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Environmental Unilateralism in the Arctic in a Human Rights Approach

I. Introduction

Promoting the rule of law at national and international levels is at the heart of the United Nations'(hereinafter: UN) mission. Establishing respect for the rule of law is fundamental to the effective protection of human rights among others. The principle that everyone — from the individual right up to the State itself — is accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, is a fundamental concept which drives much of the UN's work. But what if it does not work on international level, because there is no effective international legal instrument for a problem? Can States handle the problem by themselves and adopt unilateral acts to ensure the respect of rights on international level?

By the middle of the 20th century, it was becoming clear that human action had significantly increased the pollution of the environment and it have had direct consequences to the whole word as the right to healthy environment challenges every State. As the list of human rights has already include environmental issues, the States have special responsibility in both of the fields. In the following essay the special territory of the Arctic will be presented as a field of challenge for environmental and human right questions as well and the unilateral solutions of its coastal States: whether they are valid on international level as a ground for guarantee of human rights and the protection of environment failing any special international legal instrument for the same purpose.

II. Arctic challenges-why is this region so special in every respect?

As all human activities of almost every State leave an environmental footprint in the Arctic as the region has two major enemies: global warming and pollution, and these two form a cycle in their effects. [16]

The mainly ice covered sea surface has already started to melt drastically in the past few years. [16] The melting of once-permanent ice is already affecting native people, wildlife and plants, but the real problem is, that the effects of climate change carries no passport, and no country is immune.

As ice melts, contaminants conserved in the ice for long decades are getting into the water again and get far away with the movement of currents, Owing to the reduction of ice new shipping routes opens, **fishing facilities widen out and the exploitation of resources hidden in the continental plate is increasing in the** foreseeable future. [26] Spill probabilities will also increase with a greater number of vessels and volume of oil or other hazardous substances transported as both cargo and fuel, [19] and the main problem is that **all ice-covered area,** as a matter of fact, **is against degradation process. [7]**

Considering the fact, that the cause of these changes are imputable to human activities as a whole , only a cooperative restrictive activity of States can reduce or stop these impacts beside the fact, that the fragile and extremely vulnerable area of the Arctic needs special treatment. According to the prevailing law of the sea no State can exercise exclusive sovereignty over the region. [30] There are debates even over maritime frontiers and no specific international regulation is installed for the protection of it.

However, it is the coastal State which is touched by the effects of sea pollution in the first place not to mention the global effects, but it is always the coastal State who has to deal with the problem first. Although climate change is a global problem, and it is impossible to fight against it by unilateral achivements only, but in the case of vessel pollution of foreign ships, it is possible, at least fight for the interest of the coastal state.

III. Relation between human rights and environmental questions

While the UN Charter of 1945 marked the beginning of modern international human rights law, for environmental protection, it was the Stockholm Declaration of 1972 which meant the starting point and after that several international instrument strengthened the adequate and satisfactory environment as a human right.[28] [8] [3; 43.] Even the International Court of Justice is willing to acknowledge the relationship between the two as expressed in the case of *Gabcikovo-Nagymaros* whereby it is stated that "the protection of the environment is likewise, a vital part of contemporary human rights doctrine, for it is *sine qua non* for numerous human rights such as the right to health and the right to life itself..... as damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments".[12; 7] The same has already been declared by regional tribunals,too.[33]

IV. Impacts of this conclusion on obligations of States

Traditional debate on sovereignty has conceived of human rights and environmental law as limitations on, or even as threats to the State's freedom and independence, a more contemporary approach recognizes that protecting both human rights and the environment does not limit the State's sovereignty, but rather provides an expression of it.[29] The State is bound to ensure the protection of environment, as it is liable for the victims of pollution and other environmental damages,[8; Principle 22.] so it has to be kept in mind, that States are responsible not only towards other States and the international community as a whole under the generally accepted principle of *sic utere*,[8; Principle 21.][20] but also toward their own citizens, who have the right to healthy environment. On the other hand it has the right to protect itself from external impacts, as for pollution of those who do not stand under the jurisdiction of the State. Can a State unilaterally, by national legislations impose obligations on others to protect its own territory from pollutions?

The Arctic is home to almost four million people, including an increasing majority of non indigenous settlers and these people are directly affected by sea pollution although their rights are specially protected by international legal instruments. Rural Arctic residents in small isolated communities who depend on subsisitence hunting and fishing are likely to be affected not only in the health, but through dietary, social and cultural elements, thus their human rights relating to existence are violated so as the interest of coastal States.

IV. Unilateralism as a solution?

4.1. The rule of law — place of unilateral acts in the sources of international law of the sea

The international law of the sea (LOS) has been seen as the product of the voluntary subscription of States to rules of law namely to treaties and to customary law, as generally accepted sources of international obligations and the elements of rule of law concerning the sea. However, LOS is described as "not a static body of absolute rules, but rather a living, growing, customary law, grounded in the claims, practices, and sanctioning expectations of nation-states..." [5]. Technological changes of the time and the disturbances that have resulted in environmental and social matters require change in the existing law. It is not a matter of recording old rules, but one of making new ones, and there are no other ways of doing this than by agreement or unilateral action, and when agreement is not forthcoming, then by unilateral action alone. [25; 31.] For instance, in order to create a new convention to protect coastal States from the dangerous shipments of ultrahazardous radioactive materials, the International Maritime Organisation (IMO) convened a Special Consultative Meeting in March 1996, and thirteen nations called for additional action to establish a new legal regime. The initiative failed. Because of these sharp disagreements, it is to be expected that nations will take unilateral or coordinated actions to assert or protect their positions while international efforts to build a comprehensive regime continue. In fact, what should the concerned coastal States do than act unilaterally to protect itself?

State can incur obligations through these kinds of formal acts which are not necessarily sources of international law within the classical meaning but which are performed with the intent to produce effects in international law, known as unilateral acts. Much of the doctrine concludes that they do not constitute a source of international law,[4; 32.] but it does not mean that a States cannot create international law through unilateral acts, especially because they have a significant role in the formation of customary law. [9; 253.] The law governing the seas is thus developed by the continuous process of interaction in which the decision-makers of individual States unilaterally put forward claims of the most diverse and conflicting character" and decision-makers in other States weigh and appraise these competing claims and ultimately accept or reject them.

International tribunals have not taken a position on the question of whether unilateral acts are a source of international law; they satisfied with the statement, that such acts are a source of international obligations if they fulfil the requirements established in the *Nuclear Tests cases* in 1974 in order to guarantee legal security, as an element of rule of law. [24; 43.]

4.2. The first unilateral stept to protect the environment of the Arctic: the Arctic Waters Pollution Prevention Act (AWPPA) by Canada

By 1970 off-shore exploitation of crude oil has begun in Prudhoe Bay which increased the ship transport in the area. The incident of the S.S. Manhattan in 1969 highlighted the fragile ecosystem and the vulnerability of the region and dangers laid down in oil exploitation and its transportation so as the lack of international legal instrument to protect it, thus Canada as a modern crusader neglicted the existing LOS rules with the principle of *mare liberum* and unilaterally settled the question of pollution.

Without denying access to shipping in the waters of the Canadian archipelago, it precludes the passage of ships threathening the pollution of the environment in a shipping safety zone of 100 miles.[1] In order to enter into the zone, ships are required to meet Canadian design, construction and navigational safety standards. The liability of these ships is limited but does not depend upon proof or fault or negligence. If the ship is owned by another State, the necessary safety standards are given effect by arrangement with the State concerned. Prime Minister Trudeau emphasized that this regultaion is temporarily and is in force as long as international law provides for a satisfactory protection for the region,[2; 6.] and this Act shall be considered as the first step to development which serves the protection of environment for the humanity as a whole.[27; 62.]

4.3. International regulation to protect Arctic: Article 234 of UNCLOS and general rules

The 1982 UNCLOS contains several dispositions on sea pollution, [35. Art. 56, 207-212 especially 211(5) and 211(6).] but Article 234 is the only one which is elaborated especially to Arctic-conditions. The common lack of these provisions is that they authorise coastal States to take preventive measures on foreign ships only in the newly created territory of exclusive economic zone [hereinafter: EEZ]. [35; Part V.] In addition, coastal State is entitled to adopot special regulations for the prevention, reduction and control of marine pollution from vessels in ice-covered areas within the limits of the EEZ, where particularly severe climatic conditions and the presence of ice covering such areas for most of the year create obstructions or exceptional hazards to navigation, and pollution of the marine environment could cause major harm to or irreversible disturbance of the ecological balance. [35; Art. 234.] The problem is, if ice melts, and it does not cause the above mentioned hazards to navigation, the special mesures have to be deregulated, and only general rules can be applied in order to protection.

As for the other rules of UNCLOS concerning prevention of marine pollution, according to them coastal State is free to adopt any preventive mesure only for the territorial sea,[35; Art. 211.] namely its own State territory, but in the EEZ the possibilities are limited. International rules and standards to prevent, reduce and control pollution of the marine environment from vessels can only be establishes by coastal State through the competent international organization or general diplomatic conference, and such rules and standards shall be re-examined from time to time as necessary.[35; 211(1)] Coastal State also has the right to create special zones in EZZ where extra protection is necessary but for this there are several serious conditions to fulfill including a authorisation procedure by the competent international organisation.[35; 211(6)] In other words, in all instances mentioned above for the EEZ, the coastal State is limited in its field of operation by the generally accepted international rules and standards provided by the IMO.[21; 329.]

4.4. Unilateral development by the USSR

As the USSR dispose a coast of 10.000. km by 5 seas and a rich world of islands and archipelagos thus the State is seriously affected by offshore pollutions, not to mention the greatest extent of continental shelf in the world with many resources to expoite. The USSR after ratification of UNCLOS (10 December 1982) but long before its Soviet entry into force (12 March 1997) elabored an edict and a decree on eonomic zone so as a decree

on the safeguarding of the economic zone and another on the protection and preservation on it. [11; 172–183.]

The edict on EEZ clearly shows that the USSR legislation established rules for prevention, reduction and control of pollution of the marine environment and it is enforced in EEZ areas *covered with ice* and having partiular natural caracteristics, where pollution could cause major harm to the ecological balance or disturb it irreversibly.

Examining the provisions of Soviet legislation it is doubtless, that it is in conform with UNCLOS in some way, but it unilaterally establishes strict regulations without respecting UNCLOS, namely: according to Article 234 of UNCLOS ice-covered areas shall be regulated only as far as they are covered with ice and coastal States only have the right to regulate the safety of navigation according to general guidelines and relating international law which shall be take into account, but no authorisation of international organisation is need. These general intenational guidelines do not accept regulations relating to the design, construction, manning or equipement of vessels transporting in the EEZ, but in the Soviet legislation such kind of regulation are laid down. If it melts, no strict regulation can be applied, just the general rules according which for such kind of regulation in the EEZ there is a need to be authorised by the IMO. No authorisation process has been taken place.

The international legal literature considers the Soviet edict and decrees as a central element in the evaluation of customary norms of the law of the sea began by the Canadia AWPPA. These regulations are strictly similair to the Canadian achievements. Although formation of customary law requires general practice and not just the municipal legislation of one single State, special circumstances are present in this case. In the special case of the Arctic only 8 States are concerned as a community to form a general practice not to mention the fact that in practice, great powers have more influence than others on the formation of customary rules, and as the USSR is a major naval power and extend on a signifiant size of territory in the Arctic, so as the 1970 unilateral act of Canada was also welcomed, the relevance and developing caracter of the Soviet legislation is undeniable. [11; 172–183]

4.5. Other States in the area

After that the 27.000 tonnes of crude oil of *Exxon Valdez* spilled into the sea, the USA elaborated its *Oil Pollution Act,* and a special one concerning offshore oil exploitation and transportation near the coasts of Alaska. Norway has its *Maritime Safety Act* from 2007, but it does not include specific measures to ice-covered regions. Contrarily, the Danish acts prescribe the establishment of a service zone where icebreakers ensure the safety of navigation, but as the use of this searoute is just facultative, it cannot be regarded as an effective mesure in order to prevent pollution from vessel collision.[23; 424][17; 8.]

4.6. Legal justification of unilateral act of State creating obligation as an international norm

Several States has objected to unilateral regulations as they contardict to every aspect of the principle of *mare liberum* and the flag State doctrine. [14; 131.] [27; 64.] The *Anglo-Norvegian Fisheries* case has already declared that if a national act of State affects other States, the Act shall be examined under the title of legal security weather it may be regarded as binding on other States.[10; 20.] In the *Lotus case* the Permanent Court

of International Justice while examining the extra-territorial effect of a Turkish national legislation stated that practice of national jurisdiction in international context shall be considered as legal if there is no rule of internatonal law which prohibits it.[34; 13-15.] However, in this case the freedom of the high seas may be regarded as a prohibitive rule, but it has never been applied in absolute terms. Moreover, state practice of major maritime powers conclusively establishes that States may and do exercise authority over foreign vessels on the high seas in order to prevent injury to their territory and to defend their security and well being. In Canadian view a serious threat to the environment of a State represents a threat to its security. The right ot environmental integrity, as a matter of fact, is the same as right to territorial integrity so the principle of *self defense* enable the State to take reasonable preventive protective measures.[2] Since the impact of pollution is usually upon coastal residents, the coastal State has an understandable interest in preventing the discharge of oil. If it were practicable for the coastal State to enforce prohibitory regulations in adjacent waters, there would seem to be sufficient justification for considering this under general community policy.[22; 566.] Moreover, it would be a distortion of the freedom of the high seas to consider it as a licence to pollute marine environment and the shores of other States, and to argue that State is barred from taking preventive protection against polluting activity. It would also be a negation of the fundamental principle of international law laid down in the *Trail Smelter case*. The same is declared in the *Corfu Channel Case* which states that every state is obliged not to knowingly allow its territory to be used for acts contrary to the rights of other States.[6; 22.] A State has a rigt to self defense if the act carried out is against its fundamental interest. This principle was applied by US act against alcohol smuggling in 1935 which expanded US jurisdiction 50 more nautical miles beyond territorial sea.[18; 104-105.] Even the category of contigous zone serves the aim of protection of State interests, but this additional 12 miles is not sufficient to protection against pollutions.[32; 45.] Concerning environmental damages and their prevention — as it is learned from previous cases — the urgent need to for unilateral action is not merely being asserted as necessary to safeguard a particular essential interest of a State from a grave and imminent peril of irreversibil pollution, but rather those of the international community as a whole as it was stated in the 1998 Fisheries Jurisdiction Case between Spain and France. [5; 335] Summarizing the facts above, there is no legal burden for expanding national jurisdiction to prevent pollution under the principle of self-protection, and these unilateral acts do not confront with the rule of law of the sea. [31]

V. The future in unilateralism?

Pollution is a danger increasing with melting of ice, as huge unexplored hydrocarbon stores become accessible with sea routes to transport, too and coastal States need to assure the protection of their territory to ensure the ideal conditions of environment to their citizens as well, not to mention the interest of State not to be polluted by foreigners. On the other hand it is a duty of State to take all possible steps to prevent pollution of the seas by substances that are liable to create hazards to human health,[8; Principle 7.] and take effective actions for the protection and enhancement of the environment in accordance with their respective capacities and responsibilities. In order to fulfil its obligation on be-

half of the principle of self-protection and regarding the generally ackowledged Canadian and Russian practice, the polar States have the right to establish unilaterally regulation to respect by all who enter into their EEZ especially when international legal instruments do not serve the protection of this fragile ecosystem, and these unilateral rergulations do not confront with the traditional system of rule of law. In addition, considering the development in the law of the sea and extending coastal State jurisdiction through the last decades, it is not sure that this expansion has came to the end and would not continue. As long as international law does not elaborate better solution, coastal States have the right to enforce these kinds of mesures. Unilateralism"...a lot easier to work than genuine multilateralism..." and it is"...not, in all circumstances, [a] sin.[15; 1.]

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