Секция «Юриспруденция»

Enforceability of Obligations Erga Omnes in ICJ Proceeding

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In 1970 the International Court of Justice (further – 'The Court', 'ICJ') made one of its most frequently quoted and controversial pronouncements in paragraphs 33 and 34 of Barcelona Traction, Light and Power Company Case (further – 'Barcelona Traction'), and I quote in part:

an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*. (Barcelona Traction, ICJ Reports 1970, p. 32)[1]

Since 1970 the concept has been referred to in eight other ICJ cases, but the Court has yet not admitted a claim based on a violation of an obligation *erga omnes*. The main purpose of my work is to briefly discuss relevant parts of those cases and make a suggestion, whether the possibility of enforcing obligations *erga omnes* in ICJ proceeding exists.

Before I proceed, I will answer two preliminary questions:

1) What are obligation *erga omnes*?

Paraphrasing what is stated in Barcelona Traction, obligations *erga omnes* are those, that are owed to international community as a whole and reflect 'a common core of norms essential for the protection of communal values and interests' (ILA Study Group 2000, para.105)[5] and thus any State is entitled to invoke the responsibility in case of their breach[6]. Defining the scope of these obligations is not subject to this enquiry.

2) What is standing?

Standing is a condition, under which a State seeking to respond to a violation of international law, needs to establish a sufficient link between itself and the legal rule that forms the subject matter of the enforcement action[3]. Obviously, any state is interested in seeing international law complied with, but mere existence of an interest does not itself entail a State to bring a claim in ICJ. Legal interest, in comparison to a mere interest, is 'clothed in legal form' (South West Africa, Second Phase, ICJ Reports 1966, p.34, paras. 49-51)[9] and can be found either in general international law, or in special treaty provisions.

In Barcelona Traction the Court said that all states have a legal interest in protection of obligations *erga omnes*. However, it did not explain if this interest could be vindicated through ICJ proceeding (except for judge Ammoun, who in his separate opinion speaks on the generality of standing in case of protection of communal interest[2]), which produced a descent amount of controversy in its post-1970 jurisprudence.

Nonetheless, despite this uncertainty among the judges, I suggest that more evidence was produced in support of the concept.

Firstly, the Court itself many times acknowledged possibility of invocation of responsibility by any State, other than the injured one. Such a possibility, when enshrined in a special treaty provision, does not seem to be big of a problem, and this can be seen in post-1970 decisions of the Court and in its earlier jurisprudence[10]. The most recent piece of evidence can be found in the Wall advisory opinion, where the Court, *inter alia*, speaks on the First Article of Four Geneva Conventions (which stipulates "The High Contracting Parties undertake to respect and to ensure respect for the present Convention...") and makes a conclusion that 'It follows from that provision that every State party to that Convention, whether or not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the instruments in question are complied with' (Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004, p. 199, paras.155-160)[7].

The more difficult question arises when there is no such special provision. In this case, grounds for standing can be found in customary law, codified in article 48 of ASR[6].

Secondly, the Court never rejected the concept itself. In Nuclear tests cases both Australia and New Zealand in their memorials chose obligations *erga omnes* as a ground for standing. If the cases were not to become moot, the conclusions on the concept could be more accurate. Nonetheless, many judges elaborated on the topic. For example, four judges in their joint dissent observed that the question of standing in that case was 'capable of rational legal argument and a proper subject of litigation before this Court' (Nuclear Tests Case (New Zealand v. France), ICJ Reports 1974, Joint Diss. Opinion of Judge Onyeama et al, p.521, para.52)[7]. As the Nuclear Tests was the soonest after 1970 pronouncement, to my mind it provides the most proper interpretation of the Dictum, as reflects condition of international law at that point.

In East Timor case Portugal also based its standing on the right of people to self-determination, which was found to be *erga omnes* by the Court[4]. If the claim was not conflicted with indispensable third party rule, it could become the first such case to be admitted in ICJ.

To conclude, it seems that the possibility of invocation of responsibility in case of breach of *erga omnes* obligations exists in international law for a long time. Nevertheless, the graveness of obligations themselves and thus rareness of their breaches do not provide states with many chances to develop more accurate views on the concept, which is actually not a bad thing.

Литература

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2. Barcelona Traction, Separate Opinion of Judge Ammoun, p.286 at pp.325-6

3. Christian J. Tams, Enforcing Obligations Erga Omnes in International Law, pp.25-9

4. East Timor (Portugal v. Australia), ICJ Reports 1995, p.90 at p.102

5. First Report of the International Law Association Study Group on the Law of State Responsibility

6. ILC, Articles on Responsibility of States for Internationally Wrongful Acts (2001) [ASR], art.48

7. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004, p.136

8. Nuclear Tests Case (New Zealand v. France), ICJ Reports 1974, p.457

9. South West Africa (Second Phase), I.C.J. Reports 1966, p.6 at p.34, paras. 49-51

10. S.S. Wimbledon (United Kingdom v. Germany), 1923 PCIJ (ser. A) No. 1