

DOI 10.14746/ppuam.2017.7.03

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On the Judicialisation of International Law

Introduction

International law developed for centuries, in the form of binding rules between states, despite the lack of permanent courts to decide on the violation of those rules and settle disputes between states. For Hugo Grotius, international law in terms of rules for conduct outside the state was conceivable without judicialisation, although arbitration between sovereigns was mentioned in earlier works that he had read, such as Albertico Gentili's *Law of War*.¹

However, in discussion on the juridical nature of international law dating back to the 19th century, the lack of an international judiciary contributed to doubts concerning the legal character of international law. For writers such as Hart, in the absence of institutions – such as an international legislature, courts with compulsory jurisdiction, and centrally organized sanctions – international law resembles “that simple form of social structure, consisting only of primary rules of obligation, which, when we find it among societies of individuals, we are accustomed to contrast with developed legal system.”² According to Hart, the important source of doubt as regards the legal character of international law was the absence of the secondary rules of change and adjudications which provide for a legislature and courts, and also “a unifying rule of recognition specifying ‘sources’ of law and providing general criteria for the identification of its rules.”³ It is thus clear that the existence of courts in international law was for Hart one of the conditions

1 B. Kingsbury, *International courts: uneven judicialisation in global order*, in *The Cambridge Companion to International Law*, ed. J. Crawford, M. Koskeniemi, P. Ranganathan, Cambridge 2012, p. 203.

2 H. L. A. Hart, *The Concept of Law*, Oxford 1984, p. 209.

3 *Ibidem*.

for recognizing that international law is “really law.”⁴ It is also important to note that for Hart it was not simply courts, but courts with compulsory jurisdiction that mattered.

The international judiciary is a relatively young institution in international law, as it only appeared at the beginning of the 20th century. Earlier, international disputes could be resolved by political means, or diplomatic methods of dispute settlement, or by using international arbitration, however recourse to these was limited to only some countries.

Until the 1990s there were only a few international courts, however in the last decade of the 20th century new international courts began to emerge with increasing frequency. At one time, this phenomenon was referred to as the proliferation or multiplication of international courts.⁵ This trend continued into the first decade of the 21st century. The main issue associated with this phenomenon, which has been the subject of numerous analyses in the doctrine of international law, concerned whether this dynamic – yet uncoordinated – multiplication of international courts constituted a threat to the unity of international law. This issue tends to be analysed through the prism of two types of conflict: the conflict of jurisdiction and the conflict of jurisprudence.

Currently, however, other problems associated with the phenomenon of judicialisation are growing in significance. Both the quantitative and qualitative characteristics of this phenomenon are interesting, but its increasing significance is primarily due to its influence on international law, understood as a system. This influence is very noticeable and varied. The development of international courts is directly tied up with the aforementioned discussion on the juridical nature of international law. A comprehensive analysis of all the aspects of this issue is beyond the scope of this article. Therefore, the subsequent sections will focus firstly on issues concerning the features of the process of the multiplication of international courts, the threats associated with it, and the importance of the proliferation of international courts for international law.

The development of the international courts

The development of the international judiciary emerged from the use and experience of arbitration, the modern history of which dates back to the Jay Treaty of 1794, between the United States of America and Britain. This treaty envisaged the creation of three permanent, mixed committees, consisting of American and British citizens, whose task was to settle disputes between these countries.

4 *Ibidem*.

5 V. also, *inter alia*, in the Polish source literature a very interesting article on this issue: W. Czapliński, *Multiplikacja sądów międzynarodowych – szansa czy zagrożenie dla jedności prawa międzynarodowego*, in *Rozwój prawa międzynarodowego – jedność czy fragmentacja*, ed. J. Kolasa, A. Kozłowski, Wrocław 2007, pp. 77–130.

Under the auspices of the Hague Conventions of 1899 and 1907 efforts were made to establish permanent international courts, but ultimately only the Permanent Court of Arbitration came into being. The first international court of universal character – The Permanent Court of International Justice – was established on the basis of the Covenant of the League of Nations. The PCIJ first sat on 30 January 1922 and by 1940 it had issued 18 judgments. After Second World War, the PCIJ was replaced by the International Court of Justice, which the UN Charter established as the main judicial body of the UN. The ICJ is recognized as the most important international court currently in operation. The Court consists of 15 judges, who are elected for 9 years, and its purpose is to settle legal disputes between states. It also issues advisory opinions at the request of the UN and its specialized organizations. The jurisdiction of the ICJ, similarly to other international courts, is based on the consent of states.

In the period following WW2, regional courts also began to appear. In 1951, the Court of Justice of the European Coal and Steel Community was established, and in 1957, at the same time as the Treaties establishing the European Economic Community and Euratom, an agreement to create common institutions for the three Communities was signed, among which was the Court of Justice of the European Communities. Furthermore, in 1959 the European Court of Human Rights was established on the basis of the European Convention on Human Rights, which had been adopted by the Council of Europe.

Until the 1990s there were only 6 international courts. The sudden increase in the development of international judiciary in the start of the 1990s is associated with the collapse of the communist system. It was in this period that the term “the proliferation of international courts” first appeared. Such courts came into existence as: the International Tribunal for the Law of the Sea (established in 1996 on the basis of the United Nations Convention on the Law of the Sea, which was signed at Montego Bay in 1982), the AB of the WTO, the EFTA Court, the Central American Court of Justice, the Economic Court of the Commonwealth of Independent States, and the Court of Justice of the Common Market for Eastern and Southern Africa.

In the 1990s, courts were also established not on the basis of international agreements, but rather following resolutions from the bodies of international organisations. In 1993 the International Criminal Tribunal for the former Yugoslavia was established by Resolution 827 of the UN Security Council, to prosecute war crimes committed in the territory of the former Yugoslavia. In 1994 the International Criminal Tribunal for Rwanda was established by Resolution 955 of the UN Security Council, to investigate and settle crimes committed in Rwanda during the genocide that took place from 1 January 1994 to 31 December in 1994.

This proliferation of international courts continued into the next decade. In 2003 the International Criminal Court began operating, as the first permanent court in history

responsible for prosecuting individuals who committed the most serious crimes (e.g. genocide, crimes against humanity), after 1 July 2002. In this same period other courts were also established, including the Court of Justice of the Economic Community of West African States (ECOWAS), the Caribbean Court of Justice, and the African Court on Human and Peoples' Rights.

This dynamic multiplication of international courts and tribunals that occurred in the 1990s was described by some authors as "some of the most significant changes in international law (and, correspondingly, international relations) of our time."⁶ In the course of just 20 years, the number of international courts and tribunals increased to over 20 permanent international courts, four of which have universal jurisdiction: the International Court of Justice (ICJ), the International Tribunal for the Law of the Sea (ITLOS), the Appellate Body of the World Trade Organization (the AB of the WTO), and the International Criminal Court (ICC). Other courts and tribunals with regional jurisdiction were established in Africa (9), Europe (6) and Latin America (5).⁷

The appearance of dozens of international judicial bodies has meant that they have been classified in a variety of ways. For example, they have been divided into, *inter alia*, courts of general and specialized jurisdiction, and courts of universal and regional jurisdiction.

In the source literature, it is suggested that international courts be divided into five distinct types, on the basis of criteria that consider their fundamental jurisdictional or institutional characteristics. Although at the outset the primary purpose of international courts was the peaceful resolution of international conflicts, at present there are only three courts with the competence and necessary universal jurisdiction. The most important of these is the International Court of Justice, the primary judicial body of the UN, which has the general jurisdiction to settle all the legal disputes that are submitted to it by states. The other two courts, namely ITLOS and the AP of the WTO, have more specialized jurisdiction *ratione materiae*. The International Tribunal for the Law of the Sea has jurisdiction to settle all disputes concerning the interpretation or application of the UN Convention on the Law of the Sea, while the AB of the WTO hears appeals from reports issued by panels in disputes brought by members of the WTO. Some authors refer to these judicial bodies as "old-style ICs."⁸

The second type of international court comprises human rights courts, which have the competence to hear cases that concern violations of the human rights protected by

6 C. P. R. Romano, *The Shift from the Consensual to the Compulsory Paradigm in International Adjudication: Elements for A Theory of Consent*, "International Law and Politics" 2007, vol. 39, p. 794.

7 K. J. Alter, *The Multiplication of International Courts and Tribunals After the End of the Cold War*, in *The Oxford Handbook of International Adjudication*, ed. C. P. R. Romano, K. J. Alter, Y. Shany, Oxford 2013, p. 65.

8 K. J. Alter, *The New Terrain of International Law: Courts, Politics, Rights*, Princeton 2014.

international law. Currently, there are three such courts: The European Court of Human Rights (ECtHR), and the Inter-American Court of Human Rights (IACHR) and the African Court on Human and Peoples' Rights (ACHPR) – both based on the model of the ECtHR. The majority of cases heard by these courts are initiated by individual complaints which are filed by the aggrieved person. Interstate complaints are very rare, as can be seen from activity of the ECtHR.

The third type of international court is represented by the courts established within the framework of regional integration organisations which are involved in economic cooperation. This constitutes the largest group of international judicial bodies in the world. Many of them emerged from the experience of the CJEU, which is widely held to be the most effective transnational judicial body. However, some organisations adopted the model of dispute resolution based on the WTO, while others opted for a mixed model.⁹ The most distinctive feature of these courts is the complexity of their jurisdiction *rationae materiae*. These courts handle cases brought directly by parties alleging that their rights have been violated by the body of a given organization, and cases brought against a particular country for failure to comply with the laws of the organization. Some of these courts operate as international administrative courts and also deal with issues concerning the interpretation of community law raised by domestic courts.¹⁰

The fourth group consists of international criminal courts which rule on the liability of individuals accused of committing international crimes, who tend to be high-ranking politicians and military commanders. These are the only international bodies that decide on the liability of individuals. The first permanent international court established to prosecute individuals accused of committing such crimes was the International Criminal Court (ICC). Previously, international criminal courts had been established *ad hoc*. In addition to the International Military Tribunal (IMT) held at Nuremberg, and the Tokyo War Crimes Tribunal, which were established to punish the crimes committed during the course of the Second World War, two similar tribunals were established in the 1990s. The first of these was the International Criminal Tribunal for the former Yugoslavia (ICTY), created by Security Council Resolutions 808 and 827 in 1993, for the prosecution of crimes committed in the territory of the former Yugoslavia, while the second was the International Criminal Tribunal for Rwanda (ICTR), established by Resolution 955 of November 1994.

9 For example, the North American Free Trade Agreement dispute settlement relies on ad hoc arbitral panels, whereas the Andean Tribunal of Justice is cited as an example of a more mixed model. Cf. *The Oxford Handbook of International Adjudication*, *op. cit.*, pp. 13–14.

10 C. P. R. Romano, K. J. Alter, Y. Shany, *Mapping International Adjudicative Bodies, The Issues, The Players*, in *The Oxford Handbook of International Adjudication*, ed. C. P. R. Romano, K. J. Alter, Y. Shany, Oxford 2013, p. 13.

In addition to *ad hoc* tribunals, special, mixed and hybrid tribunals have been established to adjudicate on both domestic and international crimes. Such tribunals were established in, *inter alia*, Kosovo, Sierra Leone, East Timor, Bosnia and Herzegovina, Cambodia and Lebanon.¹¹ Hybrid tribunals are also established *ad hoc*. However, their creation does not result from a decision of the UN Security Council, but rather from the activities of the states concerned, in cooperation with the UN. Furthermore, these tribunals do not operate on the basis of international law, but domestic law as well; their composition is mixed, including both international and domestic judges; and they most often operate in the territory of the country in which the offenses were committed.

The fifth group includes the international administrative tribunals that operate within the framework of a given international organization and have the competence to decide on disputes between the organization and its officials. Although these courts implement international law, they often refer to domestic labor law, to a certain extent.¹²

Characteristics of the multiplication of international courts

The phenomenon of the multiplication of international courts which began in the 1990s was a result of various causes. Without doubt, one of these was the gradual expansion of the scope of international law, and this scope coming to encompass cases which had previously only been dealt with in national law, or which had hitherto been restricted to the exclusive competence of states.¹³ The increase in the quantity, as well as the increase of the content and the degree of complexity of the norms of international law required the establishment of extended dispute resolution institutions. The proliferation of international courts was also fostered by the development of integration organisations in Europe and other parts of the world – the establishment of specialized tribunals was supposed to ensure the effectiveness of new regulations adopted by these organisations.¹⁴ Political transformations, particularly those in Central Europe which were brought about by the collapse of the communist system, resulted in reduced political tensions and the new post-communist states were no longer reluctant to submit to the jurisdiction of international courts¹⁵. Furthermore, the creation of international courts in different parts of the world was certainly encouraged by, on the one hand, the positive experience associated with the work of such judicial bodies as the CJEU or the ECtHR and, on the other hand, the failure of existing tribunals, led by the ICJ, to settle cases that arose on the basis of new, specialized regulations with international application.

11 *Ibidem*, p. 14.

12 *Ibidem*.

13 Czapliński provides a detailed description of these causes. Cf. W. Czapliński, *op. cit.*, pp. 81–85.

14 Y. Shany, *Competing Jurisdictions of International Courts and Tribunals*, Oxford 2003, p. 3.

15 *Ibidem*, p. 85.

An essential feature of the dynamic development of international courts in the 1990s was the fact that the process was neither systematic nor orderly. To a large extent, the proliferation of these courts was uncoordinated, and some authors have described the process as one of trial and error.¹⁶ This lack of coordination chiefly resulted in the emergence of problems tied up with potential conflicts of jurisdiction or jurisprudence, to which we shall return later. It should also be noted that many of the tribunals that were established remain inactive, meaning that they either never went into session, or they heard a few cases before they stopped being active.

Cesare Romano enumerates twenty such courts, including many established in the 1990s or the 2000s, such as the Court of Justice of the African Economic Community (1991), the Court of Conciliation and Arbitration of the Organization for Security and Cooperation in Europe (1994), the Court of the Union State between the Russian Federation and the Republic of Belarus (1999), the Court of Justice of the Central African Economic and Monetary Community (2000), and Court of Justice of the African Union (2003).¹⁷

There are various reasons why states either did not ratify the instruments that constituted these courts, or why cases are not brought before them. Above all though, the essential prerequisite for international courts to begin and continue their activity is the environment in which they are to function. Conflicts, tensions between states and instability cause significant difficulties for the functioning of international courts.¹⁸ This is why Romano asserts, rightly, that international tribunals can turn out to be fragile institutions, and to a greater extent than most other international institutions. They require both sufficient preparation and a peaceful and stable environment in which to operate.¹⁹ In turn, the success of the ECtHR and the CJEU can be explained by the fact that these courts have operated in a relatively homogeneous environment of states, while African courts have struggled in diametrically opposed circumstances.²⁰

From a geographical point of view, the proliferation of courts and tribunals was an uneven process. On the one hand, the most effective international and transnational courts, such as the CJEU or the ECtHR were established and operate in Europe. On the other hand, certain parts of the world, such as Asia, have clearly avoided the tendency to judicialize international relations. This is due to a range of political, cultural and historical factors, but it also results from the international community being based on the idea of sovereign states, states which in some regions successfully oppose the trend of

16 C.P.R. Romano, *Trial and Error in International Judicialization*, in *The Oxford Handbook of International Adjudication*, *op. cit.*, pp. 111–133.

17 *Ibidem*, pp. 113–114.

18 *Ibidem*.

19 *Ibidem*, pp. 132–133.

20 *Ibidem*, p. 133.

recognizing the jurisdiction of international courts. The resistance of Asian countries to the judicialisation tendency can be explained by, for example, the refusal of communist China to submit to the jurisdiction of international courts, or the rivalry between the major powers of the region (India/Pakistan, India/China, Iran/Iraq, Japan/South Korea), or the lack of a reason to unite, etc.

Despite the tendency to judicialise international relations, many cases still remain outside the jurisdiction of international tribunals, or only appear on their case-list sporadically. Benedict Kingsbury enumerates many such cases, including military and intelligence activities, which concern the control of arms, disarmament, nuclear weapons and nuclear energy governance; global financial governance; corruption; environmental protection; political decision making processes; hazardous waste; humanitarian assistance and disaster response; and the majority of problems concerning the lives of people living in third world countries, etc.²¹ Although the ICJ, as a court of general jurisdiction, can deal with any case that falls under international law, other international courts have a relatively limited scope of competence.²² For this reason, there are continual attempts at establishing new international tribunals that could settle at least some of these cases, for example an international environmental court.

Another feature of the proliferation of international courts is their transnational nature. Increasingly, the parties to the cases dealt with by international courts are non-state actors, primarily natural persons. In the case of human right courts, such as the ECtHR, the majority of litigation is initiated by natural persons who file claims against their own states. This fact has a significant impact on the growing case-law of these courts, which is a product not so much of disputes between states, but of proceedings initiated by non-state actors.

The horizontal nature of international courts is also noteworthy. Individual international courts are not interrelated, or in a hierarchical order. They are rather autonomous and distinct from each other. This is largely due to the lack of relationship of subordination between the various special regimes within which individual courts were created.

The institution of compulsory jurisdiction accompanying the process of judicialisation is equally important. The phenomenon of the multiplication or proliferation of courts that began in the 1990s showed that states are more inclined to accept the compulsory jurisdiction of courts with a narrow scope of competence than courts of general competence, such as the ICJ. In this regard, Romano describes a paradigm shift in the international judiciary that took place at the end of the 20th century and the start of the 21st century – from a consensual paradigm requiring the explicit and special consent to the jurisdiction of a given court, to a compulsory paradigm, in which consent is to a large

21 B. Kingsbury, *op. cit.*, p. 212.

22 W. Czapliński, *op. cit.*, p. 98.

extent is formulaic, since it is expressed implicitly through the ratification of treaties creating certain international organizations.²³

Of course, compulsory jurisdiction thus understood does not entail that a state's consent to the jurisdiction of a given international judicial body has become unnecessary. However, this consent takes on a new importance, becoming rather the condition for a particular state's membership of an international organisation, in the framework of which a given judicial body operates. It is expressed in the initial act, which is most often related to the afore-mentioned ratification of the treaties that constitute organisations and their judicial bodies. However, according to Romano, even though the principle of consent has not disappeared, its importance is gradually diminishing. The expression of consent has become so far removed from the exercise of real jurisdiction that it is natural to wonder whether consent continues to have any real function in the international order.²⁴ As a result we can talk here about the type of compulsory jurisdiction that Hans Kelsen advocated for in connection with the jurisdiction of the ICJ.²⁵ However, it should be noted that states would be reluctant to acknowledge compulsory jurisdiction if the courts were to have universal jurisdiction *rationae materiae*, as the ICJ does. The increase in the tendency for states to accept the compulsory jurisdiction of international judicial bodies which was in evidence in the 1990s was inextricably tied to the limited scope of the jurisdiction of these newly-created tribunals.

Conflicts of jurisdictions and judgements

As was previously mentioned, the multiplication of international judicial bodies has raised fears, especially concerning the consequences for the unity of international law. Due to the unsynchronized and decentralized process of creating international judicial bodies, the jurisdictions of these bodies potentially overlap, which can lead to jurisdictional conflicts. An example of this is the fact that the ICJ is the appropriate body for settling all legal disputes between states, however its competence is also covered by the jurisdiction of specialized tribunals, such as ITLOS or the AB of the WTO, and also by the jurisdictions of regional courts, such as human rights tribunals. This has led to a relatively new phenomenon in international relations, namely *forum shopping*. The phenomenon itself is nothing new, but it only became noticeable in international law quite recently, particularly in connection with the multiplication of international judicial bodies. On the one hand, it can be argued that the availability of multiple judicial fora is a blessing for applicants, particularly as until recently in the international sphere these fora were either lacking or few in number. It is also suggested that the plurality

23 C. P. R. Romano, *The Shift...*, *op. cit.*, pp. 794–795.

24 *Ibidem*.

25 H. Kelsen, *The Law of the United Nations*, London 1950, pp. 522–523.

of judicial fora introduces healthy rivalry between particular courts, which can lead to judgments of better quality, expedited proceedings, and even higher levels of legitimacy.²⁶ The choice of a more favorable judicial forum tends to be appreciated by both parties. However, in practice it is often the case that parties steer their case towards the court before which they have a better chance of winning.

The principle *res iudicata* is of great importance in this context, as it denotes the inadmissibility of re-filing a claim in a case if the identity of the parties, or the legal basis and the substantive content of the claim, are the same. It is accepted that the principle has the status of a general legal principle, as such are defined in Article 38 of the Statute of the ICJ. For this reason, Czapliński holds that the principle should also be applied when the statutes of a given international court are silent on this subject.²⁷

The greatest threat associated with the unsynchronized multiplication of international judicial bodies is the danger of them issuing divergent or contradictory judgments, which would therefore entail a conflict in jurisprudence. There is the well-known example of divergent judgments being made when adjudicating on the issue of assigning responsibility to states. In the Nicaragua case, the ICJ held that there would need to be *effective control* in order to assign responsibility for acts in violation of international law. In contrast, in the Tadic case the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia ruled that there should be a less restrictive standard of control, namely *overall control*. This example is important since it addresses the crucial issue of establishing the conditions of state liability.²⁸ According to Kwiecień, when regional and/or special courts issue judgments that diverge from the jurisprudence of the ICJ, they threaten the unity and universality of international law.²⁹ Discrepancies in the jurisprudence of international judicial bodies can undoubtedly have a negative impact on the effectiveness of international law and its institutions, and even undermine its legitimacy.

The source literature offers various proposals for ensuring consistency in the jurisprudence of international judicial bodies. One suggestion is that the ICJ should become a kind of appeal court for other international courts, similar to those in domestic legal systems, in order that other international bodies could refer questions to the ICJ for preliminary rulings. It has also been proposed that a new international tribunal be established for the purpose of resolving jurisdictional conflicts.³⁰ Such institutional solutions would certainly help to increase the rule of law in international relations, but the chances of them being implemented are rather negligible, considering the reluctance of states to

26 J. Paywelyn, L.E. Salles, *Forum Shopping Before International Tribunals: (Real) Concerns, (Im) Possible Solutions*, "Cornell International Law Journal" 2009, no. 1(42), p. 80.

27 *Ibidem*.

28 R. Kwiecień, *Teoria i filozofia prawa międzynarodowego. Problemy wybrane*, Warszawa 2011, p. 101.

29 *Ibidem*.

30 Czapliński puts forward this proposal in: W. Czapliński, *op. cit.*, pp. 91–97.

accept the authority of such bodies – even in situations when it was the states themselves that appointed specialized courts to deal with specific and complex issues arising within the framework of a given international regime. On the other hand, some authors focus on non-institutional solutions which emphasize the need for dialogue among judges, their readiness to cooperate and openness to the jurisprudence of other courts. As Judge Guillaume observes, judicial dialogue is key to avoiding the dangers associated with the fragmentation of international law.³¹ However, it is also noted that divergences in case-law can also be found in the jurisprudence of domestic courts, but the risk of fragmentation in international law is mitigated by the fact that individual international courts can refer to the principles and rules of universal international law in their case-law, while adopting the rules of interpretation provided for in Articles 30 and 31 of the Vienna Convention on the Law of Treaties of 1969.³²

The implications of the multiplication of international judicial bodies for international law

Determining the full impact of international courts on the system of international law would require a broad, detailed and in-depth analysis, taking the specific characteristics of various international courts into consideration. However, for now this article will only offer a few, preliminary observations.

First of all, it has to be said that – despite fears associated with the threat that conflicts of jurisdiction and jurisprudence poses to the unity of international law – the multiplication of international judicial bodies has generally had a positive impact on international law. The expansion of international courts has led states to appeal more frequently to judicial fora in the event of contentious cases, thereby strengthening the rule of law in international relations.³³ Thus the conclusion can be drawn that the effect of proliferation has been to strengthen the impact of international law on international relations and the behavior of states.³⁴

As Shany observes, the proliferation of international judicial bodies brought about a qualitative change, which encouraged states to treat their international obligations more seriously.³⁵ This change of attitude derives from the fear of confrontation with the judicial body that is to rule on the alleged failure to fulfill obligations. This is inextricably

31 Judge Guillaume, President of the ICJ, at the United National General Assembly, 26.10.2000 <http://www.icj-cij.org/court/index.php?pr=84&pt=3&p1=1&p2=3&p3=1> [access: 28.04.2016].

32 W. Czapliński, *op. cit.*, pp. 111 and 130

33 Y. Shany, *op. cit.*, p. 283.

34 P.-M. Dupuy, J.E. Vinuales, *The Challenge of 'Proliferation': An Anatomy of the Debate*, in *The Oxford Handbook of International Adjudication*, *op. cit.*, p. 140.

35 Y. Shany, *op. cit.*, p. 5.

tied up with the previously mentioned paradigm shift with regard to compulsory jurisdiction, and the spread of this type of jurisdiction in the 1990s and the 2000s. Withdrawing the consent expressed in the ratification of a treaty constituting a given organisation is becoming particularly difficult, as the costs – political, reputational, social etc. – are prohibitive. Credibility and considerations of reciprocity are of crucial importance to states, since if states accept the jurisdiction of an international tribunal, it makes their obligations more credible. Similarly, states are more inclined to implement the rulings of international courts because refusal to do so would undermine their credibility.³⁶

Along with the states' more serious attitude to their international obligations, there is another important effect of the multiplication of international judicial bodies – namely that international norms have attained an 'objective' character, as they have been freed from the will of individual states.³⁷ This is a result of taking the business of interpreting and applying the norms of international law away from the exclusive competence of states and their subjective discretion in these matters, and assigning it to an independent judicial authority. This objectivisation of the norms of international law has been bolstered by the development of the case-law of international courts, which has gradually evolved a specific way of interpreting the norms of a given treaty and become binding on the states parties to the treaty. A good example of this is provided by the extensive case-law of the ECtHR, which confers the rights provided for in the European Convention of Human Rights, and which are expressed there in a framework and general manner, in a concrete, content-filled form. Naturally, the process of interpreting international norms is a rather complicated process. For example, although the ECtHR employs dynamic interpretation and treats the Convention as a 'living instrument,' when the Court interprets these norms it takes the local, specific circumstances of a given country into account, in the application of the margin of appreciation doctrine.³⁸ This is a key aspect of the unique judicial diplomacy of this important European court.

Undoubtedly, the activity of individual international courts plays an important role with regard to the interpretation and application of norms within the various organisations (regimes) in which they operate – this particularly applies to human rights courts and courts established under various types of integration organizations, with the EJEU at their head. In this context, the case-law of the ICJ plays a special role, as according to Professor Lauterpacht it made a clear contribution to the development and clarification of international norms.³⁹ The judgments of the ICJ are treated as authoritative state-

36 B. Kingsbury, *op. cit.*, p. 217.

37 Cf. P.-M. Dupuy, J. E. Vinuales, *op. cit.*, p. 139.

38 A. Wiśniewski, *Koncepcja marginesu oceny w orzecznictwie Europejskiego Trybunału Praw Człowieka*, Gdańsk 2008.

39 H. Lauterpacht, *The Development of International Law by the International Court*, London 1958, pp. 4-5.

ments on international law that influence not just treaty law but above all customary law.⁴⁰

Since, as was mentioned, the emergence of international courts has led to the norms of international law attaining an objective dimension, their interpretation and application has ceased to be dependent on the will of states or the subjective recognition of the sovereignty of states. However, international courts have also begun to control the states' prerogatives to define for themselves what falls under the *domaine réservé*, and therefore what constitutes the internal affairs of a given state. Some authors compare this to the development of the powers of domestic courts to decide whether or not acts of state power are constitutional.⁴¹ The encroachment of international courts into internal affairs is in any case contingent upon states being attached to the principle of non-interference in internal affairs. In this area, conflict frequently results from the activities of various tribunals, particularly those issuing judgments on violations of human rights. Undoubtedly, the encroachment of international courts into the sphere of 'domaine réservé' results in the curtailment of a state's discretionary authority to exclude certain cases from the control of international judicial bodies.

The jurisprudence of international courts has also led to the emergence of an institutional judicial layer, which has entailed that international law has become 'less horizontal'. The activity and activism of international courts has substantially enriched international law. A kind of normative surplus has been produced from their activity, resulting in international law becoming undoubtedly richer and more mature. It is often said that international courts develop international law, and they do this not just through elucidating the meaning of norms, which are incomplete and lacking in clarity, and through clarifying the fundamental principles of international law, but also through developing certain key institutions of international law, from the perspective that views this law as a system. This also applies to, *inter alia*, the concept of peremptory norms (*ius cogens*) or *erga omnes* norms. The jurisprudence of international courts, particularly the ICJ, plays a crucial role in the shaping the customary norms of international law. As Cassese observes "once the ICJ has stated that a legal standard is part of customary international law, few would seriously challenge such a legal finding." This court therefore plays an essential role in the process of creating international law.⁴²

It can thus be concluded that thanks to international judicial bodies the regulatory function of international law is becoming increasingly important in the international

40 Ch. J. Tams, *The ICL as a 'Law-Formative Agency': Summary and Synthesis*, in *The Development of International Law by the International Court of Justice*, ed. Ch. J. Tams, J. Sloan, Oxford 2013, pp. 377–378.

41 P.-M. Dupuy, J. E. Vinuales, *op. cit.*, p. 139.

42 A. Cassese, *The International Court of Justice: It is High Time to Restyle the Respected Old Lady*, in *idem, Realizing Utopia. The Future of International Law*, Oxford 2012, p. 240.

community. International judicialization can also be viewed as a process that attempts to tame the Leviathan and gradually put it under the control of international law. At one time this phenomenon was known as ‘legalization.’⁴³

Judicialisation has always been viewed with scepticism and suspicion from the perspective of classical international law. It was believed that it was incompatible with the fundamental principle or the idea of sovereignty. And the idea of sovereignty is expressed in the requirement that states consent to submitting to the jurisdiction of any international tribunal. This conflict was particularly noticeable in the struggle involved in introducing general compulsory jurisdiction into international law. There has been considerable controversy over the issue of sovereignty and the international judiciary, and no doubt this controversy will continue in the future. The influence of international courts on the conduct of states can be seen as a dialectical process, which is uniquely dynamic and is gradually changing the image of international law and its juridical nature.

Concluding remarks

In the last pages of *The Concept of Law*, Hart writes “perhaps international law is at present in a stage of transition towards acceptance of this and other form of which would bring it nearer in structure to municipal system.”⁴⁴ According to Hart, only by making international law similar to domestic law can doubts concerning the legal nature of international law be dispelled. The development of the international judiciary can thus be viewed with a certain amount of optimism, as this development has brought international law closer to being a mature legal system than it was at the turn of the twentieth century.

However, if there is indeed a process of change occurring in international law, it must be remembered that this process is unfolding in the face of fundamental contradictions. The essentially state-centric nature of the international community makes it impossible – or at least very difficult – to shape the international judiciary into a centralized, homogenous and hierarchical system; neither is this orientation around states conducive to the development of the institution of compulsory jurisdiction along the lines imagined by the Kelsenite proponents of this institution.

Nevertheless, the impact of multiplication in the last two or three decades should not be overestimated. It should be borne in mind that the process of judicialisation has been uneven in different parts of the world, and the same can be said of the scope of cases covered by the jurisdiction of international tribunals, which often have specialized jurisdiction *rationae personae*. It also cannot be forgotten that there are frequent references to

43 P.-M. Dupuy, J.E. Vinuales, *op. cit.*, pp. 138–156.

44 H.L.A. Hart, *op. cit.*, p. 231.

conflicts of jurisdiction and jurisprudence. Lastly, it is not at all certain whether the trend towards judicialisation will continue in the future. The specific geo-political situation in the world in the 1990s was conducive to the proliferation of international judicial bodies, and the situation in the second decade of the 21st century is rather different. Despite this fact, according to some authors there are reasons for optimism. For example, Kingsbury argues that currently international judicialisation is still dominated by a reformist tendency, rather than any counter movement against the development of international courts.⁴⁵ Although the future prospects for judicialisation remain uncertain, as it depends on many political factors, the influence of international courts on international law will not be negligible.

In all likelihood, the development of international judicial bodies will continue to be horizontal, heterogeneous and uneven. However, this should rather be seen as being a specific feature of the legal order that international law constitutes, and being due to the specific needs of members of the international community. It is nevertheless vital that the activity of international courts and tribunals, despite the shortcomings and deficiencies associated with their proliferation, is gradually transforming the face of international law as it develops into an ever richer and more mature system of law.

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⁴⁵ B. Kingsbury, *op. cit.*, p. 224.

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SUMMARY

On the Judicialisation of International Law

The judicialisation of international law is a relatively recent phenomenon that gained momentum in the 1990s and 2000s. Coupled with the trend towards widespread compulsory jurisdiction, it has been crucial in strengthening the commitment of states to adhere to their international obligations. Another important effect of judicialisation on international law is that at least certain international norms have acquired an "objective" nature, detached from the will of states. This is because the interpretation and application of these norms is no longer dependent solely upon the subjective discretion of states, but is subject to consideration and examination by independent judicial bodies. The process of judicialisation, while contributing to the international rule of law, has undoubtedly changed the face of international law a great deal as a result of some other factors. The multiplication of international courts has led to the expansion of the judicial

institutional layer, making international law less horizontal. Also, as a result of the growing case-law of these courts, the system of international law is becoming more complex and developed, and thus also more mature. The natural aspect of the judicial function is the development of international law. Despite the problems and risks involved, the proliferation of international courts and tribunals can be perceived as one of the important components of the dynamic transformation of international law during the recent decades.

Keywords: public international law, judicialisation, multiplication of international courts

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