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ПРИЧИНИ ВИНИКНЕННЯ ТА РОЗВИТКУ МІЖНАРОДНИХ СУДОВИХ ОРГАНІВ

REASONS FOR EMERGENCE AND DEVELOPMENT OF THE INTERNATIONAL JUDICIAL BODIES

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The article is devoted to analysis of international judicial bodies, focusing on international human rights and international criminal courts. During less than a century the international judicial bodies have obtained influence at international legal systems, and in a sense put in question issue of sovereignty. This article compares emergence of international human rights and criminal courts, which have different reasons, therefore the proliferation of respective courts are described.

The ideological and practical differences between the regional and global international human rights courts are considered, and comparison of advantages and shortcomings of each system is made. The regional human rights courts develop in slightly different directions in Europe, Africa and the Americas. Conclusion is suggested that at current level of development, regional human rights courts are more justified than a global one. The comparison of development ways of international human right courts and criminal courts is made in the article. The latter are a valuable mechanism against the impunity. The International Criminal Court is an important institution from the standpoint of the international law, but perhaps even more important from the political view. The international community has made a huge compromise regarding the states' sovereignty in order to create this Court. The success or failure of its authority will depend mostly on its international legal legitimacy, but also on will of the states. If it fails, then the idea of the regional criminal courts might be worth considering. This article also refers to issues of states' compliance with the international courts decisions, which is a criterion of judicial body's effectiveness.

Key words: international courts, international judicial bodies, human rights, fighting impunity, international development.

Стаття присвячена аналізу діяльності міжнародних судових органів, зокрема міжнародних судів із захисту прав людини і міжнародних кримінальних судів. Протягом останнього століття міжнародні судові органи отримали значний вплив на міжнародні правові системи. Деякі автори вважають, що розвиток міжнародних судів ставить під загрозу концепцію державного суверенітету; з іншого боку, ефективні міжнародні судові органи сприяють уніфікації міжнародного права та кращому захисту прав людини. У цій статті порівнюються причини появи та розвитку міжнародних судів із захисту прав людини та міжнародних кримінальних судів, а також причини, з яких держави визнають їх компетенцію, жертвуючи частиною суверенних прав.

Ключові слова: міжнародні суди, міжнародні судові органи, права людини, боротьба з безкарністю, міжнародний розвиток.

Статья посвящена анализу деятельности международных судебных органов, в частности международных судов по защите прав человека и международных уголовных судов. В течение последнего столетия международные судебные органы получили значительное влияние на международные правовые системы. Некоторые авторы считают, что развитие международных судов ставят под угрозу концепцию государственного суверенитета; с другой стороны, эффективные международные судебные органы способствуют унификации международного права и лучшей защите прав человека. В этой статье сравниваются причины появления и развития международных судов по защите прав человека и международных уголовных судов, а также причины, по которым государства признают их компетенцию, жертвуя частью суверенных прав.

Ключевые слова: международные суды, международные судебные органы, права человека, борьба с безнаказанностью, международное развитие.

During the last decades the world has witnessed a significant increase in the development and use of international law, accompanied by the proliferation of international courts and tribunals and other dispute settlement bodies available to states and, in a growing number of cases, private parties and individuals. Any society does not exist separately from the others; therefore the substantial interdependency is a crucial characteristic feature of the modern world.

The international judicial bodies resolve issues and enforce law and international treaties from human rights violations to multibillion business disputes. According to Eric Posner and John Yoo, the international tribunals "may have been a crucial force behind the integration of Europe into a single economic and political unit" [1, 3]. Cesare Romano called the expansion and development of the international judiciary "the single most important development of the post-Cold War age" [2, 709].

Since the XIX century the international judicial bodies have undergone development from the advisory institutions to the internationally recognized independent bodies with compulsory jurisdiction. In this paper the short description of the historic track of emergence of the international judicial bodies will be described in the first part. In the second part of the paper, the reasons for emergence and development of the international judicial bodies are presented. The main research questions were how did the international judicial bodies become successful, and why do states comply with the judgments, even if they de facto do not have to? There is also a small discussion about the influence of the international judicial bodies over the international law.

The emphasis has been made on international human rights courts, which are particularly important for human rights protection in the globalizing world environment, and to international criminal courts and tribunals, which are created to fight impunity in the most serious globally recognized crimes.

In the legal literature there is no exact definition of the terms "international court" and "international tribunal". As C. Romano argues, the "international court" is often used for a permanent organ, while the "international tribunal" refers to ad hoc institutions, but there is at least one exception to this rule, which is the permanent judicial organ established by the 1982 U.N. Convention on the Law of the Sea, which is called the "International Tribunal for the Law of the Sea" [2, 713]. This scholar suggests using a term "international judicial body[1]", so, for the interest of this research to avoid linguistic disputes, the terminology suggested by C. Romano was used. Hereinafter, the "international judicial body" will include international court and (or) international tribunal.

This article includes the complex research in comparative law (particularly in the international human rights law); there-

[1] "International judicial institutions" and "international judicial organs" are the synonyms.

fore, the combination of research approaches was effective for the work and enabled deeper understanding of the subject. The combination of the doctrinal, and qualitative methods was applied during the research.

Emergence and Development of the International Human Rights Judicial Bodies

The first international quasi-judicial organs date back to the Jay Treaty of 1795 [3], which provided for the establishment of three mixed claims commissions, one relating to U.S.-British border disputes and two to examine the war claims of British subjects and U.S. citizens, respectively. The Jay Treaty gave impetus to a revival of the judicial process of arbitration that had fallen into disuse during the eighteenth century [1, 738-739]. Since that during the two centuries, the international arbitration has changed significantly. Further in this paper arguments will be presented, that the increasing of the international trade and economic growth led to development of the international organizations in general and judicial bodies in particular. The inter-state trade is a subject of a wider research and will not be discussed in this paper.

The development of the international judicial bodies for human rights protection has come through different periods. The first remarkable move in the practical protection was emergence of the anti-slavery courts (African Slave Trade Mixed Tribunals (1819-1866 circa).

The emergence of these courts has been possible after the slave trade was prohibited in 1807 both in the United States and Great Britain [4,A15]. The formal British Slavery Abolition Act was passed in 1833, followed by the new independent Latin American States, to France in 1848 and to the United States in 1863 [5,123]. International cooperation began from prohibition of the slave trade, which did not mean immediate prohibition of the ownership of slaves. As J. Fernández notes, "the enslavement and slavery-related practices were prohibited in the laws and customs of war" [5, 124], further these practices were prohibited in the law of the sea. This situation allowed establishing tribunals, which dealt with the slave trade on the sea. Later, between 1817 and 1871 bilateral treaties between Britain and several other countries were signed, which led to the establishment of international courts for the suppression of the slave trade [6,552]. These courts delivered more than 600 decisions, which helped to free about 80,000 slaves [6,557]. Despite the fact, that there were no substantial provisions on the prohibition of slavery, neither proclamation of right to freedom, the anti-slavery courts can be considered as the first international quasi human rights tribunals.

Although it is important to note, that slave ownership was still allowed in many states, the different legal status of the slave trade and slavery is still evident in article 2 of the 1926 Slavery Convention [7]. Jenny Martinez argues that Britain's abolitionists used the international law to reach the goal of general abolition of the slave trade, and their interests were not only economic ones, but mostly based on humanitarian values [6,553]. The economic analysis of the XIX century Britain shows that slave trade and slave colonies were profitable for the country, but under the pressure of abolitionists inside the state, Great Britain has become an international advocate for prohibition of slave trade at first and slavery generally. It is fair to agree with the statement made by J. Martinez, "the nineteenth-century slavery abolition movement was the first successful international human rights campaign, and international treaties and courts were its central features" [6, 553]. Britain was an important power on the international landscape of those days, so its political will to make the movement successful is also important. The further development of human rights in general and international courts was often – if not always – supported by the powerful states. Arguments for this point of view will be provided later in this paper.

After the anti-slavery courts, development of international judiciary bodies for human rights protection was on pause till the 1948, when the Universal Declaration of Human Rights was proclaimed. This particular event marked a crucial change in the international law, because human rights were for the first time in history recognized as universal value. Although, the international human rights court was never created and the Declaration is not a binding document, it opened a way to creation of the regional systems of human rights protection.

Now there are three regional courts for human rights protection, which operate on the permanent basis. In Europe the European Court of Human Rights (ECtHR) was created in 1959 within the Council of Europe (now there are 47 member-states, all of which have recognized the jurisdiction of the Court). In the Americas, the regional human rights arrangements exist within the intergovernmental organisation known as the Organisation of American States. The Inter-American Court of Human Rights (IACtHR) was created in 1979, and to this date includes 25 states [8]. The African regional human rights system is the most recent and has been established within the African Union. The African Court of Human and Peoples' Rights (ACtHPR) was established in 1998 and started functioning in 2004 [9], now only 27 African states have recognized the ACtHPR jurisdiction [10].

The crucial feature of the international human rights courts is that a citizen can apply the claim against its own state. Therefore the states before ratifying the respective treaty and recognizing the jurisdiction of the court have to be ready to give up part of their sovereignty. Perhaps for this reason, there is no global judicial body for human rights protection. The United Nations (UN) bodies like the Human Rights Committee only monitors the implementation of the International Covenant on Civil and Political Rights by its State parties, the same as the UN Human Rights Council. The latter body has a complaint mechanism, but it is not a judicial body and the resolutions it issues have no binding force.

The question of whether the international community is moving towards the global human rights court is a difficult one. The first step for such a court would be universal agreement on the substantial provisions, i.e. the binding treaty with human rights catalogue, recognized by all states. If such court would come to existence, it will definitely improve the situation with human rights protection around the world, because it will insure the equal protection for everyone everywhere. On the other hand, the global court can only function on a basis of the limited human rights catalogue, as it is practically impossible to make the states agree for a broad list of human rights and freedoms. The universality of the human rights is not generally recognized in the legal doctrine, given this fact and the current level of international cooperation in this sphere, then it seems logical to agree with the argument that regional human rights courts would be working more efficiently. Each region of the world differs depending on economic, social, historic, and other circumstances, but people in the particular region also share common culture and values. This approach is in compliance with the notion of the so-called soft universalism of the human rights [11; 12]. The benefit of such approach lies not only in the easier communication at the regional basis [2, 738], than at the global, but also that the standards for protection could be set higher, because the basic standards are common for the given region. Therefore, the higher standards of human rights protection could be built on the common ground and implemented through the treaties. The other possibility to ensure that the standards are improved is to apply the dynamic or evaluative interpretation, which is applied by the ECtHR. This means that the same article of the Convention provide for the higher protection standards as the conditions of life change.

The disadvantage of the regional human rights protection systems may lie in creation of the 'exclusive' protective mechanisms, which are available only for citizens of the particular states and emergence of too diverse human right standards. The option for diminishing this disadvantage is to give the right to apply for the protection to anyone, if the violation was made at the territory of the member-state.

The discussion is far from its end, but at this moment it is important to mention that universal human rights court would be a guarantee for protection of the basic rights for everyone, but as practice shows, perhaps it is more rational to have the well functioning and effective regional judicial bodies, than aim too high and receive a dysfunctional institution, which would be incapable to enforce its judgements.

Emergence and Development of the International Criminal Judicial Bodies

The development of the international criminal law has gone through a long way of ad hoc application and universal recognition of only war crimes according to the Hague Conventions of 1899 and 1907, were the war crimes were formally recognized by the international community, to emergence of the International Criminal Court, which has become the first permanent international criminal court.

Though, for a long time there had been no notion of crime in the sense of the international law, as well as there had been no means of capturing, trying or punishing criminals. Even though some scholars mention salve trade and privacy, as first wrongdoings tried before the international courts, it is important to remember that they were "not crimes against international law, but only constituted a special basis of States' jurisdiction, otherwise restricted to crimes committed on its territory or by its nationals" [5, 125]. This shift from exclusively internal jurisdiction to international jurisdiction happened after 1945, and touched upon criminal law, but also upon the human rights law. The international community recognized the jurisdiction of various international courts.

The Nuremberg and Tokyo Criminal Tribunals were the first truly international tribunals, set the precedent for trials post factum of the war crimes and gave a way to the two criminal tribunals, the International Criminal Tribunal for the Former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR), both of which have been established by the U.N. Security Council acting under its Chapter VII powers [13]. These tribunals are ad hoc Tribunals and have limited scope of jurisdiction; their purpose is to restore international peace and security according to the art. 39 of the U.N. Charter. The functioning of the ICTY is in process of fulfilling its Completion Strategy [14]. The success of these tribunals in exercising international criminal justice inspired the international community to creation of the International Criminal Court (ICC). The Rome Statute of the International Criminal Court has been adopted on July 12, 1998[2] (the Rome Statute). On 17 July 1998, the international community reached an historic milestone when 120 States adopted the Rome Statute, the legal basis for establishing the permanent International Criminal Court [15]. The Rome Statute entered into force on 1 July 2002 after ratification by sixty countries.

In 1999 C. Romano wrote, "if the ICC is established, it will probably become a crowning moment of this era of international law and organization" [2,720]. Although this Court is still lacking an efficient mechanism for enforcement of its judgements, the mere fact of establishment of this institution is an important sign for the development of the international law. The jurisdiction of the ICC covers four most serious crimes of concern to the international community as a whole (the crime of genocide; crimes against humanity; war crimes; the crime of aggression) (art. 5 of the Rome Statute). The jurisdiction ratione personae of the ICC is limited to the State on the territory of which the conduct in question occurred; State of which the person accused of the crime is a national (art. 12 of the Rome Statute). Nevertheless, art. 13 of the Rome Statute provides for almost universal jurisdiction for the Court, because the Security Council of the UN can agree to grant the jurisdiction to the Court in any case of the abovementioned crimes.

Generally speaking, all cases pending at the ICC are against the nationals of the African states [16]. Consequently, the decision of the African Union from 2009 [17] about extension of the jurisdiction ACtHPR to deal with criminal matters is a very important one. The African Union agreed that the ACtHPR will try international crimes such as genocide, crimes against humanity and war crimes, which are the same crimes that the ICC has a mandate to deal with.

Now the international community faces the emergence of the new international judicial body, which is permanent and has jurisdiction in human rights and international criminal law. Actually, the regional international criminal court is nascent. The question then would be, are the arguments made in favor the regional international human rights courts are relevant for the regional criminal courts, and if so, is there a need in a global criminal court, i.e. the ICC.

If the international criminal justice would develop into direction of regionalization, then the future regional international criminal courts should have the following features: they should be permanent; the list of basic crimes should be equal, but the regional peculiarities could be added; the subjects to be tried at those courts (ratione personae) should be any individuals, who committed the crimes against the citizens of the member states or at the territory of the member-state.

There is no guarantee that the regionalization of the international criminal judicial bodies will be successful, neither there is no clarity if it would develop in this direction. Though, the fact of the universal recognition of the most serious crimes shows that the globalized community is moving towards elimination of impunity at least in the outrageous crimes.

Reasons for Emergence and Proliferation of the International Judicial Bodies

During the last century international organizations changed the international relations and brought serious changes to the international law. The international judicial bodies are the international organizations with special function, so the reasons their emergence are partly the same.

The scholars A. Peters and S. Peter [18,170-185] describe three types of factors why international organizations emerged and developed since XIX century till now. A first type of factors are material ones, which include economic growth, technical progress and innovation, which lead to boosting of the international trade, and this in turn led to harmonization of the measures, terms and standards. The increased mobility of people led to necessity to create harmonized rules for their movement and organize health care system. A second type of factors was ideational factors. The scholars state that realist and idealist ideologies accompanied the increase of the interstate trade. They mention un intérêt commun, which often led to establishment of the international organizations, which at the beginning were rather technical ones (for example, Postal Union, Conseil supérieur de Constantinople, etc.), but furthermore the ideals of solidarity, pacifism, and democracy supported the development of the international law and organizations. A third type of factors were called the strategic ones: "[t]he international organizations served, first, as a back door to power" [18,180]. The participation in the international organizations meant power gain for some states, as well for non-state actors and entities. The international arena provided the possibility to bring up the issues, which were not yet open to discussion at state level, and for some states it opened the possibility to bring their own agenda to the organization. These factors are also applicable for the international judicial bodies.

Some scholars connect rise of the international judicial bodies with the gradual descend of the role of sovereign states and emergence of other players at international arena. According to Antonio Cassese the first non-state actors were created by the states themselves, which were the intergovernmental organizations [19,51]. This scholar asks a question whether 'the state's authority might be replaced by the power of community'. The international judicial bodies definitely have au-

[2] The Rome Statute has been adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 12 July 1998.

thority primarily given by the states, but currently in particular cases exceed the sovereignty of the states, as they have possibility to protect human rights of the citizens against their own governments and to punish war criminals throughout the world [1, 3-4].

A. Cassese also mentions, that the power of any international organization comes from the founding member states, and "formally speaking, all these organizations may be undone by legal fiat, through a treaty or a decision of all member States repealing the founding treaty" [19, 52]. Nevertheless, the development of the international organizations, including international tribunals, shows that with time passing the organizations exceed the power of the founding states. A. Cassese also points out the transfer of authority from member states to the international organization, he speaks particularly about the European Union [19, 52], but closer look at the international judicial bodies may show us, that transfer of authority to these organizations is even more visible. Ability to exercise the sovereign power within the borders of the state and over the citizens of this state is one of the most important characteristics of the sovereign state. While international judicial bodies, especially human rights and criminal ones, have authority to adjudicate in the field, which for centuries was an exclusive jurisdiction of a state.

The reasons of flourishing of the international organizations especially in 1990s are connected by C. Romano with the fall of the bi-polar world order and the demise of the Soviet Union [2,729]. In opinion of this author the social Marxist ideology of the international relations prevented states from recognition and participation in the international judicial bodies, and with gaining independence newly formed states have been becoming the members of the international organizations, including judicial ones [2, 729-735].

The scholars, who are in favor of judicialization of international law claim, "adjudication by authentic international courts contributes to the legitimacy of international law, without which international cooperation is difficult or impossible to achieve" [1, 72]. The arguments are also made, that the international courts support the peaceful dispute resolution, because they make decisions based on "principle rather than power" [1, 72].

E. Posner and J. Yoo make argument that international tribunals play an important role in clarification of the provisions of a treaty or convention, as well as facts between the states [1, 22].

On the other hand, critics of the strengthening of the independence and widening of jurisdiction of the international tribunals state that the idea of international adjudication undermines sovereignty and democratic procedures [1, 5]. This concern was also mentioned by Henri Kissinger: "[international adjudication] is being pushed to extremes which risk substituting the tyranny of judges for that of governments; historically the dictatorship of the virtuous has often led to inquisitions and even witch hunts" [20]. It is difficult to agree with this position, because international courts are called to protect the most important values of the human society, hence for effective functioning they need to have sufficient power.

Nevertheless, legal professionals often overlook the significant difference between the international judicial body and national courts. The basic distinction lies in a coercion, which national judiciary has to enforce decisions and international one lacks. So, the important questions would be why do states comply with the judgements of the latter and what is a goal of existence of the international judiciary bodies? According to Andrew Guzman, the international judicial body produces interpretation of the existing relevant legal rules, context of their application, and relevant events. In this scholar's opinion, "[i] ts sole contribution to the dispute is information concerning what happened, what law governs, and how the law applies to the fact" [21,179]. When the parties of the dispute have the same information about the disputed event from a respected institution they are more likely to achieve a consensus, so their conflict will be solved.

If there is no effective method of coercion for the states to comply with the judgment, then the question about the very existence of the international tribunals is unclear. E. Posner and J. Yoo have an interesting approach why states chose to comply with the judgments: "there is a benefit from compliance as well. A state that complies retains the option to rely on tribunals in the future, for a state that routinely violated judgments would not credibly be able to propose international adjudication as a way of resolving a dispute with another state. Thus, a state will comply with the judgment if the cost of compliance is less than the future benefits of continued use of adjudication. The future benefits of adjudication can be high only if the tribunal performs well by resolving the dispute neutrally as between the disputing states. In other words, the tribunal must interpret the treaty or convention in a way that maximize its (ex ante) value to the parties" [1,20]. These scholars apply here the prisoner's dilemma in repeated scenario of the game, which suggests that states would prefer to comply with the tribunal's judgments not because they respect the international law, but because compliance is beneficial for them [1, 15]. In case of the human rights tribunals, the state should be democratic in order to enforce the judgments. The difference is that decisions of such courts are always against the state, if the violation is proved. Moreover, the citizens of the state make claim against their own state, so the non-democratic governments would be very resistant to enforce such judgments. In the long run, they are not afraid to lose power; therefore benefit in their version of the prisoner's dilemma would be to ignore the decisions or not to accept the court's jurisdiction in the first place. Hence, in this situation only strong coercion from other states can change the approach of a non-democratic government.

The international judicial bodies have significantly changed the landscape of international relations, and cannot be further seen as just another mean of dispute resolution. In a way, this reflects the Weberian approach to the institutions, as the international judicial bodies are organized with the high enough level of logically formal rationality [22, 727, 729, 749] and are applying the law, which is consciously recognized by the states, i.e. is legitimized by them. Therefore, the international judicial bodies become the source of legitimate authority and receive the power of coercion, so the judgments are enforced by the states even if they are not threatened by sanctions.

The idea that the international judicial bodies need to have certain level of legitimization in the international arena is used through the mechanism of ratification, when the number of states has to ratify the treaty or stature of the institution. Nonetheless, this procedure does not seem to be working perfectly, while states sometimes are obliged to ratify particular treaty, or do it with specific restrictions. The ICC, for example, is not legitimized in the global community, so its activity is highly obstructed by politicians from different states. This argument might be used in favor of regional judicial bodies, both for human rights protection and criminal cases. Between the smaller groups of parties consensus is more realistic, hence the legitimization of the judicial institution would be higher, which will make the work of this institution more effective.

However, the existence of many regional judicial bodies potentially can create the contradictory jurisprudence. Now the international judicial institutions avoid conflicts, they use different juridical techniques to differentiate the cases, and, if needed, even use the self-restraint measures. Even though the stare decisis principle does not apply in the international law, the international judicial institutions try to make the case law consistent [23,30-31]. The internationals judicial bodies are the response for globalized economy, growing interdependency of the different parts of the world, unprecedented historic mobility of people, and unification of the law, both national and international. The debate over the different kind

of the international courts and tribunals is a debate worth having, because the legal research of previous decades have not provided the vital solutions for the contemporary challenges. The internationals judicial bodies, especially the ones specializing in human rights protection and the ones deciding on the cases of international crimes, are relatively new in the legal practice. Nevertheless, they shape the international as well as national law, leading to more pronounced unification of the legal standards in the most important areas, which are human rights and criminal law.

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