Nowe wyzwania i rozwiązania w powszechnym systemie ochrony praw człowieka

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Andrey A. Shcherbovich

'Unrecognized' Human Right of International Peace: Right Place in Human Rights System and Instruments of Implementation

The UN Security Council is the only body of this Organization whose resolutions are legally binding. This body deals with issues of war and peace – the most important issues of international relations. The structure of the UN Security Council, consisting of the 5 permanent members and 10 non-permanent members, is perceived today in the world as a constant that couldn't be changed. The fact that the permanent members of the UN Security Council have the right of veto cannot be reviewed at this time.

The structure of the Security Council and the right of veto

The decision-making in the UN Security Council is regulated establishing a principle of conditional unanimity of all the permanent members of the Council (Russian Federation, United Kingdom, United States, France and China), which is necessary for the adoption of the resolution. Unanimity can be called conditional because abstention of a permanent member of the Security Council from voting on the draft resolution does not preclude its adoption. To implement the veto permanent member of the Security Council should necessarily vote against the draft resolution. The veto power is enshrined in Article 27, paragraph 3 of the UN Charter: "Decisions of the Security Council on all other [substantial] matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting"[1].

At present, we can say that certain permanent members of the UN Security Council in voting on draft resolutions have (and use) the opportunity to influence on the result of the vote in order to take into account their own political interests in regions of the world where military conflicts are taking place. Undoubtedly, with in initial structure of the Security Council, the unanimity of the permanent members of the Council was laid as a guarantee of peace. Permanent members were the allies in the Second World War whose foreign policy potential allowed defining them as

[1] See: United Nations Charter. Adopted in San Francisco June 26, 1945 // "ConsultantPlus" Legal Reference System.

superpowers. Their unanimity still represents a certain guarantee against the global military conflict.

All member countries of the UN Security Council have a moral duty to resolve international conflicts in accordance with the principles of non-use of force or threat of force, as well as the peaceful settlement of international disputes proclaimed in the UN Charter. However, the balance between the duty of the Security Council permanent members and national interests of certain countries sometimes and even often resolved in favor of the realization of national interests of those states through the use of the veto right.

The structure and procedure of the UN Security Council initially did not take into account the possible biases of permanent members in various results of the consideration of international conflicts at meetings of the Council. Despite the obvious fact that the aim and moral duty of all members of the Security Council should be precisely the peaceful settlement of international disputes, often the political will of states, conditioned by national interests, can prevail. According to some experts, this reduces the effectiveness of the Security Council as a mechanism for resolving international conflicts.

Here is a fresh example. The UN Security Council held an emergency meeting on 9 October 2016 on the situation in Syria, where two draft resolutions were considered. First one, presented by France devoted to establishment of a ceasefire and no-fly zone in Aleppo. The second one, brought by Russian Federation, was in support of the plan of the UN special envoy and the agreements between the Russian Federation and the United States on Syria of 9 September 2016. During the consideration of these draft resolutions on Syria, Russia presided in the UN Security Council meeting.

The consideration of both drafts ended in a mutual veto, which indicates a deep mutual misunderstanding between the permanent members. It is noted by recently deceased Permanent Representative of Russia to the UN Vitaly Churkin, stating that "there will be voting on two draft resolutions of the Council, and we are all well aware that none of them will be accepted"[2].

At the same time, it is impossible to quickly resolve contradictions between states, since there is no objective intermediary whose tasks include an unbiased consideration of the problem, as well as help in reaching a consensus between the permanent members of the Security Council.

Situation repeated on 12 April 2017, when Russia vetoed draft resolution condemning chemical weapons attack in Syrian Idlib province, probably caused by Syrian Governmental Army.

Therefore, the fundamental changes proposed by experts in the structure and work of the Security Council may not entail the consequences for which they count.

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[2] See: Failure of two resolutions: Battle for Aleppo continues in the UN Security Council // RIA Novosti News Agency, URL: https://ria.ru/syria/20161009/1478804026.html [accessed: 24.09.2017].

For example, the call to abolish the right of veto of all or several permanent members of the Security Council may not have the proper effect, since these countries may refuse to voluntarily surrender this right subjectively understood as instrument of protection of their own national interests. Thus, Vladimir Safronkov, Deputy Permanent Representative of the Russian Federation to the UN, said at the meeting on Security Council reform: "Any ideas that violate the prerogatives of the current permanent members of the Security Council, including the right of veto, are unacceptable for us. It should be remembered: this institution is an important factor that stimulates the Council members to search for balanced solutions. Abolition of the right of veto would be wrong from a historical and political point of view"[3].

It should be noted that the UN General Assembly formally does not have any authority in the field of coercive measures. In 1950, Soviet Union left the meeting of the Security Council and created the so-called "paralysis of the veto". General Assembly considered possible to adopt the resolution "Unity for peace", according to which it could determine the existence of a threat to peace, a breach of the peace or an act of aggression and could encourage member States to use force "if the Security Council because of lack of unanimity is unable to discharge its responsibility for the maintenance of peace and security"[4].

Subjective right to international peace in international and constitutional law

The stability of international institutions is a guarantee against the slipping of the world into a global war. The UN Charter was the first such document that secured the renunciation of war, the principle of the peaceful settlement of international disputes. The Preamble of the Charter of the United Nations proclaimed the determination "to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind"[5]. Article 1 of the Charter proclaimed the need "to maintain international peace and security and, to this end, to take effective collective measures to prevent and eliminate threats to peace and to suppress acts of aggression or other violations of peace and to conduct, by peaceful means, in accordance with the principles of justice and international law, settlement of international disputes or situations which might lead to a breach of the peace"[6].

[3] See: Russia and the United States opposed the infringement of the right of veto in the UN Security Council // TASS, URL: http://tass.ru/politika/3764703 [accessed: 24.09.2017].

[4] See: O. Sorokina The powers of the UN Security Council and the activities of the regional peacekeeping organizations // International Public and Private Law, 2008, № 2.

[5] See: United Nations Charter. Adopted in San Francisco June 26, 1945 // "ConsultantPlus" Legal Reference System.

[6] See: ibidem.

At the international level, the UN Security Council is the main instrument for implementing this principle. In this sense, the function of a representative of a state in the Security Council in consideration of the issues of war and peace is similar to the function of a doctor in the provision of medical care. The main medical principle, "do not make harm", must be followed here as well. There is real moral duty of the Security Council members to establish and maintain international peace, and the fulfillment of this moral duty must be higher than the protection of the national interests of represented states.

Now abstention from national interests is formally proclaimed exclusively for the UN Secretary General in his oath of the office, which stated that: "I solemnly swear to exercise in all loyalty, discretion and conscience the functions entrusted to me as Secretary-General of the United Nations, to discharge these functions and regulate my conduct with the interests of the United Nations only in view, and not to seek or accept instructions in regard to the performance of my duties from any Government or other authority external to the Organization".

However, after the Second World War, international law and constitutional acts of individual countries tended to consolidate the subjective human right of international peace.

One can cite a very interesting position, according to which law of peace is singled out as a separate branch of international and national constitutional law. It could be defined as a system of rules regulating relations that characterize the level of achievement by human society and states of peace as the highest value, connected with the realization of the subjective right to peace, and also determining mechanisms for ensuring and protecting the peace. The development of this branch of the law is fundamental humanistic task of mankind.

The system of the law of peace is formed on two levels: at the level of international law (on an interstate scale) and in the national law of each country. In states, the law of peace is developing with the support of international law, but based on the traditions of legal culture and features of national legislation. At the same time, international law provides general rules for all states to systematize this field of law[7].

The most outstanding constitutional act that enshrines the right to peace is the Constitution of Japan of May 3, 1947. The Preamble of the Constitution states among other things: "We, the Japanese people, desire peace for all time and are deeply conscious of the high ideals controlling human relationship, and we have determined to preserve our security and existence, trusting in the justice and faith of the peace-loving peoples of the world. We desire to occupy an honored place in an international society striving for the preservation of peace, and the banishment of tyranny and

[7] See: Konyukhov I.A. On the formation of the world of law and its constitutional and legal framework in the modern era // International public and private law. 2010, No. 2, p. 2–8.

slavery, oppression and intolerance for all time from the earth. We recognize that all peoples of the world have the right to live in peace, free from fear and want"[8].

The consolidation of the constitutional right of peace is not limited to the declarative provisions of its preamble. The Constitution establishes article 9, which forms the second chapter, "Renunciation of War", which states: "Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as a mean of settling international disputes.

In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized"[9] .

Japanese experts, however, argue that Japan has the Self-Defense Forces. The Supreme Court of Japan does not pass any decision on the constitutionality of the Self-Defense Forces, but the government (Legislative Bureau of the Cabinet) considers the provision on the Self-Defense Forces constitutional, interpreting it in this way: the minimum force for self-defense does not fall under the category "military forces" and the Self-Defense Forces do not exceed this minimum criterion[10]. At the same time, attempts are constantly being made to review the ninth article of the Constitution. The arguments of these attempts come down to the fact that the Constitution is allegedly a 'colonial' act, adopted under the influence of "legal counsel" from the United States[11].

'Conclave' as a procedural form

Regularly recurring situations, when countries cannot agree with each other when discussing the most important issues of international peace and security, lead to a decrease in the effectiveness of the work of international institutions. However, in theory quite simple solution is possible.

In the Roman Catholic Church during the election of the Pope as head of the Church (and accordingly, the head of the State of the City of the Vatican), the conclave procedure is applied. The modern form of the conclave was influenced by the events of 1268 in Viterbo, since at that time the Pope's elections were held in the place where his predecessor died. When the vote dragged on, fourteen months after

[8] See: Japanese Constitution of May 3, 1947 // Constitution Asia. Vol. 3. Far East. Moscow: Institute of Legislation and Comparative Law under the Government of Russian Federation: Norma, 2010, p. 1021–1037 // "ConsultantPlus" Legal Reference System.

[9] See: ibidem.

[10] See: Shinoda Yu. Constitutionalism and trends of reforming the Constitution of Japan // Constitutional and municipal law. 2014. No. 2, pp. 65–68.

[11] See: Krasinski V.V. Constitutional and legal regulation of the protection of state sovereignty in foreign countries // Modern Law. 2016. No. 3, pp. 122–128.

the start of the procedure, the cardinals were locked in the palace, but so far they were unable to agree on the candidature of the new Pope. In 1270, after two years from the beginning of the voting procedure, the believers dismantled the roof of the palace, where the cardinals were locked, in order to exert pressure on them to speed up the decision-making process. As a result of these elections, Gregory X was elected, while the *sede vacante* period lasted for forty months.

The term "conclave", from the Latin *cum clave* "with the key", means the process during which the Pope is elected. After his election, Pope Gregory X issued a bull ordering the procedure for holding the conclave. According to this document, the conclave should begin ten days after the death of the Pope, usually in the same city where he died. Chief officials of the city, where the conclave was held, were obliged to monitor that it was conducted properly. The cardinals were locked with two assistants, called conclavists. After that, they could not communicate with the outside world until the election was over. There was even a special system in the form of a turnstile installed in the window in order to transfer food inside. The cardinal electors were given only a small amount of food at the same time provided that the amount of food and the comfort level was reduced if the elections were tightened[12].

Some changes in the procedure for the election of the Pope underwent with the publication of John Paul II of the Apostolic Constitution of Universi Dominici Gregis, published on February 22, 1996. Paragraph 51 of this document states that "the election of the Supreme Pontiff, in conformity with the prescriptions contained in the following Numbers, is to take place exclusively in the Sistine Chapel of the Apostolic Palace in the Vatican. The Sistine Chapel is therefore to remain an absolutely enclosed area until the conclusion of the election, so that total secrecy may be ensured with regard to everything said or done there in any way pertaining, directly or indirectly, to the election of the Supreme Pontiff"[13].

The history of the creation and conduct of the conclave shows that this procedure was established precisely in order to exclude the non-election of the Pope even in the event of critical disagreements between the cardinals-electors. That is, the conclave as a procedural form allowed preserving the stability of the institution of the Roman Catholic Church to the present day.

It is interesting that the term "conclave" is used in a figurative sense. Thus, in the press this term was used to refer to the meeting of the leaders of France, Germany, Russia and Ukraine in Minsk on February 11–12, 2015, in agreement with the Set

[12] See: Frederic J. Baumgartner "I Will Observe Absolute and Perpetual Secrecy:" The Historical Background of the Rigid Secrecy Found in Papal Elections // The Catholic Historical Review, Vol. 89, No. 2 (Apr., 2003), pp. 6, 165–181.

[13] See: Excerpts from the Apostolic Constitution of Pope John Paul II «Universi Dominici Gregis», which provides detailed guidance on the work of the College of Cardinals during the election of the Supreme Pontiff, URL: http://www.katolik.ru/mir/1016-archive/70633-st2554.html [accessed: 24.09.2017].

of Measures to Implement the Minsk Agreements (Second Minsk Agreement) to resolve the conflict in Eastern Ukraine. Let us also note that, unlike the conclave, the participants of the meeting showed goodwill in reaching an agreement. In the absence of goodwill among the participants, the meeting could be completed without reaching agreements, which would lead to aggravation of the situation in the region of the military conflict[14].

I must say that meetings in the form similar to conclave could be held in other cases. For example, pursuant to paragraph 2 of Article 73 of the Federal Law "On elections of the President of the Russian Federation" vote counting begins immediately after the end of voting and carried out without interruption until the vote returns[15].

The procedure for holding a jury trial also presupposes the continuity of the jury meeting, up to the verdict. The secrecy of the jury deliberations, provided in Article 341 of the Code of Criminal Procedure of the Russian Federation, is the most important guarantee of their independence and objectivity which ensures the rendering of a fair verdict. This secrecy is guaranteed by a number of prohibitions, in particular the prohibition of any irrelevant person in the deliberation room during a meeting of the jury and the prohibition for the jury to leave the deliberation room before rendering their verdict, with some exceptions provided by law[16].

Thus, we can highlight features of conclave as a procedural form:

1. work behind closed doors;
2. the principle of non-interruption;
3. the principle of efficiency;
4. initiation on the basis of legal facts.

Work behind closed doors reflects the very nature of the conclave, from which it takes its name. Indoors means that any meeting participant will not be able to withdraw from the adoption of effective solutions, leaving the meeting.

The principle of non-interruption refers that the meeting runs continuously to achieve effective solutions. This significantly speeds up the decision-making, which is certainly a positive thing for the effectiveness of the meeting.

The principle of efficiency means that the assembly work cannot be completed without the adoption of effective solutions. The absence of this kind of guarantee significantly reduces assembly capabilities to resolve those issues for which it was assembled.

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[14] See: Sokolov M. Minsk conclave, http://izvestia.ru/news/582995 [accessed: 24.09.2017].

[15] See: Federal Law dated 10.01.2003 No 19-FZ (ed. of 07.13.2015) "On elections of President of Russian Federation" // "ConsultantPlus" Legal Reference System.

[16] See: Criminal Procedure Code of the Russian Federation. Chapter 33–56. The itemized scientific and practical commentary / EK Antonovich, PV Volosyuk, LA Voskobitova etc.; holes. Ed. L.A. Voskobitova. M.: "Rossiyskaya Gazeta" 2015, Vol. V–VI. 800.

Assembly is usually initiated on the basis of a legal fact. In case of the Conclave for the election of the Pope it is the death or resignation of the Pope, in case of election commissions it is the end of voting time, in case of the jury trial is the end of the stage of the judicial investigation and pleadings.

These statements are true, and in fact for the Conclave for the election of the Pope, and for election commissions and to the jury.

The analysis of institutions, where in the form similar to conclave is applicable showed that its application is expected most effective in situations where it is necessary to adopt effective solutions on the basis of a compromise or consensus, but there may be unavoidable contradictions among the participants.

In our opinion, the form similar to conclave can be used in meetings of the UN Security Council, for which it is necessary to make appropriate changes to its Rules of Procedure, being temporary at the moment. These changes do not affect the right of veto of the permanent members of the Security Council and other principles enshrined in the UN Charter, however, oblige the Security Council finally to adopt efficient solution based on compromise. The rules of procedure necessary to make provisions excluding the completion of the Security Council without a resolution passed by the implementation of the principles of continuity and efficiency.

Amendments to the provisional rules of procedure can be summarized as follows: "In the case of an immediate threat to international peace and security, the Security Council is obliged to adopt a resolution aimed at resolving the conflict, sitting behind closed doors. Security Council should be in session continuously to the adoption of the resolution. Other rules of procedure of the Security Council shall apply subject to these provisions".

* * *

Of course, such a form appropriate to apply only in exceptional cases of immediate threat to peace and international security, unless otherwise reach an agreement is not possible. Deciding on the use of this form can be assigned to the UN Secretary General, who shall act in that capacity in all meetings of the Security Council[17].

Introduction of the form similar to conclave to the Security Council meetings will follow the principles of the UN Charter and the purpose for the preservation and maintenance of international peace. It will also enhance the effectiveness of the Organization and its Security Council as a key international institution.

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[17] See: Rule 21 of the provisional rules of procedure. Adopted by the Security Council at its first meeting and amended at its 31, 41, 42, 44 and 48 meetings, on 9 April 16 and May 17, 6 and 24 June 1946; 138-m and 222-m on 4 June and 9 December 1947; 468th meeting of February 28, 1950; 1463rd meeting of 24 January 1969, the 1761-th meeting of January 17, 1974 and 2410 meeting, December 21, 1982 // "ConsultantPlus" Legal Reference System.

Streszczenie

W pracy podjęto analizę roli Rady Bezpieczeństwa ONZ w rozwiązywaniu sporów międzynarodowych, uwzględniającą prawo weta pięciu stałych członków Rady Bezpieczeństwa i ich zmieniające się interesy w odniesieniu do trwających konfliktów zbrojnych. Artykuł zawiera analizę przebiegu procesów decyzyjnych w Radzie Bezpieczeństwa. Wskazuje też, jakie mechanizmy postępowania Rady Bezpieczeństwa, m.in. poufne obrady, w sposób najpełniejszy sprzyjałyby realizacji prawa do pokoju.

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