3

Advisory Proceedings

> I believe that attenuation of participation is unwise as a political strategy and ill-considered as a technique for increasing the rationality of judicial decision.[1]

Conforming to its role as the principal judicial organ of the United Nations,[2] the International Court of Justice (ICJ, the Court) is competent not only to resolve conflicts between states but also to provide its opinion on any legal questions from authorised United Nations (UN) organs and specialised agencies – not from states and much less from individuals.

In this chapter, I observe that individuals are no more procedurally integrated in advisory proceedings than they are in the contentious cases examined in other chapters of this book. One would imagine that in advisory proceedings where the dichotomy of 'parties versus non-parties' is absent and everybody – governments and non-state actors alike – is technically a 'non-party', that individuals may play a more prominent role. I observe in this chapter that this is not the case.

The Court's *ratione personae* jurisdiction in the advisory realm excludes states, although it has been subject to debate in the past. The rationale for excluding both states and individuals remains the same. Under the League of Nations, Article 14 of the League Covenant authorised the Permanent Court of International Justice (PCIJ, Permanent Court) to 'give an advisory opinion upon any dispute or question referred to it by the Council or the Assembly'.[3] Following the Second World War, however, the Informal Inter-Allied Committee wished to expand this to 'all international associations of an inter-State or inter-

[1] Michael Reisman, 'Accelerating Advisory Opinions: Critique and Proposal' (1974) 68(4) *The American Journal of International Law* 648, 668–69, fn. 89.

[2] Charter of the United Nations, 1 UNTS XVI, Article 92 [hereafter United Nations Charter].

[3] Juan José Quintana Aranguren, *Litigation at the International Court of Justice: Practice and Procedure* (Brill/Nijhoff 2015) 1227.

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governmental character possessing the necessary status',[4] and even to 'any two or more States acting in concert' upon certain conditions.[5] The 1944 Dumbarton Oaks Conference, on the other hand, adopted proposals to restrict the capacity to request advisory opinions to the Security Council alone.[6] Later, the Washington Committee of Jurists struck a balance between these two extremes, by extending jurisdiction to the UN General Assembly[7] and specialised agencies within the context of the General Assembly's powers.[8] As for the proposal to allow states to request advisory opinions, this was rejected to avoid the Court becoming 'overloaded with individual applications, thus detracting from the Court's more important duties'.[9] The same concern holds true for the inclusion of individuals.

Despite this, advisory opinions have often and increasingly been requested for matters directly related to individuals. Requests in the form of abstract legal questions have been filed for matters of public interest related to the wellbeing of individuals – such as the legality of nuclear weapons or climate change obligations of states.[10] Such questions have also concerned human rights obligations of direct application to individuals, as seen in the *Reservations to the Genocide Convention* (1951) advisory opinion.[11] The Court has also been asked legal questions 'actually pending between two or more States', according to Rules 102(3) and 106 of the Rules of the Court. Such requests have often related to the rights of identified communities (for instance, the Kosovars, Palestinians,

[4] United Nations, 'Report of the Informal Inter-Allied Committee on the Future of the Permanent Court of International Justice' (1945) 39(1) Supplement: Official Documents *The American Journal of International Law* 1, 40 [143].

[5] Ibid 21–22 [68].

[6] United States, Department of State, 'Dumbarton Oaks Proposals for a General International Organisation: To Be the Subject of the United Nations Conference at San Francisco' (1945) 66 *Conference Series*, Chapter VIII, Section A [6] http://cdm16614.contentdm.oclc.org/cdm/ref/collection/isl3/id/9851.

[7] Michla Pomerance, *The Advisory Function of the International Court in the League and U.N. Eras* (Johns Hopkins University Press 1973) 27.

[8] Ibid 30.

[9] Ibid 28.

[10] *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, 241–42 [29]; A/RES/77/276.

[11] *International Status of South West Africa* (Advisory Opinion) [1950] ICJ Rep 128; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) [1971] ICJ Rep 16.

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Namibians, Western Saharans or Chagossians).[12] Certain rights of UN staff members have also been the subject of other requests.[13] Individuals have therefore been at the heart of most advisory requests. Thus, their participation in advisory proceedings is not an absurd proposition.

In this chapter, I argue that the Court's procedural rules enable individuals' participation in advisory proceedings despite its reluctance to facilitate this. In the advisory context, procedural flexibility is encouraged to meet standards of democracy, a yardstick by which to measure legitimacy of the judicial process (Section I.1.2). Their participation is also relevant for the Court's effectiveness, given one of its aims to support the UN regime and its protection of human beings through its advisory function.

I first dispel the myth that witnesses are limited to the confines of contentious proceedings (Section 3.1). I then discuss the Court's sparse engagement with *amici curiae* in the advisory context (Section 3.2). Finally, I explore the potential of the analogous extension of Article 66(2) of the Court's Statute, authorising the furnishing of information by entities beyond states and international organisations (Section 3.3). Section 3.4 concludes.

3.1 Witnesses in Advisory Proceedings?

There are two main ways for individuals to have their voices heard in relevant advisory proceedings. The first is by the government participating in oral proceedings and allowing an affected individual to make a statement as part of the government's delegation during its speaking time, as discussed in Chapter 2. Such authorisation was first granted to Professor Rotblat as part of the delegation of the Solomon Islands in the

[12] *Accordance with international law of the unilateral declaration of independence in respect of Kosovo* (Advisory Opinion) [2010] ICJ Rep 403; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136; Ibid (*Namibia*); *Western Sahara* (Advisory Opinion) [1975] ICJ Rep 12; *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) [2019] ICJ Rep 95; *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem* (Request for Advisory Opinion) [2023].

[13] *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 174; *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commissionon Human Rights* (Advisory Opinion) [1999] ICJ Rep 62.

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Nuclear Weapons advisory proceedings,[14] though he was an expert as opposed to an affected individual. The *Chagos* advisory opinion stands as the only example in practice at the time of writing whereby an affected individual made a statement to shed light on the human dimensions of the (Section 2.3).[15] This option is procedurally straightforward and relies entirely on the initiative of the government concerned, which must either recognize the value of the individual's oral contribution in terms of democratic standards for measuring legitimacy or view it as advantageous to its litigation strategy.

The alternative option, which will be the focus of this section, is for the individual to provide oral witness testimony. The participation of concerned witnesses can generally assist the Court in the elucidation of facts necessary to resolve the matter, while also giving a platform to individuals to contribute to a case that will bear consequences for them. However, the Court has not been receptive to individuals' requests to give oral testimony. One of the reasons for this is that it does not wish to deal with fact-finding in advisory proceedings, believing that its Statute and Rules do not equip it with fact-finding capacity in the advisory context.

The role of evidence varies between contentious and advisory proceedings, influencing the degree of involvement an individual may have. The term 'evidence' is not even employed in the context of advisory proceedings, but rather the terms 'information'[16] or 'written statements'[17] are used. Evidence, *stricto sensu*, is a more appropriate term for contentious proceedings where alleged facts are established or disproved. Conversely, Article 65 limits the competence of the Court to give advisory opinions on legal questions only, and the Court has specified that '[i]f a question is not a legal one, the Court has no discretion in the matter; it must decline to give the opinion requested'.[18] The Court therefore does not wish to deal with fact-finding in advisory proceedings.

However, it is quite commonplace to be presented with an advisory request on a matter that, while legal in its nature, does require some

[14] Verbatim record 1995/32, 32 [14].
[15] Verbatim record 2018/20, 71–72 [4] (Philippe Sands).
[16] Statute of the International Court of Justice, Article 66 (2).
[17] International Court of Justice, Rules of Court, Article 105.
[18] *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)* (Advisory Opinion) [1962] ICJ Rep 151, 155.

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probe into facts. According to the Court, the inclusion of factual enquiries does not obliterate the question's legal quality. Indeed, in its advisory opinion on the *Legal consequences for States of the continued presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* (1971), it stated, '[T]he contingency that there may be factual issues underlying the question posed does not alter its character as a "legal question" as envisaged in Article 96 of the Charter. The reference in this provision to legal questions cannot be interpreted as opposing legal to factual issues'.[19] It is therefore possible for the Court to receive a request for an advisory opinion on a legal question in which facts play a role.

Should this be the case, it can be envisaged to call witnesses to speak on such facts. This can be presumed as the Court refused a request for oral witness testimony in a case where it considered that no factual component existed. In the 1950 advisory opinion on the *International Status of South West Africa*, the then-Registrar received a request from Mr. R.H. Swale, chief of the Zulus in South Africa, offering his services as a witness in the case. Mr. Swale justified this request to represent the native population of South West Africa by asserting that he is highly competent, given his unique experience and qualifications that relate to the facts of the case.[20] The proposal was refuted by the Court's President at the time, on the basis that the advisory opinion 'involves only legal questions. It is therefore believed that it will not be necessary to call witnesses during the hearings.'[21]

One can imagine that witnesses would be particularly valuable if the facts of the case were controversial and needed elucidation. However, in such instances, the Court takes the more firm approach of declining to give the advisory opinion altogether. This approach was established by the Court's predecessor. The Informal Inter-Allied Committee on the future of the PCIJ insisted that an advisory question 'must be based on an agreed and stated set of facts'[22] and that advisory questions with diverging facts should be refused.[23] Furthermore, the PCIJ had once declined giving an advisory opinion because the particular question 'raised a

[19] *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (n. 11).
[20] *International Status of South West Africa* (n. 11) 340–41.
[21] Ibid 342.
[22] 'Report of the Informal Inter-Allied Committee on the Future of the Permanent Court of International Justice' (n. 4) 22 [69].
[23] Ibid 23 [73].

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question of fact which could not be elucidated without hearing both parties'.[24] Indeed, it stated in *Eastern Carelia* that 'there is [not] an absolute rule that the request for an advisory opinion may not involve some enquiry as to the facts, but, under ordinary circumstances, it is certainly expedient that the facts upon which the opinion of the Court is desired should not be in controversy, and it should not be left to the Court itself to ascertain what they are'.[25] It then deemed itself 'unable to pursue the investigation' due to a lack of consent from the Russian government, as well as 'other considerations already averted to in this opinion, which point to the same conclusion'.[26]

Over half a century later, in the *Western Sahara* advisory opinion, the Court reflected on the PCIJ's *Eastern Carelia* judgment and concluded that while the refusal of a state to take part in the proceedings certainly played a role, it was in fact the 'actual lack of "materials sufficient to enable it to arrive at any judicial conclusion upon the question of fact"'[27] that prevented the PCIJ from rendering an advisory opinion.[28] Indeed, the Court deems itself toothless when it comes to establishing evidence in advisory proceedings. This is because while Articles 48–52 of the ICJ Statute cover matters pertaining to evidence on contentious cases, no similar provisions were drafted in the context of advisory proceedings. The Court believes that it must depend on the underlying facts of the advisory request being sufficient and uncontested.

For this reason, the government of Spain was against the Court pronouncing an advisory opinion on the question of Western Sahara in 1974, as it considered the Court unequipped to 'fulfil the requirements of good administration of justice as regards the determination of the facts'.[29] Judge Federico de Castro agreed, pronouncing in a separate opinion that 'Today, it would seem certain that, when the fact on the existence of which an advisory opinion is requested is disputed or in controversy, the Court has no competence to decide upon its existence'.[30] He discussed that this would require the Court to adopt a more active

[24] *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* (Advisory Opinion) [1950] ICJ Rep 65, 72; *Eastern Carelia* (Advisory Opinion) [1923] PCIJ Series B, 28.
[25] Ibid (Eastern Carelia) 28–29.
[26] Ibid 29.
[27] Ibid 28.
[28] *Western Sahara* (n. 12) 28–29 [45]–[46].
[29] Ibid 28 [44].
[30] Ibid 138–39 (Separate opinion of Judge de Castro).

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fact-finding role in order to establish the disputed facts but that its Statute and Rules do not equip the Court with the powers to do so.[31] However, the Court considered that it had sufficient evidence before it to provide an advisory opinion in this affair[32] and came to the same conclusion in the *Wall* advisory opinion.[33] Therefore, the Court has made clear that it does not wish to deal with fact-finding in advisory proceedings, only accepting advisory questions with a factual component only when uncontroversial.

Practice has demonstrated that the Court does not believe the Statute and the Rules provide it with the procedural tools needed to clarify potentially contentious facts. In the advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the mayors of Hiroshima and Nagasaki wished to give witness oral testimony about the devastating damage caused in their respective cities, even though they had originally requested the Court to be experts. Given that neither the practice of inviting witnesses nor that of inviting experts was commonplace in the Court's advisory context, it suggested that – similarly to the Chagossians in the Mauritian delegation in the *Chagos* advisory proceedings – the mayors be included within the delegation of Japan, even though they were not pleading any point of law.[34] According to former ICJ President Rosalyn Higgins, 'not only was this sensible in the particular circumstances of these mayors; but it also for the time being put to one side [a] complex issue: can the usual procedures regarding witnesses applicable in contentious cases be applied also in advisory proceedings?'[35]

I believe that the Court has every right to analogously apply Articles 48–52 of its Statute where it considers it necessary to acquire relevant information from relevant private persons. This would enhance the Court's technocratic expertise and therefore the procedural legitimacy attached to the opinion. This is possible through Article 68 of the ICJ Statute, which reads that 'In the exercise of its advisory functions the Court shall further be guided by the provisions of the present Statute which apply in contentious cases to the extent to which it recognises

[31] Ibid.
[32] Ibid 29 [47].
[33] *Wall* (n. 12) 162 [58].
[34] Rosalyn Higgins, 'The Judicial Determination of Relevant Facts, Speech to the Sixth Committee of the General Assembly, 2 November 2007' in Rosalyn Higgins (ed), *Themes and Theories: Selected Essays, Speeches, and Writings in International Law* (OUP 2009) 1369.
[35] Ibid.

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them to be applicable'.[36] Article 68 is an umbrella provision and a residual rule that allows the entire body of rules regarding contentious cases to be applied by analogy in advisory proceedings.[37] It is therefore an appropriate path to apply the rules of evidence to advisory proceedings. It is reinforced by Rule 102(2) of the Court's Rules: 'The Court shall also be guided by the provisions of the Statute and of these Rules which apply in contentious cases to the extent to which it recognises them to be applicable. For this purpose, it shall above all consider whether the request for the advisory opinion relates to a legal question actually pending between two or more states'.[38]

The term 'to the extent to which it recognises them to be applicable' in Article 68 must be emphasised. It indicates that the Court has the power and the discretion to determine if certain articles of the Statute pertaining to contentious cases may be applicable to the advisory context.[39] This has been confirmed on two occasions. The first was in the 1950 *Advisory Opinion Concerning the Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, in which the Court explained that '[i]t is (. . .) clear that [Article 68's] application depends on the particular circumstances of each case and that the Court possesses a large amount of discretion in the matter'.[40] In another instance, in the *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* advisory opinion of 1951, the Court restated that '[A]rticle 68 of the Statute recognises that the Court has the power to decide to what extent the circumstances of each case must lead it to apply to advisory proceedings the provisions of the Statute which apply in contentious cases'.[41] Finally, the Court, in the 1971 *South West Africa* advisory opinion, described the advisory procedure as 'relatively unschematic'.[42] Article 68 is therefore a 'permissive rule'[43] that enables the Court to 'pick and

[36] Statute of the International Court of Justice, Article 68.
[37] Quintana Aranguren (n. 3) 1245.
[38] International Court of Justice, *Rules of Court*, Rule 102(2).
[39] Shabtai Rosenne, *The Law and Practice of the International Court, 1920–1996*, vol 3 (3rd edn, Brill/Nijhoff 1997) 1676.
[40] *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* (n. 24) 72.
[41] *Reservations to the Convention on Genocide* (Advisory Opinion) [1951] ICJ Rep 15, 19. See also Quintana Aranguren (n. 3) 1245.
[42] *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (n. 11) 26 [38]. See also Rosenne (n. 39) 1676.
[43] Hugh Thirlway, 'The International Court of Justice 1989–2009: At the Heart of the Dispute Settlement System?' (2010) 57(3) *Netherlands International Law Review* 347, 388.

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choose from the toolbox of its contentious procedure when dealing with advisory matters'.[44]

It is important to note that not every article in the Statute that is applicable to contentious proceedings is applicable to advisory proceedings. Certain procedural institutions would not be applicable because they are too dependent on certain core factors that define contentious proceedings and that distinguish them from advisory proceedings. For instance, advisory proceedings do not have parties, whereas contentious proceedings are governed by this feature, seeking to resolve disputes between two state litigants. Thus, there are some procedural aspects that are logically applicable to contentious proceedings because parties are involved – but could not apply in advisory proceedings. For instance, third-party intervention (governed by Articles 62 and 63 of the ICJ Statute) finds no place in advisory proceedings where parties do not exist. Another example is Article 53 of the ICJ Statute, explaining the consequences of the non-appearance of a party.[45]

Nonetheless, the rules that govern witness participation do not fall under this caveat as they are not dependent on the feature of parties in contentious cases. Although it could be argued that these issues are closely tied to questions of evidence, which are not present in advisory proceedings, the absence of the term 'evidence' in the context of advisory proceedings does not mean that evidence is either unnecessary or undesirable. In reality, there are certain fact-intensive advisory questions – for example, *Wall, Obligations of States in respect of climate change* or *Policies and Practices of Israel* – in which certain procedural tools, such as witness testimony, would be useful.

Therefore, Judge de Castro adopted a very restrictive reading of Article 68 in the *Western Sahara* advisory opinion, when he concluded that the Court is unable to apply fact-finding tools to advisory proceedings. To him, 'even if article 68 of the Statute is interpreted in the broadest manner, it would not seem that in advisory proceedings the Court is entitled'.[46] Under a more open interpretation of Article 68, there is no reason why this would not be possible; the matter is within the Court's

[44] Jean-Pierre Cot and Stephan Wittich, 'Article 68' in Andreas Zimmermann et al (eds), *The Statute of the International Court of Justice: A Commentary* (3rd edn, OUP 2019) 1868. See also Quintana Aranguren (n. 3) 1245.

[45] Quintana Aranguren (n. 3) 1245.

[46] *Western Sahara* (n. 12) 138 (Separate opinion of Judge de Castro).

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discretion, and the only obvious obstacle would be clauses that could not practically apply.

The Court has, in the past, analogously applied Articles 48–52 in advisory proceedings. In the *Judgment No.2867 of the Administrative Tribunal of the International Labour Organisation upon a Complaint Filed against the International Fund for Agricultural Development* (IFAD) advisory opinion, the Court resorted to Article 49 of the Statute and called upon one of the organisations involved to produce certain documents.[47] This advisory opinion was requested by IFAD and concerned the validity of a judgment rendered by the International Labour Organisation Administrative Tribunal (ILOAT). The ILOAT judgment was the outcome of a dispute between IFAD and its employee of Venezuelan nationality, Ana Teresa Saez García. In 2011, the Court's Registrar requested the IFAD to produce copies of its employment contract with Ms. García for the years 2005 and 2006, and the IFAD responded accordingly. It provided the contract, as well as other subsequent employment contracts. It also requested the Court to authorise it to present additional observations and documents to the Court in relation to the employment contracts.[48] The judgment specifies that the request of the Court was an application of its powers under Article 49 of the Statute. This article is part of the group of articles – between Articles 48 and 52 – addressing the gathering of evidence by the Court. It reads that '[t]he Court may, even before the hearing begins, call upon the agents to produce any document or to supply any explanations'.[49]

It is perhaps more understandable that the Court would apply articles on acquiring evidence in advisory proceedings reviewing the validity of the decisions of administrative tribunals; such cases were in fact contentious cases brought under the heading of advisory opinions, as the parties concerned were an individual and an international organisation, neither of whom had *locus standi* at the World Court (see Chapter 4). But the application of fact-finding tools in the Statute has been considered in other advisory proceedings by the Court's predecessor. In certain cases, the PCIJ considered the appointment of experts,

[47] *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organisation upon a Complaint Filed against the International Fund for Agricultural Development* (Advisory Opinion) [2012] ICJ Rep 10, 19 [15].

[48] Ibid.

[49] Statute of the International Court of Justice, Article 49.

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pursuant to its Statute's Article 50. The advisory opinion on the *Jurisdiction of the European Commission of the Danube between Galatz and Braila*[50] is an example. This case stemmed from a conflict between France, Great Britain, and Italy against Romania with regards to the competence of the European Commission of the Danube. Romania denied that the European Commission had jurisdiction in the sector from Braila to Galatz.[51] Here, the Permanent Court acknowledged that the facts that needed examination had already been investigated by the Special Committee appointed by the League of Nations. For this reason, it was not necessary to make new investigations and enquiries.[52] This means that it deemed itself competent to use the fact-finding tools at its disposal, if necessary.

In the light of the above, the articles related to witness testimony can be applied in advisory proceedings.[53] Indeed, although advisory opinions are not as high in number as judgments on contentious matters, it is still important for the Court to integrate relevant individuals in advisory proceedings on matters that concern them to meet standards of both technocracy and democracy that are used to measure its legitimacy.

3.2 Individuals as *amici curiae*

This section will examine the instances in which the Court has been confronted with requests for *amicus curiae* participation from individuals. To do so, it will explore the Court's more elaborate confrontations with *amicus curiae* from non-governmental organisations (NGOs), who often defend, *inter alia*, vulnerable individuals. It argues that while the Court's increased openness to civil society in theory is noteworthy, it raises numerous questions about its actual engagement with such entities in practice.

Non-state actors have made attempts to be *amici curiae* before the Court in contentious proceedings such as *Asylum (Colombia v. Peru)*,[54]

[50] *Jurisdiction of the European Commission of the Danube between Galatz and Braila* (Advisory Opinion) [1927] PCIJ Series B.
[51] Ibid 28.
[52] Ibid.
[53] Christian J. Tams, 'Article 50' in Andreas Zimmermann et al (eds), *The Statute of the International Court of Justice: A Commentary* (3rd edn, OUP 2019) 1438–39.
[54] Correspondence (8 October 1949), 227–28.

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Gabčikovo-Nagymaros Project (Hungary/Slovakia),[55] and *Jurisdictional Immunities (Germany v. Italy)*.[56] However, certain similar incidents in advisory proceedings are the focus of this section.

As aforementioned, there are no parties *per se* in advisory proceedings. However, when facing a request for an advisory opinion, the Court will decide which states or international organisations are permitted to provide information on the question. Indeed, Article 66(2) of the ICJ Statute reads as follows:

> The Registrar shall also, by means of a special and direct communication, notify any state entitled to appear before the Court or international organisation considered by the Court, or, should it not be sitting, by the President, as likely to be able to furnish information on the question, that the Court will be prepared to receive, within a time-limit to be fixed by the President, written statements, or to hear, at a public sitting to be held for the purpose, oral statements relating to the question.[57]

The priority accorded to states' interests is palpable in this clause, which confirms that states are *entitled* to appear before the Court – whereas international organisations are limited to those that the Court deems as capable of providing useful information.[58] Regardless, Article 66(2) – also confirmed in Article 105 of the Rules of Procedure – prohibits individuals from providing information. This was confirmed by former Registrar Stanislas Aquarone, who stated when describing the wording in Article 66(2) that *expressio unius est exclusio alterius*.[59] This famous adage, signifying that the express mention of one thing excludes all others, confirms that this clause had every intention to exclude entities that are neither states nor certain international organisations. Indeed, as the Court confirmed in the *Admissibility of Hearings of Petitioners by the Committee of South West Africa* (1956) advisory opinion, "unless

[55] Luigi Crema, 'Testing *Amici Curiae* in International Law: Rules and Practice' (2013) 22(1) *The Italian Yearbook of International Law Online* 91, 121; Eric De Brabandere, 'NGOs and the "Public Interest": The Legality and Rationale of *Amicus Curiae* Interventions in International Economic and Investment Disputes' (2011) 12(1) *Chicago Journal of International Law* 85, 94.

[56] Bruno Simma, 'Human Rights before the International Court of Justice: Community Interest Coming to Life?' in Christian J. Tams and James Sloan (eds), *The Development of International Law by the International Court of Justice* (1st edn, OUP 2013) 316, n. 63.

[57] Statute of the International Court of Justice, Article 66(2).

[58] Connie Peck and Roy S. K. Lee (eds), *Increasing the Effectiveness of the International Court of Justice: Proceedings of the ICJ/UNITAR Colloquium to Celebrate the 50th Anniversary of the Court*, vol 29 (Kluwer Law International 1997) 53.

[59] Correspondence (29 July 1970), 639.

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individuals and other non-state bodies have been explicitly granted procedural rights before an international forum they will not be accorded."[60] Regardless, the Court has been confronted by requests for *amicus curiae* participation, a well-known practice in international litigation. It has also arguably been unreceptive to *amicus curiae* briefs from non-state actors – NGOs and individuals alike.

While no universal definition of *amicus curiae* participation exists, it is a practice whereby an entity that is not a party to the case submits a brief or makes an oral statement with respect to the law or the facts, upon its initiative, in order to assist the court or tribunal to conduct a better proceeding and conclude a better judgment. Whether an entity will be allowed to participate as *amicus curiae* depends, on the whole, on the interest of the court of tribunal – rather than the interest of the requesting entity.[61] While *amici curiae* were traditionally understood to be neutral bystanders providing information as independent experts,[62] the practice has evolved to accommodate *amici* strategically advocating for causes in the public interest.[63]

While unsurprising that *amicus curiae* intervention is a welcome practice before criminal and human rights bodies,[64] and various reform proposals in investor–state dispute settlement (ISDS) have advocated for it,[65] it has been met with hesitance before inter-state courts and tribunals.[66]

[60] *Admissibility of hearings of petitioners by the Committee on South West Africa* (Advisory Opinion) [1956] ICJ Rep 23. See also Peck and Lee (n. 58) 53.

[61] Lance Bartholomeusz, 'The *Amicus Curiae* before International Courts and Tribunals' (2005) 5(3) *Non-state Actors and International Law* 209, 275.

[62] See for example *Decision on Request for leave to file amicus curiae brief* (Judgment) [2014] ECCC Trial Chamber 2 [5].

[63] See for example ICSID Arbitration Rules, Rule 37(2)(c) – the *amicus* must have a 'significant interest in the proceeding'. See also Avidan Kent and Jamie Trinidad, 'Amicus Curiae Participation in International Proceedings: Forever Friends?' in Avidan Kent, Nikos Skoutaris and Jamie Trinidad (eds), *The Future of International Courts* (Routledge 2019) 236.

[64] European Convention on Human Rights, 213 UNTS 221, Article 36(2); Rules of Procedure of the Inter-American Court of Human Rights, Rule 44; See, for example, International Criminal Court, Rules of Procedure and Evidence, Rules 103, 149. See also Hannah Woolaver and Sarah Williams, 'The Role of the *Amicus Curiae* before International Criminal Tribunals' (2006) 6(2) *International Criminal Law Review* 151.

[65] See generally, Chen Yu, '*Amicus Curiae* Participation in ISDS: A Caution against Political Intervention in Treaty Interpretation' (2020) 35(1–2) *ICSID Review – Foreign Investment Law Journal* 223.

[66] 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.

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The practice was initially accepted at the International Tribunal for the Law of the Sea (ITLOS)[67] but subsequently refused in one instance.[68] Conversely, the subject has been controversial at the World Trade Organisation (WTO), with the Appellate Body accepting the procedure despite WTO Member States strongly opposing it.[69] It is therefore perhaps no surprise that the same reluctance has been noted by the World Court.

The Court has granted *amicus curiae* rights to an NGO on one occasion: in a 1950 advisory opinion entitled *International Status of South West Africa*. The UN General Assembly requested the Court to advise on the legal status of the territory named South West Africa when under colonial rule by the German Empire and subsequently South Africa, and known today as Namibia. Following the First World War, this territory was part of the League of Nations mandate system. However, after the League's dissolution after the Second World War, it was unclear what would become of this territory, as it did not automatically fall under the UN trusteeship system. Therefore, the question was posed to the Court, which, as per Article 66(2) of its Statute, set a deadline (20 March 1950) to receive written statements from states.[70]

On 7 March 1950, a request to provide information, in accordance with Article 66(2), was received by the Court from the International League of Human Rights. This was an NGO that later, in 1976, became the International League for the Rights of Man and that had been heavily involved in colonial questions since its establishment.[71] As well as asking for the simple right to provide information, this organisation also requested a deadline extension to do so.[72]

The International League of Human Rights was an NGO as opposed to an international organisation. The latter is generally understood to be an organisation of states established by a treaty, governed by international

[67] *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* (Advisory Opinion) [2011] ITLOS, [13].

[68] *The "Arctic Sunrise" Case (Kingdom of the Netherlands v. Russian Federation)* (Order of 22 November 2013) [2013] ITLOS, [15]–[19].

[69] See World Trade Organisation, 'Participation in Dispute Settlement Proceedings' www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c9s3p1_e.htm#fnt2.

[70] *International Status of South West Africa* (n. 11) 128–30.

[71] Roger S. Clark, 'The International League for Human Rights and South West Africa 1947–1957: The Human Rights NGO as Catalyst in the International Legal Process' (1981) 3(4) *Human Rights Quarterly* 101, 102–3.

[72] Ibid.

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law and with a legal personality distinct from that of its members.[73] The International League of Human Rights did not objectively fulfil these criteria. In the Court's eyes, however, it was deemed an international organisation and authorised to submit an *amicus curiae* brief.[74] The then-Registrar thus responded favourably:

> Your letter March 7 *re* advisory opinion South-West Africa *stop* Am instructed to let you know that International Court justice is prepared to receive from you before April 10 1950 a written statement of the information likely to assist Court in its examination of legal questions put to it in Assembly request concerning South-West Africa *stop* This information confined to legal questions must not include any statement of facts which Court has not been asked to appreciate stop Court does not contemplate resorting further to League for Rights of Man in present case.[75]

Despite this, the International League of Human Rights failed to meet the deadline[76] missing the ideal opportunity to 'impress the Court upon the advantages of such participation'.[77] In fact, its statement that it prepared to submit to the Court included many arguments as to why the Court should be more open to NGO participation in advisory proceedings.[78]

Despite this one authorisation, the Court rejected subsequent requests to submit *amicus curiae* briefs by the Federation of International Civil Servants' Associations in *Awards of United Nations Administrative Tribunal* (1954) upon the grounds that it was 'not authorised to receive written or oral statements (. . .) from a body such as your Federation'.[79] Shapiro, Rabinowitz & Boudin Attorneys at Law, motivated by the short-lived success of the International League for the Rights of Man, also made a request, justifying that the Rules of the Court 'are more flexible' and that the Court's predecessor heard private organisations.[80] The Court, however, declined receiving both written and oral statements, explaining that it was 'bound by the limitations set forth in [Article 66, paragraph 2,

[73] International Law Commission, Draft Articles on the Responsibility of International Organisations [2011] *Yearbook of the ILC*, vol II, Part Two, Article 2(a).
[74] Correspondence (29 July 1970), 638.
[75] Correspondence (19 December 1949), 327.
[76] Clark (n. 71) 118.
[77] Ibid 119.
[78] Ibid 120.
[79] Correspondence (16 December 1953), [390].
[80] Ibid [394]–[395].

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of its Statute]'.[81] Even in these unique types of advisory proceedings reviewing decisions of certain administrative tribunals, and directly impacting individuals (see Chapter 4), non-state actors were *personae non gratae*. The International League of Human Rights tried its luck a second time twenty years later, when the Court was requested to provide an advisory opinion on the *Legal consequences for States of the continued presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* (1971). Here, South Africa had not respected a Security Council resolution that had called upon it to withdraw its administration from the territory of South West Africa (today known as Namibia). The latter's mandate had terminated, and South Africa no longer had a right to administer it. The Court, in its advisory opinion, declared that South Africa's continued presence in the territory was illegal. The International League of Human Rights NGO sent its request on 10 November 1970[82] – requesting not only to provide a written statement but also to participate in oral proceedings – to which the Registrar responded one week later, stating that the Court would have to make a decision that the NGO should not expect before January 1971.[83] Eventually, the Court responded, stating that the judges were not willing to allow the NGO to participate.[84] Even when it reiterated and narrowed its request to the Registrar, the latter firmly clarified that the matter was closed.[85]

If the International League of Human Rights, confident in having a precedent that supported its participation in advisory proceedings, was rejected, then other organisations making the same request had little hope of success. One organisation that learned this lesson the hard way was the American Committee on Africa, affiliated with the International League of Human Rights. The Court rejected its request in the Namibia proceedings on the grounds that the American Committee on Africa was not an international organisation.[86] The Committee starkly addressed the President of the Court concerning this rejection, claiming that 'the refusal to accept its statement was unwarranted in law, inconsistent with prior practice, and incompatible with the best interests of the Court and

[81] Ibid [397].
[82] Correspondence (29 July 1970), 639–40.
[83] Ibid 644.
[84] Ibid 672
[85] Ibid 678–79.
[86] Ibid 647.

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of the people of Namibia'.[87] Despite this, the Registrar reaffirmed the Court's refusal.[88]

The Court's stance on *amicus curiae* briefs by NGOs defending individuals' interests was affirmed in another advisory opinion, the *Legality of the Use by a State of Nuclear Weapons in an Armed Conflict* (1996), where the World Health Organisation sought to establish whether the use of nuclear weapons in an armed conflict would breach a state's international legal obligations.[89] Here, the Court refused a request by the International Physicians for the prevention of Nuclear War to submit information,[90] and the International Committee of the Red Cross – despite its unique status in international law – only had its views referenced in and annexed to Costa Rica's oral statement.[91]

However, during the *Legality of the Threat or Use of Nuclear Weapons* advisory proceedings of the same year, the Court became more receptive to *amicus curiae* briefs. The ICJ Registrar is said to have received a 'myriad of [*amicus curiae*] briefs and memoranda'[92] from NGOs. This is because the General Assembly's request for an advisory opinion was a result of their 'heavy and well organised lobbying'.[93] While it did not admit such briefs as part of the record in these cases, they were made available to members of the Court in their library.[94] Higgins explained that '[e]very judge knew from week to week what was coming in, and it was up to each judge to decide if he wished to go beyond the already voluminous official pleadings and to read these other materials'.[95] Certain judges commented on this phenomenon in their separate opinions, Judge Oda having the impression that the

[87] Ibid 649.
[88] Ibid 672.
[89] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (Advisory Opinion) [1996] ICJ Rep 66. See also Dinah Shelton, 'The Participation of Nongovernmental Organisations in International Judicial Proceedings' (1994) 88(4) *The American Journal of International Law* 611, 624.
[90] Correspondence: Letter from Eduardo Valencia-Ospina (then-Registrar) to Mr. Barry L. Levy (28 March 1994).
[91] Verbatim record 1995/33, [27], [31].
[92] Rosalyn Higgins, 'Remedies and the International Court of Justice' in Rosalyn Higgins (ed), *Themes and Theories: Selected Essays, Speeches, and Writings in International Law* (OUP 2009) 894.
[93] Ibid.
[94] Ibid; Crema (n. 55) 122; Eduardo Valencia-Ospina, 'Court Clarification: Letters to the Editor' *International Herald Tribune* (Paris, 15 November 1995).
[95] Ibid (Higgins) 894.

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request 'originated in ideas developed by some NGOs',[96] while Judge Guillaume confirmed that the Court received 'thousands of letters inspired by these groups, appealing both to the Members' conscience and to the public conscience'.[97]

The confrontations with *amicus curiae* briefs in *Nuclear Weapons* arguably influenced the adoption of Practice Direction XII in July 2004,[98] as 'many non-governmental organisations advocated their inclusion – with some success, not in their own right, but via sympathetic governments'.[99] Practice Direction XII indicates that NGOs may submit written statements, which are treated as separate publications – as opposed to elements of the case file – that may be referred to by states and international organisations presenting written and oral statements. It reads as follows:

Practice Direction XII

1. Where an international non-governmental organisation submits a written statement and/or document in an advisory opinion case on its own initiative, such statement and/or document is not to be considered as part of the case file.
2. Such statements and/or documents shall be treated as publications readily available and may accordingly be referred to by states and intergovernmental organisations presenting written and oral statements in the case in the same manner as publications in the public domain.
3. Written statements and/or documents submitted by international non-governmental organisations will be placed in a designated location in the Peace Palace. All states as well as intergovernmental organisations presenting written or oral statements under Article 66 of the Statute will be informed as to the location where statements and/or documents submitted by international non-governmental organisations may be consulted.

This Practice Direction acknowledges that NGOs may fulfil a useful role by providing the Court with information that it would not otherwise

[96] *Legality of the Threat or Use of Nuclear Weapons* (n. 10) 335 (Dissenting opinion of Judge Oda).
[97] Ibid 287–88 (Dissenting opinion of Judge Guillaume).
[98] Quintana Aranguren (n. 3) 1256–57.
[99] Andreas Paulus, 'Article 66' in Andreas Zimmermann et al (eds), *The Statute of the International Court of Justice: A Commentary* (3rd edn, OUP 2019) 1818.

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receive from states (pursuant to Article 66) or from the Secretary-General (pursuant to Article 65(2)).[100] However, there seems to be a contradiction in that this information, treated as 'publications readily available' and 'in the public domain' (paragraph 2), is 'placed in a designated location in the Peace Palace' that few are aware of (paragraph 3). Furthermore, no reference is made to the Court *itself* using the information for the purposes of its deliberations.[101] See Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (Merits) (Judgment) [1986] ICJ Rep 14, 40–41 [63].

Indeed, despite the welcome engagement with civil society through the adoption of Practice Direction XII, there is no published evidence that the Court has consulted such briefs in practice. Former Registrar Eduardo Valencia-Ospina stated that 'all such documents are given consistent treatment', but the details of such treatment in practice are unknown.[102] Conversely, international criminal tribunals or human rights courts have been noted to openly engage with such briefs.[103] However, the Court's approach is presumably due to a mindfulness towards likely disapproving states.

The same approach of the Court holds true for individuals who have made attempts to act as *amici* themselves. This was demonstrated in the same context of the *South West Africa* cases. In the 1950 advisory proceedings (for the *International Status of South West Africa* advisory opinion), Mr. Gordon F. Muirhead submitted a statement of fact and a statement of law, which he asserted that he was forwarding on behalf of the advisor of the International League for the Rights of Man. However, the Registrar responded that the Court had no evidence from the organisation that this was the case and requested that this information emanate from the organisation itself.[104] Court was not willing to receive a document from an individual.

In the *Namibia* advisory proceedings, the Court received two requests from individuals. The first was from Professor Michael Reisman from Yale University Law School, who felt 'deeply concerned' and asserted that

[100] Ibid 1828.
[101] Markus Benzing, 'Evidentiary Issues' in Andreas Zimmermann et al (eds), *The Statute of the International Court of Justice: A Commentary* (3rd edn, OUP 2019) 1411.
[102] Valencia-Ospina (n. 94).
[103] International Criminal Court, *Rules of Procedure and Evidence*, Article 103 (2); *Lautsi v. Italy* App no 30814/06 (ECHR, 18 March 2011) 21–24 [50]–[55].
[104] Correspondence (19 December 1949), 328–29.

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'critical issues are raised'.[105] For these reasons, his request to the Court was twofold: if the Court would accept a memorial from an individual, and if the Court would consider a document discussing the legality and admissibility of *amicus curiae* briefs.[106] The Registrar responded in a lengthy letter that seemed to be a personal correspondence as opposed to one in his official capacity. In his carefully justified response of rejection, he claimed – referring to the 1950 advisory opinion – that the Court had already rejected several individuals' *amicus curiae* requests in the past. He also used the context of the Court's jurisprudence in reviewing certain decisions from administrative tribunals to justify the extent to which the Court was not favourable to having individuals present oral statements.[107] The Registrar concluded by stating his belief that the Court would be 'unwilling to open the floodgates to what might be a vast amount of proffered assistance'.[108]

The second request in the 1970 advisory proceedings was from Reverend Michael Scott. While he had originally contacted the Court to deliver a statement on behalf of the American Committee on Africa, he seized the opportunity of liaison with the Registrar to also inquire if he could personally deliver an oral or written statement, due to his strong credentials and involvement in the subject matter.[109] The Registrar candidly responded that Article 66(2) of the Statute does not allow such information from individuals.[110]

In sum, the Court does not wish to involve NGOs and even less individuals. NGOs also can, pursuant to Practice Direction XII, submit such briefs – although their precise utility for the judges is unknown. NGOs could also theoretically be considered by the Court as international organisations for the purposes of Article 66(2), as was the International League of Human Rights. This would be an indirect way for concerned individuals to have their thoughts heard and to provide certain information that could be of use in the proceedings, related to the impact of the Opinion on civil society. The Court has seemingly expanded its understanding of 'international organisation' in the *Obligations of States in respect of climate change* proceedings by

[105] Correspondence (29 July 1970), 636.
[106] Ibid.
[107] See Chapter 4.
[108] Correspondence (29 July 1970), 639.
[109] Ibid 645.
[110] Ibid 647.

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authorising certain entities whose status as a traditional international organisation can be questioned.[111] However, no literal interpretation of Article 66(2) nor of Practice Direction XII could invite the formal participation of individuals – as opposed to NGOs – appeasing its fear of the floodgates of their anticipated excessive unwarranted participation.

Despite this, the Court has surpassed the wording of Article 66(2) in the past to enable entities other than states and international organisations to furnish information in advisory proceedings. This stands in stark contrast to its hesitation to authorise witnesses (Section 3.1) and individuals as *amici curiae* in advisory proceedings (Section 3.2). The next section therefore explores the potential of the analogous extension of Article 66(2) to allow for individual participation.

3.3 The Analogous Extension of Article 66(2) of the ICJ Statute?

It has been thus far established that individuals could participate in advisory proceedings as witnesses, through the application of Articles 48–52 of its Statute via the umbrella clause of Article 68, allowing for the analogous application of rules from contentious proceedings (Section 3.1). Alternatively, while neither a Practice Direction nor Article 66(2) of the Court's Statute can authorise *amicus curiae* briefs from individuals (Section 3.2), I argue in this section that the analogous extension of Article 66(2) could theoretically allow individuals to furnish information if the circumstances so required.

There are two categories of states entitled to appear before the Court. Firstly, all members of the UN are *ipso facto* parties to the ICJ Statute, and are thus entitled to appear before it.[112] Secondly, states who are not members of the UN may become parties to the ICJ Statute, if the General Assembly and the Security Council so decide.[113] As for international organisations, the Court has the discretion to decide which ones would qualify and fruitfully contribute to the advisory proceedings.

[111] See, e.g., Danilo B. Garrido Alves, 'The Concept of International Organization in the practice of the International Court of Justice' (*EJIL Talk!*, 27 July 2023) www.ejiltalk.org/the-concept-of-international-organization-in-the-practice-of-the-international-court-of-justice/.

[112] United Nations Charter, Article 93(1).

[113] Ibid, Article 93(2).

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However, in both the *Accordance with international law of the unilateral declaration of independence in respect of Kosovo* advisory opinion, and the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* advisory opinion, the Court extended the framework of Article 66(2) to allow another type of entity to participate, who was neither a state nor an international organisation.

The *Kosovo* advisory opinion was the outcome after failed negotiations between the people of Kosovo, who wished to be an independent sovereign nation, and the government of Serbia. The latter sponsored a UN General Assembly resolution asking the ICJ whether the declaration of independence from the Kosovar people, claiming that Kosovo is an independent and sovereign state, was in accordance with international law.

At the stage of proceedings, the legal status of Kosovo was unclear. It was administered by the United Nations Interim Administration Mission in Kosovo ('UNMIK'), which was created via Security Council resolution 1244 (1999). While this resolution also temporarily suspended Serbia's exercise of sovereign authority over Kosovo,[114] it did not provide Kosovo's final status, which was left to be negotiated by the parties. Further, Kosovo was not a Member State of the UN nor a party to the ICJ Statute via a decision by the UN General Assembly and Security Council.[115] Therefore, it was not a 'state entitled to appear before the Court', as per Article 66(2) of the ICJ Statute.

When advisory proceedings began, the Court considered that the unilateral declaration of independence was the subject of the question submitted before it. Hence, the authors of this declaration were 'likely to be able to furnish information on the question', pursuant to Article 66(2). The Court therefore invited the authors of the declaration to make written contributions via its Order of 17 October 2008.[116] The authors of the unilateral declaration were democratically elected leaders of Kosovo who were members of the Kosovo Assembly.[117] Leaders of any country whose sovereignty is not in question would be regarded as state officials, whose furnishing of information to the Court would thus

[114] *Kosovo* (n. 12) 443 [97] and 444 [100].
[115] United Nations Charter, Article 93.
[116] *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo* (Order) [2008] ICJ Rep 409, 410 [4].
[117] Written Contribution of the authors of the unilateral declaration of independence (7 April 2009), [6.01].

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conform to Article 66(2). However, when the sovereignty and independence of the relevant entity are questioned and when the entity in question does not qualify as a 'State entitled to appear before the Court' in the sense of Article 66(2), then the leaders cannot be considered as state officials in the same manner. They may simply be considered as, at the very least, individuals.

Serbia was clearly opposed to the Court's invitation extended to the authors of the Kosovar declaration. It argued in its written statement that the information requested by the Court should be furnished by the UNMIK, as opposed to the authors themselves. Such permission by the Court 'constitutes a considerable departure from the previous practice of the Court, and raises significant issues under (. . .) Articles 34, 35, and 66, paragraph 2, of the Statute of the Court'.[118] While I agree with Serbia that this approach raised a significant issue under Article 66(2), it was not a considerable departure from the previous practice of the Court as it was not the first time that the Court applied an analogous extension of Article 66(2) to the benefit of individuals.

The first instance in which such an analogous extension of Article 66 (2) was applied was in the *Wall* advisory opinion. In this case, the Israeli government decided to construct a security fence as a measure of self-defence against terrorist attacks coming from the West Bank.[119] The UN General Assembly, concerned that this wall would result in permanent annexation and thus encumber Palestinian self-determination, asked the ICJ what legal consequences would arise from its construction, considering rules and principles of international law, the Fourth Geneva Convention of 1949 and relevant UN resolutions.[120]

During the advisory proceedings, the Court invited Palestine to furnish information under Article 66(2), 'referring to its somewhat special character as an observer to the UN General Assembly and as a co-sponsor of the resolution requesting the opinion'.[121] Today, Palestine would qualify as a 'State entitled to appear before the Court' under the meaning of Article 66(2). This is because although it is not a UN member, Palestine could become a party to the ICJ Statute pursuant to Article 93(2) of the Statute, following the adoption of UN General Assembly Resolution

[118] Written statement of Serbia (17 April 2009), [18].
[119] *Wall* (n. 12) 194 [138].
[120] *Wall* (n. 12) 136 [1].
[121] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Order) [2003] ICJ Rep 428, 429.

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67/19 of November 2012.[122] It was therefore eligible to furnish information as any other state entitled to appear before the Court in the *Policies and Practices of Israel* advisory opinion of 2024.

Therefore, the *Kosovo* and *Wall* advisory proceedings indicate that the Court is not restricted by the wording of Article 66(2) and can analogously extend it, if it so wishes. The basis on which these decisions were made remains in question. The Orders where these decisions were declared offer brief explanations that make no reference to any legal norms or general principles of law. Rather, the Court justifies its decision by citing the unique circumstances of each case, including the role of the entity in question and its potential to assist the Court. It is the latter element that seems to have been particularly seminal.[123] The equality of parties, studied in Chapter 4, may also justify their participation.[124] In brief, the broad discretion of the Court in advisory proceedings to apply an analogous extension of Article 66(2) may go beyond the letter of the law.

I see no issue with the Court's chosen course of action in these two instances. Indeed, the good administration of justice (Section 4.2) begs us to consider the involvement of non-state entities should the advisory question revolve around them.[125] The Court's decision was made to guarantee procedural fairness and meet standards of democracy, thereby ensuring procedural legitimacy.

Former Principal Legal Secretary of the ICJ, Hugh Thirlway, points out that the Court's approach in the aforementioned two advisory proceedings would only be problematic if we considered that Article 66(2) were a limitative clause that debarred it from obtaining information from any other entity.[126] According to former Registrar Stanislas Aquarone (Section 3.2), Article 66(2) *is* limitative (*expressio unius est exclusio*

[122] A/RES/67/19.

[123] Gleider I. Hernández, 'Non-state Actors from the Perspective of the International Court of Justice' in Jean D'Aspremont (ed), *Participants in the International Legal System: Multiple Perspectives on Non-state Actors in International Law* (Routledge 2011) 151.

[124] Gleider I. Hernández, *The International Court of Justice and the Judicial Function* (OUP 2014) 56.

[125] Robert Kolb, 'Les maximes juridiques en droit international public: Questions historiques et théoriques' (1999) 32(2) *Revue belge de droit international* 407; Aurélia Lelarge, 'L'émergence d'un principe de bonne administration de la justice internationale dans la jurisprudence internationale antérieure à 1945' (2009) 27 *L'Observateur des Nations Unies*.

[126] Thirlway (n. 43) 388.

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alterius).[127] This tells us that the *Kosovo* and *Wall* cases must have been considered exceptional circumstances.

Yet, Thirlway also asks himself if the Court's discretionary practice was the 'thin end of the wedge', opening the door for individuals to be granted the same privilege, through an analogous extension of Article 66(2).[128] It is only natural that if this practice has been allowed twice, it may lead to claims for more openness in other relevant instances. However, the Court has consistently shown reluctance towards receiving such information from private persons – even where warranted. It had opportunities to do this in the five advisory proceedings where it was requested to judicially review the decisions of administrative tribunals, as examined in Chapter 4. Here, individuals – staff members of certain international organisations – were at the focal point of the dispute and had crucial information to provide to the Court. However, the Court did not apply an analogous extension of Article 66(2) in their favour. Instead, it requested for other actors permitted to furnish information – such as international organisations – to do so on their behalf. If it could not do so for such individuals with undisputed interest, involvement, and relevance in the proceedings before it, then it should come as no surprise that it would reject *amici curiae* from less implicated individuals, as examined in Section 3.2.

Furthermore, the measures in the Kosovo and Palestine proceedings were not taken in other cases where a population at the heart of a dispute undoubtedly could have provided useful information. For example, in *Obligations of States in respect of Climate Change*, the Court was asked about the legal consequences for states who have caused climate harm to '*peoples and individuals* of the present and future generations affected by the adverse effects of climate change'.[129] It is well known that this request was initiated by young students in the Pacific.[130] Their participation to offer information on the nature of their harm as a result of states' failed climate obligations would have assisted the Court in more acutely answering the question. Similarly, in the *International Status of South*

[127] Correspondence (29 July 1970), 639.
[128] Thirlway (n. 43) 388.
[129] *Obligations of States in respect of Climate Change* (Request for Advisory Opinion) [2023].
[130] A/77/PV.64, 3 ["I also wish to highlight the important role of the young law students in the Pacific who inspired this initiative and who brought it to the attention of the Vanuatu Government in 2019."]

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West Africa advisory opinion (1950) where the UN General Assembly requested the Court to advise on the legal status of the territory, certain inhabitants of the territory certainly could have furnished pertinent information. A final example is in *Western Sahara*, where the Court was tasked with determining if Western Sahara was a territory belonging to no one at the time of colonisation by Spain and what the legal ties were between this territory and the Kingdom of Morocco and the Mauritanian entity. Such an investigation, particularly to answer the latter question, surely warranted participation from the people of the Western Saharan territory.

The Court's approach to individuals in this context indicates that it perceived Kosovo and Palestine not as a collective of individuals, but rather as territories whose status under international law had not been determined, who had made declarations of statehood, and who considered themselves as sovereign and independent states. These were *sui generis* cases unlikely to reoccur, reassuring the Court's fear of opening floodgates through its discretionary decision.

In sum, while it remains implausible in practice, the Court's wide discretion surpassing the letter of the law would allow it to – in theory – analogously apply Article 66(2) to relevant individuals. This would be a gateway for them to furnish information in such proceedings. But how compatible would this be with the spirit of Article 34(1) of the ICJ Statute?[131] It is recalled from Chapter 1 of this study that Article 34(1) is one of three pillars of the ICJ's jurisdiction, precasting the parameters of the Court and determining a number of other Articles in the Statute that were drafted upon its underlying logic.[132] The structure of the Court is largely based upon the assumption that only states can be parties in cases before it.[133] However, it is debatable whether this holds true for advisory proceedings, which carry distinct features from contentious proceedings. It can be argued that the state-centric constraints of Article 34(1) are pertinent only in the context of contentious proceedings, wherein the disputes are between actual parties. The context of advisory proceedings – where there are no parties, no binding decisions, and broader legal questions often of public interest – is too distinct for such a clause to have bearing.

[131] Ibid.
[132] See opening of Chapter 1.
[133] Hernández (n. 124) 140–64, 154.

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3.4 Conclusion

Advisory proceedings are theoretically more accommodating to individuals than contentious proceedings. Not only are there fewer governing rules, but the Court has large discretion as to the procedure when it is requested to produce an advisory opinion. This discretion may enable the Court to include individuals as witnesses, through the application of Articles 48–52 of its Statute via the umbrella clause of Article 68 (Section 3.1). While *amicus curiae* participation is limited to NGOs (Section 3.2), the Court could potentially allow individuals to furnish information through an analogous extension of Article 66(2) of the Statute (Section 3.3).

But would the Court exercise such prerogatives? The ICJ is generally much more restrictive towards non-state entities than its predecessor. The PCIJ showed considerable flexibility with regards to the types of entities from which it received documents or enabled to provide oral arguments. These non-state entities ranged from labour unions and trade union federations to political parties and minority groups.[134] The Permanent Court allowed many organisations that would not qualify today as 'international organisation[s]' in the sense of Article 66(2) to participate in proceedings. For instance, in its advisory opinion on *Designation of the Workers' Delegate for the Netherlands at the Third Session of the International Labor Conference* in 1922, the Permanent Court welcomed any international organisation that expressed a desire to be heard, receiving a memorandum from the Netherlands General Confederation of Trades Unions and allowing for other trade unions to participate.[135] The ICJ, in comparison, has been far more restrictive.[136]

The Court's hesitation regarding the inclusion of witnesses can be attributed to two main reasons. First, the Court has not faced many requests for advisory opinions, much less any that would require probing into facts. In situations where this has arisen, the practice has not been applied, in favour of a more cautious and non-controversial approach.

[134] Manley O. Hudson, *The Permanent Court of International Justice, 1920–1942: A Treatise* (The Macmillan Company 1943) 422–23.

[135] *Designation of the Workers' Delegate for the Netherlands at the Third Session of the International Labor Conference* (Judgment) [1922] PCIJ Series B, 11. See also *Interpretation of the Convention of 1919 concerning Employment of Women during the Night* (Advisory Opinion) [1932] PCIJ Series A/B.

[136] Paul C. Szasz, 'Enhancing the Advisory Competence of the World Court' in Leo Gross (ed), *The Future of the International Court of Justice*, vol 2 (Oceana Publications 1976) 507.

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This can be understood from Judge Higgins' expression of relief that the question of using witness procedures in advisory proceedings was avoided by the Court in the *Legality of the Threat or Use of Nuclear Weapons* advisory opinion.[137] Second, the Court has demonstrated a general hesitation to exercise proper fact-finding mechanisms in contentious proceedings and would therefore be no different in advisory proceedings.

Regarding the analogous extension of Article 66(2) of the Statute, the Court has refrained from extending *amicus curiae* status to individuals, fearing it would open the floodgates. Good reasons plead for such an approach: in both Professor Reisman's and the American Committee on Africa's requests, they made reference to the 'precedent' established by the ICJ in accepting the International League of Human Rights to submit information in 1950. This reflects the 'thin end of the wedge' argument: on the one hand, it demonstrates the eagerness for non-state actors to rely on precedent to get their foot in the door and, on the other hand, may explain the Court's reluctance to establish any precedent that *could* open the floodgates. However, this fear is potentially unwarranted. Author Ruth Mackenzie opines that "the assumption of opening floodgates remains unproven in the face of the practice of international courts".[138] Indeed, there have been no public reports on an abundant number of NGOs submitting *amicus curiae* briefs since Practice Direction XII was published in 2004. Another related concern regarding the analogous extension of Article 66(2) of the Statute in favour of relevant individuals capable of providing pertinent information is that states may become more reluctant to turn to the Court to resolve their disputes as a result.[139] I am not fully convinced by this. As there are no parties in advisory proceedings, the spirit of antagonism feared by states (Section 1.2.4) would be absent. Furthermore, all states continue to be entitled to appear before the Court in advisory proceedings, unlike other actors, whose participation would depend on the Court's assessment of their ability to provide useful information. Finally, the Court is by no means bound to use all information presented to it.

[137] Higgins (n. 34) 1369.

[138] Ruth Mackenzie, 'The *Amicus Curiae* in International Courts: Towards Common Procedural Approaches?' in Tullio Treves et al, *Civil Society, International Courts and Compliance Bodies* (T.M.C. Asser Press 2005) 295–311. See also Paulus (n. 99) 1823, n. 96.

[139] Ingrid Rossi, *Legal Status of Non-Governmental Organisations in International Law* (Intersentia 2010) 294. See also Paulus (n. 99) 1823, n. 96.

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More frequently and openly receiving the views of private persons, who are concerned and affected by the outcome of advisory opinions, increasingly matters. The value of such participation lies in the democratic standards used to measure the Court's legitimacy in such proceedings. Such input is especially important for advisory opinions, which often impact a broad community of states and individuals.

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