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The role of international and regional instruments of human rights protection in the domestic human rights protection: are international instruments truly subsidiary?[1]

Introduction. There is a frequent discussion as to the place of the international human rights norms in the international system of human rights protection, whereas these norms are generally regarded by their nature as norms belonging exclusively to the international legal order. However, more recently they appear to be finding their right place within the domestic systems of human rights protection, being directly applicable by the domestic judicial institutions, bodies of executive power and the legislative bodies. Such instances of direct application of the international human rights norms appear to be wholly justified in situations, where the domestic system of human rights protection does not fully satisfy or does not fully comply with the international standards of human rights protection. Application of international human rights norms also appears to be justified in situations where there is a need to give meaning to a particular human rights guarantee or standard, not yet interpreted within the domestic legal system or in situations where the standard has not been applied yet. Thus, the practice of application of an international human rights standard would be useful in situations, where there is a need to find exact content of the standard as interpreted by an international human rights protection institution.

However, there are also instances, where the domestic human rights protection system does not operate properly, is not effective or lacks requisite trust of the people at the domestic level. Then, in essence, the international system of human rights protection replaces the domestic system, as a system of trusted reference in human rights protection domestically and in some instances as a system giving direct protection for breached human rights, once again, when the domestic system is not capable of giving redress for human rights breaches by the national authorities.

Thus, a question remains open whether the international human rights standard remain to be instruments of exclusively subsidiary nature to the domestic systems of human rights protection or whether they become a part of the domestic human rights protection system in situations described above. This would be a subject of discussion in the present publication. However, first we would look into the system of universal and regional human rights treaties, their scope and institutions established by them.

[1] All the opinions provided in the article are that of the author. The material is based on the lectures given to international relations students at the Syracuse University (Strasbourg branch).

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Defining international human rights norms. Human rights treaties are often criticised for establishing unclear standards. However, they have their specific substantive meaning as universal or regional legal guarantees or standards protecting individuals and groups of persons against the public authorities' acts, actions and omissions, which breach these guarantees or standards. They gain their specific meaning and are being explored by means of interpretation by international or regional supervisory mechanisms, such as international or regional human rights commissions or human rights courts.

Human rights standards in essence have two essential functions – they oblige the states to behave in a certain way, which complies with these standards and makes the states accountable for a breach of a standard, which they have themselves to redress. They also prohibit the states from acting in a way that would breach the human rights guarantees. Thus, in brief, they establish positive and negative obligations for the states.

The international human rights norms establish that human rights are universal, inalienable, indivisible and interrelated. The international human rights norms do not exclusively relate to civil and political rights, but also encompass economic, social and cultural rights. International human rights are traditionally seen as having developed within time, the first modern-time international human rights standard being the Universal Declaration of Human Rights, based on the Charter of the United Nations. They can be divided into several (three) generations of human rights: civil and political rights (first generation rights), economic, social and cultural rights (second generation rights) and group and collective rights, rights related to cultural heritage and economic well-being of a nation, bioethical rights, etc.

More recent developments in the area of human rights protection have seen international human right standards as norms of customary international law, with some norms having a status of norms of *jus cogens* or an important status of norms of peremptory international law, i.e. international human rights standards from which no derogations are possible. Examples of such norms are prohibition of torture, slavery, racial discrimination, etc.

One of the main features of human rights obligations that the states undertake is to ensure that human rights guarantees and standards should be enforceable and that they are subject to judicial protection, ensuring that independent judicial institutions supervise compliance and adherence to human rights by means of judicial review of administrative acts and acts of bodies of state power. The enforceability of human rights by means of judicial supervision requires from the domestic judiciary that in cases where limitations on fundamental rights and freedoms are imposed that these limitations are imposed on the basis of the law, in the public interest, and thus having a legitimate aim, and are proportionate to the legitimate aim pursued.

International Bill of Rights and UN human rights treaties. The Preamble to the United Nations Charter states that the "Peoples of the United Nations" are determined "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small." In 1948, the UN

General Assembly adopted the Universal Declaration of Human Rights[2] an international instrument of protection of human rights, in essence of declaratory nature, but now increasingly seen as a standard of customary international law. This standard, like many international human rights standards in our days, is generally applicable to all the states at universal level, being applicable not only to relations between the states (horizontal relations), but also to relations between the state and individual (vertical relations).[3] The Declaration enumerates civil, political, economic, social, and cultural rights. Later in 1966, the General Assembly adopted the Covenant on Civil and Political Rights (and its First Optional Protocol) and the Covenant on Economic, Social and Cultural Rights, which, jointly with the Universal Declaration on Human Rights, are known as the International Bill of Human Rights [1]. For instance, the International Covenant on Civil and Political Rights prohibits torture, slavery, discrimination and limits the capital punishment, for states in which it exists, to the gravest criminal acts. It also prohibits arbitrary arrest or detention, protects freedom of movement and residence, protects the right to trial, presumption of innocence, right to a lawyer, right to an appeal, freedom from self-incrimination, and freedom from double jeopardy, protects freedom of opinion and expression, protects freedom of association and assembly, etc. On the other hand, the International Covenant on Economic, Social and Cultural Rights guarantees such rights as the right to work and make a "decent living for themselves and their families", right to safe and healthy working conditions, right to form trade unions with the right to strike, right of everyone to Social Security, including social insurance, right to adequate food, clothing and housing and to the continuous improvement of living conditions, rights to education and healthcare, etc. In addition to the International Bill of Human Rights, the United Nations has drafted and promulgated a number of other universally applicable specialist international human rights instruments, including international treaties against torture, genocide, racial discrimination, discrimination against women and treaties dealing with refugee protection, the rights of disabled persons and rights of children. Each of the UN treaties has a monitoring mechanism of its implementation by the state parties to it, which largely can be defined as a system of state periodic reporting or system of collective or individual complaints. It is with the help of the monitoring instruments that the scope of application of particular rights could be defined.

Regional human rights protection mechanisms. The European Convention on Human Rights, signed on 4 November 1951 in Rome, is probably one of the most known regional instruments of the international human rights protection [2]. Such a conclusion can be made in comparing the Convention with the 1969 Inter-American Convention on Human Rights and the 1981 African Charter on Human and Peoples' Rights. A comparison is

[2]. One of the prominent collaborators in drafting of the Universal Declaration on Human Rights was Mr Oleksandr Bogomolov, acting on behalf of the USSR. After adoption of the Universal Declaration of Human Rights, Professor Petro Nedbaylo, of Kyiv Taras Shevchenko University, and then a permanent representative of Ukraine to the UN Human Rights Committee took an active part in its activities from 1958 to 1971. In 1968 he was awarded the Prize in the Field of Human Rights with the presentation of the UN Gold Medal.

[3]. In some cases it is argued that the international human rights standards have a *drittwirkung* effect (horizontal effect) on the relations between individuals, whereas they can refer to human rights norms in defending their rights against other individuals.

frequently drawn between them on the basis of how successful the other regional human rights protection mechanisms are in comparison with it. This argument is drawn largely from the results of work of the monitoring mechanisms for these two international legal instruments – Inter-American Court of Human Rights (and commission) and the African Court of Human Rights (and commission), the first one not supported by Canada and the United States in its activities and the second one having dealt with a little number of cases since the moment of its establishment in 2004, both criticised for being rather weak on enforcement of their own decisions [3].

A separate discussion can arise from review of the system of international criminal courts from a point of view of considering them a system of final resort for grave violations of human rights, which already took place and which were not remedied by the states domestically in good time by means of domestic human rights supervision. Such a system is designed to prohibit certain types of conduct under the international criminal law (such as for instance, war crimes, crimes against humanity, genocide and aggression) and to make persons who engage in internationally prohibited conduct criminally liable in situations where the states themselves cannot prosecute and enforce criminal law prohibitions arising from the norms of customary international law. The classical international criminal law tribunals - Nuremberg and Tokyo tribunals, best known for its activities in the aftermath of massive human rights violations, which occurred during the World War II - are currently, with the evolution of the procedural and substantive international criminal law and creation of International Criminal Tribunals for Yugoslavia, Rwanda and Sierra Leone, being succeded by a permanently functioning International Criminal Court, based in Hague and acting on the basis of the international multilateral treaty (so-called Rome Treaty) [4]. It is quite unfortunate that the International Criminal Court has no power to deal with international crimes, recognised as prohibited under the international customary law, as piracy, terrorism, trafficking in arms, drugs and human beings [5].

Domestic system of human rights protection and the doctrine of "subsidiarity". Both the international system of human rights protection (the system established by the UN) and the regional systems of human rights protection are operating on the premise that it in the first place for the national authorities to establish an efficient system of human rights protection at the domestic level. The same applies for the post-factum system of criminal prosecution by the international criminal courts for gravest human rights violations, as it is only in situations when the state is unable or unwilling to prosecute that the international criminal jurisdiction is triggered. Thus, the domestic authorities have not only to declare the same rights, as enshrined in the international and regional human rights instruments, but they also have to make sure that these rights are enforceable and that there is a system of judicial review of actions of the state, which is both effective and efficient to prevent or to redress human rights violations at the domestic level. The doctrine of "subsidiarity", in its simplest interpretation, presupposes that it in the first place the police officer, the domestic court, the local prosecutor, a judge or any other competent public official, who are to enforce human rights guarantees and standards. As an example, in context of any European system of human rights protection we are speaking first of all of

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an independent judiciary, whose primary responsibility is to ensure that human rights are complied with.

Three levels of "rule of law" protection of human rights. Thus, we have seen that there are several levels of ensuring compliance with international human rights standards, but the domestic system of human rights protection is of primary importance. The task of the domestic system of human rights protection, which is rightly stated in the Preamble of the Universal Declaration of Human Rights, is to ensure "that man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law". This from our point of view encompasses human rights protection at a universal level, regional level and level of domestic human rights system, with the last level of protection being the most important and the regional and universal level protection being of subsidiary or complementary nature.

But what happens if the national human rights protection level does not operate properly? What if the domestic remedies do not offer proper redress, are not available in practice, are inefficient and insufficient, i.e. not giving required result within reasonable time? Can then the regional and universal level protection replace the domestic system of protection of human rights? Can the person or persons seeking protection claim that the domestic system of human rights protection is generally faulty and thus there is no need to seek redress within it and therefore there is a need to seek redress at the regional or international level directly?

These issues have been partly examined from the point of view of the need to exhaust domestic remedies, which from the claimants' point of view were seen as inadequate or not giving sufficient and timely redress. The *Interhandel* case before the International Court of Justice mentions in that respect that "the respondent State must first have an opportunity to redress by its own means within the framework of its own domestic legal system the wrong alleged to have been done to the individual"[6]. The case-law of the European Convention on Human Rights has a similar approach stating that:

« … As the text of Article 35 itself indicates, this requirement is based on the generally recognised rules of international law. The obligation to exhaust domestic remedies forms part of customary international law, recognised as such in the case law of the International Court of Justice. It is also to be found in other international human rights treaties: the International Covenant on Civil and Political Rights and the Optional Protocol thereto, the American Convention on Human Rights, the African Charter on Human and Peoples' Rights… »[7].

Moreover, a requirement of exhaustion of domestic remedies, coupled with an obligation imposed on the states by the International Bill of Rights and regional human rights instruments to secure that rights and freedoms enshrined in the international human rights instruments are real and effective, show that the international human rights treaties themselves place an emphasis on the need to ensure that human rights are protected domestically in first place and only when a domestic system is not capable or not willing to perform its task can a universal or regional body be engaged. This statement is supported by the case-law of the European Court of Human Rights in the case of *Selmouni v. France*, whereas: "… states are dispensed from answering for their acts before an international body

before they have had an opportunity to put matters right through their own legal system. That rule is based on the assumption, reflected in Article 13 of the Convention – with which it has close affinity – that there is an effective remedy available in respect of the alleged breach in the domestic system. In this way, it is an important aspect of the principle that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights." [8]. Thus, one of the answers to the questions posed above is that the domestic system of human rights protection must ensure that it provides proper protection at the domestic level and it does not appear from extensive international jurisprudence on the matter of local remedies that derogation from the rule on exhaustion of domestic remedies would be possible. Also, from our point of view international law, as set of rules created by the states for the states in first place, have a great emphasis on the doctrine of state sovereignty and the multilateral state obligations arising from the international human rights treaties, which are to be respected with states complying with their obligations in good faith. One of the primary obligations for the state is to respect human rights and to ensure that the human being is truly the highest social value in the society, which is a principle generally accepted by all civilised nations and thus can arguably be said to be a principle of customary international law. This is another source of doubts that the international or regional human rights protection system can really replace the dysfunctional domestic human rights system. Furthermore, international human right guarantees and standards are frequently reflected in domestic constitutional laws and domestic regulations, which are not rarely directly referred to by the domestic courts and courts of constitutional jurisdiction using them as recognised standards that nevertheless require additional mechanisms for their domestic enforcement. Moreover, last, but not least, among the arguments in examining the issue of interaction of the international, regional and domestic human rights systems is the argument relating to existence of a more powerful and more capable enforcement machinery within the domestic system of a state, which the universal or regional systems of human rights protection are not permitted to have, frequently operating within the limits of allowed by the states authority.

Concluding remarks. Thus, as we have seen from the rhetoric above the international and regional systems of human rights protection remain to be instruments of subsidiary nature to the domestic systems of protecting human rights. This is a true statement for a number of reasons, one of which is the primary role of the domestic system in ensuring that human rights are enforced and complied with within the state. Even though the international human rights standards might be referred to or applied directly by the domestic actors, they still require domestic machinery for their enforcement. Therefore, a brief conclusion can be reached that the domestic human rights protection system remain primary actors in enforcing international human rights standards, with the subsidiary and complementing role of the international and regional human rights bodies, who enforce these standards on the states that are not willing or not able to comply with them. Thus, the important role of the domestic systems in enforcing these standards remains unchanged, even in situations where the state does not comply in sufficient and proper manner with its obligations arising from regional or international human rights treaties. On the contrary, in such situations, regional or international human rights supervisory mechanisms have to

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come into force to ensure that the state gets back into track in complying with its obligations arising under international human rights law and performs such obligations in good faith.

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2. A competing instrument is the EU Charter of Fundamental Rights, which repeats many of the provisions of the European Convention of Human Rights, but covers only 27 states parties to the European Union. The rights in the charter are divided into six section: dignity, freedoms, equality, solidarity, citizens' rights and justice. http://www.europarl.europa.eu/charter/default_en.htm .
3. For more information on the activities of the Inter-American Court of Human Rights and the African Court of Human Rights see the following web-sites: http://www.corteidh.or.cr/index.cfm and http://www.african-court.org/en/court/about-the-court/institutional-background/. The possibilities for creating a single Asian regional human rights protection system are still being explored and it appears that there is no strong momentum for creation of that system (for more details see Vitit Muntarbhorn's summary of the lecture on the issue « Towards a Human Rights System in the Asian Region? » ; http://www.waseda-giari.jp/sysimg/imgs/200908_si_munterbhorn_summary.pdf).
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Залишається відкритим питання про те, чи є міжнародні стандарти виключно субсидіарними механізмами по відношенню до національної системи захисту прав людини. При відповіді на це питання автор обґрунтовує, що національна система захисту прав людини залишається основною у забезпеченні дотримання

міжнародних стандартів захисту прав людини, а роль міжнародних та регіональних організацій із захисту прав людини залишається субсидіарною і допоміжною.

***Ключові слова**: права людини; міжнародний захист прав людини; національний захист прав людини; субсидіарний механізм.*

Остается открытым вопрос о том, являются ли международные стандарты исключительно субсидиарными механизмами по отношению к национальной системе защиты прав человека. Отвечая на этот вопрос, автор обосновывает вывод, согласно которому национальная система защиты прав человека остается основной в обеспечении соблюдения прав человека, а роль международных и региональных организаций остается субсидиарной и вспомогательной.

***Ключевые слова**: права человека; международная защита прав человека; национальная защита прав человека; субсидиарный механизм.*

A question remains open whether the international human rights standards remain to be instruments of purely subsidiary nature to the domestic systems of human rights protection. Answering this question the author argues that the domestic human rights protection system remains the primary actor in enforcing international human rights standards, with the subsidiary and complementing role of the international and regional human rights bodies.

***Key words**: human rights; international human rights protection; national rights protection, subsidiary mechanism.*

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