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POSSIBLE ENVIRONMENTAL SOLUTIONS TO OIL SPILLS IN THE BLACK SEA DUE TO THE RUSSIAN INVASION (ON THE EXAMPLES OF THE U.S. AND INTERNATIONAL EXPERIENCE DEALING WITH OIL SPILLS)

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Асташева О.С., Чебан В.М. Шляхи розв'язання проблеми розливів нафти в Чорному морі у зв'язку з російською збройною агресією (на прикладі американського та міжнародного досвіду боротьби з розливами нафти).

Чорне море є внутрішнім морем, тобто ізольованим від Світового океану. Беручи до уваги те, що Чорне море з'єднано лише з Середземним морем через Турецькі протоки, воно є дуже екологічно вразливим. Збройний конфлікт незмінно негативно впливає на стан довкілля. Розливи нафти, які сталися через російське вторгнення, радикально змінили екосистему Чорного моря, а згодом будуть серйозно загрожувати його біорізноманітності та екосистемі усього узбережжя в цілому. Протягом останніх 20-30 років, ще до повномасштабного російського вторгнення, фахівці Українського наукового центру екології моря спільно з проектом EMBLAS були глибоко стурбовані змінами в Чорному морі.

Ще більш разючі зміни в екосистемі Чорного моря відбулися в червні 2022 року, коли російські війська націлили на покинутий вантажний танкер, що дрейфував у північній частині Чорного моря дві протикорабельні ракети [1]. Судно було завантаженим близько 600 тоннами дизельного палива і таким чином покинуті танкери з тисячами бочок дизельного палива стали «екологічною бомбою уповільненої дії» в акваторії Чорного моря [2].

Що стосується існуючої нормативної бази з захисту Чорного моря, то в 1992 році шість прибережних країн (Болгарія, Грузія, Румунія, Російська Федерація, Туреччина та Україна) підписали та ратифікували Конвенцію про захист Чорного моря від забруднення. Відтоді Комісія із захисту від забруднення Чорного моря відповідає за стале управління Чорним морем. Реальна ефективність цієї Комісії виявилася дуже низькою з огляду на те, що з 24 лютого 2022 року не було прийнято жодного акту щодо збереження Чорного моря в умовах російського вторгнення.

Дійсно, закони про збройні конфлікти також забезпечують певний правовий захист природи, хоча ці закони неоднозначні та мають суворі обмеження. Наприклад, є щойно ухвалений проєкт принципів збереження навколишнього середовища у зв'язку зі збройним конфліктом Комісією з міжнародного права ООН. Реальна ефективність цього проєкту на цей момент є невідомою.

Таким чином, за відсутності адекватних міжнародних механізмів для негайного усунення розливів нафти, варто взяти до уваги добре сформовану систему реагування федерального уряду США для протидії та боротьби з викидами нафти у судноплавні води. Ця система є надзвичайно ефективною, оскільки функціонує через добре сформовану спільну мережу федеральних, штатних і локальних державних установ. Україні бракує такої скоординованої співпраці, і тому державні органи не можуть належним чином відреагувати на значне забруднення Чорного моря.

Таким чином, ми, по-перше, розкриємо існуючі міжнародні механізми боротьби з розливами нафти, та, по-друге, проаналізуємо урядову політику США з боротьби з розливами нафти на прикладі розливу нафти Exxon Valdez, застосувавши його до існуючої природоохоронної політики в Україні. Тобто, метою статті є визначення того, як існуючі міжнародні механізми можуть захистити навколишнє середовище Чорного моря, які є правові прогалини в механізмах міжнародного та українського правового реагування. Іншою метою є визначити, як урядова політика США впоралася з розливами нафти, щоб запропонувати шляхи більш ефективної співпраці для української урядової політики з боротьби з забрудненням.

Ключові слова: розлив нафти в Чорному морі, російське вторгнення, розлив нафти Exxon Valdez, вчинення екоциду, система реагування США, ефективна співпраця відомств (агенств), інститут On-Scene Coordinators (OSC).

Astasheva O.S., Cheban V.M. Possible environmental solutions to oil spills in the Black Sea due to the Russian invasion (on the examples of the U.S. and international experience dealing with oil spills).

The Black Sea is an inland sea, that is basically isolated from the World Ocean. Even though it is connected only with the Mediterranean Sea through the Turkish Straits, the Black Sea is very environmentally vulnerable. Armed conflict invariably has a negative impact on nature. Oil spills that happened because of Russian invasion have radically changed the ecosystems of the Black Sea, and subsequently seriously threatened its biodiversity, and ecosystem as a whole. During the last 20-30 years, even before the full-scale Russian invasion, specialists of the Ukrainian Scientific Center for Marine Ecology, together with the EMBLAS project, were deeply worried about changes in the Black Sea [1].

Even more rapid change in the Black Sea ecosystem happened in June 2022 when Russian forces used two anti-ship missiles to target an abandoned cargo tanker adrift in the northern Black Sea. The vessel was loaded with around 600 tons of diesel fuel. The abandoned tankers, with thousands of barrels of diesel fuel, constituted an "environmental time bomb [2]."

As to the existing framework, in 1992, six coastal countries (Bulgaria, Georgia, Romania, the Russian Federation, Turkey and Ukraine) signed and ratified the Convention on the Protection of the Black Sea from Pollution. Since then, the Black Sea Pollution Protection Commission has been responsible for the sustainable management of the Black Sea. The real effectiveness of this Commission turned out to be very low considering the fact that not a single act was adopted for the preservation of the Black Sea in terms of Russian invasion since February 24th 2022.

Indeed, there is some legal protection for nature under the laws of armed conflict too, although these laws are ambiguous and have strict limitations. For instance, there is a set of Draft Principles for environmental preservation in relation to armed conflict, which was just adopted by the UN International Law Commission.

Thus, in the absence of adequate international mechanisms to address oil spills immediately, it is worth to take into account well established US Response System as the federal government mechanism to respond to discharges of oil into navigable waters of the US. While this system functions through a cooperative network of federal, state, and local agencies, Ukraine lacks this coordinated cooperation, and cannot respond properly to the significant contamination of the Black Sea.

Thus, we will reveal the existing international mechanisms to combat oil spills. Then, we will mainly focus on US Governing policies that deal with oil spills on the Exxon Valdez oil spill example, applying it to the existing policies in Ukraine.

Key words: oil spill in the Black Sea, Russian invasion, Exxon Valdez oil spill, the commission of ecocide, US Response System, effective cooperation of agencies, the institute of On-scene Coordinators (OSCs).

The question under study has not been thoroughly elaborated yet due to the absence of precedents in the ecocide in the Black Sea and the ambiguous international framework on this issue. As of November 2022, the Prosecutor's Office of Ukraine is investigating 10 criminal cases related to the commission of ecocide by

the Russian military, for example, according to the State Environmental Inspection, at least 50,000 dolphins died in the waters of the Black Sea [3].

The purpose of the Article is to determine, how the existing international framework can protect the Black Sea environment, what are the legal gaps in the mechanisms of international and internal Ukrainian protection. Another purpose is to determine how US Governing policies dealt with oil spills to suggest ways of more efficient cooperation for Ukrainian Governing policies.

On 25 February Russian warships shelled a small (2200 ton) Moldovan-flagged fuel oil tanker and set it ablaze. The tanker remained drifting until July 2022, when it was hit during an airstrike by a Russian Kh-3 missile. The Naval Institute Guide to World Naval Weapon Systems found there is no obvious military justification for this attack, and Russia should have been prohibited from striking it based on environmental concerns [4]. Under the Rome Statute, an attack causing "widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated" is a war crime that falls within jurisdiction of the International Criminal Court [5].

Also, The San Remo Manual on International Law Applicable to Armed Conflicts at Sea recognizes "damage to or destruction of the natural environment" as part of the definition for "collateral damage [6]." Firstly, it forbids the use of the marine environment as an instrument of warfare. Secondly, it prohibits making the marine environment an object of attack during an armed conflict at sea.

As to the most recent instruments protecting marine ecology during armed conflicts, the WCEL Specialist Group on Peace, Security and Conflict has been working on the International Law Commission (ILC) [7] programme drafting the Protection of the Environment in relation to Armed Conflict act. In May 2022 the ILC adopted the final version of 27 Draft Principles [8], sending them to the General Assembly for final consideration before adoption.

The most important part there was the post-conflict one, where obligations of environmental remediation, liability and cooperation are covered. These issues are generally omitted, and subsequently, they are being exclusive in the current Russian invasion. We will not delve into the analysis of this document, as the final version of it is not adopted yet. However, it may serve as a vital instrument to respond to discharges of oil into waters of the Black Sea.

During the Vietnam War's Operation the U.S. sprayed over 20 million gallons of herbicides covering over 4 million acres of land in the span of a decade [9]. Protocol Additional to the Geneva Conventions of 12 August 1949, and Protocol I relating to the Protection of Victims of International Armed Conflicts of 8 June 1977 declare, that the environment can be protected too as the victim of warfare. It also states, that attacks against the natural environment by way of reprisals are prohibited [10], which is customary international law recognized by the ICRC [11]. Both Russia and Ukraine are bound by abovementioned international instruments without any reservations.

Article 55 of Additional Protocol I to the 1949 Geneva Conventions applies to the destruction resulting in oil spills into the sea leading to extensive damage such as fueling oil tanker by Russian armed forces. The Commentary to Additional Protocol I indicates that there were delegations which wanted the heightened protection of Article 56's "works or installations containing dangerous forces" to apply to "oil production installations and storage facilities for oil products."

For instance, when Iraqi forces leaked over 240 million gallons of oil into the Persian Gulf in 1991, it was one of the worst environmental disasters [12]. Therefore, UN resolution 47/34 about environmental damage and depletion of natural resources was adopted in 1993 to prevent situations of the release and waste of crude oil into the sea during conflicts [13].

The ICRC's customary Rule 43 states that "Launching an attack against a military objective which may be expected to cause incidental damage to the environment which would be excessive in relation to the concrete and direct military advantage anticipated is prohibited [11]." In the case of shelling oil tanker in the Black Sea, military objective requirement was not covered. Even in the case if there was a military advantage, ICRC Rule 45 still applies, stating that the use of methods or means of warfare that are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment is prohibited.

Now, we will mainly focus on the possible solutions of oil spills taken into consideration US Governing practice. We are going to consider US Governing policies that dealt with oil spills based on the Exxon Valdez oil spill example.

The U.S. Environmental Protection Agency's Oil Spill Program plays an important role in protecting the environment through prevention of, preparation for, and response to oil spills. U.S. organizations such as EPA Regions III and V, the EPA Environmental Response Team, the EPA Office of Research and Development,

the U.S. Fish and Wildlife Service, the State of Alaska Department of Environmental Conservation, the State of Wisconsin Department of Natural Resources, the University of California Wildlife Health Center, and BP Amoco Corporation are ones dealing with problems of oil spills [14].

Without careful planning and clear organization, efforts to deal with large oil spills could be slow, ineffective. In the US, the system for organizing responses to major oil spills is called the National Response System. In Ukraine there is no system for organizing responses to oil spills. In contrast to effective cooperation of the US agencies, the interaction between the Ukrainian State Environmental Inspection and the Administration of Sea Ports of Ukraine is not established. For example, when there was an oil spill in 2020, the Seaports Administration knew about this incident and did not inform the Ukrainian State Environmental Inspection about it [15]. In this way, it is not possible to effectively build the interaction of governmental structures without a clear understanding of their functions. Thus, we recommend to establish a consistent legal practice of cooperation to combat oil spills effectively based on the US model.

In this regard, we suggest to create a structure responsible for directing response actions and coordinating all other efforts at the scene of a discharge or spill. In the US it is called On-scene Coordinators (OSCs), that have the most prominent role in the National Response System. OSCs work in partnership with other federal, state, local, and private response agencies, providing support and information to regional response committees. Four federal agencies have staff that serve as OSCs: the Coast Guard, the U.S. Environmental Protection Agency (EPA), the U.S. Department of Energy, and the U.S. Department of Defense.

OSCs are stationed in locations across the country to allow for quick and efficient response to spills.

The OSC is responsible for four main tasks during an oil spill response:

(1) assessment, which consists of evaluation of the size, nature and potential hazards of a spill,

(2) monitoring of actions being taken to control and clean up a spill to make sure they are appropriate,

(3) response assistance, during which is indicated whether extra assistance is being needed,

(4) reporting on OSC is required to file a summary report that outlines the actions taken to remedy the spill [14].

The Exxon Valdez oil spill although being catastrophic, enabled the US federal government to crecoopate strategy to respond to oil spills effectively. The lessons they learned have helped to prevent more oil spills and response when spills do occur. The OSC, in cooperation with the Exxon Corporation, established several goals for the response. The most important goal was to prevent additional spilling of oil. For this purpose, the Exxon company opened a communications network that allowed information about the spill and the cleanup efforts to be shared with state and federal government officials, private company representatives, and others who were interested in the events surrounding the spill. This set an important precedent, how private companies partly responsible for spills, cooperate with federal government.

Conclusion. We can regard sinking the tank as environmental time bomb, due to the fact of a significant initial contamination of the Black Sea. That very quickly destroys the marine ecosystem, thus the damage done by an oil tanker spill is catastrophic.

The ICRC's customary Rule 43 clearly states that if sinking of oil tanker for military purposes causes environmental damage that does not meet necessity and proportionality, it is prohibited. There was no military advantage in striking fuel oil tanker in the Black Sea. Thus, in the absence of adequate international mechanisms to address oil spills immediately, it is worth to take into account well established US Response System as the federal government mechanism to respond to discharges of oil into navigable waters of the US. While this system functions through a cooperative network of federal, state, and local agencies, Ukraine lacks this kind of system, and cannot respond properly to the significant contamination of the Black Sea.

The primary mission of the US Response System is to provide support to state and local response activities. We recommend to establish a consistent legal practice of cooperation to combat oil spills effectively based on the US model, especially the institute of On-scene Coordinators (OSCs), which works in partnership with other federal, state, local, and private response agencies, providing support and information to regional response committees to respond to oil spills effectively. The Exxon Valdez oil spill enabled the US federal government to create strategy to respond to oil spills together with private companies. The lessons learned during combating Exxon Valdez oil spill have helped to prevent more oil spills and response when spills do occur.

Our environment is precious. We have a duty to steward it well. Thus, it is important to put more effort in creation of the developed governmental institutes that can respond to ecological disasters efficiently based on the examples of more developed States such as the US to fulfill international standards.

References:

1. Екологічний моніторинг, Стале управління водними ресурсами , ‘Як за останні 20–30 років змінився стан Чорного моря?’ (*Міністерство захисту довкілля і природніх ресурсів*, 17 Лютого 2022) URL*:* https://mepr.gov.ua/news/38961.html (12.11.2022).
2. ‘Occupiers hit Moldavian tanker ‘Millennial Spirit’ with missile, drifting with remains of diesel fuel on board in Black Sea, remains of cargo burning – task force’ (*Interfaxcomua*, 7 липня 2022) URL*:* https://interfax.com.ua/news/general/844365.html (12.11.2022).
3. Анна(Анетт) Абрамова, ‘Внаслідок дій російських військових у Чорному морі загинуло 50 тисяч дельфінів’ (*Свідомі*, 6 листопада 2022) URL*:* https://svidomi.in.ua/page/vnaslidok-dii-rosiiskykh-viiskovykh-u-chornomu-mori-zahynulo-50-tysiach-delfiniv (12.11.2022).
4. Mark Jessup, ‘UKRAINE SYMPOSIUM – OIL TANKERS AS “ENVIRONMENTAL TIME BOMBS,” OR NOT’ (*Lieber Institute West Point* , Aug 12, 2022) URL*:* https://lieber.westpoint.edu/oil-tankers-environmental-time-bombs-or-not/#:~:text=The%20Millennial%20Spirit%20is%20a%20small%20%282200%20ton%29,Russian%20warships%20shelled%20her%20and%20set%20her%20ablaze. (12.11.2022)
5. ‘International Criminal Court’ (*Rome Statute of the International Criminal Court*) URL*:* https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf (12.11.2022)
6. International institute of humanitarian law, San Remo Manual on International Law Applicable to Armed Conflicts at Sea (Cambridge University Press 2010) URL*:* https://www.cambridge.org/core/books/san-remo-manual-on-international-law-applicable-to-armed-conflicts-at-sea/E8C865A3FFD433AC0F3DF7E02950ED70 (12.11.2022).
7. ‘Analytical Guide to the Work of the International Law Commission’ (*Protection of the environment in relation to armed conflicts*, 2011) URL*:* https://legal.un.org/ilc/guide/8_7.shtml (12.11.2022).
8. ‘Protection of the environment in relation to armed conflicts Texts and titles of the draft preamble and the draft principles adopted by the Drafting Committee on second reading’ (*United Nations A/CN4/L968 General Assembly*, 4 July–5 August 2022) URL*:* https://documents-dds-ny.un.org/doc/UNDOC/LTD/G22/348/04/PDF/G2234804.pdf?OpenElement (12.11.2022).
9. ‘Agent Orange ‘ (*HISTORYCOM EDITORS*, May 16, 2019) URL*:* https://www.history.com/topics/vietnam-war/agent-orange-1 (12.11.2022).
10. ICRC, ‘Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977’ (*PROTECTION OF THE NATURAL ENVIRONMENT*, 8 June 1977) URL*:* https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?documentId=E20CAD5E1C078E94C12563CD0051DD24&action=OpenDocument (12.11.2022).
11. *ICRC*, ‘Official Comment to Rule 43 Application of General Principles on the Conduct of Hostilities to the Natural Environment’ (*ICRC*, 26 листопада 2020) URL*:* https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule43 (12.11.2022).
12. Dan Balz Rick Atkinson, IRAQ DUMPING FLOOD OF OIL INTO GULF, US SAYS’ (*ICRC*, January 26, 1991) URL*:* https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule43 (12.11.2022).
13. *UN General Assembly,* ‘Protection of the environment in times of armed conflict: resolution / adopted by the General Assembly’ (*UN General Assembly (47th sess : 1992-1993)*, 1993) URL*:* https://digitallibrary.un.org/record/158808?ln=en (12.11.2022).
14. Epa understanding oil spills and oil spill response, ‘Responding To Oil Spills: The National Response System’ (*EPA Office of Emergency and Remedial Response*, December 1999) URL: https://www.epa.gov/emergency-response/understanding-oil-spills-and-oil-spill-response> (12.11.2022).
15. Андрій Мальований голова Держекоінспекції, ‘»Розлив нафти в Чорному морі»: Адміністрація морських портів України не повідомила Держекоінспекцію про екологічне лихо’ (*Державна екологічна інспекція України*, 26 листопада 2020) URL https://www.dei.gov.ua/posts/1209 (12.11.2022).