

## ***Attribution of conduct which is acknowledged and adopted by a state as its own: employing the conception ex post facto***

***Атрибуція поведінки, що визнається та приймається державою як власна: використовуючи концепцію постфактум***

*Svitlana Andreichenko*

### Key words:

*international responsibility, internationally wrongful acts, attribution of conduct to a state.*

### Ключові слова:

*міжнародна відповідальність, міжнародно-протиправне діяння, атрибуція поведінки держави.*

The world development is characterized by the majority of contradictory and unequivocal tendencies that essentially change the determinant characteristics of the system of international relations and explicitly symbolize the beginning of the new world order which differs from the Westfalian world model which was established for almost four centuries. One of time signs is the origin and steady increase of a number of non-state subjects of the political process or "actors beyond the sovereignty"<sup>1</sup>.

The manifestation of the negative "side effect" of the expansion of the participants of international relations are the threats for international law and order, that are made by non-state subjects acting independently from a State and whose acts lead to violation of the fundamental values of international community in varied spheres (International human rights law, Law of international security, International humanitarian law, Environmental law, Admiralty law etc.). "The weak subjects became stronger in the sense they could harm others, – noted M. Lebedeva. – The world in the 21st century has ran into the non-state actors who could give a considerable dare to a State"<sup>2</sup>.

The aim of studying and solving the problem of conduct attribution of non-state individuals and groups to a State and realization of international responsibility in general demands grave scientific support, considering theoretically well-grounded suggestions of researchers of international law.

The problem of international responsibility of a State for individuals and groups is paid much attention in the world law literature (A. Abass, B. Conforti, J. Crawford, J.-M. Henckaerts, A. Klephem, D. Malcolm, S. Olleson, A. Reynich, N. Santarelli, A. Seibert-Fohr, I. Williamson, C. Yamada, I. Ziemel). In the Ukrainian science doctrine of international law this problem is scantily explored I. Lukashuk, M. Buromenskiy, V. Boutkevitch, A. Dmitriev, N. Zelinska.

At the same time in the competent science researches that are great contributions to the theory and practice of realization of international responsibility, a number of problems isn't paid so much attention to as it has to be done, in particular attribution and state responsibility of non-state subjects.

One of the rules of attribution of international unlawful acts to a State which is provided in the Draft Articles on the Responsibility of States for Internationally Wrongful Acts of 2001 is "acknowledgement". The ground of attribution according to Article 11 are applied to acts which are not registered to a State according to all other rules which are determined in Articles. Article 11 fixes: "Conduct which is not attributable to a State under the

<sup>1</sup> Тараненко Г. Вплив неурядових організацій на процеси трансформації сучасної світ-системи : автореф. дис. ... канд. політ. наук : спец. 23.00.04 «Політичні проблеми міжнародних систем та глобального розвитку» / Г. Тараненко ; Ін-т світової економіки і міжнар. відносин НАН України. – К., 2011. – С. 1.

<sup>2</sup> Лебедева М. Акторы современной мировой политики: тренды развития / М. Лебедева // Вестник МГИМО-Университета. – 2013. – № 3(28). – С. 42.

preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own"<sup>3</sup>. This article was originally meant to cover the cases of a successor State and of the conduct of a private person or entity belonging to a State. As wrote C. Yamada, within these limitations, the transfer of responsibility would not be problematic. However, the text of draft Article 11, as now formulated, includes also the case of the transfer of attribution of conduct, and of the consequent responsibility, from one State to another. As this may adversely affect the position of the injured State, such a transfer of responsibility should not be allowed without its consent<sup>4</sup>.

All the bases for attribution covered in chapter II, with the exception of the conduct of insurrectional or other movements under article 10, assume that the status of the person or body as a State organ, or its mandate to act on behalf of the State, are established at the time of the alleged wrongful act. Article 11, by contrast, provides for the attribution to a State of conduct that was not or may not have been attributable to it at the time of commission, but which is subsequently acknowledged and adopted by the State as its own<sup>5</sup>.

The conduct which is not attributed to the subject on basis of general standards about the responsibility nevertheless is going to be rated as its acts according to international law in case the subject recognizes and accepts this conduct as its own.

The general principle, drawn from State practice and international judicial decisions, is that the conduct of a person or group of persons not acting on behalf of the State is not considered as an act of the State under international law. This conclusion holds irrespective of the circumstances in which the private person acts and of the interests affected by the person's conduct. Thus, like article 10, article 11 is based on the principle that purely private conduct cannot as such be attributed to a State. But it recognizes "nevertheless" that conduct is to be considered as an act of a State "if and to the extent that the State acknowledges and adopts the conduct in question as its own"<sup>6</sup>.

In article 11 the key value belongs to the formula "acknowledges and adopts". First of all it is about the acts which are going to be made after the appropriate conduct has been made. If acknowledgement and adoption were promised in advance, it would rather refer to assistance of law violation. In this case the question will be about the application of Article 16 of Articles about State responsibility "Aid or assistance about the international unlawful acts".

The phrase "acknowledges and adopts the conduct in question as its own" is intended to distinguish cases of acknowledgement and adoption from cases of mere support or endorsement. ICJ in the United States Diplomatic and Consular Staff in Tehran case used phrases such as "approval", "endorsement", "the seal of official governmental approval" and "the decision to perpetuate [the situation]"<sup>7</sup>. These were sufficient in the context of that case, but as a general matter, conduct will not be attributable to a State under article 11 where a State merely acknowledges the factual existence of conduct or expresses its verbal approval of it<sup>8</sup>.

In international controversies, States often take positions which amount to "approval" or "endorsement" of conduct in some general sense but do not involve any assumption of responsibility. The language of "adoption", on the other hand, carries with it the idea that the conduct is acknowledged by the State as, in effect, its own conduct. Indeed, provided the State's intention to accept responsibility for otherwise non-attributable conduct is clearly indicated, article 11 may cover cases where a State has accepted responsibility for conduct of which it did not approve, which it had sought to prevent and which it deeply regretted. However such acceptance may

<sup>3</sup> Commentaries to the draft articles on Responsibility of States for internationally wrongful acts adopted by the International Law Commission at its fifty-third session (2001) // Yearbook of the International Law Commission. – 2001. – Vol. II. – Part 2 : Report of the Commission to the General Assembly on the work of its fifty-third session. – P. 52.

<sup>4</sup> Yamada C. Revisiting the International Law Commission's Draft Articles on State Responsibility / C. Yamada // International Responsibility Today Essays in Memory of Oscar Schachter / ed. by M. Ragazzi. – Leiden ; Boston : Martinus Nijhoff Publishers, 2005. – P. 122.

<sup>5</sup> Commentaries to the draft articles on Responsibility of States for internationally wrongful acts adopted by the International Law Commission at its fifty-third session (2001) // Yearbook of the International Law Commission. – 2001. – Vol. II. – Part 2 : Report of the Commission to the General Assembly on the work of its fifty-third session. – P. 52.

<sup>6</sup> Ibid.

<sup>7</sup> United States Diplomatic and Consular Staff in Tehran (United States of America vs. Iran). Merits : Judgment of 24 May 1980 // ICJ Reports. – 1980. – № 3. – P. 3.

<sup>8</sup> Commentaries to the draft articles on Responsibility of States for internationally wrongful acts adopted by the International Law Commission at its fifty-third session (2001) // Yearbook of the International Law Commission. – 2001. – Vol. II. – Part 2 : Report of the Commission to the General Assembly on the work of its fifty-third session. – P. 53.

be phrased in the particular case, the term “acknowledges and adopts” in article 11 makes it clear that what is required is something more than a general acknowledgement of a factual situation, but rather that the State identifies the conduct in question and makes it its own<sup>9</sup>.

The conditions of acknowledgement and adoption are cumulative, as indicated by the word “and”. The order of the two conditions indicates the normal sequence of events in cases in which article 11 is relied on. Acknowledgement and adoption of conduct by a State might be express (as for example in the United States Diplomatic and Consular Staff in Tehran case), or it might be inferred from the conduct of the State in question. J. Crawford wrote on this subject: “The act of adoption may be express, as in Teheran Hostages and Gabcikovo-Nagymaros, or implied, as in the Lighthouses Arbitration and Bichmann”<sup>10</sup>.

The phrase “if and to the extent that” is intended to convey a number of ideas. First, the conduct of, in particular, private persons, groups or entities is not attributable to the State unless under some other article of chapter II or unless it has been acknowledged and adopted by the State<sup>11</sup>.

Secondly, a State might acknowledge and adopt conduct only to a certain extent. In other words, a State may elect to acknowledge and adopt only some of the conduct in question. State may selectively identify those non-state actions that it wishes to adopt, and is not required to approach the matter from an “all or nothing” standpoint<sup>12</sup>.

Thirdly, the act of acknowledgement and adoption, whether it takes the form of words or conduct, must be clear and unequivocal<sup>13</sup>.

To bring responsibility the acknowledged conduct has to contradict international liabilities which it acknowledges. The conduct could be lawful for its immediate subject, but unlawful for the state that acknowledges it. For example, some states made an agreement about the fishery limitation in a fixed sea section. The State which doesn't participate in the agreement, proceeded against these limitations and didn't have responsibility for it. Nevertheless one of the sides in agreement acknowledged and adopted the conduct from the third state as its own, since the catch was given at its disposal.

From the other hand, I. Lukashyk noted that if a state acknowledges and adopts the subject conduct which contradicts the liabilities of the latter, but is lawful for the State that acknowledges itself for not to have responsibility for such conduct. This regulation is confirmed that even in case of assistance in making international offense, the State which provides such assistance didn't have responsibility if violated liability isn't valid for it. All this doesn't have to lead to the avoidance of the responsibility for the unlawful conduct. So, the immediate subject of a conduct have to have the responsibility for the breach of the liabilities despite acknowledgement of the corresponding conduct by the other State. Or otherwise, the acknowledgement of a conduct which violated commitments of a state, which was made by the third state didn't exempt the offender from liability<sup>14</sup>.

The International Law Commission commented: “The principle established by article 11 governs the question of attribution only. Where conduct has been acknowledged and adopted by a State, it will still be necessary to consider whether the conduct was internationally wrongful. For the purposes of article 11, the international obligations of the adopting State are the criterion for wrongfulness. The conduct may have been lawful so far as the original actor was concerned, or the actor may have been a private party whose conduct in the relevant respect was not regulated by international law. By the same token, a State adopting or acknowledging conduct which is lawful in terms of its own international obligations does not thereby assume responsibility for the unlawful acts of any other person or entity. Such an assumption of responsibility would have to go further and amount to an agreement to indemnify for the wrongful act of another. Instances of the application of the prin-

<sup>9</sup> Commentaries to the draft articles on Responsibility of States for internationally wrongful acts adopted by the International Law Commission at its fifty-third session (2001) // Yearbook of the International Law Commission. – 2001. – Vol. II. – Part 2 : Report of the Commission to the General Assembly on the work of its fifty-third session. – P. 53.

<sup>10</sup> Crawford J. State Responsibility: The General Part / J. Crawford. – Cambridge : Cambridge University Press, 2013. – P. 187.

<sup>11</sup> Commentaries to the draft articles on Responsibility of States for internationally wrongful acts adopted by the International Law Commission at its fifty-third session (2001) // Yearbook of the International Law Commission. – 2001. – Vol. II. – Part 2 : Report of the Commission to the General Assembly on the work of its fifty-third session. – P. 53.

<sup>12</sup> Crawford J. State Responsibility: The General Part / J. Crawford. – Cambridge : Cambridge University Press, 2013. – P. 187.

<sup>13</sup> Commentaries to the draft articles on Responsibility of States for internationally wrongful acts adopted by the International Law Commission at its fifty-third session (2001) // Yearbook of the International Law Commission. – 2001. – Vol. II. – Part 2 : Report of the Commission to the General Assembly on the work of its fifty-third session. – P. 53.

<sup>14</sup> Лукашук И. Право международной ответственности / И. Лукашук. – М. : Волтерс Клувер, 2004. – С. 142.

ciple can be found in judicial decisions and State practice. For example, in the Lighthouses arbitration, a tribunal held Greece liable for the breach of a concession agreement initiated by Crete at a period when the latter was an autonomous territory of the Ottoman Empire, partly on the basis that the breach had been “endorsed by [Greece] as if it had been a regular transaction <...> and eventually continued by her, even after the acquisition of territorial sovereignty over the island”<sup>15</sup>.

Instances of the application of the principle can be found in judicial decisions and State practice. For example, in the Lighthouses arbitration, a tribunal held Greece liable for the breach of a concession agreement initiated by Crete at a period when the latter was an autonomous territory of the Ottoman Empire, partly on the basis that the breach had been “endorsed by [Greece] as if it had been a regular transaction <...> and eventually continued by her, even after the acquisition of territorial sovereignty over the island”<sup>16</sup>.

The arbitration regarded Greece as a successor to Crete and, having taken over the administration of the lighthouses, treated the concession as its own. As shown in this case, acknowledgement does not have to be by a formal proclamation; condoning an unlawful act may also constitute sufficient acknowledgement. And where condoning is combined with a formal statement of approval, the evidence of acknowledgement is even stronger<sup>17</sup>.

In the context of State succession, it is unclear whether a new State succeeds to any State responsibility of the predecessor State with respect to its territory. However, if the successor State, faced with a continuing wrongful act on its territory, endorses and continues that situation, the inference may readily be drawn that it has assumed responsibility for it<sup>18</sup>.

Outside the context of State succession, the United States Diplomatic and Consular Staff in Tehran case provides a further example of subsequent adoption by a State of particular conduct. There ICJ drew a clear distinction between the legal situation immediately following the seizure of the United States embassy and its personnel by the militants, and that created by a decree of the Iranian State which expressly approved and maintained the situation. In the words of the Court: “The policy thus announced by the Ayatollah Khomeini, of maintaining the occupation of the Embassy and the detention of its inmates as hostages for the purpose of exerting pressure on the United States Government was complied with by other Iranian authorities and endorsed by them repeatedly in statements made in various contexts. The result of that policy was fundamentally to transform the legal nature of the situation created by the occupation of the Embassy and the detention of its diplomatic and consular staff as hostages. The approval given to these facts by the Ayatollah Khomeini and other organs of the Iranian State, and the decision to perpetuate them, translated continuing occupation of the Embassy and detention of the hostages into acts of that State”<sup>19</sup>.

In that case it made no difference whether the effect of the “approval” of the conduct of the militants was merely prospective, or whether it made the Islamic Republic of Iran responsible for the whole process of seizure of the embassy and detention of its personnel *ab initio*. The Islamic Republic of Iran had already been held responsible in relation to the earlier period on a different legal basis, viz. its failure to take sufficient action to prevent the seizure or to bring it to an immediate end<sup>20</sup>.

In the Priebke case in 1996, the Military Tribunal of Rome attributed responsibility to Italy for the behaviour of Italian partisans during the Second World War on the basis that it had encouraged their actions and had officially recognised them after the conflict. In the *J. T. case* in 1949, the District Court of The Hague also raised the question of how far a State whose territory had been occupied could be held liable, after liberation, for acts committed by the resistance movement organized with the consent of the government-in-exile. The International

<sup>15</sup> Commentaries to the draft articles on Responsibility of States for internationally wrongful acts adopted by the International Law Commission at its fifty-third session (2001) // Yearbook of the International Law Commission. – 2001. – Vol. II. – Part 2 : Report of the Commission to the General Assembly on the work of its fifty-third session. – P. 53.

<sup>16</sup> Ibid. – P. 52.

<sup>17</sup> Abass A. Complete International Law / A. Abass. – Oxford : Oxford University Press, 2012. – P. 266.

<sup>18</sup> Commentaries to the draft articles on Responsibility of States for internationally wrongful acts adopted by the International Law Commission at its fifty-third session (2001) // Yearbook of the International Law Commission. – 2001. – Vol. II. – Part 2 : Report of the Commission to the General Assembly on the work of its fifty-third session. – P. 52.

<sup>19</sup> United States Diplomatic and Consular Staff in Tehran (United States of America vs. Iran). Merits : Judgment of 24 May 1980 // ICJ Reports. – 1980. – № 3. – P. 74.

<sup>20</sup> Ibid. – P. 63–68.

Criminal Tribunal for the Former Yugoslavia made the same point in its judgment on appeal in the *Tadic* case in 1999, when it held that a State was responsible for the acts of individuals or groups that were not militarily organized and that could be regarded as *de facto* State organs if the unlawful act had been publicly endorsed or approved *ex post facto* by the State<sup>21</sup>.

In the course of proceedings in Nikolić (“Sušica Camp”)<sup>22</sup>, Trial Chamber II of the ICTY was faced with a defense motion challenging the exercise of jurisdiction over the accused as a result of the manner in which he had been brought before the Tribunal. The facts were that “unknown individuals” had detained the accused in the territory of the then FRY, transferred him to Bosnia and Herzegovina, and then handed him over into the custody of SFOR. In addressing the issues arising from that course of events, the Trial Chamber made reference to Article 11 of the Articles, opining that they were relevant as “*general legal guidance*”.

It should be noted that the Trial Chamber expressly referred to Article 11 by analogy, given that the entity to which the accused had been handed over, and which was alleged to have adopted or acknowledged the conduct in question was not a State, but SFOR and the Prosecution. Further, it may also be noted that the question of attribution was not relevant for the purposes of State responsibility as such (although the Trial Chamber referred to attribution to SFOR and the Prosecution of the “illegal acts” and “illegal conduct” of the unknown individuals), but was rather relevant for the purposes of deciding whether the actions of the “unknown individuals” were to be attributed to SFOR, thus tainting the jurisdiction of the ICTY.

In the court decision about the application of The Convention on the Prevention and Punishment of the Crime of Genocide could be found references to Article 11 Articles. So in particular it is indicated that: “<...> none of the situations, other than those referred to in Articles 4 and 8 of the ILC’s Articles on State Responsibility, in which specific conduct may be attributed to a State, matches the circumstances of the present case in regard to the possibility of attributing the genocide at Srebrenica to the Respondent. The Court does not see itself required to decide at this stage whether the ILC’s Articles dealing with attribution, apart from Articles 4 and 8, express present customary international law, it being clear that none of them apply in this case <...> the Respondent has not acknowledged and adopted the conduct of the perpetrators of the acts of genocide as its own (Article 11)”<sup>23</sup>.

In *Mondev International Ltd. vs. United States of America*, the Tribunal made reference to the Commentary to Article 11 in support of its statement that “[i]n general, the State is not responsible for the acts of private parties”<sup>24</sup>.

As regards State practice, the capture and subsequent trial in Israel of Adolf Eichmann may provide an example of the subsequent adoption of private conduct by a State. On 10 May 1960, Eichmann was captured by a group of Israelis in Buenos Aires. He was held in captivity in Buenos Aires in a private home for some weeks before being taken by air to Israel. Argentina later charged the Israeli Government with complicity in Eichmann’s capture, a charge neither admitted nor denied by Israeli Foreign Minister Golda Meir, during the discussion in the Security Council of the complaint. She referred to Eichmann’s captors as a “volunteer group”. Security Council resolution 138 (1960) of 23 June 1960 implied a finding that the Israeli Government was at least aware of, and consented to, the successful plan to capture Eichmann in Argentina. It may be that Eichmann’s captors were “in fact acting on the instructions of, or under the direction or control of Israel, in which case their conduct was more properly attributed to the State under article 8. But where there are doubts about whether certain conduct falls within article 8, these may be resolved by the subsequent adoption of the conduct in question by the State”<sup>25</sup>.

<sup>21</sup> Henckaerts J.-M. Customary International Humanitarian Law: Volume 1, Rules / J.-M. Henckaerts, L. Doswald-Beck, C. Alvermann. – Cambridge : Cambridge University Press, 2005. – P. 535.

<sup>22</sup> Prosecutor vs. Dragan Nikolić (“Sušica Camp”). Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal : Case № IT-94-2-PT, 9 October 2002.

<sup>23</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina vs. Serbia and Montenegro) : judgment of 26 February 2007. – P. 414.

<sup>24</sup> *Mondev International Ltd. Vs. United States of America* (ICSID Additional Facility Case № ARB(AF)/99/2) : Award of 11 October 2002. – P. 68.

<sup>25</sup> Commentaries to the draft articles on Responsibility of States for internationally wrongful acts adopted by the International Law Commission at its fifty-third session (2001) // Yearbook of the International Law Commission. – 2001. – Vol. II. – Part 2 : Report of the Commission to the General Assembly on the work of its fifty-third session. – P. 53.

Another important aspect that should be considered in the context of Article 11 is the issue of self-defense. Crawford J. writes on this subject: "Care should thus be exercised when considering the possibility of using ARSIWA Article 11 to "entrap" other states by deeming them to have adopted conduct which is merely tolerated or not disowned. Under-currents of this may be seen in the so-called "Bush Doctrine", in which the United States claimed to make no distinction for attribution purposes between the terrorists responsible for the 9/11 attacks and the states which harboured them. On this basis the United States could have equated the refusal by the Taliban, the then de facto rulers of Afghanistan, to hand over Osama Bin Laden in September 2001 with the adoption of Al-Qaeda's actions, thereby attributing the 9/11 attacks to Afghanistan and using this as a basis for self-defense under Article 51 of the UN Charter. The adoption required by ARSIWA Article 11 is not to be lightly inferred"<sup>26</sup>.

According to M. Williamson, it is still difficult to provide a legal basis for using force to target even al Qaeda in Afghanistan without a Security Council mandate. The UN Charter only permits force to be used in two situations (when authorized by the Security Council or in self-defense), neither of which would apply to the use of force by individual states against al Qaeda targets within Afghanistan. Furthermore, state practice suggests that historically the legitimacy of military reprisals against non-state groups in response to terrorist acts has been largely rejected by the international community<sup>27</sup>.

The Security Council has frequently condemned the use of force, such as air strikes on alleged terrorist bases inside a foreign state, even when those air strikes were in response to previous attacks by non-state actors emanating from the territory of that state. The *opinio juris* of the majority of states does not support the use of military force against a sovereign state in retaliation for attacks by non-state actors. In essence, even though it may be claimed that air strikes against targets within Afghanistan would have been legitimate, had they been confined to al Qaeda and excluded the Taliban, such a proposition is open to criticism on the basis that international law does not currently support the use of force in such situations, as is borne out by state practice<sup>28</sup>.

To reckon up it should be indicated that in many cases the conduct which is acknowledged and adopted by a State is the conduct of individuals or groups. So their acts soon become the acts of a State regardless of if the individual or group wasn't a state organ at the time of commitment and wasn't representative to act on a State's behalf. It is not enough competency for an attribution of conduct to a State for such non-state actors, so as it's not enough to have a simple approval for the employment excluding on principle which provides the impossibility of a state responsibility for the conduct of individuals and groups.

The employment of Article 11 in the context of realization the right of self-defense by the states that have suffered from the one hand helps a State establish international responsibility for the corresponding unlawful conduct by the non-state subjects (in case the abidance of criteria is provided by Article 11) and from the other hand if to take notice of the position of the International Law Commission according to that acknowledgement has to be clear and not unequivocal, it will be hard to find enough evidence in practice to confirm the principle of acknowledgement and according to attribution to a State the unlawful conduct of private actors.

## Summary

Article is dedicated to consideration of peculiarities of the employment the rule of attribution of conduct to a State which is not attributed to it on the basis of general standards about responsibility, but nevertheless will be considered as the act of State for international right in case a State will acknowledge and adopt this conduct as its own. It is established that the employment of Article 11 ARSIWA 2001 p. in the context of realization the right of self-defense by the states that have suffered from the one hand helps a State establish international responsibility for the corresponding unlawful conduct by the non-state subjects.

<sup>26</sup> Crawford J. *State Responsibility: The General Part* / J. Crawford. – Cambridge : Cambridge University Press, 2013. – P. 188.

<sup>27</sup> Williamson M. *Terrorism, War and International Law: The Legality of the Use of Force* / M. Williamson. – Farnham : Ashgate Publishing, 2009. – P. 205.

<sup>28</sup> Ibid.

## Анотація

Статтю присвячено розгляду особливостей застосування правила атрибуції державі поведінки, яка не атрибується державі на підставі загальних норм про відповідальність, проте буде розглядатися як діяння такої держави за міжнародним правом у разі, якщо держава визнає й приймає цю поведінку як свою власну. Встановлено, що застосування статті 11 Статей 2001 р. в контексті реалізації права на необхідну оборону державами сприяє настанню міжнародної відповідальності за відповідну протиправну поведінку з боку недержавних суб'єктів.

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**Svitlana Andreichenko,**  
*PhD, Associate Professor of the Department of International Law  
and International Relations  
National University «Odessa Law Academy»*