Hybrid tribunals and internationalized courts in the international criminal justice

Tribunales híbridos y tribunales internacionalizados en la justicia penal internacional

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ABSTRACT

In recent years in the Russian and foreign doctrine of international law even more often it is possible to meet skeptical opinions concerning activity of the International Criminal Court. From the moment of establishment of this judicial authority there passed more than ten years, for this period billions of dollars are spent, however only four sentences are pronounced that speaks about low efficiency of its work and sets thinking on possible alternative models of the international criminal justice. According to authors of article, the solution of the problem of ensuring inevitability of punishment for commission of serious international crimes can be promoted by creation of criminal judicial authorities *of ad hoc* with the mixed jurisdiction combining the international and national components. In article the theoretical aspects connected with definition of a concept of the mixed (hybrid) model of jurisdiction, history of creation of the first hybrid tribunals and the internationalized vessels are considered. Besides, authors in detail analyze legal bases of their activity; internal structure; features of subject and personal jurisdiction; the structure and an order of legal proceedings of hybrid tribunals and the internationalized vessels, come to light the main problems which they face in practice, and also the prospects of functioning of similar international criminal judicial authorities in the future.

Keywords: hybrid tribunals, the internationalized courts, international criminal justice, International Criminal Court

RESUMEN

En los últimos años, en la doctrina rusa y extranjera del derecho internacional, aún más a menudo es posible encontrar opiniones escépticas sobre la actividad de la Corte Penal Internacional. Desde el momento del establecimiento de esta autoridad judicial pasaron más de diez años, para este período se gastan miles de millones de dólares, sin embargo, solo se pronuncian cuatro sentencias que hablan de la baja eficiencia de su trabajo y ponen a pensar en posibles modelos alternativos del criminal internacional justicia. Según los autores del artículo, la solución del problema de garantizar la inevitabilidad del castigo por la comisión de delitos internacionales graves puede promoverse mediante la creación de autoridades judiciales penales ad hoc con la jurisdicción mixta que combina los componentes internacionales y nacionales. En el artículo se consideran los aspectos teóricos relacionados con la definición de un concepto del modelo mixto (híbrido) de jurisdicción, la historia de la creación de los primeros tribunales híbridos y los buques internacionalizados. Además, los autores analizan en detalle las bases legales de su actividad; estructura interna; características del sujeto y la jurisdicción personal; La estructura y el orden de los procedimientos judiciales de los tribunales híbridos y los buques internacionalizados ponen de manifiesto los principales problemas que enfrentan en la práctica, y también las perspectivas de funcionamiento de autoridades judiciales penales internacionales similares en el futuro.

Palabras clave: tribunales híbridos; los tribunales internacionalizados, justicia penal internacional, Corte Criminal Internacional

RESUMO

Nos últimos anos, na doutrina russa e estrangeira do direito internacional, ainda mais frequentemente, é possível encontrar opiniões céticas sobre a atividade do Tribunal Penal Internacional. Desde o momento do estabelecimento dessa autoridade judicial, passaram-se mais de dez anos; nesse período, são gastos bilhões de dólares; no entanto, apenas quatro sentenças são pronunciadas que falam sobre a baixa eficiência de seu trabalho e põem em consideração possíveis modelos alternativos do criminoso internacional. justiça. Segundo os autores do artigo, a solução do problema de garantir a inevitabilidade da punição pela prática de crimes internacionais graves pode ser promovida pela criação de autoridades judiciais criminais ad hoc com a jurisdição mista, combinando os componentes internacionais e nacionais. No artigo, são considerados aspectos teóricos relacionados à definição de um conceito de modelo de jurisdição misto (híbrido), história da criação dos primeiros tribunais híbridos e navios internacionalizados. Além disso, os autores analisam detalhadamente as bases legais de sua atividade; estrutura interna; características do assunto e jurisdição pessoal; a estrutura e a ordem dos processos judiciais dos tribunais híbridos e dos navios internacionalizados vêm à tona os principais problemas que eles enfrentam na prática, e também as perspectivas de funcionamento de autoridades judiciais penais internacionais semelhantes no futuro.

Palavras-chave: tribunais híbridos, os tribunais internacionalizados, justiça criminal internacional, Corte Criminal Internacional

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INTRODUCTION

Achievement of the treasured purpose of inevitability of punishment for commission of serious international crimes is impossible without efforts of national authorities of implementation of justice worldwide. "Already today congestion of the procedure of consideration of the case in MUS is obvious. Effective justice is not promoted by the procedures of the adoption of charges and intermediate appeals which are dragging out process and not repaid. Participation in judicial proceedings of representatives of the victims whose status still is not accurately certain" (Bogush, 2014; Ghodsi & Barzamini, 2018). adds complexity.

Limited financing of the International Criminal Court and the bulky procedural mechanism do not allow Court to make large-scale investigations worldwide. In the article V. Bourque-Whyte writes that "three investigations and, at most, two processes in a year, cannot stop impunity and make a notable contribution to ensuring legal responsibility. Though prosecution of several high-ranking criminals can have serious moral and legal value, it cannot achieve main objectives of the Roman system and least of all answers the unrealistic expectations assigned to Court" (Burke-White 2008). Further the scientist suggests developing the mechanism of cooperation of MUS with national competent authorities within *a positive ("proactive")* complementarity.

MATERIALS AND METHODS

As material for work data on already existing hybrid tribunals served and are internationalized vessels if to consider them as bodies of the mixed criminal jurisdiction. In our opinion, achievement of a main objective of prevention of impunity for commission of serious crimes on international law is possible in the way which is already approved by the international community - internationalization of national courts and establishment of hybrid tribunals. The hybrid model of jurisdiction which is characterized by a combination of national and international components according to certain scientists, "promises a lot of benefit and actually offers approach which can solve, on the one hand, problems of exclusively international justice, and with another - purely national law" (Dickinson, 2003). Creation of such form of the mixed international and national criminal jurisdiction became the last tendency of formation of modern system of the international criminal justice (Kayumova, 2008; Heydarian, 2018).

Considering a problem of efficiency of prosecution of violations of norms of the international humanitarian law (IHL), Philippe Xavier noted that the main idea of creation of a form of hybrid jurisdiction consists in that "to create competent authority, so to speak, "to a measure", depending on the available opportunities at the end of the conflict or even before its end" (Xavier, 2008). The problem of post-conflict societies, according to the scientist, consists that the states, owing to insufficient implementation of norms of MGP and non-recognition of supranational criminal jurisdiction, are forced to look for other decisions, than just inaction or the announcement of amnesty. Therefore one of such alternative decisions can take the form "creations of special vessels (not to use the term "extraordinary courts") or (paralegal) commissions on establishment of the truth and reconciliation".

In the international legal doctrine there is no uniform definition of hybrid jurisdiction today. V. L. Tolstykh considers hybrid courts the jurisdictional bodies created by the UN and the interested state which part national and international judges are E.Skinnider means involvement of the international and national elements in the organization, structure and functioning of tribunals (Skinnider, 2007). by the mixed jurisdiction, and E. Bratch notes that property of "hybridism" of tribunal is shown in three aspects: on its origin (to creation by means of internal and external processes), to the mandate (merging of elements of national and international law), and on its structure (a combination of national and international participants) (Bruch. 2010; Rasooli & Abedini, 2017; Abramova et al., 2016).

At the same time the general opinion is that tribunals such function in the sphere of criminal legal proceedings, have various mixed elements in their activity and are created for a concrete case, possess the legal nature *of ad hoc (Condorelli & Boutruche, 2004)*.

The international practice of creation of the mixed criminal jurisdiction is connected with the beginning of the third millennium, namely with 2000 when in the territory of East Timor special chambers for prosecution of mass and gross violations of human rights were created.

Since 1995 the territory of East Timor was occupied by Indonesia. After the numerous meetings and negotiations with participation of GS UN and representatives of Portugal, between warring parties the agreement on settlement on East Timor in which holding national poll of inhabitants of Timor about future status of the territory is provided was concluded.

On August 30, 1999 in East Timor the referendum on the status of the territory, and following the results which about 80% of votes of inhabitants were given for finding of independence by East Timor was held.

After the announcement of results of vote the paramilitary forces playing for autonomy as a part of Indonesia with assistance of armed forces of Indonesia, started a campaign of violence and terror during which thousands of residents of East Timor were killed, and to 500000 were forced to leave the houses.

Not in forces to settle current situation, the government of Indonesia asked for the help the United Nations then the Security council authorized creation of multinational forces under uniform command of Australia for the purpose of restoration of peace and safety, and subsequently, the resolution 1272(1999) of October 25, 1999 founded the UN Transitional Administration in East Timor (BAOOHBT) as the complex, multipurpose body for peacekeeping bearing full responsibility for ensuring management in East Timor during transition to independence.

After the events connected with finding of independence by the new state, the UN Security Council repeatedly specified not importance of accountability of the persons guilty of commission in 1999 of serious violations of human rights, for ensuring reconciliation and stability in the region. According to the resolution in East Timor the UN Transitional Administration had to bear SB 1272 (1999), shared responsibility for administrative management.

In 2000 BAOOHBT made several decisions on the basis of which the corresponding mechanism known as Special chambers on serious crimes in Timor-Leshti was created today.

Subsequently the international community repeatedly used model of hybrid jurisdiction during creation of specialized tribunals of ad hoc and internationalization of national courts. Besides special chambers in East Timor, it: the mixed Judicial boards in Kosovo (2000); Special Court across Sierra Leone (2002); Trial chamber on investigation of war crimes in Bosnia and Herzegovina (2005); Extraordinary trial chambers in Cambodia (2006); Special Tribunal for Lebanon (2007). A number of scientists carry also Special tribunal for Iraq (Geib & Bulinsky 2006). created in 2003 to the internationalized vessels. Besides, the Extraordinary African chambers created in 2013 treat judicial authorities with hybrid jurisdiction.

Between the listed mixed (hybrid) tribunals is much in common, however, each of them is unique as it is created for a concrete, certain case, and owing to this fact has features of jurisdiction, the mechanism of implementation of legal proceedings, definition of measures of punishment and others.

Legal basis of functioning of each concrete judicial authority are acts, various by the legal nature, however, all of them are accepted at the initiative of the United Nations, namely according to resolutions of the Security council.

The first mixed judicial authorities - chambers on serious crimes in Timor-Leshti, and also judicial boards in Kosovo were created on the basis of decisions (orders) of the institutes founded by the UN on the place of the conflict - the UN Transitional Administration in East Timor and the UN Mission in Kosovo, given necessary legislative and executive powers. Subsequently the United Nations began to conclude agreements with the interested state on establishment of judicial authority, and a basis of their functioning there were Charters (Sierra Leone, Lebanon) or the Law playing the same role (Cambodia). The Law on an order of transfer of affairs from the International criminal Tribunal for the former Yugoslavia in the State court of Bosnia and Herzegovina of 2004 became a legal basis of functioning of special chamber on war crimes in the State court to Bosnia and Herzegovina.

Location. As a rule, placement of the mixed tribunals happens within the respective countries. It provides close interaction of employees with local population, proximity to proofs and witnesses, availability to the victims. Also, for safety of tribunals their transfer to other state is possible. So it happened to Special court across Sierra Leone: article 10 of the Agreement between the UN and the government of Sierra Leone about establishment of Special court of 2002 says that the Court can sit outside the residence if it considers it necessary for effective implementation of the functions. After Charles Taylor's arrest in Nigeria he was brought to Freetown, however, right after it, the Presiding judge, referring to rules of procedure, declared that to judge the former Liberian president in Sierra - Leon is unsafe and that it can lead to a new wave of disorders in all region. For this reason on June 16, 2006 the UN Security Council adopted the resolution 1688(2006) on the transfer of trial of the former president to the Hague, to premises of the International Criminal Court.

Jurisdiction. Each hybrid tribunal or court has special prerequisites of creation which, undoubtedly, are reflected in its jurisdiction, both subject, and personal. As almost all of them are created in post-conflict societies (except Special Tribunal for Lebanon), the general for all, as a rule, is inclusion in subject jurisdiction of war crimes, crimes against humanity and genocide. Structures are based on norms of international humanitarian law, besides, provisions of Charters of Tribunals *of ad hoc* for the former Yugoslavia and Rwanda, and also the Statute of the International Criminal Court are involved.

Features of subject jurisdiction depend on the purposes creation of tribunals or on character of the conflict. For example, in a case with Special court across Sierra Leone, under its jurisdiction the crimes provided by the Law of the state on prevention of child abuse of 1926 and the Law on deliberate infliction of harm of 1861 get. Violations of girls and stealing them with the low purposes, and also arson of houses and public buildings are referred to them. Judges of Extraordinary chambers of Cambodia are authorized to conduct judicial proceedings in the relation, including, destructions of cultural values during armed conflict as this structure is formulated in the Hague Convention of 1954, and also crimes against diplomatic personnel as it is understood on sense of the Vienna Convention of 1961.

As for Special tribunal for Lebanon, its exclusiveness is shown that it possesses jurisdiction over persons who are accused of commission of the attack which entailed the death of the former prime minister of Lebanon Rafik Hariri and 22 more people and also other connected crimes.

The structure, structure and order of legal proceedings in judicial authorities differ depending on whether it is independent judicial authority of the mixed type, or the internationalized national court.

For example, for implementation of the program of the UN Mission for affairs of temporary administration in Kosovo the staff of the international employees which as of December, 2007, includes 13 judges and 8 accusers is created. All of them are appointed the Secretary general for a period of six months with the right of repeated appointment.

The chamber on war crimes in Sarajevo works as constant office of the State court of Bosnia and Herzegovina. The Court consists of three divisions - on criminal cases, on administrative cases and appeal, all in its structure 54 judges, of them 16 - international. Chambers are created both in division on criminal cases, and in appeal division, they consist of three judges, the chairman - national judges and two members - the international judges.

As for the mixed (hybrid) tribunals (Sierra Leone, Cambodia, Lebanon), with small nuances their structure is formed by the bodies responsible for implementation of investigation and prosecution (in Extraordinary chambers of Cambodia functions of investigation and prosecution are divided between investigative chamber and office of accusers), actually trial chambers (cameras), appeal chamber (camera) and the secretariat.

Financing of almost all mixed tribunals (except the former Special chambers on serious crimes in Timor-Leshti) is carried out on the basis of voluntary contributions of member states. In it there are pluses and minuses. Unconditional plus is that their activity does not go a heavy burden on the budget of the United Nations as, for example, works of Tribunals for Yugoslavia and Rwanda. The mixed (hybrid) tribunals and the internationalized courts have still brief experience of work, however the beginning of their functioning already revealed both a number of the positive moments, and presence of certain problems. Some of them were noted by the UN Secretary General in 2004 in the Report "The rule of law and justice of a transition period in conflict and post-conflict societies".

RESULTS AND DISCUSSION

From May 14 to May 18, 2007, in Turin the Conference on the international criminal justice in which the most authoritative representatives of all organizations of the international and internationalized criminal justice participated took place. The short analysis of materials of the Conference allowed revealing the problematic issues standing including, before the internationalized courts and the mixed (hybrid) tribunals.

First, representatives of all hybrid judicial authorities noted problems with weak financing or the limited budget that has an adverse effect on the organization of legal proceedings.

Secondly, on one of the first places there is also a problem of staffing and lack of experience in conducting trial on the international crimes. In this regard it is noted that the states should create such personnel structures which simplify sending out on business of the employees working in national judicial systems for work in the International Courts of Justice.

Thirdly, a common problem is also technical ensuring legal proceedings, namely the organization of translation and interpretation; support of witnesses; management of work of court; conducting investigations; analysis of legal documents; administration; ensuring physical protection and maintenance of public relations.

There are also private problems concerning each concrete mixed tribunal or the vessels caused by its specifics. For example, for Extraordinary chambers in Cambodia the problem of collecting proofs on the crimes committed 30 years ago as temporary jurisdiction of chambers belongs to the crimes committed during regime of red Khmers from 1975 to 1979 takes place. Representatives of the UN Mission for affairs of temporary administration in Kosovo noted that the jurisdictional mandate without subject and temporary restrictions interferes with effective work of the international judges and accusers.

One of the problems revealed as a result of the analysis of work of the mixed tribunals is also the problem of recognition of the international legal status of such institutions. For example, after the conflict in East Timor the most part of defendants Special chambers on serious crimes remains in the territory of Indonesia, and among them - the main persons responsible for the crimes committed by the Indonesian military personnel. Indonesia from the very beginning negatively treated creation of Special chambers and still does not transfer defendants for attraction them to responsibility.

Some scientists in the works criticize the mixed tribunals because of a binding of their creation and activity to resolutions of the UN Security Council that involves their dependence on the political decisions of permanent members of Council existing at the moment (Köchler, 2006).

V. L. Tolstykh in general identifies their legitimacy with "will of the international community on behalf of which the UN acts".

Meanwhile, in the nearest future similar stereotypes can be reconsidered in connection with establishment *of Extraordinary African chambers (Extraordinary African Chambers - EAS)* in Dakar (Senegal) under the auspices of the African Union for prosecution of Hissène Habré. Chambers were created as the "third" alternative as a result of pronouncement by the International Court of Justice of the decision on business *the Questions concerning the obligation to prosecute or give out (Belgium against Senegal)* in judicial system of Senegal on the basis of the agreement between Senegal and the African union. The agreement was signed on August 22, 2012, opening of Chambers took place in February, 2013 and trial of Hissène Habré began in July, 2015.

Jurisdiction of Extraordinary trial chambers the EXPERT extends to the serious crimes committed in Chad during the period from June 7, 1982 to December 1, 1990 - genocide, war crimes, crimes against humanity and application of tortures. It is defined in article 3 of the Statute as follows: "Extraordinary African Chambers have the right to pursue and judge the persons or persons bearing the main responsibility for crimes and serious violations of international law, international common law and the international conventions, ratified by the Republic of Chad, made in the territory of Chad during the period from June 7, 1982 to December 1, 1990". The judicial case and Office of the Prosecutor

are formed by agreement the Minister of Justice of Senegal and the Chairman of the Commission the EXPERT. At the same time in structure of each of Chambers, besides Senegalese judges, the judges having the international status (Art. 11) are appointed. The applicable law - actually the Statute of tribunal and the national legislation of Senegal (Art. 16), financing of Chambers is carried out at the expense of contributions of the states the EXPERT on a voluntary basis, and in case of need, "additional financial resources can be mobilized at the scheduled time" (Art. 16).

Sara Williams allocates two signs giving originality to this judicial authority: first, this application *of universal* jurisdiction by the internationalized court, and secondly, it is called the first trial which took place in Africa and judging the former head of the African state (Wiliams, 2013). Really, in that situation which developed around prosecution of the African leaders by the International Criminal Court today creation of similar body is if not a panacea, then, at least, a certain guarantee of objective justice.

Important historical value of Extraordinary chambers consists also that their institution creates a precedent of regional approach to internationalization of national jurisdiction. It's not just that they are formed irrespective of UNSC: they show a possibility of options of the international criminal prosecution of high-ranking officials of the states, alternative from jurisdiction of MUS, in case of commission of serious crimes by them on international law.

In modern conditions the similar decision at the regional level of the African continent is, in fact, pioneer, but it does not mean that it will not enter the international practice further. The charter of the UN "does not interfere at all with existence of regional agreements or bodies for permission of such questions relating to maintenance of the international peace and safety which are suitable for regional actions" (the Art. 52(1) so the precedent of Court in Dakar can be used by other international regional organizations for sense of the Charter.

SUMMARY

It should be noted that the model of hybrid criminal jurisdiction at the moment is represented urgent and can be demanded not only concerning mass and gross violations of norms of international humanitarian law, but also and in other cases - for example, in fight against piracy or crimes of the international terrorism. Let's remind that both creation of special hybrid tribunal, and a possibility of internationalization of local courts were discussed as alternatives of prosecution of the Somali pirates in 2010 about what in the special report stated the UN Secretary General.

On October 7, 2016 the UN Secretary General once again submitted the report on a situation with piracy and the armed robbery at the sea at coast of Somalia where highlighted need of a solution of the problem of piracy not separately, and within well-coordinated international measures.

CONCLUSION

Thus, the mixed (hybrid) model of criminal jurisdiction represents understanding the international community of need of combination of efforts at all levels for prevention of impunity of commission of serious crimes on international law. Considering the prospects of establishment of the mixed (hybrid) forms of the international criminal justice at the universal and regional levels, need of development and acceptance within the United Nations of necessary minimum standards for the organization of the mixed criminal legal proceedings ripened now. Such standards could exist as the Standard agreement of the international organization (the UN or the UN, regional on sense of the Charter) with the interested state and the Standard Charter of legal agency of the mixed type.

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