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INTERNATIONAL COURTS IN THE INTERNATIONAL LAWMAKING PROCESS

The article is dedicated to the issue of role of international courts in international lawmaking process. The author studies the problem of recognizing international judicial bodies as international lawmaking subjects. She considers different scientific approaches to meaning of judicial decisions for lawmaking process in international law: from the classic understanding of them as subsidiary means for the determination of rules of law to a new vision of international courts' judgments as international law sources.

Moreover, in the paper some international tribunals' activity is considered and the international lawmaking capacity of their majority is stressed. The courts' classification in the context of international lawmaking is also done.

Key words: international court, international lawmaking, international judicial lawmaking, classification of international courts.

Problem statement. The issue of international law sources has always been a topic one. Being firstly resolved in the article 38 of the Statute of the Permanent Court of International Justice and in the same article of the Statute of the International Court of Justice this question seemed to be closed but actually it was not so. Even at the very beginning there were many discussions on the list of international law sources. One of the most important aspects of such debates has always been the issue of international courts in international lawmaking process. Although the general and more spread approach requires to considerate judicial decisions as a subsidiary mean for law determination, there are a lot of scientists that see it in completely different way. They talk about lawmaking functions of international adjudicators. The discussion became especially acute at the late twentieth century with the rapid proliferation of international judicial bodies. This process continues at the present time but seems to be uncontrolled end unfounded that could lead to some systemic and practical problems either in international judicial activity either in international lawmaking process. That's why we suppose that the above-mentioned sphere requires well-grounded studies and systematization.

Analysis of recent researches and publications. The works of many famous scientists and specialists in the sphere of international law are dedicated to different aspects of international lawmaking. They are Anzilotti, Brownlie, D'Amato, Kelsen, Martens, Butkevich, Kolosov, Levin, Lukashuk, Merezhko, Tunkin and others. Some authors, for example, D'Amato, Danilenko, Merezhko, Shokin, conducted the complex studies of international treaty and interna-

tional custom making. But unfortunately there are no enough specific scientific studies of full international lawmaking process neither of new tendencies of its development such as a tendency of international judicial lawmaking.

Paper purpose. Given the before-mentioned reasoning the purpose of the article is to figure out a place of international adjudication in international lawmaking process, to define more important in this aspect international courts and to rank them according to different criteria for the scope of further systematization.

Paper main body. Since the period after the Second World War the question of international law sources has provoked many discussions in scientific circles all around the world. The well-known classic concept made on the positivism grounds strictly insists on the existence of two main and almost exclusive sources of international law: international treaty and international custom. The main normative support of this theory is the prominent Artcile 38 of the Statute of the International Court of Justice that says that the Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states ; b) international custom, as evidence of a general practice accepted as law; c) the general principles of law recognized by civilized nations ; d) subject to the provisions of Artcile 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. As you see according to the article there is three categories of international law norms sources: international conventions (treaties), international customs and «the general principles of law», but the last one has always been disputed since there is no unique comprehension of the very concept of the general principles of law nor of their list so their using is very rare. As for the paragraph (d), judicial decisions and the teachings of the most highly qualified publicists of the various nations are only subsidiary means «for the determination of rules of law», but not for their making. Actually the text of the article is almost the literal copy of the analogical article of the Statute of the Permanent Court of International Justice of 1920.

Such a normative and scientific position is typical for the beginning of the XX century when the legal positivism putting state's will in the center of any international legal process was the most popular especially in international law science.

But the nowadays realities of the international life demonstrate radical changes in international law sources and international lawmaking conceptions. Some of these changes touch the issue of the role of international courts' decision in international lawmaking processes. If before in the early twenties century the common idea was to consider judicial decisions only as subsidiary means for the determination of rules of law, lately in the mid-twentieth century there were some scientists that have seen them as international law sources having a certain lawmaking effect, now there is a lot of researchers that is sure about lawmaking force of international courts' judgments.

The citations of some prominent international law scientists could be a good illustration of this thesis. For example, Tom Ginsburg, associate professor of law and political science of University of Chicago is convinced that «judges at the international level, like judges in national legal systems, frequently make law in the course of resolving disputes» [1, p. 1]. He talks about the inevitability of international judicial lawmaking: «Judges are supposed to resolve disputes in accordance with pre-existing legal rules, but quite often pre-existing legal rules do not provide a definitive answer. When confronted with a situation where there is no clear pre-existing rule, the judge must make a new rule» [1, p. 4]. What's more he thinks that «the existence of international judicial lawmaking is acknowledged by state practice. State pleadings before international courts often exhibit a concern with the possible rule-creating functions of international judicial decisions» [1, p. 6].

Gilbert Guillaume, member of the Institut de Droit International, former president of the International Court of Justice expresses his thoughts in more moderate but similar way. He says that «it is interesting to note that from awards to judgments, arbitrators and judges have essentially always relied on the jurisdictional precedents that they enumerate, without even questioning the opinion of the States as to the peremptory nature, or even the customary nature of the applied norms. The recourse to precedent does not hide well the desire to ignore positive law and to promote natural law created by the conscience of judges» [2, p. 23].

We can find the same thoughts in the works of many other younger scientists like Marjan Ajevski: «Courts do make law. Plain and simple. They have an enormous normative pull, especially in a system of law that is largely unwritten» [3, p. 17]. And they also talk about different problems emerging in the connection: «This system of international constraint on judges is lacking to say the least. Not only are judges elected to international tribunals in a highly political way there are also very few mechanism that would ensure professional quality whilst on the bench. Very few institutional constraints exist in terms of the election, training and deliberations of international judges. In furtherance, there is no unified education system that would mould judges in a specific ethos, since there is no specific ethos to begin with. Quite the contrary, if anything the international system, if not value neutral, is value plural. Consequently, the international system has had to develop some informal mechanisms for constraining judges» [3, p. 17].

Obviously the international judicial lawmaking is in the process of transformation. But the role of different international courts in it is quite varied. The absence of a strict normative regulation provokes huge inhomogeneity in courts' practice and procedures. We would like to bring some order in the enlarging and complicating system of international courts.

There are some studies dedicated to the lawmaking functions of different international courts but on our view it lacks a large comparative analysis of the mentioned system that would give more complete and broad vision of the whole international judicial lawmaking process having place in the last years.

At the same time the necessity of such a study is emerging since there are some risks of uncontrolled development of the system.

«First, it increases the risk of overlapping jurisdictions and contradictory judgments. This was the case for interstate relations in the swordfish dispute between the European Union and Chile, which the former wished to bring before the International Tribunal for the Law of the Sea, and the latter before the World Trade Organization. ... Yet this proliferation not only creates risks of contradictory decisions in specific cases, but also risks of contradictions of jurisprudence. Such inconsistencies can be the fruit of a stated desire to distance precedents that are estranged from the tribunal in question. Thus, in the Tadic case, the International Criminal Tribunal for the former Yugoslavia wished to oppose the International Court of Justice with regard to the issue of the law governing the responsibility of a State involved in a civil war within the territory of another State. In certain branches of law, these divergences can also be the consequence of a growing specialization that judges and arbitrators are pursuing. Thus, in the Loizidou case, the European Court of Human Rights distanced itself from the jurisprudence of the International Court of Justice on reservations in the name of the specificity of human rights. Finally, the divergences can simply be the fruit of ignorance» [2, p. 18].

It's worth mentioning the study of Marjan Ajevski «International Criminal Tribunals as Lawmakers — Challenging the Basic Assumptions of International Law» in which he did a thorough research of the practice of international criminal courts. He also talks about the importance of such studies since «in the recent years the explosion of international tribunals has been astounding. Never before have international communications and international relations been so «legalized» the Project on International Courts and Tribunals has counted *forty three* (emphasis added — O. N.) existing, extinct, dormant or nascent judicial bodies. It has applied five set of criteria to define what it considers a «judicial body». The vast majority of these judicial bodies has been established or remodeled in the past two decades. More importantly, a large number of these judicial bodies have started to resemble a specific model, i.e. a supranational tribunal» [4, p. 63]

Within the most relevant international lawmaking judicial bodies it's worth mentioning the International Court of Justice (hereinafter — the ICJ), the International Tribunal for the Law of the Sea, international criminal courts (the International Criminal Court (hereinafter — the ICC), the International Criminal Tribunal for Yugoslavia (hereinafter — the ICTY) and the International Criminal Tribunal for Rwanda (hereinafter — the ICTR), the Appellate Body of the World Trade Organization, the European Court of Justice (hereinafter — the ECJ) and the European Court of Human Rights (hereinafter — the ECtHR), the Iran-US Claims Tribunal, the Court of Arbitration for Sport, the International Centre for Settlement of Investment Disputes etc.

It's clear that exactly the ICJ plays a key role in the international lawmaking although its practice is not so constant. The Court first repeatedly confirmed that it was not the role of the Court to create the law. Thus, in *the Fisheries* case, it clarified in 1973 that «as a court of law, [it] cannot render

judgment sub specie legis ferendae or anticipate the law before the legislator has laid it down» [5]. Similarly, in the 1996 advisory opinion on *the Legality of the Threat or Use of Nuclear Weapons*, the Court refused to replace a failing legislator, and consequently decided that, in view of the state of international law, it could not rule on the legality of the threat or use of nuclear weapons in «an extreme circumstance of self-defense, in which the very survival of a State would be at stake» [6]. «On numerous occasions, members of the Court in various statements or opinions have also recalled that 'that it is not the role of the judge to take the place of the legislator… [It] must limit itself to recording the state of the law without being able to substitute its assessment for the will of sovereign States» [2, p. 8].

At the same time the situation is not as simple as it seems at the theoretical level since there are a lot of ICJ's decisions that demonstrate the lawmaking capacity of the court. It's worth mentioning the ICJ's advisory opinions in *the Reservations to the Genocide Convention, the Certain Expenses, Reparations for Injuries* cases, the *Barcelona Traction* case. In the latest «the ICJ introduced the distinction between two sets of obligations, one that exists inter se, i.e. among the parties, and a second one that is owed to the international community as a whole» [4, p. 67], well-known as obligations *erga omnes*. Actually exactly the ICJ is considerate by many scientists as «one of the biggest developers of general international law» [4, p. 66]. But it's not a common point of view because the others think that «the International Court of Justice does not recognize any binding value to its own precedent» [2, p. 12].

The lawmaking tendencies appear in the practice of other international courts, for example, the International Tribunal for the Law of the Sea (hereinafter — the ITLOS). On the view of James Harrison, «it is already possible to determine the development of a consistent jurisprudence in the decisions of the ITLOS which has only been in operation for ten years. For instance, the factors that the Tribunal propounded in the initial cases on prompt release have been relied on in subsequent prompt release proceedings» [7, p. 218]. One may see the *Camouco* case, the *Monte Confurco* case, the *Volga* case, the *Juno Trader* case etc.

Even in more evident way we can find the manifestation of lawmaking activity in international criminal tribunals' practice. Although the ICTY clearly explained its approach to the lawmaking question in the so-called *Kupre [ki]* Trial Chamber judgment of 2000, its latter practice evidenced another tendency. In the judgment of 2000 the court said that «being international in nature and applying international law principaliter, the Tribunal cannot but rely upon the well-established sources of international law and, within this framework, upon judicial decisions. What value should be given to such decisions? The Trial Chamber holds the view that they should only be used as a «subsidiary means for the determination of rules of law» (to use the expression in Article 38(1)(d) of the Statute of the International Court of Justice, which must be regarded as declaratory of customary international law). … Clearly, judicial precedent is not a distinct source of law in international criminal adjudication. …. More specifically, precedents may constitute evidence of a

customary rule in that they are indicative of the existence of *opinio iuris sive necessitatis* and international practice on a certain matter, or else they may be indicative of the emergence of a general principle of international law. Alternatively, precedents may bear persuasive authority concerning the existence of a rule or principle, i.e. they may persuade the Tribunal that the decision taken on a prior occasion propounded the correct interpretation of existing law» [8, par. 540]. But lately this year in the *Aleksovski* Appeals Chamber judgment of 2005 the court actually crossed out its previous position. It said that «the Appeals Chamber, therefore, concludes that a proper construction of the Statute, taking due account of its text and purpose, yields the conclusion that in the interests of certainty and predictability, the Appeals Chamber should follow its previous decisions, but should be free to depart from them for cogent reasons in the interests of justice. Instances of situations where cogent reasons in the interests of justice require a departure from a previous decision include cases where the previous decision has been decided on the basis of a wrong legal principle or cases where a previous decision has been given per incuriam, that is a judicial decision that has been «wrongly decided, usually because the judge or judges were ill-informed about the applicable law» [9, par. 107–108] (footnote omitted — O. N.). The consequence of this is that now Trial Chamber of the ICTY and the ICTR are bound by the judgments of the Appeal Chamber and that the Appeal Chamber itself is the only one that can depart from a previously decided precedent and only with cogent reasons.

Talking about another prominent international criminal tribunal we must accept that unfortunately it's too early speak about the solid ICC's approach to judicial lawmaking questions since it has only 13 years of practice and 3 final decisions. But the analysis of its argumentation gives to the researchers the possibility to conclude that «the ICC simply accepted the decision of the ICTY as settled law» [4, p. 208]. Clearly that with time the practice of the court could change but the existence of hierarchical structure gives more reasons to think that the ICC would follow the the ICTY's and the ICTR's approach to the applicable law.

Regarding to the courts of regional character it's interesting to study the ECtHR's practice since it has a long history enough and a lot of cases to analyze. In its 1990 *Cossy v United Kingdom* decision, the Court deduced that it «is not bound by its previous judgments; indeed, this is borne out by Rule 51 para. 1 of the Rules of Court. However, it usually follows and applies its own precedents, such a course being in the interests of legal certainty and the orderly development of the Convention case-law. Nevertheless, this would not prevent the Court from departing from an earlier decision if it was persuaded that there were cogent reasons for doing so. Such a departure might, for example, be warranted in order to ensure that the interpretation of the Convention reflects societal changes and remains in line with present-day conditions» [10, par. 35].

On this basis, in the past 10 years the ECtHR has several times explicitly declared that it was reversing its case-law, with the goal of either creating new rights (for example, for the benefit of prisoners, minorities and transsex-

uals) or to abandon the rule of judicial economy in order to more fully determine the rights of litigants [2, p. 13]. But it cannot overturn the abundant case-law use of the court.

The ECJ's decisions are also full of references to its previous decisions. But it «did not hesitate to change its jurisprudence over time. To do this, it primarily employed the method of distinguishing between precedent invoked and cases examined. However, in certain cases it proceeded to truly and explicitly overrule precedent» [2, p. 14]. On the other hand the ECJ «has been called as being one of the key actors in reshaping the European Communities and the European Union. Through the introduction of the doctrines of direct effect, supremacy of EC law of implied powers and of human rights it creates a system of law that is far mare radical than anyone expected in 1951» [4, p. 67–68].

What's more although the ECtHR and the ECJ are considered so-called self-reliant or self-contained regimes they often use judgments of each other. «The former, as we know, assures member States' respect of the European Convention on Human Rights. The latter assures the European Union's respect for the fundamental rights guaranteed by the Convention. The overlap of competence, at times contested and finally called into question by the Lisbon Treaty, has raised certain problems despite the care taken by each Court to consider the jurisprudence of the other. Difficulties have arisen recently, for example, with respect to the rules governing the fight against international terrorism or the status of real property in Northern Cyprus. Here again, precedent was not ignored, yet each jurisdiction pursued its course according to the goals that the treaties assign to them» [2, p. 20].

This example demonstrates the use of external precedents that lately becomes more frequent. «A ruling in one regime may affect a ruling in another that seemingly has little to do with that specific regime... [E]ven though certain international courts are designed to interpret a regime specific law it may have incidental consequences outside of that specific regime. This is not surprising given that fact that all of these judicial bodies are interpreting a certain type of international law as well as the general tenets of international law. They cannot but apply rules that are used throughout the international law system» [4, p. 69–70].

Unfortunately in the article limits we have no possibility to review the practice of all international judicial bodies but even the abovementioned analysis demonstrates a wide precedent use of external and internal character. Such a practice gives us the possibility to conclude that international courts become more active participants of international lawmaking process. Now we would like to make some systematization with the purpose to define which courts are more effective in the process and more constant using precedents.

First of all we should mention the difference in the lawmaking activity of the courts of a global and regional character. On the view of Gilbert Guillaume «if the legal situation is the same for the courts of a global nature and those of regional character, the practice of these courts is very different. In both cases, precedent is often invoked. In the first, it is rarely abandoned.

In the second, evolutions or even outright changes in jurisprudence are more frequent» [2, p. 13]. Actually a contradictory practice of the ECtHR and the ECJ mentioned above demonstrates the thesis of more changeable character of regional courts' activity.

Speaking above the lawmaking in international law we must state that the international global courts' practice is more important for the process since in this way the general international law is forming.

Another approach to the international courts distinction is to divide all international judicial bodies in dependent and independent ones. On the view of Eric A. Posner and John C. Yoo, professors of law from the universities of Chicago and California, «a tribunal is independent when its members are institutionally separated from the state parties, when they have fixed terms and salary protection, and the tribunal itself has, by agreement, compulsory rather than consensual jurisdiction. Conventional wisdom holds that independence at the international level, like independence at the domestic level, is the key to the rule of law as well as the success of formalized international dispute resolution. We argue, by contrast, that independent tribunals pose a danger to international cooperation because they can render decisions that conflict with the interests of state parties. Indeed, states will be reluctant to use international tribunals unless they have control over the judges. On our view, independence prevents international tribunals from being effective» [11, p. 7].

Such a position isn't a common one in international law science. For example, Tom Ginsburg doesn't agree with it. He thinks that «they have the wrong criteria for operationalizing independence. There is nothing about permanence, or what might be called institutionalization, which will necessarily render standing courts ineffective. Posner and Yoo argue that domestic courts, unlike international courts, are subject to mechanisms of political control. I argue that the differences are only of degree rather than kind. Every international dispute resolver is subject to constraints. Certainly one can imagine bodies that are appointed for the purpose of resolving a particular dispute and are able to exercise substantial independence, while conversely there may be standing bodies that are substantially constrained» [1, p. 38].

We agree with the Ginsburg's thesis saying that «from the point of view of judicial lawmaking, standing tribunals may be more effective than those appointed for a particular dispute. To the extent that they see a stream of cases presenting similar issues over time, standing tribunals may develop mechanisms of signal and interaction with their political principals that may make them more effective delegates. Standing bodies may develop proficiency in determining state interests and preferences as they see the same parties in a series of disputes over time. They may be better able to establish creative focal points that maximize disputant payoffs; indeed their reputation for choosing effective rules may itself generate compliance in future cases. They may create rules that will discourage future disputes — in other words, effective precedent» [1, p. 39].

He also arrived to the conclusion about some factors that lead to greater discretion on the part of international tribunals. «First, lawmaking power

increases with the number of parties to a regime. Second, lawmaking power increases with the difficulty of amending the treaty or overruling the lawmakers. Third, lawmaking power increases with the cost of exiting the regime. The first two propositions imply that multilateral regimes tend to be more conducive to judicial discretion than bilateral regimes, because the difficulty of obtaining agreement to revise or amend the treaty increases with the number of parties that must negotiate change. ... The third proposition is that the more costly and difficult it is for states to exit a regime, the greater the discretion of the court» [1, p. 39–40].

The first factor by Tom Ginsburg works also for the international courts division in interstate and transnational or supranational tribunals. «The more cases a court has the bigger the chances that it will create a sizable reference point for itself and the more opportunities it will have for expanding the law through interpretation. The way a tribunal is structured has a significant influence on the number of cases that it will have. An interstate tribunal (one that is limited to only hearing state to state complaints e.g. the ICJ) is likely to have fewer cases before it than a supranational one» [4, p. 72]. The examples of the latest are the ECJ, the ECtHR, the ICTY, the ICTR, the ICC etc. They are established by a group of states or the entire international community and exercise jurisdiction over cases directly involving private parties. « [T]he direct link between supranational tribunals and private parties creates opportunities for those tribunals to establish direct or indirect relationships with the different branches of domestic governments. Through these relationships, a supranational tribunal can harness the power of domestic government to enforce its rulings in the same way that the judgments and orders of a domestic court are enforced» [12, p. 290].

So, another criterion of international lawmaking courts distinction could be the interstate or supranational character of a court. Evidently the bigger is a body the bigger lawmaking importance it has.

Conclusions. To conclude the article we would like to emphasize that in the point of view of many international law scientists international courts can create legal norms. What's more they are creating them at the moment. The absence of a strict regulation and even more of a solid scientific conception that could interpret judicial lawmaking has led to the situation where the courts have different approaches to the use of precedent. The practice of internal and external precedents use is even more diverse. But more o less the courts making decisions appeal to norm of other judgments. This fact gives to researchers the grounds to argue that judicial decisions are much more than subsidiary means for the determination of rules of law and can be seen as real international law sources.

The brief analysis of practice of some more prominent international tribunals gives us the possibility to conclude that the precedent use is characteristic for all of them. But we can state that some judicial bodies occupy more important place in lawmaking process at the moment. For example, the courts of a global nature are more stable in their precedent use that the regional ones and the norms that they form are more important for the creation of general

international law. The supranational or transnational tribunals having a more abundant practice are more effective producing the international legal norms than the courts of interstate character. Finally the so-called independent tribunal with a higher possibility will produce international law norms rather than the provisions that are compulsory only to the contesting parties. Evidently judicial lawmaking processes must be regulated in more uniform and systematic way in some international legal documents to avoid the possible future abuses.

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МІЖНАРОДНІ СУДИ У МІЖНАРОДНОМУ ПРАВОТВОРЧОМУ ПРОЦЕСІ

Резюме

Статтю присвячено розгляду питання щодо ролі, яку відіграють міжнародні суди у процесі міжнародної правотворчості. Авторка досліджує проблему визнання міжнародних судових інституцій як суб'єктів міжнародної правотворчості. Вона розглядає різноманітні наукові підходи щодо значення, яке мають судові рішення для правотворчого процесу у міжнародному праві: від їхнього класичного розуміння як допоміжних засобів для визначення правових норм до нового бачення рішень міжнародних судів як джерел міжнародного права.

Крім того, у статті розглянуто діяльність деяких міжнародних судів та наголошено на їхній правотворчій потенції, а також проведено їхню класифікацію у контексті міжнародної правотворчості.

Ключові слова: міжнародний суд, міжнародна правотворчість, міжнародна судова правотворчість, класифікація міжнародних судів.

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МЕЖДУНАРОДНЫЕ СУДЫ В МЕЖДУНАРОДНОМ ПРАВОТВОРЧЕСКОМ ПРОЦЕССЕ

Резюме

Статья посвящается вопросу о той роли, которую играют международные суды в международном правотворческом процессе. Автор исследует проблему признания международных судебных институций в качестве субъектов международного правотворчества. Он рассматривает различные научные подходы касательно того значения, которое имеют судебные решения для правотворческого процесса в международном праве: от их классического понимания в качестве вспомогательных средств для определения правовых норм до нового видения решений международных судов в качестве источников международного права.

Кроме того, в статье рассматривается деятельность некоторых международных судов и акцентируется их правотворческий потенциал, а также проводится их классификация в контексте международного правотворчества.

Ключевые слова: международный суд, международное правотворчество, международное судебное правотворчество, классификация международных судов.