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# Final Thoughts

> If parties turn to the ICJ, they cannot expect that special attention will be paid to the requirements of 'justice'.[1]

This study synthesised the broad scope of contexts in which individuals interact with the International Court of Justice (ICJ, the Court). Its approach was binary, exploring this relationship in terms of the Court's procedural mechanisms, on the one hand, and its legal reasoning and decision-making, on the other hand.

First, this study sought to assess the extent to which individuals are integrated in the procedural law of the Court (Part I). Looking beyond disputes on the violation of a multilateral human rights treaty or customary human rights obligations, it identified thematic areas where individuals are still at the heart of the dispute: diplomatic protection, advisory proceedings, and those reviewing the decisions of certain administrative tribunals. Rather than examining how the Court has developed the law in such disputes, it noted the ways in which individuals are starkly absent from proceedings, analysing the underlying reasons for this and exploring how they could be further integrated.

Second, the study explored the extent to which individuals are considered in decisions of the Court (Part II). It again looked beyond disputes on the violation of a multilateral human rights treaty or customary human rights obligations, where individuals are inherently considered. Instead, it turned to areas greatly dealt with by the Court where certain human dimensions may potentially be overlooked as they are not the principal focus of the dispute. It therefore focused on territorial, maritime, or environmental disputes, as well as disputes around treaty interpretation or custom identification. It was observed that states parties

[1] David D. Caron and Christian Tomuschat, 'Article 2(3) UN Charter' in Andreas Zimmermann et al (eds), *The Statute of the International Court of Justice: A Commentary* (3rd edn, OUP 2019) 133.



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often raise concerns to the Court about the relevance of their populations. It was therefore discussed why, despite this, the Court does not factor in such considerations in its decision-making.

The conclusions reached may come as no surprise to *connaisseurs* of the Court: individuals are both integrated in the procedural law of the Court and considered in its decisions to a minor extent. While granting legal standing to individuals was considered during the establishment of the Court's predecessor, it was denied for fear of threatening state sovereignty (Chapter 1). This, however, did not lessen the types of disputes that would arrive at the Court's docket with a clear connection to one or several individuals. Diplomatic protection proceedings, for example, were the historical avenue enabling the protection of injured individuals (Chapter 2). Yet, the fiction characterising this practice would result in the absence of the individual in proceedings, despite his or her centrality to the dispute. A similar lack of initiative can be noted in advisory proceedings, where questions of interest to communities of individuals are often posed to the Court (Chapter 3). Despite the procedural avenues being available to the Court, I have argued that they have not been exercised by the latter. Conversely, it made attempts in advisory proceedings reviewing the decisions of certain administrative tribunals (Chapter 4), adjusting its procedural mechanisms to satisfy the principle of the equality of the parties. Yet, it was unable to go so far as to allow individuals to stand as equal parties to international organisations, or to use procedural discretion in other ways to more convincingly equalise the parties. This contributed to the relevant administrative tribunals removing their jurisdiction from the Court.

The conclusion is no different when examining how the Court considers individuals in its decisions (Part II). While state parties have brought arguments forward that coastal fishing populations should be factored in to determine if tacit agreements existed between parties on a maritime boundary, as a relevant circumstance in maritime boundary delimitation or as historic fishing rights, the Court has perceived such arguments as 'non-legal' and has prioritised the stability of boundaries (Chapter 6). The threshold for individuals to be considered as a relevant circumstance is exceptionally high and has only been met in one instance. In territorial disputes, the Court has only considered individuals' behaviour as evidence of the Court's sovereignty as opposed to a reflection of their own desires (Chapter 7). In both instances, equity, which would allow for the greater consideration of individuals, is an afterthought as opposed to an element of the legal reasoning.

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In environmental disputes, opportunities to strengthen the nexus between human rights and environmental matters have also been missed, despite promising disputes being raised by states, direct questions being asked about the relevance of local populations, and relevant principles being invoked (Chapter 8). Only in the realm of the interpretation of treaties and the identification of customary law have initiatives been uniquely taken by the Court to recognise individuals' rights (Chapter 9).

What these procedural and substantive instances examined in this book show is that the relationship between the individual and the ICJ is not a distant or improbable subject of inquiry. On the contrary, each chapter has demonstrated the clear relevance of individuals in the matters under examination. Each chapter has also illustrated the attempts made by individuals, state litigants, or both for greater inclusion of individuals both in law and practice. Such attempts remain evident in new cases filed and requests for advisory opinions at the time of writing.

The natural question that arises is why such attempts have remained largely unfulfilled. Why have efforts to integrate individuals procedurally and substantively been so unsuccessful? This study has identified and analysed the specific reasons behind the reluctance of both the Court and state litigants.

This overall reticent approach can be rooted in the historical decision to limit *locus standi* before the Court to states. Indeed, the absence of the individual's *locus standi* has fostered a state-centred culture and mindset at the Peace Palace where emphasis is placed on states' interests, both procedurally and in legal reasoning. It has also meant that they have limited opportunities to express their views and that consideration for them in judgments will be at the goodwill of both state litigants and the Court. Procedural and substantive law are difficult to separate and 'react upon each other' in every legal system[2] and, to an extent, explains why the findings of this study have been largely analogous whether discussing the individual in the law or the practice of the ICJ.

This reluctance manifests itself in a multitude of ways explored in this book – including how the Court occasionally perceives disputes where individuals are in focus. Rosenne refers to the *Application of the Convention of 1902 Governing the Guardianship of Infants (Netherlands v. Sweden)*, where the Netherlands sued Sweden for allegedly violating the 1902 Convention on the guardianship of infants by placing a Dutch

[2] Clarence Wilfred Jenks, *The Prospects of International Adjudication* (Stevens 1964) 184.

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child living in Sweden under a Swedish regime of protecting upbringing.[3] He explains that the case was originally entitled *Case concerning the Guardianship of an Infant* in the Court's General List, which emphasised the human being in the matter as opposed to implying that the case was a matter of 'abstract treaty interpretation'.[4]

A similar observation can be made in *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*. Leading up to this case, Italian courts had entertained civil claims brought against Germany by victims of Nazi crimes seeking reparation. Germany seized the Court claiming that Italy had failed to respect its jurisdictional immunity. The Court sided with Germany, after assessing whether immunity was applicable to acts committed by the armed forces of a state in the course of conducting an armed conflict.[5] Judge Yusuf criticised that the real-life situation of the Nazis demanded an examination not of this question but of whether the refusal of Italian courts to grant jurisdictional immunity to Germany constituted an internationally wrongful act.[6] The emphasis was therefore on the link between the denial of immunity by the Italian courts, on the one hand, and the lack of reparations, on the other hand.[7] In his view, the Court's focus was 'too abstract and formalistic' and best left 'for academic papers and scholarly discussions'.[8] This might, in part, be influenced by the Court's isolated character, as described by Philip Allott.[9]

Therefore, while much has been done and can be celebrated at the Court in both its jurisprudence and procedure, the main hindrance to any strengthening of the relationship between the individual and the Court lies in the willingness and creativity of state litigants and of the Court to navigate the contours crafted by Article 34(1) of the latter's Statute both in law and in practice.

I have argued that this can be done. In law, both state litigants and the Court have the power to summon witnesses, and state litigants may also

[3] *Case concerning the Application of the Convention of 1902 Governing the Guardianship of Infants (Netherlands v. Sweden)* (Judgment) [1958] ICJ Rep 55, 63.
[4] Shabtai Rosenne, 'Reflections on the Position of the Individual in Inter-state Litigation in the International Court of Justice' in Pieter Sanders (ed), *International Arbitration Liber Amicorum for Martin Domke* (Springer 1967) 240–51, 114.
[5] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* (Judgment) [2012] ICJ Rep 99, 61.
[6] Ibid 291 [5] (Separate opinion of Judge Yusuf).
[7] Ibid [9].
[8] Ibid [7].
[9] Philip Allott, *Eunomia: New Order for a New World* (OUP 1990) 240.

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give relevant individuals a platform as a part of their delegations during oral proceedings. In practice, I have argued that while the Court may not be able to go beyond state litigants' requests, it could make more of an effort to respond to such concerns when raised by states. I have challenged the Court's concerns for stability by arguing that its perception of this concept can be more accommodating. I have argued that its concerns for formalism might harm its legitimacy more than uphold it.

This stems from a social idealist approach to international law, which pleads for a greater balance between states and individuals, and places more emphasis on the role of the individual in the international legal order. Through this lens, it is argued that the Court's effectiveness and legitimacy are compromised through its current approach. The Court's effectiveness – the measurement of the degree to which a court accomplishes its specific objective aim – depends on its ability to adopt an all-encompassing approach to ensuring peace. It also depends on its ability to incorporate the UN Charter's people-focused preamble into this approach, as the principal judicial organ of the UN. Finally, it must confer legitimacy to the UN as a judicial custodian. This legitimacy stems from the fairness of its process and the just quality of its decisions. From a social idealist approach, both are at stake when examining the Court's relationship with individuals.

Admittedly, any assessment of legitimacy is a slippery slope and frustratingly intangible.[10] The same holds true for effectiveness and for yardsticks such as justice, fairness, and democracy. Such assessments are therefore inevitably subjective, especially when informed by an international legal theory. The delicate tensions between the state and the individual, stability and development of international law, law and justice, *lex lata* and *lex ferenda*, apology and utopia, and the role that the Court plays amidst them all, has shadowed me throughout the writing of this study and will, in all probability, remain a part of my thinking beyond,[11] for it is certainly not enough to only understand the functioning of the World Court in these respects. Rather, we must commit ourselves to understanding these debates in the wider context of international law. The scholarly efforts of this study have been put forth in this spirit.

[10] Brian McGarry and Yusra Suedi, 'Judicial Reasoning and Non-state Participation before Inter-state Courts and Tribunals' (2022) 21(1) *The Law & Practice of International Courts and Tribunals* 123, 142.

[11] Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (CUP 2006).

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