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Some Thoughts on the Proliferation of International Courts and Tribunals

ABSTRACT

In the second half of the 20th century and in the first decades of the 21st century not only further international courts and tribunals resolving traditional interstate disputes have been set up, but new types of international courts as well. The functioning of the new courts contributes to the peaceful settlement of disputes between States, the international protection of human rights, the reinforcement of regional economic cooperation and they also ensure to hold to account perpetrators of the gravest international crimes, in summary, they promote the prevalence of the rule of law in international law.

Keywords: human rights courts ■ courts of regional economic integration organizations ■ forum shopping ■ fragmentation of international law ■ legal transplantation ■ spread of compulsory jurisdiction ■ relations between international courts and national courts

I.

Even though the settlement of disputes between States by arbitration dates to several centuries ago, the functioning of permanent international courts looks back on barely longer than one hundred years and for decades merely a few international courts existed.

At the Hague Peace Conferences held in 1899 and 1907, issues related to international adjudication were amply addressed, however, no agreement was reached on a permanent international court; the result of the negotiations was the Permanent Court of Arbitration, what this did not qualify as a permanent court, since it was in fact a list of experts designated by the States parties to Convention I. adopted at the Hague Peace Conferences of 1899 and 1907.

The first permanent international court was established within a regional framework in 1907, namely, the Central American Court of Justice, however, it functioned for merely 10 years.

At the peace talks following World War One a decision was made to set up a permanent international court, the Permanent Court of International Justice, which in 1945 was superseded by the International Court of Justice, the principal judicial forum of the United Nations.

In the second half of the 20th century and in the first decades of the 21st century considerable changes ensued in relation to international adjudication, namely, not only further international courts and tribunals deciding traditional interstate disputes have been set up, such as the International Tribunal for the Law of the Sea and the OSCE Court of Conciliation and Arbitration, but also international courts of different character.[1]

II.

1.As it is well-known, following the World War Two, not only the codification of human rights in international conventions commenced, but step by step the international institutions monitoring and safeguarding the observance of human rights were established as well, such as human rights committees and courts. First and foremost, human rights courts depart from international courts resolving classic interstate disputes so far as their tasks include the examination of matters related to the interpretation and application of regional human rights conventions and other documents concerning human rights, as well as to decide on the individual complains submitted by individuals, groups of individuals or NGOs or States concerning violations of human rights. At present three highly important human rights courts operate: the European Court of Human Rights, the Inter-American Court of Human Rights as well as the African Court of Human and People's Rights.

The human rights courts are interpreting conventions in an evolutive manner and of the teleological interpretation of treaties, by which they contribute greatly to the formation of the international *corpus juris* of human rights.

2.Another group of the new types of courts imply the courts of economic integration organisations. In the second half of the 20th century and the first decades of the 21st century the number of judicial dispute resolution mechanisms operating within regional economic integration organisations has considerably increased, via which the States belonging to these organisations intend to secure the uniform interpretation of the founding treaties of the integration and of secondary legal sources, thereby reinforcing the integration.[2]

[1] Karen J. Alter estimates the number of currently functioning courts to be 25, however, this number depends on the discretion whether certain conflict resolution mechanisms, e.g., that of the World Trade Organisation we align with the courts. See Alter, 2014, 65.

[2] Cf. Tino, 2015, 469-470.

According to some authors, the dispute resolution bodies function in the framework of up to 55 regional economic and political organisations, however, only a part of these can be considered to be courts.[3] Such courts of regional economic-political integration organisations are as follows: in Europe, the Court of Justice of the European Union and the EFTA Court; in Africa, the East African Court of Justice, the COMESA (Common Market for Eastern and Southern Africa) Court of Justice, the ECOWAS (Economic Community of West African States) Community Court of Justice and the Southern African Development Community Tribunal; in Latin America, the new Central-American Court of Justice, the Court of Justice of the Andean Community and the Mercosur (Mercado Común del Sur) Permanent Review Tribunal; while in the Caribbeans, the Caribbean Court of Justice operate.

3.The new types of courts include the international criminal courts, which were established to investigate and prosecute individuals for greave breaches of international criminal law or international humanitarian law, as such we can mention the International Criminal Court and the two *ad hoc* criminal tribunals established pursuant to UN Securitiy Council resolutions, namely, the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, and the hybrid criminal courts.

The human rights courts and the courts of regional integration organizations differ considerably from traditional international courts which resolve on interstate disputes, primarily because the competence of these new courts is not only confined to the settlement of interstate disputes, but they resolve the disputes of other subjects'of law, thus the disputes between non-states actors, and disputes of the latter with States. The increase in the number of international courts is a great novelty in the international law of the era, since these courts, beyond the settlement of specific legal disputes, have a significant role in the development of international law and as Lauterpacht emphasised the fact that "(T)he development of international law by international tribunals is, in the long run, one of the important conditions of their continued successful functioning and of their jurisdiction".[4] Apart from these, the proliferation of international courts has other consequences as well, which have been addressed in special literature voluminously.[5] Beyond the above, based on the establishment, features, and operation of various international courts, we wish to highlight some of them.

III.

1.In comparative jurisprudence, legal transplantation is an issue treated considerably, and many authors address the issues of legal transplantation mostly be-

[3] Cf. Baudenbacher – Clifton, 2014, 251.

[4] Lauterpacht, 1982, 6-7.

[5] An exhaustive review of this, see Dupuy – Viñuales, 2014, 135-157.

tween different legal systems, between national laws, or between national laws and international law. In the scope of studies related to international law only scarcely do we find works concerning international courts and in the context of legal transplantation these works mostly deal with general legal principles of law recognised by civilised nations under Point c) of Para. 1 of Article 38 of the Statute of the International Court of Justice or they analyse the definitions or arguments borrowed from national laws appearing in the decisions of international courts.[6]

However, legal transplantation can be discerned in other aspects in the context of international courts, and especially the new-type international courts instantiate this. In relation to the establishment and functioning of these courts, legal transplantation is clearly discernible, so far as at the different groups of courts following and adoption of certain models is well noticeable. The models of the African and Latin-American regional economic integration organisations were the European Economic Community and the European Union, and this applies to the dispute settlement mechanisms of these organisations as well,[7] most of which follow the European Court of Justice as to their structure, operation, procedural rules, and the types of their decisions.

For regional human rights courts also, the European model was definitive, which is understandable since of the international systems of the protection of civil and political rights we can certainly designate the European Court of Human Rights the most successful and efficient.

With respect to judicial fora legal transplantation can be traced at *ad hoc* criminal courts as well, so far as the structure and the procedures etc. at the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda really coincide.

2. In the 1990s in international literature which were concerned about the harmful effects of the proliferation of international courts they were referring to the competition among judicial fora and to the possibility of forum shopping.

Undoubtedly, because of the simultaneous operation of various international courts with the same competence, the possibility of forum shopping may arise, that is, the opportunity may be open for the States, other entities, or natural persons to opt for a judicial forum with their dispute (if they have a *locus standi* before the relevant courts), from which they expect a more favourable decision.

Without treating the issue of forum shopping in detail, we need to set forth that the opportunity to choose from several international judicial fora cannot be regarded as a new phenomenon in international law. Since already between the two World Wars the States could decide themselves whether to submit their dispute either to an arbitration court consisting of the members of the Permanent Court of Arbitration or to the Permanent Court of International Justice.[8]

[6] A good example for that is a recent monography of George Mousourakis. Cf. Mousourakis, 2020, 30-32.

[7] According to special literature the courts which consider the Court of the European Union to be a model amount to a dozen. Cf. Alter – Helfer – Saldias, 2012, 632.

[8] In this context, see Boisson de Chazournes, 2017, 16-30.

As for the rivalry among the various international courts, naturally, this cannot be excluded. This, however, has been from the outset restricted by the exclusive jurisdiction of some courts for certain disputes. Usually, the International Court of Justice and the International Tribunal for the Law of the Sea have been referred to as examples for rivalry among judicial fora, which cannot be excluded because of the provisions on the jurisdiction *ratione materiae* of the two courts. However, the real rivals for these two courts are the arbitration courts, mainly the arbitration courts consisting of the members of the Permanent Court of Arbitration, which are a kind of "gap-filling" instrument of the settlement of disputes pursuant to Annex VII of the International Convention on the Law of the Sea.[9]

3) Related to the proliferation of international courts, the most frequently voiced concerns have been the threat of the fragmentation of international law and of the different interpretation of international legal norms by different international courts.

We need to note that these views cannot be considered novelty, since already at the beginning of the 1950s Winfried Jenks wrote that in the scope of different historical, functional, and regional groups of the world different international treaties were elaborated and adopted; and these prevail separately, their relationship is in a way analogical to the national laws of States distinct from each other.[10]

The views pertaining to the fragmentation of international law were emphasised at the end of the 1990s with reference to the growing number of international courts.[11]

Obviously, in the case of the simultaneous existence and functioning of several international courts, it cannot be excluded that certain norms of international law are interpreted differently. An example for the differing interpretation by the international courts is the standpoint taken by the *ad hoc* Criminal Tribunal for the Former Yugoslavia in the Tadić case, which departed from the decision of the International Court of Justice in the *Military and Paramilitary Activities in and against case* as well as in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide case* (Bosnia and Herzegovina v. Serbia and Montenegro), which construed the issue differently whether, because of the dependence of armed groups on the State and the control exercised by the State over these groups, the relationship between them can be considered to be so close that the activity of the group can be attributed to the specific State.[12]

[9] From the entry into force of the UN Convention on the Law of the Sea in 1982 to the spring of 2022, to the arbitration courts functioning under the auspices of the Permanent Court of Arbitration 14 disputes related to the law of the sea were submitted.

[10] Jenks, 1953, 403.

[11] A multiplicity of the works of special literature treats the questions of the fragmentation of international law, see especially Koskenniemi – Leino, 2002, 553-579. According to the authors of the study, those who worried over the fragmentation of international law in fact were anxious about the privileged status of the International Court of Justice. See also, Dupuy – Viñuales, 2014, 147-149. The fragmentation of international law was also considered by the International Law Commission, and in 2002, it set up a special Study Group for the examination of the issue.

[12] In this context, see Cassese, 2007, 649-668.

The different interpretation of international law, as Luis Barrionuevo Arévalo points that out, can be primarily traced back to the absence of hierarchical order among international courts, and with respect to certain disputes international courts do not have exclusive jurisdiction, and where the exclusive jurisdiction applies, for example, in the case of human rights courts, we encounter horizontally related fora, which may easily arrive at differing conclusions in the interpretation of certain norms.[13] However, this argument is only partly true. Namely, regional human rights courts pay close attention to one another, and the two human rights courts with significant legal practice, that is, the European Court of Human Rights and the Inter-American Court of Human Rights frequently refer to the other's decisions, what is more,[14] in the legal practice of these two human rights courts some convergence can be discerned.[15]

By our days we can assert that the concerns related to the fragmentation of international law have proved to be exaggerated,[16] and in fact among the decisions of different international courts there are no greater differences than among the ones reached by the courts of any Federal State.[17]

4)The emergence of new international courts has contributed to the reinforcement of the rule of law in international law so far as an increasing number of courts are conferred with compulsory jurisdiction.

In this context, first and foremost we should mention the courts of the regional economic and political integration organisations, most of which by the founding States have been conferred with compulsory and exclusive jurisdiction in matters of the interpretation and application of primary and secondary sources of law of the given integration system.

The proliferation of compulsory jurisdiction is noticeable in the case of regional human rights courts, however, this still cannot be considered general, since in our days solely the European Court of Human Rights has compulsory jurisdiction and the realisation of this took almost four decades.

Regarding traditional interstate disputes some progress has been made around compulsory jurisdiction, although, the International Court of Justice has the same compulsory jurisdiction based on unilateral declarations as the one adopted by the founding fathers of the Permanent Court of International Justice upon the elaboration of the optional clause system one century ago. At the same time, the solution of contracting in substantiating the optional clause has become quite widespread, and this is the principle on which the compulsory jurisdiction of several judicial fora is based on. Thus, this solution is applied in the

[13] Arévalo, 2009, 49.

[14] From the legal practice of the European Court of Human Rights we know about 60 decisions in which they expressly referred to the legal practice of the Inter-American Court of Human Rights. See also, Raisz, 2010.

[15] Cançado Trindade, 2010, 256.

[16] In this context, see Blutman, 2020, 105-111.

[17] Lock, 2015, 24.

case of the compulsory jurisdiction of the International Tribunal for the Law of the Sea, of the OSCE Court of Conciliation and Arbitration, and of certain human rights courts.

5.The phenomenon that the prevalence of direct relations between international courts and national courts has become established and its institutional forms have been elaborated is related to the functioning of new international courts.

The courts of the regional integration organisations and regional human rights courts exercise "compliance with treaties control" over the legislation and legal practice of the States belonging to the given system, thereby exercising functions similar to those of Constitutional Courts. Beyond this, these courts are in direct relation with Member State courts, and they cooperate with them, which in the case of courts deciding traditional interstate disputes is excluded by reason of the character of the matter.

In the framework of the preliminary ruling procedure, in all cases in which the interpretation of norms related to the integration are necessary, the Member States' courts are authorised, and in certain cases obligated, to refer to the court of the integration organisation for preliminary ruling on the precise interpretation or validity of the law of the integration,[18] and the courts of the integration organs via their rulings by all means influence the decision of the national court of the Member State in a specific case. It is a further separate issue whether e.g., in the case of the European Court of Justice the relation between that Court and the national courts can be construed as a monologue or a dialogue. The European Court of Justice designates that as an instrument of cooperation and uses the term of "dialogue" with reference to the common responsibility and equality of the two sides.[19]

The direct relation with national courts can be shown in the practice of human rights courts as well. This, however, has prevailed solely at the European Court of Human Rights since, after the entry into force of Protocol 16 to the European Convention on Human Rights in 2018, the highest courts and tribunals of the States parties to the European Convention on Human Rights "may request the Court to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the Protocols thereto." [Article (1)], however, the opinions do not bind the court requesting the opinion.

[18] At the court of several economic integration organisations the preliminary ruling procedures are designated as advisory opinions, for example, at the EFTA Court, the COMESA Court of Justice and the Mercosur Permanent Review Tribunal.

[19] In this context, see Krommendijk, 2021, 111.

IV.

As a conclusion one can state that the increase in the number of international courts and tribunals is a great novelty in the international law of the second half of the 20th century and the first decades of the 21st century. That was necessitated by the prominence of the protection of human rights, the intensification of regional economic integration, furthermore, the demand to hold to account the perpetrators of the gravest international crimes committed during local and international armed conflicts by the international community of States.

Initially, the proliferation of international courts found negative response, for instance, in special literature many experts were concerned primarily about the opportunity of forum shopping and the fragmentation of international law, however, by today it is proven that such threats are not to be feared.

Nowadays the functioning of the new types of international courts contributes not only to the peaceful settlement of disputes, but highly promote the development of international law, and the establishment of the international *corpus juris* of human rights.

The increasing number of international courts having compulsory jurisdiction, and the institutionalisation of direct relations and cooperation between international judicial fora and national courts demonstrate predominance of the rule of law in international relations.

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