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JUDICIAL LAW-MAKING AS A FUNCTION OF THE INTERNATIONAL COURT OF JUSTICE

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SUMMARY

This article deals with a theoretical and practical problem of recognizing judicial precedent as a formal source of international law. The author proves that the legislation of international justice bodies, in particular the UN International Court of Justice, are not only closely connected with law application, but also have independent significance. It is established that the importance of judicial legislation by international judicial institutions and its results are difficult to overemphasize, as from "auxiliary means of determining legal norms" judicial decisions have evolved into an effective tool for resolving international disputes improving the quality of international law. The results of judicial legislation are acts-regulations; case-law decisions; and rules of international instruments (Convention on the Territorial Sea and the Contiguous Zone 1958 and UN Convention on the Law of the Sea 1982).

Key words: judicial legislation, judicial precedent, the International Court of Justice, international public law, maritime delimitation.

СУДЕБНОЕ ПРАВОТВОРЧЕСТВО КАК ФУНКЦИЯ МЕЖДУНАРОДНОГО СУДА ООН

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АННОТАЦИЯ

Статья посвящена теоретической и практической проблеме признания судебного прецедента как формального источника международного права. Автором доказано, что правотворчество международных органов правосудия, в частности Международного суда ООН, не только тесно связано с применением права, но и имеет самостоятельное значение. Установлено, что значение судебного правотворчества международных судебных учреждений и ее результатов переоценить трудно, так как от «вспомогательных средств определения правовых норм» судебные решения эволюционировали в эффективный инструментарий разрешения международных споров, качественно совершенствуя международное право. Результаты судебного правотворчества – акты-регламенты, решения прецедентного характера, нормы международных документов (Конвенции о территориальном море и прилегающей зоне 1958 г., Конвенции ООН по морскому праву 1982 г.).

Ключевые слова: судебное правотворчество, судебный прецедент, Международный суд ООН, международное публичное право, делимитация морских пространств.

Problem statement. Over the past 70 years, experts in international law have been discussing a number of the problem issues: whether the decisions of international justice bodies are a formal source of international law. At first glance, such a simple formulation of the problem should not contain special difficulties in its study. However, this problem includes several important components: international experts need to come to an unequivocal understanding of the of "judicial precedent" concept, to formulate the doctrine of judicial precedent as a form of international law and to recognize that judicial law-making by international justice bodies is a function closely related to law enforcement while having an independent value in the regulation of international relations.

The relevance of the research topic is due to a qualitatively new state of international relations and international law. However, the question remains unanswered: what is the legal force of the international justice bodies decisions, which constitute the result of these bodies law-making.

State of research. Among international scholars, it is widely believed that there is a tendency in international law to preserve judicial continuity and formation of case law elements. The principle of the relative strength of the preliminary decision (a convincing precedent) of the court is at the stage of formation. International law lacks the requirement to comply with previous decisions of international justice bodies, which does not prevent some of the latter from starting the practice of taking into account their preliminary judicial decisions [1].

The concept of "law-making process" and "legal source of law" are, in a certain sense, overlapped by the authors. With all the differences in the international scholars' approach to the problem of definition of law source, it is understood as the state bodies legal norms creation activity or such activity result. The procedure for the development and adoption of international conventions is a recognized law-making process. In addition to pointing to the form (external form) of existence of the rule of law, scientists include the method of its creation in the definition of law sources (e.g. T.A. Antsupova) [2].

Anglo-American literature widely uses the equating of international courts with national ones that offer case-by-case

law development [3]. Both judges and experts analyzing the work of courts are sure that court judgments are awarded due to the law-making activity. They admit that international courts do not formally apply the concept "look at previous judgments" (stare decisis), which is literally translated as "stick to the adjudicated", but they invariably refer to their previous judgments. M. Shahabuddeen writes, "The International Court of Justice often quotes its decisions" [4].

Ukrainian experts in international law have no doubt about the statement that the judicial precedent in the form it operates in the common law systems does not exist in international law. It is also widely believed that thanks to case law, in particular, the European Convention on Human Rights has in fact become a system of norms that shape European human rights standards. At the same time, the legal nature of decisions of the European Court of Human Rights is determined in different ways in the legal science, which is facilitated by the vagueness of the certain terms use: "judicial law-making", "judicial precedent", "judicial practice", "court judgment", "precedent of interpretation" [5, p. 28]. Such conceptual ambiguity hinders the characterization of the nature of judicial law-making by international justice bodies.

Purpose of the Article. The author of this article analyses the content of decisions of the International Court of Justice on the maritime delimitation issue in order to prove that such decisions can be deemed judicial precedents established in the process of the long-term judicial practice.

Presentation of Main Material. In the legal literature, most authors associate the process of judicial law-making with justice, the court principal function. At the same time, scientists pay attention to the subordinate, dependent, incidental, integral, derivative nature of judicial law-making. Such statements can be accepted in part when characterizing the precedent judicial law-making. Indeed, the function of law-making is the auxiliary one in the justice provision. The need in the judicial bodies law-making arises only when some difficulties arise in the process of justice administration (the necessity of interpretation or bridging the law gaps). And since judicial law-making help to eliminate them, it, respectively, has a subsidiary character. However, without establishing the nature of the judicial law-making connection with other functions of the judiciary, it is impossible to clearly consider the essence of judicial law-making as an auxiliary activity, since the adoption of the rules of the judicial activity procedure is not of auxiliary, but of independent law-making nature. In accordance with Art. 30 (1) of the UN International Court of Justice Statute, the court performs the function of regulatory law-making [6]: The Court shall frame rules for carrying out its functions. In particular, it shall lay down rules of procedure.

There are two opposing views on the characterization of the decisions of international judicial institutions as a source of public international law in the legal literature. The proponents of the "negative" view argue that judicial judgments are only the evidence for determining the existence or absence of certain principles and rules, and the Court's essential role in interpreting the existing rules of international law is also recognized. In the opinion of Hersch Lauterpacht, decisions of the International Court of Justice state that there is law. Moreover, the scientist in the mid-50s of the last century admitted that the modern international law consisted in the decisions of the International Court of Justice: "they are not binding on states. Nor are they binding on the Court. But no written order can prevent them from authoritatively showing that there is international law, and no written rule can prevent the Court from considering them as such" [7, p. 21–22].

A trend has taken shape in the Ukrainian scientific community, according to which it is recognized that "judges of the International Court of Justice sometimes do more than just "qualify the rules of law" [8, p. 102]. The example of judgment in the case of the British-Norwegian dispute (1951) that established criteria for identifying the lines, from which the territorial sea width is calculated, is used as proof. And it is very important to note that the above criteria are included in the rules of the Geneva Convention on the Territorial Sea and the Contiguous Zone, 1958.

Ukrainian scientist V.G. Butkevich notes that most theorists and practitioners of international law determine formal sources of international law as the existing factual material, out of which international experts choose legally binding sources. In this context, we can use the following classification, which, as the scientist points out, is a kind of compromise and a certain result of heated discussions about the sources of international law: 5 main categories or forms: a) international treaties; b) international customs; c) rulings of international courts and arbitral tribunals; d) doctrines of international law; and e) decisions of international bodies and organizations [9, p. 111]. This classification is consistent with the content of article 38 of the International Court of Justice Statute [6].

Interpretation of the literal content of provisions of Art. 38 and Art. 59, Statute of the International Court of Justice, leads to the statement that court judgments of international instances are only additional means for determining the rules of law. But it should be taken into account that these documents were drawn up after World War II, and today the International Court of Justice have de facto made a significant contribution to the development of international law. In addition, some Judges of the Court, e.g. D. Fitzmaurice, consider that the jurisprudence of the Court on clarifying the content of rules and principles of international law gradually forms the general effect of its rulings per sample of the French current practice (une jurisprudence constante) [10, p. 8].

According to the updated information posted on the official website of the International Court of Justice, the Court can clarify, improve and interpret rules of international law. "It may also pay attention to defects in law and state the emergence of new trends" [11].

In the practice of the International Court of Justice, we find a number of issues, regarding which there is a stable group of cited judgments that constitute a judicial precedent. These decisions relate to the delimitation of maritime spaces. The analysis of such decisions is related to the precedent contained in the case on the North Sea the continental shelf delimitation adopted in 1969 in disputes between the Federal Republic of Germany and Denmark; the Federal Republic of Germany and the Netherlands requested the Court to determine the principles and rules of the international law to be used in the delimitation of the adjacent continental shelf areas between them.

Denmark and the Netherlands referring to provisions of article 6 of the 1958 Convention on the Continental Shelf believed that the principle of "equal distance" should be used as the principle of delimitation. Germany insisted that the delimitation should be carried out based on the principle of justice, because if the principle of "equal distance" is applied, the part of the continental shelf belonging to Germany in accordance with the length of its North Sea coast will be wrongfully reduced, i.e. Germany demanded a resolution of the dispute from the standpoint of borders delimitation, and not the division of the continental shelf.

On 20 February 1969, the Court, by 11 votes to 6, issued a decision, in which it determined that the basic principle of the shelf delimitation was an agreement between the parties concerned and stressed that the use of the method of equal distance was not binding on the parties. The court recognized that the continental shelf was "a natural extension of the land territory (of a state) in the sea and under the sea" and it shall be delimitated "with the consent of the parties in accordance with the principles of justice and taking into account all relevant circumstances" [12]. In subsequent decisions, the Court developed that trend by clarifying the content of the principles of justice. The conclusions reached predetermined the subsequent practice of dispute resolution in the field of maritime delimitation (it is mentioned and used in all decisions on maritime delimitation). Thus, in a recent case (No. 165), the Court states that "in accordance with established jurisprudence, the territorial sea is delimited out in two stages", "the continental shelf and the exclusive economic area must also be delimited in two stages" [13; paras. 135, 150, 172, 174], i.e. the Court uses its own decisions on such problematic issues in order to make a similar decision in the new dispute.

Arbitral awards on the continental shelf delimitation between the United Kingdom and France (1974 and 1978), and between Guinea and Guinea-Bissau (1985) were used by the International Tribunal for the Law of the Sea in the case between Bangladesh and Myanmar (2012), as well as in the case on delimitation of land and maritime boundaries between Nicaragua and Colombia [14].

Thus, in fact, as to the issue of maritime delimitation, a jurisprudence constante has been formed in the international judicial and arbitration practice, i.e. in the process of citing and borrowing, the relevant decisions are gradually acquiring a precedent nature. We believe that precedent decisions can be understood as decisions that, due to the credibility of the arguments contained in them, are perceived as authoritative statements of rules of law and therefore form international law. Without being binding on future disputes, such decisions, by virtue of their citedness and their conclusions borrowings, have some impact on the subsequent practice of dispute resolution and development of international relations, and, accordingly, of international law. Precedent decisions form interlinked groups emerging around individual issues of international law. This, in turn, as A. Smbatyan believes, allows us to distinguish two groups of precedent decisions: system-forming and consolidating ones [15, p. 35]. The system-forming decisions, in her opinion, are those, which are considered by the international judicial community as the most authoritative, and are cited in the majority of disputes addressing the relevant similar issues. The decisions that justify their own conclusions by provisions set out in the system-forming decisions are called consolidating decisions by the scientist. As a vivid example, A. Smbatyan cites the decision of the International Court of Justice in the case of the territorial dispute between Romania and Ukraine regarding the Zmiinyi Island. The Court's conclusions are based on the arguments set out in the most authoritative decisions in the field of maritime delimitation [15]. The decision on this dispute can be considered as an example of a consolidating decision. At the same time, in the said case, the Court not only analyzed and adopted the findings of its previous decisions, but also made a number of new conclusions, which, as the practice shows, were used by it in the settlement of subsequent disputes. For example, many of the Court's findings in the decision made in 2012 in the case concerning the delimitation of land and maritime boundaries between Nicaragua and Colombia are based on references to the dispute between Romania and Ukraine. A similar approach can be seen in the decision of the International Tribunal for the Law of the Sea on the delimitation of the maritime boundary in the Bay of Bengal. This gives reason to believe that the decision regarding the Zmiinyi Island, due to the credibility of arguments set out in it, is gradually acquiring the status of a system-forming decision.

Examples of citation, borrowing and references to previous decisions of the International Court of Justice (e.g., we believe that one of the recent procedural decisions in case No. 163 "Immunities and Criminal Proceedings", Equatorial Guinea v. France (Preliminary objections of 6/06/2018) can be attributed to mandatory precedents since the failure of the parties (or one of the parties) to comply with a procedural requirement has specific binding consequences. Furthermore, providing such decisions with binding legal force will further ensure not only respect for the decisions of international justice bodies, but will also facilitate the implementation of decisions on the merits [16].

Conclusions. Thus, it can be argued that the long-term practice of the International Court of Justice on certain issues (topics), for example, on the issue of maritime delimitation has created decisions, which should be characterized as judicial precedents established in the process of jurisprudence constante.

The international legal system does not apply the principle of stare decisis and lacks rules and criteria that distinguish among the decisions of international courts and arbitrations, i.e. those, to which judges and arbitrators should subsequently be particularly attentive. In each case, it is for judges to decide whether and how to rely on previous dispute resolution practices, and if "yes", then in which manner exactly.

Decisions of international courts and arbitration tribunals have the same legal force, and become part of the international legal order from the moment they are adopted. Only judges, within the limits of discretion and the best judgment, have the right to determine whether the given decision has a precedent value.

It is difficult to overestimate the importance of judicial legislation of international judicial institutions and its results, since from "auxiliary means of rules of law determination" judicial decisions have evolved into an effective tool for re-

solving international disputes and qualitatively improved international law.

Judicial precedents of the UN International Court of Justice have led to the emergence of international standards on the peaceful passage and obligations of coastal states.

Thanks to decisions of the UN International Court of Justice, a method for determining the boundaries of the continental shelf has been established, as well as the basic provisions of the continental shelf concept have been formulated.

Judicial practice had contributed to the drafting of the Convention on the Territorial Sea and the Contiguous Zone of 1958 and UN Convention on the Law of the Sea of 1982.

References:

1. Москаленко В. Специфіка прецедентного права Суду європейського співтовариства. Актуальні проблеми державного управління. Х., 2005. № 3 (26). С. 179–186.

2. Анцупова Т.О. Процесуальне право Ради Європи: принципи, система, динаміка: дис… докт. юрид. наук: спец. 12.00.11 – «Міжнародне право». О.: Національний університет «Одеська юридична академія», 2013. 443 с.

3. Познер Р.А. Проблемы юриспруденции / Пер. с англ. К.: Акта, 2004. 487 с.

4. Shahabuddeen M. Precedent in the World Court. Cambridge; New York: Cambridge University Press, 1996. 245 p.

5. Буроменський М.В. Звернення до Європейського суду з прав людини: практика Суду і особливості українського законодавства. Харків: Фоліо, 2000. 304 с.

6. Statute of The International Court of Justice. URL: http://www.icj-cij.org/files/statute-of-the-court/statute-of-the-court-ru.pdf/

7. International Law: The Development of International Law by The International Court / By Sir Hersch Lauterpacht. London: Stevens, 1958. 408 p.

8. Міжнародне публічне право: підручник / За заг. ред. В.М. Репецького. 2-е вид. К.:Знання, 2012. 437 с.

9. Буткевич В.Г., Мицик В.В., Задорожній О.В. Міжнародне право. Основи теорії: підручник. К.: Либідь, 2002. 608 с.

10. Gilbert Guillaume. The Use of Precedent by International Judges and Arbitrators. Oxford Journals Law & Social Sciences Jnl of Int. Dispute Settlement. 2011. Vol. 2. Issue 1. P. 5–23. URL: https://ru.scribd.com/document/295103004/GUILLAUME-Gilbert-the-Use-of-Precedent-by-International-Judges-and-Arbitrator-2011

11.International Court of Justice. URL: http://www.icj-cij.org/en/annual-reports

12. North Sea Continental Slelf cases. URL: http://www.icj-cij.org/docket/files/51/5535.pdf/

13. Land Boundary in the Northern Part of Isla Portillos (Costa Rica v. Nicaragua). URL: http://www.icj-cij.org/en/case/165

14.Continental Shelf (Tunisia/Libyan Arab Jamahiriya) case. URL: http://www.icj-cij.org/docket/files/63/950; Delimitation of the Maritime Boundary in the Gulf of Maine Area. URL: http://www.icj-cij.org/docket/files/67/6369.pdf; Continental Shelf (Libyan Arab Jamahiriya/Malta) case. URL: http://www.icj-cij.org/docket/files/68/6393.pdf; Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea case. URL: http://www.icj-cij.org/docket/files/120/14075.pdf; Maritime Delimitation in the Black Sea case. URL: http://www.icj-cij.org/docket/files/ 132/14987.pdf; Maritime Delimitation and Territorial Questions between Qatar and Bahrain case. URL: http://www.icj-cij.org/docket/files/87/7027.pdf; Reports of International Arbitral Awards. URL: http://legal.un.org/riaa/cases/vol_XVIII/3-413.pdf

15. Смбатян А.С. Прецедентные решения органов международного правосудия. Евразийский юридический журнал. 2013. № 3 (58). С. 33–39.

16. Immunities and Criminal Proceedings (Equatorial Guinea v. France). URL: http://www.icj-cij.org/en/case/163

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