

The contribution of international courts and tribunals to the development of procedural rules

OC - (ILA-14171) - HOW INTERNATIONAL COURTS AVOID TO EXERCISE THEIR JURISDICTION. THE COMPETENCE OF COMPETENCE AND “INVERTED JUDICIAL ACTIVISM”

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Abstract

The norms regulating the competence of international courts determine the basic principles of the procedural framework under which international courts perform their judicial function. These norms determine what matters, whether disputable or non-contentious, the body in question can deal with at all, what premises must be met in order to enable it to consider the case and issue a ruling on the merits. However, the assessment of whether the conditions laid down in the competency norms are fulfilled in a particular case is the responsibility of the very court to which the case is submitted. This right of international courts is called the "competence of competence" and has the character of a general principle

resulting from the very essence of the court's function. Under its terms, each international judicial authority is solely competent to resolve any dispute or doubt regarding the existence and scope of its competence in relation to a given case. Otherwise, as Dinah Shelton rightly points out, international courts would have to either take all cases addressed to them, irrespective of any allegations of lack of jurisdiction, or automatically reject any case in which such allegations would be raised.

As a consequence, international courts themselves determine their jurisdiction on the basis of binding international law norms regulating their competences. Formally, these norms do not differ from other international legal norms: they are created in the same way (in international agreements or other instruments establishing these courts or tribunals, e.g. resolutions of international organizations, but also include customary norms or general principles of law, such as the "competence of competence" itself or the principle of conferred powers); just as other norms they gain and lose binding force. Therefore, international courts, in order to apply norms regulating their competences, must interpret them by using the same recognized methods and subject to the same rules of interpretation as in the case of adjudication of the merits.

One can distinguish four types of interpretative attitudes that the courts may adopt: the attitude of concealing or ignoring competence issues, the attitude of interpretative restraint, the attitude of interpretive activism to justify own competence and an attitude of interpretive activism to justify lack of competence or its limitation – which we called "inverted activism". Various courts may adopt similar attitudes, while they may be influenced by various factors and goals that they want to achieve. Adoption of a given approach by a given body in the interpretation of its competences may be of an incidental character, conditioned only by the circumstances of a given case, or systemic, when the court consistently adopts the same approach in every case in which similar elements appear. In this way the courts may shape certain concepts or even their own policy regarding issues related to the interpretation of competence norms.

It might seem that the refusal or avoidance of the international court from taking a case is a manifestation of judicial restraint. Nothing could be more misleading: in the context of research on the issue of the "competence of competences" the judicial restraint attitude is neutral in relation to the result of the interpretation. Activism, on the other hand, is a targeted approach characterized by the court's striving to achieve a certain result: confirmation or denial of one's own jurisdiction. However, regardless of whether in the interpretation of their competences international courts adopt an attitude of restraint or one of the varieties of judicial activism, this interpretation is usually made in a dynamic manner, taking into account legal and non-legal factors affecting the perception of the role of courts in the international legal order and changes occurring in the real world.

Although distinguishing the attitude of reverse activism, aimed at demonstrating the lack of jurisdiction or its limitation, may be considered controversial or surprising, the practice of international courts shows that they are equally creative in justifying their competence to deal with the case as well as lack thereof. The proposed paper will refer to several examples of such practices that are particularly important from the point of view of shaping procedural rules. On the one hand, they relate to the principles or standards of interpretation and application of competence norms (as e.g. in the case of the International Court of Justice, the "Monetary Gold rule" in the *East Timor* case or "non-existence of the dispute" in the recent *Marshall Islands* case). On the other hand, they prove that international courts can – by means of solely an interpretation seeking to limit or exclude their own jurisdiction – create a completely new procedural systemic solution without a formal legal basis, as was the case with the "pilot judgment procedure" in the case law of the European Court of Human Rights.

Thus, the proposed paper focuses on the phenomenon of "reversed activism" of international courts in the interpretation of their competence norms and its consequences for the development (or maldevelopment) of procedural norms regarding the formal assessment (scope of jurisdiction, admissibility etc.) of court's competence to resolve a given case.

Palavras-chave : jurisdiction/admissibility, competence of competence, interpretative judicial activism