УДК 340.111

REGULATION OF HUMAN RIGHT TO DEFENSE IN INTERNATIONAL LAW

Dmitriy BOYCHUK,
Postgraduate Student at the Department of Theory of State and Law of
Yaroslav Mudriy National Law University

SUMMARY

The article is devoted to theoretical analysis of the human right to defense in public international law. The analysis of the legal literature in the mentioned topic is carried out. Examples are given of the norms of international acts that establish the human right to defense. Develops the thesis that a person is a subject of international public law. The types of practical realization of the human right to defense in international law are considered. It has been suggested that the qualitative regulation of the human right to protection by acts of an international legal nature and the high level of its practical implementation can not only contribute to the protection of human rights, but also have a positive impact on international relations in today's globalized world.

Keywords: human rights, human right to defense, defense of rights, subjects of international law.

РЕГЛАМЕНТАЦИЯ ПРАВА ЧЕЛОВЕКА НА ЗАЩИТУ В МЕЖДУНАРОДНОМ ПРАВЕ

Дмитрий БОЙЧУК,
аспирант кафедры теории государства и права
Национального юридического университета имени Ярослава Мудрого

АННОТАЦИЯ

В статье проводится теоретическое исследование регламентации права человека на защиту в международном публичном праве. Осуществляется анализ юридической литературы в указанной тематике. Приводятся примеры норм международных актов, которыми устанавливается право человека на защиту. Развит тезис о том, что человек является субъектом международного публичного права. Рассмотрены виды практической реализации права человека на защиту в международном праве. Выдвинуто предположение о том, что качественное регулирование права человека на защиту актами международно-правового характера и высокий уровень его практической реализации может не только способствовать защите прав человека, но и оказывать положительное влияние международные отношения в современных условиях глобализированного мира.

Ключевые слова: права человека, право на защиту, защита прав, субъекты международного права.

SUMMARY

Articolul este dedicat analizei teoretice de reglementare a dreptului omului la apărare în dreptul internaţional public. Se efectuează analiza literaturii juridice în subiectul menţionat. Se analizează normele actelor internaţionale care instituie dreptul omului la apărare. Se dezvoltă teza că o persoană este un subiect de drept internaţional public. S-a sugerat că reglementarea calitativă a dreptului omului la protecţie prin acte cu caracter juridic internaţional şi nivelul ridicat de punerea sa în aplicare practică poate nu numai contribuie la protecţia drepturilor omului, dar, de asemenea, au un impact pozitiv pe relaţii internaţionale în lumea globalizată de astăzi.

Cuvinte cheie: drepturile omului, dreptul la apărare, de apărare a drepturilor, subiecte de drept internaţional.

Problem statement. The regulation, observance and defense of human rights in a modern, globalized world is an important element in both the securing of democracy and the rule of law in countries, and as an essential component of constructive peaceful international cooperation and development.

The relevance of the topic of research is confirmed by the degree of non-disclosure of the topic of regulation of the right to defense in international law in the context of a modern globalized society. How closely L.G. Udovyka mentions, globalization is a many-sided, multilevel and non-linear process of expanding, strengthening and accelerating the global integration of state-legal, economic-financial, socio-political institutions, ideas, principles, etc. Its consequence is the formation of a complicated global mega society, significant changes in the relevant societies, and etc.. Human rights in the conditions of globalization are considered as legal possibilities of a person to carry out appropriate actions for the satisfaction of his/her spiritual and material interests, providing existence and development, having specific which is connected with the features of the con-

tent of the process of globalization [7, p. 603]

The state of the research. Scientific analysis of human rights problems is carried out by many scholars J.-L. Bergel, O.M. Bolsunova, D.A. Bocharov, E.R. Dashkovskaya, R. Dvorkin, M.Yu. Zadnipryana, V.V. Lemak, D. V. Lukyanov, M.I. Kozyubra, A.M. Kolodiy, A.V. Petrishin, S.P. Pogrebnyak, V.S. Smorodinsky, E.A. Uvarova, Mark van Huk, S.V. Shevchuk, U.V. Schokin, L.Ya. Tragnuik, I.V. Yakovyuk etc.

The purpose and the task of the article is a general theoretical analysis of the regulation of the human right to defense in international law.

Essential material. The human right to defense is one of the fundamental human rights and exists as a legal guarantee to other rights. As we noted earlier, it is characterized by appropriate versatility and can be realized in various types of social relations, depending on the field of law, on the object of legal relations, the subject of the right to defense, etc. [5, p.19], [6]. Such a right is regulated both by the norms of the domestic national legislation and by the acts of an international law.

In the research of the regulation of human right for defense in international law, we must take into account the existing division of international law into public and private law. Differentiation for such legal systems is carried out in accordance with the presence or absence of the relevant private or public interest.

Traditionally, when using the term "international law" we are talking about international public law. For marking the research of the private-legal aspects of international relations, the term "international private law" is used. In our opinion, the human right to protection can exist and be implemented in both of these legal orders, since the consolidation and realization of such a right corresponds to the public interests of the relevant subjects of international law and to the individual private interests of individuals both. It is still an analysis of the specifics of the realization of the human right to defense in international public law that is the subject of our research.

Defining the limits of our work, it is impossible to ignore the right to arms as a component of human right to defense. In our opinion, the human right to arms is regulated by international public law, by the constitutional right of foreign countries or other domestic rules of foreign law. That is the reason we will not deepen in its analysis in this work. Study of the specifics of the regulation of such a right is carried out by us separately [4] and requires additional further research.

As we noted earlier, the human right to protection exists as a legal guarantee in relation to other rights [5, p.19]. On this basis, we can assume that the realization of such a right in international law is primarily about guaranteeing and protecting the rights of the so-called third generation (right to peace, right humanitarian aid, right to health and the environment, right to political, social and cultural self-determination, etc.). In the relevant international agreements, the rights of the third generation are defined as a necessary condition for the defense and protection of fundamental human rights: United Nations Declaration on the Right of Peoples to Peace (1984); African Charter on Human and Peoples' Rights (1986); Declaration of the United States Conference on the Human Environment (Stockholm Declaration, 1972); Rio de Janeiro Declaration on Environment and Development (1992), etc.) [10, p.54].

The human right to defense in international law is displayed in the fastening of various human rights. In our opinion, the human right to defense is strongly connected with the human right to life and the possibilities of defending such a right. A large number of international agreements also consolidate human right to life. Among them are: the Charter of the United Nations; the Universal Declaration of Human Rights (1948); the International Covenant on Civil and Political Rights; the European Convention on Human Rights; the African Charter on Human and Peoples' Rights (1981). According to scientists, the most complete description of the right to life is contained in the American Convention on Human Rights (1969). [15, p.202]

During the analysis of international agreements which regulates human rights, first of all, we should pay attention to the Declaration of Human Rights and Citizenship (1948). The right to defense is mentioned in Art. 7, according to which all people are equal before the law and have the right to equal defense be the law without any differences.

At first sight, it may seem that defense by the law can be understood as protection by the state. In our opinion, such a norm needs to be broadly interpreted, since the term "defense" in the law should is understood as the need to protect all law-protected relationships and by all the possibilities of realizing human rights for protection provided by the law (including self-defense, etc.).

Futhermore, the article mentions the right of a person to defend against any discrimination or any incitement to it. Such a statement today is already quite traditional for many acts of international law. Nevertheless, in the context of the current trends of a globalized world, it does not lose its relevance.

Different types of human right to defense are established by other norms of Declaration in accordance with the relations: the right

to defense of the accused person (Article 11); the right to defense from interference in family and private life (Article 12); the right to defense of the family (Article 16) etc.

Analyzing mentioned norms, it should be concluded that they cover a large amount of social and legal relations that need defense, and it is no doubt that the Declaration at the time of adoption was considered as a model for both "the spirit of the law" and the level of legislative technique, but some discussion issues may arise today.

For example, Art. 16 states that "The family is the natural and fundamental center of society and has the right to defense from the side of society and the state". In our opinion, the emphasizing of two specific subjects of protection in an international legal act of such a general level as the Declaration is not appropriate, as it may lead to unequal approaches of the definition of such subjects and, as a result -to the striking differences in using the law.

The Convention for the Protection of Human Rights and Fundamental Freedoms (1950) establishes the right of a person to be defended within the limits of the rules of Article 5 "The right to liberty and security of person" and Article 6 "The right to a fair trial". The abovementioned norms establish the list of cases when a person may be deprived of his liberty. It also mentions the right of the detained person to verify the lawfulness of such arrest; the right to secure a legal sanction in case of illegal arrest; the presumption of innocence in criminal proceedings; the right to "the time and opportunity to prepare for person's defense"; the right to self-defense; the right for legal defender; the right to an interpreter etc. Article 13 of the Convention specifically regulates the right to an effective way of defense in national agency, even if the offense was committed by persons who have done their official duties. [11]

American Convention on Human Rights (1969) in its preamble states that human rights require international protection in the form of a convention consolidating in that way the human right to defense in international law. The Convention establishes a large number of human rights (the right to life, the right to health, the right to privacy, etc.). Particular attention is paid by the Convention in Articles 8 and 25 to the varieties of realization of a person's right to trial defense.

In addition, Art. 31 establishes the possibility of including to the system the ways of defense of other rights (in accordance with the procedure mentioned in Articles 76-77). In our opinion, the possibility of expanding the list and content of the rights that can be defended by the Convention is an indicator of the proper level of legislative technique and corresponds to the modern requirements of normative legal acts.

The mentioned convention distinguishes between two ways of defense in the form of such bodies: the Inter-American Commission on Human Rights and the Inter-American Court on Human Rights.

A large number of norms of international legal agreements, which do not directly contain the term "defense", somehow or other regulate the human right to defense, for example, part 2. Art. 15 Declaration of 1948: "No one shall be baselessly deprived the citizenship or the right to change his or her citizenship". Such a norm indicates the protection of the human right to citizenship or the right to change it.

In the context of regulation of human rights in international law the question arises: is a person a subject of international law? The enumeration of subjects of international law is a controvertsial topic for an international legal science [16, p.168] The question about human as the subject is one of the largest debatable issues in modern science of international law. Until the middle of the twentieth century in the law literature dominated the opinion that the legal personality of the individual is completely absorbed by the legal personality of the state, with which a person is connected with the relations of citizenship [14, p.42].

In our opinion, the human right to defense in international law is closely connected with the responsibility of the state (as a subject of international law) to guarantee and implement such defense: there is an appropriate connection as a right (of the person) and obligation (of the state).

The legal consequences of the second world (in the form of the actual and legal recognition by the international community of the international charge of individuals) [footnote on the Nuremberg], the adoption of the Universal Declaration of Human Rights was a significant step to the recognition of the international legal personality of a person. Today there is no single opinion among scientists on this issue. According to the position of the Department of International Law of the Yaroslav the Wise National Law University human is recognized as the subject of international law. Such a position is based on the theory of "jus naturale" as is known, the person is the primary.

We agree with such a statement of the Department and accept it as a basis for the consideration of the human right to defense in international law.

First, with regard to the subjective structure of human right to defense in international law, it should be noted that a person acts either as an independent subject of international law or as a component of other subjects (as a representative

of a state, an international organization, etc). It should be noted separately that the person can use his/her right to defense as a component of humanity in general.

N.I. Uzdimaeva agrees with V.A. Usanova, who defines the "special subject" of self-defense is the world community that is united to solve global problems of the present: terrorism, ecological cataclysms, economic crises, etc. [17, p.29]. (Barcelona case track).

In our opinion, the emphasizing the world community as a subject of human right to defense in a certain way does not correspond to the traditional list of subjects of international public law (state, state-like education, international organizations, peoples and nations fighting for their independence, man) [14, p.32-42]

From another point of view, such a definition corresponds to the current trends of the globalized world and can be as an appropriate "model" to be used by the international community for defending common global issues.

The mentioned thesis confirms the idea that the rights of the third generation can be realized solely by the common actions of all participants in public relations [3]. I.B. Ivankiv also agrees with the author, and developing such a scientific position, emphasizes that it is impossible to really provide such rights for a person without guaranteeing their implementation for all: "Violation of any right of a third generation in a particular place results in violation of the rights of persons on whom this violation was not directly influenced"[10, p.55]

Separately, attention should be paid to the specifics of diplomatic defense. Such a type of defense is considered as one, which in accordance with international law and using diplomatic channels is provided by the state to its citizens in order to secure or restore their rights and interests violated by a foreign state. [International Law - Dictionary of Reference].

In our opinion, the realization of the human right to defense in international law can exist in the following types:

- appeal to the relevant competent judicial authority (ECHR, Inter-American Court, etc.,)
- appeal to an international organization (OSCE, UN, ICAO, WTO, International Committee of the Red Cross, UNESCO, etc.);
- defense of the accused person during an international trial (International Criminal Court);
- defense or self-defense during international armed conflicts;
- diplomatic or other protection of the state of its citizens;

Among the mentioned types of realization of the right to defense in international law for today, taking into account the European integration processes, we consider it necessary to pay special attention to the European Court of Human Rights (ECHR). The very existence and operation of such an international judicial institution is still an indicator of the realization of the human right to defense (as right to the defense of person's rights) at the highest international level. Unfortunately, domestic Ukrainian statistics on appeals to the ECHR have been steadily increasing over recent years, updating it's own "anti-record". In 2016, Ukraine ranked first in terms of the number of appeals to the ECHR, having formed 22.8% (18150 appeals) of the total (80,000 applications) [13]. But we should mention the fact that such statistics are based on the total number of applications accepted to the ECHR. Although there is a point of view that we need to calculate such statistics in a proportional way to the population of the country. In our opinion, such clarification should take place, but it is impossible to deny the existing increase in the number of applications while simultaneously reducing the population of Ukraine.

It should be noted that realization of the right to defense in the form of an appeal to the ECHR is not possible without the prior using of such a right within the limits of national legislation (using all available levels of the national judicial system) [CU, art.55]. In our opinion, this norm, on the one hand, is intended to provide an opportunity to resolve the conflict at the national level and reduce the burden on the ECHR. From another point of view, taking into account the specifics of the national judicial systems (in the form of temporal length of court proceedings at all instances), this results, at least, in delaying (on the part of the state) the provision to a person the opportunity to defend the violated right at the highest international level. It is well-known that such proceedings may continue for years (Schokin vs. Ukraine) [18].

The authors of the Great Ukrainian Legal Encyclopedia mention the term "interstate legal system", which means a holistic, structurally organized, consistent interaction of subjects of international law, which ensures the achievement of international law and order as a prerequisite for the functioning of the global world system as a and regional systems both. Such cooperation is carried out with the help of international legal norms and other legal ways [8, p.288]. In our opinion, this kind of interaction should balance the burden between national judicial systems and the methods of international human rights defense.

There is no doubt that the main purpose of international law is held as the prevention or cessation of armed conflict and war. Guessing that certain proceedings ("cases") in international courts format "man against the state" are indicators of many common problems in society the country, we can conclude that

the timely, fully and fairy resolution of such conflicts can generally help to reduce the level of tension in society and fulfill a preventive function in relation to probable problems.

Conclusions. To sum up, the following should be emphasized:

- the considering of humanity as a subject of international law is logically motivated and corresponds to the modern tendencies of the globalized world;
- the right to defense of human rights as a component of humanity, and the protection of the rights of the third generation are becoming increasingly urgent and need development (both scientific and legislative);
- the human right to defense is not only directly established in the norms of international law, but it is logical results from such norms;
- the person acts as the subject of the right to defens in international law;
- it is impossible to deny the fact that without the individual's status as a citizen of a particular state the using his/her right to defense in international law can be substantially complicated;
- the ways of international defense existing today (international judicial institutions) can be recognized by the states fictitiously, without proper execution of their decisions;
- objects of appeals to international human rights institutions are important indicators of existing social problems in the country;
- timely resolution format of conflicts by ways of international cooperation is an indication not only of the right to protection of a particular individual, but also reduce determinant of social tension in the country in general.

Our analysis of the regulation and realization of the right to defense in international public law is not as far as formulating the relevant conclusions, but rather makes us the task to explore that human right in international private law later.

References

1. Algan B. Rethinking Third Generation Human Rights / B. Algan // Ankara Law Review. – 2004. – Vol. l, No. L. – P. 121–155.
2. American convention on human rights . – [Електронний ресурс]. – Режим доступу:https://www.cidh.oas.org/basicos/english/basic3.american%20convention.htm.
3. Vasak K. Les Différentes catégories des droits de l'homme, in A. Lapeyre / F. de Tinguy and K. Vasak (eds) // Les dimensions universelles des droits de l'homme. – 1990. – Vol. I. – P. 303
4. Бойчук Д.С. Право на зброю як складова права на захист: міжнародний досвід. Актуальні проблеми сучасного міжнародного права : зб. наук. ст. за матеріалами II Харк. міжнар.-прав. читань, присвяч. пам'яті проф. М. В. Яновського і В. С. Семенова, Харків, 21 листоп. 2016 р. : у 2 ч. – Харків, 2016. – С. 177-180.
5. Бойчук Д.С. Щодо питання місця права на захист у системі прав людини. Проблеми законності: зб. наук. праць / Д. С. Бойчук. – Харків: Нац. юрид. ун-т імені Ярослава Мудрого, 2017. – Вип. 136. – С.15-20.
6. Бойчук Д.С. Щодо питання різновидів права людини на захист. Юриспруденція в теорії і на практиці: питання вдосконалення правової грамотності: Матеріали всеукраїнської науково-практичної конференції, м. Запоріжжя, 24-25 лютого 2017 р. / Д. С. Бойчук. – Запоріжжя, 2017. – С. 6-8.
7. Велика українська юридична енциклопедія: у 20 т. Т.2.: Філософія права – Х.: Право, 2017. – 1128 с.
8. Велика українська юридична енциклопедія: у 20 т. Т.3: Загальна теорія права – Харків: Право, 2017. – 952 с.
9. Загальна Декларація прав людини від 10.12.1948 // Офіційний Вісник України. – 2008 р. – № 93. – Ст. 3103
10. Іванків І. Б.Відмінні ознаки прав людини третього покоління / І. Б. Іванків // Наукові записки НаУКМА. Юридичні науки. – 2016. – Т. 181. – С. 54-57.
11. Конвенція про захист прав людини і основоположних свобод від 04.11.1950 // Офіційний вісник України. – 1998. – № 13, / № 32.Велика українська юридична енциклопедія: у 20 т. Т.2.: Філософія права – Х.: Право, 2017. – 1128 с.
12. Конституція України // Відомості Верховної Ради України. – 1996. – №30. – Ст. 141.
13. Лешенко И. Статистика обращений ЕСПЧ / И. Лешенко. – [Електронний ресурс]. – Режим доступу: http://zib.com.ua/ru/print/127613-ukraina_zanimaet_pervoe_mesto_sredi_stran_soveta_evropi_po_k.html
14. Міжнародне право: Навч. посібник / За ред. М.В. Буроменського. – Київ: Юрінком Інтер, 2005. – 336 с.
15. Мірошниченко О.А. Закріплення права людини на життя в міжнародних документах/ О. А. Мірошниченко // Проблеми законності. Вип. 59. – Харків : Нац. юрид. акад. України ім. Я. Мудрого, 2003. – С. 200-204.
16. Тарасов О.В. Міжнародна правосуб'єктність людини в практиці Нюрнберзького трибуналу Проблеми законності : акад. зб. наук. пр. / ред. В. Я. Тацій. – Х. : Нац. юрид. акад. України, 2011. – Вип. 115. – С. 200-206.
17. Уздимаева Н.И. Правовая самозащита: концептуально-проблемные основы теории. Монография. / Н.И. Уздимаева. — Саранск: Мордовский университет, 2008. – 111 с.
18. Щокін проти України: Справа ЄСПЛ (Заяви № 23759/03 та № 37943/06) від 14.10.2010 // Офіційний вісник України. – 2013. – № 5. – С. 236.

INFORMATION ABOUT THE AUTHOR
Boychuk Dmitriy Sergeyevich – Postgraduate Student at the Department of Theory of State and Law of Yaroslav Mudriy National Law University;

ИНФОРМАЦИЯ ОБ АВТОРЕ
Бойчук Дмитрий Сергеевич – аспирант кафедры теории государства и права Национального юридического университета имени Ярослава Мудрого;
nigredo111@gmail.com