

ABSTRACT

The Legitimacy of the International Court of Justice: The World of International Judges with special reference to Latin America

Nowadays there is an increasing number of international courts and tribunals, therefore it becomes relevant to study the challenges international judges face with during their work. One of the most important courts at universal level is the International Court of Justice (ICJ) with a well-known historical role in the peaceful settlement of disputes.

Judges of the ICJ generally work under political pressure, though the Court has always been declared to be free from any political bias. This paper attempts to examine impartiality and independence of ICJ judges concerning the nomination, selection process and whether we can observe some regional particularism in the procedure of decision-making and voting and if national politics influences the decision-making. However, there is another direction: how international law infiltrates into domestic law and how ICJ decisions affect the region.

The paper pays special attention to Latin American judges, as the region has always actively participated in the work of the ICJ and it is also affected by many of its decisions and through these, Latin America has a historical role in the development of international law. At the same time the paper also attempts to highlight the unique socio-legal nature of public international law since international law is the context where this topic is placed. It is inseparable from the subject matter as, without taking it into consideration, it can lead us to false conclusions..

Keywords: International Court of Justice, ICJ, Public International Law, International Judges, Latin America.

The Legitimacy of the International Court of Justice: The World of International Judges with special reference to Latin America

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INTRODUCTION

The International Court of Justice (ICJ) is one of the six main bodies and the most important judicial organ of the United Nations (UN) that resolves international disputes of states.

Outside of the academic world the ICJ must often face with accusations of being politically motivated to some extent and that the Court is a semi-political organ. As a matter of fact the Court often has to deal with complex issues that generally belong to the high political interests of states and because of the nature and weight of these cases they cannot evade or skip political questions, quite often the legal question and the political aspect are inseparable and the judges may not only rely on the evidence but they must take potential impacts of the case into consideration. For example in case of the North Sea Continental Shelf Cases, the Court's decision was *ex aequo et bono*, which is also a legal method to decide, in this case judges have a certain freedom to decide in accordance with equitable principles and taking account of all relevant circumstances so that Denmark, the Netherlands and the former Federal Republic of Germany could agree on the decision since the Court considered a solution which was the best for all the parties involved in this case. This indicates that decision-making is a complex process where the rule of law is a basis, but there are many more aspects and interests that must be taken into consideration.

In order to give a comprehensive view on the issue, on the one hand we must examine it strictly from the aspect of international law. I regard the sources and rules of public international law as a starting point (in this case I rely on especially the Statute of the ICJ), but on the other hand, it is important to look at the topic from an outer point of view, therefore the paper attempts to apply not only legal methods, but tries to borrow methods applied in political science especially in case of the voting activity of the judges. Nonetheless, we

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mustn't forget about the historical perspective where necessary and the unique social character of public international law which is essential to understand further problems and criticism on ICJ.

Therefore, the paper begins with a short presentation of the unique nature of Public International Law and the problems concerning its efficiency. Here it may be interesting to take a glance at the question whether there exists an especially Latin American interpretation of international law.

After this I examine the International Court of Justice starting with briefly looking at its historical background and then analyzing its competence, tasks and structure and just referring to its controversial rule in the protection of human rights.

THE UNIQUE SOCIO-LEGAL NATURE OF PUBLIC INTERNATIONAL LAW AS A POINT OF REFERENCE

Public International Law has a peculiar social and legal nature: it is based on the sovereign equality of states that creates a horizontal legal system based on the will of states, comparing it to the domestic law (e.g. criminal law) which is a vertical system with a certain hierarchy. Because of this, in international law we usually face with the fact that it has a nature of the so called *lex imperfecta*, a legal norm consisting of hypothesis, disposition, but lacking sanction which is very important since the power of law lies in the fact that it can be forced, without sanction law cannot operate well. (Hereby it must be noted that the theoretical question of sanction is very complex even in domestic criminal law.)

Therefore, one of the main criticisms that the ICJ generally faces with is that it cannot enforce its decisions, only the Security Council (SC) might help the states and the ICJ by putting political pressure on the state that doesn't seem to have the will to execute the judgment, but it is not usual and the SC must be expressly requested to do that and even in this case the Council reserve the right to decide upon it and accordingly it can deny this request. As a typical example, we could mention the Case Concerning the U.S. Diplomatic and Consular Staff in Tehran where the United States filed an application against Iran after the Iranian government didn't prohibit the rebellious people to seize the American embassy and take members of the embassy staff hostage. Despite of the judgment held by the ICJ in May, 1980 (though it also held an unanimous order on the 15th of December, 1979 that Iran didn't execute), the staff remained in hostage until January, 1989 when they were released because of the two countries involved could reach an agreement in Alger as Iran didn't wanted to participate in the proceedings in front of the ICJ therefore it didn't accept its jurisdiction.

Other similar cases include the United States v. Nicaragua. In this case the United States was brought to the ICJ because the U.S. helped the rebels against the Sandinista government and deployed mines in the seabed. During the proceedings the U.S. not only ignored the ruling, but also withdrew its consent to the jurisdiction. (Posner 2004, p. 9).

The U.S. also rejected to follow the decision in the Avena (Mexico v. U.S.) case where the U.S. breached its obligations under the 1963 Vienna Convention as it didn't allow legal representation from the Mexican consulate to meet their citizens arrested and imprisoned for crimes in the United States or similarly, we could mention the LaGrand case (Germany

v. U.S.) where the LaGrand brothers were sentenced to death in the U.S. and even though the Court ordered not to execute the death penalty on the other brother, on the day the order came out, the U.S. executed the other LaGrand brother. This case contributed to that the ICJ could define that its temporary court orders are legally binding. However, in connection with the Avena case, as it was mentioned above, the ICJ held that defendants weren't provided with all the tools of protection. Under the pressure of the Court in 2004 the president, George W. Bush ordered Texas State to have new trials in the case of foreigners, still Texas executed defendants. Recently, John Kerry as State Secretary asked Texas not to execute E. Tamayo, one of the alleged perpetrators, since it is against the decision of the ICJ, moreover, it could worsen the diplomatic relations between Mexico and the USA, but in 2014 Tamayo was executed.

Apart from the above-mentioned problems, we also often meet the unique category of soft law in international law which has a practical importance, though dogmatically it is not clear (Blutman 2008, p. 30), but it is not the aim of this paper to get in details about soft law and justify it. What really matters about it is that it can rather be considered to be social norms that coordinate the conduct of states and other actors of international law (Blutman 2008, p.34) and states tend to accept it and regard it as obligatory because of political reasons rather than because they fear of legal consequences. Therefore soft law itself can be a practical but difficult phenomena to define and sometimes states don't even agree whether a document, a treaty has this soft law character or not: e.g. when the General Assembly of the United Nations (GA) accepted the Universal Declaration of Human Rights in 1948, some states like the United States, Great Britain and the former Soviet Union regarded it as moral norms that are not binding, but some states like Mexico or Lebanon considered it as a real, substantive source of international law while Belgium had a view that those norms of the Declaration that were part of the customary law had to be considered obligatory but the binding force of the rest of the norms had to be examined. On the whole, soft law, that is most typical in international law, is also a phenomenon that demonstrates how law and political interests go hand in hand and that can cause more confusion about sanctions of public international law, even though it can help to resolve issues so it has a definite practical relevance.

As for the most neuralgic point of public international law, what one must understand that we shouldn't overrate the role of sanctions in international law, because in most of the cases a state doesn't care if the conduct of another state was unlawful, it usually becomes interested when the conduct of the other state adversely affects its interests and this is a process beyond law. So that the aim of this process is not the same as e.g. in criminal law, it's not punishment, but rather to terminate an agreement and get out of cooperation. (Valki 1989, p. 167). This is what clearly appears in case of use of force, states mustn't use armed force as a repression, but only for self-defence (which is also interesting as in criminal law it is not a sanction, but in international law it can be considered to be a sanction). So accepting international law is justified by interests concerning cooperation between states and not force since the creator of the rules and the one obliged by them is the same entity.

However, there is another interesting question that is worth mentioning in connection with the topic: if there exists a specific regional particularism when interpreting or applying Public International Law. Nonetheless, the aim of the paper was to slightly touch upon the Latin American approach, it is interesting to see that except for Latin America, we couldn't

really distinguish such a special approach expressly, however, nowadays it seems that there are regional interpretations (European, Asian).

When discussing the general and specific features of international law, an interesting question arises whether there exists a Latin American interpretation of international law. In Europe the first international law schools and scholars of international law were Spanish (we usually mention the name of Vitoria or Suárez in this context). It is no wonder Latin American judges of the ICJ also insist on this Hispanic tradition.

From the 1880s to 1950s there was a disciplinary battle about the Latin American approach to international law. (Becker Lorca 2006 ,p 284). Becker Lorca applies a differentiation in the approach of international law, how it changed from period to period: through the 19th century (until the 1880's) international law was an instrument in the process of nation building, then as part of the creation of Latin America as well as a method for creating its definition until the 1950's which was followed by a two-decade-period of 'professional radicalization and fragmentation' and finally, up to the 2000's a 'period of professional depoliticization and irrelevance of international law as a discourse for thinking the region' (Becker Lorca 2006, p. 284).

Though these disputes about whether there exists a Latin American international law are over, we must mention the fact that there are some fields of Public International Law that can be associated with Latin America since the region contributed for example to the development of maritime law (e.g. the Exclusive Economic Zone was created by the proposal of Caribbean states, and through this to the whole international law, as maritime law is not only a field of international law, but traditionally many basic rules or definitions were founded upon maritime law and later introduced into general international law) or diplomatic relations, for example there is a specific 'Latin American' way of interpreting the asylum, not to mention the general principles that are also applied in a special way in Latin America. However, as a clear sign of regional particularism in this context and also as part of the basic rules of international law, we must mention the Calvo Clause, the Tobar doctrine Estrada and the Drago principles.

As it can be seen later as well, many important cases in front of the ICJ can be related to Latin America, which are now considered to contain the basics of international law (e.g. Haya de la Torre, Nottebohm, Military and Paramilitary Activities in Nicaragua etc.) The 1936 Montevideo Convention or the 1948 Bogota Pact are still considered to be fundamental documents concerning states and principles etc., but these are just very few examples of an almost infinite list of rules due to the activity of the Latin American region.

In conclusion, we can see that since international law and their rules and representing organs are created by the promise of states concerning their conduct, they decide upon what norms they accept and to what extent. International law doesn't want to create general provisions prevailing for good for it can be defined as the law of similar interests and objectives (Valki 1989, p.168) and it is based on states that voluntarily accept the regulation and in our case the work and decisions of the ICJ. Therefore, even before getting into details, we can conclude that the picture we have on the ICJ and its judges is very complex and we must be cautious with making definite, categorical statements about the activity or efficiency of the Court.

I also attempted to highlight that the enforcement mechanisms of the ICJ are directly derived from the nature of international law and it (with regard to its sanctions and the ICJ itself) cannot be compared to domestic law this way and one simply cannot expect this unique system to behave like criminal law and the ICJ cannot be blamed, in the contrary, I agree with those who state that the ICJ is still the most important judicial body in international relations. (Llamzon 2008)

In the following I present the International Court of Justice, its competence and structure that can highlight the role of the Court in the protection of international law.

THE INTERNATIONAL COURT OF JUSTICE

Historical Background

Notwithstanding the ICJ, seated in The Hague, is a judicial organ, its creation in 1945 was a political process. During the negotiations in Dumbarton Oaks the question arose whether the Permanent Court of International Justice (PCIJ) should be reserved or a new court should be established. The reasons for a new court were that the mandate of the judges of the PCIJ had expired and if they had declared that the new court is basically similar to the PCIJ (U.N. Charter 1945, art. 92), the belligerent countries would have been automatically members of the Statute of the Court. Even though the new and the old statutes are basically the same and the ICJ kept the organizational structure of the former court, the major change was a technical one: the statute was attached to the UN Charter. Therefore, the ICJ as a successor of the PCIJ continued the achievements of its predecessor: it was a permanently established judicial organ ruled by its own Statute and Rules of Procedure, their decisions were binding on parties and also its work could be followed up publicly, one of its aims were and still is to develop international law, its judges represented all types of legal systems and Statute provided the list of legal sources of international law.

Competence and structure of the ICJ - The efficiency of ICJ

The ICJ is the most important judicial forum where states can settle their disputes that can endanger the international peace and security (and it is also a constitutional court for United Nations).

According to article 36 of the ICJ Statute, the Court has the competence to decide upon

- a. the interpretation of a treaty;
- b. any question of international law;
- c. the existence of any fact which, if established, would constitute a breach of an international obligation;
- d. the nature or extent of the reparation to be made for the breach of an international obligation.'

Beyond these tasks, the ICJ has very important role in maintaining the international peace and security and as it was mentioned before, developing international law since the ICJ contributes to the creation of new definitions and theories and it promotes the application

of these rules which, in the end, can lead to the acceptance by customary law.

As it can be concluded from the above-mentioned, the ICJ has a special status in this unique, horizontal system and it often works under political pressure therefore it always takes the opportunity to explicitly emphasize that the Court is a judicial organ with clearly legal nature and not political. Just to mention some relevant examples without providing a taxative list, in the case of Case Concerning the U.S. Diplomatic and Consular Staff in Tehran (1980) or the Case Concerning Military and Paramilitary Activities In and Against Nicaragua (1986) or the Advisory Opinion on Namibia (1971).

It is no wonder ICJ judges often underline the pure legal nature of the Court and also that their explicit aim is to develop international law as they are often legal scholars 'with recognized competence in international law' (ICJ Statute 1945, art. 2) and many of them took part in the work of the International Law Committee before becoming a judge of ICJ unlike the judges of many criminal tribunals. In the latter case individuals are involved in the proceedings therefore the majority of judges must have experience in the traditional judicial work and developing law is a by-product.

As article 2 of the ICJ Statute sets 'The Court shall be composed of a body of independent judges, elected regardless of their nationality from among persons of high moral character'. They are fifteen and from different countries elected for nine years and representing the different legal systems of the world, with regard to a regional proportionality and a proportional gender ratio. In practice the Latin American and Caribbean region has 2 seats.

The nomination process is an interesting and complex procedure: They are elected by the General Assembly and by the Security Council from a list of persons nominated by the national groups in the Permanent Court of Arbitration. The groups mustn't nominate more than four persons, not more than two of whom shall be of their own nationality (they usually nominate one). They hand the list to the Security General who submits it to the General Assembly and to the Security Council as they elect separately with regard to the above mentioned representation of the main forms of civilization and of the principal legal systems of the world. In order to be elected the absolute majority of the votes must be obtained. The judges serve their position in terms since the mandate of five judges shall expire at the end of three years and the terms of five more judges shall expire at the end of six years. Working in turns also serves the independence of decision-making. (Despite of the replacement, they shall finish any cases commenced.) (ICJ Statute 1945, art. 4-15) In concrete cases there is an opportunity to elect ad hoc judges. Here we must mention that the whole nomination and election process must be supported by the state of the candidate. Since it takes a very long and costly campaign to get elected and obviously it is in interest of the state as well and we mustn't forget that there are states in the General Assembly and in the Security Council who will vote, therefore the candidates rely on the support of their state which suggests a certain link between a judge and his state.

As for the Latin American region, here we can follow the distribution of seats:

Patrick Lipton Robinson	Jamaica	2015-
Bernardo Sepúlveda-Amor	Mexico	2006-2015
Antônio Augusto Cançado Trindade	Brazil	2009-
Gonzalo Parra-Aranguren	Venezuela	1996-2009

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Francisco Rezek	Brazil	1996-2006
Andrés Aguilar-Mawdsley	Venezuela	1991-1995
Mohamed Shahabuddeen	Guyana	1988-1997
José Maria Ruda	Argentina	1973-1991
José Sette-Camara	Brazil	1979-1988
Eduardo Jiménez de Aréchaga	Uruguay	1970-1979
Luis Padilla Nervo	Mexico	1964-1973
José Luis Bustamante y Rivero	Peru	1961-1970
Roberto Córdova	Mexico	1955-1964
Lucio Manuel Moreno Quintana	Argentina	1955-1964
Ricardo Joaquín Alfaro	Panama	1959-1964
Enrique C. Armand-Ugon	Uruguay	1952-1961
Levi Fernandes Carneiro	Brazil	1951-1955
José Gustavo Guerrero	El Salvador	1946-1958
Isidro Fabela	Mexico	1946-1952
José Philadelpho de Barros e Azevedo	Brazil	1946-1951
Alejandro Álvarez	Chile	1946-1955

Traditionally, as it was mentioned above, the judges cultivated the Hispanic way as the original approach to international law and it can be seen from the table that from 1946 there were four Latin American seats which also supports the view how active and engaged Latin American judges were to develop contemporary international law. Alejandro Álvarez, one of the first judges of ICJ, had a very strong influence on the theory of an independent American international law and from this very active period we can find other judges having a dissenting or individual opinion on different issues (Leonhard 1968, p. 679). (E.g. Judge Moreno Quintana, who mentioned in the case of Temple Preah Vihear that territorial sovereignty is a traditionally important issue in the region and also drew the attention when two Spanish speaking countries had dispute that it must be considered that they are two Latin American states and after making it sure to clarify this context, we can move towards international legal solutions. [Leonhard 1968, p. 681]. However, hereby I must mention that even the judges of this period had different views, as Judge Álvarez referred to American international law based on the Monroe Doctrine while others considered the approach of the United States as typically Anglo-American and separated from the Latin American view.

As for the practice of the ICJ, it had its own periods: the first period was between 1946 and 1966 when Western and Latin American countries were in the focus of the Court (the turning point was the Namibia case). The second period was the one between 1966 and 1986 when developing and socialist countries became in the centre of attention and their 'reservation' to the optional clauses they made in order to accept the ICJ's jurisdiction. (At this time many other states that were parties in front of the ICJ from the beginning e.g. the United States or France started to make reservations to their own optional clause.) This was also the period when the ICJ introduced ad hoc judges. The third period started with the Nicaragua case in 1986, which restored the trust in the Court as it was the longest and most complex case in front of the Court and it also showed that developing and small states can

also turn to the ICJ.

Apparently, it had its reason that during the first period Latin American judges were highly active presenting dissenting or individual opinions (and very often in connection with the theory of international law) and as a matter of fact, this trend hasn't changed a lot. E.g. lately, in the joint cases of Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica versus Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua versus Costa Rica) Judge Trindade had his separate opinion, but it is a usual trend among Latin American judges.

As for the proceedings, the procedure begins with the parties meeting the President of the International Court of Justice and present why they want to turn to the ICJ what their expectations are and if it fits in the scope of competence of the ICJ, the written stage starts which is followed by the oral hearing within the ICJ. The ICJ can order to visit the place (just like in Gabcikovo-Nagymaros case, involving Hungary and Slovakia, which was important in the history of the ICJ since it was the first case ICJ decided to visit the place and also the first time it accepted amicus curiae petition.) Then the ICJ puts together a set of judges (Murphy 2012) who decide upon the case and once the judgment is ready, there is no appealing the ruling but there is a possibility to revisit the previous decision (Murphy 2012).

The following table shows an overview about the cases in front of the ICJ with respect to the participation of Latin America:

	No.of- Ca- ses1*	No.of cases concerning Latin-Ame- rica	
1947	2	-	
1948	1	-	
1949	6	1	Asylum (Haya de la Torre 1) /Colombia v. Peru/
1950	4	2	Asylum (Haya de la Torre 2,3) /Colombia v. Peru/
1951	4	1	Nottebohm /Liechtenstein v. Guatemala/
1953	3	-	
1954	3	-	
1955	8	2	Antarctica 1,2 /UK v Chile, UK v. Argentina/
1957	6	-	
1958	3	1	Arbitral Award /Honduras v. Nicaragua/
1959	4	-	
1960	2	-	
1961	2	-	
1962	1	-	
1967	2	-	
1970	1	-	
1971	1	-	
1972	3	-	

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1973	3	-	
1974	1	-	
1976	1	-	
1978	1	-	
1979	1	-	
1980	1	-	
1981	2	-	
1982	1	-	
1983	1	-	
1984	3	1	Military and Paramilitary Activities in and against Nicaragua /Nicaragua v. United States of America/
1986	3	3	
1957	1	-	
1988	2	-	
1989	4	-	
1990	1	-	
1991	4	-	
1992	3	-	
1993	3	-	
1994	1	-	
1995	3	-	
1996	1	-	
1998	5	1	Vienna Convention on Consular Relations /Paraguay v. United States of America/
1999	17	1	Territorial and Maritime Dispute /Nicaragua v. Honduras/
2000	1	-	
2001	3	1	Territorial and Maritime Dispute /Nicaragua v. Colombia/
2002	3	1	Revision of the Judgment in the Case concerning the Land, Island and Maritime Frontier Dispute /El Salvador v. Honduras/
2003	4	1	Avena and Other Mexican Nationals /Mexico v. United States of America/
2004	1	-	
2005	1	1	Dispute regarding Navigational and Related Rights /Costa Rica v.Nicaragua/
2006	3	1	Pulp Mills on the River Uruguay /Argentina v. Uruguay/
2008	7	3	Interpretation of the Judgment in the Case Avena /Mexico v.United States of America/ Aerial Herbicide Spraying /Ecuador v. Colombia/ Maritime Dispute /Peru v. Chile/
2009	3	1	Certain Questions concerning Diplomatic Relations /Honduras v. Brazil/

2010	4	1	Certain Activities carried out by Nicaragua in the Border Area /Costa Rica v. Nicaragua/
2011	2	1	Construction of a Road in Costa Rica along the San Juan River /Nicaragua v. Costa Rica/
2013	4	3	Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea /Nicaragua v. Colombia)/ Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast /Nicaragua v. Colombia/ Obligation to Negotiate Access to the Pacific Ocean /Bolivia v. Chile/
2014	5	1	Maritime Delimitation in the Caribbean Sea and the Pacific Ocean /Costa Rica v. Nicaragua/
Σ	160	28	

It can be noticed that in the recent years the question the Court usually decides upon is in connection with the application of Public International Law and not the definition of certain rules whether they exist in Public International Law. Thus nowadays, not the creation but rather the application of international law is in focus.

We can also see that from the end of the 90's the Latin-American region is an active participant in front of the Court. Most of the cases are about territorial (especially maritime) disputes by which these states help to improve e.g. maritime law. However, it must be highlighted that this activity can hardly be interpreted without the Pan-American context and dispute solving mechanisms. (Valencia-Ospina, 2014)

In order to hear and decide on a case, the Court must have jurisdiction which is consensual in international law and should be based on a treaty (usually there is a provision of the treaty that contains that in case of disputes the Court is entitled to proceed, it is very typical), a special agreement (compromis), a unilateral declaration or in the practice rarely, the jurisdiction relies on the forum prorogatum.

The jurisdiction is exactly the other circumstance because of which the ICJ is often regarded as inefficient body. Some argue that states can accept it or not, though there is a tendency that '...civil law countries are more likely to recognize the jurisdiction of the International Court of Justice than common law or Islamic law countries. On the other hand, common and Islamic law states design more precise commitments to the court with more reservations and have more durable commitments.' (Mitchell, 2006) However, many U.N. Member States 'have never appeared before the Court in a contentious case and why the Court is regarded as an important, but not dominant, player in the field of international dispute resolution' (Murphy 2012). In my opinion the other reason for that is the proceedings have high costs and decision-making is a slow process, it can take years so states often think twice before turning to the ICJ, nonetheless we must admit that as establishing jurisdiction is the first stage, states that don't agree with the proceedings (usually the party that acted

unlawfully) try to exclude the jurisdiction of the ICJ or claim that the pleading of the other party is not admissible as this is the shortest way to end this case without getting into details and turning onto the case itself. In case of the Nuclear Tests case (Australia v. France, New Zealand v. France) the Court had to drop the case as they realized there was no dispute, so no case anymore.

As for the jurisdiction, the most vulnerable point is the unilateral declaration. As Smith writes about the Nicaragua v. United States case: 'the provision and withdrawal of jurisdiction inherently politicizes and nationalizes proceedings'. (Smith 2005, p. 208). It is because making a unilateral declaration is like signing a *blanco cheque*, as it usually limits the sovereignty of the state therefore they usually make reservations that, after a US senator are called Connally reservations. This means that the US doesn't accept the jurisdiction of the ICJ in cases that are basically national issues which is rather a subjective point of view.

One of the criticisms the ICJ often gets is that only states can turn to the Court for judgement and this may limit the Court to hear cases on human rights or some types of issues regarding international security. However, the ICJ had some cases where human rights had a major importance (like the above-mentioned LaGrand, the advisory opinion on the Legality of Nuclear Weapons or the Arrest Warrant of 11 April 2000 [Democratic Republic of the Congo v. Belgium]) its activity in connection with human rights is not so significant (Crook 2004, p. 3.), hence we shouldn't forget about the above mentioned soft law character and that it is a very difficult issue until the obligations of the state or what their duties are not being defined clearly and in these complex cases where there is a range of problems to be solved the ICJ must make a priority list and it will not necessarily give primacy to human rights considerations (Crook 2004, p. 5).

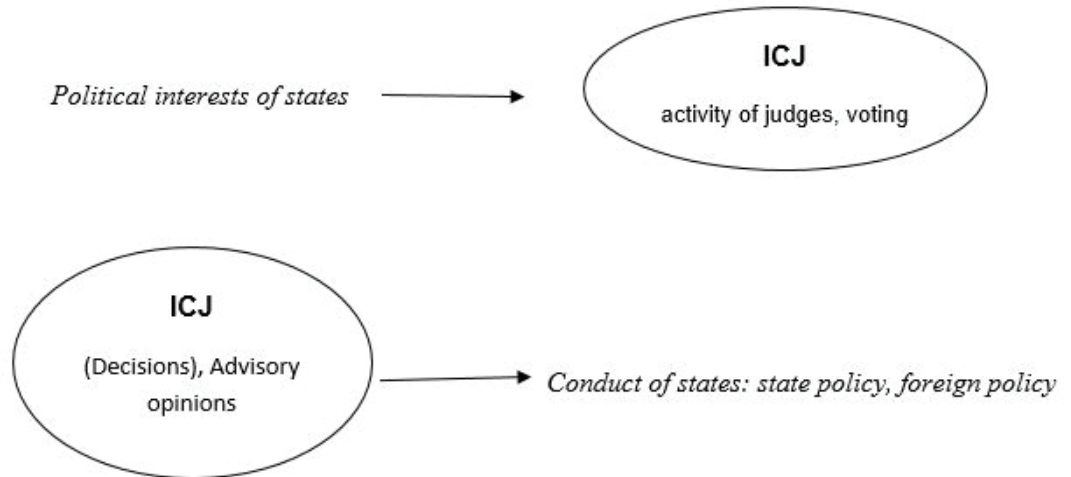
Nonetheless, it must be mentioned that international law becomes more and more efficient in protecting individuals (Kovacs 2010, p. 118) and though the international law is considered to be neutral towards different ideologies, it still has and carries values (Valki 1989, p. 207) which means that there must exist a certain community based on same values. These values and the existence of this community must be detected in case of the decisions of the Court as well. But these communities of common values usually form easier on a regional level (especially in Europe and Latin America). In case if the human rights decisions it would be very important to examine what we can learn from the Latin American judicial system as for Europe it is a model from many aspects and we mustn't forget that judges trained under this system are sitting in the ICJ as well.

In the following, I focus on those, not only legal factors that may influence the ICJ and the decision-making of judges and try to make it clear whether the Court should change its approach or because of this unique nature of Public International Law they can insist strictly on international law as a kind of a guarantee for an impartial decision.

HOW DO THE POLITICAL INTERESTS OF STATES INFLUENCE THE JUDGES OF ICJ?

As for the political interests, I regarded them as they can take effect into two directions: first, we shall examine how states could influence the inner operation of the ICJ if it is possible to

influence at all in order to get a favorable decision and on the other side how the decisions and especially the advisory opinions may affect the conduct of states at international level.



Now that we see how complex the nomination and election of the judges and proceedings are, some subjective factors haven't been examined and whether these factors are occasional or show a tendency. We haven't taken into consideration the mentality of judges and whether there are circumstances that can influence the way they vote. As it was mentioned before, the point of reference, the hypothesis is that judges are impartial and independent as the Statute of ICJ demands it. Even in this paper there were some facts mentioned that support this theory: how five judges are replaced every three year, how they are nominated from that particular list and the whole proceeding of election. We could also mention the immunities and privileges that just as in case as in diplomatic law serve the independent and troublefree work. However, there is another side to the coin: how do they get onto the list? Especially those judges coming from a diplomatic carrier are usually related to the government and it might threaten judicial objectivity and independence (Shelton 2003,p. 32). Another important circumstance to mention is that the permanent members of the SC always have judges in the ICJ and a state gets to have a judge if they are a party to a case being heard in the Court (Murphy, 2012), (this judge is often a national of the involved party, but necessarily) this is the legal instrument of ad hoc judge, whose mandate expires when the case is solved. The opportunity to nominate ad hoc judges makes it possible for the parties to the case to influence the size and the composition of the Chamber from both sides (Smith 2005, p. 209).

However, it is true that judges have to vote with simply 'agreeing' or 'disagreeing' with the majority (Smith 2005, p. 226), so in the dissenting and concurring opinions judges can get into detailed reasoning and this is an evidence of their independence and that is why lack of anonymity has a relevance.

Therefore, it has importance that in 2004 Posner tested the voting behavior of judges, whether they tend to vote in favor of their home state or they feel sympathy for those states that share the same political system or economic level and he showed that judges are significantly biased in favor of their country, from an average 50 % when they don't have any ties to that country in question to almost 90% when their own state was involved as a party

(Posner 2005, p. 3).

It seems they would like to avoid even the slightest signs that can relate them to their country, the question is whether it is necessary. As impartiality is not necessary to some extent since they don't only solve a case, but they form international law, they act in the spirit of international law (Hernandez 2012), not to mention that for example international civil service knows the term 'dual loyalty', according to which nobody can be expected to act against its state. I don't consider this new factor, 'national identity' as Posner introduces (Posner 2005, p. 12) to be problematic and it is not new, it first appeared with the Jay Treaty and then it migrated to the PCIJ and then the ICJ a successor inherited it. (Smith 2005, p. 203) Nonetheless in many cases, judges themselves are aware of their own reputation so they signed first if they felt biased and refused to decide: e.g. in Nottebohm case Sir Lauterpacht had previous consultations with Liechtenstein or in the case of the Temple of Preah Vihear, Judge Jessup did the same; Judge Higgins was excluded in two cases, the Lockerbie case and in the Gabčíkovo-Nagymaros case (which is still a pending case). Therefore, impartiality and independence seem to work well in practice. (Brown 2013, p. 87) We know only one case in the ICJ's history when a judge doubted the impartiality of his colleague. (Judge Buergenthal questioned Judge Elaraby's impartiality as he contributed to the work of the Egyptian Ministry of Foreign Affairs as a legal adviser and also took part in the negotiation in Camp David in 1978 (Hernandez 2012, p. 203).

However, as Posner writes, it has a psychological, economic and selection effect on decision-making (Posner 2005, p. 12). The latter is what was mentioned earlier when arguing that the government must have a certain influence when deciding upon whether they should vote for a potential candidate in order to put his name onto the list. As for the first influential factor, I indicated that judges would like to hide their ties to their home country, which may not be necessary, but clearly, they don't want to be identified with a country, which is reasonable. Posner mentions the economic factor as well, when the mandate of the judge expires, the government might not support his carrier in re-electing or retiring in his country by getting a respected position. I also consider this to be a form of political and psychological pressure.

Beside the national identity, it is interesting to examine whether there is a collective identity, namely if there exists bloc voting. The blocs could organize along different interests as regional, military, economic, political systems or it is also interesting to examine whether judges of SC permanent member states vote together or not. What Posner found is that the phenomena of bloc voting exists and statistics verify that judges are likely to vote in favor of a state which is in the same economic situation (similarly wealthy or poor) and those judges coming from democratic countries are not likely to vote that much in favor of a nondemocratic state. (Posner 2005, p. 27)

It is easy to conclude that the more complex a case is as there are political interests involved and it has a certain weigh so it puts pressure on the judges, the more biased the judges will be when deciding, but, which is important to note, they don't vote this way intentionally.

Besides, it is very important to comprehend the position and place ICJ has comparing it to other judicial forums. Nowadays we can spot how more and more tribunals are set up, especially in the field of international criminal law. The subjects of these tribunals and courts are individuals and because of this, although they are international or partly international

forums, they have more things in common with domestic procedures so standards of impartiality and independence of judges are also similar. These tribunals show diversity, but it is interesting to take a look at the same issue and how judges function in that field. For example art. 36, para. 3 of the Rome Statute of the ICC expects the high moral character, impartiality and integrity and the qualifications in their States for appointment to the highest judicial offices, they must have competence in either criminal law and procedure, with relevant experience of international law (international humanitarian law, human rights) and extensive experience in a professional legal capacity relevant to the judicial work of the Court. The nomination of candidates could be made by any State Party and it is the same procedure as in case of nominating judges to the ICJ. The election is divided into two lists of candidates: List A will contain those with a criminal law background and experience and List B will comprise those with international legal expertise. (Shelton 2003, p.37). What is interesting in contrary to the ICJ, criminal tribunals don't support re-election in order to keep the independence of judges as usually there is serious lobbies and campaigns for re-election. What make these tribunals unique comparing to the ICJ is that prosecutors also work with the tribunals, so regulation for independence and impartiality are evident and may be regarded more strictly or a bit differently as in case of the ICJ.

Comparing it to the ICJ, these forums face different political influence or we can say dependence: because they need states to cooperate in investigating, arresting, in the transfer or financially support these forums. The ICJ doesn't have to face many of these factors but in return it is a bit further from domestic procedures: judges are closer to the academic world, the parties are states with high political interests and expectation and we can mention the advisory opinion as a very special institution which is not a typical method in domestic adjudication. While in case of the ICJ, the different legal systems that judges represent can lead to an exciting interaction and can have a positive effect on developing international law, in case of the criminal tribunals, where this is not a primary objective, the diversity of legal systems could cause difficulties.

May the work of the Court have an impact on political interests of states? - The other direction

As it was mentioned, only states could turn to the ICJ in order to settle their dispute in the form a judgment. The Court doesn't acknowledge precedent law (Hurd, 2014 p. 194), so the decisions are obligatory only in a particular case and only for states involved as parties. Therefore judgments don't necessarily have that strong and direct impact on the foreign policy of a state, though it can influence their future conduct and as a subsidiary source, states themselves often use earlier decisions in their reasoning in order to support their point of view. However, it can have certain consequences within a state as well, e. g. In 2012 in the case of Jurisdictional Immunities of The State, the Italian Constitutional Court refused to implement the Court's decision, which can threaten legal stability and certainty and this can concern the government policy as well. From the above mentioned Avena case it can be clearly seen how the ICJ decision may influence the national politics.

Nonetheless, judgments have an effect on the picture states would like to create about themselves, their conduct during proceedings, their attitude towards the ICJ can influence their international position and the trust put in a state with a questionable conduct when e. g. it would like to enter into a treaty with other parties, other potential members may not

have the will to cooperate.

The other form of 'decision' making is the advisory opinion, which is an official, but not binding legal opinion or point of view of the ICJ (Though the Statute itself doesn't explicitly state that an advisory opinion doesn't have binding force). As art. 96 (a) of the U.N. Charter sets 'The General Assembly or the Security Council [and those agencies authorized by them] may request the International Court of Justice to give an advisory opinion on any legal question'. Even at the first glance we can see that here political organs ask for this opinion which immediately borrows political character to it.

This type of forming opinion is foreign to many legal systems and it enables national politics to be a part of judicial administration (Smith 2005, p. 209). The advisory opinions are the evidence that the ICJ doesn't work, how Smith writes it, in a 'judicial vacuum' (Smith 2005, p. 225).

In case of the Legality of the Threat or Use of Nuclear Weapons the WTO turned to the ICJ first, but when the Court held, it didn't have jurisdiction, the U.N. General Assembly asked the ICJ to share its view on the question. Though it was a theoretical interpretation of law (it can be considered as abstract since it wasn't connected to a particular case), it had serious impact on international politics, however, some judges (like judge Oda objected to give opinion on an abstract question). Its political motivation was that the GA had set this issue on its agenda long ago, but no improvements happened since then.

For example the Advisory Opinion of The Unilateral Declaration of Independence in Respect of Kosovo there was a misinterpretation, because to the public it seemed that the ICJ had supported the independence of Kosovo albeit it only declared that to proclaim independence itself is not contrary to international law but states turned this for their own benefit and regarded at this opinion as a consent or confirmation after their act of recognition. It is not aim of this paper to get in details about that even the question the ICJ got wasn't the most suitable.

Albeit it has never been a question that advisory opinions are not obligatory it must be mentioned that sometimes these also contain *erga omnes* norms (Lamm 2011 p. 200) like since the Bernadotte-case nobody has doubted that the U.N. is an objective legal personality or in the Namibia-case the ICJ ordered (formally 'advised') member states to accept that the presence of the South African Republic in Namibia (Southwest Africa) is unlawful. In case of the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, the opinion of the Court was that Israel had acted against the international law when building the wall and called all subjects to the 1949 Geneva Convention to keep the humanitarian international law (This was the result of the work of the Hungarian judge, Judge Herczegh who was almost uniquely known for his work on humanitarian law and in the Red Cross Movement [Crook 2003, p. 7]). The previous two cases are typical examples when the ICJ declared something instead of the U.N. Security Council. (Lamm 2011, p. 202).

CONCLUDING REMARKS

I attempted to present the legal and the outer, not necessarily legal factors affecting the ICJ, so the main aim of the paper is the exploration of these impacts and the demonstration of

them. It is interesting to find out whether these arguments lead us to the consequence that judges are politically biased or it comes hand in hand with the unique social nature of public international law. In my opinion political factors cannot be avoided but they don't have significant impact on the decision making. Obviously, it depends on the legal culture of a state, but as for the mentality of lawyers, we are usually trained to be positivist, we have a bipolar way of thinking: 'law' - 'not law', 'having legal nature' - 'not having legal nature'. This conceptualization of law is difficult to apply in public international law, especially in case of soft law (Blutman 2008, p. 30), but still it has its advantages and can be applied as a point of reference which can be practical for judges when they must decide on a case with a record and documentation of more thousand pages.

As for the judges, I find it very interesting to analyze how they vote and how the ICJ can be criticized upon its activity, that it is not easy to force the execution of a judgement, though it has its reasons as it was mentioned above or criticized upon political interests affecting its work, but what matters is that it sets the boundaries for international disputes. Besides, impartiality is not a magic word, to some extent it is not important and cannot be expected, especially in case of human rights, because this is how the political culture is transmitted. The objective beyond the concrete cases is to make this system of rules be accepted by more and more states so that legal tools and terms used in states with a certain development level of political culture could be applied by those less developed and could generate interaction among the most developed (Valki 1989). Furthermore, in my opinion the term 'biased' cannot be interpreted and applied directly in this case and I agree with Smith when he writes that bias based on the national identity of judges is not and 'never was as powerful as claimed'. (Smith 2005, p. 199) However, there is an interesting circumstance that surveys and statistics haven't analyzed yet, but which is worth observing: the nationality of judges, since a state is not obliged to elect a judge with the same citizenship as the elector state. It doesn't happen often so that now it doesn't have much relevance, but it is interesting to follow up whether it is going to be a growing tendency.

There are slight differences in how judges from a particular region may decide but these regional tendencies can be detected everywhere, not only in Latin America, though the role of the region in giving more flexibility to law is obvious.

As for the other direction, the decisions of the Court can also affect the policy and political interests of states, sometimes more, sometimes less. The judgments are only obligatory for the parties involved and only in that particular case. In this context there is no precedent, but it might influence the future conduct of states and may contribute to the development of a certain practice or the *opinio iuris*, in the end it may develop the customary international law. Definitely, the advisory opinions have political impact, as it could be seen in case of Kosovo or the Construction of a Wall in the Occupied Palestinian Territory, though the number of these is not significant (the last was in 2010, the ILO filed it, before that in 2008 on the independence of Kosovo, the Wall in 2003, in 1995 the Legality of Nuclear Weapons, just to mention some recent and relevant examples, since 1945 the Court have given its opinion 26 times).

In conclusion, I found that all forms of criticisms could be traced back to the unique nature of international law and not taking this into account can lead to misinterpretation of sanctions and to the failure to understand the aim, efficiency and executing mechanism of the

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ICJ. Shabtai Rosenne also warns that ‘outsiders’ may see more into a statement than the ICJ itself would have intended to express. (Rosenne 2006, p. 613).

From the lawyer’s perspective I find that it happens that judges belonging to a certain region or bloc may vote in the same way or have the same opinion, legal reasoning, but I consider it as a natural phenomenon deriving from the same legal background and judicial culture they come from and I don’t see that it would endanger their impartiality or it would have any significant effect on their commitment towards international law and judges would be biased and the Courts’s Statute and Procedural Rules also contain the necessary safeguards. Moreover (as other studies confirm it too [see Romano 2002, p.583]) there is no evidence that Latin American judges would be considered to be a voting bloc. On the contrary, one of the strongest points of the ICJ is exactly the fact that judges came from different background, so the composition of the Court is varied.

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(Footnotes)

1 * Data refer to judgments and advisory opinions together. In some cases the ICJ held more judgements in one topic, but the Court handles them as separated judgments.



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