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**TO THE PROBLEM OF FORMATION OF INTERNATIONAL CUSTOM
ON PROHIBITING KILLING OF WHALES**

The article is dedicated to the problem of formation of international custom on prohibiting killing of whales. The authors study the notions of «international custom» and «persistent objector» in international law and its elements. Also the article analyzes whether the custom is formed as for the prohibition of killing of whales and Japan's attitude to this issue.

Key words: custom, persistent objector, Taiji cove, prohibiting killing of whales, Ric O'Barry's project.

Problem statement. The topicality of the problem is determined primarily by the protection of the surrounding fauna. Over the last 15 years ruthless trapping and killing of dolphins have taken place in Japan in Taiji cove. The Japanese government provides 23,000 permits every year for the killing of dolphins in coastal areas, which occur as the mass slaughter of cetaceans. Besides, this problem affects human rights, as Japanese consumers eat poisoned meat, but the Japanese government has made great efforts to hide it.

Analysis of recent researches and publications. To research that problem the author worked with electronic recourses. And the major role in the work given was played by the film «The Cove» [1]. It presents an ocean conservationist's point of view. The film highlights the fact that the number of dolphins killed in the Taiji dolphin drive hunting is several times greater than the number of whales killed in the Antarctic, and claims that 23,000 dolphins and porpoises are killed in Japan every year by the country's whaling industry. It has drawn controversy over neutrality, secret filming, and its portrayal of the Japanese people. Also the articles of such authors as Gopalakrishnan Manazite [4] and Dmitry Desyaterik [5] are being searched. Their works are widely dedicated to the unformed ban on killing of whales.

Paper purpose. The goals of this work are to determine what the custom is in international law and its elements; to investigate whether the custom is formed on the prohibition of killing whales in international law; if «yes», what elements prevail; to analyze Japan's attitude to this issue; the concep-

tion of «persistent objector», its role in the formation of the custom; to determine whether that custom should be formed.

Paper main body. To explore this issue, it should be noted that the custom is usually created by a long application in relations between all or some states, but not enshrined in an international treaty; it is a source of law in such cases when relations are not regulated by an international treaty [7]. A necessary condition for the recognition of the international source of law or custom, as it is called, a customary rule of international law, is the recognition of all or some of the states, expressed either in an active form or by abstinence (*opinio juris*). Customs, which are based on the principles of equality and sovereignty, bind on all countries. Other customs act for the member states which recognized them.

It should be noted that the real evidence of whaling Norwegians come from Scandinavia in the 1000 AD. From the Bay of Biscay whaling spread north along the coast of Europe and to Greenland. In the following century the Danes and later the British began to fish in waters of the Arctic. In the next century whaling also started on the east coast of North America. In the first half of the XIX century, it began in South Africa and the Seychelles [4]. In Japan, this kind of fishing originated in the 1600s and continues today. There is nobody to hinder whalers and complete extermination of entire populations, such as the gray whale.

Only since 1986 the international ban on whaling for commercial purposes, which monitors the execution of the special commission, has started to have effect [3]. The International Whaling Commission (hereinafter — IWC) is the global body charged with the conservation of whales and the management of whaling. The IWC currently has 88 member governments from countries all over the world. All members are signatories in the International Convention for the Regulation of Whaling. This Convention is the legal framework, which established the IWC in 1946.

Uncertainty over whale numbers led to the introduction of a 'moratorium' on commercial whaling in 1986. This remains in place although the Commission continues to set catch limits for aboriginal subsistence whaling [1]. Today, the Commission also works to understand and address a wide range of non-whaling threats to cetaceans including entanglement, ship strike, marine debris, climate change and other environmental concerns. Among all measures of that Commission these are aimed: to complete prohibition of production of certain types of cetaceans; to allocate certain areas of the world ocean as «whale sanctuaries»; to establish quotas for cetaceans; to impose restrictions on the size of harvested whales; to set opening and closing of seasons and areas of whaling; to prohibit production of cubs fed by mother's milk, and female whales with calves.

In addition, it is obligatory to report, including fishing statistics collected during harvesting biological information [3]. The IWC also initiates, coordinates and sponsor research and publishes the results of cetacean research. However, a lot of countries continue to hunt under the scientific programs. Japan has also decided to continue to hunt in a similar way.

In view of the latest data, the fishery gradually has reached its peak, and some countries have taken the appropriate measures, however, Japan avoids ecological catastrophe, and is only pretending.

At the last meeting of the IWC in Japan they brought a number of charges in the largest whaling, where they stated that it was the way they fight pests, which in turn were like people, being the apex of the food chain, absorbing large amounts of fish. Why do they forget that people in this case are «pests»?! For example, the gross world production of the fishery field in the world in January-November 2014 amounted to 21 855.7 million AMD, which is 25.3 % higher than the same figure for 2013 [6]. In this situation, it is simply biological nonsense. It is obvious that the volume of fishing will be reduced, and the reason is people and not someone else.

If the IWC lifts the ban on whaling for commercial purposes, the gap between supporters and opponents of a mining will be deepened. During the discussion at the meeting the organization for the protection of the environment will watch for the monitor closely.

The most ardent supporters of lifting the ban are Iceland, Japan and Norway, which come up with scientific purposes and catch thousands of whales annually. Japan has long made no secret of the fact that all the meat of marine giants, allegedly murdered in the interests of science, gets on the table of the Japanese [1].

In addition, it should be noted that the custom of the ban on commercial whaling on a larger scale began to emerge in the 2000s. For example, the Central Zoo Authority of India (CZA) banned maintenance of dolphins in captivity in their country and declares that the nature of the Dolphins' highly intellectual and sensitive «and should be regarded as» non-human beings [5]. But Japan still produces annually about 20,000 permits for whaling in the small town of Taiji and the same number of dolphins each year during the hunting season from September to May is destroyed or sold to dolphinariums around the world for thousands and millions of dollars.

Besides, this custom ban was also formed primarily due to the following facts: dolphin's meat is considered to be a delicacy in some regions, but for culinary delights, you can pay a lot. On the coast of Taiji, where dolphins are found, there is a high concentration of mercury. According to the study by the Health Sciences University of Hokkaido and Daiichi University's College of Pharmaceutical Studies, the concentration of mercury in the bodies of residents of Taiji is ten times higher than the standard indicators of the country. For example, the mercury concentration with an index of 0.005 % may cause kidney damage [4]. Thanks to this, dolphins' meat was removed from the school lunch program in Taiji and reduced scale catching of dolphins.

For a more detailed consideration of the problem of habit forming to ban whaling should be considered such a concept as a concept of «persistent objector». Each state has the right to declare the non-recognition of one or another of the new rules of customary law. In this case, it will not have legal force for it; it will be a norm «strongly objects» (persistent objector). The non-recognition should be clearly defined and unambiguous. «Objected strongly» does not

accept the norm as a whole, without any reservations and exceptions. In this case, Japan itself is a persistent objector and doesn't intend to make a similar custom, because it believes that the country had formed the custom for a long time which is based on extraction of marine mammals, and more than half of the Japanese believe that it should not be interrupted since the tradition of the imperial system. And the population is in favor of the approval of Prime Minister Shinzo Abe [5]. As it is stated above, the IWC must protect cetaceans in nature, but for some reason, small whales, dolphins and porpoises, are not protected. A former representative of Japan in the organization argued that there had never been an occasion to discuss that some kind is special.

In the world there are many animal protection organizations, but in Japan they, unfortunately, do not work properly. Some groups simply post information about the dolphin captivity issue on their websites for fund-raising purposes.

Richard «Ric» O'Barry is an American first recognized in the 1960s for capturing and training the five dolphins that were used in the well-known TV series Flipper [3]. O'Barry made a radical transition from training dolphins in captivity to assertively combating the captivity industry soon after Kathy, one of the Flipper dolphins, died in his arms. O'Barry believes Kathy committed suicide. He said: «She looked into my eyes and stopped breathing. I released her and she plunged to the bottom of the pool» [2]. This moment is a life trainer turned dolphin activist in zoo-protector.

In 1970 he founded the Dolphin Project, a group aimed at the education the public about captivity and, where feasible, free captive dolphins. He was featured in the Academy Award-winning film, «The Cove» (2009), which used covert techniques to expose the yearly dolphin drive hunting that goes on in Taiji, Japan. Also, this work was chronicled in films such as «A Fall from Freedom» and in the Animal Planet mini-series «Blood Dolphins» [3].

As Ric says that there are many organizations in Japan: Green Peace, WWF, and the International Fund for Animal Welfare — and they all share millions of dollars between them. Each year, the biggest whaler restarts its work and organizations remain as they have never existed in principle.

There is one organization that is supposed to protect cetaceans in nature, this is the IWC (International Whaling Commission — the only body that regulates the fishery, which is officially recognized by the UN), but for some reason, small cetaceans are not protected. And according to the Ric O'Barry project the reason for this situation is the fact that customers of the commission have their shares in this business. In Finland, the Japanese use special equipment to lure dolphins [1]. They asked Japan to clarify the situation with this sphere of hunting, to which Japan responded that it's just a matter of local importance, and the IWC does not extend its competence for that.

Never the less, the Taiji dolphin slaughter begins every September. Every year about 20000 dolphins die because of that hunting, they are taken to the dolphinariums, their meat is taken to the restaurants and then consumers of this meat increase the concentration of mercury in their bodies. In April, 2015 Ric O'Barry met with members of the Obama Administration at the

White House to personally deliver over 1 million signatures of petition to end the dolphin slaughter in Taiji and that we'll see, could 2015 be the year of the dolphin [2].

Conclusions. After examining this information, several conclusions must be made. First, following the definition of the word «custom», it is usually created by a long-term application in relations between states, but it is not enshrined in a treaty, and in this case the rule is mandatory for all states only if it is based on principles of equality and sovereignty. Other customs are recognized for its member states, it refers to such practice and the prohibition to kill whales. Today the situation with the marine mammals in the world is getting worse, and inaction of the organizations to protect the rights of animals and developing whaling may lead to environmental disaster. And Japan as a persistent objector inactive in the given situation, and as a country with the most intense whaling, it aggravates. I think this practice should be mandatory for all states with the majority voted for this custom. According to research scientists, particularly dolphins are highly developed and intelligent creatures. And scientists believe that the killing of these mammals at the legal level should be equated with the murder of a man, and it is necessary to protect their rights properly. Alas, the formation of custom ban to kill whales is possible only if all nations agree. Considering the position of the Japanese government, this event will not soon delight rights activists and freedom of marine mammals.

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**ДО ПРОБЛЕМИ ФОРМУВАННЯ МІЖНАРОДНО-ПРАВОВОГО
ЗВИЧАЮ ПРО ЗАБОРОНУ ВБИВСТВА КИТІВ**

Резюме

Стаття присвячена розгляду питання щодо формування міжнародно-правового звичаю, який би забороняв вбивство всіх видів китоподібних. В роботі аналізуються поняття «міжнародний звичай» і «persistent objector», так як заборона вбивства китів тісно пов'язана з міжнародним правом. Японія в даному випадку є державою «persistent objector», що не приймає подібний звичай. Слід зазначити, що в статті досліджується наполеглива робота проекту Ріка О'Баррі, єдиного із захисту морських тварин і риб, який діє на території Японії. Авторки вважають, що формування звичаю про заборону вбивства китів можливо тільки в тому випадку, якщо всі держави дадуть на це згоду, але позиція Японії із цього питання уповільнює зазначений процес.

Ключові слова: міжнародний звичай, persistent objector, бухта Тайцзи, заборона вбивства китів, проект Ріка О'Баррі.

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**К ПРОБЛЕМЕ ФОРМИРОВАНИЯ МЕЖДУНАРОДНО-ПРАВОВОГО
ОБЫЧАЯ О ЗАПРЕТЕ УБИЙСТВА КИТОВ**

Резюме

Статья посвящена рассмотрению вопроса о формировании международно-правового обычая, который бы запрещал убийство всех видов китообразных. В работе анализируются понятия «международный обычай» и «persistent objector», так как запрет убийства китов тесно связан с международным правом. Япония в данном случае является государством «persistent objector» и не принимает подобный обычай. Следует отметить, что в статье исследуется упорная работа проекта Рика О’Барри, единственного по защите морских животных и рыб, который действует на территории Японии. Авторы считают, что формирование обычая о запрете убийства китов возможно только в том случае, если все государства дадут на это согласие, но позиция Японии по этому вопросу замедляет упомянутый процесс.

Ключевые слова: международный обычай, persistent objector, бухта Тайцзи, запрет убийства китов, проект Рика О’Барри.