint publication,

> Russia has always been a conglomerate of differently vectored values, ideas, origins and images, where the light is easily combined with the dark, the irrational with the rational, the European with the Asian, the evolutionary with the revolutionary.[21]

Each civilization has worked out its own mechanisms of protection against external influences, including in the sphere of law. For example, the uniqueness of law in India is connected with a history in which it is possible to trace the layers of law that drove the predecessors thereof to the periphery and then looked for ways of coexistence. In this respect we can agree with Glenn's idea that Hindu law has the ability to "fold back" and "withdraw into itself." Glenn writes:

> As offered relatively little resistance to [W]estern expansion, so [H]indu law has folded back into itself when faced with external pressure. This may be one of the burdens of tolerance, or pluralism, as a central philosophy. Hindu teaching could offer itself to the [C]hthonic people of India, and be largely accepted by them, but on the arrival of the [M]uslims, around the eleventh century, [H]indu law was gradually supplanted by [I]slamic law as the law of the land, though it probably retained some application in local [H]indu dispute resolution.[22]

Bringing their legal systems to the point of starting a new integration-type formation, as one can see from the above, the BRICS countries, on the one hand, were already full of different vectors of influence representing some kind of *Meccano kits*,[23] while, on the other hand, as experts point out, faced a unique form of integration. Its peculiarity is manifested in the informal nature of establishing social, economic and legal links between the regional formation participants. In the academic literature, based on status features, the BRICS is classified as an international quasi-

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[20] Rodriguez 2011, at 113.

[21] Vladimir Przhilenskiy & Maria Zakharova, *Which Way Is the Russian Double-Headed Eagle Looking?*, 4(2) Russian Law Journal 6, 7 (2016).

[22] Glenn 2000, at 273.

[23] *Meccano* is a model construction system for children invented in the early 20th century by Frank Hornby who later founded the firm of the same name. The term [*enigma del mecano*] was used in relation to the mosaic nature of legal systems of the world by Professor L.M. Díez-Picazo. For details *see* Marie-Claire Ponthoreau, *Droit(s) constitutionnel(s) comparé(s)* 143–144 (Paris: Economica, 2010).

organization[24] or is called an "informal club."[25] The BRICS is fundamentally different from the notion of an international organization in the traditional sense, as it is not vested with legal capacity, functions without constituent instruments, does not have a formalized organizational structure or any rights to make legally binding decisions.[26]

Therefore, such mechanisms of cooperation as, for example, directives functioning in the EU or less stringent forms such as model regulations in various ways applied within structures comparable to post-Soviet CIS countries are currently not relevant for the legal systems of the BRICS participants. And at the moment we can observe albeit visible but so far only initial steps of the BRICS countries' legal systems in certain areas of legal integration. At the latest forum (The IV Legal BRICS Forum) which took place in November 2017 in Moscow, the following areas of regulatory environment were declared to be the priority spheres of legal cooperation: trade, taxation, ecology,[27] the digital economy, cultural dialogue among the BRICS countries and the fight against global terrorism.[28] Earlier, on 15 July 2014, by virtue of the Fortaleza Agreement, the BRICS countries established a New Development Bank for the purpose of financing infrastructure projects and sustainable development projects in the BRICS and developing countries. Notably, Agustina Vazquez pointed out that,

> When considering G7 and BRICS economic results, namely GDP annual growth rates in 2003–2008, the BRICS figures are impressive when compared to the weak economic performance of G7 nations.[29]

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24 *Абашидзе А.Х., Солнцев А.М.* БРИКС — международная квазиорганизация? // Актуализация процесса взаимодействия стран БРИКС в экономике, политике, праве [Aslan Kh. Abashidze & Alexander M. Solntsev, *Is BRICS an International Quasi-Organization?* in *Actualization of the Process of Interaction of the BRICS Countries in Economy, Politics, Law*] 14 (K.M. Belikova (ed.), Moscow: RUDN University, 2012).

25 *Кузнецов А.В.* Транснациональные корпорации стран БРИКС // Мировая экономика и международные отношения. 2012. № 3. С. 3 [Alexei V. Kuznetsov, *Transnational Corporations of the BRICS Countries*, 3 Global Economy and International Relations 3, 3 (2012)].

26 *Бевеликова Н.М.* БРИКС: правовые особенности развития // Журнал российского права. 2015. № 8. С. 113 [Nelly M. Bevelikova, *BRICS: Legal Peculiarities of Development*, 8 Journal of Russian Law 110, 113 (2015)].

27 For details on this aspect of cooperation *see, e.g.*, Elena Gladun & Dewan Ahsan, *BRICS Countries' Political and Legal Participation in the Global Climate Change Agenda*, 3(3) BRICS Law Journal 8 (2016).

28 In July 2017, at the meeting of the BRICS High Representatives held in Beijing, Nikolai Patrushev, Secretary of the Security Council of the Russian Federation, suggested that all BRICS countries should join the International Anti-Terrorist Data Bank set up by the Russian Federal Security Service. РФ предложила БРИКС подключиться к Банку данных против терроризма // РИА Новости. 28 июля 2017 г. [Russia Invited BRICS to Join the Anti-Terrorist Data Bank, RIA Novosti, 28 July 2017] (Jun. 6, 2018), available at https://ria.ru/defense_safety/20170728/1499319308.html.

29 Agustina Vazquez, *Is the BRICS New Development Bank a Fledgling Alternative to the World Bank?*, 4(3) BRICS Law Journal 6, 32 (2017).

At the same time, transnational cooperation is becoming another area of the legal integration of the BRICS countries. Until recently, the common weakness of the economies of the BRICS countries preventing them from joining the world leaders was believed to be the absence of powerful structures of transnational business grown on their own national soil. However, lately this situation has been changing. Examples of such change include the computer giant Lenovo and the financial group CITIC (China), the industrial group TATA Industries and the oil and gas company ONGC (India), the mining company THK CVRD and the oil and gas company Petrobras (Brazil), the telecommunications giant MTN Group and the retail giant Steinhoff International (South Africa). As for Russia, such companies as Gazprom, Lukoil, Rusal, Severstal, VimpelCom and Norilsk Nickel[30] can be named. The development of transnational companies determines the need for specific forms of security provisions and regulations functioning in this sector of the national economy, such as "soft law" as well as other nongovernmental forms of regulation of public relations.[31]

The aforementioned examples of multi-vector and multi-level legal cooperation and integration are in a certain sense peculiar. Such an integration model can be identified in line with the Aristotelian thesis as a "unity of dissimilar." This model of cooperation and integration manifests itself not only at the level of legal principles (regulations) and institutions, but also at the level of legal values. What are its peculiar features in this case?

3. The BRICS Countries' Philosophy of Law: Experiences of the Proper and the Actual

As pointed out by Marco A.B. Martins, the BRICS bloc has reached its limits in terms of the possibility of a greater extent of integration due to the heterogeneity of its members as well as the geocultural realities, political differences and geographical remoteness. At the same time, the Portuguese researcher believes that

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[30] *Вергун А.Н.* Сотрудничество стран БРИКС как новый формат интеграционного процесса быстроразвивающихся стран // Вестник МГИМО-Университета. 2015. № 5(32). С. 153–161 [Alla N. Vergun, *Cooperation Between the BRICS Countries as a New Format of the Process of Integration of Rapidly Developing Countries*, 5(32) MGIMO Review of International Relations 153 (2013)].

[31] Soft law became the subject of scientific evaluation relatively recently – in the middle of the 20th century. But there is no consensus yet on the soft law concept in a legal science. Some scientists believe that "soft" law covers only "non-binding rules or documents that interpret or communicate to others the idea of their creators about legally binding norms or represent promises that create expectations about the future behavior of a person" (Andrew T. Guzman & Timothy L. Meyer, *International Soft Law*, 2(1) Journal of Legal Analysis 171, 174 (2010)). Other scientists believe that the term "soft law," as a rule, "refers to any international document different from an international treaty that contains principles, norms, standards and other provisions regarding the expected behavior" (Dinah L. Shelton, *Normative Hierarchy in International Law*, 100(2) American Journal of International Law 291, 319 (2006)).

> the BRICS bloc can become a global force, on the condition that it assert and combine its differences in the exercise of power, otherwise this objective will be difficult to achieve because the differences are superior to similarities in terms of unity and national interest, it is not simply enough to wish to counterbalance the United States as a real power to set the international agenda. Finally, it is clear that in spite of the heterogeneity and scope of its own limits, the BRICS have assumed a new position within the framework of global governance in the last decade, becoming a platform where it was possible to analyze specific challenges of negotiating on common causes such as avoiding future financial crises or even trying to solve environmental issues.[32]

As we can see, the European analysts believe that one of the main tasks of the BRICS bloc is to overcome the differences in the "exercise of power." Yet, this is possible only on condition of the availability of a new philosophy of power, a philosophy which has to be law-related rather than political – i.e. a philosophy of law. Naturally developing cooperation among the BRICS countries, including in the sphere of law, cannot but give rise to some reflection in this regard. Reflection over what already exists is inevitably followed by questions about what could exist and what may happen in the future depending on how the partnership of the five countries evolves. Will the BRICS be capable of becoming a real force actually participating in the process of globalization? Will the political leaders of the five countries be willing to move in the same direction? Will they demonstrate the willingness to maintain a strategic partnership? And, finally, will they be able to form a common legal space maximally conducive to their interaction in the spheres of politics and economy, culture and values? If the answers to these questions are positive, it is necessary to raise the question about the possibility of a common philosophy of law for the BRICS. Here it should be noted that, in this regard, we can only talk about a philosophy of law that would not contradict the national systems of legal values or distort the existing legal pictures of the world of the five different civilizations, but would rather be built upon them, promoting their convergence and natural co-evolution.

Speaking of the possibility of the BRICS philosophy of law, one has to think about what tasks can be set for such a philosophy and what resources can be used to create it. Since the current globalization is not only a process of engineering and technology development or informational, financial and economic integration, but also a movement towards a common legal order, a common culture and a common system of values, the ability to influence this process and, more importantly, to manage it is the most important condition for participating as a subject rather than

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[32] Marco António Batista Martins, *The European Union and the BRICS: Challenges and Power Relations Between Antagonism and Interdependence*, 9(4) International Journal of Arts & Sciences 495 (2017).

as an object. In this case, any claims to universalism in the sphere of the philosophy of law are an effective tool allowing the so-called Western countries to get political, economic, legal and symbolic advantages in the competitive struggle for the future. Thus, in the period of globalization philosophical and legal means are involved in the struggle for political, economic and cultural domination. Or, alternatively, the philosophy of law as one of the subsystems of the value system can act as a guarantor of maintaining the capacity and civilizational identity of the countries involved in the processes of integration. At the same time, it is important not to use the philosophical and legal maxims for the purpose of justifying isolation and, particularly, for the purpose of moral justification of the isolationism of the emerging legal systems. However, the protection of civilizational identity as well as defense of the national interests directly fall within their competence and retain importance in the structure of internal goal-setting.

What can the five countries located on four continents and for the first time correlated only in the course of analyzing the prospects of the emerging economies have in common? First of all, each of the countries represents a separate civilization transcending national boundaries and having its own culture and history. And each civilization can offer its own special theory of justice, the role of which in the development of the legal system is impossible to overestimate. As far back as half a century ago, the American philosopher John Rawls put forward the theory of justice as a kind of quintessence of the ideology of the political circles standing at the origins of the current globalization. Although this theory is debated and criticized in the countries of Western Europe and North America, its claims to global legal universalism and to the role of a representative of the historical experience of the West are unquestionable. That is why the reaction of the philosophers of the BRICS countries to the theory of Rawls, its ideas and principles as well as the conclusions which could be made based on this theory is so essential and relevant.

In Russia, the reaction to the ideas of Rawls's theory of justice was rather reserved – and for a good reason. Almost simultaneously with Rawls's theory of justice a theory of real communism arrived, the author of which, A. Zinovyev, deduced the structure of Soviet society from the so-called "communal relations," where occupation of the best room, the best place in a room or the best sun-lounger on the beach depends, among other things, on chance, but not only on chance. Meanwhile, it looks as though Rawls introduces new axiomatics, different from both the Marxian and the Weberian ones. According to the American philosopher, the fact that some people turned out to be poor and sick while some other people turned out to be rich and healthy is a matter of pure chance, coincidence. In his opinion, it is not the result of rational decisions – right or wrong, correct or erroneous – as Weber, an adherent of capitalism who linked capitalist rationality to religious asceticism, would argue. Nor is it a consequence of someone's malicious intent, of a collective takeover of ownership of the means of production (with inevitable conversion into wealth and power),

as in the case of Marx. It is only a chain of random coincidences and unrealized opportunities that lead some members of society to poverty and an unhappy life.

At the same time, based on the hypothesis put forward by Zinovyev, the main question which the theory of justice needed to answer for Russia is the question of how to ensure justice in conditions of weakness and the underdevelopment of institutions. This, in turn, logically raises a different question – the question of how to understand justice within the theory of justice of the communal society, what meaning it should have and what word/concept it can be expressed by. And will it be a theory or is it an issue of a pre-theoretical lifeworld – the only sphere where it is possible to look at the question of comparing the two concepts of justice (the Russian and the American) at all?

Is the theory of justice possible in these conditions exactly a theory? It certainly is. It is just that the way of presentation looks too unusual, although very attractive for those who were once again deprived of the theory which could explain what is happening in the present and forecast what may happen in the future. As early as the 19th century, the peculiarity (otherness) of the Russian culture, values and meanings became almost the only topic of interest for Russian philosophers. However, nobody seriously tried to formulate on such a basis a concept like Rawls's, except for the aforementioned study of communism by Zinovyev.

Meanwhile, the experiences of other countries also facing the challenge and trying to understand what kind of "theory of justice" they could offer as their own alternative may turn out to be very interesting. For example, the issue of the comparative analysis of Rawls's theory of justice was formulated in the Chinese comparative studies in line with the country's own traditions of understanding and argumentation of justice.

As Ruiping Fan points out, there is a lot of disagreement with regard to the comparison of the Confucian understanding of justice with the Rawlsian theory. Thus, some researchers argue that the two points of view are incomparable due to the fact that Confucius' doctrine of justice is based on metaphysics and serves as a foundation for a moral doctrine, while Rawls's theory of justice is a generalization of some practical experience and is aimed at improving the system of social action. Fan does not agree with this position. In her opinion, both the first and the second understanding of justice are based on social life experience and comprehension thereof. In addition, both the first and the second viewpoint on the fair and just organization of society are aimed at improving it. At the same time, Fan finds differences between these viewpoints in terms of substance – and very significant ones. By way of experiment, she suggests theoretically applying the Rawlsian principles of justice to a society dominated by the Confucian system of values. Fan writes:

> To begin with Confucians would agree with Rawlsians that there ought to be fundamental principles to direct the institutions, law, and policies of

> society. However, I would argue that Confucians could not affirm that such principles primarily concern the *distribution* of primarily social goods. For Confucians, the first subject of fundamental social principles should not be distribution. The particular Confucian understanding of human nature and its implications for human society does not allow a theory of social justice primarily to focus on the allocation of social goods, even if the allocation of some social goods is important and must be involved in the Confucian view of social justice.[33]

Further on, Fan asks the question of whether a Confucian familist civil society is possible and gives a positive answer to this question. At the same time, the author is well aware of the difficulties existing on the way to implementing the Confucian ideal in the current conditions. It takes not just the revival of Confucian values based on the life experience of an individual family, but a combination thereof with the ideals of civil society, precedence of law and equality before the law.

> The issue we face is not simply to stress equal citizenship in Chinese society. Rather, the challenge is to articulate the social structures that can make possible a Confucian familist civil society in which there is both rule of law and space for robust family loyalties and associations of friendship and collaboration. Chinese culture must develop a means for curing the abuses of the past without killing the body of cultural commitments that mark its true character and give it a prospect for a future with more integrity of its own.[34]

Fan's optimism with regard to the possibility of building a familist civil society and the rule-of-law state based on family values is shared by some Western researchers. However, they do not tend to see a fundamental denial of family values in Western society. Thus, according to Erin Cline, family values underpin moral progress both in the West and in the East. In addition, she points out the similarity between the American thinker of the 20th century and the ancient Chinese sage, drawing attention to the fact that both Rawls and Confucius define the inner sense of justice as an inherent attribute or an essential feature of the entire human race. "Rawls and Kongzi," Cline writes, "also maintain that parent-child relationships provide the foundation for cultivating a sense of justice, which in turn provides the foundation for a stable and harmonious society."[35] In fact, she is convinced that comparative

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33 Ruiping Fan, *Social Justice: Rawlsian or Confucian?* in *Comparative Approaches to Chinese Philosophy* 144, 145 (B. Mou (ed.), London: Routledge, 2003).

34 Ruiping Fan, *Reconstructionist Confucianism: Rethinking Morality after the West* 40–41 (Dordrecht; New York: Springer, 2010).

35 Erin M. Cline, *Two Senses of Justice: Confucianism, Rawls, and Comparative Political Philosophy*, 6(4) Dao 361, 379 (2007).

studies will allow gaining a better insight into both traditions, revealing their hidden semantic resources and heuristic potential while gradually moving towards the mutual enrichment of cultures and social practices.

As for the attitude towards the issue of justice in the Indian philosophical, political and legal tradition, one circumstance needs to be taken into account. Indian society has always been and remains a caste-based society, which implies neither the same understanding of justice for everybody nor the understanding of justice in the European sense of the word at all. The differences here are much more significant than in the case of the ethics and philosophy of the Chinese tradition. The point is that, in order to determine justice, Indian philosophers and jurists often use the concept of "Nyaya," which in European terms means something similar to logic, cognitive theory and rules of argumentation, rather than ethics or – even less – a separate social philosophy. For example, Indian philosophers have repeatedly pointed out that the Rawlsian concept of justice is too "aristocratic" and suggests a system in which civil society and political and legal institutions are included as equals or as systemic elements. But what fits American or, say, Canadian society, has little to do with other social systems where a civil society in the Western sense of the word does not exist and institutions are formed in conjunction with religion, tradition and the social reality. "The Global Justice debate," Aakash S. Rathore writes, "is currently parochial (that is, a monological, predominantly Anglo-American exercise) and romantic (that is, academic and privileged/elitist, out-of-touch with ground realities, and yet self-satisfied and glib)."[36]

The two remaining BRICS countries demonstrate a similar attitude towards the theory of justice, however with some notable individual features. Both the Republic of South Africa and the Federative Republic of Brazil have followed a similar path in their historical and legal development. Their colonization by Europe began before they formed their own civilization with sufficiently developed political and legal institutions. At the time of their first encounters with the Europeans, the South African and South American tribes had neither a separate philosophy nor differentiated law. Unsurprisingly, their prevailing ideas about justice were rather primitive and could not have a significant impact on the development of institutions and values brought from Europe and adapted to the conditions of the colonized nations. This circumstance can explain the absence of any noticeable reaction to the challenge contained in Rawls's theory of justice. This fact, however, by no means rules out the possibility of inclusion of the corresponding theory in the education courses of South African and Brazilian universities. Therefore, the formation of the BRICS philosophy of law should take into account the civilizational experiences of South Africa and Brazil the philosophical comprehension of which is just starting.

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[36] Aakash Singh Rathore, *The Romance of Global Justice? Sen's Deparochialization and the Quandary of Dalit Marxism*, 5(1) Indian Journal of Human Development 175 (2011).

Conclusion

The BRICS boat has been successfully set afloat. Over the course of its journey thus far, it has set in motion a number of actions towards strengthening the cooperation among its passengers, the five countries of the bloc of regional leaders, building up both the quantitative segment (we are referring, in particular, to the accession of South Africa to the BRIC group in 2011) and the qualitative segment of integration (the creation of the New Development Bank of the BRICS countries based on the Fortaleza Agreement).

It should be acknowledged that in certain areas of cooperation the BRICS potential is still not exhausted. For example, one of the vectors of humanitarian law development in the BRICS countries may be the creation of a Human Rights Court of the BRICS countries.

With regard to the philosophy of law for the BRICS, it should be noted that the integration of the social and moral experiences of past generations should in many respects contribute to the preservation of their civilizational identity and the creation of conditions for coexistence and interaction both within and beyond the bloc.

The prospects of further success of the BRICS boat to remain afloat upon the treacherous waterways of global politics, economics and law are not absolutely clear yet. According to expert assessments, we can anticipate several different scenarios for the BRICS future: (1) the BRICS is amorphous and its creation is only a fantasy of economic journalists;[37] (2) a rapidly progressing China drops out of the BRICS; (3) the BRICS is expanded;[38] (4) the BRICS goes on to exist in the declared form of a five-member bloc.

The development of centrifugal or, on the contrary, centripetal forces at the base of the bloc will largely depend on how successfully the BRICS countries manage to turn the effects of social, economic and legal heterogeneity into a positive segment of the evolution of the common integrated formation.

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[37] For details *see* Jean-Luc Sauron, *L'Europe est-elle toujours une bonne idée?* 5 (Paris: Gualino, 2012).

[38] New options such as BRICET (BRIC + Eastern Europe and Turkey), BRICKET (BRIC + Eastern Europe, Turkey and Korea), BRIMC (BRIC + Mexico) were discussed. Goldman Sachs experts look beyond the change in the BRIC format and suggest singling out a new group – Next 11 – in which they include Indonesia, Iran, Nigeria, Turkey, Mexico, Bangladesh, Vietnam, Egypt, Pakistan, the Philippines and South Korea. This term was introduced into the discourse in the agency's annual report of 15 December 2005. For details *see Хейфец Б.А.* БРИК: миф или реальность? // Мировая экономика и международные отношения. 2010. № 9. С. 72–80 [Boris A. Kheyfets, *BRIC: Myth or Reality?*, 9 World Economy and International Relations 72 (2010); *Шонин Н.Е., Минниахметова К.И.* БРИКС: проблемы и перспективы сотрудничества // Вестник Башкирского университета. 2014. № 1. С. 199–204 [Nikolai E. Shonin & Kamila I. Minniakhmetova, *BRICS: Problems and Prospects of Cooperation*, 1 Bulletin of the Bashkir University 199 (2014)].

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THE RANGE OF ADMINISTRATIVE JUSTICE SPECIALIZATIONS IN RUSSIA AND THE OTHER BRICS COUNTRIES

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This article deals with the challenges concerning increasing administrative justice efficacy in Russia and other BRICS countries, where the specialized development of jurisdictional bodies is inconsistent and far from effective. The article analyzes the gaps and disputed aspects of administrative justice including the mechanisms for judicial administrative dispute resolution in the BRICS countries. The authors argue that the level of effectiveness of administrative justice vested in judicial procedures depends critically on the specialization of the administrative courts. This involves individual judges, separately operating permanent judges, judicial committees, mono-courts, independent administrative judicial systems incorporated into larger judicial systems within the courts of general jurisdiction, and separate and independent administrative and judicial systems. Even though the BRICS countries do not have a structured administrative judiciary, the retrospective and comparative analysis of their administrative justice jurisdiction and its most effective practices and mechanisms undertaken by the authors enables them to rethink the existing approach to resolving administrative cases via the judiciary. The aim of the article is to initiate the creation of an independent administrative court system organization in order to ensure better justice in the areas of social life including legal relations with executive bodies. Suggestions for the implementation of the specialization of the administrative judiciary in the Russian Federation are given. The authors, for the first time in Russian jurisprudence, propose a theoretical model of an independent, four-tiered specialized legal mechanism of administrative justice, which includes the interrelated factors of court organization, the judiciary and their legal status. The range of the four specialized tiers of the administrative judicial system is proposed. It is argued that they should include a systematic succession represented by lower courts, first instance lower courts, area courts and a Higher Administrative Court of the Russian Federation.

Keywords: BRICS countries; administrative law; administrative justice; specialized administrative judiciary; court specialization.

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Introduction

One of the critical tasks in the area of law of any state is the increase in the effectiveness of jurisdictional bodies provided via the development of scholarly legal tools.

The goal of increasing the efficiency of jurisdictional bodies is correspondingly related to the adequate enhancement of all the tiers of the mechanism of administrative justice to protect the rights and legal interests of citizens and organizations when they are violated or challenged, and the prompt remedy of the infringed justice.

One of the ways to accomplish this is through the analysis of similar institutions in the mechanisms of administrative justice of foreign states, here with reference to the BRICS countries.

At present, BRICS is not a legally registered interstate association, having neither its own coordinating center nor its own headquarters. The consolidating basis of its activity is economic integration and mutual assistance in the modernization of economic systems. At the same time, for each of the BRICS member states there are

a relevant number of specific issues. One of the central common issues for all BRICS countries is the enhancement of administrative justice and specialization of the tiers of its mechanism for protecting the rights, freedoms and legitimate interests of citizens and organizations. As noted by D. Maleshin,

> In some countries, such as Russia, China and South Africa, special laws regulate the proceedings, but none of the BRICS countries has adopted the administrative court model.[1]

Comparing these mechanisms in different BRICS member states, identifying their specific features and contrasting them with each other can reveal their pros and cons, advantages and disadvantages, and tendencies that increase their effectiveness and tendencies that lead to inhibition in their development and a decrease in their efficacy.

Unfortunately, there are no special institutions for the BRICS countries that would provide the solution to the above issues. However, there is the Inter-departmental Coordination Council at the Lomonosov Moscow State University (Moscow), based at the Department of Public Administration since 2012, which explores BRICS issues. The purpose of the council is research and educational work devoted to the study of the problems of the BRICS countries. At the same time, though, there are no research outputs or other results produced by the council that contain comparative legal studies of the administrative justice problems in the BRICS countries. Consequently, the absence of such outputs and research results concerning BRICS has resulted in the legal situation that international standards in this field concerning the existing international legal standards of administrative procedure are mostly covered (with minor exceptions) by the states of the European continent exploring a specialized judiciary.[2]

It is common practice that traditional research on comparative jurisprudence is limited to its geographical dimension and compares the norms and institutions of law and law enforcement practices in different states. If a federal state is concerned, then only in the subjects of the federation.

Identifying specific features of the institutions of administrative justice in Brazil, Russia, India, China and the Republic of South Africa and their comparison is an important task of the legal field, is of considerable research interest and contributes much to the solution of purely pragmatic issues.

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1 Dmitry Maleshin, *Chief Editor's Note on Administrative Justice in BRICS Countries*, 3(2) BRICS Law Journal 5 (2016).

2 *See, e.g.*, Stefaan Voet, *Belgium's New Specialized Judiciary*, 2(4) Russian Law Journal 129 (2014); Alan Uzelac, *Mixed Blessing of Judicial Specialization: The Devil Is in the Detail*, 2(4) Russian Law Journal 146 (2014); Elisabetta Silvestri, *Judicial Specialization: In Search of the "Right" Judge for Each Case?*, 2(4) Russian Law Journal 169 (2014); Ricardo Perlingeiro, *Contemporary Challenges in Latin American Administrative Justice*, 3(2) BRICS Law Journal 21 (2016).

However, from the point of view of the methodology of legal research it is no less important and promising to implement the so-called "fourth" dimension, which, as in physics, makes reference to the temporal dimension. We contend that the comparison of the same norms, institutions and practices in one and the same state (and here the focus will be on Russia) at different stages of its development within this Russian perspective is to be done within the temporal dimension so as to examine more effectively the legal experience, the dynamics of the development of administrative justice, which, to some extent, may allow us to determine its future course.

The methodological rationale of this article is based on divergent qualitative methods, such as: cause-and-effect methods for shaping the stages and actual trends in the development of administrative justice; synthesis, formal and logical induction, deduction and comparison for a comprehensive approach to examine the main tracks of administrative justice development in the BRICS countries. Dialectical research methods included historical, retrospective and the legal method of comparative law, which enabled the authors to objectively and comprehensively analyze interrelations and the integrity of administrative justice in the BRICS countries and to study the system of domestic administrative justice development both diachronically and synchronically. Structural and functional methods were implemented to create a theoretical legal basis to work out a four-tiered model of administrative justice, its operational mechanism and constituents.

1. Administrative Justice in Brazil, India, China and South Africa

Being a complex institution of public law, administrative justice is a complex institution, which is based on various organizational forms. In Russian scholarly literature, administrative justice is considered to be a special judicial procedure for trying the cases that deal with public administration issues. This relates to the protection of subjective public rights and the provision of the rule of law in the area of public administration. A judicial form of conflict resolution arises in connection with the assessment of the legality of the acts and actions of a public authority within its main task. The maintenance of the rule of law over abuse of power in public administration is the protection of the rights and legitimate interests of citizens against unlawful acts and decisions of executive bodies and law enforcement bodies in the area of public administration. An administrative form of justice is a special branch of justice that provides judicial control over public authority for dispute resolution of a public and legal nature under special procedural rules.[3]

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[3] *Хаманева Н.Ю.* Административная юстиция и административно-правовые отношения: теоретические проблемы // Труды Института государства и права Российской академии наук. 2009. № 1. С. 49 [Natalya Yu. Khamaneva, *Administrative Justice and Administrative Legal Relations: Theoretical Issues*, 1 Proceedings of the Institute of State and Law of the Russian Academy of Sciences 41, 49 (2009)].

In related literature, it is also noted that *administrative justice* includes hearings of administrative disputes in a special order by both judicial and extrajudicial (quasi-judicial) administrative-jurisdictional bodies.[4]

Unfortunately, there is practically no comprehensive comparative research on administrative justice in the BRICS countries, except for that undertaken by Ricardo Perlingeiro, and some segments of this mechanism in the BRICS countries in its judicial and out-of-court forms.

The analysis of legislation in Brazil, India, China and South Africa conducted and concerning the mandatory or non-mandatory pre-trial procedure before applying to court for the resolution of various public disputes (mainly those relating to taxation and customs) is of great theoretical and practical interest.

1.1. Administrative Justice in Brazil

The topic of administrative justice in Brazil is actively researched in the works by Ricardo Perlingeiro,[5] a federal judge in Rio de Janeiro and professor at the Fluminense Federal University, who noted that:

> The time has come for starting a new stage in cooperation on experience exchange between the administrative law systems and the administrative procedure of Brazil and Russia. Both countries are closely cooperating within the BRICS and the exchange of legal experience and expertise between these countries can be no less useful than economic cooperation. Since the legal systems of both countries use continental law, the systems of their administrative law and administrative justice are comparable.[6]

From the point of view of legal practice, specifically, comparison of the procedural rules and legal terms is of great interest for Russian administrative justice. First, from the point of view of legal rights, it is not unlawful in Brazil to file a complaint on an administrative matter with the public office that is charged with the relevant responsibility and power (in Russia it may be the office of the human rights ombudsman or an office for the rights of entrepreneurs); second, nor is it unlawful to file a suit in court asking for interim measures, such as, *inter alia*, a preliminary

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4 *Панова И.В.* Проблемы административной юстиции // Актуальные проблемы административного судопроизводства: Материалы Всероссийской научно-практической конференции (г. Омск, 28 ноября 2014 г.) [Inna V. Panova, *Challenges of Administrative Justice* in *Challenges of Administrative Judiciary: All-Russian Conference Proceedings (Omsk, 28 November 2014)*] 140 (Omsk: Omsk Law Academy, 2015).

5 *Перлинжейру Р.* Система административной юстиции Бразилии: сравнительно-правовой анализ // Государство и право. 2015. № 7. С. 75–90 [Ricardo Perlingeiro, *The System of Administrative Justice in Brazil: A Comparative Legal Analysis*, 7 State and Law 75 (2015)].

6 *Id.* at 75.

injunction. It addition, Brazil has highly specialized courts of administrative justice, in particular the system of electoral courts, which are inferior to a higher court – the Supreme Electoral Court. Nevertheless, there are examples in Brazilian legal practice, which we consider unacceptable, not only for Russian administrative justice, but also for the entire judicial power in Russia. They refer to the right of disciplinary power of Brazilian judges of the courts of the second instance who are endowed with disciplinary powers over judges of the courts of first instance, and have powers to participate in the appointment of judges to certain positions.[7]

However, we cannot agree with Perlingeiro's opinion and assurance that the judicial power should not interfere with the internal affairs of the public body and must respect its internal rules and regulations. For example, the author claims that the judiciary should interfere neither with the internal criteria nor with the election of the president of a public university, or in the criteria compilation for selecting members of a university arbitration body.[8] This point of view explains the fact that such kinds of elections entail exclusively internal consequences and, of course, there are no vested individual rights to be protected by the courts. The same applies to the administrative structure of the legislature (election to the commission, etc.).

Nevertheless, if a civil servant claims a violation of his or her personal rights, even if the alleged violation is directly related to his or her involvement in some administrative body, this dispute should not be excluded from the scope of fundamental human rights.

1.2. Administrative Justice in India

In India, as well as in the legal family of the United Kingdom, the United States, Australia and Canada, there are no specialized administrative courts, and administrative disputes are resolved by the courts of general jurisdiction. Based on Amendment No. 42 to Part XIV-A of the Constitution of India, the jurisdiction of the general courts and administrative tribunals has been delineated. Administrative tribunals are created to try taxation, electoral and customs cases and for the recovery of damages in respect of a number of types of administrative violations. These cases are excluded from the jurisdiction of the general courts, where administrative disputes can be tried only after they have passed the jurisdiction of the quasi-judicial (i.e. tribunals) litigation. As noted by Rehan Abeyratne, India has long suffered from an overburdened judiciary in which a staggering four million cases are pending before the high courts. Leaving these courts understaffed only exacerbates the pendency crisis. Institutional bickering has blocked many qualified nominees from

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[7] Eugenio Raúl Zaffaroni, *Poder JudicLario: Crise, Acertos e Destkertos* [*Judicial Branch: Crisis, Blows, Mistakes*] (São Paulo: RT, 1995).

[8] Perlingeiro 2015, at 87.

assuming judgeships.[9] Even though, at present, the judicial system of India possesses extrajudicial and specialized administrative justice within the judicial body, there is a broad judicial neglect of administrative law principles and procedural rules.

1.3. Administrative Justice in China

In China, a separate specialized administrative justice in the form of administrative courts does not exist. In the Chinese system of courts of general jurisdiction there are no special committees of judges for administrative cases, though these committees had been formed before 1989 in the Supreme People's Court and many local people's courts. In 1989, the Administrative Procedure Code was adopted by the National People's Congress. The most recent enactment by this body was the Administrative Procedure Law, which was adopted by the National People's Congress on 4 April 1989, and came into force on 1 October 1990. There was strong support for administrative litigation law, and this field has expanded dramatically since the promulgation of the Administrative Litigation Law in 1989.[10] This legally formalized and vested the jurisdiction of administrative cases to the people's courts. These courts have the right to hear administrative cases including complaints against administrative bodies and their officials for violating the legitimate rights and interests of citizens and legal entities.

At the same time, the Administrative Procedure Code of China put some limitations on the liability for administrative case hearings, including certain categories of administrative cases permitted for court trials in the other BRICS countries. In particular, in China these include administrative cases related to state acts in the fields of defense and foreign relations, mandatory normative acts and specific administrative acts, which have been legally adopted as a final text by certain institutions.[11]

Thus, unlike in Russia, administrative justice in China is somewhat limited, leaving no possibility for judicial review. It is necessary to point out that administrative justice in China does not replace the administrative authorities in assessing the appropriateness of the decisions made by the latter, within the limits of their statutory competence and responsibility.

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[9] Rehan Abeyratne, *Judicial Appointments and Administrative Law in India*, Admin Law Blog, 16 May 2017 (Jun. 9, 2018), available at https://adminlawblog.org/2017/05/16/judicial-appointments-and-administrative-law-in-india/.

[10] Jyh-Pin Fa & Shao-chuan Leng, *Judicial Review of Administration in the People's Republic of China*, 23(3) Case Western Reserve Journal of International Law 447 (1991). *See* officials' reports before the National People's Congress in Fazhi Ribao (Legal System Daily), 29 March 1990, at 1; Wu Naitao, *The Origin of the Chinese Legal System*, 33 Beijing Review 23 (1990) (promulgated on the order of the Chairman of the People's Republic of China on 4 April 1989).

[11] *Хаоцай Л.* Очерки современного административного права Китая [Lo Haotsai, *Essays on Modern Administrative Law of China*] (Moscow: Knigodel, 2010).

1.4. Administrative Justice in South Africa

Under the Constitution of South Africa, the judicial system of the Republic includes the Constitutional Court, the Supreme Court of Appeal, High Courts and Magistrates' Courts. High Courts have territorial jurisdiction within each province or its parts. They try all civil and criminal cases, and they operate as Courts of Appeal for lower courts. There are neither separate administrative judicial systems nor separate administrative courts in South Africa. This fact is pointed out in an article by D. van Loggerenberg, the title of which speaks for itself: "Specialization of South African Judges and Courts: Multi-Skilled, Multitasked, Multiaccess?"[12]

Moreover, administrative justice in South Africa is of a discrete nature. Specifically, the Law on Tax Administration in South Africa, adopted in 2012, led to the creation of a four-tiered system for settling tax disputes. This very fact is of critical interest both for judicial and for law-making areas of Russian administrative law.[13]

The first instance of conflict resolution between taxpayers and taxation authorities in South Africa is the Taxation Council, the administrative body within the structure of the State Revenue Service. This council consists of a presiding judge appointed from among defense lawyers, a certified accountant and a representative of the business community. Moreover, taxpayers have the right to apply to the tax court only after the decision made by the relevant administrative and public bodies. Decisions of tax courts may be appealed to a third instance – to the branches of the Supreme Court of South Africa in the provinces. These courts can make the following decisions: confirm the assessment of the taxpayer's obligation, annul the decision or reach a new decision; or return the case to the taxation court for a trial with a different bench of judges. Finally, taxpayers have the right to appeal to the fourth instance, which is the Supreme Court of Appeal, whose decision has precedential value.

2. History of Administrative Justice Development in Russia

Russian administrative justice issues and their development are rather thematically broad. For instance, in the reference book by Yu. Starilov published in 2007 the list of the themed literature on administrative law exceeds 1,000 sources.[14] However, even in this profound book there are no studies on the problems of expanding

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12 Danie van Loggerenberg, *Specialization of South African Judges and Courts: Multi-Skilled, Multitasked, Multiaccess?*, 2(4) Russian Law Journal 187 (2014).

13 *Янкевич С.В.* Порядок разрешения налоговых споров в Южно-Африканской Республике // Право. Журнал Высшей школы экономики. 2015. № 4. С. 174–185 [Semyon V. Yankevich, *The Procedure for Resolving Tax Disputes in the Republic of South Africa*, 4 Law. Journal of the Higher School of Economics 174 (2015)].

14 *Старилов Ю.Н.* Административное право: Специальная литература: Справочное пособие [Yuriy N. Starilov, *Administrative Law: Special Literature: A Reference Manual*] (Voronezh: Publishing House of the Voronezh State University, 2007).

specialization of the mechanism of administrative and judicial justice and the need to integrate it within an independent administrative and judicial system headed by the Supreme Administrative Court of the Russian Federation.

The evolution of administrative justice in Russia was heavily influenced by France more than 200 years ago. The intensive development of French law projected onto a number of countries in Western Europe and Russia. By the middle of the second half of the 19th century a number of profound monographs[15] and manuals[16] had already been published in Russia. They included the analysis of the legislative foundations and law enforcement practices of the administrative justice bodies of France, Germany, Austria, Italy, Spain and Portugal, as well as theoretical work on the Institute of Administrative Justice of Russia.[17]

Therefore, it is evident that the evolution of administrative justice in Russia did not arise all of sudden and from nowhere. Administrative justice was understood as an administrative court for dispute resolution on breaches in managerial cases. Violation of duties and responsibilities were imposed on the governing bodies by laws and orders of the higher authorities.[18] As the recent research reflects, it is pointed out that certain institutions of administrative justice began to emerge in Russia in the 1870s. However, they had many organizational and procedural imperfections.[19]

The pinnacle of the development of administrative justice within the process of pre-Soviet Russian state-building should be considered to be the statute titled "Regulations for Courts of Administrative Cases," adopted just over 100 years ago, on 30 May 1917.[20] The first point of this statute reads as follow:

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[15] *See, e.g.*, *Корф С.А.* Административная юстиция в России. Кн. 1–3 [Sergey A. Korf, *Administrative Justice in Russia. Books 1, 2 & 3*] (St. Petersburg: Tip. Trenke i Fyusno, 1910).

[16] *See, e.g.*, *Гаген В.А.* Административная юстиция: Конспект лекций [Vladimir A. Gagen, *Administrative Justice: A Summary of Lectures*] (Rostov: Tip. T-va S.S. Sivozhelezov i Co., 1916).

[17] *Старилов Ю.Н.* Административная юстиция: Конец XIX – начало XX века: Хрестоматия. Ч. 1 и 2 [Yuriy N. Starilov, *Administrative Justice: The End of the XIX – the Beginning of the Twentieth Century: Reader. Parts 1 & 2*] (Voronezh: Publishing House of the Voronezh State University, 2004).

[18] *Тихомиров Ю.А.* Конституционные основы формирования и деятельности административных судов // Проблемы защиты публичных и частных интересов в административных судах: Материалы конференции [Yuriy A. Tikhomirov, *The Constitutional Basis for the Development and Operation of Administrative Courts* in *Problems of Protection of Public and Private Interests in Administrative Courts: Conference Proceedings*] (Moscow: Russian Academy of Justice, 2001).

[19] *Зеленцов А.Б.* Административная юстиция России: историко-правовой аспект // Проблемы защиты публичных и частных интересов в административных судах: Материалы конференции [Alexander B. Zelentsov, *Administrative Justice of Russia: Legal Background* in *Problems of Protection of Public and Private Interests*, *supra* note 18].

[20] Положение о судах по административным делам от 30 мая 1917 г., Собрание узаконений и распоряжений правительства, 1917, № 127, ст. 692 [Regulations for Courts of Administrative Cases of 30 May 1917, Legislation Bulletin of the Government, 1917, No. 127, Art. 692].

> Judicial power regulating administrative cases shall belong to: administrative judges, district courts and the Governing Senate. [Clause 10 of the statute] provided that the administrative court is entitled to try: 1) cases on the protests of commissars on orders, orders, actions and omissions of institutions and officials of the city, provincial, districts and towns administration; 2) commissars' protesting cases to statutes, orders, actions as well as governmental bodies and officials' omissions at regional, municipal and district levels; 3) cases on municipal dumas (parliaments) complaints, zemstvo and village assemblies and individuals, societies and mandatory institutions, actions and omissions dealing with complaints of municipal dumas (parliaments), local districts, settlements, communities and individuals' to rulings, mandatory orders and omission mentioned in point 1 above as well as well as to commissars, their assistants and subordinates; 4) special cases legally delegated to the jurisdiction of administrative court.

Also, it was stipulated that the reasons for filing protests and complaints might be as follows: the imperfections dealing either with breach of the law or mandatory order issued by the authorities, or with their abuse of power; digression from execution of the enactments enforced by law or by the authorities' mandatory orders and tardiness with the clients.

The volume of that statute was quite impressive and contains 92 comprehensive provisions. There is no doubt that administrative justice in Russia would have been effective if not upset by the October Socialist Revolution in 1917.

The Soviet period can be characterized by nearly the complete absence of a specialized administrative judiciary. The legal literature of the Soviet period considered the powers of a number of state bodies – the People's Commissariat of State Control, the Workers' and Peasants' Inspection, the Chief Disciplinary Court of the All-Russian Central Executive Committee (1920s) – and some scholarly research on administrative justice was carried out.[21] However, these bodies should be referred to as pre-judicial, extrajudicial, quasi-judicial and even pseudo-judicial administrative bodies. Even economic disputes at that time were considered to be civil law cases (in the 1980s they were called "horizontal"). But, the economic disputes arising from administrative legal relations were not even mentioned in the Soviet legislation. Only the bodies of state arbitration got the opportunity to consider such "vertical" disputes (between the state enterprise and the Ministry), though in a very limited segment and only at the very end of the 1980s.

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[21] *Старилов Ю.Н.* Административная юстиция: проблемы теории // Административное судопроизводство в Российской Федерации: развитие теории и формирование административно-процессуального законодательства. Вып. 7 [Yuriy N. Starilov, *Administrative Justice: Theoretical Issues and Development of Administrative Proceeding* in *Administrative Court Proceedings in the Russian Federation: Development of the Theory and Formation of Administrative Procedural Legislation. Issue 7*] 27 (Yu.N. Starilov (ed.), Voronezh: Publishing House of the Voronezh State University, 2013).

3. Assessment of the Effectiveness of Current Procedural Legislation in Russia

This situation changed in the post-Soviet period of Russia's development. The Judicial Reform Concept of 1991 recognized the need for the creation of specialized courts. The criteria for establishing a specialized court were the specificity of the legal area, the subject of legal regulation and its purposes. It was emphasized that a special criterion for setting up a specialized court should be the specificity of its judicial procedure envisioned by law and including either a separate chapter in the procedural code or an unincorporated provision.

The bill named the Federal constitutional law (Federal law "On Federal Administrative Courts of the Russian Federation") was prepared and sent to the State Duma by the Supreme Court of the Russian Federation; it was adopted by the State Duma on 22 November 2000 in the first reading (under No. 7886-3).[22] Judging from the texts of the draft law, the preamble and the conclusions of the Russian government, the State Duma Legal Department and the State Duma Committee on State Construction, the creation of administrative courts would start with 600 to 700 federal inter-district administrative courts integrating the functions of the Court of Appeal for magistrates' courts trying administrative cases. Judicial panels were to hear administrative cases tried by the supreme courts of the republics, district and regional courts, courts in the cities of federal significance, courts of the autonomous areas and autonomous regions. Each panel was to be made up of the "judges presiding on the republics' district and regional court panels" if demanded. Their number should not be more than the number of Russian Federation subjects. Twenty-one federal district administrative courts, whose jurisdiction was extended to several constituent entities of the Russian Federation, would be established. Similar to district appellate arbitration courts, the judicial panel of the Supreme Court and of the general jurisdiction courts of the Russian Federation subjects were to try administrative cases. It is unclear why those lawmakers called the judicial panels "federal administrative courts," while it was stated that the Supreme Court was qualified as the court of higher instance in relation to the federal district administrative courts.

Amendment 1 of Art. 3 of the bill made it binding that the federal administrative courts be included in the courts of general jurisdiction. Thus, it is evident that the configuration of the Russian administrative and judicial system under the bill of 2000 very much resembles the configuration of the current arbitration and judicial system of Russia after 2014. Today it functions autonomously in the system of courts of general jurisdiction (similar to military tribunals).

Article 1 of the bill determined the jurisdiction of the administrative courts. It provided that administrative cases (besides administrative offenses, constitutional,

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[22] *Старилов Ю.Н.* Административная юстиция: проблемы теории [Yuriy N. Starilov, *Administrative Justice: Problems of Theory*] (Voronezh: Publishing House of the Voronezh State University, 1998).

civil and criminal law proceedings) shall include the following: cassation on challenging court decisions, actions and their omission by public authorities, local municipal authorities, public associations and official persons, as well as the cases on the breach of electoral and tax legislation; and dispute resolution between state authorities and local government bodies. In addition, administrative jurisdiction was authorized to suspend or terminate the activities of public associations. In spite of all of this, the bill was not sent to the State Duma. No matter how strange it may seem there were neither financial obstacles nor organizational obstacles hindering the development of administrative courts. The proposed implementation of the system of administrative courts in two stages – the first, from 2001 and the second, from 2002 – was considered acceptable. We contend that the main reason why the bill never "reached" the second reading in the State Duma might be explained by the lack of clearly defined procedural legislation regulating the legal work of administrative courts.

In addition, one of the main reasons for the bill's rejection was the lack of solid legal rationale in the study of this issue.[23] Ten years later, the presiding committee of the Council of Judges of the Russian Federation developed and approved the program for the development of courts of general jurisdiction and improved the organizational support of their activities for the period until 2023 (Decision No. 133 of 26 December 2007). It was considered expedient to establish administrative courts as a necessary condition for the growth and increased efficiency of the judicial system.

The 8th All-Russian Congress of Judges decided in their final decision of 19 December 2012 "On the Judicial System of the Russian Federation and the Main Directions of Its Development" (para. 4 of the substantive provisions) to request the State Duma of the Federal Assembly of the Russian Federation prioritize consideration of the bill of federal constitutional law "On Federal Administrative Courts of the Russian Federation."

That decision was preceded by the Federal constitutional law adoption of clause 10 on the establishment of the Judicial Board for Administrative Cases within the Supreme Court of the Russian Federation.[24] The establishment of the Judicial Board

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23 Федеральный закон "Об административных процедурах". Инициативный проект с комментариями разработчиков [*Federal Law "On Administrative Procedures." Initiative Project with Developer's Comments*] (Moscow: Complex-Progress, 2001); *Problems of Protection of Public and Private Interests*, *supra* note 18.

24 Федеральный конституционный закон от 7 февраля 2011 г. № 1-ФКЗ "О судах общей юрисдикции в Российской Федерации", Собрание законодательства РФ, 2011, № 7, ст. 898 [Federal constitutional law No. 1-FKZ of 7 February 2011. On Judges of General Jurisdiction in the Russian Federation, Legislation Bulletin of the Russian Federation, 2011, No. 7, Art. 898]; Федеральный конституционный закон от 8 июня 2012 г. № 1-ФКЗ "О внесении изменений в статьи 13 и 14 Федерального конституционного закона 'О судебной системе Российской Федерации' и статьи 21 и 22 Федерального конституционного закона 'О судах общей юрисдикции в Российской Федерации'", Собрание законодательства РФ, 2012, № 24, ст. 3064 [Federal constitutional law No. 1-FKZ of 8 June 2012. On Amendments to Articles 13 and 14 of the Federal Constitutional Law "On the Judiciary of the Russian Federation" and Articles 21 and 22 of the Federal Constitutional Law "On General Jurisdiction Courts in the Russian Federation," Legislation Bulletin of the Russian Federation, 2012, No. 24, Art. 3064].

for administrative cases and arrangements for its composition were enforced by the further Resolution of the Plenum of the Supreme Court No. 3 of 10 March 2011. In fact, the board started functioning on 14 March 2011. Further on, in accordance with Art. 24 of the Federal constitutional law, the supreme court of any republic, a regional court, the court of a city of federal significance, the court of an autonomous region and the court of the Autonomous Okrugs were also bound to operate within a judicial board for administrative cases. This last court should be composed of a judicial committee of judges and chairpersons of the appropriate courts. The presiding committee of this administrative court had to be approved by the members of the judicial boards of the appropriate courts after the application of the chairperson of the presidium. Specialized committees for administrative cases are established and operate in accordance with the Federal constitutional laws on Military and Arbitration Courts and in these court systems.

It should be noted that there were many inconsistencies in enforcing administrative judiciary specialization. For instance, the advertisement of vacant positions for judges on administrative cases and their position adhered to the wording:

> A judge of the Supreme Court of the Russian Federation of the Judicial Board of Administrative Cases.[25]

This was obviously illogical, for it clashed with the fact that according to the law it was not possible to transfer a supreme court judge to the committee or any other jurisdiction even in extreme cases. If, in principle, we exclude the possible negligence in the wording of this document, it can be assumed that the Supreme Court was determined to see a composition of "unchanging" judges' committees. This fact might entail serious consequences over time. For instance, if a judge of a judicial committee for administrative cases within the Supreme Court makes a point to specialize, for example, in criminal or economic law, he or she will have to go to another committee of the Supreme Court and undergo the appointment procedure identical to the one for transfer to another court. That is, he or she will have to go through all these steps again, and only in the case that there would be an announcement about opening a vacancy for the position he or she is seeking.

However, we contend that the institution of "unchangeable" committees in question may enhance the specialization of judges, i.e. raise their professionalism to the maximum possible level, which would contribute to the improvement in the effectiveness of fair justice.

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[25] Российская газета. 27 февраля 2017 г. [Rossiyskaya Gazeta. 27 February 2017].

4. Integrity of the Existing Terms "Administrative Wrongdoing" and "Crime"

Alongside the above inconsistencies, there is the critical problem of the procedural affiliation of the norms that govern court proceeding on administrative offenses. In the related literature it is noted that in Soviet law the administrative judiciary was understood as consideration by the court of administrative offenses or complaints about similar decisions made by other executive bodies within their competencies. In the post-perestroika period, administrative cases also included the cases arising from public relations, which dealt with civil or arbitration procedure.[26] In an article by B. Rossinskiy, it was proposed that administrative liability, unlike criminal and civil liability, which are assigned to the judicial order (in litigated cases), should be predominantly shifted to extrajudicial procedure by officials of executive bodies.[27]

At first glance, this proposal may seem attractive, as it might lead to the significant decrease of the judicial burden. It is critical to be sensible concerning the amount of related responsibilities accounted for by this "out of court" administrative dispute resolution means, especially if this "predominantly extrajudicial procedure" deals with administrative offenses of legal entities. Moreover, it seems unrealistic that officials of executive bodies would scrupulously stick to the norms of legal jurisdiction, though it would do a world of good if a certain number of cases on administrative offenses could be delegated to the jurisdiction of the relevant officials of executive authorities.

Nevertheless, some number of cases on administrative offenses will still be tried in the courts. In addition, this number will be significant. For instance, the Chairman of the Supreme Court of the Russian Federation, V. Lebedev, in his speech delivered on 6 December 2016 at the 9th All-Russian Congress of Judges, held that in 2016 the courts tried 6 million cases of administrative offenses.

In order to increase the efficacy of administrative justice it could be reasonable to do two main things: transfer some administrative cases to the jurisdiction of executive bodies; and organize judicial proceedings on administrative offenses. The latter should deal with electoral disputes, challenging decisions in respect of the qualifications for judges on the committees, appeals of the ombudspersons, the rights of the child, the rights of entrepreneurs, defense of individuals or an indefinite group of people. Such suggestions for the efficacy of administrative justice

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[26] *Воскобитова Л.А.* Предметная область судебной власти и виды судопроизводства // Судебная власть и уголовный процесс. 2017. № 1. С. 59–67 [Lidiya A. Voskobitova, *Subject Area of the Judiciary and Types of Legal Proceedings*, 1 Judicial Power and Criminal Procedure 59 (2017)].

[27] *Россинский Б.В.* Окончательно ли разграничение административного производства и производства по делам об административных правонарушениях? // Журнал административного судопроизводства. 2016. № 1. С. 49–51 [Boris V. Rossinskiy, *Is the Delimitation of Administrative Judiciary and Administrative Proceedings on Administrative Wrongdoings Totally Final?*, 1 Journal of Administrative Judicial Proceedings 49 (2016)].

enhancement will be in keeping with the "closed" types of proceedings proclaimed by Art. 118 of the RF Constitution. However, the suggested approach is neither radical nor constructive. There is another proposal that mostly deals only with administrative offenses. In relation to this issue in Russia, it is interesting to note the suggestions made by French scholar K. Beshe-Golovko who believes that, in principle, in French law all "administrative offenses" (using Russian terminology) are part of criminal law, which in its essence and in a broad sense is a repressive right. As an exception, in France an offense is considered "administrative," i.e. related to the competence of administrative courts but not criminal courts, when dealing with encroachment relating to all types of state property, except for violation of traffic rules (in the latter case, the offense will be "criminal" in the strict sense of the word).[28] To put it in a nutshell, in the context of the issue studied in this article, the main thing is that in French law there are no administrative offenses (except for those associated with encroachment relating to all types of state property), and all of them are referred to as criminal offenses.

Comparing French legal experience concerning the issue in question with that of Russia, we can claim that the gap between a criminal offense (a crime) and an administrative offense is not that big. First, because such remedies as fines for both kinds of offenses are quite comparable. Second, because theorists and practicing legal professionals have singled out a certain group of socially dangerous actions which in criminal legislation is called "criminal misconduct."[29] It is noted that this proposal is not new, and its origins can be traced back to the 1960s.[30]

All of the above gives justification for raising the questions (at least in theoretical studies) and sequentially to correlate the terms "administrative offense," "criminal offense" and "crime."[31] However, we trust that the practical implementation of this

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[28] *Беше-Головко К.* Административная юстиция во Франции: вопрос развития правового государства // Административное судопроизводство в Российской Федерации: развитие теории и формирование административно-процессуального законодательства. Вып. 7 [Karin Beshe-Golovko, *Administrative Justice in France: The Issue of the Development of a Rule of Law State* in *Administrative Court Proceedings in the Russian Federation*, *supra* note 21] 778.

[29] *See, e.g.*, *Гаврилов Б.Л.*, *Рогова Е.В.* Мировая юстиция и уголовный проступок: мнение ученого и практика (обоснование проблемы, современное состояние и меры по совершенствованию) // Мировой судья. 2016. № 12. С. 20–31 [Boris L. Gavrilov, Evgeniya V. Rogova, *World Justice and Criminal Misconduct: Point of View from a Theorist and Practitioner (Problem Statement, Current Status of the Problem and Improvement Measures)*, 12 Justice of the Peace 20 (2016)]; *Дорошков В.В.* К вопросу об уголовном проступке // Мировой судья. 2016. № 12. С. 31–39 [Vladimir V. Doroshkov, *On the Issue of Criminal Offense*, 12 Justice of Peace Judge 31 (2016)].

[30] *Кузнецова Н.Ф.* Преступление и преступность [Ninel F. Kuznetsova, *Crime and Crime Wave*] 167–170 (Moscow: Moscow State University, 1969).

[31] *See* for further details *Клеандров М.И.* О линейке понятий "административное правонарушение", "уголовный проступок" и "преступление" // Мировой судья. 2017. № 7. С. 3–12 [Mikhail I. Kleandrov, *On the Line of Concepts "Administrative Offense," "Criminal Offense," and "Crime,"* 7 Justice of the Peace 3 (2017)].

theoretical understanding of the problem may be hindered by the issue of the criminal liability of legal entities, whose administrative responsibility has long been provided in legislation and does not raise any objections in theory nowadays. In addition, on the contrary – in the criminal law, there is the term "group crime," but there is no such term in administrative law as "group administrative wrongdoing." However, it is evident that legal practice badly needs the enforcement of administrative responsibility not only for individual legal entities, but also for the groups of legal entities with the main "person involved" who has criminal liability: for example, for bribery, the one who has committed this offense in the interests of a certain group of legal officials associated with him or her.

Implementation of this approach will make it possible to create:

a) a single substantive legal basis and codified legislative act on criminal and administrative offenses (since there is a similarity in their social nature, it provides the grounds for making general and special parts in the code);

b) a single codified procedural act regulating criminal-administrative relations on proceedings, investigation and preliminary investigation[32] of administrative cases.

Naturally, implementation of these suggestions will require much effort in order to incorporate them into the procedural code of the following norms relating to the investigation of administrative offenses:

– principles of competitiveness;

– introduction of a position to support "prosecution";

– institutions providing state-supported free legal advice to a person suspected of committing an administrative offense;

– provisions designed to ensure compliance with the guarantees of suspects committing administrative offenses which are similar to the guarantees provided for the commission of crimes, both during the preliminary investigation and during the trial of the case (with all necessary natural and justifiable exceptions).

In a certain way, the possibility to similarly treat an administrative offense and a crime was demonstrated by the Constitutional Court of the Russian Federation in Resolution No. 20-P of 4 June 2015.[33] The subject of consideration by the Constitutional

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[32] *See Воскобитова Л.А.* Судопроизводство по делам об административных правонарушениях и его место в системе реализации судебной власти // Мировой судья. 2017. № 2. С. 31 [Lidiya A. Voskobitova, *Judicial Proceedings on Administrative Wrongs and Its Place in the System of Exercising Judicial Power*, 2 Justice of the Peace 28, 31 (2017)]. Also, it can be noted that for cases of administrative offenses dealing not with the disputes of physical persons with the executive body, but, the opposite, the claim of the state against a physical person who has breached the ban, mandated by the state. In such cases, criminal procedure rather than civil procedure should apply.

[33] *See* Постановление Конституционного Суда Российской Федерации от 14 июля 2015 г. № 20-П "О проверке конституционности части 2 статьи 1.7 и пункта 2 статьи 31.7 Кодекса Российской Федерации об административных правонарушениях в связи с запросом мирового судьи судебного участка № 1 Выксунского судебного района Нижегородской области", Собрание законодательства РФ. 2015. № 30. Ст. 4657 [Resolution of the Constitutional Court of the Russian Federation No. 20-P of 4 June 2015. On Verification of the Constitutionality of Part 2 of Article 1.7

Court in this case was the provisions of the RF Code of Administrative Offenses acting as the legal basis for resolving the issue of termination of enforcement of a final court decision on imposing an administrative penalty.

In the applicant's opinion, the legal provisions challenged by him are contrary to Arts. 2, 15 (part 1), 18, 19 (part 1) and 54 (part 2) of the RF Constitution, providing for the termination of the enforcement of administrative punishment in cases, because according to the law, administrative responsibility or liability for a particular wrongdoing is canceled should a criminal liability have been imposed for the same wrongdoing. As a result, a wrongdoer avoids administrative punishment or liability. In such cases, we can state that administrative liability of a wrongdoer (even if his or her fault was decided in court) is never enforced. Similarly, neither can a wrongdoer be charged with criminal liability, as criminal law is irreversible.

In the above resolution, the Constitutional Court determined how to limit this injustice. It was noted that the enforcement of this ruling leading to the termination of administrative punishment in the event it incorporates criminal elements should be done in keeping with clause 2 of Art. 31.7 of the RF Code of Administrative Offenses if the following conditions are not met: firstly, legal provisions to terminate administrative liability for concrete administrative wrongdoing and replacing it with criminal liability should these have been enforced simultaneously; secondly, legal transformation of administrative wrongdoing into administrative offense would retain liability exactly for the wrong, which had been previously provided for administrative punishment. The RF Code of Administrative Offenses prescribed to courts and other law enforcement bodies to follow clause 2 of Art. 31.7, explaining the conditions for the implementation of administrative punishment first enforced by law and terminated later on the grounds of incorporation into it some criminal elements. It also noted the necessity of checking the above conditions. The Constitutional Court found clause 2 of Art. 31.7 of the RF Code of Administrative Offenses not to comply with Arts. 15 (parts 1 and 2) and 54 of the RF Constitution concerning the issue of termination of the decision to impose an administrative penalty for the commission of an administrative offense, if the termination of administrative liability for an administrative offense is simultaneously accompanied by criminal liability for the same wrongdoing.

5. Shortcomings of Modern Administrative Procedural Law

The adopted Code of Administrative Proceedings of the Russian Federation on 8 March 2015[34] and part 2 of Art. 118 of the RF Constitution provided that the judiciary

and Paragraph 2 of Article 31.7 of the Code of Administrative Offenses of the Russian Federation in Connection with the Request of the Magistrate of Judicial Section No. 1 of the Vyksa Judicial Area of the Nizhny Novgorod Region, Legislation Bulletin of the Russian Federation, 2015, No. 30, Art. 4657].

34 Федеральный закон от 8 марта 2015 г. № 21-ФЗ "Кодекс административного судопроизводства Российской Федерации", Собрание законодательства РФ, 2015, № 10, ст. 1391 [Federal law No. 21-FZ

should act through constitutional, civil, criminal and administrative proceedings. Correspondingly, the issue about the role and function of the administrative judiciary was legally completed. In fact, from legislative and procedural points of view, it is still far from being called appropriate, and it is not clear how this constitutional provision is implemented in modern Russia.

The situation may be considered more or less appropriate with criminal procedural law and legal proceedings, since it is based on one federal law – the RF Criminal Procedure Code. In addition, it draws many complaints from legal professionals and has many amendments as well as suggestions to adopt a new criminal code because of a new criminal policy. It is good that the entire legislation for criminal proceedings is currently concentrated in a single federal law and in a single criminal code.

The state of affairs with constitutional legal procedure is much worse. There is no single law on constitutional legal proceedings in Russia at all, although a number of states with much less constitutional and judicial activity, especially in non-federal states, have codified constitutional acts (e.g. in Belarus and Mongolia). In Russia, judicial procedural norms for the Constitutional Court are contained in the Federal constitutional law "On the Constitutional Court of the Russian Federation,"[35] but they are rather scattered and they are not concentrated in a separate section. The procedural norms for the constitutional and statutory courts of the subjects of the Russian Federation are also embedded in the nominal laws of the subjects themselves and regulate their judiciary. There are twenty-four such laws in Russia, and all of them, including procedural institutions and related regulations, are the so-called "sleeping laws," except for those in the subjects of the Russian Federation, where these courts function today. And most importantly, all laws on these courts – including the Federal constitutional law "On the Constitutional Court of the Russian Federation" as well as the laws of the subjects of the Russian Federation and their constitutional (statutory) courts do not have a single, codified legislative basis. Correspondingly, their procedural norms and institutions, organizational aspects, scopes of authority and judicial status characteristics vary greatly.

The state of affairs with civil procedure concerning its legislative and procedural provisions is not much better. However, there is also another inconsistency, in that Art. 118 of the RF Constitution does not mention an arbitration judiciary, whereas

of 8 March 2015. Code of Administrative Proceedings of the Russian Federation, Legislation Bulletin of the Russian Federation, 2015, No. 10, Art. 1391]. The draft Code on Administrative Proceedings was submitted to the State Duma by the Supreme Court of the Russian Federation in 2008, which the President of this Court mentioned at the 7th All-Russian Congress of Judges, while noting that the prospect of its adoption by the legislator was "rather vague" (Российская газета. 2 декабря 2008 г. [Russian Newspaper. 2 December 2008]).

35 Федеральный конституционный закон от 21 июля 1994 г. № 1-ФКЗ "О Конституционном Суде Российской Федерации", Собрание законодательства РФ, 1994, № 13, ст. 1447 [Federal constitutional law No. 1-FKZ of 21 July 1994. On the Constitutional Court of the Russian Federation, Legislation Bulletin of the Russian Federation, 1994, No. 13, Art. 1447].

in fact it does exist in the form of the Arbitration Procedure Code, and a part of it, more precisely, half of it, is devoted to the resolution of economic disputes arising out of civil legal relations.

As for the current situation with the administrative judiciary stipulated in Art. 118 of the RF Constitution, it has not been based so far on the recently adopted RF Code of Administrative Proceedings. First, this can be explained by the fact that the administrative procedure, mostly dealing with the judiciary on economic disputes, arises from administrative legal relations, i.e. administrative legal proceedings on economic issues are largely based not on the Administrative Procedure Code of the Russian Federation (hereinafter the APC) but on the Arbitration Procedure Code.

Secondly, the APC itself indicates that its competence (powers, authority) is not projected onto proceedings on administrative offenses (part 5 of Art. 1), even though they include a large segment of the general administrative judiciary. Currently, the RF Code of Administrative Offenses leaves this issue open and under the ruling of Art. 24.1 that defines the tasks for the judiciary on administrative cases and the ruling for judicial procedures regulated by Chapter 29, "On Litigation of Cases on Administrative Offense." And without embedding in one "line" of relations covered by the notions of "administrative offense," "criminal offense" and "crime," as suggested above, the problem of breach – procedural – but (in the constitutional dimension) of the rules governing the procedure for dealing with cases administrative offenses do not solve.

Thirdly, the APC has several other gaps concerning its legal proceedings arrangement where the provisions are contained in the APC itself and they "do not work out." It is evident that this is caused by the inconsistency of some articles of Chapter 2 with Art. 134 (RF Civil Procedure Code). This is proved by the fact that the Constitutional Court repeatedly has encounters with this matter. In practice, it means that the APC will have to be thoroughly reconsidered and updated.

In addition, there are evident gaps in the legislative provisions in respect of access to justice, including, first, the gaps in the administrative legislation. These gaps have been repeatedly manifested in law enforcement practice, and mainly seen before the Constitutional Court. Thus, for example, the Constitutional Court, in its consideration of the case that ended up with the adoption of Resolution No. 6-P of 31 March 2015, stated that in the modern judiciary there are no judicial bodies in the current system of legal regulation that would be bound to try administrative cases on the acts of the Federal Tax Service. These do not comply with the requirements for the regulation of legal norms adopted by federal executive bodies, neither in their form and subject, nor in their registration and publication. However, at the same time they contain an explanation (normative interpretation) of the duty for all tax authorities and of tax regulations that may contradict their true goal (meaning) of taxation and, thereby, violate the rights of taxpayers. The case in question, having been considered by the Constitutional Court, came across such an explanation given by the Federal Tax Service, which implicitly but inevitably, bound a huge number of taxpayers to commit actions which were rather burdensome for them.

This serves as an example where the Constitutional Court found the mechanism of administrative judiciary lacks special rulings for court proceedings applying the norms of federal executive bodies as well as the norms of the Federal Tax Service. The interpretation of these provisions cannot be considered to be a legal basis, but actually they possess legal power. Some of the federal taxation interpretations contained not only regulations directed to an uncertain audience of taxpayers, but also ruled that the failure to comply with the regulations would be followed by imposing on such taxpayers corresponding tax sanctions. The imperfections of these interpretations made it impossible to appeal in court. The implementation of these sanctions limited access to justice, in breach of part 1 of Art. 46 of the RF Constitution, which guarantees the judicial protection of people's rights and freedoms to everyone. Also, it was in breach of part 2 of Art. 46 of the RF Constitution according to which the decisions and actions or omission of action by federal public authorities, local government bodies, public associations and officials, and thus people shall have the right to appeal the court decisions.

And only after that, in keeping with the mandates of the Constitutional Court, the Federal law of 15 February 2016 No. 2-FZ expanded the powers of the Supreme Court, enabling it to try at first instance the cases brought about by federal executive bodies. The court on intellectual rights was given the authority to try at first instance the disputable cases on interpretation of intellectual property, including patent rights, company brands, goods and logos, etc. These helped to fill in the gap of illegality in this area of the law.

Moreover, we can foresee the possible prospective "splitting off" of certain types of administrative judiciaries, capable of "developing" first into separate procedural institutions and then obtaining autonomy and becoming an independent type of legal judiciary. That may lead to amendment of Art. 118 of the RF Constitution. Let us take, for instance, legal proceedings for electoral disputes. Here, according to the Constitutional Court, by virtue of the constitutional nature of the proceedings, the trial disputing substantive laws shall be conducted through litigation when trying the cases on the merits on the basis of the adversarial and equal rights of the parties. This law also extends to appealing court decisions and actions (as well as inaction) of electoral boards. The process of counting votes and calculating the results of voting is critical for the full results of elections. The existing law enforcement practice that completely excludes the possibility of judicial protection of citizens' electoral rights, in case they are breached at any stage of the electoral process, following the moment of voting, and thereby denying the right of voters to appeal the results of voting in the polling station where they have voted, does not meet the requirements of the RF Constitution.[36]

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[36] Постановление Конституционного Суда Российской Федерации от 22 апреля 2013 г. № 8-П [Resolution of the Constitutional Court of the Russian Federation No. 8-P of 22 April 2013] (Jun. 9, 2018), available at http://www.garant.ru/.

In general, it is obvious that the procedure for electoral matters should be carried out especially in the periods of the elections themselves, which are very time-consuming and conducted regardless of the day of the week and the time of day. The situation is similar with disputing the decisions of the qualification panel of judges, both federal and regional, in defining judges' competencies provided in the Committee for Judges' Qualifications with respect to their disciplinary proceedings. With regard to the latter, an analysis of Decree No. 13 of the Plenum of the Supreme Court of the Russian Federation on 14 April 2016 "On Judicial Practice of Implementing Legislation Regulating Disciplinary Responsibility of Judges" provides definite and considerable grounds concerning fundamental and constitutionally proclaimed responsibilities of the judges, their autonomy and independence. This approach is explicit in federal and regional administrative court proceedings that try the cases on human rights, children's rights, entrepreneurs' rights, rights of individuals and an indefinite group of persons. Unfortunately, the APC does not provide for the regional commissioner to apply to the court in defense of the rights of other persons, and the laws of the subjects of the Russian Federation do not allow such rights to be granted to them either.

But no sooner had the norms of the APC been enforced than the Constitutional Court received appeals to consider some of the code's provisions to be unconstitutional. A number of such appeals dealt with part 9 of Art. 208 APC, which provided that the claimants or their representatives disputing the normative legal acts in the courts, or other subjects of the Russian Federation in the Supreme Court of the Russian Federation, should have a degree in law or have higher legal education in law. The Constitutional Court, in its court decisions of 6 June 2016 No. 1157-O, 6 June 2016 No. 1156-O, etc., incorporated this provision into a number of other norms that do not limit the access to justice and, thus, are not in breach of the provisions of the RF Constitution. However, in fact, the above problems do exist and they are manifested through limited access to justice in Russia,[37] as well as the demand for some of the code's provisions and amendments,[38] which has been discussed in more detail in one of the specialized periodicals in this field.[39]

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[37] *Власов Е.В.* Проблемы доступности судебного представительства в административном судопроизводстве // Российское правосудие. 2016. № 7. С. 23–32 [Evgeniy V. Vlasov, *Problems of Accessibility of Judicial Representation in Administrative Legal Proceedings*, 7 Russian Justice 23 (2016)].

[38] *Тарибо Е.В.* О неопределенности переходных законодательных норм (на примере Кодекса административного судопроизводства) // Журнал конституционного правосудия. 2016. № 3(51). С. 12–13 [Evgeniy V. Taribo, *On the Ambiguity of Transitional Legislative Norms (on the Example of the Code of Administrative Proceedings)*, 3(51) Journal of Constitutional Justice 12 (2016)].

[39] *Серков П.П.* Административное право, административное судопроизводство и механизм правоотношений // Журнал административного судопроизводства. 2016. № 1. С. 14–24 [Pyotr P. Serkov, *Administrative Law, Administrative Proceedings and the Mechanism of Legal Relations*, 1 Journal of Administrative Judiciary 14 (2016)].

Conclusion

Elimination of the imperfections discussed in these pages, as well as overcoming inconsistencies in the Administrative Justice Code of the Russian Federation to codified legislation, will undoubtedly increase the efficacy and excellence of the administrative justice mechanism and lead to the improvement of relevant judicial practice. A real increase in the effectiveness of administrative court judicial procedure and proceedings will be possible with the adequate and systemic improvement of the entire complex of all the constituents of the administrative justice mechanism, including the development of an administrative judiciary and the status of judges within the administrative judiciary. Such a complex development of all the components of Russian administrative mechanism will lead to the setting up of separate, albeit autonomous at first, systems of administrative courts.

Specifically, administrative justice itself can operate within a framework of courts of general jurisdiction. This is a separate independent administrative and judicial system incorporating separate administrative courts that may operate as systems, not only as components, including quasi-judicial specialized bodies with the subsequent judicial control functions, as well as strong financing and adequate human resources (personnel) for their functioning.

It would be advisable to develop a strong legal basis resting on scholarly research, and legislative, normative, organizational, financial, information and methodological developments so as to enable administrative justice to operate effectively.

In considering the issue in question, we propose the following. The judicial part of the administrative justice mechanism should make use of the best Russian and foreign developments relating to an effective administrative judiciary and judicial proceedings,[40] and also to the legal basis of the Russian Federation with its amendments and minimized norms regulating the resolution of administrative disputes and cases which are not subject to the Administrative Justice Code.

The authors consider it critical to provide legal assistance to a party who needs it and does not have the opportunity to provide it, should the interests of justice so require.[41]

As for the status of the judges in the prospective administrative courts, it is our view to retain the requirements existing at present, except for those newly appointed judges who need to pass a qualification examination on administrative justice. For example, the staffing of the judiciary of the administrative courts of the specialized, administrative judiciary of the Russian Federation will be carried out to a significant

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40 *Euro-American Model Code of Administrative Jurisdiction: English, French, German, Italian, Portuguese and Spanish Versions* (R. Perlingeiro & K.-P. Sommermann (eds.), Niterói: Editora da UFF, 2014).

41 Malgorzata Wasek-Wiaderek, *The Principle of "Equality of arms" in Criminal Procedure Under Article 6 of the European Convention on Human Rights and Its Functions in Criminal Justice of Selected European Countries* (Leuven: Leuven University Press, 2000).

extent by the "overflow" of judges who previously specialized either in administrative dispute resolution or in commercial (arbitration) or military courts.

The current situation with the judicial hierarchy is more complicated,[42] because the implementation of the bill on administrative courts, passed in 2000, is not fully appropriate. We also suggest that the area of operation of the administrative court of any level should not coincide with the administrative division of the country. In the very first approximation, the structure of the links of the prospective system of administrative courts proposed by the authors of this article may be as follows.

The first tier includes non-federal, independent justices of peace, which are the lower court. The legal basis for this is contained in Federal law of 5 April 2016 No. 163-FZ "On Amendments to the Code of Administrative Judicial Proceedings of the Russian Federation and Certain Legislative Acts of the Russian Federation." The wording of this Law (part 1 of Art. 1 of the APC) was amended and, after the words "courts of general jurisdiction", a comma appears followed by the words "justice of the peace judges". We consider that being non-federal courts the justice of peace courts, as independent courts, will become the lowest link not only for administrative justice. Their jurisdiction will include the resolution of a number of categories of criminal and civil cases. We suggest that the jurisdiction of the justices of the peace should hear the cases on normative acts and actions committed (as well as inactions) by municipal authorities.

The second tier is represented by district administrative courts. These are courts of first instance that should hear the cases on challenging the acts, actions and decisions of federal executive bodies' area (district) administrative court. The Bill of 2001[43] may serve as a legal basis for this. Geographically, their authority may extend to several administrative districts within the boundaries of the common territory. In the capacity of a court of first instance, there will be the hearing of cases disputing normative acts, decisions and actions by regional authorities. Also, complaints against judicial acts issued on administrative cases by magistrates may be tried by the first instance courts.

The third tier is the area (district) administrative courts, which operate on the territories of several subjects of the Russian Federation and deal with appeals relating to offenses by its authorities. The legal basis for this tier rests on the Bill of 2001. Geographically, the authority of these courts will extend to the territory of several subjects of the Russian Federation. These courts should be similar to the current

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42 *Старилов Ю.Н.* Административные суды в России: новые аргументы за и против [Yuriy N. Starilov, *Administrative Courts in Russia: New Arguments "for" and "against"*] (Moscow: Norma, 2004).

43 Федеральный конституционный закон от 15 декабря 2001 г. № 1-ФКЗ "О внесении изменений и дополнений в Федеральный конституционный закон 'О Конституционном Суде Российской Федерации'", Собрание законодательства РФ, 2001, № 51, ст. 4824 [Federal constitutional law No. 4-FKZ of 15 December 2001. On Amendments to the Federal Constitutional Law "On the Constitutional Court of the Russian Federation," Legislation Bulletin of the Russian Federation, 2001, No. 51, Art. 4824].

appellate arbitration courts. In the capacity of a court of first instance, they will consider appeals against acts, decisions, actions, etc., passed by the authorities of the subjects of the Russian Federation. Also, they will be a higher authority for inter-district administrative courts.

The fourth tier is the independent Supreme Administrative Court of the Russian Federation, which considers disputes on challenging acts, actions and decisions of federal executive bodies. This tier should be represented by the current Administrative Committee of the Supreme Court of the Russian Federation with the appropriate distribution of powers, and later, should there be a clearly indicated need, it would transition into an independent Higher Administrative Court of the Russian Federation. Its competence will embrace the jurisdiction of the courts of first instance and it should review cases on challenging acts, actions and decisions of federal executive bodies. It will also integrate the functions of higher courts in relation to the district administrative courts and a supervisory court. It will also have to interpret the law and provide explanations on issues relating to judicial practice. Thus, the range of the specialized Higher Administrative Court[44] should be the creation of an independent, four-tiered administrative and judicial system of the Russian Federation headed by the Higher Administrative Court of the Russian Federation. The proposed four-tiered administrative and judicial justice system, being specialized at each operational level of administrative justice, may significantly, in comparison with the operation of non-specialized justice, increase the quality of court decisions and opinions and the quality of judicial protection of the rights and legitimate interests of citizens and organizations should they be violated or challenged.

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[44] *La justicia administrativa en el derecho comparado* (J. Barnés Vázquez (ed.), Madrid: Civitas, 1993).

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MILITARY INTERVENTION IN THE GAMBIA: LESSONS FROM THE IVORY COAST, LIBERIA AND SIERRA LEONE

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This article analyses the recent Economic Community of West African States (ECOWAS) military intervention in the Gambia, primarily focusing on possible legal bases for the enforcement action. It examines the political situation following the release of the election results and details the international response to the post-election situation in the Gambia. Among the legal bases assessed include United Nations Security Council authorisation of regional enforcement action under Chapter VIII of the U.N. Charter through Resolution 2337 (2017), intervention by invitation and consent through prior treaty. In so doing, the article also illuminates the plausibility that the ECOWAS military intervention may be considered as unilateral enforcement action, a point further stressed through an analysis of prior ECOWAS interventions, most notable, the interventions into Sierra Leone and Liberia. Moreover, the intervention in the Ivory Coast following the 2010–2011 post-election crisis is also examined in showcasing the situational similarities between those in the Ivory Coast and those in the Gambia. In so doing, the article inter alia, explores the international legal framework pertaining to the prohibition of the threat and use of force; analysing its nature as well as exceptions to it. Article 2(4) of the U.N. Charter, read together with Article 53, therefore form the backbone of the contribution.

Keywords: military intervention; United Nations Security Council; regional organisations; regional enforcement action; African Union; ECOWAS.

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Introduction

In recent decades, unilateral regional enforcement action on the African continent has become a topic of debate. Politically, the continent has arguably the most turbulent and volatile landscape of any region in the world. Since the establishment of the African Union (AU) in 2002, the promotion of democracy has been a cornerstone of its approach to policy on the continent.[1] In pursuing and ensuring peaceful transitions of power following democratic elections across states in Africa, several situations have arisen where a sitting head of state refuses to surrender power upon the completion of successful democratic elections.[2] The

[1] The objectives of the AU under the African Union Constitutive Act are to *inter alia* "promote democratic principles and institutions, popular participation and good governance" (Art. 3(g)), as well as the principles of the AU to have "respect for democratic principles, human rights, the rule of law and good governance" (Art. 4(m)). *See also* André Mbata Mangu, *The African Union and the Promotion of Democracy and Good Political Governance Under the African Peer-Review Mechanism: 10 Years On*, 6(1) Africa Review 59, 62–63 (2014).

[2] *See*, for example, former President Yahya Jammeh who refused to relinquish power to successor Adama Barrow in the 2016 Gambian elections, former President Laurent Gbagbo refusing to relinquish power to his successor Alassane Ouattara in the 2010 Ivorian elections and former President Didier Ratsiraka refused to relinquish power to his successor Marc Ravalomanana following the 2001–2002 Madagascar election. *See* Jo-Ansie van Wyk, *Political Leaders in Africa: Presidents, Patrons or Profiteers?*, 2(1) Occasional Paper Series 12, 17–18 (2007).

resistance toward allowing a transition in power has on several occasions prompted international as well as regional efforts to rely not only on peaceful settlement of disputes, but also military intervention, both in the threat and use of force. These interventions have mostly aimed at facilitating a transition of power or restoring the power of democratically elected leaders.[3] This paper analyses the most recent such military intervention, namely the Economic Community of West African States (ECOWAS) intervention in the Gambia following the 2016 presidential elections. In assessing the existence of a legal basis by comparing several different legal justifications, important similarities and differences in previous unilateral military interventions are discussed. In determining the most viable legal justification for the ECOWAS intervention, this paper consistently and continuously contrasts the various legal bases with those of other ECOWAS interventions. Among these, specific attention will be paid to the ECOWAS interventions in Liberia of 1989, Sierra Leone of 1998 and the Ivory Coast of 2010.

1. Unilateral Enforcement Action in the International Legal Order

The use of force in international law is prohibited by the Charter of the United Nations (hereinafter the U.N. Charter). Article 2(4) of the U.N. Charter states:

> 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.

Although the interpretation of Art. 2(4) is not spared from criticism, this paper's primary point of departure is that the use of force under Art. 2(4) is understood to constitute a general prohibition.[4] In other words, any use of force in international

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[3] As was the case following the 2010–2011 Ivorian elections and the 2016–2017 Gambian elections. For a brief position on the Ivory Coast *see* Martin Rupiya, *A Review of the African Union's Experience in Facilitating Peaceful Power Transfers: Zimbabwe, Ivory Coast, Libya and Sudan: Are There Prospects for Reform?*, 12(2) African Journal on Conflict Resolution 161, 171 (2012), and for the Gambia *see* David Perfect, *The Gambian 2016 Presidential Election and Its Aftermath*, 106(3) The Commonwealth Journal of International Affairs 323, 328–329 (2017).

[4] A great part of this debate surrounds the scope of the prohibition in Art. 2(4). Particularly, arguments have been put forward suggesting that only the use of force violating a state's "political independence" and "territorial integrity" is prohibited. *See* Tom Ruys' discussion on the contrasting notions put forward in the International Court of Justice *Case Concerning the Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America), 27 June 1986,* and *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America), 6 November 2003*, versus the *The Corfu Channel Case, 9 April 1949*, on the scope of prohibition of the use of force by Art. 2(4), in Tom Ruys, *The Meaning of "Force" and the Boundaries of the Jus Ad Bellum: Are "Minimal" Uses of Force Excluded from UN Charter*

law, if not sanctioned by the United Nations Security Council (hereinafter the U.N. Security Council) would be deemed illegal. The U.N. Charter does however allow three exceptions to the use of force.[5] These three are: the right of the U.N. Security Council to authorise member states to use force,[6] the right to use force in self or collective defence,[7] and where the U.N. Security Council authorises the use of force by regional arrangements or agencies.[8] While these three exceptions are firmly rooted within the wording and intention of the U.N. Charter, an additional exception is examined, the principle of consent (intervention by invitation within the context of the Gambia).

While the authority of the U.N. Security Council as the primary international organisation to authorise the use of force is maintained, emerging state practice must too be considered. Often and particularly within the African context, situations arise where the U.N. Security Council does not explicitly authorise the use of force in a given situation (as was the case in the Gambia). The historical analysis suggests that regional organisations, such as the AU and ECOWAS, have at times been more willing to resort to the threat or use of force even without U.N. Security Council authorisation.[9] Based on this approach, this paper then examines alternative legal bases to U.N. Security Council authorisation, for the threat or use of force in the Gambia.

In this regard, the U.N. Security Council powers in authorising regional enforcement action must briefly be examined. Apart from authorising individual states to use force, the Security Council may also utilize regional organisations to enforce military measures on its behalf.[10] Chapter VIII of the U.N. Charter recognises regional arrangements and agencies and their participation in matters of international peace and security.[11] Article 52(1) of the U.N. Charter reads:

2(4)?, 108(2) American Journal of International Law 159, 165–167, 208–210 (2014). *See also* Oliver Dörr, *Prohibition of Use of Force*, Max Planck Encyclopedia of Public International Law (2015) (May 19, 2018), available at http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e427. Although there are arguments put forward that Art. 2(4) only prohibits the use of force directed at the territorial or political independence of a state, this interpretation is beyond the scope of this paper.

5 Suyash Paliwal, *The Primacy of Regional Organizations in International Peacekeeping: The African Example*, 51(1) Virginia Journal of International Law 185, 190–191 (2010).

6 Arts. 39, 41 and 42 of the U.N. Charter.

7 *Id.* Art. 51.

8 *Id.* Art. 53(1).

9 *See* below the case of ECOWAS intervention into Sierra Leone and Liberia. Paliwal 2010, at 187. *See also* the case of NATO intervention in Kosovo, Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10 European Journal of International Law 1 (1999).

10 Art. 53(1) of the U.N. Charter. This thesis consistently uses the term "regional organisations" to refer to Art. 53(1) "regional arrangements or agencies."

11 *Id.* Arts. 52(1)–(3) and 53(1).

> Nothing in the present Charter precludes the existence of regional arrangements or agencies dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.

While the U.N. Charter does not specifically define regional organisations, it is clear in its wording of the need for U.N. Security Council authorisation of regional enforcement action. Article 53(1) of the U.N. Charter reads:

> The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council…

In recent decades, regional organisations such as the AU, ECOWAS and even the Southern African Development Community (SADC) have shifted their approaches to emphasise collective regional security within Africa. Although not a direct matter of discussion within this paper, the security framework of these regional and sub-regional organisations have raised concern that they have begun to challenge the primacy of the U.N. Security Council in matters of peace and security.[12]

Under Chapter VII, the U.N. Security Council is the primary organ responsible for the maintenance and restoration of international peace and security, and may utilize regional organisations and authorise their use of force.[13] As one of the exceptions to the use of force in the U.N. Charter, Art. 53(1) has undergone a significant amount of strain, particularly on the African continent where regional and sub-regional organisations have seemingly on occasion taken primary responsibility over matters of peace and security.[14] On occasion, regional organisations, and particularly African regional organisations have engaged in peacekeeping missions without the consent of the host state, nor the authorisation of the U.N. Security Council.[15] Moreover, these

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[12] Erika De Wet, *Regional Organizations and Arrangements: Authorization, Ratification, or Independent Action* in *The Oxford Handbook of the Use of Force in International Law* 314, 353–355, 368–369 (M. Weller (ed.), Oxford: Oxford University Press, 2015); Erika de Wet, *The United Nations Collective Security System in the 21st Century: Increased Decentralization Through Regionalization and Reliance on Self-Defence* in *Coexistence, Cooperation and Solidarity: Liber Amicorum Rüdiger Wolfrum* 1553, 1557–1563 (H.P. Hestermeyer et al. (eds.), Leiden; Boston: Martinus Nijhoff, 2012).

[13] Art. 53(1) of the U.N. Charter.

[14] Paliwal 2010, at 189–191; Erika De Wet, *The Evolving Role of ECOWAS and the SADC in Peace Operations: A Challenge to the Primacy of the United Nations Security Council in Matters of Peace and Security?*, 27(2) Leiden Journal of International Law 353 (2014).

[15] De Wet, *Regional Organizations and Arrangements*, at 358; Paliwal 2010, at 191.

regional organisations have conducted military interventions into member states without U.N. Security Council authorisation.[16] This practice, particularly by the AU and ECOWAS, has raised questions as to what extent U.N. Security Council authorisation of regional enforcement action is still required.[17] Ordinarily, where no authorisation for regional enforcement action exists, such enforcement action, if not within the confines of the exceptions to Art. 2(4), would be considered illegal.[18]

2. The Gambian Elections of 2016

On 1 December 2016, the Gambian presidential elections were held across the country. The following day, before the announcement of the election results, President Yahya Jammeh announced his defeat, conceding to president elect and winner of the Gambian elections, Adama Barrow. On 5 December 2016, Independent Electoral Commission Chairman Alieu Momarr declared the official election results by Gambia's Independent Electoral Commission showing that Barrow had obtained 227 708 votes, with Jammeh receiving 208 487 votes.[19] However, on 9 December, President Jammeh announced his rejection of the election results claiming that "serious and unacceptable abnormalities" had occurred and called for a new election to be held. Subsequent to his announcement, Gambian troops were deployed to the state's capital, Banjul, and Serekunda, the largest city in the Gambia.[20]

On 10 December 2016, U.N. Secretary-General Ban Ki-moon and the U.N. Security Council called on Jammeh to "fully respect the outcome of the election and to resolve all disputes that may arise from the electoral process through established legal procedures" further calling for "a peaceful, timely and orderly transfer of power, in full respect of the will of the Gambian people as expressed in the election."[21] The U.N. Security Council called on the support of the United Nations Office for West Africa (UNOWAS) as well as ECOWAS, to "preserve stability in the West African country and work towards the installation of a democratically elected Government in the

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16 Specifically, the ECOWAS interventions in Liberia and Sierra Leone will be addressed in this section.

17 De Wet 2014.

18 Arts. 2(4) and 51 of the U.N. Charter. *See* De Wet 2014; Paliwal 2010, at 188.

19 Muhammed Jah, *The Total of Final Election Results by Alieu Momarr Njai – Chairman IEC*, Independent Electoral Commission, 5 December 2016 (May 19, 2018), available at http://iec.gm/the-total-of-final-election-results/.

20 Ruth Maclean, *The Gambia: Life Goes On in Banjul as Yahya Jammeh Clings to Power*, The Guardian, 11 December 2016 (May 19, 2018), available at https://www.theguardian.com/world/2016/dec/11/the-gambia-election-results-yahya-jammeh-adama-barrow-troops-banjul.

21 United Nations Secretary-General, Statement Attributable to the Spokesman for the Secretary-General on the Gambia, 10 December 2016 (May 19, 2018), available at https://www.un.org/sg/en/content/sg/statement/2016-12-10/statement-attributable-spokesman-secretary-general-gambia.

country."[22] On 19 January, the AU ultimately announced that it would no longer recognise Jammeh as the President of the Gambia.

On 19 January, fearing for his safety in the Gambia, Barrow was sworn in as President of the Gambia in the Gambian embassy in Dakar, Senegal. On that same day, the U.N. Security Council passed Resolution 2337 (2017) on the situation in the Gambia.[23] Despite a lack of explicit authorisation by the Security Council and subsequent to Resolution 2337 (2017), Senegalese forces, assisted by forces from Ghana and Nigeria, entered the Gambia, placing it under a naval blockade.[24] On 21 January, Jammeh conceded defeated in a statement on state television, saying

> I have decided today in good conscience to relinquish the mantle of leadership of this great nation with infinite gratitude to all Gambians.[25]

3. Assessing the Legal Bases for ECOWAS Intervention: Implicit Authorisation, Treaty-Based Consent or Intervention by Invitation

3.1. United Nations Security Council Resolution 2337 (2017)

On 19 January 2017, only several hours after Barrow was officially sworn in as President of the Gambia, the U.N. Security Council passed Resolution 2337 (2017) on the situation in the Gambia. The resolution called on Jammeh to step down as President and welcomed the African Union's Peace and Security Council declaration that it would no longer recognise Jammeh as the Gambia's president.[26] It called on countries and regional organisations to cooperate with "President Barrow" and assist in realising the transition of power.[27] While Resolution 2337 (2017) gave no express authorisation for military intervention into the Gambia, it did express its support to ECOWAS in resolving the crisis.[28] Several ambassador's to the U.N. affirmed their stance that Resolution 2337 (2017) did not authorise any military intervention

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22 Gambia: UN Calls on Outgoing President to Respect Election Results and to Carry Out a Peaceful Transition, UN News, 10 December 2016 (May 19, 2018), available at https://news.un.org/en/story/2016/12/547542-gambia-un-calls-outgoing-president-respect-election-results-and-carry-out.

23 U.N. Security Council, Security Council resolution 2337 (2017) (on the outcome of the presidential elections held in Gambia on 1 December 2016), 19 January 2017, S/RES/2337.

24 Gambia Crisis: Senegal Sends in Troops to Back Elected Leader, BBC News, 19 January 2017 (May 19, 2018), available at https://www.bbc.com/news/world-africa-38682184.

25 Gambia's Yahya Jammeh Confirms He Will Step Down: Leader of 22 Years Announces on State Television That He Has Decided to Relinquish Power, Al Jazeera, 21 January 2017 (May 19, 2018), available at https://www.aljazeera.com/news/2017/01/gambia-yahya-jammeh-agrees-step-170120184330091.html.

26 Paras. 2, 4, 7 of U.N. Security Council Resolution 2337 (2017).

27 *Id.* paras. 7, 9.

28 U.N. Security Council Resolution 2337 (2017).

against Gambia. Uruguay's U.N. Ambassador Elbio Rosselli stated: "Nothing in this resolution should be interpreted as authorization for the express use of force," while these sentiments were shared by Bolivia's U.N. Ambassador Sacha Llorenty Soliz.[29]

It is prudent to note that the language of Resolution 2337 (2017) did not expressly authorise the use of force in the usual manner the Security Council authorises the use of force. Instead, it states that the Security Council:

> Expresses its full support to the ECOWAS in its commitment to ensure, by political means first, the respect of the will of the people of the Gambia as expressed in the results of 1st December elections.[30]

The use of the words "by political means first" suggests that the use of force could be applied at a later stage, upon the lapse of "political means." However, as Erika De Wet indicates, it is also important to note that Resolution 2337 (2017) was not adopted under Chapter VII of the U.N. Charter. Combined with the timing of Resolution 2337 (2017) passing only a few hours after the inauguration of President Barrow and his explicit request for enforcement action, with the fact that ECOWAS troops positioned on the Gambian border only entered the Gambia after Barrow's official request, indicates the legal basis for the enforcement of democracy pointed further away from authorization from Resolution 2337 (2017) and more toward intervention by invitation.

Although an explicit authorization to use force seems an unlikely conclusion, an argument for implicit U.N. Security Council authorization of the use of force by ECOWAS remains plausible. Two indicators point toward this argument. Firstly, Resolution 2337 (2017) acknowledged and welcomes the decisions reached on the Gambia by both the ECOWAS 50th Ordinary Session held on 17 December 2016, and the decision of the AU's Peace and Security Council held on 12 December 2016. This raises important questions regarding the intention of Resolution 2337 (2017). The decision of ECOWAS and AU at their respective summits both came to similar conclusions – that "all necessary measures" could be used to give effect to the results of the 1 December Gambian elections. The determinations and decisions made at the ECOWAS and AU summits, if read within the general understanding of a threat of use of force, would certainly constitute as such. This fact is further informed by the subsequent actions of ECOWAS when it amassed a 7000-strong force along the Gambian border. In this light, it seems reasonable to conclude that the statements made at the organization's summits constitute a threat of use of force. Presently, however, the primary concern is the acknowledgement of these statements by Resolution 2337 (2017). The argument for implicit authorization would therefore

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29 Michelle Nichols, *U.N. Backs West African Efforts to Install New Gambia President*, Reuters, 19 January 2017 (May 19, 2018), available at https://www.reuters.com/article/us-gambia-un-vote-idUSKBN1532T8.

30 Para. 6 of U.N. Security Council Resolution 2337 (2017).

stem from first and foremost, the resolution's acknowledgement of the threat of use of force, and its choice of words that it supported ECOWAS to give effect to the will of the Gambian people "by political means first." Resolution 2337 (2017) would certainly have been aware of the decisions the AU and ECOWAS had come to, given it acknowledged their statements, and the U.N. Security Council could certainly have foreseen the materializing of these statements. This fact perhaps informed the very nature of the resolution, a "non-authorizing" yet "non-prohibitive" stance. In any case, where such a resolution failed to at the least implicitly authorize the use of force, several other legal bases could give possibly legality to the ECOWAS use of force.

In light of Resolution 2337 (2017), it is prudent to revisit the situation in the 2010 Ivorian Elections, as well as the ECOWAS interventions into Liberia and Sierra Leone.

The situation in the Gambia was not the first where an incumbent head of state refused to relinquish power to their successor. In the 2010–2011 Ivorian elections, President Laurent Gbagbo refused to concede to successor Alassane Outtara. The refusal of Gbagbo to relinquish power eventually lead to U.N. and ECOWAS peacekeeping forces (under the banner of the United Nations Operation in Côte d'Ivoire (UNOCI)) to use force to install Outarra. Even before the Ivory Coast situation, on two other occasions, ECOWAS had used force (without U.N. Security Council authorisation); both in the Liberian civil war of 1989–1996 and the Sierra Leon coup of 1998. These situations are subsequently addressed below.

3.1.1. The 2010–2011 Ivorian Elections

The situation in the Gambia was not the first in which U.N. Security Council Resolution prompted regional enforcement action by ECOWAS, nor was it the first such situation where an international response was involved in unseating a president unwilling to relinquish power. Instead of unilateral military intervention however, efforts by both ECOWAS and U.N. peacekeeping missions culminated in an eventual transition of power through multinational forces working against President Gbagbo of the Ivory Coast.

The Ivorian elections of 2010 were held in two rounds on 31 October and 28 November 2010 respectively. On 4 November 2010, Ivory Coast IEC Chairman Youssouf Bakayoko announced the provisional results of the first round of elections. President Laurent Gbagbo from the ruling Ivorian Popular Front (IPF) had received 38.3% of the vote with former Prime Minister and main opposition leader Alassane Dramane Ouattara from the Rally of the Republicans (RDR) receiving 32.08%. The third position was occupied by Henri Konan Bedie from the Democratic Party of Ivory Coast (DPIC) who had received 25.24% of the vote. According to the UN, the voter turnout for the first round was 85.11%, approximately 4.8 million voters of the country's 5.7 million population.[31]

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[31] Côte d'Ivoire Presidential Elections 31 October – 28 November 2010, Fact Sheet: 25 November 2010 (May 19, 2018), available at http://www.un.org/ar/peacekeeping/missions/unoci/documents/cote_d'ivoire_elections_round2_%20factsheet24112010.pdf.

No candidate could secure a majority vote and according to the Ivorian Constitution, a second round of elections had to be held for a run-off between the top two candidates from the first round.[32] On 6 November 2010, President of the Constitutional Council Paul Yao N'Dré, confirmed the provisional results of the first round of elections, declaring Gbagbo to be in the lead.[33]

On 2 December 2010, President of the CEI Youssouf Bakayoko announced provisional results of the second round of elections showing that Ouattara had secured 54.1% of the vote with Gbagbo securing 45.9% of the vote.

The announcement came after days of postponement and beyond the deadline which was set for the announcement to take place. Consequently, Ouattara was declared the winner of the election. On 3 December 2010, the President of the Constitutional Council N'Dré announced that the CEI no longer had the authority to announce election results as it had missed the deadline. N'Dré argued that only the Constitutional Council had the authority to announce decisions on contested results.[34] Article 94 of the Ivory Coast Constitution states that the Constitutional Court "controls the regularity of the operations of the referendum and proclaims the results." It further states that "the Constitutional Council shall proclaim the final results of the presidential elections." The announcement of 2 December 2010 by the CEI was overturned and N'Dré declared Gbagbo winner of the elections. Speaking on national television, N'Dré stated that results in seven regions in the north of the country (where Ouattara drew most of his support from) had been annulled. He was quoted saying:

> The irregularities are of such a nature that they invalidated the vote.[35]

Consequently, Gbagbo had won the election, being credited 51.45% of the vote, with Ouattara receiving 48.55%.

3.1.2. U.N. Security Council Response: Peacekeeping in the Ivory Coast

The character of the military intervention in the Ivory Coast differs from that of a U.N. Security Council authorised regional enforcement action. Instead, the military operation was in principle, undertaken under the banner of UNOCI's peacekeeping forces. The primary legal basis for military intervention in enforcing the outcome of

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[32] Art. 94 of the Constitution of Côte d'Ivoire, adopted 23 July 2000.

[33] Decision du Conseil constitutionnel n° 2010/ EP032 du 6 Novembre 2010.

[34] Ivory Coast Poll Overturned: Gbagbo Declared Winner, BBC News, 3 December 2010 (May 19, 2018), available at https://www.bbc.com/news/world-africa-11913832.

[35] Marco Chown Oved, *War Fears as Ivorian Poll Results Overturned*, Independent, 4 December 2010 (May 19, 2018), available at https://www.independent.co.uk/news/world/africa/war-fears-as-ivorian-poll-result-overturned-2150975.html.

the 2010–2011 democratic elections in the Ivory Coast stemmed from U.N. Security Council Resolution 1975 (2011), which reaffirmed UNOCI's mandate established under U.N. Security Council Resolution 1528 (2004). The United Nations Mission in Côte d'Ivoire (MINUCI), predecessor of UNOCI, was established by Resolution 1479 (2003). MINUCI was mandated to facilitate the implementation of the Linas-Marcoussis Agreement, a reconciliation agreement facilitated by France with the aim of creating a government of national reconciliation in the Ivory Coast.[36] In its establishment of MINUCI's mandate, the Resolution included a "military component on the basis of option (b) identified in the Secretary-General's report" as a means of "complementing the operations of the French and ECOWAS forces" in the Ivory Coast following the first Ivorian Civil War.[37] It further requested ECOWAS and French forces in the execution of their mandate in accordance with Resolution 1464 (2003) to work in close consultation with the Special Representative and Monitoring Committee in the implementation of their respective mandates.[38] Resolution 1479 (2003) was however preceded by Resolution 1464 (2003), in which the U.N. Security Council first made its determination that the situation in the Ivory Coast was a threat to international peace and security.[39] Although MINUCI's establishment inevitably included a military component and further determined that the challenges to the stability in the Ivory Coast constituted a threat to international peace and security in the region, Resolution 1479 (2003) did not authorise the use of force by any of the parties involved in the Ivorian Civil War.

On 27 February 2004, acting under Chapter VII of the U.N. Charter, U.N. Security Council Resolution 1528 (2004) authorised the formation of UNOCI.[40] The establishment of UNOCI for an initial period of 12 months, transferred peacekeeping authority from the MINUCI and ECOWAS forces to UNOCI.[41] Echoing the sentiment of those in Resolution 1464 (2003) and Resolution 1479 (2003), that the situation in the Ivory Coast constituted a threat to international peace and security, Resolution 1528's predecessor, Resolution 1527 (2004), authorised the extension of the MINUCI mandate until 27 February 2004.

Resolution 1528 (2004) set out UNOCI's mandate, including the monitoring of ceasefire and movements of armed groups, disarmament, demobilisation,

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[36] Letter dated 27 January 2003 from the Permanent Representative of France to the United Nations addressed to the President of the Security Council, 27 January 2003: The Linas-Marcoussis Agreement was a ceasefire agreement between rebel forces and followed the First Ivorian Civil War, a year-long conflict stemming from a volatile political climate and ethnic tensions.

[37] Para. 2 of U.N. Security Council Resolution 1479 (2003).

[38] *Id.* para. 11.

[39] Preamble of U.N. Security Council Resolution 1464 (2003).

[40] U.N. Security Council Resolution 1528 (2004).

[41] *Id.* para. 2.

reintegration, repatriation, resettlement, protection of United Nations personnel, institutions and civilians, support for humanitarian assistance, the implementation of the peace process, assistance in the field of human rights, public information and law and order. Among these, UNOCI was given authorisation "to use all necessary means to carry out its mandate, within its capabilities and its areas of deployment."[42] Further to renewing authorisation given to French and ECOWAS forces through resolution 1527, it authorised French forces for a period of 12 months to "use all necessary means in order to support UNOCI in accordance with the agreement to be reached between UNOCI and the French authorities."[43]

In particular, the resolution also authorised French forces to contribute to the general security of the area of activity of the international forces, intervene at the request of UNOCI in support of its elements whose security may be threatened, intervene against belligerent actions, if the security conditions so require, outside the areas directly controlled by UNOCI, and, to help protect civilians in the deployment areas of their units.[44] Resolution 1528 (2004) was clear in its authorisation given to both UNOCI, ECOWAS and French forces, that "all necessary means" included the use of force.

U.N. Security Council Resolution 1975, unanimously adopted on 30 March 2011 following post-election violence, condemned all violations of international law, reaffirming each states' primary responsibility to protect civilians.[45] The U.N. Security Council recalled its determination that the situation in the Ivory Coast constituted a threat to international peace and security.[46] The Resolution also recalled its authorisation given to UNOCI to "use all necessary means to carry out its mandate to protect civilians under imminent threat of physical violence within its capabilities and its areas of deployment, including to prevent the use of heavy weapons against the civilian population…"[47] The resolution further adopted targeted sanctions against Gbagbo and his associates.[48] On 3 April 2011, after several attacks by Gbagbo loyalists against U.N. peacekeepers, U.N. and French peacekeeping forces secured the international airport in Abidjan. In line with Resolution 1975 (2011), France authorised its forces to act against Gbagbo forces. On 11 April 2011, Gbagbo surrendered to Ouatarra's forces and was subsequently detained under U.N. protection. Resolution 1975 (2011) is regarded as the primary legal basis for the use of force in the Ivory Coast by UNOCI and ECOWAS forces in order to install President-elect Ouatarra.

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42 Para. 5 of U.N. Security Council Resolution 1528 (2004).

43 *Id.* para. 11.

44 *Id.* para. 5.

45 Preamble of U.N. Security Council Resolution 1975 (2004).

46 *Id.* Preamble.

47 Para. 3 of U.N. Security Council Resolution 1975 (2011).

48 *Id.* para. 12.

3.2. ECOWAS Intervention Prior to the Ivory Coast: The Case of Liberia and Sierra Leone

On 28 December 2010, at an Extraordinary Session of the Authority of Heads of State and Government, ECOWAS delivered a statement in which it gave Gbagbo an ultimatum – to step down as president or face the use of force against him in order to install president elect Ouattara.

> In the event that Mr. Gbagbo fails to heed this immutable demand of ECOWAS, the Community would be left with no alternative but to take other measures, including the use of legitimate force, to achieve the goals of the Ivorian people. 11. Against the background of the parlous security situation, the Heads of State and Government hereby instruct the President of the ECOWAS Commission to convene without delay a meeting of the Committee of Chiefs of Defence Staff in order to plan future actions, including the provision of security along the Côte d'Ivoire-Liberia border, in the event that their message is not heeded.

While the statement was a firm response by ECOWAS against Gbagbo's refusal to step down, no subsequent military intervention occurred. Instead, the statement would at most have amounted to a threat of use of force (much like the case in the Gambia) which under Art. 2(4) of the U.N. Charter, remains unlawful. While in the case of the Ivory Coast, ECOWAS did not follow through with its decisions, the swift intervention by ECOWAS forces in in the Gambia suggests a shift in its approach to these situations.[49]

The situation in the Ivory Coast was not the first such instance that ECOWAS had threatened or even intervened militarily in West Africa. ECOWAS first intervened in the 1989–1996 Liberian Civil War. In August 1990, several West African nations under the banner of ECOWAS sent a peacekeeping mission to Monrovia. This multi-later force, known as the Economic Community of West African States Monitoring Group (ECOMOG), spent three years in Liberia during which it temporarily yet successfully ceased bloodshed and ethnic cleansing.[50] Notably, the ECOMOG mandate was to impose a ceasefire, assist in forming an interim government and enable elections to be held in the country within 12 months.[51]

While no U.N. Security Council Resolution allowed the use of force by ECOWAS in Liberia, ECOWAS relied on the Protocol Relating to Mutual Assistance on Defence in justifying its intervention. Article 18 of the Protocol permitted intervention into

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[49] *See* broadly Paliwal 2010, at 206–214.

[50] Liberia: Waging War to Keep the Peace: The ECOMOG Intervention and Human Rights, Human Rights Watch (June 1993) (May 19, 2018), available at https://www.hrw.org/legacy/reports/1993/liberia/.

[51] *Id*. ECOMOG's justification for the intervention on the basis that the civil war was no longer confined to an internal conflict since thousands of ECOWAS nationals were trapped in Liberia and many more thousands of refugees had fled to neighbouring countries.

another state's internal affairs which are "substantially supported externally."[52] In its Preamble, the Protocol states that members "firmly resolve to safeguard and consolidate the independence and sovereignty of member states against foreign intervention." It goes on to say that any "armed threat or aggression" directed against member states shall constitute a threat or aggression against the entire community.[53] Where an "internal armed conflict within any member state engineered and supported from the outside" and which is "likely to endanger the peace and security," ECOWAS is empowered to institute armed or collective intervention.[54] Article 13(1) and (2) specifically allows for the creation of an ECOWAS military force, and this section has been cited as a further legal basis for the Liberia intervention.[55] However, the legal basis for the interventions by ECOMOG have been questioned, with arguments suggesting that the interventions were a violation of the Protocol on Mutual Assistance and Defence and the Organisation for African Union (OAU) Charter,[56] that the intervention was illegal under Arts. 2(4) and 53(1) of the U.N. Charter.[57] ECOMOG's intervention into Liberia was followed by further intervention into Sierra Leone in 1998. On 25 May 1997, President Ahmad Tejan Kabbah of Sierra Leone was overthrown by a military coup. In February 1998, ECOMOG forces aided by the Sierra Leone Civil Defence Force, were able to "reverse" the coup.[58]

While no U.N. Security Council Resolution allowed for the use of force by ECOWAS against both Liberia in 1990 and in Sierra Leone in 1997, both interventions were praised by the Security Council, giving them a "retroactively authorised status" through U.N. Security Council Resolutions 788 (1992)[59] and 1132 (1997).[60] While

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52 Peter A. Jenkins, *The Economic Community of West African States and the Regional Use of Force*, 35(2) Denver Journal of International Law and Policy 333, 344 (2007).

53 Art. 2 of the ECOWAS Protocol Relating to Mutual Assistance on Defence (May 19, 2018), available at http://www.operationspaix.net/DATA/DOCUMENT/3827~v~Protocole_d_Assistance_Mutuelle_en_matiere_de_Defense.pdf.

54 *Id.* Art. 4(b).

55 ECOWAS and the Subregional Peacekeeping in Liberia, The Journal of Humanitarian Assistance, 25 September 1995 (May 19, 2018), available at https://sites.tufts.edu/jha/archives/66.

56 David Kode, *The Complexities of Democracy-Building in Conflict-Affected States: The Role of ECOWAS and the African Union in Côte d'Ivoire*, International IDEA (2016) (May 19, 2018), available at https://www.idea.int/sites/default/files/publications/democracy-building-in-conflict-affected-states-the-role-of-ecowas-and-au-in-cote%20divoire.pdf.

57 Jenkins 2007, at 344–345.

58 Peter A. Dumbuya, *ECOWAS Military Intervention in Sierra Leone: Anglophone-Francophone Bipolarity or Multipolarity?*, 25(2) Journal of Third World Studies 83 (2008).

59 U.N. Security Council Resolution 778 (1992) commended ECOWAS's efforts to restore peace, security and stability in Liberia and specifically called upon ECOWAS to continue its efforts in implementation of the Yamoussoukro IV Accord.

60 U.N. Security Council Resolution 1132 (1997) specifically authorized under Chapter VIII of the U.N. Charter, to among others, ensure the implementation of provisions of the resolution.

the issue of *ex post facto* security council authorisation may not be an acceptable conclusion, and consequently remains outside the scope of this paper, Resolutions 788 (1992) and 1132 (1997) may at best remain *ex post facto* legitimisation of these interventions.[61]

The case of the Ivory Coast shows a remarkable similarity in the situation where a head of state refuses to surrender power and further illustrates that the situation in the Gambia was not a new occurrence. Yet, in the Ivory Coast, clear U.N. Security Council authorisation was given, explicitly to ECOWAS, UNOCI, and French forces in the region. No doubt existed as to whether these forces could use force in executing their mandate. Similarly, the situations in Sierra Leone and Liberia, occurring without U.N. Security Council authorisation, have been seemingly granted this authorisation *ex post facto*. Although these situation show that ECOWAS has been more willing to resort to the use of force in the Security Council's absence, it cannot be said to have set any precedent holding value for the Gambia. No further resolutions on the situation were passed and consequently, an argument for *ex post facto* authorisation of the ECOWAS intervention in the Gambia seems hold no credibility. Yet, these interventions have illustrated regional organisation practice in preceding years, and perhaps as a result, show their lack of reluctance to engage in such interventions.

3.3. ECOWAS Intervention: The 1999 ECOWAS Protocol Relating to the Mechanisms for Conflict Prevention, Management, Resolution, Peace-Keeping and Security

Following the ECOWAS interventions into Liberia and Sierra Leone, the ECOWAS Protocol Relating to the Mechanisms for Conflict Prevention, Management, Resolution, Peace-keeping and Security (hereinafter the 1999 ECOWAS Protocol) was adopted in an attempt to put future interventions on better ground.[62] Dubbed the "most ambitious instrument on the regulation of collective security ever attempted to date" the organisation, once meant to be purely economic, needed a stronger legal foundation for its military missions.[63] The Preamble of the 1999 ECOWAS Protocol among others, mentions the organisation's concerns regarding the proliferation of conflicts which "constitute a threat to peace and security in the African continent." Among its objectives include the prevention, management and resolution of internal and inter-state conflicts, maintain and consolidate peace, security and stability within the Community, and "constitute and deploy a civilian and military force to maintain or restore peace within the sub-region, whenever the need arises."[64]

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[61] Erika De Wet, *The Chapter VII Powers of the United Nations Security Council* 291–293 (Oxford: Hart Publishing, 2004).

[62] Isabel Meyer, *ECOWAS: The Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-Keeping and Security* 3 (Munich: GRIN Verlag, 2010).

[63] *Id*.

[64] Art. 3 of the 1999 ECOWAS Protocol.

Article 10 of the 1999 ECOWAS Protocol empowers the Mediation and Security Council to take decisions on issues of peace and security. Specifically, Art. 10 allows the Mediation and Security Council to "authorise all forms of intervention and decide particularly on the deployment of political and military missions."[65] In relation to its application, Chapter V of the 1999 ECOWAS Protocol further states that where a case of internal conflict arises, the mechanism shall be applied where such conflict (a) threatens to trigger a humanitarian disaster, (b) that poses a serious threat to peace and security in the sub-region.[66] Chapter V further states that the mechanism may be applied "in the event of an overthrow or attempted overthrow of a democratically elected government" or any other situation which the Mediation and Security Council may decide on.[67]

Finally, Art. 52 on Cooperation states that ECOWAS shall fully cooperate with the Organisation for African Unity, United Nations, and other relevant international organisations.[68] It adds that in accordance with Chapters VII and VIII of the U.N. Charter, ECOWAS shall inform the United Nations should it undertake any military intervention in pursuit of the objectives of the 1999 ECOWAS Protocol.[69] While Art. 52 provides some context regarding ECOWAS's cooperation with the United Nations, specifically adhering to Art. 54 of the U.N. Charter,[70] Art. 53 of the Charter specifically prohibits enforcement action by regional agencies without prior U.N. Security Council authorisation.[71]

A military intervention based on a legal basis found in the 1999 ECOWAS Protocol may however, not be sufficient within the context of the U.N. Charter. Article 2(4) of the U.N. Charter put aside, enforcement action by regional agencies under Art. 53 clearly requires U.N. Security Council authorisation. Further, Art. 103 of the Charter specifically affirms the Charter's supremacy over other treaties or agreements.[72] Where any conflict between the obligations of a member state under the U.N. Charter and obligations under any other international agreement arise, the member states obligations under the U.N. Charter prevails.[73]

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65 Art. 10(c) of the 1999 ECOWAS Protocol.

66 *Id.* Art. 25.

67 *Id.*

68 *Id.* Art. 52.

69 *Id.*

70 Article 54 of the U.N. Charter states: "The Security Council shall at all times be kept fully informed of activities undertaken or in contemplation under regional arrangements or by regional agencies for the maintenance of international peace and security."

71 *Id.* Art. 53.

72 *Id.* Art. 103.

73 *Id.*

Further, Art. 2(7) of the U.N. Charter prohibits a member state from intervening into another member state where domestic affairs of that state concern. Although it would be abiding by the 1999 ECOWAS Protocol, and even bound to uphold its objectives, it is doubtful that ECOWAS's intervention into the Ivory Coast would be legal under the U.N. Charter.

On 12 December, the AU's Peace and Security Council stressed its determination to take all necessary measures in accordance with all AU instruments, in ensuring compliance with results of the 1 December elections.[74] Although the AU pointed to Art. 23(4) of the African Charter on Democracy, Elections and Governance, which identified the refusal of an incumbent president to transfer power to their successor, as a form of unconstitutional change in government, it does not permit the use of force against such government.[75]

On 17 December 2016, ECOWAS echoed similar sentiments on the situation in the Gambia, stating that the will of the Gambian people had to be respected, and that

> the authority [ECOWAS] shall undertake all necessary actions to enforce the results of the election.[76]

Article 9 of the ECOWAS Protocol on Democracy and Good Governance Supplementary to the Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-keeping and Security states that

> The party and/or candidate who loses the elections shall concede defeat to the political party and/or candidate finally declared the winner, following the guidelines and within the deadline stipulated by the law.[77]

Further, ECOWAS's Protocol on Non-Aggression specifically prohibits member states from threats or use of force against other member states in relation to territorial integrity or political independence.[78]

At its 50th Ordinary Session held on 17 December 2017, ECOWAS's Authority of Heads of State and Government considered what it described as the "worrying

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74 Communique of the Peace and Security Council on the post-election situation in the Islamic Republic of the Gambia, 12 December 2016, PSC/PR/COMM. (DCXLIV), at para. 12 (May 19, 2018), available at http://www.peaceau.org/en/article/peace-and-security-council-644th-meeting.

75 Article 23(4) of the African Charter on Democracy, Elections and Governance states: "Any refusal by an incumbent government to relinquish power to the winning party or candidate after free, fair and regular elections…"

76 Ulf Laessing & Paul Carsten, *West Africa Bloc to Take "Necessary Actions" to Uphold Gambia Vote Result*, Reuters, 17 December 2016 (May 19, 2018), available at https://www.reuters.com/article/us-gambia-politics-idUSKBN1460H6.

77 Signed by Yahya Jammeh himself on 21 December 2001.

78 Art. 1 of the ECOWAS Protocol on Non-Aggression.

political situation in the Gambia."[79] The Authority of Heads of State and Government agreed to uphold the election results of 1 December 2016, guaranteed the protection of Adama Barrow and requested the endorsement of the AU and the U.N. on all decisions taken on the matter of the Gambia.[80] The Authority also agreed that it "shall take all necessary measures to strictly enforce the results of the 1 December 2016 election."[81] The term "all necessary measures" was undoubtedly not used coincidentally and has come to be understood under international law as a normative code permitting enforcement action including the use of force.[82]

While the Authority may have relied on Art. 9 on the Protocol on Democracy and Good Governance, Art. 45 of the Protocol imposes only sanctions and the suspension of the member state from ECOWAS activities. Article 45 allows, upon the recommendation of the Mediation and Security Council, a decision to be taken as stipulated in Art. 45 of the 1999 ECOWAS Protocol. Article 45 however, makes no mention of intervention or use of force.[83]

However, Art. 3 of the 1999 ECOWAS Protocol permits the deployment of military forces to maintain or restore peace within the sub-region "whenever the need arises."[84] Read together with Art. 25 of the 1999 ECOWAS Protocol (the application of the Mechanism), the use of force may be authorised in domestic conflicts, massive violations of human rights, the overthrow of a democratic government or "any other situation as may be decided by the Mediation and Security Council."[85]

3.4. Intervention by Invitation

Although the above arguments, each consisting of several factors in favour of the existence of a legal bases for the ECOWAS intervention, each too has its own

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79 Para. 33 of the ECOWAS Authority of Heads of State and Government Final Communique, 17 December 2016 (May 19, 2018), available at http://www.ecowas.int/wp-content/uploads/2016/12/Communiqu%C3%A9-Final_50th-Summit_Abuja_Dec-16_Eng.pdf.

80 *Id.* para. 38.

81 *Id.* para. 38(h).

82 Christian Pippan, *Collectively Enforcing the Results of Democratic Elections in Africa ECOWAS, the AU, and UN Security Council Resolution 2337 (2017) – Part I*, Völkerrechtsblog, 10 February 2017 (May 19, 2018), available at https://voelkerrechtsblog.org/collectively-enforcing-the-results-of-democratic-elections-in-africa/.

83 Article 45 of the 1999 ECOWAS Protocol states: "In situations where the authority of government is absent or has been seriously eroded, ECOWAS shall support processes towards the restoration of political authority. Such support may include the preparation, organisation, monitoring and management of the electoral process, with the cooperation of relevant regional and international organisations. The restoration of political authority shall be undertaken at the same time as the development of respect for human rights, enhancement of the rule of law and the judiciary."

84 Art. 3(h) of the 1999 ECOWAS Protocol.

85 *Id.* Art. 25(b).

detrimental characteristics. Before any conclusion may be drawn, there is one other legal bases which must be explored, and perhaps the strongest of legal bases yet to be used as a justification for the intervention in the Gambia. During his official swearing in as President of the Gambia, Barrow made a special request to ECOWAS, the AU and the U.N. to remove Gbagbo and assist in the transfer of power. The primary argument advanced in order to justify ECOWAS's military intervention into the Gambia was intervention by invitation at the request of Barrow as the predominantly internationally recognised President of the Gambia.[86] Basing its legality on intervention by invitation, ECOWAS forces began amassing on the Gambian border. On 19 January, after Jammeh's continued refusal to step down, and the passing of Resolution 2337 (2017) by the U.N. Security Council, Senegalese forces entered the Gambia. While minor clashes against Gambian forces were reported, Senegal halted its offensive to provide for a final mediation effort.[87]

Intervention by invitation is defined as a military intervention by foreign troops in an internal conflict at the invitation of the government concerned.[88] State practice in the field of intervention by invitation suggests that such intervention may be requested in cases of purely internal conflict.[89] While certain governments (such as apartheid governments, governments in exile, or invitations issued under duress) are for the most part, not capable of inviting foreign troops,[90] as Georg Nolte notes, states have sometimes attempted to enhance the legitimacy of intervention by invitation by anticipating this possibility in a treaty or by undertaking multilateral operations.[91] Although such participatory or collective non U.N. mandated interventions have been universally recognised,

> It is possible, however, that multilateral interventions by regional security systems might in the future be considered to be a better legitimized form of intervention at the invitation of a government.[92]

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86 Mohamed Helal, *The ECOWAS Intervention in the Gambia – 2017*, Public Law and Legal Theory Working Paper Series No. 414, 2 October 2017, at 10 (May 19, 2018), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3046628.

87 Colin Freeman, *Gambia Crisis: West African Nations Halt Gambia Military Operation to Give Yahya Jammeh Final Chance to Step Down*, The Telegraph, 20 January 2017 (May 19, 2018), available at https://www.telegraph.co.uk/news/2017/01/19/gambia-crisis-british-tourists-flee-west-african-forces-poised/.

88 Georg Nolte, *Intervention by Invitation*, Max Planck Encyclopedia of Public International Law (May 19, 2018), available at http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1702.

89 *Id.*

90 *Id.*

91 *Id.* para. 24.

92 *Id.*

The crux of this principle as a legal basis may be considered under two points: the question of which authority is entitled to extend an invitation for military intervention and whether certain instruments such as the AU's Constitutive Act, the 1999 ECOWAS Protocol and the ECOWAS Protocol Relating to Mutual Assistance on Defence may better serve to inform the legal basis for intervention by invitation.

3.4.1. The Legal Authority to Request Intervention

International law generally accepts that the only authority which can legally request military intervention is the internationally recognised *de jure* government.[93] Such *de jure* internationally recognised authority can legally enter into treaties, dispose of the state's resources and have its ambassadors accredited by international organisations.[94] It is also generally accepted that intervention by invitation during a civil war is impermissible.[95]

The primary legal basis used to justify ECOWAS's intervention into the Gambia was that of the consent of President Barrow.[96] Consequently, it is important for purposes of this dissertation to establish whether the ECOWAS intervention in the Gambia could be founded on the legal basis of intervention by invitation. In making such a determination, addressing the question of the legality of the intervention by invitation depends on whether President Barrow would legally have possessed the authority to issue such an invitation.

Traditionally, the test for such an invitation was based on whether the government issuing the invitation had exercised effective control over the territory and population of the state.[97] While the practice of recognition has fallen away in recent times, occurring more through a state's actual dealings with another state, specific international recognition of President Barrow as the head of state of the Gambia may be a determining role in establishing the legality of the intervention in the Gambia.

Yet another point of contention regards whether ECOWAS and the AU's recognition of President Adama Barrow, while Barrow himself not exercising control of the Gambia, was premature recognition.[98] Arguments put forward for this suggest that the wording adopted by the Communique of the 50th Ordinary Session of the ECOWAS Authority of Heads of State and Government only enforce the outcome

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[93] Erika De Wet, *The Modern Practice of Intervention by Invitation in Africa and Its Implications for the Prohibition of the Use of Force*, 26(4) European Journal of International Law 979, 982 (2015).

[94] *Id.*

[95] *Id.* at 992.

[96] Helal 2017, at 10 – An argument specifically raised by the Senegalese representative before U.N. Security Council Resolution 2337 (2017) was adopted.

[97] *Id.* at 11.

[98] *See* specifically *Id.* at 13.

of the elections and do not necessarily give recognition to President Barrow as the head of state.[99]

However, when further international recognition is concerned, it was clear that President Barrow had, already before ECOWAS forces had crossed into the Gambia, recognised by several international organisations and states. Resolution 2337 (2017) specifically noted the election of Barrow as President of the Gambia, referring to "former President of the Islamic Republic of the Gambia, Mr. Yahya Jammeh" himself having publicly recognised and accepted Barrow as the new President on 2 December. The resolution further endorsed the decision of ECOWAS and the AU to recognise Barrow as President.[100] Moreover, on 14 January 2017, five days before the ECOWAS intervention, the AU announced its intention to stop recognising Jammeh as the President of the Gambia.[101]

While neither state practice nor academic scholars have provided a conclusive settlement to the debate between effective control and democratic legitimacy,[102] a new perspective towards democratic governance and a respect for human rights has given democratic legitimacy a more prominent role as a determining factor for recognition.[103] As De Wet suggests, once a government has been internationally recognised as the "legitimate representative of a state," they enjoy a large discretion when inviting direct military support from foreign states.[104]

3.5. Intervention by Invitation Through Prior Treaty

In determining a potential legal basis for the intervention in the Gambia, Art. 4(j) of the AU's Constitutive Act empowers members states to request military intervention from the AU in order to maintain peace and security. Read together with the ECOWAS Protocol Relating to Mutual Assistance on Defence, an intervention by invitation is further informed:

> When an external armed threat or aggression is directed against a Member State of the Community, the Head of State of that country shall send a written request for assistance to the current Chairman of the Authority of ECOWAS,

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99 The wording of the Communique states: "The Authority shall take all necessary measures to strictly enforce the results of the 1st December 2016 elections," *supra* note 77.

100 Para. 1 of U.N. Security Council Resolution 2337 (2017).

101 AU to Stop Recognising Gambia's Jammeh as President: African Union Says It Will Not Recognise Yahya Jammeh's Presidency Unless He Steps Aside When His Mandate Expires, Al Jazeera, 14 January 2017 (May 19, 2018), available at https://www.aljazeera.com/news/2017/01/au-cease-recognising-jammeh-gambia-president-170113160749764.html.

102 Helal 2017, at 12.

103 De Wet, *The Modern Practice of Intervention*, at 984.

104 *Id.* at 998.

> with copies to other Members. This request shall mean that the Authority is duly notified and that the AAFC are placed under a state of emergency. The Authority shall decide in accordance with the emergency procedure as stipulated in Article 6 above.[105]

In terms of Art. 6 of the ECOWAS Protocol Relating to Mutual Defence, the Authority shall decide on the expediency of military action, entrusting the Force Commander of the Allied Armed Forces of the Community (AAFC) in its execution,[106] and such decisions are immediately enforceable.[107]

However, both the 1999 ECOWAS Protocol and the ECOWAS Protocol Relating to Mutual Defence have limitations. The 1999 ECOWAS Protocol provides clear circumstances when the mechanism may be applied – in the case of internal conflict, where there is humanitarian disaster threatened or where such conflict poses a serious threat to peace and security in the sub-region.[108] The ECOWAS Protocol Relating to Mutual Assistance on Defence is also unambiguous as to need for a "written request" and moreover, the crisis remained a purely internal one – accordingly, the use of force under the Protocol would be impermissible.[109]

Conclusion

The prohibition on the use of force in international law has been well established, and so too have exceptions to it. Specifically, the right of a regional organization to use force in ensuring regional peace and security has been encompassed by Art. 53(1). Consequently, such use of force is subject to the powers of the U.N. Security Council to authorize such force. Although, it must also be acknowledged that several situations have in the past presented favorable arguments for unilateral enforcement action by ECOWAS and have been complemented by the retroactive authorization of such action. While even these situations continue to present debate among the international community as to whether they set any precedent, or at the least contribute to suggest Security Council practice has before condoned unilateral action, such an avenue may be the weaker of options in justifying the ECOWAS action in the Gambia. Indeed, where arguments point towards Resolution 2337 (2017) as implicitly authorizing ECOWAS enforcement action, instead of acting as *ex post facto* authorization, a stronger and more supported legal backing exists. Yet, the

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105 Art. 16 of the ECOWAS Protocol Relating to Mutual Assistance on Defence.

106 *Id.* Art. 6(3).

107 *Id.* Art. 6(4).

108 Art. 25(a–b) of the 1999 ECOWAS Protocol.

109 Art. 18(b) of the ECOWAS Protocol Relating to Mutual Assistance on Defence.

deficiencies in Resolution 2337 (2017) in either implicitly authorizing the enforcement action or retroactively authorizing it remain. Evidently, the most notable legal bases for the ECOWAS intervention seem to be rooted in the principles of intervention by invitation, and consent to such intervention through prior treaty.

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PREVENT ENVIRONMENTAL DAMAGE DURING ARMED CONFLICT

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International humanitarian law consists of different rules that are used for protecting people and restricting the methods of warfare. The application of international humanitarian law is not only limited to the protection of victims related to armed conflicts during the outbreak of hostilities; however, it is also helpful for protecting the victims of these conflicts, including environment. The legal rules for the protection of environment in armed conflict also provide legal protection for the environment during the outbreak of hostilities. The study is divided into several sections, starting from environmental damage in the context of warfare. Afterward, the study discusses the importance of preventive measures in armed conflicts. Furthermore, the properties of prevention protection of environment are discussed including cultural property, engineering installations and protected areas near hospitals and safety zones. The study has shown positive consequences of preventive protection method in both the conduct and the outbreak of hostilities. A set of mechanisms or legal procedures is imposed under humanitarian conventions to provide preventive protection to the environment. The principles of humanitarian law have been developed and enforced through the actions of the Red Cross. However, proved nonetheless to be insufficient to prevent environmental destruction. Principally, the enforcement mechanisms hindered the effectiveness of the provisions. In contrast, several conditions for the possibility of registering cultural property in the international register of cultural should be encouraged based on special prevention mechanisms so that the humanitarian conventions can take serious considerations towards it.

Keywords: armed conflict; culture; environmental damage; humanitarian; prevention protection method; warfare.

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1. International Humanitarian Law

The concept "international humanitarian law" (IHL) refers to the understanding of *jus in bello*, which means the laws concerned with the conduct of war.[1] International humanitarian law is apparently supervised and promoted by the International Committee of the Red Cross (ICRC). It is claimed by the ICRC that IHL is an important aspect of the international law that rules relations between countries.[2] The focal point of the law is to empower and guard individuals who are not participating in fighting (medics, aid workers and civilians) and can no longer fight (sick, prisoners of war, shipwrecked troops and wounded).[3] Further, it aims to espouse the rights and duties directed toward of the parties to a conflict in the conduct of such events.

International humanitarian law, according to international lawyers, was a humanitarian focus to the Geneva part juxtaposed to the Hague law, which was a promoter of the methods of warfare. However, it is deemed that both laws preliminary focus on humanitarian aspects and; thus, overlap.[4] According to Cherif Bassiouni, IHL refers to the obligations of international law, concerned with customary, Hague or Geneva, and conventional armed conflict.[5] The history of IHL is associated with two common approaches: (1) a story of oppression and imperialism, and (2) the humanization of war and law.[6]

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1 Yoram Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict* (3rd ed., Cambridge: Cambridge University Press, 2016).

2 Gary D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (Cambridge: Cambridge University Press, 2016).

3 The Geneva Conventions of 1949 and Their Additional Protocols, ICRC, Overview, 29 October 2010 (Jun. 10, 2018), available at https://www.icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions/overview-geneva-conventions.htm.

4 Amanda Alexander, *International Humanitarian Law, Postcolonialism and the 1977 Geneva Protocol I*, 17(1) Melbourne Journal of International Law 15, 17 (2016).

5 *Globalization and Its Impact on the Future of Human Rights and International Criminal Justice* (M. Cherif Bassiouni (ed.), Cambridge: Intersentia, 2015).

6 Amanda Alexander, *A Short History of International Humanitarian Law*, 26(1) European Journal of International Law 109 (2015).

It occurs by providing for pre-emptive protection of environment prior to the outbreak of hostilities and a subsequent phase of the attack on the environment by determining the international responsibility for the violation of the rules of environmental protection and the appropriate penalty for the perpetrators. Therefore, humanitarian protection of the environment can be divided into three phases:

1) preventive protection before the outbreak of the military operations;

2) control protection during the operation of armed conflict;

3) deterrent protection through the determination of international responsibility for violating environmental protection rules and imposing civil or criminal penalties if this responsibility is established after an attack on the environment and a violation of the protection rules.

Another advantage of this conventional law is to easily prevent a de facto "oligarchic" from the "strongest states" from imposing its will on most states.[7] The Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)[8] is a predominant source of conventional IHL. The Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)[9] is another leading source of conventional IHL. Thereby, it is essential to ascertain the essence of environment by international law before demonstrating the extent of IHL in protecting environment.

1.1. Definition of Environment in the Context of Warfare

It is witnessed from the 1982 World Charter for Nature that warfare or other hostile activities degrading nature, shall be secured.[10] The protection of the environment is intrinsically associated to the human well-being, but it is further concerned with the natural environment. Under IHL, the environment is accredited as natural instead of providing a wider definition of the word.[11] In this context, prohibited acts cause lasting, severe and widespread damage to the natural environment. The natural environment qualifies to the ICRC Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949.[12]

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7 Rymn James Parsons, *The Fight to Save the Planet: U.S. Armed Forces, Greenkeeping, and Enforcement of the Law Pertaining to Environmental Protection During Armed Conflict*, 10(2) Georgetown International Environmental Law Review 441, 470 (1998).

8 Chris Jenks, *A Matter of Policy: United States Application of the Law of Armed Conflict*, 46(3) Southwestern University Law Review 337 (2017).

9 Thomas Buergenthal et al., *International Human Rights in a Nutshell* 1–29 (5th ed., St. Paul: West Academic, 2017).

10 Haydn Washington et al., *Why Ecocentrism is the Key Pathway to Sustainability*, 1 Ecological Citizen 35 (2017).

11 Asif Khan & Maseeh Ullah, *The Protection of Environment during Armed Conflict: A Case Study of International Humanitarian Law (the Case of Fallujah)* (Jun. 10, 2018), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3069563.

12 Theresa U. Akpoghome & T.C. Nwano, *Revisiting the Legal Framework Indirectly Protecting the Environment in Situations of Armed Conflicts*, 1(2) Ajayi Crowther University Law Journal 1 (2017).

According to the regulations of the Fourth Geneva Convention, the means of harming the enemy is not unlimited and occupying state shall merely by considered as usufructuary and administrator of the public buildings, agricultural works, and forests.[13] Likewise, IHL poses a significant challenge to the enforcement and applicability for environmental protection. The overwhelming conflicts are internal even though IHL is fundamentally developed in a period of interstate conflicts. Thereby, mostly laws are less restrictive or inapplicable when applied to internal conflicts. It is witnessed that approximately 40% of all intrastate conflicts are linked to natural resources over the last sixty years.[14]

The Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD) also links interstate conflicts with environment. The ENMOD Convention was ascertained by the United States as a reaction to the military strategies during the Vietnam War.[15] The establishment of the convention was due to the reaction of using large quantities of chemical defoliants, resulting in lasting environmental contamination and extensive human suffering.

Global degradation is further observed as a major contributing factor to future armed conflicts as the effects of climate change are increasingly emerged. In the context of environment and armed conflicts, the United Nations and the Intergovernmental Panel on Climate Change (IPCC) have stated the probability that food and resource scarcity are induced by climate-change, sparking regional conflict.[16] Disputes over water accessibility are already a major impediment to long-lasting peace settlements between some nations in the Middle East. For instance, in the 1980s, the armed conflict in the Sudan was instigated by food insecurity and famine.[17] Furthermore, food self-sufficiency and increasingly danger of civil conflict are mitigated by uncontrolled urban migration and spiraling populations in East Africa soil erosion and deforestation.[18]

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[13] Timothy J. Heverin, *Legality of the Threat or Use of Nuclear Weapons: Environmental and Humanitarioan Limits on Self-Defense*, 72(4) Notre Dame Law Review 1277 (2014).

[14] Vally Koubi et al., *Do Natural Resources Matter for Interstate and Intrastate Armed Conflict?*, 51(2) Journal of Peace Research 227 (2014).

[15] Silke Marie Christiansen, *Climate Conflicts – A Case of International Environmental and Humanitarian Law* 189–234 (Cham: Springer, 2016).

[16] War And Conflict – Related Environmental Destruction, Encyclopedia.com (2009) (Jun. 10, 2018), available at https://www.encyclopedia.com/environment/energy-government-and-defense-magazines/war-and-conflict-related-environmental-destruction.

[17] Marie G. Jacobsson, *Working to Protect the Environment in Armed Conflict*, Medium, 2 November 2016 (Jun. 10, 2018), available at https://medium.com/@UNEP/working-to-protect-the-environment-in-armed-conflict-ce9aff1aa479.

[18] S.M. Enzler MSc, *The Impact of War on the Environment and Human Health*, Lenntech (September 2006) (Jun. 10, 2018), available at https://www.lenntech.com/environmental-effects-war.htm.

1.2. Environmental Damage of War

The International Court of Justice (ICJ) has stated *that "environment is under daily threat"* and *that it "is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn."*[19] The destruction of the environment is as old as warfare itself.[20] Moreover, technological advancements have changed the landscape of war, fundamentally affecting both the ways, in which hostilities are conducted.[21]

The methods of warfare are extremely destructive because of technological advances in military weaponry and tactics in this century. To drive civilian populations from an area and to demoralize opposing troops, armed forces mostly use target objects of particular interest that mainly include churches and mosques in Yugoslavia and natural areas in Guatemala inhabited by indigenous peoples.[22] Combatants have often deliberately or indiscriminately targeted the environment for depriving troops of cover, food, and water. It has entailed the use of inhumane weapons such as poisonous gas, landmines, and chemical defoliants; violation of protected natural areas through troop movement, poaching for food, and actual combat; and scorched earth practices.

The atomic bomb attacks on the Japanese cities of Hiroshima and Nagasaki in 1945 was the greatest environmental calamity in the history of armed conflict. This tragic impact of destruction is extensively captured through eyewitnesses rather than sterilized statistics.[23] A wave of searing heat could scorch thousands of people in the gardens and streets in the center of the city within a few seconds. Furthermore, conflict outbreak poses several potential risk enhancement factors such as weak governance, poverty, and income inequality.[24] Natural disasters deepen grievances as they cause more acute imbalances and increase resource scarcity between areas of abundance and scarcity. The unequal distribution of ex-post humanitarian aid or ex-ante preventative measures are linked to grievances as imposed by governments. It is deemed that conflict is contributed through weak government resources to natural disasters.

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[19] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226 (Jun. 10, 2018), also available at http://www.icj-cij.org/files/case-related/95/095-19960708-ADV-01-00-EN.pdf.

[20] Tara Weinstein, *Prosecuting Attacks That Destroy the Environment: Environmental Crimes or Humanitarian Atrocities?*, 17(4) Georgetown International Environmental Law Review 697, 699 (2005).

[21] Mete Erdem, *Enforcing Conventional Humanitarian Law for Environmental Damage During Internal Armed Conflict*, 29 Georgetown Environmental Law Review 435, 435–436 (2017).

[22] Carl E. Bruch, *All's Not Fair in (Civil) War: Criminal Liability for Environmental Damage in Internal Armed Conflict*, 25 Vermont Law Review 695, 697–698 (2001).

[23] Carl-Friedrich Schleussner et al., *Armed-Conflict Risks Enhanced by Climate-Related Disasters in Ethnically Fractionalized Countries*, 113(33) Proceedings of the National Academy of Sciences 9216 (2016).

[24] Pieter Serneels & Marijke Verpoorten, *The Impact of Armed Conflict on Economic Performance Evidence from Rwanda*, 59(4) Journal of Conflict Resolution 555 (2015).

Economic opportunities for criminal activity are presented through the disruption caused by natural disasters. These influences on livelihoods allow individuals to join armed groups. The opportunity cost of conflict is increased with better access to reconstruction aid. When disasters construct a smokescreen for expanding military or political objectives, political opportunities are aroused for conflict engagement.

Environmental damage is recognized as a humanitarian issue; and humanitarian law is helpful to protect the environment in times of peace as well as in times of armed conflict. Even though; non-derogable human rights are still applicable in times of armed conflict, humanitarian law is the main set of rules by which situations of armed conflict are regulated. The principles of humanitarian law have been developed and enforced through the actions of the Red Cross. However, proved nonetheless to be insufficient to prevent environmental destruction. Principally, the enforcement mechanisms hindered the effectiveness of the provisions.[25] Although, warfare has never been separable from the use of environmental destruction, the protection of the environment has never been a top priority in the conduct of warfare.[26]

In Gulf War, Iraqi forces set fire to 600 of Kuwait's oil wells and uncapped or damaged 175 more. During the same conflict at least six million barrels of oil were deliberately discharged into the Arabian Gulf, adding to the already considerable damage wrought by routine oil industry operations and the hundreds of attacks on tankers and oil facilities during the Iran-Iraq war.[27] These examples and others led nations gathered at the U.N. Earth Summit to declare,

> Warfare is inherently destructive of sustainable development. States shall, therefore, respect international law providing protection for the environment in times of armed conflict and cooperate in its further development, as necessary.[28]

The environmental damage in wartime is inevitable. It occurs with any adverse, incremental change in the existing status of the environment. In the future, armed conflict will continue and the damage from armed conflict, based on current trends, is certain to increase.[29] If environmental damage during armed conflict is not restrained,

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[25] Aurelie Lopez, *Criminal Liability for Environmental Damage Occurring in Times of Non-International Armed Conflict: Rights and Remedies*, 18(2) Fordham Environmental Law Review 231, 268 (2006).

[26] *See* Laurent R. Hourcle, *Environmental Law of War*, 25(3) Vermont Law Review 653, 654 (2001). For example, during the 1993 intervention into Somalia, "post-action reports of the U.S. Forces indicate that environmental issues were a low priority." *See Id.* at 681.

[27] Aaron Schwabach, *Ecocide and Genocide in Iraq: International Law, the Marsh Arabs and Environmental Damage in Non-International Conflicts*, 15 Colorado Journal of International Environmental Law & Policy 1, 1 (2004).

[28] United Nations Conference on Environment and Development, Rio Declaration on Environment and Development, U.N. Doc. A/CONF.151/26 (vol. I); 31 I.L.M. 874 (1992).

[29] Parsons 1998, at 460.

the armed forces that are intended to protect us from harm may become the agents of our ultimate destruction. Therefore, the need to protect the environment against unjustified damage during armed conflict is an unmet challenge of the 21st century.

1.3. The Importance of Preventive Measures

Preventative remedies are peculiarly important to environmental protection. There is a growing awareness that environmental damage "cannot be adequately compensated in pecuniary terms, nor readily reversed or restored."[30] The practical implications of precautionary principle are indicated through several multilateral environmental agreements that outline the fundamental features of precautionary principle in national level environmental initiatives.[31] It has been witnessed from Montreal Protocol on Substances That Deplete the Ozone Layer,[32] where parties are demonstrated for protecting the ozone layer by undertaking precautionary measures to control equitably global emissions. The importance of international laws is further implied from the precautionary principle that is able to guard civil population from catastrophic effects and natural calamities during peace time and prevent such damages. It has been witnessed from the Rio Declaration, sustainable development is inherently destructive through warfare.[33] Therefore, the protection for the environment is respected under international law in the context of armed conflict and development. Similarly, the importance of undertaking a precautionary approach is emphasized by the ICRC in the absence of scientific certainty that refers to the probable impact of a specific weapon on the environment.[34]

2. Preventive Protection of the Environment in Armed Conflicts

Preventive protection in armed conflicts refers to those legal procedures that are imposed by conventional IHL prior to the outbreak of armed conflict for ensuring

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[30] *See* Henry H. Almond Jr., *Strategies for Protecting the Environment: The Process of Coercion*, 23 University of Toledo Law Review 313 (1992).

[31] Alexandru Florin Magureanu & Ioan Ştefu, *Environmental Protection and Armed Conflicts in National and International Regulations*, International Conference of Scientific Paper, AFASES 2014, Brasov, 22–24 May 2014 (Jun. 10, 2018), available at http://www.afahc.ro/ro/afases/2014/manag/Magureanu_Stefu.pdf.

[32] Lucy J. Carpenter & Stefan Reimann (Lead Authors), *Update on Ozone-Depleting Substances (ODSs) and Other Gases of Interest to the Montreal Protocol*, Chapter 1 in *Scientific Assessment of Ozone Depletion: 2014*, Global Ozone Research and Monitoring Project – Report No. 55, World Meteorological Organization, Geneva, Switzerland, 2014 (Jun. 10, 2018), also available at https://www.esrl.noaa.gov/csd/assessments/ozone/2014/chapters/chapter1_2014OzoneAssessment.pdf.

[33] Chee Yoke Ling, *The Rio Declaration on Environment and Development: An Assessment* (Penang: Third World Network, 2012).

[34] Elizabeth Mrema et al., *Protecting the Environment During Armed Conflict: An Inventory and Analysis of International Law* (Nairobi: UNEP/Earthprint, 2009).

that the environment is protected from potential aggression. Four points should be considered of preventive protection:

1) the legal protection provided by IHL to the environment and other victims of armed conflict gives these categories – including the environment – legal rights that cannot be waived or agreed upon. This is decided by Art. 7 common to the four Geneva Conventions of 1949;

2) the legal protection provided by conventional IHL of environment represents the minimum protection to be observed, states parties to the conflict may agree, at any stage of the armed conflict and even before the outbreak of hostilities, to provide additional protection for the environment other than those established by IHL, as decided by Art. 6 common to the four Geneva Conventions of 1949;

3) the sources of legal protection of the environment in IHL are not limited to the four Geneva Conventions of 1949 and the Additional Protocols of 1977, but other sources are existed, such as the Hague Conventions of 1899 and 1907;

4) finally, the legal protection is not being specifically and explicitly addressed but is more related to the legal protection of victims of armed conflict in general, which can be adapted to provide special protection for the environment at various stages of outbreaks of hostilities, considering environment as one of the victims of armed conflict.

2.1. General Preventive Protection of Environment

The terms "the prevention of environmental harm," and "protection of the environment" are used in the similar context. There are distinctions and nuances framed between the two terms.[35] Protection refers to the extent of positive action attempted to guard the environment from hard. Prevention and prohibition connote restrictions on the competency to execute activities that would destruct the environment. Thereby, the idea of environmental protection subjects for the wide range of environmentally beneficial obligations in general environmental discourse.

Several international instruments are set forth by the U.N. Security Council to guard the environment throughout the armed conflict. Several military manuals, reported practice and official statements have articulated the general need to protect the environment during armed conflict. Severe damage to the environment is caused by condemnations of behavior in armed conflict. Numerous states pinpointed the importance of the protection of the environment during armed conflict as witnessed from the ICJ in the *Nuclear Weapons case*.[36] Such general protection

[35] Tara Smith, *The Prohibition of Environmental Damage during the Conduct of Hostilities in Non-International Armed Conflict*, PhD Thesis (May 2013) (Jun. 10, 2018), available at https://aran.library.nuigalway.ie/handle/10379/3523.

[36] Michael A. Becker, *The Dispute That Wasn't There: Judgments in the Nuclear Disarmament Cases at the International Court of Justice*, 6(1) Cambridge International Law Journal 4 (2017).

of environment before the outbreak of the hostilities is determined through the following mechanisms:

2.1.1. Issue Military Instructions and Manuals to Ensure Respect for Environmental Protection Rules in Case of Armed Conflict

There are many legal provisions that oblige States parties to international humanitarian conventions for promoting the dissemination of rules of IHL, including the rules of environmental protection. This mechanism is provided by the general mechanisms of prevention in Art. 80(2) of Protocol I, which requires States parties to issue orders and instructions to ensure respect for the provisions of IHL and to implement their obligations in this regard. One of the oldest general mechanisms as referred to in Art. 1 of the Hague Convention (IV) Respecting the Laws and Customs of War on Land of 1907, which provides that

> The Contracting Powers shall issue instructions to their armed land forces which shall be in conformity with the Regulations respecting the laws and customs of war on land, annexed to the present Convention.[37]

Military manuals, which present one avenue for developing a unified set of norms that armed forces could follow in all types of armed conflict. The manuals provide a practical means for educating military officers and commanders and constitute a reference for use during the conflict. In setting forth rules of engagement, these manuals clarify, implement, and enforce specific standards governing environmental damage in armed conflict. Furthermore, since the manuals set forth norms by which governments hold their soldiers accountable, they may reflect developing *opinio juris* (and state practice) and emerging customary international law.[38]

The issuance of such military manuals, as a mechanism of general environmental protection prior to the outbreak of hostilities, is not limited to States alone, indeed, international humanitarian organizations have also contributed to the application of this mechanism by issuing instructions and military directives to the armed forces. For example, nations; such as, United States and Germany have detailed military manuals, which require, *inter alia*, troops to act in the same manner regardless of whether they are engaged in an international or an internal conflict. Thus, the joint U.S. Navy/Marine Corps/Coast Guard Commander's Handbook on the Law of Naval Operations provides that

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[37] *Rules of International Humanitarian Law and Other Rules Relating to the Conduct of Hostilities: Collection of Treaties and Other Instruments* 14 (Geneva: ICRC, 1989; revised and updated edition, 2005).

[38] Bruch 2001, at 743. As of 2000, only a few nations had military manuals, and most of these were for developed nations. *See Id.* footnote 286, quoted Arthur H. Westing, *In Furtherance of Environmental Guidelines for Armed Forces During Peace and War* in *The Environmental Consequences of War: Legal, Economic, and Scientific Perspectives* 171 (J.E. Austin & C.E. Bruch (eds.), Cambridge: Cambridge University Press, 2000).

> In those circumstances when international armed conflict does not exist (e.g. internal armed conflicts), law of armed conflict principles may nevertheless be applied as a matter of policy.[39]

Some has observed that the German Humanitarian Law Manual requires German soldiers

> to comply with the rules of IHL in the conduct of military operations in all armed conflicts however such conflicts are characterized.[40]

Certain model guidelines have been developed by the ICRC to help out governments in ascertaining military manuals that emphasize international law,[41] as well as the Military Manual on the Protection of Cultural Property, issued by UNESCO in 2016. In 1999, the U.N. Secretary-General explicitly required U.N. peacekeeping forces to follow norms applicable to IHL.[42] The U.N. Secretary-General's order specifically provides that

> United Nations force is prohibited from employing methods of warfare which may cause superfluous injury or unnecessary suffering, or which are intended, or may be expected to cause, widespread, long-term and severe damage to the natural environment.[43]

Similarly, when NATO developed rules of engagement for peacekeeping forces in the former Yugoslavia, they said: "looked to the [Geneva] Protocols as a good statement of many of the customary rules of armed conflict" and "clearly stated… that we would require the forces to follow the rules of armed conflict" including the environmental provisions of Protocol I.[44]

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39 U.S. Navy, U.S. Marine Corps, U.S. Coast Guard, *The Commander's Handbook on the Law of Naval Operations*, NWP 1-14M (Washington: Department of the Navy Office of the Chief of Naval Operations and Headquarters, U.S. Marine Corps, and Department of Transportation U.S. Coast Guard, 1995), at 6-1.

40 Bruch 2001, at 743–744.

41 Revised Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict, prepared by the International Committee of the Red Cross and presented to the U.N. Secretary-General, annexed to Report of the Secretary-General on the United Nations Decade of International Law, U.N. Doc. A/49/323, 19 August 1994, p. 49–53.

42 U.N. Secretary-General, Secretary-General's Bulletin: Observance by United Nations Forces of International Humanitarian Law, 6 August 1999, ST/SGB/1999/13.

43 *Id.* para. 6.3.

44 *See* Bruch 2001, at 745.

2.1.2. Oblige States Parties to Refrain from Inventing, Developing or Acquiring a New Method of Warfare

Article 36 of Protocol I stated that

> In the study, development, acquisition or adoption of a new weapon, means or method of warfare, a High Contracting Party is under an obligation to determine whether its employment would, in some or all circumstances, be prohibited by this Protocol or by any other rule of international law applicable to the High Contracting Party.

Article 36 of Protocol I has suggested to review the new weapons, means of warfare and methods. It has been deemed that two factors should be considered to determine the new weapon. These factors include:

1) by reference to the state;

2) by reference to the date.

The first factor indicates that a weapon has been in use with one state would not prevent the receiving state from stating the new weapon before being sold to another state. In contrast, the second point indicates that weapons that are in use could not be considered new throughout the terms of Art. 36 on approval by a state of Protocol I.[45] Thereby, it is essential for a state to execute a review of those weapons, subjected to international scrutiny to defend its possession and use them vigorously.

2.1.3. Encourage States to Conclude Bilateral or Collective International Agreements to Prevent Any Hostilities That May Cause Damage to the Environment

The encouragement by the provisions of IHL for States to agree on additional rules of protection constitutes one of the general mechanisms of prevention as a means of legal instruments imposed by international law on States prior to the outbreak of hostilities to provide general protection of the environment, both natural and civilian. It has been witnessed from Art. 6 common to the four Geneva Conventions of 1949 that parties may conclude other matters and special agreements that can be appropriate for developing autonomous provision. Similarly, additional protection to objects comprising adverse forces is emerged through high contracting parties to the conflict as witnessed from Art. 56(6) of Protocol I.

Article 11 of the San Remo Manual on International Law Applicable to Armed Conflicts at Sea stipulate that

> The Parties to the conflict are encouraged to agree that no hostile actions will be conducted in maritime areas, containing:
>
> (A) rare or fragile ecosystems, or

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[45] Justin McClelland, *The Review of Weapons in Accordance with Article 36 of Additional Protocol I*, 85(850) International Review of the Red Cross 397 (2003).

(B) the habitat of depleted threatened or endangered species or other forms of marine life.[46]

Article 14 of the 1994 ICRC Guidelines on the Protection of the Environment encourages States "to enter into further agreements providing additional protection to the natural environment in times of armed conflict."

2.1.4. Give International Humanitarian Organizations and Bodies Freedom of Intervention to Protect the Environment in Case of Armed Conflict

IHL provisions obligate States – prior to the outbreak of hostilities – to grant humanitarian organizations and bodies the freedom to act to protect victims of armed conflict, including the environment, which could cease potential damage that may occur after the outbreak of hostilities. Article 70(5) of Protocol I states that

> the Parties to the conflict and each High Contracting Party concerned shall be encouraged to facilitate the relief operations referred to in the first paragraph.

It is witnessed from Art. 81(3) that the assistance provided by the Red Cross Societies and the association to the armed conflict victims should be facilitated to the high contracting parties and the parties to the conflict.

Although, these texts did not specifically mention that international organizations concerned with the protection of the environment were given this advantage, at the same time they did not prevent such organizations from being given the possibility, since the term "other humanitarian organizations" in Art. 81(4) including, without doubt, humanitarian organizations concerned with the protection of the environment, like the ICRC, Greenpeace, Doctor Without Borders and Health Without Borders.

This mechanism of environmental protection is a protective mechanism that protects the environment from potential damage before the outbreak of hostilities and may be a control mechanism that provides such protection after the outbreak of armed conflict. Thus, previous international texts, such as Arts. 70 and 81 of Protocol I, have been approved referred to as "the High Contracting Parties," a term that is referred to States before their entry into the armed conflict, and "parties to the conflict," which indicates the outbreak of armed conflict between them.

2.1.5. Encourage States in Peacetime to Teach IHL Rules for the Protection of the Environment During the Outbreak of Hostilities

The promotion of IHL is contributed through numerous international humanitarian texts of the armed forces and further informed generations about the rules and principles to be observed in the event. By incorporating humanitarian norms and

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[46] San Remo Manual on International Law Applicable to Armed Conflicts at Sea, 12 June 1994 (Jun. 10, 2018), available at https://ihl-databases.icrc.org/ihl/intro/560?opendocument pdf.

values, the conduct of combatants is restricted during hostilities to protect victims of armed conflict – including the environment – at various secondary and university levels and to provide of national libraries on the principles of IHL.

The teaching of international humanitarian rules, in general, and of environmental protection, in peacetime, as previously mentioned, is one of the most important mechanisms for the preventive protection of the environment from possible damage to the environment in case of armed conflict. This mechanism is structured to prevent the existence of violence and hostilities acts by incorporating texts related public awareness and protection rules. Furthermore, once hostilities are ceased, they prevent the spread of hostilities to other protected groups. Articles 47, 48, 127 and 144 of the four Geneva Conventions of 1949 revealed that the act of this convention was tried to be disseminated by the high contracting parties in their time of peace, countries and war. The indiscriminate effects of 1980 are assumed to be witnessed for the use of specific conventional weapons.

2.1.6. Forming Special Teams of Qualified Personnel to Ensure Environmental Protection in Case of an Outbreak of Hostilities

For the safety of the environment and other victims of armed conflict, this mechanism is the predominant for the occurrence of military actions. It emerges in IHL was in Art. 6 of Protocol I, based on the decision of the 20th Congress of the Red Cross in Vienna in 1965, which called for the need to work on forming a group of individuals capable of working in the implementation of IHL. This Article, entitled "Qualified Personnel," provides that:

– the High Contracting Parties in peacetime also seek the assistance of the National Red Cross (Red Crescent, Red Lion, and Sun) Societies, to train qualified personnel to facilitate the application of the Conventions and this Protocol, particularly with regard to the activities of the Protecting Powers;

– the recruitment and training of such personnel are within the domestic jurisdiction;

– the ICRC shall hold at the disposal of the High Contracting Parties the lists of persons so trained which the High Contracting Parties may have established and may have transmitted to it for this purpose;

– the conditions governing the employment of such personnel outside the national territory shall, in each case, are the subject of special agreements between the parties concerned.

The study can add to this mechanism of general prevention mechanisms another one that leads to the same purpose, which is the mechanism of legal advisors, provided for in Art. 82 of Protocol I, stipulate that

> The High Contracting Parties at all times, and the Parties to the conflict in time of armed conflict, shall ensure that legal advisers are available, and advise military commanders at the appropriate level.

According to the previous provisions, the legal adviser's system can be formed in times of peace and war, but the system of qualified personnel is always invoked as a preventive measure in times of peace and before the outbreak of hostilities. In addition, the system of legal advisers has been implemented and applied in many countries, such as Sweden in 1986 and Germany in 1992, while the system of qualified personnel has not yet been implemented or benefited with.

2.1.7. Holding Periodic Conferences, Meetings, and Seminars to Activate the Rules of Environmental Protection in Case of Armed Conflict

Article 7 of Protocol I, entitled "Meetings," states that:

> The Depositary of the Protocol shall convene a meeting of the High Contracting Parties, at the request of one or more of the said Parties and upon the approval of the majority of the said Parties.

Several preventive legal means are provided by the Article for protecting the environment caused by the occurrence of hostilities. In view of the importance of this general preventive mechanism, the Statute of the International Committee of the Red Cross on 24 June 1998, referred to it as the responsible in the development and application of the rules of IHL.

2.1.8. The Duties of Military Commanders to Prevent Any Violation of the Provisions of IHL Relating to the Protection of the Environment

The provision of preventive protection of the environment is foreseen under international law to prevent any violations of IHL. This mechanism for general protective protection was provided for in Art. 87 of Protocol I, which decided that:

– the High Contracting Parties and the Parties to the conflict shall require military commanders, with respect to members of the armed forces under their command and other persons under their control, to prevent and, where necessary, to suppress and to report to competent authorities breaches of the Conventions and of this Protocol;

– to prevent and suppress breaches, High Contracting Parties and Parties to the conflict shall require that, commensurate with their level of responsibility, commanders ensure that members of the armed forces are aware of their obligations;

– the High Contracting Parties and Parties to the conflict shall require any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or of this Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol.

It has been deemed under Art. 87 of Protocol I that members of armed forces reveal their interest and focus on training and respect the law in upholding the law. Similarly, members of the armed forces should access the machinery to prosecute

and investigate violations of the law and enforce lawful targets to all positions. However, it does not only provide preventive protection for categories protected by IHL – including the environment but also provide the deterrent or repressive protection by suppressing such violation if it occurs and imposing disciplinary or deterrent criminal sanctions.

2.1.9. Avoid the Establishment of Military Installations and Targets near Civilian Objects That Are Part of the Civilian Environment

International humanitarian law has ascertained military installations and targets for the civilian environment that aims to secure the lives and property of civilians. These installations must be implemented by the states parties during the hostilities occurrence as witnessed from Arts. 48, 51 and 52 of Protocol I. During the outbreak of hostilities, the armed conflicts should be distinguished between civilian objects and military targets, and the prohibition of indiscriminate attacks. However, at the same time, these provisions of the Convention do not prevent States from entering into armed conflicts in peacetime to avoid the establishment of military installations and targets in residential areas. Article 12(1) of Protocol I states, for example, that

> Medical units shall be respected and protected at all times and shall not be the object of attack.

Therefore, it is possible to emphasize that the obligation to avoid the establishment of military targets and installations near the elements of the civilian environment, is not only the responsibility of the military leadership during the course of the hostilities. But, the obligation with the civil and political administration of States parties to the conventions, to work.

2.1.10. Take the Feasible Precautions to Protect the Environment at the Planning Stage of the Attack

After the outbreak of hostilities, this mechanism executed in the preliminary phase of the aggression or attack on the environment. The general mechanisms of prevention are taking precautions to deter the impact of harm on the environment and other protected categories. This mechanism of general prevention, provided for in Art. 57 of Protocol I, within Chapter IV, entitled "Preventative measures." This Article has postulated several precautions to avoid the effects with respect to these attacks:

(a) those who plan or decide upon an attack shall:

(i) do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives within the meaning of para. 2 of Art. 52 and that it is not prohibited by the provisions of this Protocol to attack them;

(ii) take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects;

(iii) deter the launch of any attach that can be disastrous for the community and their objects and allow expected participation of the concrete and direct military forces;

(b) the attack refrained under military guidelines should be cancelled or suspended as the impact is expected to cause both loss of civilian life and objects;

(c) warning should be given to civilian population, before the attacks, affecting them beyond impermissible circumstances.

2.2. Special Preventive Protection of Environment Before the Outbreak of Military Actions

According to conventional IHL, the study has identified the special preventive protection of certain environmental elements which are cultural property, engineering installation, and some protected areas mainly hospitals or safety and neutral zones.

2.2.1. Cultural Property

During armed conflict, the protection of cultural property is relied on the principle that destruction to the cultural property refers to the destruction to the cultural heritage of all human beings. The general provisions of humanitarian law protecting civilian property are relied on the cultural heritage of every people and customary international law.[47] The destructiveness of World War II tempted the international community to exercise and endow particular legal protection since the instigation of civilization. Article 1(1) of the Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954 stated that the term cultural property shall cover, irrespective of origin or ownership:

(a) the cultural heritage of every person is defined in the movable or immovable property of armed conflict;

(b) the preservation and exhibition of the movable cultural property is defined in the movable cultural property of buildings;

(c) centers containing monuments are defined in the subparagraphs of cultural property.

2.2.1.1. Avoid Establishing Cultural Property near Military Targets

Article 8(a) of the Hague Convention of 1954 states that cultural property shall be at the distance of all large industrial centers or military targets that are

[47] Protection of Cultural Property in the Event of Armed Conflict, ICRC, Overview, 29 October 2010 (Jun. 10, 2018), available at https://www.icrc.org/eng/war-and-law/conduct-hostilities/cultural-property/overview-cultural-property.htm.

vital, such as an airport or radio station, factory working for national defense, a port or railway station of importance or an important transport route. That humanitarian agreements oblige States parties to avoid the establishment of various military objectives or installations near civilian objects that are part of the civilian environment, in order to protect these objects, in general, from the effects of destruction that might be caused in the event of the outbreak of hostilities and attacking of military targets close to those objects (Arts. 48, 51 and 52 of Protocol I[48]), which would have been sufficient for the preventive protection of cultural property from the effects of potential hostilities, since civil objects include all objects not contributing to military action, including objects or cultural property (Art. 52 of Protocol I). However, the sense of the importance of cultural property to the human legislator is not the property of the States that contain it but belongs to all humanity, has led him to decide on special preventive protection of cultural property – in addition to the general preventive protection it covers – by obliging States to avoid the establishment of military objectives or directly related to military action, such as airports, radio stations, and military production plants, etc. near these cultural properties.

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[48] Article 48 of Protocol I: "In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives."

Article 51 of Protocol I:

1. The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations.

2. The civilian population as such, as well as individual civilians, shall not be the object of attack.

3. Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities.

4. Indiscriminate attacks are prohibited.

5. Among others, the following types of attacks are to be considered as indiscriminate…

6. Attacks against the civilian population or civilians by way of reprisals are prohibited.

7. The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations.

8. Any violation of these prohibitions shall not release the Parties to the conflict from their legal obligations with respect to the civilian population and civilians, including the obligation to take the precautionary measures provided for in Article 57.

Article 52 of Protocol I:

1. Civilian objects shall not be the object of attack or of reprisals. Civilian objects are all objects which are not military objectives as defined in paragraph 2.

2. Attacks shall be limited strictly to military objectives.

3. In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used.

2.2.1.2. Construction of Places Allocated for the Preservation of Cultural Property in a Manner That Is Resistant to the Effects of Combat Operations

Article 8(2) of the Hague Convention of 1954 states that

> A refuge for the movable cultural property may also be placed under special protection, whatever its location, if it is so constructed that, in all probability, it will not be damaged by bombs.

This paragraph calls upon States, prior to the outbreak of armed conflicts, to build premises dedicated to the preservation of cultural property, to be built and equipped with equipment to resist any damage they may suffer during the outbreak of hostilities, such as bombing, artillery or guided missiles.

2.2.1.3. Registration of Cultural Property in Special Records of the Competent International Organization

The Hague conventions have prepared a special preventive protection of cultural property in 1954 to prepare an "International Register of Cultural Property under Special Protection" by United Nations Educational, Scientific and Cultural Organization (UNESCO). The Director General of UNESCO and the High Contracting Parties supervised these special protective measures.[49] However, there are several conditions for cultural property to be registered in the international:

– cultural property is considered as an important factor;

– and not to be used for military purposes;

– and to be located at a sufficient distance from military objectives.[50]

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[49] Article 12 of the Regulations for the Execution of the Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954, titled "International Register of Cultural Property under Special Protection":

"1. An "International Register of Cultural Property under Special Protection" shall be prepared.

2. The Director-General of the United Nations Educational, Scientific and Cultural Organization shall maintain this Register. He shall furnish copies to the Secretary-General of the United Nations and to the High Contracting Parties.

3. The Register shall be divided into sections, each in the name of a High Contracting Party. Each section shall be subdivided into three paragraphs, headed: Refuges, Centers containing Monuments, Other Immovable Cultural Property. The Director-General shall determine what details each section shall contain."

[50] "Article 13. Requests for registration

1. Any High Contracting Party may submit to the Director-General of the United Nations Educational, Scientific and Cultural Organization an application for the entry in the Register of certain refuges, centers containing monuments or other immovable cultural property situated within its territory. Such application shall contain a description of the location of such property and shall certify that the property complies with the provisions of Article 8 of the Convention.

2. In the event of occupation, the Occupying Power shall be competent to make such application.

3. The Director-General of the United Nations Educational, Scientific and Cultural Organization shall, without delay, send copies of applications for registration to each of the High Contracting Parties."

2.2.2. Engineering Installations

Engineering works and vital installations have been classified as civilian elements of the environment surrounding the battlefield, as they do not directly contribute to military action. The release of dangerous forces is caused through this work and installations. It results into damage to civilian property and loss of civilian life regardless of the concrete and direct military expected advantage.[51]

Since this part of the civilian environment protected during the outbreak of hostilities was addressed in various locations of this study, we will only discuss the mechanisms of special preventive protection decided by international humanitarian conventions for these works and engineering facilities as part of the civic environment. These mechanisms can be found in Art. 56 of Protocol I, entitled "Protection of Works and Installations Containing Dangerous Forces." This Article included preventive protection mechanisms for these installations as follows:

Article 56(5) of Protocol I states that military objectives under the conflict are endeavored by the parties in the installations or works. The protected installations or works are permissible and defended from the object attack in hostilities regardless of defensive actions for protecting installations or works. The protected works or installations are repelled by hostile actions to the limited weapons. The special protection against attack provided by this paragraph shall cease:

– for a nuclear engineering station;
– for a dam or a dike;
– for other military objectives.

It is deemed that all precautionary measures should be taken to ignore the release of abrupt forces, if the protection ceases installations or military objectives as specified in aforementioned paragraph.[52]

This protection mechanism for engineering installations applies after the outbreak of hostilities and not before it because this paragraph has addressed the "parties to the conflict." However, the reality confirms that the obligation to avoid the establishment of military targets near the engineering or dangerous installations, as a mechanism of special prevention, is in times of peace, and before the outbreak of these operations, as the construction of dams and bridges and power plants of civil installations usually is carried out in times prosperity and peace not in times of turbulence and war.

Several points about the formula are worthy of mention:[53] It is deemed that both international and domestic armed conflict should be restricted under the derivative

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51 Betsy Baker, *Legal Protections for the Environment in Times of Armed Conflict*, 33 Virginia Journal of International Law 351 (1993).

52 Michael N. Schmitt, *Humanitarian Law and the Environment*, 28(3) Denver Journal of International Law and Policy 265, 303–304 (2000).

53 *See Id.* at 304–306.

environmental protection. Article 56 would not be violated if armed conflicts strike against targets.[54] Lastly, the subjectivity and non-quantifiable standards and cations can be described through the ICRC commentary as based on severe threshold.[55] A number of exceptions should be followed if dams and dikes are stuck based on available attacks for enemy, direct support of the enemy war effort and unintended purpose.

For instance, a road across a dam or a dike forming a part of a system are essential paradigms of logistics system. A critical role is played by nuclear electrical generating stations in an armed conflict based on defensive emplacements and objectives. Furthermore, the enumerated objects abrupted by reprisal attacks are also mentioned.

This special mechanism for the protection of engineering installations from the dangers of potential hostilities is contained in Art. 56(6) which provides that

> The High Contracting Parties and the Parties to the conflict are urged to conclude further agreements among themselves to provide additional protection for objects containing dangerous forces.

This Article makes it clear that the agreement to grant additional protection to engineering installations may occur prior to the outbreak of hostilities and thus constitutes one of the special prevention mechanisms for such installations, which may occur after the outbreak of hostilities and thereby provide control protection rather than preventive one.

Article 56(7) states that

> In order to facilitate the identification of the objects protected by this Article, the Parties to the conflict may mark them with a special sign consisting of a group of three bright orange circles placed on the same axis, as specified in Article 16 of Annex 1 to this Protocol [Article 17 of Amended Annex]. The absence of such marking in no way relieves any Party to the conflict of its obligations under this Article.

The beginning of this Article was not addressed to the parties to the conflict but as follows: "Parties to the conflict may," which gives this mechanism a dual preventive and monitoring nature, which obliges the High Contracting Parties (prior to the outbreak of hostilities) and the parties to the conflict (after the outbreak of such operations).

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54 *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* 668 (J. Pictet (ed.), Geneva: ICRC; Martinus Nijhoff, 1987).

55 *Id.* at 669–670.

2.2.3. Other Protected Areas

Such zones include hospital and safety zones, non-defended localities, demilitarized zones, and other specially protected sites during the outbreak of armed conflict as a component of the civilian environment surrounding the battlefield. Protected areas shall mean specific areas which the humanitarian conventions give it a special and further protection in the case of outbreaks of hostilities. The provisions of the humanitarian conventions imposed on States, in peacetime and before the outbreak of hostilities, legal means, and procedures to prevent such areas from being destroyed in the event of armed conflict.

2.2.3.1. Hospital and Safety Zones and Localities[56]

Hospital and safety zones and localities are special defined areas established by the States, before or during the outbreak of armed conflict, to protect the sick, wounded and other persons in need of care, these sites shall constitute only a small part of the state's territory with low population density and far from any military objective or facility and the conduct of combat operations.[57]

Article 23 of the First Geneva Convention[58] and Arts. 14 and 15 of the Fourth Geneva Convention[59] tackle this issue by stated that

> In time of peace, the High Contracting Parties and, after the outbreak of hostilities, the Parties thereto, may establish in their own territory and, if the need arises, in occupied areas, hospital and safety zones and localities so organized as to protect from the effects of war, wounded, sick and aged persons, children under fifteen, expectant mothers and mothers of children under seven. Upon the outbreak and during the course of hostilities, the Parties concerned may conclude agreements on mutual recognition of the zones and localities they have created. They may for this purpose implement

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[56] "A. 'Hospital zones and localities,' generally of a permanent character, established outside the combat zone in order to shelter military or civilian wounded and sick from long-range weapons, especially aerial bombardment… B. 'Safety zones and localities,' generally of a permanent character, established outside the combat zone in order to shelter certain categories of the civilian population, which, owing to their weakness, require special protection (children, old people, expectant mothers, etc.) from long-range weapons, especially aerial bombardment... C. 'Hospital and safety zones and localities,' which are a combination of A and B above" (*see* Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949: Commentary (J. Pictet (ed.), Geneva: ICRC, 1958) (Jun. 10, 2018), available at https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/1a13044f3bbb5b8ec12563fb0066f226/515ec8abe917fe30c12563cd0042aee8).

[57] *The Handbook of International Humanitarian Law* 513 (D. Fleck (ed.), New York: Oxford University Press, 1995).

[58] Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949.

[59] Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949.

the provisions of the Draft Agreement annexed to the present Convention, with such amendments as they may consider necessary. The Protecting Powers and the International Committee of the Red Cross are invited to lend their good offices in order to facilitate the institution and recognition of these hospital and safety zones and localities.

Following points are mentioned regarding protection of civilian medical and religious personnel in Art. 15:

Article 15. Protection of civilian medical and religious personnel

1. Respect and protect civilian medical personnel.

2. Civilian medical personnel should receive available help in affected areas.

3. Civilian medical personnel should be assisted by the occupying power to empower them for performing their functions. The incompatible tasks should not be executed under humanitarian mission regardless of the permission.

4. The essential services shall be executed for civilian medical personnel based on each safety and supervisory measures to the assumed conflict.

5. Medical personnel should be identified and protected under the provisions of the conventions.

For instance, the area under the Osijek hospital should be protected under the ICRC supervision under Art. 23 of the First Geneva Convention. Following categories are presented based on restricted access zones, which include family members visiting patients in the hospital, persons over 65 years of age, and sick and wounded civilian and military personnel. Means of oblique red bands should be used to mark these zones and localities.[60,61] The Geneva Conventions have presented this emblem and its success and failure leads to the violations of conventions. A red cross emblem on a white ground should be marked for the wounded and sick.[62]

2.2.3.2. Non-Defended Localities

Non-defended localities refer to the inhabited place where enemy occupation and location are placed in a zone where armed forces are communicated. A non-defended locality might be unilaterally declared by a party tends to an armed conflict. The instigation of such locality should be fulfilled on following circumstances:[63]

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60 Art. 85(3) of Protocol I: "In addition to the grave breaches defined in Article 11, the following acts shall be regarded as grave breaches of this Protocol, when committed wilfully, in violation of the relevant provisions of this Protocol, and causing death or serious injury to body or health…"

61 Marc Weller, *The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia*, 86(3) American Journal of International Law 569 (1992).

62 Protected Areas and Zones, The Practical Guide to Humanitarian Law (Jun. 10, 2018), available at http://guide-humanitarian-law.org/content/article/3/protected-areas-and-zones/.

63 Deidre Willmott, *Removing the Distinction Between International and Non-International Armed Conflict in the Rome Statute of the International Criminal Court*, 5 Melbourne Journal of International Law 196 (2004).

– no hostile use;
– no acts of hostility;
– no activities in support of military occupation;
– evacuation of all combatants.

Article 59 of Protocol I prohibits the non-defended localities to the conflict to attack by any means. A non-defended locality might be declared through appropriate authorities of a Party to the conflict. Following conditions fulfilled the locality, which include no acts of hostility, no activities in support of military operations, all combatants must be evacuated and no hostile should use military establishments.

The ascertainment of non-defended localities might be agreed on the parties to the conflict even if such localities are not fulfilling the assumptions mentioned in the aforementioned paragraph. The limits of the non-defended locality are precisely defined and described by the agreement. An agreement shall be marked to the party of the conflict with the other party where the limits prescribed are highly visible on boundaries.

2.2.3.3. Demilitarized Zones

A demilitarized zone refers to the area in which agreements or treaties between contending groups, nations and military powers prevent military activities, personnel or installations. A demilitarized zone usually relies on an ascertained boundary or frontier between one or more alliances or powers.[64] A de facto international border should be formed by a demilitarized zone, for instance, the 38th parallel between South and North Korea.

The parties to an armed conflict are agreed on the basis of a demilitarized zone, which cannot be used or occupied for military objectives to the conflict. In times of peace or armed conflict, a verbal or written agreement can be used to ascertain a demilitarized zone.[65] The subject of the agreement is normally an area which fulfills the following conditions:[66]

1. This zone (demilitarized) is established in peacetime and may be created after the outbreak of hostilities.

2. Evacuation of fighters and moving military targets from these areas.

3. Use of fixed (non-transferable) military targets in these areas is made for civilian use.

4. The authorities or the population should not commit any acts of hostility.

5. Cease all military activity in these areas.

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[64] Peter Jurczek, *Meaning of DMZ as a Peace and Ecological Zone*, Korea DMZ Peace Forum, Seoul, 24 September 2008 (Jun. 10, 2018), available at https://www.tu-chemnitz.de/phil/europastudien/geographie/download/DMZ.pdf.

[65] Demilitarized Zones, How Does Law Protect in War? (Jun. 10, 2018), available at https://casebook.icrc.org/glossary/demilitarized-zones.

[66] Art. 60(3) of Protocol I.

It clear above that Protocol I's Art. 59 "Non-Defended Localities" and Art. 60 "Demilitarized Zones" offer some potential protection for the environment. Under Art. 59, a party to a conflict can declare and mark "non-defended localities" that opponents cannot attack once informed of that area's status. These areas must be an "inhabited place near or in a zone where armed forces are in contact which is open for occupation by an adverse Party." Article 60 deals with demilitarized zones, is substantially similar to Art. 59. The main difference between the articles is that areas under Art. 60 must be agreed to specifically by the parties, while "non-defended localities" are created by unilateral declaration addressed to the adverse party. Further, demilitarized zones need not be inhabited, near the actual fighting, or open for occupation.[67]

Theoretically, national parks or other areas of environmental significance could be classified as Art. 59 non-defended localities or, alternatively, as Art. 60 demilitarized zones.[68] These two articles, however, only protect the environment in circumstances that would not prevent the usual collateral damage outside the specially protected areas. Thus, lands not included in designated areas would still be subject to war-related environmental damage. In contrast, it is witnessed that states can reach to the existing agreement in peacetime to protect the environment on such areas. The certainty and reliability would restrict the areas under conflict. According to international standards, the sites would be demonstrated to dispel possible adversary and to accomplish a strategic advantage.

Conclusion

After examining the preventive protection mechanism determined by IHL to ensure the protection and preservation of the environment from the effects of armed conflict before its outbreak; it is worth evaluating this method of legal protection, and to know that either this article has achieved its purpose or not. To answer this question, the article has examined the positive and negative consequences of this mechanism.

Positive consequences (Benefits). The preventive protection method (both public and private) has some positive consequences. It is protected under the provisions of this law not only during the conduct of hostilities but also against the harm that may be caused by the imposition of preventive protection prior to the outbreak of hostilities. The contribution of IHL by providing preventive protection to the environment and other protected categories in times of peace and before the outbreak of hostilities contributes to highlighting international attention to the

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[67] Baker 1993, at 372–373.

[68] For further discussion of demilitarized nature reserves, *see* Philippe Antoine, *International Humanitarian Law and the Protection of the Environment in Time of Armed Conflict*, 32(291) International Review of the Red Cross 517, 532–533 (1991).

environment. The enactment of humanitarian conventions has provided preventive protection to the environment by imposing a set of mechanisms or legal procedures. States are obliged to follow in times of peace and before the outbreak of hostilities, contributes to the development of the rules of IHL by extending its temporal application. Preventive protection established by humanitarian conventions prior to the outbreak of hostilities also contributes to the consolidation of international rules for the protection of the environment for all, civilians and combatants, in times of peace and war alike. Preventive protection of the environment and other protected categories, by means of legal methods and procedures prior to the outbreak of hostilities, contribute to the definition of the rules of protection established under the provisions of IHL by disseminating, training, teaching them in various stages of education in peacetime. Preventive protection and dissemination mechanisms are therefore of paramount importance in IHL. Respect for and compliance with the rules of IHL require, first and foremost, the introducing and training of IHL.

Negative consequences (Disadvantages). The preventive protection method (both public and private) has some negative consequences. Some special prevention mechanisms, such as preventive mechanisms for cultural property, are required to stipulate several conditions for the possibility of registering cultural property in the International Register of Cultural Property prepared by UNESCO, and thus enjoy special protective protection, including: that cultural property is significant, not to be used for military purposes and to be away from military positions or locations of strategic importance. The humanitarian conventions, which have imposed preventive mechanisms on States parties for protecting the victims of armed conflicts in peacetime and before the outbreak of hostilities are not explicitly referred to the environment as victims of armed conflict but rather to provide preventive legal protection to the victims of armed conflicts in general, and, in view of the importance of the environment and the need to preserve them in times of peace and war, it was necessary to give an explicit reference to this modern legal term (environment) especially in the Additional Protocols of 1977. It is a descriptive requirement as for the first requirement concerning the significant importance of cultural property, since all cultural property is important, and it is difficult to distinguish between it according to importance. The other two conditions, which relate to the non-use of cultural property for hostile purposes and are located at a sufficient distance from the military objectives, are mutually exclusive. It is not a matter of depriving cultural property of special protection if it is used for military purposes, but rather extends to the nature or status of the cultural property, which may exclude it from the scope of special protection. Certain mechanisms of prevention, those for the protection of cultural property, such as the construction of places dedicated to the preservation of the movable cultural property equipped and resistant to bombing, the inventory of cultural property and the information of other States, require a degree of financial expenditure that most developing countries are unable to meet.

Recommendations.

1. Incorporating environmentally friendly rules of law in national military manuals could act as a secondary deterrent to international law for preventing armed forces from inflicting harm to the environment both within the state and abroad. For instance, if nations such as the United States were to include environmentally friendly practices in military manuals then it may present a model for other nations to adopt.

2. Training military operators and humanitarian law attorneys should be emphasized on the protection of the environment. The curricula of judge advocate schools, service academics, international courses and war colleges should be refined to assure appropriate concentration for normative and operational dynamics.

3. The most important agreements should be regulated to the armed conflict and frustrating the international effort to revert it. The non-participation should be refined when the conditions motivate the non-party states.

4. The environmental outcomes should be explored through significant resources. The dynamics of the risks should be comprehended to protect the environment.

5. To adequately protect the environment during times of war and hold those who cause environmental destruction responsible, the existing international law must change. International law must be structured in a way that is specific and can be understood by the international community.

6. A system of sharing information should be established worldwide to allow the public to know the environmental effects of every military operation. For example, in the United States, the Emergency Planning and Community Right-to-Know Act of 1986 gathers information about toxic chemicals and makes it available to the public.

7. Harm to the environment can be prevented by eliminating weapons that cause widespread destruction. International law could create legislation to eliminate the manufacturing and use of all weapons that could violate these conditions such as nuclear, chemical, and biological weapons and certain types of explosives. Even though many states are committed to eliminating these weapons, there are still several states that possess them.

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THE INTERNATIONAL RESPONSIBILITIES OF DEVELOPED COUNTRIES IN ADAPTATION TO AND MITIGATION OF CLIMATE CHANGE: AN ETHICAL MANDATE

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This article asserts three propositions. First, climate change and/or global warming has (and will continue to have) qualitative differences in its nature and impact on rich and poor countries, thus demonstrating the imperative of adaptation to and mitigation of its effects. Second, the current international environmental regime is insufficient for sensible global distributive justice. What is more, in the absence of an adequate regime the world continues to ignore fundamental ethical issues and the immediate needs of climate-vulnerable countries. Third, the effective preservation of the environment necessitates that developed countries bear the (ethical) responsibility for meeting the costs associated with climate change, and urgently and unremittingly discharge their obligation to assist developing and/or least developed countries in adapting to and mitigating the impact of global warming.

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Introduction

The science is clear regarding the fact of climate change (namely, any change in climate over time, whether due to natural variability or as the result of human activity). Observations show that the global climate system is *warming decisively because of human activity that is causing average global temperatures to rise, a phenomenon commonly called "global warming."* One resulting effect is seen in features of extreme weather conditions including drought, heavy precipitation, heat waves and the increased intensity of tropical cyclones. Experimental evidence suggests that greenhouse gas (GHG) emissions at or above current rates will cause *greater warming* and bring about many changes in the global climate system during the 21st century, and, therefore, "tipping points" may occur sooner and at lower GHG concentrations than previously expected unless emissions are cut drastically and promptly.

1. Adaptation to and Mitigation of Climate Change: An Ethical Mandate

Founded on this imminent climate disaster, the Intergovernmental Panel on Climate Change (IPCC) definitively concluded that, "[Adaptive] capacity needs to be improved everywhere."[1] For the purposes of our discussion, adaptation should be considered *alongside* mitigation. In addition, adaptation should be understood as practical steps to protect developing and/or least developed countries (LDCs) from the likely harm that will result from the impact of global warming[2] and mitigation as policies concomitant with the limitation and/or reduction of GHG emissions[3] *significantly more* in developed countries.

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1 Martin Parry et al. *Technical Summary* in *Climate Change 2007: Impacts, Adaptation and Vulnerability: Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* 23, 43 (M. Parry et al. (eds.), Cambridge: Cambridge University Press, 2007).

2 Ellina Levina & Dennis Tirpak, *Adaptation to Climate Change: Key Terms*, OECD, COM/ENV/EPOC/IEA/SLT(2006)1 (May 2006), at 6 (Jun. 12, 2018), available at http://www.oecd.org/dataoecd/36/53/36736773.pdf.

3 *Id.* at 9, note 8.

Broadly, there are three reasons why adaptation is an ethical issue. To begin with, there are the concerns as to what we should value and why. There are also the issues of who is responsible for meeting the costs of adaptation and who is eligible for adaptation assistance, issues both of which have ethical magnitudes.[4] Lastly, adaptation is a governance issue, because it involves action or inaction on the part of both individuals and political actors.[5] These truths are further strengthened by five specific facts.

First and foremost, *because it is both spatially and temporally diffuse in cause and effect*, climate change involves exceptionally multi-dimensional, intra- and inter-generational ethical challenges.[6] Though it will impact on most of humanity, climate change and/or global warming presents a division both in terms of culpability and in terms of vulnerability.[7] Largely, shocking impacts will be felt by the *world's most vulnerable communities in the global south* that do not have the capabilities of adaptation, communities located, for example, in drought-prone parts of Africa, areas of Asia susceptible to flooding and parts of the Caribbean and the Pacific coastline exposed to hurricanes and storms.[8] What is more, the present theoretical tools are ineffectual in addressing the basic issues involved in climate change, such as inter-generational equity, animal life, nature and *more*, presenting substantial obstacles to efforts aimed at implementing a fruitful solution to the problem.[9] Given the very complex issues it involves, *adaptation* in particular may pose a great difficulty to finding an appropriate reaction.[10]

Secondly, the language (of *justice*) itself is appealed.[11] Since important human, environmental and inter-generational good in general are threatened by climate change, meeting the costs of adaptation is a requisite of justice despite the reality

4 Lauren Hartzell-Nichols, *Responsibility for Meeting the Costs of Adaptation*, 2(5) WIREs Climate Change 687, 690 (2011).

5 W. Neil Adger et al., *Adaptation Now* in *Adapting to Climate Change: Thresholds, Values, Governance* 1 (W.N. Adger et al. (eds.), Cambridge: Cambridge University Press, 2009).

6 Stephen M. Gardiner, *The Perfect Moral Storm: The Ethical Tragedy of Climate Change* 489 (Oxford: Oxford University Press, 2011), as cited in Hartzell-Nichols 2011, at 690, note 20. *See also* Stephen M. Gardiner, *A Perfect Moral Storm: Climate Change, Intergenerational Ethics and the Problem of Moral Corruption*, 15 Environmental Values 397, 397 (2006).

7 UNFCCC, Climate Change: Impacts, Vulnerabilities and Adaptation in Developing Countries (2007), at 26–29 (Jun. 12, 2018), available at http://unfccc.int/resource/docs/publications/impacts.pdf. *See also* Dan Kuwali, *From the West to the Rest: Climate Change as a Challenge to Human Security in Africa*, 17(3) African Security Review 18, 25 (2008).

8 Kuwali 2008, at 25. *See also* Ashleigh Downing & Alain Cuerrier, *A Synthesis of the Impacts of Climate Change on the First Nations and Inuit of Canada*, 10(1) Indian Journal of Traditional Knowledge 57, 57–58 (2011); Anthony Costello et al., *Managing the Health Effects of Climate Change*, 373 Lancet 1693, 1694 (2009).

9 Gardiner 2006, at 407.

10 Hartzell-Nichols 2011, at 691.

11 *Id.*

of scientific and policy ambiguity.[12] Thirdly, because they are variable, the reasons provided in answer to the question "Why is adaptation necessary?"[13] basically connote the ethical nature of adaptation, as there are *many different ways of understanding the morally related harms.*[14]

The theoretical and practical links adaptation has with broader development goals is the fourth fact. Improving health services through decreasing the threat of increased tropical diseases due to *warming*, for instance, can be a *common goal of development and adaptation*.[15] A shortcoming, though, is that such an approach of integration may make it even more difficult to assign responsibility for meeting the costs of climate change.[16]

The fifth and equally significant fact is that other domains of the world may be harmfully affected by climate change, and hence questions about *the ethical standing of other species and nature are central*.[17] Considering the anthropocentric focus of all of the above approaches, even when the integrity of the ecosystem is at risk, this argument merits consideration. Nonetheless, it is still a challenge, given the difficulty of concurrently protecting human beings and the world of nature permanently.[18]

Overall, these clusters of arguments suggest why adaptation necessarily is an ethical issue and/or imperative.

2. Who Should Pay the Costs of Climate Change?

There is an enduring theoretical disagreement as to which nations have the responsibility to meet the costs of adaptation, as neither history nor philosophy

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12 Darrel Moellendorf, *Justice and the Assignment of the Intergenerational Costs of Climate Change*, 40(2) Journal of Social Philosophy 204, 205 (2009). *See also* Stephen N. Schneider & Janica Lane, *Dangers and Thresholds in Climate Change and the Implications for Justice* in *Fairness in Adaptation to Climate Change* 23 (W.N. Adger et al. (eds.), Cambridge: MIT Press, 2006) as cited in Hartzell-Nichols 2011, at 691, note 15; The Time for Ecological Justice Is Now, Ecological Justice, Backgrounder 2011–2016 (Jun. 12, 2018), available at https://www.devp.org/sites/www.devp.org/files/documents/materials/devpeace_backgrounder_2011-2016_ecological_justice.pdf.

13 Simon Caney, *Climate Change, Human Rights and Moral Thresholds* in *Human Rights and Climate Change* 69 (S. Humphreys (ed.), Cambridge: Cambridge University Press, 2010) as cited in Hartzell-Nichols 2011, at 691, note 38.

14 Hartzell-Nichols 2011, at 691.

15 *Id.* at 691–692. *See also* Stephen R. Dovers & Adnan A. Hezri, *Institutions and Policy Processes: The Means to the Ends of Adaptation*, 1(2) WIREs Climate Change 212, 227 (2010).

16 Hartzell-Nichols 2011, at 692.

17 *Id. See also* Dennis Patrick O'Hara & Alan Abelsohn, *Ethical Response to Climate Change*, 16(1) Ethics and the Environment 25 (2011); Adger et al. 2009; *Environmental Ethics: Readings in Theory and Application* 678 (L.P. Pojman (ed.), 4th ed., Toronto: Wadsworth Thomson, 2005) as cited in Hartzell-Nichols 2011, at 692, note 42.

18 Hartzell-Nichols 2011, at 692.

offers a conclusive guide to what would constitute a fair distribution of burden.[19] Reasonably, however, three common correlated arguments can be put forward to attribute this responsibility to the *developed nations*.

The principal one is the overwhelming historical and current responsibility of these countries for most of the GHG in the earth's atmosphere.[20] This argument addresses the disconnection between responsibility for cause and effect.[21] Because climate science suggests that anthropogenic emissions destabilise some of the earth's natural systems,[22] the current dangerous climate events – *including global warming* – are the result of the last two centuries of industrialisation and widespread mercantile capitalist production in the North. Nevertheless, this approach is deficient because, among other things, it stresses historical responsibility rather than offering prompt solutions in general.[23]

The wealth accumulated by the developed countries from unconstrained fossil-fuel industrialisation and the consequent ability to provide the funds for adaptation are the foundations for the other two arguments.[24] Together, they form an approach that concentrates on those who are guilty of free-riding on the welfare created by the underlying activities that are the causes of climate change.[25] Given that it does not depend on historical blame, but on who benefitted, this sort of approach does seem to offer a better solution. Nevertheless, it is still problematic, since it frequently combines the arguments about capacity, responsibility and impact whereas in theory they are separate.[26]

Critics further emphasise *two considerable flaws* in the above approaches. Primarily, the arguments largely isolate from the discourse the principal issue of how

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19 Marina Cazorla & Michael Toman, *International Equity and Climate Change Policy*, Climate Issue Brief No. 27, Resources for the Future (December 2000), at 1 (Jun. 12, 2018), available at http://www.rff.org/files/sharepoint/WorkImages/Download/RFF-CCIB-27.pdf.

20 Jeremy Moss, *Climate Justice* in *Climate Change and Social Justice* 51, 53–54 (J. Moss (ed.), Carlton, Vic.: Melbourne University Press, 2009). *See also* Paul G. Harris, *World Ethics and Climate Change: From International to Global Justice* 121 (Edinburgh: Edinburgh University Press, 2010); Cass R. Sunstein, *Irreversible and Catastrophic: Global Warming, Terrorism, and Other Problems Eleventh Annual Lloyd K. Garrison Lecture on Environmental Law*, 23(1) Pace Environmental Law Review 3 (2005).

21 Henry Shue, *Global Environment and International Inequality*, 75(3) International Affairs 531, 534 (1999).

22 Climate Change: Impacts, Vulnerabilities and Adaptation in Developing Countries, *supra* note 7, at 2. *See also* Climate Change 2007: Synthesis Report: Summary for Policymakers (2007) (Jun. 12, 2018), available at http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr_spm.pdf.

23 Moss 2009, at 54–55.

24 *Id.* at 55. *See also* Shue 1999, at 7.

25 Moss 2009, at 56. *See also* Axel Gosseries, *Historical Emissions and Free-Riding*, 11(1) Ethical Perspectives 36 (2004).

26 Moss 2009, at 57–58.

the global South has been dispossessed of the capacity and/or resources needed to self-reliantly respond to the catastrophe that it is the first to suffer from and the worst presently affected.[27] *The history of colonialism* (the formal relation, the political domination and the economic exploitation), and a *history of "coloniality"* against humanity and nature as *epistemicide* and *ecocide*, respectively,[28] is the biggest impediment to climate justice today, because it helps to identify the roots of injustice as an epistemological crisis of coloniality[29] and it results in intra-generational (underdevelopment in the global South) and inter-generational (unsustainable economic activities) injustices.[30] The mentioned arguments, however, fail to openly address this element of historical restraint.

The second flaw is that the arguments are preoccupied with the North-South (intra-generational) aspects of climate justice, ignoring *inter-generational concerns*.[31] Although it is theoretically extremely complex and hard to operationalise, inter-generational equity must be underlined, as it is a key component of any sustainability worldview and because it favours mitigation efforts which ultimately reduce the risk of "runaway" climate change.[32]

Therefore, founded on the aggregate accounts explored above, this essay maintains the view that *developed countries should bear the greatest (ethical) responsibility for meeting the costs of adaptation.*

3. What Form Should the Obligations Take?

The U.N. Framework Convention on Climate Change (UNFCCC) states that,

> Parties should protect the climate system… on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities.[33]

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27 Sam Adelman, *Re-Imagining Climate Justice in the Ecology of Knowledges*, a draft of a chapter in *Re-Imagining Our Sociological Contemporaneity: What Is the Age of Re-Embodiments?* (forthcoming from Greenhouse Press), at 7.

28 *Id.*

29 Anibal Quijano, *Coloniality of Power, Eurocentrism, and Latin America*, 1(3) Nepantla: Views from the South 533, 533–553 (2000).

30 Adelman, *Re-Imagining*, supra note 27, at 7–8.

31 Jeremy Baskin, *The Impossible Necessity of Climate Justice?*, 10(2) Melbourne Journal of International Law 424, 426 (2009).

32 *Id.* at 426, note 10.

33 United Nations Framework Convention on Climate Change, 9 May 1992, Art. 3 (Jun. 12, 2018), available at http://unfccc.int/resource/docs/convkp/conveng.pdf.

Accordingly, a classification of rich countries (Annex I UNFCCC) with obligations to reduce their emissions and poor and medium-income countries (non-Annex I UNFCCC) without this obligation was established.[34] In addition, developed nations are responsible for funding climate change initiatives around the globe by providing, among other things, "new and additional financial resources" for LDCs.[35] Furthermore, the Kyoto Protocol to the UNFCCC went into effect in 2005 as the first instrument with legally binding emission reduction targets and timetables.[36]

3.1. Problems with the Current International Environmental Regime

Essentially, the current international environmental regime performs well in terms of *recognising and including theories and rules for distributive justice* between rich countries and poor countries.[37] However, the existing framework response towards the problem of climate justice is criticised for its *manifold weaknesses*. Primarily, it is equivocal on the details of how climate justice might be addressed.[38] Also, emission reductions alone cannot be an adequate solution to "(*dangerous*) climate change" in that even if Annex I countries reduced their emissions to nil and other countries took modest action, the vulnerability would still persist.[39] Worse, there are now very limited carbon funds in the international market, which shows that developed countries cannot even meet their Kyoto Protocol obligations.[40] Additionally, there is the pragmatic problem that the extensive economic growth that began in the early 1990s has hardly been environmentally sustainable.[41] Lastly, critics point out that

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34 Art. 4(2) of the United Nations Framework Convention on Climate Change.

35 *Id.* Arts. 4(9), 4(1)(e), and 3(5).

36 Kyoto Protocol to the United Nations Framework Convention on Climate Change, 10 December 1997 (Jun. 12, 2018), available at https://unfccc.int/resource/docs/convkp/kpeng.pdf. *See also* Warwick J. McKibbin & Peter J. Wilcoxen, *Climate Change Policy After Kyoto: Blueprint for a Realistic Approach* 43 (Washington: Brookings Institution Press, 2002) as cited in Addie Haughey, *The World Bank Clean Technology Fund: Friend or Foe to the UNFCCC?*, 9(2) Sustainable Development Law & Policy 57, 61 (2009).

37 Chukwumerije Okereke, *Climate Justice and the International Regime*, 1(3) WIREs Climate Change 462, 471 (2010).

38 Baskin 2009, at 426. *See also* Roda Verheyen & Peter Roderick, *Beyond Adaptation: The Legal Duty to Pay Compensation for Climate Change Damage*, WWF-UK Climate Change Programme Discussion Paper (November 2008), at 10–13 (Jun. 12, 2018), available at http://assets.wwf.org.uk/downloads/beyond_adaptation_lowres.pdf.

39 Baskin 2009, at 426–427. *See also* Charles H. Greene et al., *A Very Inconvenient Truth*, 23(1) Oceanography 214, 214 (2010).

40 Charlotte Streck & Jolene Lin, *Making Markets Work: A Review of CDM Performance and the Need for Reform*, 19(2) European Journal of International Law 409, 420 (2008). *See also* Christopher Carr & Flavia Rosembuj, *Flexible Mechanisms for Climate Change Compliance: Emission Offset Purchases Under the Clean Development Mechanism*, 16 New York University Environmental Law Journal 43, 50 (2008).

41 Baskin 2009, at 427.

the present regime has not provided a foundation able to sufficiently overturn the underlying forces and permanent structures of global inequality.[42]

The control of global *ecological change and its challenges*, such as global warming, in the international governance arena continues approximately on the basis of the prevailing notion of *market-based conceptions of distributive equity*.[43] The outcome is that *fundamental concepts of climate justice remain excluded in the administration of development circles*.[44]

3.2. What Further Obligations Do Developed Countries Have to Assist (Developing/Least Developed Countries) in Adapting to and Mitigating Climate Change?

Despite existing legal and factual gaps, and given the risk that climate change will become *excessively expensive* for adaptation,[45] developed countries should undertake the following key obligations to assist developing countries and/or LDCs in *adapting to* and *mitigating global warming*. The analysis here is made *separately for adaptation and mitigation* and, in addition to UNFCCC, is *mainly founded on* a clear understanding of *the relevant ethical principles* and/or renewed appreciation of the inter-relationships between humanity and the environment as revealed above.

3.2.1. Adaptation

In respect of adaptation, numerous official and familiar promises, such as lump sum monetary transfers, insurance plans or technology transfers, have been made to help increase the adaptive capacity of the climate-vulnerable in the developing countries and LDCs.[46] However, contemporaneous evaluations show that most of the promises *have not been executed adequately and/or have even collapsed*. For instance, up to the present time the G8 countries have delivered very limited funding to adaptation efforts in developing countries, a meagre amount *which indeed does*

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[42] Okereke 2010, at 471.

[43] *Id.*

[44] *Id.*

[45] Martin Parry et al., *Assessing the Costs of Adaptation to Climate Change: A Review of the UNFCCC and Other Recent Estimates* (London: International Institute for Environment and Development and Grantham Institute for Climate Change, 2009). *See also* Adapting to Climate Change: What's Needed in Poor Countries, And Who Should Pay, Oxfam Briefing Paper 104 (2007) (Jun. 12, 2018), available at https://policy-practice.oxfam.org.uk/publications/adapting-to-climate-change-whats-needed-in-poor-countries-and-who-should-pay-114075; Sven Harmeling & Kit Vaughan, *Climate Change Adaptation in Developing Countries: What the G8 Has to Deliver*, WWF-UK Discussion Paper (July 2008), at 1–2 (Jun. 12, 2018), available at http://germanwatch.org/klima/g8adapt08.pdf.

[46] UNFCCC, Report of the Conference of the Parties on Its Seventh Session, Held at Marrakesh from 29 October to 10 November 2001, Addendum – Part Two: Action Taken by the Conference of the Parties, 7th Sess., U.N. Doc FCCC/CP/2001/13/Add.1, 21 January 2002 (Decision 7/CP.7 – funding under the Convention) (Jun. 12, 2018), available at http://unfccc.int/resource/docs/cop7/13a01.pdf. *See also* Verheyen & Roderick, *supra* note 38, at 27–28.

not meet even the most urgent adaptation needs. The G8 countries also proclaimed their willingness to support climate research and risk assessments, *but without any joint guarantees to distribute the available funds.*[47] Mainly what is expected of the developed countries *pertaining to adaptation* then is that they must implement the many monetary and other various aid proposals, and promptly and without interruption deliver the tens of billions of dollars promised and/or needed to prepare the vulnerable and poor countries for adaptation efforts.[48] Further allied key (and real) assistance, though this list is *incomplete* (and already *familiar*), might include:

– improving the scientific capabilities and research capacity of the climate-vulnerable;

– pursuing research and development into mitigation and adaptation technologies that would help humanity sustainably meet its future energy and other natural resource needs, and help cope with harms that climate change will exacerbate;

– reinforcing and, wherever applicable, developing institutes that, in a timely manner, collect, screen and publicise dynamic information on climate, climate change and/or global warming and its impact for decision makers and/or communities at all levels;

– reducing unnecessary subsidies, in particular, grants for food and agriculture which can lead to mal-adaptation; for instance, overuse of marginal lands, chemical inputs and water;

– empowering these countries and their local communities. This is *most crucial*, because it increases adaptability by increasing community responsibilities and awareness of changes.[49] *Science is worthy but science and traditional knowledge together are superior in efforts to tackle global warming.*[50] While transparency of benchmarks, distribution and monitoring can and should be demanded,[51] the developing countries and/or LDCs pursuing assistance must ultimately decide the collection and combination of adaptive policies tailored in respect of their own indigenous knowledge. *Inter alia community-based adaptation*[52] – i.e. initiatives aimed at serving the communities most at risk to promote schemes, and with the money going directly to them rather than dripping down through (*global* and) national financial channels – will be vital.[53]

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[47] Harmeling & Vaughan, *supra* note 45, at 1–4. *See also* Maxine Burkett, *Climate Reparations*, 10(2) Melbourne Journal of International Law 509, 532 (2009).

[48] Burkett 2009. *See also* Harmeling & Vaughan, *supra* note 45, at 3–4.

[49] Downing & Cuerrier 2011, at 67.

[50] *Id.*

[51] Harmeling & Vaughan, *supra* note 45, at 4.

[52] Lisa Friedman, *Bangladesh Needs the West's Help, But Isn't Waiting for It*, ClimateWire (US), 30 March 2009 (Jun. 12, 2018), available at http://www.nytimes.com/cwire/2009/03/30/30climatewire-bangladesh-needs-the-wests-help-but-isnt-wai-10340.html?pagewanted=all.

[53] Burkett 2009, at 533.

3.2.2. Mitigation

Adaptation, however exhaustive, will truly be meaningless if combative mitigation is not achieved globally and *significantly more in the developed countries*.[54] Hence, with regard to mitigation two key obligations are actively sought from the industrialised nations. Chiefly, they must implement the 2020 reduction targets *consistent with the 2°C limit*.[55] The present policies in the developed world aimed at pursuing construction of coal-fired power plants without CO2 capture prove that *they do not yet appreciate* the gravity of the risks associated with global warming.[56] Notably, in the USA there is no meaningful policy modification towards confronting the extreme harm of global warming to which we have subjected billions of people of our present and future generations.[57] *Global warming* is progressively expected to reach levels that will be catastrophic particularly for developing countries and/or LDCs if the G8 and other developed countries do not immediately start to reduce their GHG emissions so as to at least keep the warming at or below the 2°C target.[58] Even a 2°C temperature increase stabilisation will lead to severe impacts[59] and, upsettingly, emissions from emerging economies are also increasing, thus requiring action no matter how unfair it may seem.[60] But developed countries still have *the greatest responsibility* to substantially lower their carbon footprint notwithstanding the political and/or sovereignty arguments that claim the impracticability of such a duty,[61] given the consequences for the most vulnerable, indeed for all of humanity,[62] *for sovereignty will never deliver global justice*.[63] Therefore, given the uncertainty and yet the clearly grave risks associated with climate change, developed countries must collectively commit at least to the 2020 targets so as to keep global warming at or below 2°C.[64]

Moreover, mitigation efforts require a guarantee of non-repetition from the developed countries in the form of, among other steps, serious measures of shifts

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54 Burkett 2009, at 533.

55 Harmeling & Vaughan, *supra* note 45, at 2.

56 James Hansen et al., *Target Atmospheric CO2: Where Should Humanity Aim?*, 2 Open Atmosphere Science Journal 217, 229 (2008).

57 Burkett 2009, at 534.

58 Harmeling & Vaughan, *supra* note 45, at 2.

59 *Id.*

60 *Id. See also* Sam Adelman, *Between the Scylla of Sovereignty and the Charybdis of Human Rights: The Pitfalls of Development in Pursuit of Justice*, 2(1) Human Rights and International Legal Discourse 17, 19 (2008).

61 Hansen et al. 2008, at 226–227.

62 Burkett 2009, at 534.

63 Adelman 2008, at 35.

64 Harmeling & Vaughan, *supra* note 45, at 2.

in policy that secure non-repetition and the raising of public – not to mention their own – awareness.[65]

Conclusion

A unilateral solution to climate change which does not involve general geo-engineering cannot be attained (*even imagined*), and hence we will need to become involved with climate justice more deeply than we have up to now. An ethical solution is evidently imperative in order to tackle global warming universally and lay a foundation for a more equitable global order which is able to operate *within a finite environment*. This imposes a variety of obligations on the developed countries. They must (*among other measures*) take immediate and exigent action now to fulfill their existing (as well as agree and implement future) financial assistance and other commitments, so as to meet the costs of climate change and/or adaptation efforts in those most vulnerable countries. Furthermore, they must be determined in their efforts related to short- and long-term mitigation or achieving emission reduction targets in order to keep global warming (at or below) the 2°C limit.

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[65] Burkett 2009, at 534.

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COMMENTS

CRIME AS AN OBJECT OF INQUIRY IN RUSSIAN CRIMINALISTICS

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This article deals with the definition of the subject and objects of modern Russian criminalistics. It is aimed at sensitizing world public opinion to the necessity of inquiry into the criminalistic essence of crime and encouraging criminalists to study new techniques of crime investigation in order to mitigate risks and reduce errors arising in the criminal investigation process.

One of the main objects that is constantly undergoing research in Russian criminalistics is criminal activity. The subject of Russian criminalistics is the regularities of criminal activity. When investigating crimes scientists are interested in the information that allows the successful investigation of the crimes and determination of the offender. The information about different types of crimes, which is necessary for crime investigation, is accumulated in the criminalistic characteristic of crimes. The Criminalistic Characteristic of Crimes is a scientific theory of modern Russian criminalistics that makes it possible to fully examine the specific features of crimes of all kinds, i.e. the forensic nature (essence) of crime, the system of crime elements with their characteristics, and the relationship between those elements. In U.S. and European criminalistics, the regularities of criminal activity are not defined as an object of study of this science. Yet, in the U.S. and European countries criminal profilers investigating criminal cases study the criminal links between crimes to identify crime series and crimes committed by similar offenders (or to determine co-offenders).

Keywords: crime; criminalistics; criminalistic characteristic of crimes; investigation; objects of criminalistic science; criminal profiling; subject of criminalistic science.

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Introduction

Science is a system of knowledge about the laws and basic properties of a particular subject area, confirmed by observational and experimental data, and embedded in a certain sign system – the language of science. The main functions of science are to obtain new knowledge of the essence of the objects of scientific research and keep track of reality.

The object of study of any social science is the specific phenomena of the surrounding world (living and inanimate matter, human activity, natural phenomena, etc.).

All the same, the existence of any science as an absolutely independent field of knowledge becomes possible only when the essence of the object under inquiry is cognized through the discovery of the regularities of its existence. In other words, the essence of a certain science finds its expression in the essence of its subject matter.

The subject of a science is the objective regularities that make up the essence of this or that phenomenon of the surrounding world studied by that science. The subject of a science is a specific aspect of the real object identified by the system of regularities and "replacing" this object in the research process in the form of its model. Such regularities becoming laws of science represent a relationship of phenomena which may be necessary, general, stable, repetitive, essential.

The main objects of Russian criminalistics inquiry are two types of human activity:

1) criminal activity (i.e. crime preparation, crime accomplishment, and concealment of a crime);

2) criminal investigation and prevention activities.

The additional objects of Russian criminalistics inquiry are:

a) the spheres of human activity in which certain types of criminal acts are committed, and therefore the elements of the abovementioned types of activity are interconnected;

b) the unlawful act in the form of torts and administrative offenses[1] which is not a crime but, by its nature, is similar to criminal activity;

c) the knowledge and achievements of other sciences allowing the solution of the problems of criminalistics.[2]

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[1] *Кустов А.М.* Научный взгляд на предмет и объекты российской криминалистики // Библиотека криминалиста. Научный журнал. 2012. № 3(4). С. 63 [Anatoliy M. Kustov, *Scientific Outlook on the Subject and Objects of Russian Criminalistics*, 3(4) Criminalist's Library Scientific Journal 59, 63 (2012)].

[2] *Бирюков В.В., Бирюкова Т.П.* Криминалистика: объективная необходимость возникновения, соотношение ее объекта и предмета // Ученые записки Таврического национального университета им. В.И. Вернадского. Серия «Юридические науки». 2014. Т. 27(66). № 3. С. 185 [Valeriy V. Biryukov &

These types of activities are examined by criminalistics in their forensic aspect. Criminalists are particularly interested in all the information that, in terms of its content, will allow them to successfully investigate any crime. Specifically, while making inquiry into criminal activity, scientists put strong emphasis on the criminalistic nature of the crime, i.e. the information about the crime and its attributes that will allow for effective crime investigation, establishing all the circumstances of the crime, and determining the offender.

In turn, the regularities of the abovementioned objects of the actual reality are the subject of modern Russian criminalistics.

1. The Subject of Russian Criminalistics

Let us begin with the fact that to do any scientific and practical research into criminal activity for the purpose of exploring its nature (essence), it is necessary to obtain knowledge of the elements that make up the system of criminal activity, as well as of the regularities under which the system exists. As a matter of fact, objective knowledge of criminal activity can be obtained only when considering the criminal activity as a system.

The regularities of criminal activity[3] that are of interest to criminalistics represent relatively stable and recurring correlations between the constituent elements of the system and other phenomena of the surrounding world revealed through the system evolution which determine the characteristics of the system elements and the nature (essence) of the criminal activity as a whole.

The knowledge of the criminal activity system elements and regularities is the information basis for generating recommended practices in criminal investigation and developing forensic technology in science, and for establishing all the circumstances of the committed crime in practice.

For example, in the course of inquiry into 3,000 crimes related to illegal fishing in the Caspian Sea and the rivers flowing into it, the following regularities were established. The crimes are always committed by a group of criminals and mainly during the daytime. The offenders are: (a) aged 18 to 50 years; (b) men who live in coastal settlements and are not officially employed. Many offenders have previously been convicted of illegal fishing. They always use boats, GPS navigation devices, and certain kinds of fishing nets. Their criminal activity is largely aimed at catching sturgeon species.[4]

Tatyana P. Biryukova, *Criminalistics: Objective Necessity, Occurrence, Correlation of Its Object and Subject*, 3 Scientific Notes of the Taurida National V.I. Vernadsky University. Series "Juridical Science" 180, 185 (2014)].

[3] In their publications, different authors also use the terms "patterns of criminal activity" and "linkage of elements of crime."

[4] *Бессонов А.А.* Расследование незаконной добычи рыбных ресурсов: Учебное пособие [Aleksey A. Bessonov, *Investigation of Illegal Extraction of Fish Resources: A Training Manual*] 8–65 (Moscow: Yurlit-inform, 2015).

This information allows criminalists to recommend the use of unmanned aerial vehicles (UAV) equipped with video cameras for the investigation of such crimes in order to record the time of the catch. The criminal investigator should examine coastal settlements to detect offenders among the local residents who are not employed but enjoy a certain level of affluence. Particular attention should be paid to those residents who were earlier convicted and own boats. It is possible to locate the places where offenders install fishing nets in the event that GPS navigation devices are seized.

The Russian scholar L. Vidonov conducted a study that also proves the need for a scientific study of the regularities of criminal activity in crime investigation. He studied more than 1,000 criminal cases of murder and revealed regularities that allow investigators to establish a suspect according to the characteristics of the place, the method of murder, and the characteristics of the victim. For example, L. Vidonov revealed that in a given case of the murder of a woman aged 15 to 22 years, committed in a secluded or solitary place by causing multiple injuries or strikes, the most likely person to be suspected is a man aged 15 to 23 years who was either a friend of the woman or had a relationship with her, residing within 400–500 meters of the crime scene, known for his cruelty and heavy drinking, and previously apprehended and convicted for hooliganism or theft.[5]

These examples show how a criminal investigator can collect relevant information by making use of the knowledge acquired by scientists through their investigations of the regularities of similar crimes committed earlier.

Michael D. Porter correctly points out that if sufficient physical evidence such as DNA or fingerprints is available, crimes can often be confidently attributed to a specific offender. Even in the absence of such evidence, it may still be possible to establish, with a high level of confidence, the crimes that were perpetrated by the same individual based on analysis of their typical forensic and psychological characteristics.[6] In Russian criminalistics such features of crimes are studied as the regularities of criminal activity.

The first legal scholars who defined the subject of Russian criminalistics in the middle of the last century, and whose definition was agreed upon by most Russian scientists, were R. Belkin and Yu. Krasnobaev. In accordance with their definition, the subject of Russian criminalistics includes the following groups of regularities:[7]

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5 *Видонов Л.Г., Селиванов Н.А.* Типовые версии по делам об убийствах: Справочное пособие [Leonid G. Vidonov & Nikolay A. Selivanov, *Typical Versions on Murder Cases: Reference Manual*] 18 (Gorky: Prosecutor's Office of the USSR, 1981).

6 Michael D. Porter, *A Statistical Approach to Crime Linkage*, 70(2) The American Statistician 152 (2016).

7 *Белкин Р.С., Краснобаев Ю.И.* О предмете советской криминалистики // Правоведение. 1967. № 4. С. 90–94 [Rafail S. Belkin & Yuriy I. Krasnobaev, *On the Subject of Soviet Criminalistics*, 4 Pravovedenie 90–94 (1967)]; *Белкин Р.С.* Курс криминалистики. В 3 т. Т. 1: Общая теория криминалистики [Rafail S. Belkin, *A Course of Criminalistics. In 3 vol. Vol. I: General Theory of Criminalistics*] 73–156 (Moscow: Yurist, 1997).

1) the regularities that make up the essence of the crime whose knowledge is necessary for successful crime investigation;

2) the regularities associated with the emergence, existence, and disappearance of information about the crime;

3) the regularities associated with such activities in the crime investigation and prevention process as collecting, researching, evaluating, and using the information about a crime;

4) the forensic methods of crime investigation and prevention developed on the basis of cognition of the abovementioned regularities.

Yet, at the beginning of the 21st century an active discussion on the need to clarify the subject of Russian criminalistics began. Many different points of view were expressed on this issue in scientific publications. In this regard, in our opinion, it is necessary to agree with some of them and to extend the definition of the subject of Russian criminalistics with the following elements that are relevant to the investigation of crimes:

5) the regularities of torts and administrative offenses, which by their nature are similar to crimes of the corresponding types;[8]

6) the regularities of the spheres of human activity that are related to the crimes committed in them and that, in this connection, are of importance for the investigation of such crimes;

7) the technique used to implement the recommendation systems developed by criminalistics in crime investigation;

8) the knowledge and achievements of other sciences which are of importance to criminalistics.[9]

This understanding of the subject of Russian criminalistics is dictated by the accumulated theoretical knowledge, the practice of using this knowledge in crime investigation, and the peculiarities of modern crimes. In view of the above, Russian criminalistics can be defined as a legal science about the regularities that make up the essence of a crime and other related activities that are relevant to crime investigation, the regularities in the emergence of information about a crime, collection, research, evaluation, and the use of this information in crime investigation and prevention, as well as about special methods and means of crime investigation and prevention based on the knowledge of the abovementioned regularities and the knowledge of other sciences, about the technique of their implementation in this activity and adaptation to it.

8 Kustov 2012, at 63.

9 Biryukov & Biryukova 2014, at 185.

2. The Concept of Crime in Russian Criminalistics

A crime is a systemic, social, socially dangerous, and unlawful phenomenon of objective reality that, on the basis of the integrity principle, is internally organized as an organic whole through the close interrelation of its constituent elements and, in this way, is detached from its environment although relating to it to a certain extent. Since the world around us is a system, criminal activity is also a system, but of a lower level.

The system of a crime includes the following elements:

– the criminal (offender);

– the victim and/or the object of encroachment;[10]

– the crime scene, including time, location and other circumstances of the crime;

– the method of criminal activity (modus operandi) or actions taken to achieve the criminal result, the weapons and tools used, the signature aspect;

– the traces of the crime and other information that has been recorded in the memory of people and electronic devices (for example, physical evidence, trace evidence, footprints, fingerprints, bloodstains, electronic evidence and other evidence).

Each of these elements is a system of a lower level than that of the crime within which they are included. All these elements are interrelated with each other and define each other's basic characteristics.

In this connection, we must consider, and perhaps this is the most important point, the interrelations between the crime elements, which reveal themselves as follows:

A) The choice of the victim and/or the object of the assault always depends on the characteristics of the offender. Typically, the criminal and the victim have a certain connection with each other (they live or work in the same place, they are friends, business partners, etc.). Sometimes the perpetrator chooses the object of encroachment on the basis of its location (for example, the theft of paintings from a museum).

B) The offender chooses the method of a crime (modus operandi) on the basis of the victim's characteristics (or the characteristics of the object of the assault) and the features of the crime scene. The method of a crime (modus operandi) contains information on the offender's characteristics.

C) The method of a crime (modus operandi) is reflected at the crime scene in the form of traces. Also, at the crime scene the traces are left by both the criminal and the victim.

D) In many cases the victim has a connection with the crime scene (this can be a house, a place of work, a walking route, etc.).

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[10] For example, in the case of theft, this is the object of encroachment (money or other property); in the case of murder: the victim; in the case of robbery: the victim and the object of encroachment (the property of the victim).

For example, to commit a terrorist act a terrorist always chooses a crowded place, a modus operandi that will involve a large number of victims and destruction. As a rule, the terrorist himself has accomplices, the connection with whom is carefully concealed, and he has also gone through special training to commit terrorist activities. It is self-evident that as a result of the act of terrorism, specific traces remain. For example, at an explosion site there remain details of the explosive device (bomb), which may contain fingerprints and bodily fluids containing DNA, and explosives residue in the offender's house. Also, in many cases there are witnesses and video recordings by outdoor surveillance cameras.

Scientists search for the regularities in criminal activity within the framework of these interrelations of the crime system elements. These interrelationships of the crime system elements are depicted in the diagram below.

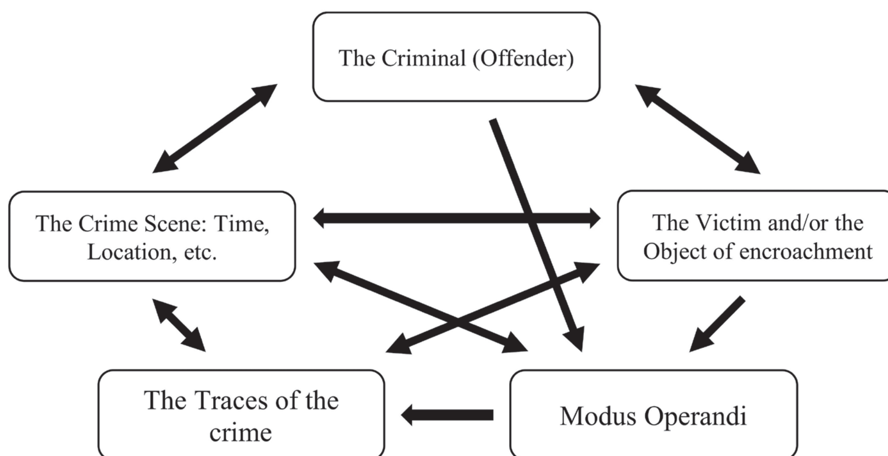

Figure 1: *Correlation of elements of the system of crime*

When conducting scientific research and inquiry into a crime, it is necessary to take into account the principles upon which the crime exists as a system.

It is possible to note the following *principles of the existence of a crime as an independent system*:

1) the system of a crime is a complete set of elements, which is a single whole and determines its nature as a crime. The existence of a crime as a system without any of these elements is not possible. However, each element individually will not carry all the signs of this system in itself. It is self-evident that all elements must exist simultaneously;

2) the formation of the characteristics of each element in the system of a crime occurs in the process of interaction with other elements.

For example, when a hired killer chooses the place and time for a homicide and the type of weapon, he will take the victim's characteristics, daily life schedule and route, and the presence or absence of a bodyguard into account. If the characteristics of anything connected with the intended victim change (the route of movement, he hires a bodyguard, etc.), then the killer will change the place, time, and possibly even the type of weapon;

3) all the elements of the system of a crime are interrelated. The relationships can be of two types:

a) causal relationships (causation) – they involve the emergence and/or development dependence of one system element on another in accordance with the scheme: cause → result;

b) correlation relationships – they involve the existence of one element in the presence of another, and a change in the characteristics of the former entails a change in the characteristics of the latter and/or the entire system as a whole.

In a crime, as in any phenomenon of objective reality, the relationships between the elements of its system exist objectively and are not directly perceived. They can be detected only by revealing the regularities in the relationships between the elements composing such a system and their properties;[11]

4) the emergence and development of a crime system is determined by one or more objective and subjective factors that apply to both its internal and its external elements.

For example, an internal factor in a crime system may be the wrongful conduct of the victim that provokes a criminal to commit a crime against him (the victim insults the criminal).

External factors in the system of a crime can be environmental conditions (weather, manufacturing processes, political events, economic factors, etc.), which determine the criminal act. For example, a change in weather conditions during a flight may force the pilot to violate the rules or procedures of flying, resulting in a plane crash.

Subjective factors in the crime system are those that depend on the will of the persons involved in this system as its elements. Objective factors are those that do not depend on the will of the persons involved;

5) the system of a crime is not static; on the contrary, it constantly moves through a series of successive stages in its development, but this system is always qualitatively the same, identical to itself.

The most elementary stages of development that criminal activity follows are crime preparation, crime accomplishment, and concealment of a crime;

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[11] *Князьков А.С.* О критериях значимости криминалистической характеристики преступлений // Вестник Томского государственного университета. 2007. № 304. С. 125 [Aleksey S. Knyazkov, *On Criteria of the Meaning of Criminalistic Characteristic of a Crime*, 304 Tomsk State University Journal 122, 125 (2007)].

6) the system of a crime in its present state bears the information of its past state and the possibility of predicting its development in the future;

7) repeatability, expressed in the fact that the main part of the elements of the system of a crime and the regularities between them, despite the originality of each individual criminal act, are identical in the same type of a crime (typical).

These principles of the existence of a crime as a system makes it cognizable and allows it to be put in the form of a theoretical model in science and in the form of a proof model (evidence-based model of a crime) in crime inquiry.

3. Crime Inquiry Specificities in Russian Criminalistics

Identification of the criminalistic essence of criminal activity, down to the content of its system elements and the regularities that are relevant to crime inquiry, is carried out through the scientific knowledge of particular crimes. Research on crimes occurs in order to obtain knowledge of criminal activity in general and the characteristics of various types of crimes (their groups).

Cognition of a particular criminal case can be scientific and practical, based on the results of primary and secondary reflection. These types of knowledge differ in the following features.

Scientific cognition of crime is crime research performed to obtain theoretical knowledge of crime for solving scientific problems. Practical cognition of crime is research on a particular crime by an investigator to achieve the objectives of criminal proceedings.

Every crime, like any other kind of activity, leaves information about itself in its crime scene primarily in the form of traces. Cognition of a crime based on the results of "primary reflection" is the research on information about the crime which is imprinted in its crime scene. Cognition of a crime based on the results of "secondary reflection" is the research on information about the crime which is recorded by the investigator in the procedural documents (evidence).

The investigator, as a rule, learns about the crime from his "primary reflection." The transfer of knowledge can be: (a) direct, when the crime is recorded on video (by the criminal himself, by eyewitnesses, or by a video surveillance system); (b) conveyed by traces of the crime.

The forensic scientist, as a rule, learns about the crime from his "secondary reflection," i.e. by inquiring into the empirical data contained in the case files of the investigating authorities and courts.

Russian forensic scientists research the crime from different perspectives using separate criminalistic theories – for example, the theory of the method of a crime, the theory of criminalistic research of man, etc. – for this purpose. The Theory of the Criminalistic Characteristic of Crimes, though, allows them to make a full and comprehensive inquiry into criminal activity.

The criminalistic characteristic of crimes is an information model containing data on the criminalistic essence of crimes of a certain type (groups of crimes similar to each other), i.e. information on the system elements and regularities in the relationships of these elements to each other are important for effective investigation. This model is based on research into criminal cases and other materials of investigation and cases heard by judges. It is important for the development of investigative methods for various types of crimes (their groups) and techniques used in solving different tasks in crime investigation and prevention.[12]

Scientists formulate the criminalistic characteristic of crimes of a certain type (murder, acts of terrorism, bombings, rape, robbery, crimes against children, etc.) according to the following scheme.

Stage 1. The scientist selects the empirical material to be researched for particular types of crimes and determines its whereabouts: court or investigating authorities' archives.

Stage 2. The scientist researches the selected empirical data (criminal cases, other case files) in order to identify the criminalistic significant signs of committed crimes and their regularities.

Criminalistic significant signs of a crime are the typical signs that characterize the essence of the crime and are important for conducting an effective investigation.

Stage 3. The scientist or group of scientists carry out analysis of the investigated crimes, systematize their criminalistic significant signs, and identify regularities between the elements of the crime system.

Stage 4. The researcher forms a criminalistic characteristic of the researched type (group) of crimes on the basis of the information obtained; for example, a criminalistic characteristic of murder, of acts of terrorism, of rape, etc.

Stage 5. The researcher adapts the criminalistic characteristic of crimes to the requirements of modern practice of crime investigation and, on its basis, creates a methodology for investigating the crimes whose model it represents.

Stage 6. The information contained in the criminalistic characteristic of crimes is used by criminal investigators in crime investigation, and scientists analyze its effectiveness.

Stage 7. On the basis of observation, scholars assess the reliability of the information contained in the criminalistic characteristic of crimes, the effectiveness of its use in crime investigation, and determine the moment when new research is required to improve it.

The accumulation of scientific information about crimes of a certain type in the criminalistic characteristic is carried out in the form of the following information blocks:

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[12] *Бессонов А.А.* Частная теория криминалистической характеристики преступлений: Дис. … докт. юрид. наук [Aleksey A. Bessonov, *Theory of the Criminalistic Characteristic of Crimes: PhD thesis*] 76 (Moscow, 2017).

– information on typical criminals (offenders);

– information on typical victims and/or the objects of encroachment;

– information on a typical crime scene (time, location and other circumstances of the crime);

– information on a typical method of criminal activity (modus operandi);

– information on typical traces of the crime and other sources of information on the crime.

Information on the regularities in the relationships between these elements reveals the dependence of the characteristics of one element on another: for example, the type of criminal who chooses a certain method of committing a crime and certain weapons; how the criminal and the victim are interrelated; the features of the victim that determine the choice of a specific place and time of crimes committed by the criminal, etc.

The great scientific significance of the criminalistic characteristic of crimes lies in the fact that it reveals the criminalistic essence of the crimes of a particular type (group of similar crimes), because it contains the criminalistic (forensically) significant information on those crimes and the regularities in the relationships between their elements as a system. All this information on crimes is obtained by scientists on the basis of research and analysis of the real practice of their investigation and trial proceedings, and in this regard can be used: (a) for researching the crime as an object of criminalistics; (b) for developing crime investigation methodology and techniques; (c) in practical activities throughout the investigation of particular crimes.

Another theory of criminalistics used by Russian scholars to study the regularities of criminal activity is the theory of the mechanism of crime.

The *mechanism of crime* is a system of interaction processes between the participants that are directly and indirectly involved in the crime and the environment of the crime scene, coupled with the use of weapons, tools, and other individual elements of the environment linked to the crime. The mechanism of crime determines the emergence of criminalistic information about the crime itself (that is, traces), its participants and results.[13]

The difference between the methodology of cognition of crime used by the criminalistic characteristic of crimes theory and the one used by the mechanism of crime theory is as follows:

– the Theory of Criminalistic Characteristic of Crimes allows the accumulation of information about typical characteristics of elements that make up the system of a particular type of crime, and the collection of data on the relationships between these elements;

[13] *Веренич И.В., Кустов А.М., Прошин В.М.* Криминалистическая наука и теория механизма преступления: Монография [Igor V. Verenich et al., *Criminalistics Science and Theory of the Mechanism of Crime: Monograph*] 182 (A.M. Kustov (ed.), Moscow: Yurlitinform, 2016).

– the Theory of the Mechanism of Crime makes it possible to study the characteristics of the crime and its constituent elements from the point of view of the development of criminal activity in time and space in stages (preparation, commission, staging).[14]

The significance of these theories in the cognition of criminal activity lies in the fact that, using these theories, scholars can study the regularities of committed crimes of any type. Scientific information on the characteristics of crimes obtained by scientists can be used to formulate criminal investigative techniques, implemented in practice while investigating particular crimes, and used to identify suspects.

As the well-known Russian scientist R. Belkin has written, the investigative practice is the source of methodology and techniques for investigating crimes, and the criterion for their truthfulness and effectiveness (this outline plays the role of a fundamental axiom in criminalistics).[15]

4. The Specificity of Inquiry into Crimes in the U.S., European Countries, and Other Countries

While in Russian criminalistics equal attention is paid to the development of methods for both theoretical and practical cognition of crimes, the main efforts of foreign scientists are aimed at creating methods for practical cognition of crimes in the process of their investigation without forming the theoretical foundations of the science. In the U.S., European countries, and many other countries around the world, criminalistics (forensic science, criminal investigation) does not include inquiry into the regularities of criminal activity.

At the same time, solving the most urgent practical problems of forensic research, foreign criminalists carry out an active and broad scientific search for the latest technologies from various fields of scientific knowledge[16] (psychology, statistics, economics, astronomy, etc.) suitable for forensic purposes.

For example, M.D. Porter, inspired by the Bayesian approach, developed the methodology of statistical analysis of crime series linkage which identifies and groups crime events committed in certain areas sharing a common offender and reveals the most likely suspects. One of the key laws of elementary probability theory applied in this methodology reveals connected and committed by the same person or a group of persons crimes based on the information derived from the geographical

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[14] *See* Bessonov 2017, at 252–253; *Кустов А.М.* Криминалистическое учение о механизме преступления: Дис. … докт. юрид. наук [Anatoliy M. Kustov, *Criminalistic Doctrine About the Mechanism of Crime: PhD thesis*] 101–112 (Moscow, 1997).

[15] *Белкин Р.С.* Курс криминалистики. В 3 т. Т. 3: Криминалистические средства, приемы и рекомендации [Rafail S. Belkin, *A Course of Criminalistics. In 3 vol. Vol. III: Criminalistic Tools, Techniques and Recommendations*] 349 (Moscow: Yurist, 1997).

[16] *See* Криминалистика: Учебник. Т. I [*Criminalistics: Textbook. Vol. I*] 52 (A.I. Bastrykin (ed.), Moscow: Ekzamen, 2014).

coordinates of the places of the commission of crimes, the time of their commission, and the time interval between the crimes. The method allows the identification of a serial criminal by comparing the characteristics of recorded crimes which have suspects identified with those that do not. To justify the consistency of the approach, Porter makes the following arguments: (a) certain regularities can always be traced in the criminal behavior of the same person; (b) the behavior of each criminal has the key features distinguishing him from other criminals; (c) the behavior of criminals can be observed, measured, and accurately fixed. Porter's methodology of statistical analysis of crime series linkage reveals 82% of existing linkages between the criminal cases forming the crime series, with a 5% false positive rate. While identifying crime series, it is possible to distinguish 74% to 89% of additional crime events from a ranked list of 50 criminal incidents.[17]

As such, Porter's criminal linkage analysis is one of the proofs of the need to study the regularities of criminal activity in criminalistics in order to effectively investigate crimes.

When investigating crimes in Western Europe, the United States, Canada, Australia, and other countries, profiling, also called criminal investigative analysis, is used.

Profiling is the method of working up a sketch of the suspect in an investigated crime using the information models formed on the basis of the analysis of individual elements of crimes, traces, and psychological characteristics recorded in previously committed, similar crimes. The overall goal of profiling is the expeditious identification and apprehension of the criminal offender, or offenders, involved in multiple, violent crimes. The main types of profiling include the following: psychological profiling, offender profiling, crime scene profiling, and geographic profiling.[18]

In 1992, John E. Douglas, Ann W. Burgess, Allen G. Burgess, and Robert K. Ressler published "Crime Classification Manual" to assist in investigative profiling. Their manual gives the typical characteristics of such offenses as violent crime (murder, rape, sexual assault), arson, computer crime, and cybercrime. The typical characteristics of these crimes describe each of the key elements in categorizing a crime: victimology (age of the victim, relationship with the offender, etc.), crime scene indicators frequently noted (environment, place, time, physical evidence, weapon, among others), staging (the purposeful alteration of a crime scene), common forensic findings (the analysis of physical evidence), and investigative considerations. Profiling is, in fact, a form of retroclassification, or classification that works backward based on these elements and carried out by investigative profilers.[19]

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17 *See* Porter 2016, at 152–165.

18 *See* John E. Douglas et al., *Criminal Profiling from Crime Scene Analysis*, 4(4) Behavioral Science & the Law 401, 404–405 (1986); John E. Douglas et al., *Crime Classification Manual: A Standard System for Investigating and Classifying Violent Crimes* 97–98 (2nd ed., San Francisco: Jossey-Bass, 2006); Michael D. Lyman, *Criminal Investigation: The Art and Science* 100–149 (6th ed., New Jersey: Prentice Hall, 2010).

19 *See* Douglas et al. 2006, at 93–434.

As such, profiling is a sort of counterpart to the criminalistic characteristic of crimes used in Russia. Nevertheless, the main difference between the criminalistic characteristic of crimes and profiling is that the former is framed by scholars for all types of crimes and contains information on the typical characteristics of the system elements and their regularities, while the latter is not suitable for use in all types of crimes. Profiling is most suitable for crimes that involve some form of psychopathology, such as murder, rape, ritualistic crimes, and torture.[20]

Other scholars – S.T. Easton and A.K. Karaivanov – proposed applying an economics approach to the Network Theory in the study of crime. They developed a theory of optimal networks in the context of criminal organizations and they proposed a method for identifying the structure of a criminal organization, criminal connections between its members, its criminal "boss," and key "players." The basis of this method is network analysis, developed by the social economy, which allows the identification of the cost-benefit ratio of creating and maintaining links in the social network, as well as the strength of these bilateral and unilateral links. Within the framework of this method, it is suggested that a criminal organization be viewed as a social network that is the product of a behavioral process in which the criminals choose their network links with others according to a set of specified costs and benefits to participation, and the function of optimizing ties in this network is provided by its criminal "boss." By establishing the coefficient of the strength of these links, the hierarchy of the criminal organization, its size and key "players," and, most importantly, its criminal "boss," are revealed.[21]

It should be added that sometimes scientists from outside of Russia put forward proposals to use theoretical propositions from seemingly remote fields in the investigation of crimes, for example the use of astronomy propositions in terms of achievements in the field of prognostics.[22]

Thus, the methods of other sciences may expand the capabilities of forensic scientists in understanding the regularities of criminal activity and increase efficiency in crime investigation.

Conclusion

The study of criminal activity as the main object continues to be the foundation of Russian criminalistics. The regularities of a crime are the subject of Russian criminalistics. At the moment, a qualitative change in the world around us, of which

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20 *See* Stephen Tong et al., *Understanding Criminal Investigation* 70 (Chichester, Malden: Wiley-Blackwell, 2009).

21 *See* Stephen T. Easton & Alexander K. Karaivanov, *Understanding Optimal Criminal Networks*, 10(1–2) Global Crime 41 (2009).

22 *See* Gloria Laycock, *Crime, Science and Evaluation*, 62(1) Criminal Justice Matters 10 (2005).

crimes are a part, causes a change in the approaches to defining the subject of Russian criminalistics.

It seems that the scientific research relating to crimes performed in order to obtain relevant information on crimes which will improve the efficiency and effectiveness of crime inquiry should be a task of the first importance to criminalistics throughout the world. In addition, it is precisely the definition of the subject of criminalistics that makes it possible to talk about criminalistics as an independent science. At the same time, in many countries criminalistics is a part of other sciences: criminology, police sciences, etc.[23]

The criminalistic characteristic of crimes is the theory of Russian criminalistics which is an independent field of science studying the crime specificities which enable effective and successful investigation.

The information on the criminalistic specificities of various kinds of crime is accumulated in the criminalistic methodology within the criminalistic characteristic of crimes. This is one of the current trends in the development of Russian criminalistics.[24]

Criminal investigators use information contained in the criminalistic characteristic of the type of crime they inquire into in order to: (a) advance the hypothesis as to who committed the crime, where the suspect can be looked for, where the weapons and traces of crimes can be found, etc.; (b) model the circumstances of the investigated crime that have not yet been established; (c) plan the investigation and determine the information that should be established relating to the crime; (d) assess the results of the investigation in terms of the completeness of the established circumstances of the crime.

However, Russian criminalists need to more actively, fully, and comprehensively study the valuable experience and knowledge of their foreign colleagues regarding the methodology of the theoretical and practical study of crimes and to integrate all of the advanced technologies into national science and practice.

The experience of scholars and practical experts in the investigation of crimes in many countries shows that the methods of the widest range of social and other sciences can be extrapolated into the process of cognition of the regularities of criminal activity in the field of criminalistics. In this regard, this area of research is very promising, offering a potentially big return in science for Russian scholars.

Summing up, we can also say that the inquiry into the criminalistic essence of crimes is the future of criminalistics and the crime investigation process. Each method of inquiring into crimes in criminalistics should necessarily be based on empirical material and aimed at obtaining new scientific knowledge by studying the empirical material.

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23 Darko Maver, *Criminal Investigation/Criminalistics in Europe: State of the Art and a Look to the Future*, 64(3) Revija za kriminalistiko in kriminologijo 233, 242 (2013).

24 Stanislav A. Yalyshev, *Problems and Ways of Development of Modern Russian Criminalistics*, 64(3) Revija za kriminalistiko in kriminologijo 245, 247 (2013).

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CRYPTOCURRENCIES LEGAL REGULATION

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This article evaluates the legal framework of cryptocurrency in various countries. The new currency instrument is abstract currencies. They are currencies in the sense that they can be exchanged peer-to-peer. They are representations of numbers, i.e. abstract objects. An abstract currency system is a self-enforcing system of property rights over an abstract instrument which gives its owners the freedom to use and the right to exclude others from using the instrument. Cryptocurrency or virtual currency is a cryptographically protected, decentralized digital currency used as a means of exchange. Due to the development of new technologies and innovations, the rate of use of virtual currency is rapidly increasing throughout the globe, replacing not only cash payments and payments by bank transfer, but also electronic cash payments. Among the best-known representatives of cryptocurrencies are Bitcoin, Litecoin and Ethereum. Legal scholars have not yet reached a consensus regarding the nature and legal status of virtual currency. Virtual currency possesses the nature of obligations rights as well as property rights, since it may be both a means of payment and a commodity. Depending on the country, the approach to cryptocurrencies may be different. Today there is already an international cryptocurrency community that does not have a single coordinating center. Only progressive jurisdiction and state regulation of cryptocurrency activity will allow the creation of the conditions that will ensure the implementation of legitimate and safe cryptocurrency relations.

Keywords: bitcoin; blockchain; cryptocurrency; e-money; mining; token; virtual currency.

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Introduction

Cryptographic currencies appeared due to technological progress and the evolution of money as a completely liquid medium of exchange. Indeed, originally money fulfilled the function of the exchange of goods. It was then assigned to gold as the universal equivalent. The next stage was the transition to paper money, until, today, we have the emergence of electronic money (e-money).

Money is first and foremost a social convention, which emerges to build trust between strangers in their economic transactions, both inter-temporal and in spot markets. A convention of monetary exchange facilitates valuable inter-temporal exchanges that would not occur otherwise.

According to this view, individuals who may neither know nor trust each other choose to settle their transactions by offering symbolic objects-bank deposits or banknotes, for instance, in exchange for labor, goods and services because they find this trading arrangement superior to the available alternatives.[1]

A monetary system can thus be viewed as a social convention that emerges to build the trust needed to support valuable economic interactions between strangers. In a way, confidence in the institution of money can shore up the lack of trust in other members of society. Laboratory research provides some empirical support for this view.[2]

Historically, public confidence in a currency largely referred to the quality of the coins that formed the basis of the currency. States had an obvious advantage over private issuers in guaranteeing this quality, not only because they could set and enforce quality standards more easily than private issuers, but also because states can internalize the long-run benefits of a stable currency, thus strengthening the incentive to avoid debasements.[3]

Digital money or e-money has been around for a long time. The main forms of e-money are commercial bank reserves with the central bank and the money created by commercial banks when they make loans.

The past ten years have seen the creation of a new class of digital instruments that are not issued by a sovereign institution or commercial bank, are not denominated in a sovereign unit and do not have physical counterparts. Since these instruments may be used as a currency, they are variously labeled "electronic cash," "digital currency," "virtual currency," or "cryptocurrency."

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1 Gabriele Camera et al., *Money and Trust Among Strangers*, 110(37) Proceedings of the National Academy of Sciences 14889 (2013).

2 Gabriele Camera & Marco Casari, *The Coordination Value of Monetary Exchange: Experimental Evidence*, 6(1) American Economic Journal: Microeconomics 290 (2014).

3 Charles A.E. Goodhart, *The Two Concepts of Money: Implications for the Analysis of Optimal Currency Areas*, 14(3) European Journal of Political Economy 407 (1998).

1. Definition and Type of Virtual Currency

The new currency instrument is abstract currencies. They are currencies in the sense that they can be exchanged peer-to-peer. They are representations of numbers, i.e. abstract objects. An abstract currency system is a self-enforcing system of property rights over an abstract instrument which gives its owners the freedom to use and the right to exclude others from using the instrument.

Virtual currency is unlike money in that it is theoretically defined as crypto-graphically decentralized digital currency, whose issuer is decentralized, and is used as a means of exchange. It is not currency in a literal sense; it does not fulfill the basic characteristics of currency; for example, it is not acknowledged by the State.[4]

However, some experts argue that virtual currency is essentially not much different from standard currency. In its essence, only a small part of our economy is made up of cash; most of the money is in electronic form, which means only the data stored on a computer. The State no longer backs its currency with gold. The current system of legal currency works on mutual trust between the people and the monetary institutions and government, all of whom believe that the legal currency will still have value in the future. Virtual currency is also based on trust among its users that in the future it will still have value.[5]

The European Commission currently provides a working definition of virtual currency as follows:

> [It is] a digital representation of value that is neither issued by a central bank or a public authority, nor necessarily attached to a fiat currency, but is accepted by natural or legal persons as a means of payment and can be transferred, stored or traded electronically.[6]

Data on transactions stored on the software platform *blockchain*, or distributed ledger technology, underpins many virtual currencies, but can also be used within private, permissioned ledger systems – versions of public and private systems may be used by financial institutions, governments and cross-industry.[7]

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4 David L.K. Chuen, *Handbook of Digital Currency: Bitcoin, Innovation, Financial Instruments, and Big Data* 310 (London: Elsevier, 2015).

5 Benjamin Guttmann, *The Bitcoin Bible: All You Need to Know About Bitcoins* 123–124 (Germany: BoD, 2013).

6 European Commission, Proposal for a directive of the European Parliament and of the Council amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing and amending Directive 2009/101/EC (Jun. 18, 2018), available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52016PC0450.

7 Marco Iansiti & Karim R. Lakhani, *The Truth About Blockchain*, Harvard Business Review, January – February 2017 (Jun. 18, 2018), available at https://hbr.org/2017/01/the-truth-about-blockchain.

Abstract currency payments are not intermediated – although they take place over the internet, they are peer-to-peer like cash – they are settled as soon as enough system participants agree they are valid.

The general arguments for a successful distributed cryptocurrency are as follows:

1. *Open-source software*: A core and trusted group of developers is essential to verify the code and possible changes for adoption by the network.

2. *Decentralized*: Even if it is not fully distributed, it is essential that it is not controlled by a single group of persons or entity.

3. *Peer-to-peer*: While the idea is not to have intermediaries, there is a possibility of pools of subnetworks forming.

4. *Global*: The currency is global, and this is a very positive point and workable for financial integration with or without smart contracts among the parties.

5. *Fast*: The speed of transaction can be faster and confirmation time can be shortened.

6. *Reliability:* The advantage is that there is no settlement risk and it is non-repudiable. The savings in cost of a large settlement team for financial activities can be potentially huge.

7. *Secure*: Privacy architecture can be better designed incorporating proof of identity with encryption. If that is done, the issues surrounding Know Your Customer/Client (KYC) and anti-money laundering and terrorist financing (AML/TF) will be resolved.

8. *Sophisticated and flexible*: The system will be able to cater to and support all types of assets, financial instruments and markets.

9. *Automated*: Algorithm execution for payments and contracts can be easily incorporated.

10. *Scalable*: The system can be used by millions of users.

11. *Platform for integration*: It can be designed to integrate digital finance and digital law with an ecosystem to support smart contracts with financial transactions. Customized agreements can be between multiple parties, containing user-defined scripted clauses, hooks and variables.[8]

According to CoinMarketCap – Forbes, there are more than 1,100 kinds of virtual currencies in the world, and this data is changing all the time. Among the best-known representatives of cryptocurrencies are Bitcoin, Litecoin, Ethereum, Dash and XYO. The most popular virtual currency is Bitcoin (BTC); it is a cryptographically protected peer-to-peer payment system. It takes up 40% of the cryptocurrency market. Bitcoin is called "digital gold." The value of Bitcoin is based on trust that it will have value also in the future. However, the value varies greatly. In December 2014 one bitcoin had a value of US$310, whereas in December 2017 its value was US$20,000.[9]

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[8] Chuen 2015, at 12–13.

[9] Global Bitcoin Price Index, BitcoinAverage (Jun. 18, 2018), available at https://bitcoinaverage.com/en/bitcoin-price/btc-to-usd.

It is entirely appropriate to ask why the popularity of virtual currency has risen. One of the reasons is that people's trust in traditional legal currencies has weakened. For example, the virtual currency Bitcoin was born in response to the outbreak of the global financial crisis in 2008 as a reaction to the failure of the financial system. Some media report about the correspondence of the declining confidence in legal currencies (e.g. the euro and the U.S. dollar) and the increase in the purchase of bitcoins.

Bitcoin is not an investment instrument, an equity or a bond, but primarily a currency and a means of exchange. In April 2017, Japan formally legalized Bitcoin and recognized it as legal tender. In some cities of Switzerland, you can even pay taxes with bitcoins, and Swiss Falcon Private Bank has become the first traditional bank that offers to open accounts in BTC.

There is an opinion that Bitcoin is a more reliable means of payment than money and gold because fiat money can be issued by the state in any amount, whereas the maximum amount of bitcoin is only 21 million, more than 16 million of which have already been mined.

Another popular type of virtual currency is Ethereum (ETH), an open-source, public, blockchain-based distributed computing platform and operating system featuring smart contract (scripting) functionality. It accounts for 18% of the cryptocurrency market, and it is compared to oil.

Cryptocurrency XYO is not an ordinary blockchain-powered start-up. XYO first appeared in the industry in 2012. Since then they have managed to spread 1 million beacons all over the globe. Now they are planning to deploy over 1 million more microdevices, satellites and sticker-based trackers. In the case of XYO Network, the company is looking to combine blockchain technology with crypto-location technologies to provide location-reliant markets with an option to employ transactions which depend on the time or location of delivery. The main purpose of this new project is to create a successful location-based business to get Bluetooth and GPS tracking beacons out into the world. The current use cases span industries including e-commerce, logistics and rental car agencies, among others. With over 1 million devices out in the world already, the project is certainly off to a good start.[10]

The banking sector too has not been immune to the popularity of virtual currency. In August 2017, the world's six largest banks – Barclays, Credit Suisse, the Canadian Imperial Bank of Commerce, HSBC, MUFG and State Street – launched a project to create their own cryptocurrency.[11]

The emission and mining of virtual currency, its use for settlements as well as turnover are not fully regulated and are not under the supervision at the state or

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[10] JP Buntinx, *What Is XYO Cryptocurrency?*, Null TX, 21 March 2018 (Jun. 18, 2018), available at https://nulltx.com/what-is-xyo-cryptocurrency/.

[11] Martin Arnold, *Six Global Banks Join Forces to Create Digital Currency*, Financial Times, 31 August 2017 (Jun. 18, 2018), available at https://www.ft.com/content/20c10d58-8d9c-11e7-a352-e46f43c5825d.

national level, and the legal regulation associated with it is currently under construction. Cryptocurrency is not tied to any of the national currencies, and at the same time it is a commodity.

The measure of the value of the cryptocurrency depends on the following main factors:

1) value offer, as well as other actions of the issuer; for example, maintaining a fixed or semi-fixed exchange rate;

2) network dimensions. The cost of the currency depends on how many users, and with what level of income, are accepted into the network. With the growth in the size of the network (i.e. consumers and sellers), the value of the currency increases proportionally;

3) the institutional conditions governing the virtual community, that is, virtual communities that have a transparent policy and modern security measures are highly trusted, which is a prerequisite for creating a more valuable cryptocurrency;

4) reputation of the issuer of the cryptocurrency to fulfill its obligations. In carrying out payments by cryptocurrency, for the lender there is no authority responsible for the reliability of the transaction, therefore one of the most important elements influencing the virtual rate is the trust accumulated by the issuer of the cryptocurrency;

5) assumptions about the future value of the currency and the history of cyber-attacks of victims in the virtual community.

2. Legal Status of Cryptocurrencies

2.1. Cryptocurrency is Money

Supporters of this position note the similarity of some functions of cryptocurrency with monetary means. Cryptocurrency can be a means of payment for goods and services, and, for example, U.S. law specifically stipulates that it can be a payment unit in which wages are paid.

In some countries, cryptocurrency has become a unit of settlement which is recognized and accepted by various subjects in the market.

The U.S. Financial Crimes Enforcement Network (FinCEN) believes that transactions involving the exchange of cryptocurrency for fiat money should be regulated in the same way as the operations involving the exchange of fiat money alone. Legal entities involved in the flow of funds with cryptocurrencies are required to obtain licenses.

Japan has recognized cryptocurrency Bitcoin fiat money as having the same function as money. Accordingly, the government decided to develop a regulatory framework for the full integration of the cryptocurrency into the banking system of Japan. The national regulator for the cryptocurrency is the Financial Services Agency of Japan, which regulates issues in respect of the emission of national currency.

2.2. Cryptocurrency is a Money Surrogate

The opponents of identifying cryptocurrency as the equal of the ordinary money note argue that cryptocurrency is not a monetary instrument since the state does not issue it, does not guarantee its value and does not establish the obligation that it be accepted. In the vast majority of jurisdictions, cryptocurrency is not recognized as an official means of payment and does not apply to money. For example, the tax service of the Netherlands does not consider cryptocurrency to be a legal means of payment, and the Central Bank of Denmark announced in 2014 that Bitcoin is not a currency. From the point of view of the Danish regulator, this cryptocurrency has no real trade value compared to gold or silver and is more comparable to glass beads.[12]

2.3. Cryptocurrency is Electronic Money

In international law, the definition of electronic money was fixed in 1998 by a report on electronic money of the European Central Bank (ECB). Electronic money is broadly defined as the electronic storage of monetary value on a technical device that can be widely used to make payments in favor of not only the issuer, but also other companies, and that does not require the mandatory use of bank accounts for transactions, but acts as a prepaid instrument to a bearer.[13]

The supporters of the position that cryptocurrency is a type of electronic money point out that cryptocurrency has no issuers as electronic means of payment. It can be considered to be cash, which is traditionally provided by one person to another person, without opening a bank account to fulfill monetary obligations.

According to the Electronic Money Directive (2009/110/EC), electronic money is a monetary value which follows from the submitted requirements to the issuers: this value should be stored electronically; the electronic money itself must be issued in order to receive funds.[14]

In the systems of cryptocurrency the unit of account has been changed. This important problem is defined by the ECB as follows:

1) these systems rely on a certain exchange rate which can fluctuate since the value of the cryptocurrency is usually based on its own supply and demand;

2) the connection with the traditional currency is lost to some degree, which could be problematic when restoring funds, even if it is allowed;

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[12] The Danish Central Bank went on to point out that bitcoins are not protected by any national laws or guarantees, such as a deposit guarantee. Danmarks Nationalbank, Bitcoin er ikke penge (Jun. 18, 2018), available at http://www.nationalbanken.dk/da/presse/Documents/2014/03/PH_bitcoin.pdf#search=Bitcoin.

[13] European Central Bank, Report on Electronic Money (August 1998) (Jun. 18, 2018), available at https://www.ecb.europa.eu/pub/pdf/other/emoneyen.pdf.

[14] Directive 2009/110/EC of the European Parliament and of the Council of 16 September 2009 on the taking up, pursuit and prudential supervision of the business of electronic money institutions amending Directives 2005/60/EC and 2006/48/EC and repealing Directive 2000/46/EC, 2009 O.J. (L 267) 7.

3) the fact that the currency is called differently (that is, not the euro, the U.S. dollar, etc.) and the fact that monetary funds should not be redeemed at face value (nominal par), means that full control over the cryptocurrency is left to its issuer, which is usually a non-profit organization;

4) electronic money systems are regulated by regulatory enactments, and the founders of the electronic money systems, which conduct emission of the payment means in the form of electronic money, are subject to appropriate administrative requirements and control. For the cryptocurrency systems, the risks faced by each type of currency differ.

Electronic money is primarily exposed to an operational risk associated with the potential malfunction of the system on which it is stored. Cryptocurrencies are not only under the influence of credit, operational and liquidity risks without any legal protection, but these schemes are also subject to the legal risk of security breach and fraud as a result of the lack of regulation and public oversight.

The definition of the cryptocurrency systems used in this ECB report excludes such objects as PayPal – a payment system established on the internet. The PayPal account is financed through a credit transfer of a bank account or by a credit card payment, that is, it operates within the banking system. Furthermore, PayPal falls under the regulation of the Commission de Surveillance du Secteur Financier of Luxembourg,[15] whereas the electronic money system is supervised by Banque centrale du Luxembourg.

The opponents of this point of view emphasize that the main difference between cryptocurrency and electronic money is the absence of an intermediary in the transactions that verifies the payment, since when paying in cryptocurrency the calculation is carried out one subject to another directly.

2.4. Cryptocurrency is a Financial Instrument

A financial instrument is a security or its derivative. Moreover, the derivative is a contract that, as one of the options, provides for the realization of the obligation to buy or sell securities, currency or goods.

The underlying asset of a derivative financial instrument can be a currency, commodity or securities as well as various statistical indicators, indices and percentages. Accordingly, if cryptocurrency is not a commodity or a security, it will not be the underlying asset for the derivative financial instrument.

The position that cryptocurrency can be a financial instrument was taken by the German Ministry of Finance. In 2013, it issued a decree on recognizing cryptocurrency as an official means of settlement. At the same time, the law clearly delineates this status from the status of a legal means of payment – cryptocurrency has not received such a status in Germany yet.

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15 Commission de Surveillance du Secteur Financier (CSSF) [Financial Sector Surveillance Commission] (Jun. 18, 2018), available at http://www.cssf.lu/en/.

2.5. Cryptocurrency is a Commodity

A commodity is a material or non-material object that can be used in economic terms. In a number of countries, cryptocurrency is treated as property or a commodity and is taxed. The legal systems of these countries qualify cryptocurrency as an inexhaustible non-material commodity with a definite value at each particular moment.

The Australian Tax Service does not consider cryptocurrency as money or foreign currency, equating operations with its participation to barter agreements (*barter arrangement*).[16]

In September 2015, the Commodity Futures Trading Commission (CFTC) recognized the Bitcoin cryptocurrency as a commodity.[17] In 2017, the Israel Tax Service published a draft circular in which the cryptocurrency is qualified as a digital unit having a nominal value that can be used for barter or for investment purposes.[18]

2.6. Cryptocurrency is a Security

The U.S. Securities and Exchange Commission (SEC), in their report on the investigation of the situation regarding a blockchain startup "The DAO," pointed out that the issuance of ICO (initial coin offering) tokens (a *token* is a unit of value issued by a private organization in the blockchain system) must be considered to be securities regardless of what the thing the investors had invested their money in was called and how it worked.[19]

The opponents of such a position argue that cryptocurrency does not contain liability rights and is not a monetary obligation. They rely on the fact that the relations that are contained in the transaction of cryptocurrencies are most comparable in nature to the barter agreement.

The emission of cryptocurrency is carried out on the internet in a decentralized manner and therefore does not meet the concept of the emission of securities. The issuer is each participant of the payment system, since the transaction creates a new block in the transaction chain. On this basis, cryptocurrency does not meet the characteristics of securities and is not a security itself.

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[16] Australian Government, Australian Taxation Office, Tax Treatment of Cryptocurrencies (Jun. 18, 2018), available at https://www.ato.gov.au/General/Gen/Tax-treatment-of-crypto-currencies-in-Australia---specifically-bitcoin/.

[17] Commodity Futures Trading Commission, Order Instituting Proceedings Pursuant to Sections 6(c) and 6(d) of the Commodity Exchange Act, Making Findings and Imposing Remedial Sanctions, 17 September 2015 (Jun. 18, 2018), available at https://www.cftc.gov/sites/default/files/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfcoinfliprorder09172015.pdf.

[18] Jenny David, *Israel Seeks Tax on Bitcoin*, Bloomberg BNA, 24 January 2017 (Jun. 18, 2018), available at https://www.bna.com/israel-seeks-tax-n73014450141/.

[19] SEC Issues Investigative Report Concluding DAO Tokens, a Digital Asset, Were Securities: U.S. Securities Laws May Apply to Offers, Sales, and Trading of Interests in Virtual Organizations, Press Release, 25 July 2017 (Jun. 18, 2018), available at https://www.sec.gov/news/press-release/2017-131.

2.7. Cryptocurrency is Property

The Internal Revenue Service (IRS) of the United States has issued guidance on the taxation of transactions with Bitcoin and other cryptocurrencies, according to which they can be qualified as:

1) currency,

2) property, and

3) investment instruments (long-term investment in shares).[20]

For the purposes of payment of U.S. federal taxes, Bitcoin is considered to be property, upon sale of which the owners will not receive the profit from the exchange rate differences, but the profit from the capital gains.

At the same time, payment of wages in cryptocurrencies is subject to income tax and salary tax, and payments in cryptocurrencies to independent contractors are taxed applying the self-employment tax.

3. Legal Regulation of Virtual Currencies in Non-European Countries

In a number of non-European countries the approach to cryptocurrencies is different.

Argentina. Virtual currencies are not legal tender under the country's National Constitution, which designates the Central Bank as the only authority that may issue legal tender.[21]

In ***Australia***, virtual currency is not considered to be a financial product, and, consequently, cryptocurrency activity is not subject to license (except for activities associated with fiat money or other financial instruments). The Australian Digital Currency Industry Code of Conduct developed by the Australian Digital Currency & Commerce Association establishes the proper standards for conducting cryptocurrency business in the country, but is mandatory for execution only for the members of the Association.[22]

Brazil. Brazil's Securities Exchange Commission, Comissão de Valores Mobiliários (CVM), has determined that the digital currency Niobium Coin (NBC) is not a financial asset. The CVM has stated that virtual currencies are to be considered securities only when they pay interest or dividends to their investors, or when they allow for participation in company management through votes.[23]

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[20] New IRS Notice Confirms Tax Treatment of Bitcoins as Property and Not Currency – Expected to Increase Popularity for Self-Directed IRAs, According to IRA Financial Group, Cision PRWeb, 25 March 2014 (Jun. 18, 2018), available at http://www.prweb.com/releases/bitcoins-self-directed-/ira-tax-property-currency/prweb11704323.htm.

[21] Ignacio Olivera Doll & Camila Russo, *Argentina's Biggest Futures Market Plans to Join the Bitcoin Party*, Bloomberg, 2 November 2017 (Jun. 18, 2018), available at https://www.bloomberg.com/news/articles/2017-11-02/argentina-s-biggest-futures-market-plans-to-join-bitcoin-party.

[22] Tax Treatment of Cryptocurrencies, *supra* note 16.

[23] Brazilian SEC Confirms: Digital Currency Niobium Coin (NBC) Is Not a Financial Asset, Markets Insider, 22 January 2018 (Jun. 18, 2018), available at http://markets.businessinsider.com/news/stocks/brazilian-sec-confirms-digital-currency-niobium-coin-nbc-is-not-a-financial-asset-1013591426.

Canada ranks as second in the world after the United States in terms of the number of installed bitcoin ATMs. Payment for goods or services with the help of the cryptocurrency in Canada is subject to taxation as a barter transaction. In case of sale of the digital currency, income tax, a corporation income tax or a capital gains tax is levied.[24]

In ***China***, a general approach to the legal regulation of cryptocurrency transactions has not been worked out yet. The current Chinese legislation does not contain any special rules for taxation of virtual currency and transactions with it. At the same time, in the announcement of the National Bank of 2013, cryptocurrency is defined as a virtual commodity, not a currency, and may be taxed with the value-added tax, and income and profit in the cryptocurrency are subject to a corporate tax, individual income tax and capital gains tax.[25]

Cyprus. The Central Bank directly acknowledged for the first time recently that Bitcoin is not illegal, but highlighted the risks of using an unregulated digital currency. The banking regulator has twice previously issued a warning to consumers saying there are risks involved in trading in virtual currencies, in line with a December 2017 ruling issued by the European Banking Authority (EBA). This action resulted in the hesitation by the Cyprus Stock Exchange and the Securities and Exchange Commission (CySEC), despite its initial eagerness, to allow bitcoin-traded products, such as derivatives.[26]

Ecuador has banned the issuance, promotion or circulation of virtual currencies and plans to issue its own digital currency for use as legal tender. Ecuador's official fiat currency is the U.S. dollar, and the digital currency under Ecuador's Electronic Currency System will be "equivalent and convertible to U.S. dollars."[27]

Hong Kong. Regarding the status of cryptocurrency, the authorities recognize that this sphere is not regulated by law and warn that criminal responsibility exists for fraudulent operations. This position has been taken by Hong Kong since 2014. At the moment, the government does not consider it necessary to introduce (adopt) new legislation on the regulation of trade (of cryptocurrencies) in such virtual goods or to prohibit citizens from participating in such transactions (with cryptocurrency).[28]

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[24] Government of Canada, What You Should Know About Digital Currency (Jun. 18, 2018), available at https://www.canada.ca/en/revenue-agency/news/newsroom/fact-sheets/fact-sheets-2013/what-you-should-know-about-digital-currency.html.

[25] Vitalik Buterin, *China Releases First Regulatory Report on Bitcoin Businesses*, Bitcoin Magazine, 5 December 2013 (Jun. 18, 2018), available at https://bitcoinmagazine.com/articles/china-releases-first-regulatory-report-on-bitcoin-businesses-1386283989/.

[26] Elias Hazou, *Central Bank Says Bitcoin Is Not Illegal*, CyprusMail, 26 February 2014 (Jun. 18, 2018), available at http://cyprus-mail.com/2014/02/26/central-bank-says-bitcoin-is-not-illegal/.

[27] Belén Marty, *Ecuadorian Banks Must Adopt Official Electronic Currency or Else*, PanAm Post, 31 May 2015 (Jun. 18, 2018), available at https://panampost.com/belen-marty/2015/05/31/ecuadorian-banks-must-adopt-official-electronic-currency-or-else/.

[28] Leonhard Weese, *Hong Kong Report Suggests Cryptocurrency Is Largely Left Out of City's Organized Crime*, Forbes, 30 April 2018 (Jun. 18, 2018), available at https://www.forbes.com/sites/leonhard

India. In 2013, the authorities stated that they did not want to regulate the turnover of Bitcoin. In 2016–2017, a massive tightening of rules on the circulation of funds began; the authorities actually arbitrarily began to take gold away from citizens; simultaneously, blockchain-solutions for the banks and other innovations became more available.

The fundamental stand of the Reserve Bank of India (RBI) with regard to Bitcoin and other cryptocurrencies is that they are not legal tender currencies. They cannot be used for payments as usual currencies. Rather, they have big risks without any regulation and support. The RBI has issued warnings three times, first in December 2013, then in February 2017 and finally on 5 December 2017. The initial caution by the RBI in 2013 explains why investment in virtual currencies such as Bitcoin is risky.[29]

Indonesia. Bank Indonesia has warned that cryptocurrencies may not be used for payments in the country and payment firms are not allowed to make virtual currency transactions. Bank Indonesia affirms that it forbids all payment system operators (principal, switching operator, clearing operator, final settlement operator, issuer, acquirer, payment gateway operator, electronic wallet operator, money transfer operator) and financial technology operators in Indonesia, both bank and non-bank institutions, from processing transactions using virtual currency, as stated in Bank Indonesia Regulation No. 18/40/PBI/2016 on Implementation of Payment Transaction Processing and Bank Indonesia Regulation No. 19/12/PBI/2017 on Implementation of Financial Technology.[30]

Israel. The Israeli central bank and Finance Ministry have issued warnings to the public about the risks associated with virtual currencies. Israel's central bank has said it would view virtual currencies such as Bitcoin as financial assets, not as a currency. The Israel Securities Authority (ISA) has recommended lenient ICO regulations which would include clear guidance on what constitutes a security that triggers securities law, as opposed to a utility token, which the ISA indicated should not necessarily be deemed a security by virtue of its conferring "usage rights in a product or service."[31]

Japan is a world leader in innovation and the cryptocurrency industry. Its Japan Authority of Digital Assets is a self-regulatory authority. In 2016, a law was put in place that regulates the activities of exchanges: they are now subject to registration with the

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weese/2018/04/30/hong-kong-report-suggests-cryptocurrency-is-largely-left-out-of-citys-organized-crime/#78b6bf303775.

[29] Tojo Jose, *Cryptocurrency Regulation in India*, Indian Economy, 7 January 2018 (Jun. 18, 2018), available at https://www.indianeconomy.net/splclassroom/cryptocurrency-regulation-in-india/.

[30] Sujha Sundararajan, *Indonesia Central Bank: Cryptocurrency Payments "Not Legitimate*," CoinDesk, 15 January 2018 (Jun. 18, 2018), available at https://www.coindesk.com/indonesias-central-bank-cryptocurrency-payments-not-legitimate/.

[31] Israel: The Hotspot for Blockchain Innovation, Deloitte (February 2016) (Jun. 18, 2018), available at https://www2.deloitte.com/content/dam/Deloitte/il/Documents/financial-services/israel_a_hotspot_for_blockchain_innovation_feb2016_1.1.pdf.

Financial Services Agency, which can conduct inspections of such businesses and apply appropriate administrative measures. In accordance with this law, cryptocurrency is an asset-like value. Virtual currency and transactions with it are subject to taxation in accordance with the standard rules: the income received by an individual in the form of a cryptocurrency is subject to income tax; the profit gained by a legal entity in digital currency is subject to corporate income tax; the sale of cryptocurrency is subject to the Japanese analogue of the Consumption Tax.[32]

In ***Jordan***, virtual currencies are not legal tender and the central bank has warned against their use. Banks, currency exchanges, financial companies and payment service providers operating in Jordan are prohibited from dealing in virtual currencies.[33]

Lebanon. In 2017, the governor of the Banque du Liban (BDL), Lebanon's central bank, reported that his institution has banned the use of cryptocurrencies. Bitcoin and other cryptocurrencies remain a significant threat to consumers and payment systems. He announced that the BDL would, in the next few years, release its own digital currency in compliance with Lebanese law, although he did not specify whether this store of value would be a true cryptocurrency.[34]

Malaysia. Virtual currencies were previously not legal tender in Malaysia, but the government will enforce new cryptocurrency regulation soon.[35]

In **Mexico**, cryptocurrencies are not legal tender currency. The lower house of Mexico's Congress approved legislation for FinTech companies and gave legal clarity for ICOs, payment methods and cryptocurrencies generally. Additionally, the law would permit open banking (sharing of user information by financial institutions) through public application programming interfaces (APIs). Details of the regulation will be determined by the CNBV (banking and securities regulator), the central bank and the Finance Ministry. Mexico's Senate approved a version of the bill in December 2017, which now awaits President Nieto's signature.[36]

Nigeria. Nigeria does not regulate or recognize cryptocurrency as legal currency. The Central Bank of Nigeria (CBN) has not approved the use of cryptocurrency for

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[32] Diet OKs Bill to Regulate Virtual Currency Exchanges, The Japan Times, 25 May 2016 (Jun. 18, 2018), available at https://www.japantimes.co.jp/article-expired/#.WFGw4vmLTIV.

[33] Omar Obeidat, *Central Bank Warns Against Using Bitcoin*, The Jordan Times, 22 February 2014 (Jun. 18, 2018), available at http://www.jordantimes.com/news/local/central-bank-warns-against-using-bitcoin.

[34] Adam Reese, *Lebanon's Central Bank Bans Cryptocurrency*, ETHNews, 31 October 2017 (Jun. 18, 2018), available at https://www.ethnews.com/lebanons-central-bank-bans-cryptocurrency.

[35] Deputy Governor's Opening Address at the Asian Banker Digital Finance Convention 2018, Kuala Lumpur, 22 March 2018 (Jun. 18, 2018), available at http://www.bnm.gov.my/index.php?ch=en_speech&pg=en_speech&ac=792.

[36] Reuters Staff, *Mexico Financial Technology Law Passes Final Hurdle in Congress*, Reuters, 2 March 2018 (Jun. 18, 2018), available at https://www.reuters.com/article/us-mexico-fintech/mexico-financial-technology-law-passes-final-hurdle-in-congress-idUSKCN1GD6KX.

any transactions in the country. Various government agencies have issued warnings about cryptocurrencies and ICOs.[37]

Russian Federation. In April 2017, the Central Bank of the Russian Federation recognized virtual currency as a digital commodity, and in February 2018 the Russian Duma began discussion of cryptocurrency legislation – a draft Federal law on digital assets.[38]

The bill provides that mining is an entrepreneurial activity aimed at creating a cryptocurrency and/or validation in order to receive remuneration in the form of cryptocurrency. Cryptocurrency is defined as a type of digital financial asset created and accounted for in the distributed registry of digital transactions by the participants of this registry in accordance with the rules of maintenance of the register of digital transactions. The rules of turnover of cryptocurrencies are not determined by the bill and will be established separately.

Singapore. The Monetary Authority of Singapore (MAS) published a consultation paper proposing legislation for payment services. The proposed bill would expand the scope of regulation to include the purchase and sale of virtual currencies and other innovations used in domestic money transfers and merchant transactions via point-of-sale or online payment gateways. The new legislation would be incorporated into Singapore's existing laws on payment services, the 2006 Money-Changing and Remittance Businesses Act. The draft is the second of its kind and was amended following feedback received from the first consultation paper.[39]

Thailand does not regulate cryptocurrency transactions, but the position of the SEC in Thailand is that Bitcoin is an asset that can be traded. The SEC does not endorse the status of Bitcoin, and Bitcoin is not recognized as legal tender to pay off debt. The Cabinet of Thailand (the executive branch of the Thai government) has approved the drafts of two royal decrees that would regulate digital asset transactions and levy taxes on digital assets.[40]

United States of America. In the United States, prejudicial supervision of virtual currency is the responsibility of the state. For example, the states of Idaho, Louisiana, New York and Washington adopted the concept that the transfer of virtual currency

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[37] Central Bank of Nigeria, Virtual Currencies Not Legal Tender in Nigeria, Press Release (Jun. 18, 2018), available at https://www.cbn.gov.ng/Out/2018/CCD/Press%20Release%20on%20Virtual%20Currencies.pdf.

[38] Проект федерального закона "О цифровых активах" [Federal Law Draft "On Digital Assets"] (Jun. 18, 2018), available at https://www.minfin.ru/ru/document/?id_4=121810.

[39] Monetary Authority of Singapore, Proposed Payment Services Bill, Consultation Paper P021 – 2017 (November 2017) (Jun. 18, 2018), available at http://www.mas.gov.sg/~/media/resource/publications/consult_papers/2017/Consultation%20on%20Proposed%20Payment%20Services%20Bill%20MAS%20P0212017.pdf.

[40] CryptoFinTech in Thailand: The Thai Initial Coin Offering (TICO), LinkedIn (Jun. 18, 2018), available at https://www.linkedin.com/pulse/cryptofintech-thailand-thai-initial-coin-offering-tico-eder/.

and mining are the objects of money transmission in accordance with the law "on the unification of monetary services." In turn, for the implementation of cryptocurrency services, a license is required.[41]

At the federal level, there is the Guidance of the Internal Revenue Service No. 2014-21 of 25 March 2014, currently in force, according to which virtual currency is a digital reflection of value which acts as a means of exchange, a unit of settlement and a valuable stock. For taxation, digital money in the U.S. is classified as property.[42]

It is as property then that it is considered for taxation purposes; and operations with cryptocurrency are also taxed. For example, the salaries paid to employees with Bitcoin are subject to federal income tax withholding, as well as payroll taxes.

In 2011, FinCEN issued regulations clarifying that a foreign-located business qualifies as a Money Services Business (MSB) if it does business as an MSB "wholly or in substantial part within the United States." According to FinCEN:

> Whether or not a foreign-located person's MSB activities occur within the United States depends on all of the facts and circumstances of each case, including whether persons in the United States are obtaining MSB services from the foreign-located person, such as sending money to or receiving money from third parties through the foreign-located person.[43]

In 2013, FinCEN issued guidance providing that any virtual currency "exchanger" (i.e. a person engaged as a business in the exchange of virtual currency for real currency, funds or other virtual currency) is a money transmitter (i.e. a person engaged in the business of accepting and transmitting currency, funds or other value that substitutes for currency) under the Bank Secrecy Act (BSA) and its implementing regulations and, therefore, required to register with FinCEN as an MSB within 180 days of beginning operations.[44]

On 26 July 2017, FinCEN of the U.S. Department of the Treasury announced the assessment of a $110 million civil money penalty against Canton Business Corporation (BTC-e), one of the largest virtual currency internet-based exchanges by volume in the world, for its willful violations of federal anti-money laundering

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[41] Washington State Department of Financial Institutions, Virtual Currency Regulation (Jun. 18, 2018), available at http://www.dfi.wa.gov/documents/money-transmitters/virtual-currency-regulation.pdf.

[42] Financial Crimes Enforcement Network, Application of FinCEN's Regulations to Persons Administering, Exchanging, or Using Virtual Currencies: Guidance (FIN-2013-G001), 18 March 2013 (Jun. 18, 2018), available at https://www.fincen.gov/sites/default/files/shared/FIN-2013-G001.pdf.

[43] *Id.*

[44] Financial Crimes Enforcement Network, Bank Secrecy Act Regulations – Definitions and Other Regulations Relating to Money Services Businesses, 76 F.R. 43585, 43588, 21 July 2011 (Jun. 18, 2018), available at www.gpo.gov/fdsys/pkg/FR-2011-07-21/pdf/2011-18309.pdf.

laws, as well as a $12 million civil money penalty against the BTC-e operator and Russian national Alexander Vinnik.[45]

Vietnam. Virtual currencies are not money nor legal tender in Vietnam and the State Bank of Vietnam warns against investing in, holding or transacting in virtual currencies.[46]

4. Legal Regulation of Virtual Currencies in Europe

At the same time, a number of countries demonstrate a complete inability to respond adequately and competently to innovations and technological progress. To resolve the legal aspects of virtual currency, the European Union has also faced the need to create the appropriate legal regulation, but does not hurry with its adoption. Currently, there is no single legal definition of virtual currency and general legal regulation in the EU, but some countries of Europe have defined the status of virtual currency for taxation purposes.

The first attempt to provide the basis for a discussion on virtual currency schemes is a European Central Bank report "Virtual Currency Schemes." It is important to take into account that these currencies both resemble money and necessarily come with their own dedicated retail payment systems; these two aspects are covered by the term *virtual currency scheme*.

Virtual currency schemes are relevant in several areas of the financial system and are therefore of interest to central banks. This, among other things, explains the ECB's interest in carrying out an analysis, especially in view of its role as a catalyst for payment systems and its oversight role.

The ECB report begins by defining and classifying virtual currency schemes based on observed characteristics; these might change in the future, which could affect the current definition. A virtual currency can be defined as a type of unregulated, digital money which is issued and usually controlled by its developers, and used and accepted among the members of a specific virtual community.[47]

Depending on their interaction with traditional, "real" money and the real economy, virtual currency schemes can be classified into three types:

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[45] Financial Crimes Enforcement Network, FinCEN Fines BTC-e Virtual Currency Exchange $110 Million for Facilitating Ransomware, Dark Net Drug Sales, 26 July 2017 (Jun. 18, 2018), available at https://www.fincen.gov/sites/default/files/2017-07/BTC-e%20July%2026%20Press%20Release%20FINAL1.pdf.

[46] Ministerio del Poder Popular para Relaciones Interiores, Justicia y Paz, Desmantelado galpón de moneda virtual "Bitcoin" en Carabobo, 27 enero, 2017 [Ministry of the People's Power for Interior, Justice and Peace, Dismantled Shed of Virtual Currency "Bitcoin" in Carabobo, 27 January 2017] (Jun. 18, 2018), available at http://www.mpprijp.gob.ve/index.php/2017/01/27/desmantelado-galpon-de-moneda-virtual-bitcoin-en-carabobo/?platform=hootsuite.

[47] European Central Bank, Virtual Currency Schemes (October 2012) (Jun. 18, 2018), available at http://www.ecb.europa.eu/pub/pdf/other/virtualcurrencyschemes201210en.pdf.

1) those that refer to closed virtual currency schemes, basically used in online games;

2) those that have a unidirectional flow (usually an inflow), i.e. there is a conversion rate for purchasing the virtual currency, which can subsequently be used to buy virtual goods and services, but exceptionally also to buy real goods and services;

3) those that have a bidirectional flow, i.e. the virtual currency in this respect acts like any other convertible currency, with two exchange rates (buy and sell), which can subsequently be used to buy virtual goods and services, but also to purchase real goods and services.

The ECB considers that the absence of a distinct legal framework leads to other important differences as well:

1) traditional financial actors, including central banks, are not involved. The issuer of the currency and scheme owner is usually a non-financial private company. This implies that typical financial sector regulation and supervision arrangements are not applicable;

2) the link between virtual currency and traditional currency (i.e. currency with a legal tender status) is not regulated by law, which might be problematic or costly when redeeming funds, if this is even permitted;

3) the fact that the currency is denominated differently (i.e. not the euro, U.S. dollar, etc.) means that complete control of the virtual currency is given to its issuer, who governs the scheme and manages the supply of money at will.

The ECB considers that in the current situation, virtual currency schemes:

1) do not pose a risk to price stability, provided that money creation continues to stay at a low level,

2) tend to be inherently unstable, but cannot jeopardize financial stability owing to their limited connection with the real economy, their low volume traded and a lack of wide user acceptance,

3) are currently not regulated and not closely supervised or overseen by any public authority, even though participation in these schemes exposes users to credit, liquidity, operational and legal risks,

4) could represent a challenge for public authorities, given the legal uncertainty surrounding these schemes, as they can be used by criminals, fraudsters and money launderers to perform their illegal activities,

5) could have a negative impact on the reputation of central banks, assuming the use of such systems grows considerably and in the event that an incident attracts press coverage, since the public may perceive the incident as being caused, in part, by a central bank not doing its job properly, and

6) do indeed fall within central banks' responsibility as a result of characteristics shared with payment systems, which give rise to the need for at least an examination of developments and the provision of an initial assessment.[48]

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[48] Virtual Currency Schemes, *supra* note 47.

In July 2014, the EBA issued its considered opinion on virtual currencies. From its perspective as a prudential banking policy authority for the European Union, the EBA highlighted a lengthy list of risks to virtual currency participants, existing financial institutions and regulators. The EBA opinion concluded that in the short term only the certain risks that arise during the interaction between virtual currencies and regulated financial institutions are able to be regulated.

These presently regulable risks would include the risk of money laundering and financial crime, contagion risk to conventional payment systems and user-related information risks. For these risks, the EBA has recommended that existing financial institutions should be discouraged from dealing with virtual currencies, thereby "shielding" them while at the same time mandating that virtual currency exchanges comply with anti-money laundering and counter-terrorist financing requirements.[49]

The European Commission has a similar definition that electronic money is a digital equivalent of cash, stored on an electronic device or remotely on a server. On 26 May 2016, the European Parliament adopted a resolution on virtual currencies (2016/2007(INI)) with the aim of implementing an approach for the legal regulation of virtual currency at the EU level and identifying the problems associated with the use of virtual currency.[50]

By the end of 2016, legal regulation at the EU level had been adopted only with regard to preventing the financing of terrorism and the legalization of the proceeds of crime, on the basis of which in October 2016 an Opinion of the European Central Bank was adopted.[51]

Detailed regulation will certainly be a long process, with respect to the fact that the technology itself, which is about to be regulated, is developing faster than the legislator's regulatory attempts.

Belgium. The National Bank of Belgium has warned investors and the public of the dangers of virtual currencies and declared that they are not legal tender; and the Minister of Justice has announced his intention to impose strict regulations on virtual currency activities.[52]

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[49] European Banking Authority, EBA Opinion on "Virtual Currencies," EBA/Op/2014/08, 4 July 2014 (Jun. 18, 2018), available at http://www.eba.europa.eu/documents/10180/657547/EBA-Op-2014-08+Opinion+on+Virtual+Currencies.pdf.

[50] European Parliament resolution of 26 May 2016 on virtual currencies (2016/2007(INI)) (Jun. 18, 2018), available at http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P8-TA-2016-0228.

[51] Opinion of the European Central Bank of 12 October 2016 on a proposal for a directive of the European Parliament and of the Council amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing and amending Directive 2009/101/EC (CON/2016/49) (Jun. 18, 2018), available at https://www.ecb.europa.eu/ecb/legal/pdf/en_con_2016_49_f_sign.pdf.

[52] National Bank of Belgium, Digital Currencies: Threats and Opportunities for Monetary Policy, Press Release, 16 June 2017 (Jun. 18, 2018), available at https://www.nbb.be/en/articles/press-release-digital-currencies-threats-and-opportunities-monetary-policy.

The Baltic countries do not hurry with the adoption of legislation on cryptocurrencies either. The most progressive in these terms is ***Estonia***, which is planning to launch a new Estonian digital currency, similar to Bitcoin and Ethereum – *Estcoin*.[53] "Blockhive OÜ," owned by Japanese investors, installed equipment for cryptocurrency mining and since the autumn of 2017 has been engaged in the production of cryptocurrency in the industrial park of Estonia Pakri, and it is already expanding its production.

Lithuania and ***Latvia***, when choosing a method for regulating cryptocurrency, are Europe-oriented. In October 2017, the Central Bank of Lithuania outlined the legislative framework that can regulate the cryptocurrency turnover. The laws are applied by proceeding from the features of the project and the currency itself. In addition, the regulations relating to securities, money transfers, collective investments and a number of other financial transactions can also be used for blockchain.[54]

The State Revenue Service of Latvia declared that cryptocurrency is a commodity or a product and is subject to value added taxation[55] despite the obvious contradiction with the pre-judicial decision No. C-264/14 of the European Court of Justice of 2015, according to which Bitcoin is defined as a currency (means of payment), but not a commodity and is not subject to taxation on commodities.[56] In 2017, amendments came into force in the Law on the Prevention of Money Laundering and Terrorism Financing, where virtual currency is defined as a digital representation of the value which can be transferred, stored or traded digitally and operates as a means of exchange, but has not been recognized as a legal means of payment, cannot be recognized as a banknote or coin, non-cash money and electronic money, and is not a monetary value accrued in the payment instrument.[57]

Bulgaria. The legal status of virtual currencies in Bulgaria remains uncertain. The Bulgarian National Revenue Agency (NRA) states that the personal income for

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53 Peter Teffer, *Estonia Tests Water for Own Virtual Currency*, EUobserver, 24 August 2017 (Jun. 18, 2018), available at https://euobserver.com/eu-presidency/138796.

54 Bank of Lithuania, Bank of Lithuania Announces Its Position on Virtual Currencies and ICO More, 11 October 2017 (Jun. 18, 2018), available at https://www.lb.lt/en/news/bank-of-lithuania-announces-its-position-on-virtual-currencies-and-ico.

55 Valsts ieņēmumu dienests, Par darījumiem ar kriptovalūtu un nodokļiem, 07. maijā, 2017 [Service of State Revenues, On Transactions and Taxes with Cryptocurrencies, 7 May 2017] (Jun. 18, 2018), available at http://m.lvportals.lv/visi/e-konsultacijas/11918-par-darijumiem-ar-kriptovalutu-un-nodokliem/.

56 Judgment of the Court (Fifth Chamber) of 22 October 2015 (request for a preliminary ruling from the Högsta förvaltningsdomstolen – Sweden) – *Skatteverket v. David Hedqvist* (Case C-264/14) (Reference for a preliminary ruling – Common system of value added tax (VAT) – Directive 2006/112/ EC – Articles 2(1)(c) and 135(1)(d) to (f) – Services for consideration – Transactions to exchange the "bitcoin" virtual currency for traditional currencies – Exemption) (2015/C 414/08) (Jun. 18, 2018), available at https://publications.europa.eu/lv/publication-detail/-/publication/3f2f909f-a23b-11e5-b528-01aa75ed71a1/language-lv.

57 Law on the Prevention of Money Laundering and Terrorism Financing, "Latvijas Vēstnesis," 116(3900), 30.07.2008, "Ziņotājs," 16, 28.08.2008 (Jun. 18, 2018), available at https://likumi.lv/ta/en/en/id/178987.

physical persons from trading with virtual currencies must be declared with the annual tax return. The tax due is 10% from the annual basis of assessment. The NRA confirms that for the purpose of taxation the income from the sale of cryptocurrencies shall be treated equally as the income from the sale of financial assets. Where the transactions are carried out by a legal entity, the rules for corporate taxation shall be applicable. Nevertheless, the NRA stance is not clearly established, for the fact remains that virtual currencies are scarcely regulated in Bulgaria. Therefore, those requirements shall not apply to Bitcoin and other crypto exchanges.[58]

Croatia and ***Slovenia*** are two countries with a certain common history, having both been part of the former Yugoslavia. It is therefore not surprising that the countries have similarities in their perspectives on blockchain technology and its applications.

Slovenian regulators have released a statement clarifying certain ambiguities related to Bitcoin and other digital currencies. The Tax Administration of the Republic of Slovenia said it received queries from taxpayers who were interested in the possible tax implications of bitcoin transactions. In response, the Tax Administration requested a formal decision from the Ministry of Finance, which, in reply, stated that Bitcoin remains a virtual currency – thus, it is not a "monetary asset" under Slovenian law.[59]

In 2018, Croatian and Slovenian businesses and crypto-enthusiasts are coming together in Croatia to map out strategies that will create a framework for cryptocurrency policy in their countries.[60]

The Czech Republic previously had no law regulating cryptocurrency. An anti-money laundering law prepared by the Finance Ministry requires virtual currency exchanges to determine the identity of customers. Bitcoin users will no longer be able to "hide behind fake names or nicknames."

The Finance Ministry determined that it is possible to disguise links to criminal activity using virtual currency and that virtual currency poses the risk of tax fraud. The law has been endorsed by the House and now heads to the Senate. Cryptocurrency users have called the law a disaster.[61]

In ***Denmark***, the two EU directives are transposed into Danish law in the Payment Services Act, which came into force in 2009. The previous Danish Act also regulated

[58] Vassil Kostov, *The Legal Framework of Cryptocurrencies in Bulgaria*, Legal Net, 13 February 2018 (Jun. 18, 2018), available at https://1legal.net/en/blog-read129-the-legal-framework-of-cryptocurrencies-in-bulgaria.

[59] Nermin Hajdarbegovic, *Slovenia Clarifies Position on Cryptocurrency Tax*, CoinDesk, 24 December 2013 (Jun. 18, 2018), available at https://www.coindesk.com/slovenia-clarifies-position-cryptocurrency-tax/.

[60] Croatia and Slovenia Cryptocurrency Enthusiasts Plan Self-Regulation, Crypto Economy, 21 February 2018 (Jun. 18, 2018), available at https://www.crypto-economy.net/en/croatia-and-slovenia-crypto currency-enthusiasts-plan-self-regulation/.

[61] Czech Republic Introduces Law Regulating (Restricting) Bitcoin, CCN.com, 31 January 2017 (Jun. 18, 2018), available at https://www.ccn.com/czech-republic-introduces-law-regulation-bitcoin/.

a number of electronic systems for the payment of goods and services that were not covered by the two directives, e.g. electronic vouchers that represent a claim for a number of services rather than a monetary amount. Since Denmark wanted to continue regulating these systems, the concept of payment substitutes was introduced.

Virtual currencies as defined above are usually regulated by Danish law if they have an issuer. In that case, they are normally either e-money or payment substitutes. Whether they belong in one category or the other generally depends on whether they can be used with other persons than the issuer. If this is the case, they are usually defined as e-money.

Conversely, bitcoins and similar solutions with no central issuer are covered neither by European legislation nor by the Danish Payment Services Act. When virtual currencies are characterized as unregulated, this is the type referred to. The absence of regulation reflects the fact that there is no issuer against whom statutory claims can be made.[62]

Finland. Finland's Financial Supervisory Authority (FSA) issued a warning that initial coin/token offerings (ICOs/ITOs) and cryptocurrencies are risky and highly speculative investments. The FSA warned consumers of the volatile price of Bitcoin and other digital currencies, citing the EBA's 2013 publication on the risks of crypto-currencies.

A new research paper released by the Bank of Finland has lauded the self-governing capacity of the bitcoin ecosystem. The paper states that

> bitcoin cannot be regulated. There is no need to regulate it because as a system it is committed to the protocol as is and the transaction fees it charges the users are determined by the users independently of the miners' efforts.

The paper analyzes the fundamental underpinnings of Bitcoin, and explores an array of potential use-cases for the technology. The researchers conclude that Bitcoin's design as an economic system is revolutionary. Its apparent functionality and usefulness should further encourage economists to study this marvelous structure.[63]

France. The Bank of France has issued warnings similar to other European nations. There were informal indications that France might have been willing to allow virtual currency companies to operate as payment service providers under French law, and France has now indicated it will implement customer identity verification rules for virtual currency platforms. France plans to create a legal framework for raising funds

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[62] Anders Laursen & Jon Hasling Kyed, *Virtual Currencies*, Danmarks Nationalbank, Monetary Review, 1st Quarter 85, 87 (2014).

[63] Gur Huberman et al., *Monopoly Without a Monopolist: An Economic Analysis of the Bitcoin Payment System*, Bank of Finland Research Discussion Papers 27 (2017) (Jun. 18, 2018), available at https://helda.helsinki.fi/bof/bitstream/handle/123456789/14912/BoF_DP_1727.pdf?sequence=1&isAllowed=y.

via cryptocurrencies and aims to become a leading center for offerings in bitcoin-style digital currencies.[64]

Greece. The Bank of Greece adopted the EBA's warnings to consumers regarding virtual currencies. Greek payment services law cannot be applied to virtual currencies, given that virtual currency exchange services do not fall under the definition of payment services.[65]

Ireland. Ireland's Department of Finance has proposed the creation of a new blockchain working group to help create cohesive regulation across government agencies. Revealed in a new report, titled "Virtual Currencies and Blockchain Technology," the working group would aim to help bring a coordinated approach to rules around cryptocurrencies and monitor developments in blockchain technology, "addressing considerations raised by consumers, industry, the EU, and governments worldwide."[66]

Ireland has a national cryptocurrency IrishCoin which works with organizations associated with the tourism, hospitality and pubs & entertainment sector, acting as a discount voucher, and for payment remittance.[67]

Iceland regulates virtual currencies as electronic currency through the Icelandic Exchange Act, which effectively prohibits entities from engaging in the exchange of virtual currency.[68]

Italy. A law requiring identification of parties in bitcoin transactions has been proposed in the Italian Parliament, but no regulation has appeared yet. Cryptocurrency is not legal tender. The Italian Ministry of Economic Development is working on a decree that aims at classifying the use of cryptocurrencies in the country and to list "service providers related to digital currencies." The Ministry of Economy and Finance, in its Press Release No. 22 of 2 February 2018, stated its commitment to examine the cryptocurrency phenomenon in Italy in all its aspects.[69]

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64 Reuters Staff, *France to Create Legal Framework for Cryptocurrency Offerings*, Reuters, 22 March 2018 (Jun. 18, 2018), available at https://www.reuters.com/article/us-france-cryptocurrencies/france-to-create-legal-framework-for-cryptocurrency-offerings-idUSKBN1GY0YE.

65 The Legal Framework of Virtual Currency Exchange Licensing and Operation in Greece, Law & Technology (Jun. 18, 2018), available at https://lawandtech.eu/en/2017/11/29/virtual-currency-exchange-licensing-in-greece/.

66 Department of Finance, Discussion Paper: Virtual Currencies and Blockchain Technology (March 2018) (Jun. 18, 2018), available at http://www.finance.gov.ie/wp-content/uploads/2018/03/Virtual-Currencies-and-Blockchain-Technology-March-2018.pdf.

67 IrishCoin (Jun. 18, 2018), available at http://irishcoin.org.

68 Foreign Exchange Act No. 87, 17 November 1992, as amended up to 1 May 2013 (Jun. 18, 2018), available at https://www.cb.is/library/Skraarsafn---EN/Capital-surveillance/Foreign%20Exchange%20Act%20-%20Copy%20(1)%20-%20Copy%20(1).pdf.

69 Valute virtuali: in consultazione pubblica lo schema di decreto per censire il fenomeno, Comunicato Stampa N° 22 del 02/02/2018 [Virtual Currencies: In Public Consultation the Decree Scheme to Assess the Phenomenon, Bulletin Prints No. 22 of 2 February 2018] (Jun. 18, 2018), available at http://www.mef.gov.it/ufficio-stampa/comunicati/2018/documenti/comunicato_0022.pdf.

The ***Luxembourg*** financial regulatory commission (CSSF) has issued a statement which concludes that virtual currencies are not legal tender. It warns that virtual currencies entail risks for their holders, and reminds financial services providers that carrying out activities in the financial sector requires authorization by the Minister of Finance and subjects them to CSSF supervision.[70]

The Netherlands does not regulate Bitcoin under its Act on Financial Supervision, but its national bank has released consumer warnings regarding the use of virtual currency. One court has ruled that it is a "medium of exchange" but not electronic money, and another court has classified virtual currency as an "object" subject to seizure. A Dutch court ruled in favor of a plaintiff who was owed a small amount of bitcoin in mining proceeds. In its ruling, the court expressly stated that Bitcoin represents a transferable value and has all the characteristics of a property right.[71]

In ***Poland***, cryptocurrencies are not illegal, but at the same time they are not legal tender. They are subject to capital gains taxes and value-added tax. Poland's Financial Ombudsman has called on the country's Ministry of Finance to regulate the local cryptocurrency industry, claiming that as Poland's cryptocurrency market is experiencing rapid growth, it should be subject to regulations that would protect customers of cryptocurrency exchanges.[72]

Portugal has been following trends that the European Union has laid down, such as the EU agreement to enforce closer regulation of cryptocurrencies, and such as an agreement by the European Council that proposed closer cryptocurrency regulations to prevent their abuse in money laundering and terrorism financing.

Portugal's Securities Market Commission has in the past revealed it was supervising banks and brokerages to keep a close eye on the Bitcoin hype that was sweeping the nation in December 2017.[73]

Spain. Virtual currencies are reportedly taxable as an electronic payment system under gambling law, but their treatment under other areas of law is unclear. Currently, the Spanish government is preparing blockchain-friendly legislation including

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70 Communiques 2014, Commission de Surveillance du Secteur Financier (CSSF) [Sector Press Releases 2014, Financial Sector Surveillance Commission] (Jun. 18, 2018), available at http://www.cssf.lu/fileadmin/files/Publications/Communiques/Communiques_2014/Communique__virtual_currencies_140214.pdf.

71 Rechtbank Amsterdam, ECLI:NL:RBAMS:2018:869, 14 February 2018 (Jun. 18, 2018), available at https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBAMS:2018:869.

72 Rzecznik Finansowy apeluje o uregulowanie finansowych technologii, PolskieRadio, 14.02.2017 [Finance Spokesperson Appeals for the Regulation of Finance Technology, PolskieRadio, 14 February 2017] (Jun. 18, 2018), available at https://www.polskieradio.pl/78/1227/Artykul/1727516,Rzecznik-Finansowy-apeluje-o-uregulowanie-finansowych-technologii.

73 Portugal's Regulator is Supervising Banks and Brokerages to Halt Bitcoin "Euphoria," CCN.com, 14 December 2017 (Jun. 18, 2018), available at https://www.ccn.com/portugals-regulator-is-supervising-banks-and-brokerages-to-halt-bitcoin-euphoria/.

possible tax breaks to attract companies in the emerging blockchain technology sector.[74]

Sweden becomes the latest nation to see its central bank consider a digital currency, a process that for most has included at least some exploration of blockchain-based digital currencies. The Swedish national bank recently hinted that it has plans to create a national cryptocurrency called E-krona.[75]

Switzerland. The Swiss financial regulator has defined licensing requirements for bitcoin kiosk operators and said that virtual currency platforms are subject to the anti-money laundering act, but other regulation is unlikely because virtual currencies are perceived as a marginal phenomenon.

The Swiss Financial Market Supervisory Authority (FINMA) revealed a potential ICO regulation which would use a three-tier system for classifying tokens based on their use and the rights and benefits they confer on a purchaser.

The proposed plan, which has not yet been implemented, sets forth four groups of tokens/coins:

1) payment tokens (cryptocurrencies), which would not be classified as securities;

2) utility tokens, which would generally not be considered securities if they have a use or can be exchanged for a service. However, the purchaser must be able to use the token at the time of the ICO;

3) asset tokens, which are widely considered securities and are subject to Swiss securities law;

4) hybrid tokens, which will have to be assessed on a case-by-case basis.[76]

The United Kingdom is a leader in cryptocurrency integration and one of the most favorable and convenient jurisdictions for conducting a cryptocurrency business. However, the final position of the government on legal regulation is still not worked out. The income (profit) of an economic entity is subject to capital gains tax, corporate tax and income tax.[77]

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[74] Giulio Prisco, *Government of Spain Considers Blockchain-Friendly Regulations*, Bitcoin Magazine, 22 February 2018 (Jun. 18, 2018), available at https://bitcoinmagazine.com/articles/government-spain-considers-blockchain-friendly-regulations/.

[75] E-krona, the Next National Cryptocurrency of Sweden, Crypto Economy, 2 February 2018 (Jun. 18, 2018), available at https://www.crypto-economy.net/en/e-krona-the-next-national-cryptocurrency-of-sweden/.

[76] FINMA, FINMA Publishes ICO Guidelines, Press Release, 16 February 2018 (Jun. 18, 2018), available at https://www.finma.ch/en/news/2018/02/20180216-mm-ico-wegleitung/.

[77] Revenue and Customs Brief 9 (2014): Bitcoin and Other Cryptocurrencies, Policy Paper, GOV.UK, 3 March 2014 (Jun. 18, 2018), available at https://www.gov.uk/government/publications/revenue-and-customs-brief-9-2014-bitcoin-and-other-cryptocurrencies/revenue-and-customs-brief-9-2014-bitcoin-and-other-cryptocurrencies.

Conclusion

Cryptocurrency is a new product of historical development and progress. It has become a liquid, easy to implement medium of exchange, alongside fiat money. Cryptocurrency performs one of the most important functions inherent in money – the exchange of information of the community, which recognizes it as an appeal. Cryptocurrency has already been recognized as a means of exchange. Therefore, in the near future circulation and mining of cryptocurrencies will become an integral part of the market economy.

E-money is also digital, however the main difference is that e-money is issued not only by the State, but also by commercial banks, creating a certain imbalance. The issuer of cryptocurrency is decentralized, and it exists only virtually.

Virtual currency possesses the nature of obligations rights as well as property rights, since it may be both a means of payment and a commodity.

A number of countries demonstrate a complete inability to respond adequately and competently to innovations and technological progress. But the emergence of decentralized systems and cryptocurrency will inevitably lead to evolutionary changes in the international legal system.

Even today there is already an international cryptocurrency community that does not have any single coordinating center. Only progressive jurisdiction and state regulation of cryptocurrency activity will allow the creation of the conditions that will ensure the implementation of legitimate and safe cryptocurrency relations.

It is quite obvious that it is necessary to determine the essence and nature of cryptocurrencies, as well as their legal status and functions, alongside cash and e-money.

Legal science is on the threshold of the theory of cryptocurrencies.

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