INTERNATIONAL JUDICIAL PRECEDENT: FEATURES, TYPES, SIGNIFICANCE

Keywords: international courts, court decision, judicial practice, established jurisprudence, source of international law

ABSTRACT: The author’s concept of the essence of international judicial precedent is offered, claiming that international courts perform a law-making function. The author is convinced that 1) “jurisprudence constante” (established jurisprudence) is synonymous with judicial precedent; 2) precedent decisions are created by international courts as a consequence of the settlement of similar disputes, the issues of which are either vaguely regulated or not regulated at all by the norms of international law; 3) judicial precedent, as part of an international court decision, should be considered a formal source of international law; 4) judicial precedents should be included in the list of formal sources of international law, which are subsidiary sources. Given the numerous views on the nature, content, legal force of precedent decisions of international courts, it is proposed the definition of judicial precedent, which takes into account the characteristics of modern international relations. An international judicial precedent is a decision that contains legal positions that either clarify the content of the current rule or formulate a new rule. Such decisions shall be considered by the court which made them or by another court (or arbitral tribunal) in considering such a similar case; they are imperatively binding on the dispute parties, as well as politically binding on third actors of international law. The establishment by the court of a rule in the form of a legal position should be considered as a natural process in international law-making. A legal position can exist as a formula, which is initially a mandatory requirement of the motivating part of a court decision, but if such a legal position is repeated in subsequent decisions, it becomes an international custom, in particular, it becomes legally binding for an indefinite number of similar relations, or such a legal position is included in text of an international treaty. As the law-making function of international courts raises questions,
there are offered the author's definitions of “international judicial law-making”, “soft law”, “international judicial precedent”, “precedent of interpretation”, “vertical international judicial precedent”, “horizontal international judicial precedent”.

INTRODUCTION

In the science and practice of international law there is a discussion about the essence of the concept of sources of public international law and their classification (Aspremont, 2011; Kyivets, 2011; Onishchenko, 2016; Panezi, 2007). Part of this problem is the recognition of the existence of international judicial institutions’ law-making function, because there is no unanimity among international experts on: 1) whether “jurisprudence constante” (established jurisprudence) can be considered synonymous with judicial precedent; 2) if the answer to the first question is positive, then the decisions in which categories of cases are precedent and what legal force such decisions are endowed with; 3) what exactly the number of identical decisions must be made in order to be able to state the emergence of the relevant case law; 4) should it be only final decisions of the dispute. The answers to these questions identified by the practice of international relations and law pose a new doctrinal task to the science of international law, which determines the reassessment of historically formed ideas about international justice as a means of peaceful settlement of disputes and the role of courts decisions in international law. We state the problem of understanding the essence of international judicial law-making at the research level. The Anglo-American legal system has traditionally seen it as an important tool in regulating international relations, which has legally binding consequences (Darcy, 2014; Denza, 2008; Goldstein, 2004; Jennings, 2002; McWhinney, 1983). Authors of Romano-Germanic origin (Ginsburg, 2005; Hernández, 2016; Lauterpacht, 1958; Lupu & Voeten, 2012), as well as the most reform-minded lawyers of the post-Soviet space (Anakina, 2008; Buromensky, 2015; Butkevych, 2005; Butkevych, 2010; Komarova, 2018; Tarasov, 2014), consider judicial law-making at the national and international level to exist de facto, but the lack of legally established powers over the law-making function of courts
determines the secondary role of law-making after law-application, which is the main. We are convinced that the analysis of the law-making process should be carried out based on the principles of pragmatism and realism. At the doctrinal level there is an ongoing discussion on the sources of international law, the relationship between the concepts of “source of international law” and “form (formal source) of international law”. In the XXI century there is an urgent need to expand the list of formal sources of international law by recognizing that precedent decisions are a formal source of international law. The purpose of the article is to formulate aspects of the author’s concept of the essence of international judicial precedent.

RESULTS AND DISCUSSION

Given the numerous views on the nature, content, legal force of precedent decisions of international courts, we propose definition of judicial precedent, which takes into account the characteristics of modern international relations. An international judicial precedent is a decision that contains legal positions that either clarify the content of the current rule or formulate a new rule. Such decisions shall be considered by the court which made them or by another court or arbitral tribunal in considering such a similar case; they are imperatively binding on the dispute parties, as well as politically binding on third states. The establishment by the court of a rule in the form of a legal position should be considered as a natural process in international law-making. A legal position can exist as a formula, which is initially a mandatory requirement of the motivating part of a court decision, but if such a legal position is repeated in subsequent decisions, it becomes an international custom, in particular, it becomes legally binding for an indefinite number of similar relations or such a legal position is included in text of an international treaty.

To decide whether a court decision is a judicial precedent or not, legal science has tested the characteristics of four models: the so-called natural model of precedents, the model of rule of precedents, the model of the result of precedent, the model of principles (Alexander & Sherwin, 2004).
We offer the fifth – the model of formal certainty, which is characterized by the following features: the rules set out in previous decisions are considered as prescriptions to be applied to an indefinite number of disputes and have preferential authority for decision makers and all participants of international relations, as such rules either supplement existing international legal acts, or a rule formulated by a court in order to bridge a gap in law, will be included in the relevant international treaty in the future. In fact, this means that within the framework of such a model, the created norm acquires formal certainty due to the main sources of international law. The classification of international judicial precedents has an important practical purpose: due to the understanding of the difference in the types of international judicial precedents, it can be argued that international courts create judicial precedents and what legal force these decisions are endowed with. According to the legal force, we propose to divide the international judicial precedents into: a) mandatory precedents (precedents of vertical action); b) convincing (persuasive) precedents or precedents of horizontal action. Mandatory international judicial precedent, as researched, for example, includes judgments of the European Court of Justice (hereinafter – ECJ), adopted as a result of a preliminary ruling procedure, as the Court clarifies the rules of EU law at the request of a national court, creates new rules that become binding (Case C-105/03, 2005). Judgments rendered in the preliminary ruling procedure often formulate and generalize the concepts, approaches, and practice of the ECJ in resolving specific cases; basic principles are formed that determine the interaction of the EU legal system with the national legal systems of the member states and with international law. The precedents of the Grand Chamber of the European Court of Human Rights (hereinafter – ECtHR) (Cases no.15318/89,1998; no. 33071/96, 2001; no. 48787/99, 2004; no. 46221/99, 2005; no. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90, 16073/90, 2009), the Appeals Chambers of the International Criminal Tribunals and the International Criminal Court (Cases no. ICC-01/05-01/13 A10, 2018; no. ICTR-05-86-S, 2009; no. ICTR-98-41A-A, 2012; no. IT-94-1 Du[Ko Tadi], 1999; no. ICTR-96-04, 2002; no. IT-95-14, 2004; no. IT-04-74-A, 2016), and the WTO Appellate Body (AB of WTO report WT/DS58/AB/R, 1998) are relatively binding
on other vertically related bodies. Persuasive, or horizontal, judicial precedents are becoming a fairly common legal phenomenon, as international judicial and arbitration institutions actively refer to previous decisions of their own, as well as borrow the legal positions of decisions of other bodies of international justice. According to our scientific observations, as a result of the precedent (established) practice of the International Court of Justice (hereinafter – ICJ), persuasive judicial precedents have developed in the areas of humanitarian law, protection of human rights, settlement of territorial problems, and environmental protection. In the field of humanitarian law, the legal positions of the ICJ have significantly supplemented the UN Charter (1945), the Convention (IV) respecting the Laws and Customs of War on Land (1907), the Geneva Convention (III) relative to the Treatment of Prisoners of War (1949), the Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (1949). In particular, the Court provided a definition of the content of the right to self-defence; a conclusion was made on the principles and norms of humanitarian law that apply during a period of armed conflict and should apply to nuclear weapons. The Court drew attention to the need to distinguish between cases of armed attack referred to in Article 51 of the UN Charter and other less severe forms of use of force, with the Court explaining the criteria for the necessity and proportionality of appropriate action. The UN Security Council, considering jus cogens and erga omnes human rights obligations, the prohibition of the threat or use of force, the right of peoples to self-determination, reaffirmed that the prohibition of genocide is an erga omnes obligation and specified the general concept commitment erga omnes. The Court clarified the concept of genocide, the subjects of responsibility for this international crime, outlined the territory in which there is an obligation to punish such crimes (Cases concerning military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America), 1986; application of the Convention on the prevention and punishment of the crime of genocide (Bosnia-Herzegovina v. Yugoslavia), 1996; armed activities on the territory of the Congo (Democratic Republic of the Congo v. Uganda), 2005; application of the Convention on the prevention and punishment of the crime of genocide (Bosnia and Herzegovina v. Serbia and Montenegro), 2007). The Court
confirms that the legal classification of the crime of genocide depends on the type of conflict - domestic or international. Since the Convention on the Prevention and Punishment of the Crime of Genocide does not contain specific provisions on erga omnes obligations, the Court details the meaning of jus cogens, such as: it is stated that “the prohibition of torture is part of customary international law and is a mandatory rule (jus cogens)” (Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), 2012, July, para. 99). The International Court of Justice has ruled that the protection of human rights enshrined in the International Covenant on Civil and Political Rights (1966) does not cease during war, with the exception of Art. 4 of the Covenant, which allows certain provisions to be waived during a state of emergency. The Court has established a legal position according to which international human rights treaties apply “to actions taken by a state in the exercise of its jurisdiction outside its own territory”, especially in the occupied territories (Case concerning application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Yugoslavia), 1996, July, para. 32; armed activities on the territory of the Congo (Democratic Republic of the Congo v. Uganda), 2005, December, para. 64; Jurisdictional immunities of the state (Germany v. Italy: Greece intervening), 2012, February, para. 95). The ICJ clearly distinguishes between a prohibition of actions of the constituent jus cogens and the procedural immunity of the state. The case law of the Court on the settlement of territorial disputes is of normative significance. The ICJ has formulated the characteristic features of the procedural institution of estoppel (Separate opinion of sir Percy Spender, case concerning the temple of Preah Vihear, 1962). Estoppel can be considered as a norm of international law based on judicial practice, confirmed and developed by the Court, which found that estoppel was formed in the principle of case law, which allows qualifying this principle as a universal custom. The Court has identified and confirmed important provisions on environmental impact assessment, in particular, in relation to activities that may cause transboundary damage, states should conduct an environmental impact assessment prior to project implementation; also recognized that such an obligation could be considered a requirement of customary international law if there was
a risk that the planned activity in a given area would have significant negative transboundary consequences (Nuclear tests cases, 1974, December, paras. 45, 46). The case law of the ICJ in resolving maritime disputes has proved to be very productive: (1) providing definitions of “historic waters”, “historic rights (legal title)”, “historic bays”, which are not in conventional international law (Fisheries case (United Kingdom v. Norway), 1951, December 1951, pp.130,131; land, island and maritime frontier dispute (El Salvador/Honduras: Nicaragua intervening). (1992, September, para. 384; Declaration of judge Oda, p. 619); (2) the establishment of the scope of legal personality of the coastal state determined the content of Art. 4 of the Convention on the Territorial Sea and the Contiguous Zone (1958); (3) the decision in the case of fisheries of 18 December 1951, which determined the content of Art. 3 of the Convention on the Territorial Sea and the Contiguous Zone, and Art. 7 (1) of the UN Convention on the Law of the Sea (Fisheries case, 1951, December p.140); Case concerning the continental shelf, 1982, February, para.103); (4) trends in the development of international maritime law, initiated by decisions in fisheries cases in 1974, which led to the practice of states that began to grant fishing rights in their 200-mile zones, as well as were enshrined in Art. 57, 62 (4) of the UN Convention on the Law of the Sea (Fisheries jurisdiction case, 1974, July, paras.70-78); (5) the proposed method of direct baselines, which became part of the concept of the archipelago and archipelago waters, enshrined in Articles 47-49 of the UN Convention on the Law of the Sea (Fisheries case, 1951, December, p.133; North Sea continental shelf cases, 1969, February, para. 46); (6) an updated definition of continental shelf, included in Art. 1 of the Convention on the Continental Shelf (Fisheries case, 1951, December, p.133; North Sea continental shelf cases, 1969, February, para. 46); (5) the proposed method of direct baselines, which became part of the concept of the archipelago and archipelago waters, enshrined in Articles 47-49 of the UN Convention on the Law of the Sea (Fisheries case, 1951, December, p.143). The Court formulated the principles of justice in the delimitation of sea areas: the principle of significant disproportion of the length of the coast; the principle of excluding the mathematical bias of the conditions of the equidistant line; the principle of the cutting effect, identified the relevant circumstances that need to be considered by the parties to achieve a fair result (North Sea continental shelf cases, 1969, February, para. 96; Aegean Sea continental shelf case, 1978, December, para. 86; Case concerning the continental shelf, 1982, February, para.81). The Court also listed the factors that the parties
should take into account in the negotiation process, namely: the general configuration of the parties’ coast and the presence of special or unusual features; physical and geological structure, natural resources of the continental shelf; a certain proportion of the reasonable degree of proportionality to be created by a fair demarcation between the area of the continental shelf belonging to the coastal state and the length of its coast (Case concerning delimitation of the maritime boundary in the gulf of Maine area, 1984). The methodology of delimitation of maritime spaces is an important result of the Court’s work, as no international legal act enshrines such a methodology. Methodology for delimitation of maritime spaces is used by the International Court of Justice, the International Tribunal for the Law of the Sea and arbitration tribunals (Cases concerning territorial and maritime dispute between Nicaragua and Honduras in the Caribbean Sea, 2007; maritime delimitation in the Black sea, 2009; territorial and maritime dispute, 2012; delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal, 2012; maritime delimitation in the Caribbean Sea and the Pacific Ocean, 2017; delimitation of the Maritime Boundary between Ghana and Côte d’Ivoire in the Atlantic Ocean, 2017). We believe that the developed methodology of delimitation of marine spaces is part of modern customary international law.

Due to its practice, the International Tribunal for the Law of the Sea has established rules of law that complement the content of the convention provisions on the actual relationship between a ship and a flag State, in particular on the possibility of bail, bail or other security refer the matter to the Tribunal (The « M/V SAIGA» Case, 1997, the «Monte Confurco» Case, 2000; the «Camouco» Case, 2000; the «Juno Trader» Case, 2004; the «Hoshinmaru» Case, 2007; the M/V «Virginia G» Case, 2014).

The judgment of the European Court of Justice is a formal source of law and part of the EU legal system. Prevention of environmental pollution, in particular marine pollution, is one of the areas of effective action of the European Union due to the case law of the ECJ (Case of Poulsen, 1992, November, para 13; Case C-120/99, 2001, October, para.63; case C-216/87, 1989, December, para. 24; case C-459/03, 2006). It has been established that, according to the case law of the Court, the exclusive
competence of the EU in fisheries is related to the protection of natural resources, which determines the establishment of a quota system. The ECJ noted that the principle of relative stability is to some extent a departure from the general rule of equal access to fisheries, but the need to ensure relative stability in the economic situation of the fishing industry and the dependence of some coastal communities on fisheries is appropriate.

CONCLUSIONS

As the law-making function of international justice bodies raises questions, we consider it expedient to offer the author’s definitions of “international judicial law-making”, “soft law”, “international judicial precedent”, “precedent of interpretation”, “vertical international judicial precedent”, “horizontal international judicial precedent”. International judicial law-making is the activity of international judicial institutions, as a result of which legally binding rules are created. To ensure justice the function of law-making is ancillary because the need for law-making of judicial bodies arises if in the process of administration of justice there are tasks to interpret the rules of current law or to overcome gaps in the law. But it is impossible to unambiguously consider the essence of judicial law-making as an ancillary type of activity, as the adoption of regulations on the procedure of judicial activity of a certain judicial body has an independent law-making character. Judicial law-making is almost unregulated compared to convention law-making (treaty law-making). However, we note the existence of an actual delegation of the law-making function to international judicial institutions. Judicial law-making and settlement of disputes are in dialectical interdependence. “Soft law” is a special group of sources of international law (resolutions, precedent decisions of international judicial institutions), which contain recommendations. The legal provisions may be further enshrined in international legal instruments. Despite the recommendatory, non-binding nature, these norms have legal force, affect the formation and general trends of the international legal order, and may eventually be transformed into “hard law”. The notion of “international judicial practice” and “established practice of international
justice bodies” (or “established jurisprudence”) should be considered as general and partial, as not everything that constitutes the activity of international justice bodies can be called established jurisprudence (only thanks to such practice international judicial precedents are formed). International judicial precedent is a decision of international judicial bodies that contains legal positions, which are created in the process of normative interpretation of current law, or they overcome gaps in law, or supplement important features of law that in certain circumstances (similar characteristics in plots of cases considered by the court) can be borrowed, referred to, quoted in the motivating part of the decision. Such decisions are binding on the dispute parties and not binding on other actors of international relations, but they are usually considered in the regulation of future relations as new international customs. The precedent of interpretation is a sample of the interpretation by a judicial body of certain norms of current international law, which is used by the bodies of international justice when considering similar issues concerning the interpretation of law norms. If the judicial bodies use the legal positions proposed in previous cases, which contain the results of interpretation, in future similar cases, then the legal positions formulated in the motivating parts of the decisions form the international judicial precedent. Vertical international judicial precedent is a decision of a higher structural body (Grand Chamber, Appeals Chamber, Appellate Body) of a certain international judicial institution, which contains legal positions that must be considered by other departments of this court or the body itself in similar case in the future. Vertical international judicial precedent can be absolute, i.e. a structurally lower judicial body, under no circumstances and exceptions, has the right to make a decision without taking into account the legal conclusions made by the higher judicial body. Also, vertical international judicial precedent may be relative, i.e. in certain circumstances a higher judicial body may take a different decision in a similar court case, which means that there is no obligation to be bound by its own previous decision. Horizontal international judicial precedent is a decision of a certain body of international justice in a case, which is adopted as a result of “horizontal interaction” of international justice bodies, i.e. with citation, reference or borrowing of a certain legal position, which serves as a model
of interpretation of international norms. This is the attitude towards their practice and the practice of other international courts demonstrated by international judicial and arbitration institutions, which in resolving cases generally tend to follow the approaches they used before, if they do not consider it necessary to change these legal positions.

Some decisions, which are traditionally cited in justifying new decisions, are so important for the development of the international law that they go beyond the traditional interpretation of existing law. Horizontal (convincing or persuasive) international judicial precedents are created over time, which confirms the rationality, importance and necessity of compliance with a particular law norm, formulated earlier.

Given the debatable issue of the existence of international justice bodies’ law-making function, we believe that the proposed definitions, classification of judicial precedents, classification of sources of international law will be interesting and useful for future international law professionals. The author hopes for the support of scholars and practitioners who do not deny the idea of the development of international law due, in particular, the international judicial precedent.

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