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JUDICIAL INDEPENDENCE IN INTERNATIONAL COURTS

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The issue of the defining elements of a truly fair justice system has become a constant and consistent concern of international and/or regional political and legal organisations. Given the scale of the phenomenon of establishing and resorting to international courts and tribunals, reflecting, among others, the preference and availability of international actors for settling their disputes by independent and impartial decision-makers, the principles and values of the international judiciary have been subjected to discussions in an increasingly elaborate manner. Among these, judicial independence occupies a special position, being tightly connected to the issue of the legitimacy of such institutions, as an essential factor in ensuring voluntary compliance to the internationally adopted decisions.

In this context, the present paper addresses the independence of the judiciary in international courts, both in terms of the fundamental theoretical contributions and from a practical perspective, by following the institutional provisions and guarantees for ensuring an independent and impartial judiciary in the statutes of two of the most relevant international courts, namely the International Court of Justice and the International Criminal Court.

Keywords: *principles and values of justice, International Court of Justice, International Criminal Court, judicial independence, international judges, formal guarantees of independence, de facto independence.*

INDEPENDENȚA JUSTIȚIEI ÎN CADRUL INSTANȚELOR INTERNAȚIONALE

Problematica privind elementele definitorii ale unui sistem de justiție realmente just a devenit o preocupare constantă și consecventă a organizațiilor politico-juridice internaționale și/sau regionale. În contextul amplorii fenomenului de înființare și utilizare a curților și tribunalelor internaționale, reflectând, între altele, preferința și disponibilitatea actorilor internaționali pentru soluționarea disputelor lor prin intermediul unor terți independenți și imparțiali, s-au pus din ce în ce mai elaborat în discuție principiile și valorile caracteristice instituțiilor internaționale de justiție. Între acestea, independența justiției ocupă o poziție aparte, fiind strâns legată de chestiunea legitimității acestor instituții, factor esențial în asigurarea conformării voluntare față de hotărârile emise la nivelul justiției internaționale.

În acest context, prezenta lucrare abordează independența justiției în cadrul instanțelor internaționale, atât prin prisma contribuțiilor teoretice fundamentale, cât și la nivel aplicativ, prin urmărirea prevederilor și garanțiilor instituționale pentru asigurarea unei justiții independente și imparțiale în statutele a două dintre cele mai relevante instanțe internaționale, și anume – Curtea Internațională de Justiție și Curtea Penală Internațională.

Cuvinte-cheie: *principii și valori ale justiției, Curtea Internațională de Justiție, Curtea Penală Internațională, independența justiției, judecători internaționali, garanții formale ale independenței, independență de facto.*

Introduction

A multitude of international tribunals, in a broad sense, exist and are currently active, some established after the end of the Second World War, others, in a very large number, after the end of the Cold War. They have subjects of law of different legal natures (states, non-governmental organisations, individuals, etc.), various (sometimes even competing) competencies, and the fields in which they operate and the purposes for which they were created are particularly diverse – compliance with treaties international, ensuring respect for human rights, punishing individuals who have committed international crimes, solving trade disputes and other issues in the area of economic interests, and so on. K.Alter estimated, in 2013, that if in 1989 there were six permanent international tribunals, plus the dispute settlement system under the General Agreement on Tariffs and Trade, in the meantime there are more than 24 such tribunals, which issued over 37,000 binding judgments, more than 90% of them after the fall of the Berlin Wall [1, p.64]. It can be noticed, therefore, an increase in the preference of international actors (of course, in parallel with the extension of the notion of international actors) to the settlement of disputes through courts of a stable nature (most often, permanent ones), which issue judgments with binding legal force from a position of neutrality, of independence.

As Th.Meron notes, the courts, in their position of neutral, respected, and independent arbitrators, offer an alternative way of solving disputes, including political and social ones, and this is a role played by both

domestic courts, within national society, as well as international courts, within the community that transcends state borders [2, p.360]. Moreover, judgments issued by international courts have a significant impact not only on the parties to a conflict or the legal subjects directly affected but also on the domestic policies of states, on national legislations and national legal systems.

The power that international courts currently possess has led to concerns regarding their credibility, legitimacy, and effectiveness, and the preoccupation for their legitimacy is closely linked to the matter of their independence. It does seem that the legitimacy of international tribunals, similarly to the legitimacy of national judicial systems, is largely based on their independence [3, p.92]. In this context, a particular question arises: to what extent is it (or not) necessary for international courts to have as benchmarks and to apply those principles of justice the observance of which is also required of states, in their national judicial systems? In an attempt to answer, I will discuss one of the manners in which the existence and activity of international courts affects (even indirectly, as an example of organisation) the other international actors, namely their establishment in accordance with principles the observance of which is deemed necessary for states themselves to be able to participate in the international system. In this respect, ensuring an independent and impartial judiciary is a key element.

To achieve this goal, I will analyse the main theoretical approaches regarding the independence of the international judiciary and I will follow the main formal provisions and guarantees found in the statutes of two of the most relevant international tribunals, namely the International Court of Justice (ICJ) and the International Criminal Court (ICC). The two are chosen for their global importance, but also because they allow for a comparison in terms of their different moments of establishment from a historical and political perspective, the purposes for which they were created, their jurisdictions, their legal subjects, etc. It is possible to identify, thus, both what is common to them in terms of the provided guarantees of independence, but also in what way the particularities of each have influenced the concrete manners in which the issue of independence is reflected in the international documents governing their activity.

The general political and legal framework of the International Court of Justice

Established in 1945 by the Charter of the United Nations, the International Court of Justice is one of the six main organs of the United Nations (UN) and, at the same time, the main judicial body of the organisation. Its functioning is regulated by a Statute, annexed to the UN Charter, which is based upon the Statute of the former Permanent Court of International Justice, and represents an integral part of the Charter [4, Article 92]. The mission of the Court is to resolve, in accordance with international law, the disputes that are submitted to it, as established in Article 38 of the Statute [5].

According to the text of the Charter, all UN Members are *ipso facto* parties to the Statute of the ICJ, and it is also possible for a state to be a party to the Statute of the Court without also being a UN Member (the case of Switzerland, for instance, which was a party to the Statute before becoming a member of the organisation). The Charter stipulates that every UN Member undertakes to comply with the judgment of the International Court of Justice in any case to which it is a party, and if one of the parties to a case does not fulfill its obligations deriving from a judgment of the Court, the other party may have recourse to the Security Council of the organisation, which may, if it deems necessary, make recommendations or decide upon the measures to be taken in order to give effect to the judgment [4, Articles 92-94].

In what concerns the personal jurisdiction of the ICJ, as regulated by the Statute, only states may be parties in the cases brought before the Court. On the one hand, this regards the States Parties to the Statute (Members of the UN), and, on the other hand, the Court is open to other states as well, under certain conditions (conditions which shall not place the parties in a position of inequality before the Court). As for the Court's substantive jurisdiction, it comprises all the cases referred to it by the parties, as well as all matters specifically provided for in the UN Charter or other treaties and conventions in force. It is also possible for States Parties to the Statute to declare that they recognise the jurisdiction of the Court as *ipso facto* binding, even without a special convention, in relation to any other state accepting the same obligation, for all legal disputes concerning the interpretation of a treaty, any matter of international law, the existence of any fact which, if established, would constitute a breach of an international obligation, as well as the nature or extent of the reparation to be made for the breach of an international obligation. If a dispute regarding the jurisdiction of the Court arises, the decision on the matter will be made by the Court itself [5, Articles 34-36]. In what concerns the law

applicable by the Court in settling the disputes submitted to it, the Statute provides that it shall apply international conventions, both general and particular, which lay down rules expressly recognized by the contesting states; international custom, "as evidence of a general practice accepted as law"; "the general principles of law recognized by civilized nations"; and "judicial decisions and the teachings of the most qualified publicist of the various nations, as subsidiary means for the determination of rules of law", subject to the provisions of Article 59 (which stipulates that the decision of the Court only has binding force between the parties to the dispute and only for that particular case). The Court also has the power to settle a case *ex aequo et bono*, insofar as the parties agree [5, Article 38].

The general political and legal framework of the International Criminal Court

The International Criminal Court was established in 1998, in response to the necessity of creating a permanent, international mechanism to investigate and prosecute the most serious crimes of an international nature and the individuals who commit them. If various international tribunals have been previously established in order to prosecute individuals suspected of committing similar crimes (the International Military Tribunals in Nuremberg and Tokyo at the end of World War II, the International Criminal Tribunal for the Former Yugoslavia in 1993, and the one for Rwanda in 1994), the ICC represents the first international criminal court of a permanent character. The Statute of the Court, adopted on 17 July 1998 and entered into force on 1 July 2002, which governs its activity and functioning, is a "classical" international treaty, to which there are currently 123 States Parties.

As expressed in the Preamble to the document, the States Parties, "[m]indful that during this century millions of children, women, and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity", "[r]ecognizing that such grave crimes threaten the peace, security and well-being of the world", and "[a]ffirming that the most serious crimes of concern to the international community as a whole must not go unpunished", agree that the repression of such crimes must be effectively ensured both by taking measures at the national level and by enhancing international cooperation. In this regard, without neglecting the fact that it is the duty of each state to subject the individuals responsible for committing international crimes to its own criminal jurisdiction, the aim was to establish a criminal court that is international, permanent and independent, yet linked to the UN system, and that has complementary jurisdiction to national criminal jurisdictions in what concerns "the most serious crimes of concern to the international community as a whole" [6, Preamble, Article 1].

In this context, according to the Statute, the Court's substantive jurisdiction has been established over four types of international crimes, namely the crime of genocide, crimes against humanity, war crimes and the crime of aggression. While the first three benefitted from complex definitions expressly provided in the Statute, the crime of aggression was defined later, and the Court only has jurisdiction over it since 2018. In terms of the Court's personal jurisdiction, it is only exercised over individuals, natural persons, the Statute establishing that "[a] person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment" [6, Article 25]. *Ratione temporis*, the Court has jurisdiction over crimes committed after its entry into force, which has constituted (along with the complex definition of international crimes in the Statute) a substantial element in reducing potential criticism regarding the issue of legality, which consistently affected the legitimacy of the previously established international criminal tribunals. A similar role is played by the decision regarding the complementarity of jurisdiction, in the manner in which it is conceived. Essentially, the Court will not adjudicate and will instead declare a case inadmissible if it is being investigated or prosecuted by a state which has jurisdiction over it, or if it has already been investigated by such a state, and that state has decided not to prosecute that person. In both situations, the Court will judge, however, if that state lacks the will or ability to complete the investigation or prosecution. These situations are clarified in Article 17 of the Statute. A state's lack of will can be determined if, for instance, the state's decision not to investigate or prosecute was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court, or if there was an unjustified delay in the proceedings, which, in the circumstances, is not consistent with an intent to bring that person to justice, or if the proceedings were not or are not being conducted independently or impartially, but in a manner that is also not consistent with an intent to bring that person to justice. In what concerns the state's lack of ability to investigate or prosecute, the Court will consider whether this inability (to obtain the accused or the evidence and testimony or to otherwise carry out the proceedings) is due to a total or substantial collapse or unavailability of its national

judicial system. The Court will also not adjudicate when the person concerned has already been tried for the conduct which is the subject of the complaint, and a trial by the Court is not permitted under Article 20, para. 3 (which establishes certain exceptions to the *ne bis in idem* rule), or if the respective case is not of sufficient gravity to justify the Court's action [6, Article 17].

In carrying out its work, the International Criminal Court applies, first of all, the Statute, the Elements of Crime and its Rules of Procedure and Evidence, and secondly, where appropriate, the applicable treaties and the principles and rules of international law (including the established principles of the international law on armed conflict). In the absence of such rules, the Court may apply, as long as that they are not incompatible with the Statute, with international law and with internationally recognised norms and standards, the general principles of law that the Court derives from the national laws belonging to various legal systems of the world (including, as appropriate, the national laws of the states that would normally exercise jurisdiction over a certain crime). The Court may also apply the principles and rules of law as it has interpreted them in its previous decisions [6, Article 21].

Independence and impartiality of the international judge – general aspects

E.Benvenisti and G.W. Downs draw attention to the widespread perception, especially among developing countries, that international institutions as a whole continue to be disproportionately influenced by a small group of powerful states, the same states that have played a key role in creating and designing these institutions. In this context, in recent years, experts in the field have increasingly argued that the legitimacy and credibility of international courts will be essentially associated with the degree to which they will be perceived as independent [7, p.1057]. In E.Voeten's words, "[j]udicial independence strikes at the heart of what is different about a world with international courts" [8, p.421]. If in what concerns national judicial systems, the issue of independence and that of impartiality have been consistently studied, the preoccupation for the independence of international courts is more recent, reflecting the scale of the phenomenon of international justice in the past three decades.

The authors in the field, with slight nuances, seem to have agreed to a definition of judicial independence applicable to both the national and the international sphere. E. Voeten thus states that judicial independence refers to the set of factors, institutional and not only, which, to a greater or lesser extent, allow judges autonomy, when they issue legal opinions, from the preferences of other political actors [8, p.421-422]. D.Cardamome, in the same line of thought, defines it as the requirement that allows judges to develop their legal opinion without being bound by the preferences of other actors [3, p.96]. Even if judges apply the law by reference to certain specific circumstances, not exclusively in the abstract, and may be influenced by their own legal philosophies, or various cultural or ideological considerations, independence allows them to ignore the preferences and bias of external elements [3, p.96; 8, p.422].

The roles of judicial independence can also be approached as common elements to independence at the national and the international level. Th.Meron identifies three such roles, fundamental in both contexts. First of all, independence is crucial for the rule of law. Judges who are independent of political or other types of pressure will adjudicate in the light of legal principles and in the absence of inappropriate external influences. This strengthens public respect for the courts and leads both individuals, at the domestic level, and governments, at the international level, to resort to courts for credible dispute settlement. In the same sense, when judges are independent and act in accordance with the law, their decisions are marked by certain predictability, which allows political and economic actors to guide their behavior accordingly and contributes to society's stability and prosperity. Secondly, independence of the judiciary is an instrumental factor in the protection of individual rights, with the courts assessing, independently and impartially, the complaints of individuals and deciding, if appropriate, to repair the situations in which such rights have been violated; in order to be able to act effectively, judges must be assured that there will be no repercussions for them as a result of the judgments issued. Thirdly, independent courts represent an indispensable means by which governments can be compelled to comply with the law (which has implications both for protecting individual rights as well as, for instance, for maintaining the separation of powers in the state); while many disputes between state powers or between levels of government can be resolved politically, it is also possible to settle political or social disputes through neutral, respected and independent arbitrators, both at the national level and within the international community [2, p.359-360].

If authors in the field recognise that judicial independence is a significant factor in maintaining the credibility and legitimacy of international courts [3, p.92, 96; 8, p.438; 9, p.271], the issue of the standards of independence applicable to international courts and judges, as potentially different from such standards regarding national judges, shortly appeared. In a well-known formulation of this matter, R.Mackenzie and P.Sands questioned whether it was appropriate to approach the independence of the international judiciary in the same way as that of national judges, or whether, on the contrary, there was something qualitatively different about international law and international courts which makes it necessary to apply different, more precisely lower, standards of independence at the international level [9, p.275-276]. The authors in question did not provide an answer. However, in this matter, generally speaking, the debates have been consistent. On one end of the spectrum of opinions, a notable approach belongs to J.Crawford and J.McIntyre, who show that, given the different institutional and political frameworks of national and international tribunals, the principles developed at the national level cannot be automatically transposed at the international level and, in their view, the increased intertwining of politics and law, as well as the fragility of institutions, seem to call for a more stringent application of the principles of independence and impartiality at the international level [10, p.191, 205-206]. At the other end of the same spectrum, E.Posner and J.Yoo, in a well-known approach, have operated a distinction between "dependent" international courts, those in which judges are appointed by states parties for the purpose of resolving a particular dispute (such as the panels for settling trade disputes in the old system of the General Agreement on Tariffs and Trade), and "independent" ones, in which judges are appointed before a specific dispute appears and are in office for fixed periods (as in both the International Court of Justice and the International Criminal Court). The authors argued that the most successful courts are the "dependent" ones, and used their efficiency as a measure of this success, stating that "dependent" courts are more efficient, or that the "independent" ones are not necessarily more efficient (except for those in the European system), and even that independence prevents international courts from being effective [11, p.3,7,72-74]. A direct response to the approach of the two belongs to R.Helfer and A.-M. Slaughter, who challenge the shortcomings of Posner and Yoo's theory, methodology and empirical examples, and offer a counter-theory, that of "constrained independence". According to the authors, states set up international tribunals in order to improve the credibility of their commitments in specific multilateral structures, and subsequently "use more fine-grained structural, political and discursive mechanisms to limit the potential for judicial overreaching" [12, p.901]. In their opinion, "[c]onstrained independence maximizes the benefits of delegation to independent decision-makers while minimising its costs", and allows states to draw attention to independent judicial and quasi-judicial review bodies when they are approaching (or have exceeded) "the politically palatable limits of their authority" [2, p.942]. As D.Cardamome notices, this well-known critical position against the claims of Posner and Yoo does not, however, state that international judges must enjoy absolute independence [3, p.95], which also reflects the above-mentioned issue, of the different standards of independence at the international level from the national level of the judiciary.

For that matter, there is a wide range of specific features of the supranational legal system that lead authors to suggest that the direct transposition of the principles applicable at the national level is not always a suitable approach; in view of these distinctive elements, it is argued that the concept of judicial independence does not seem to apply to international judges in the same way in which it applies to national ones [3, p.94]. Among these differences between the levels of justice systems, A.Torres Pérez lists "the pervasiveness of state consent" (the states establish international courts and tribunals and their jurisdictions, and decide on the enforcement of their judgments), the isolation and diversity of international courts (which make it difficult to apply common standards of independence even between them, let alone between international courts and national ones), as well as the separation of powers (more precisely, the diversity of sources of power, given that international institutions are not subjected to a single, ultimate rule, unlike national systems, where power belongs to the people and is distributed among state powers through the Constitution) [13, p.4-13]. In another specification of these differences, D.Cardamome lists the manner in which judgments are enforced (at the national level, courts operate within a system of coercive force, while, at the international level, the enforcement of judgments is rather left to states), as well as the dependence of the international justice system on the funding received from states (which is very often politically motivated) [3, p.94-95]. What is certain is that a multitude of sources of possible influence may affect international judges, and states clearly represent a major (yet not the only) source.

There are, of course, a multitude of mechanisms by which the independence of the judiciary can be ensured. In Th.Meron's opinion, among the most important ones are public respect for the courts, as well as the conduct of the judge (the judge's perception of themselves as independent and impartial is an element that contributes to this). The two are mutually reinforcing: if the courts are seen as impartial, they will be respected, and a court that enjoys public respect will find it easier to issue independent judgments, and, if necessary, to confront the powerful interests of governments or societies. Particularly referring to the conduct of the international judge, Meron points out that not all of them held a similar position before the appointment, many of them previously being diplomats, theorists, legal advisers, etc. When accepting the appointment, they must also accept, among other things, the values and duties of a person holding such a position, and the acquisition of an independent and impartial conduct requires a process of adaptation and discipline on the part of the new judge in office. In order to ensure independence and impartiality, it is also necessary for the judicial process to have a transparent nature, publicity representing a source of public confidence in administering justice as well. Moreover, it is necessary for the decisions to be reasoned, the clear expression of the arguments and bringing to light the thought processes of the judges representing essential elements of protection against judicial errors [2, p. 360].

The impartiality and independence of judges are provided for and guaranteed by national constitutions and statutes, respectively by statutes of the international courts and tribunals. In this context, I propose an applied view of the main statutory provisions relevant to the independence and impartiality of judges of the International Court of Justice and the International Criminal Court, followed by a discussion on the assessment of judicial independence through these formal institutional guarantees.

The independence and impartiality of judges of the International Court of Justice and the International Criminal Court. Discussion

Article 2 of the Statute of the International Court of Justice clearly states that only independent judges may be members of the Court. They must be "persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices or are jurisconsults of recognized competence in international law" [5, Article 2]. The appointment procedure requires the national groups of the Permanent Court of Arbitration to nominate candidates from among individuals who can meet these conditions, each group being able to nominate a maximum of four candidates, no more than two of whom may be of that particular nationality. It is recommended that, before formulating proposals, each national group consults its highest court of justice, its legal faculties and schools of law, and its national academies and national sections of international academies devoted to the study of law. The Secretary-General of the United Nations draws up a list in alphabetical order of all the candidates thus nominated, and submits this list to the General Assembly and the Security Council, which shall, independently of each other, proceed to elect the members of the Court. The candidates who have obtained an absolute majority of votes in both the General Assembly and the Security Council will be considered elected [5, Articles 2-10]. The electors shall bear in mind not only the individual fulfillment of the conditions for holding office, but also that in the body as a whole, through these choices, "the representation of the main forms of civilization and of the principal legal systems of the world should be assured" [5, Article 9]. It is also expressly provided that no two nationals of the same state may be among the 15 members of the Court, and, if more nationals of the same state obtain an absolute majority of votes in both the General Assembly and the Security Council, only the eldest of them will be considered elected. Regarding the voting in the Security Council, the Statute provides that no distinction is to be made between the permanent and the non-permanent members of this body [5, Articles 3, Article 10]. The members of the Court are elected for a term of nine years, which can be renewed, and there is also a gap between appointments: regular elections take place every three years and regard five judges.

With a view to ensuring independence and impartiality, it is stated that, before taking office, each member of the Court shall make a solemn declaration in open court that he will exercise his powers impartially and conscientiously [5, Article 20]. Also, members are prohibited from exercising any political or administrative function, or any other professional occupation. They are also prohibited from acting as an agent, counsel, or advocate in any case, and also from participating in the decision of any case in which they have previously taken part as agents, counsels, or advocates for one of the parties, or as members of a national or international court, of a commission of enquiry or in any other capacity [5, Articles 16-17]. When working in the chambers set up according to Articles 26 and 29 of the Statute (specialized chambers, chambers set up for the exami-

nation of a specific case, the Chamber of Summary Procedure), if a judge has the nationality of one of the parties, he will retain the right to sit in the case in question. As a measure of leveling the balance, if a judge, who is a national of one of the parties, is included on the Bench, any other party may appoint a person of their choice to sit as judge, and, if no judges having the nationality of the parties are included, each of the parties may proceed in this manner in order to appoint a judge [5, Article 31]. The Statute also provides for the possibility of excuse or disqualification; if for a special reason, one of the members of the Court considers that he should not take part in the decision of a particular case, he shall inform the President, and if the President considers that, for a special reason, one of the members of the Court should not sit in a particular case, he will notify him in this regard (in both situations, in case of disagreement, the Court will decide) [5, Article 24]. Also, in the spirit of ensuring independence, the members of the Court are entitled to deliver their separate opinion to non-unanimous judgments [5, Article 57].

As further measures of protection, the members of the Court shall, in the exercise of their functions, enjoy diplomatic privileges and immunities, and are entitled to periodic leave and an annual salary (the President receives a special annual allowance, and the Vice-President, a special allowance for each day on which he acts as President). All salaries, allowances and compensations are fixed by the General Assembly and cannot be decreased during the term of office (in fact, the expenses of the Court are borne by the UN, in the manner established by the General Assembly) [5, Articles 19,23,32,33]. The members of the Court cannot be removed from office unless, according to the unanimous opinion of the other members, they no longer fulfill the required conditions [5, Article 18].

With regard to the judges of the International Criminal Court, although there is a wide range of statutory similarities with those of the International Court of Justice, the specificity and different jurisdiction of the former have led, for the purpose of ensuring an independent and impartial administration of justice, to the adoption of a number of specific rules; I will therefore point out the significant statutory differences.

Thus, the International Criminal Court consists of 18 judges, yet it is provided in the Statute that the Presidency of the Court may propose an increase in this number, indicating the reasons for such an increase. The decision on the matter is to be taken by the Assembly of States Parties, which shall be convened for this purpose and shall decide by a vote of two-thirds of its members. The judges of the ICC are also chosen from among persons who meet the conditions required in their states for the exercise of the highest judicial offices and are of high moral character; the Statute provides, additionally, that they must be known for their impartiality and integrity. Candidates must also meet a number of specific conditions. On the one hand, they shall have established competence either in criminal law and procedure, as well as relevant experience in criminal proceedings (as judge, prosecutor, advocate, or in any other similar capacity), or in relevant areas of international law (international humanitarian law and the law of human rights are specified examples), as well as extensive experience in a professional legal capacity which is relevant to the activity of the Court. On the other hand, every candidate shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court. For any given election, each State Party may nominate one candidate, who does not necessarily have to be a national of the proposing state, but must have the nationality of a State Party. The nominations may be made either by the procedure for the nomination of candidates for appointment to the highest judicial offices in that state, or by the procedure of nominating candidates for the International Court of Justice, provided in its Statute, and are accompanied by a detailed statement specifying how the candidate fulfils the necessary requirements. For the purposes of the election, two lists of candidates will be prepared. List A contains the names of candidates with the qualifications specified in Article 36 para. 3 (b) (i) (established competence and experience in criminal law and procedure), and List B contains the names of candidates with the qualifications specified in Article 36 para. 3 (b) (ii) (established competence in international law). At least nine judges are to be elected from list A and at least five judges from list B, and this proportion must be maintained in all elections. The judges are elected by secret ballot at a meeting of the Assembly of States Parties convened for this purpose, and the persons elected are to be the 18 candidates who obtained the highest number of votes and a two-thirds majority of the States Parties that are present and voting. Similar to the ICJ, the ICC may not include more than one national of the same state, and, in choosing judges, the States Parties shall take into account the need to ensure the representation of the principal legal systems of the world; in the case of the ICC, an equitable geographical representation, as well as a fair representation of female and male judges shall be additionally ensured. Moreover, States Parties shall also take into account the need for ensuring

the presence of judges with legal expertise in certain areas, including (but not limited to) violence against women and children. If the judges of the ICC are also elected for a nine-year term, and there is a similar gap between elections (every three years, one-third of the members), the ICC judges cannot be reelected (however, if a judge has been assigned to any trial or appeal the hearing of which has already commenced in a Trial or Appeals Chamber, they shall continue in office until that case is closed) [6, Article 36]. In fact, a significant difference with regard to the International Criminal Court is the organisation into divisions, namely the Pre-Trial Division, the Trial Division, and the Appeals Division (in the case of the International Court of Justice, the judgment is final and without appeal), each division containing an appropriate proportion of specialists in criminal law and criminal procedure and specialists in international law (the first two sections are mainly composed of judges with experience in criminal trials) [6, Article 39].

In Article 40, expressly entitled "Independence of the judges", it is stated that the judges shall be independent in the performance of their functions, shall not engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence and, also, they are required to serve on a full-time basis at the seat of the Court and shall not engage in any other professional activity. The excuse and disqualification of judges are also provided for, inclusively by reference to the Court's Rules of Procedure and Evidence. The Statute provides, in general terms, that a judge shall not participate in any case in which his or her impartiality might reasonably be doubted on any ground. Any question concerning the disqualification of a judge is to be decided by an absolute majority of the judges, and the challenged judge is entitled to present his or her comments on the matter, but will not take part in the decision [6, Articles 40-41].

The judges of the ICC (as well as the Prosecutor, the Deputy Prosecutors, and the Registrar) enjoy, in the exercise of their functions and related to the office, the same privileges and immunities as are accorded to heads of diplomatic missions and, moreover, after the expiry of their terms of office, they continue to be accorded immunity with regard to the words (spoken or written) and acts performed by them in their official capacity. These privileges and immunities may also be waived, in the case of a judge, by a decision taken by an absolute majority of the judges. Moreover, the judges are entitled to receive salaries, allowances, and reimbursement of expenses (which may not be reduced during their terms of office), as decided by the Assembly of States Parties. The Statute establishes, however, the possibility of losing the position under certain conditions, as well as the possibility of disciplinary measures. Thus, if a judge has committed serious misconduct or a serious breach of their duties under the Statute (if the misconduct is of a less serious nature, they shall be subject to disciplinary measures), or is unable to exercise the required functions, the Assembly of States Parties may decide the removal from office. The decision is to be adopted by a two-thirds majority of the States Parties, upon a recommendation adopted by a two-thirds majority of the other judges; the challenged judge may present and receive evidence and make submissions in his/her favor, but will not participate in the consideration of the matter [6, Articles 46-49].

It can be noted, in this context, that there are a number of formal statutory guarantees to ensure the independence and impartiality of the judges of the two Courts, guarantees adapted to the specifics and jurisdiction of each. To date, numerous and consistent proposals and recommendations have been formulated in the specialized literature, including for possible statutory changes, for the purpose of ensuring a degree of independence that is as wide as possible, towards the highest standards. Most of the literature, however, has focused on the rules regarding the appointment, selection, and tenure of judges in a similar way to the approaches on judiciary independence at the state level. While it is true that these formal structural elements play an important role in determining the independence of the judiciary, they are not, in themselves, sufficient, and the effectiveness of international courts and their freedom to interpret and develop the law in the manner they deem appropriate also represents "a function of attributes of the wider political context in which they are embedded" [7, p. 1057]. A major disadvantage of focusing exclusively on formal guarantees is that an important distinction may be ignored, namely the one between *de jure* independence (reflected in the legal foundations) and *de facto* independence (a result of actual experience). L.P. Feld and S.Voigt introduced and used this distinction in order to measure the independence of national courts (they measured, in fact, the impact of judicial independence on economic growth), pointing out that there is little correlation between formal institutional provisions and the degree to which judges are perceived, by experts, as being independent [14, p.1,23]. Returning, in 2015, with a similar study on the international judiciary, the authors show that the independence of international judges is a necessary condition for courts to produce quality information and that solid information about the

previous behaviour displayed by parties in a treaty is a necessary condition for the reputation mechanism to operate internationally [15]. The political aspect in this matter is therefore not to be neglected, and formal guarantees are necessary, yet not sufficient.

There is a multitude of factors involved in shaping the outcome of litigation at the level of international tribunals: the relative clarity of the relevant legal texts, the discretion they leave to judges, the analytical qualities and the moral convictions of the judges. There is also a multitude of factors that increase or diminish the perceived legitimacy of the law created by international tribunals: the judicial process itself, the content of the new rules, and how they affect various stakeholders. However, in assessing the extent to which the activity of international courts is seen as legitimate, the most significant element seems to be the perceived independence of such an international court, especially the independence from powerful states, the same ones that seem to have dominated the creation process of these institutions [7, p.1058]. The legitimacy of these international judicial institutions, which is also achieved through the elements (formal and factual) that indicate their independence, is a significant element in the voluntary compliance of states with their judgments, especially since there is a lack of strong coercive mechanisms. If a state is aware of the fact that it can favourably influence such an institution or its judges, what confidence will other subjects of law have in using the mechanisms of the international judiciary, and what confidence will that state itself have in the judgments issued by it?

Conclusions

In order to participate as members in the international community, states must embrace certain values, accept that they have certain responsibilities, and meet a number of conditions, such as respect for the rule of law, human rights, and so on. The existence (not only formal, but also effective) of an independent and impartial judiciary at the domestic level is one of these fundamental conditions. At the same time, various institutions with the purpose of administering justice have also been established and are operating at the international level, and they are as well part of the international political and legal system.

It is true that there are significant differences between national and international justice systems, and such differences can be noted even between these courts and tribunals. However, ultimately, respect for certain values and principles, such as independence or impartiality, lies at the heart of public justice systems, whether national or international. Just as, at the national level, respect for the principles and values of justice must take precedence over the interests of governments and members of the state apparatus, similarly, at the international level, adherence to the same values, even at different standards, must constitute a priority, at least in what concerns permanent courts of a general nature. States and other relevant international actors need to understand that they have a responsibility to design and treat these judicial institutions so that they, as well as their judges, enjoy a degree of independence to the highest possible standards.

A number of steps in this direction have already been taken, through the various statutory provisions that act as guarantees of the independence and impartiality of the institutions concerned and their judges. However, beyond the existence of formal guarantees, it is imperative that international courts and tribunals also enjoy *de facto*, effective independence, which, both at the national and international level, means primarily the elimination or reduction to the irrelevance of the role and influence of the political element. Almost regardless of the actual rules contained in the statutes, it is imperative that states modify their own approach to these institutions as sources of fulfilling various particular interests and accept, instead, the administration of justice in its essence, which can only be independent.

Such an approach, based on general values and principles, other than the immediate state interest, is essential for ensuring the symmetry of conditions required for participating in the international community, for obtaining and maintaining public trust from other states, individuals, international organisations and so on, and, ultimately, for the credibility and legitimacy of the international judiciary as a whole.

References:

1. ALTER, K. The multiplication of international courts and tribunals after the end of the Cold War. In: *The Oxford Handbook of International Adjudication*, coord. Cesare P.R. Romano, Karen J. Alter, Yuval Shany. Oxford: Oxford University Press, 2013; eBook: Oxford University Press, 2014, p.63-89. https://doi.org/10.1093/law/ 9780199660681.003.0004. Available: https://faculty.wcas.northwestern.edu/~kal438/KarenJAlter2/Recent_&_ In_Progress_files/AlterOxfordHandbookMultiplicationIC2014.pdf [Accessed: 22.09.2021]

2. MERON, T. Judicial Independence and Impartiality in International Criminal Tribunals. In: *The American Journal of International Law*, 2005, vol.99, no.2, p.359-369. https://doi.org/10.2307/1562502. Available: https://www.jstor.org/stable/1562502 [Accessed: 22.09.2021]
3. CARDAMOME, D. Independence of International Courts. In: *Judicial Power in a Globalized World*, coord. P.Pinto de Albuquerque, Krzysztof Wojtyczek. eBook: Springer Nature, 2019, p.91-104.
4. Carta Organizației Națiunilor Unite, 1945.
5. Statutul Curții Internaționale de Justiție, 1945.
6. Statutul Curții Penale Internaționale, 1998.
7. BENVENISTI, E. & DOWNS, G.W. Prospects for the Increased Independence of International Tribunals. In: *German Law Journal*, 2011, vol.12, no.5, p.1057-1082. https://doi.org/10.1017/S2071832200017223. Available: https://www.cambridge.org/core/journals/german-law-journal/article/prospects-for-the-increased-independence-of-international-tribunals/81F437D6C546CA591C63AD90EB45A18F [Accessed: 22.09.2021]
8. VOETEN, E. International Judicial Independence. In*: Interdisciplinary Perspectives on International Law and International Relations: The State of the Art*, coord. Jeffrey L. Dunoff, Mark A. Pollack. New York: Cambridge University Press, 2013, p.421-444.
9. MACKENZIE, R. & SANDS, P. International Courts and Tribunals and the Independence of the International Judge. In: *Harvard International Law Journal*, 2003, vol.44, no.1, p.271-285. Available: https://heinonline.org/HOL/LandingPage?handle=hein.journals/hilj44&div=12&id=&page= [Accessed: 22.09.2021]
10. CRAWFORD, J. & MCINTYRE, J. The Independence and Impartiality of the 'International Judiciary'. In: *The Culture of Judicial Independence. Conceptual Foundations and Practical Challenges*, coord. Shimon Shetreet, Cristopher Forsyth. Leiden, Boston: Martinus Nijhoff Publishers, 2012, p.187-214.
11. POSNER, E.A. & YOO, J.C. Judicial Independence in International Tribunals. In: California Law Review, 2005, vol.93, no.1, p.1-74. Available: https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2758& context=journal_articles [Accessed: 22.09.2021]
12. HELFER, L.R. & SLAUGHTER, A.-M. Why States Create International Tribunals: A Response to Professors Posner and Yoo. In: *California Law Review*, 2005, vol.93, no.3, p.889–956. Available: https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2655&context=faculty_scholarship [Accessed: 22.09.2021]
13. TORRES PÉREZ, A. In Nobody's Name: A Checks and Balances Approach to International Judicial Independence. In: *MPIL Research Paper Series*, 2017, no.3, p.1-23. Available: https://papers.ssrn.com/sol3/papers.cfm? abstract_id=2924435 [Accessed: 22.09.2021].
14. FELD, L.P. & VOIGT, S. EconomicGrowth and Judicial Independence: Cross-Country Evidence Using a New Set of Indicators. In: CESifo *Working Paper No. 906*. 2003. p. 1-35. Available: https://www.cesifo.org/DocDL/cesifo_wp906.pdf [Accessed: 22.09.2021]
15. VOIGT, S., GUTMANN, J. & FELD, L.P. Economic growth and judicial independence, a dozen years on: Cross-country evidence using an updated Set of indicators. In: *European Journal of Political Economy*, 2015, vol.38, p.197-211. https://doi.org/10.1016/j.ejpoleco.2015.01.004

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