THE ACCESS AND PARTICIPATION OF INDIVIDUALS IN MECHANISMS OF INTERNATIONAL JUSTICE

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ABSTRACT. *Together with states and other entities, individuals are currently part of a system of institutions and norms operating at a global level, which, ultimately, must target and ensure their protection. In order to respect democratic principles, including at the supranational, international, global level, the supranational legal order must allow individuals to participate in the mechanisms by which their rights, freedoms, and fundamental interests may be affected, including in the mechanisms of accomplishing international justice. Currently, individuals are widely recognized as subjects of international law, and there are a variety of forms through which they have access to, or participate in, or intervene before international courts, but in manners that are insufficient in order to adequately manage their participation needs. Ensuring a wider access of individuals to international courts, on the one hand, guarantees and strengthens their rights, and, on the other hand, legitimizes the exercise of authority by these courts. In this context, the paper aims to look at the main forms in which the access and participation of individuals in the mechanisms of justice at the international level are allowed, as well as to discuss manners of expanding such access and ensuring the solid observance of the principle of procedural fairness and the procedural rights of individuals when involved in international legal proceedings.*

Keywords*: access to justice, individuals, international justice, international courts, procedural fairness.*

The emergence of supranational political regimes has modified both the models and forms of governance, as well as the role and power of international courts [1, p.493]. Such courts have been conceived and established for the dispute of international settlements in a peaceful manner, as a form of achieving the desideratum of international peace and security and maintaining an international lawful order. More than solving international disputes, they create law from a position of authority; they exercise public authority in a manner which cannot be reduced to a classical, state-centered representation model [1, p.493]; they create and modify the normative expectations of various actors, hence developing legal normativity; their decisions produce effects beyond individual disputes, affecting general legal structures; and many actors use such decisions similarly to how they use formal sources of international law [2, p.3-5] – all of these representing evidence for the development of a significant role of international courts in global government. Currently, these courts are also part of certain institutional projects and strategies designed to facilitate the solving of stringent global issues, to achieve common goals and to enhance coopera-

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tion on the global level, to mention just a few such new functions, which puts them in the service of the promise of international law to contribute to global justice [3, p.8]. In this sense, beyond deciding on particular disputes, they shape and promote certain normative regimes [4, p.62], one of the most important ones being the human rights regime. It is worth mentioning that, even when the decisions of international courts are not formally binding and compulsory, the specialists, the politicians and the legal opinions formulated on various matters invoke them frequently as they would represent binding precedents, and previous judgments do influence the shaping of following ones [4, p.63], and the interested parties, such as non-governmental organizations, other states, national and transnational legislative structures can mobilize around such judgments [5, chapter 1, section II].

The development of international law in the direction of this diversification of the roles and functions of international courts indicates a transition from an international system based on politics and power to one governed by a true „global rule of law" [1, p.491]. Individuals, governments and non-governmental organizations are now placed in a new system of rules that have reformed the legal meaning of state borders, reshaping the powers, limits, rights and obligations of states. While a legitimate state must be understood, more and more, through the language of democracy and human rights, the idea of legitimate authority has also become tied, in moral and legal terms, to maintaining human rights values and democratic standards. States are to subject themselves to new and intensified forms of surveillance and monitoring by an ever-increasing number of international regimes, authorities and courts, and how a state treats its citizens is no longer a matter for that state alone [6, p.9; 7, pp.107-113]. In the international community, norms regulating war, weapon systems, war crimes, human rights, the environment, etc. have transformed the order of states, incorporating national policies into new forms and layers of responsibility and governance. Therefore, the boundaries between states, nations, and societies can no longer claim the deep legal and moral significance they used to hold, but, instead, they can be judged, along with the communities they include, by standards that are at least general, if not universal. In other words, they can be analyzed and evaluated according to the standards that, in principle, apply to any person, any individual, and individuals are considered to be equally worthy of representing an object of concern and respect [6, p.9]. These contemporary regional and global political forces disrupt any simple correspondence between national territory, sovereignty, political space and the democratic political community. It is equally true, however, that, at the global level, a series of problems related to transparency, accountability and democracy are highly obvious, and there is a high need for certain chains of accountability and democratic processes that include all of those significantly affected by such issues. What is necessary, in fact, as expressed by David Held, is a movement for justice and legitimacy at the global level, which would put pressure on governments and international institutions in the direction of certain critical points. Their precedent and

foundation is identified in the transition from an international law based on effective power to one based on the principles of self-determination, law, democracy and human rights. In this sense, particularly important is that there is a commitment to the rule of law and that the individuals of all faiths and nationalities are protected, no matter where they live [6, p.11-14]. These requirements should apply to international courts, too.

In an attempt to identify the manner in which the power of international courts interacts with the principle of democracy, how this power may be justified according to the fundamental premises of democratic theory, Armin von Bogdandy și Ingo Venzke developed an understanding of international justice as an exercise of public authority, by which they mean the legal capacity to determine others and to influence their freedom, namely to shape their legal or factual situation [3, p.7, pp.17-18]. Understanding international judicial practice as an exercise of public authority shows that such a practice cannot be sufficiently justified on the traditional basis of state consent, nor on a functionalist narrative, that exclusively focuses on the goals or values that courts are to serve. Moreover, international courts cannot draw sufficient legitimacy from the legitimation of public authority exercised by other institutions, be they states or other international institutions. As autonomous actors exercising public authority, their actions require an authentic mode of justification, one that respects the basic principles of democratic theory [3, pp.8-10, section 2]. Partially building on this theory, Nienke Grossman showed that state consent and procedural fairness towards the parties of a dispute are insufficient to substantiate the legitimacy of justice institutions at the international level. Given how the international justice system has developed, these institutions can rule on international rights and obligations of entities that are not parties to the process, can deeply affect the interests of entities that are not part of the a particular dispute, and can shape the law prospectively, a new approach to the legitimacy of international courts is required. Among others, it is deemed necessary that courts adhere to certain universal standards of justice (they cannot facilitate the violation of a set of fundamental norms such as the prohibition of torture, slavery, racial discrimination or genocide) and that procedural fairness is reimagined in order to include the entities the rights and obligations of which are being adjudicated. Democratic theory is used in order to justify the authority of international courts by the fact that the interested entities are given the opportunity to participate in formulating the policies that affect them [4] and the adoption of decisions that concern them.

Considering democracy as an inevitable normative foundation for the justification of public authority, and analyzing the ways in which the democratic legitimation of international judgments can be improved, Bogdandy and Venzke show that the starting point of these democratic justifications is represented by the individuals whose freedom shapes judicial decisions, however indirectly and mediated this happens [3, p.25, p.41]. Democratic legitimacy must be generated without raising doubts

about the judge's monopoly over the decision, as well as without diluting a nuanced concept of democracy that requires the effective participation in decision-making processes. Accordingly, one of the essential manners in which judicial procedures can strengthen the democratic legitimation of court decisions is represented by the justification of decisions regarding the participants in the trial, since the parties are involved in the way the case is conducted, and the court must manage the arguments they formulate. Therefore, a possible answer to the problem of justifying the exercise of public authority by international courts can be identified in increasing the possibility of intervention and participation [3, pp.26-27].

Consequently, there are multiple arguments in favour of a more extensive participation of individuals before international courts: respect for democratic principles and the justification of the exercise of public authority; respecting the fundamental human right and the fundamental principle of access to justice; ensuring procedural justice or procedural fairness – all of these being in a continuous interaction and contributing to the legitimacy of international courts. The issue of participation in the act of justice is both an indicator of respecting democratic principles, as well as a component of the fundamental right and principle of access to justice, and is the basis for assessing procedural fairness, too.

The individuals are already granted participation in the international legal and judiciary order and certain manners of ensuring respect for their equal human worth through the international judiciary are already implemented. They have a passive procedural capacity before the International Criminal Court and other courts and tribunals acting in the field of international criminal law. They also have the active procedural capacity to file complaints against states for violating treaties in the field of human rights. Such rights are internationally recognized through various legal documents, such as, for instance, the *Statute of the Inter-American Commission on Human Rights* [8], the *European Convention on Human Rights* [9, art.34], the *Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court of Human and People's Rights* [10, art.30]. What is easily noted in this sense is that the mechanisms that allow the direct access of individuals as parties, on the one hand, presuppose the consent of the state (it is, in fact, a form of participation that is mediated by the state's participation in that mechanism), and, on the other hand, have more of a regional nature. At the global level, there are certain mechanisms within the United Nations that act for the same purpose, ensuring respect for fundamental rights and allowing individuals to file complaints for violations of such rights, but these are not judiciary in the classical meaning of the term. What would be necessary for ensuring better and broader respect for such fundamental rights would be, ideally, to allow any individual to file any complaint against any state that violates such a right, and not having such a system already implemented is one major deficiency of the international legal order and international judiciary.

When individuals are parties to the existing trials and procedures to which they can participate directly, it is also necessary that the requirements of procedural fairness are well respected. In what concerns the fundamental principle of procedural fairness, it is shown that, for a court to be legitimate, it should also be procedurally fair. For instance, individuals have a strong basis, according to international human rights law, for the right to a fair and impartial hearing when their rights are subjected to international adjudication. Even if the legal instruments regarding human rights refer, in general, to the respect of their right to a fair trial before national courts, there is no difference in the judicial function that justifies the limitation of this right only with regard to the judgment carried out at the national level [4, pp.81-84], and the same requirements should also apply to international adjudication.

Moreover, beyond broadening the possibility for individuals to be actual parties before international courts, the legitimacy of such courts would also benefit from allowing non-parties to participate in the judicial procedures. This is desirable in at least two situations: when, given the dispute to be adjudicated, a court will rule on the international rights and obligations of the non-party, in which case the non-party would also have to be fairly and impartially heard, as well as when interests of third parties are to be involved in the dispute, in which case the non-party should have the possibility to influence the results [4, p.81]. These possibilities are already being considered in international regulations and judicial practice. In the *Pulau Ligitan* case, for instance, the International Court of Justice admitted that it is possible for a party to intervene even if it cannot show a jurisdictional connection with any of the other parties to the trial [11, par.35]. Also, in the World Trade Organization system of proceedings, the members that are not parties to the disputes have always been able to participate in all stages of the dispute [12, art. 4(11), 10, 17(4), 21]. The practice in investment arbitration, however, leaves very little possibility for the participation of third parties, which is motivated, among other things, by the effective resolution of the dispute in the specific individual case; however, a tendency to expand these procedures has also been identified [3, pp.27-28]. Another significant issue in this field is represented by the situation of those actors which, although do not have a legally protected interest in a particular case, still want to intervene, called *amici curiae*, very often represented by non-governmental organizations. Their participation can broaden the potential for legitimation, as they can reduce the distance between judicial proceedings and the national or global public [3, p.29]. While international regulations either didn't mention, or didn't allow for this possibility, the international judicial practice has developed in the sense that *amici curiae* may introduce opinions as part of the arguments of the litigating parties in certain courts. This possibility exists in the regional human rights courts, for instance, and even the WTO dispute settlement organs and investment arbitration tribunals, to some extent, allow it. Even more of this distance between international judicial proceedings and the public could be

reduced, however, if the intervention of *amici curiae* that are represented directly by individuals would be broadly allowed and encouraged.

Beyond participation and intervention, at the international judicial level procedural fairness should also be reimagined as to include, in a fair and equitable manner, these other interested entities that are not party to a particular dispute [4, p.81]. Their access is an important component, but the way in which they are dealt with procedurally matters, as well. Thus, it is mandatory that interested and non-litigating entities are heard fairly and impartially and that they have an effective and equal opportunity to present their arguments. This, of course, also applies to individuals, when they meet the conditions to be heard before an international court, i.e. when courts rule on their rights and obligations that derive from international law. When individuals do meets the conditions to be heard in an international dispute, they must be able to present their position regarding the implications of the case on their rights, on the manner in which the international law relevant to their rights and obligations may constrain the action of the parties to the dispute [4, p.86]. Just as legitimacy at the domestic level presupposes the participation of those whose rights and obligations are subject to judgment, legitimacy at the international level presupposes the same. Allowing courts to rule on the rights and obligations of rights holders without granting them a procedural voice is a serious threat to legitimacy and disregards the broad recognition of individuals as subjects of international law [4, p.84].

To conclude, it is true that the current international courts and quasi-judicial bodies allow wider access to potential litigants, and are more autonomous than their predecessors [1, p.491], often acting at a lever that is rather transnational rather than inter-state. This means, among others, that individuals and other entities, such as non-governmental organizations, have a significant influence on the selection and access to such courts, as well as on the implementation of the judgments rendered [13]. Ensuring a wider participation of other international actors than the traditional ones, and of other entities that are interested in the ongoing trials and judicial procedures, is also supported as an argument for the democratic legitimation of the authority of such courts, as well as for respecting individual rights and fundamental requirements of achieving justice, such as access and procedural justice. What is desirable for achieving such goals is a participation of individuals in the international legal and judicial order that is as direct as possible, or as little mediated as possible, and various forms of expanding such access and participation to international justice are currently encouraged and argued for. Moreover, a larger uniformity at the international judicial level is desirable in order to ensure a proper representation of various interests and the widest possible participation in the resolution of cases. For the purpose of the democratic legitimacy of international courts, it is imperative for them to show that the entities the rights and obligations of which are affected by court rulings have had the opportunity to express their opinion before the courts.

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