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Remarks on Practice

Part II of this monograph explored the extent to which individuals are considered in the legal reasoning of the Court. It did so by identifying contexts in which individuals are not at the centre of the dispute (as was the case in Part I) but would be affected by it, such as maritime disputes (Chapter 6), territorial disputes (Chapter 7), environmental disputes (Chapter 8), and the interpretations of treaties and identification of custom (Chapter 9).

It was observed that individuals are rarely considered in the Court's legal reasoning in such disputes. An exception lies in the interpretation of treaties and the identification of customary law, where the Court has, albeit sometimes ambiguously, contributed to the development of individuals' rights.

Generally, such consideration for individuals rests upon certain identified conditions: the Court must not overstep its assignment, contravene the principle of stability, or counter legal formalism.

The Court would not consider individuals *proprio motu* if there were no mention of them in state litigants' pleadings and limits itself to the evidence provided by the litigants[1] or respecting their requests in their Special Agreements.[2] They therefore set the boundaries for the pending judgment. While the Court may reject the litigants' submissions if it wishes,[3] it may not innovate outside of their submissions.[4] However, it

[1] E.g., *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* (Judgment) [2010] ICJ Rep 14, 72–73 [168].

[2] E.g., in *Continental Shelf (Libyan Arab Jamahiriya/Malta)* (Judgment) [1985] ICJ Rep 13, 23–24 [19]; *Minquiers and Ecrehos (France/United Kingdom)* (Judgment) [1953] ICJ Rep 47, 52; *Barcelona Traction Light and Power Company Ltd. (Belgium v. Spain)* (Second Phase) (Preliminary Objections) (Judgment) [1970] ICJ Rep 3, 37 [49].

[3] E.g., *Case of Free Zones of Upper Savoy and the District of Gex* (Order) [1930] PCIJ Series A 138; PCIJ, *The Case of the S.S. Lotus* (Judgment) [1927] PCIJ Series A 31.

[4] Hugh Thirlway, *The International Court of Justice* (OUP 2016) 85–86.

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was seen in many instances in Part II that state litigants often do raise concerns for their populations in their pleadings.

Reticence to contravene the principle of stability or to counter formalism largely explains the Court's approach in maritime (Chapter 6) and territorial boundary disputes (Chapter 7).[5] In the former chapter, it explains why the Court has rarely considered relevant circumstances to adjust a provisional line and has yet to consider historic fishing rights.[6] In the latter chapter, it is why boundary treaties are of particular value to the Court[7] and why the *uti possidetis* principle takes precedence over the principle of self-determination.[8]

A fishing practice characterised by its historical longevity and therefore considered to be stable should form part of the Court's application of the principle of stability. This reframing would allow for historic fishing rights to be upheld and, therefore, for the needs of local populations to be considered. As for the Court's adherence to formalism, it is still balanced by the principle of equity. The latter's existence acknowledges that the law is not always fair and that other relevant factors should be considered where they may allow for justice. In maritime boundary disputes, it was argued that equity does not encourage extra-legality and can play a greater role when adjusting a provisional line. In territorial boundary disputes, equity could also play a prominent role, extending beyond its traditional function as the last resort in the absence of other titles. The application of equity is both precise and appropriate, remaining true to its original conception and purpose. In the words of Professor Stephen Humphreys,

> [E]quity has, at its conceptual root, repeatedly centred on the human person, and it moreover shares an intimate, indeed foundational, relation with the notion of human rights, at least at the moment of the latter's conceptual emergence in the form of ideas about natural rights.[9]

In both contexts of territorial and maritime disputes, judges are thus encouraged to assess whether the outcome aligns with the core demands

[5] Yusra Suedi, 'Man, Land and Sea: Local Populations in Territorial and Maritime Disputes Before the International Court of Justice' (2021) 20(1) *Law and Practice of International Courts and Tribunals* 30.

[6] Leonardo Bernard, 'The Effect of Historic Fishing Rights in Maritime Boundaries Delimitation' (Presented at the tenth LOSI Conference, Seoul, May 2012) 19.

[7] *Territorial Dispute (Libyan Arab Jamahiriya/Chad)* (Judgment) [1994] ICJ Rep 6, 37 [72]; *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)* (Merits) (Judgment) [1962] ICJ Rep 6, 34.

[8] *Frontier Dispute (Burkina Faso/Republic of Mali)* (Judgment) [1986] ICJ Rep 554, 566–67 [25].

[9] Stephen Humphreys, 'Equity before "Equity"' (2023) 86(1) *Modern Law Review* 85.

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of justice and to make the necessary adjustments if it does not. As argued in the introduction of this study, justice serves as a benchmark for evaluating judicial outcomes, representing a balance between states and individuals within the framework of social idealism. David D. Caron and Christian Tomuschat have argued that insisting on justice 'makes good sense in situations where the legal position, as inherited from the past, does not respond to the needs of times that have changed', but that the approach to change should be 'peaceful (. . .) that seeks to adapt a traditional legal framework to a present which demands a greater share of equity and justice'.[10] Such proposals have been made in the relevant chapters.

Beyond *non ultra petita*, stability, and formalism, one final reason for the Court's reticence is its caution to develop international law. In concluding Part II, I reflect that while the Court does not have a legislative function, it develops the law nonetheless through the clarifications and interpretations. It should not shy away from doing so, particularly where individuals are involved.

While the UN General Assembly proclaimed in its Resolution 171(II) A of 1947 that 'it is (. . .) of paramount importance that the Court should be utilised to the greatest practicable extent in the progressive development of international law',[11] neither the UN Charter nor the Court's Statute attributes it with a legislative function. Nor do the *travaux préparatoires* of the Statute indicate that the Court was intended to be a lawmaker. Conversely, Article 38 indicates that its function is 'to decide in accordance with international law', possibly implying pre-existing law.[12] The Court has supported this reading in its jurisprudence, stating, in the 1974 *Fisheries Jurisdiction* case, 'In the circumstances, the Court, as a court of law, cannot render judgment *sub specie legis ferendae*, or anticipate the law before the legislator has laid it down.'[13] It also clearly stated in the *Nuclear Weapons* advisory opinion that

> It is clear that the Court cannot legislate (. . .). Rather its task is to engage in its normal judicial function of ascertaining the existence or otherwise of legal principles and rules applicable (. . .). The contention that the giving

[10] 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.

[11] A/RES/171(II) A-C.

[12] Yuval Shany and Rotem Giladi, 'International Court of Justice' in Yuval Shany (ed), *Assessing the Effectiveness of International Courts* (OUP 2014) 168.

[13] *Fisheries Jurisdiction (United Kingdom v. Iceland)* (Merits) (Judgment) [1974] ICJ Rep 3, 23–24 [53].

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> of an answer to the question posed would require the Court to legislate is based on a supposition that the present *corpus juris* is devoid of relevant rules in this matter. The Court could not accede to this argument; it states the existing law and does not legislate. This is so even if, in stating and applying the law, the Court necessarily has to specify its scope and sometimes note its general trend.[14]

However, developing the law can be borne out of various tasks. The Court has identified the legal status of already-existing law.[15] It has also clarified the meaning or provided interpretations.[16] Its design of criteria for ascertaining customary law and identifying treaties or recognising obligations *erga omnes* are only some examples[17] – as well as those apparent in Chapter 9 where the Court interpreted treaties and identified custom to the benefit of individuals. While none of these tasks involve legislating *stricto sensu*, the outcome has been the development of international law. As Hernández argues,

> To reduce the development of law down to the mere exposition of norms waiting to be discovered or 'exposed', as though they somehow exist objectively, and outside the hermeneutical process, is also a technique for judges to shield themselves from the accusation that they are engaging in law-creating rather than merely the interpretation of the law. Dispensing with that fallacy, whether judgments are a source of law or merely a means for the determination of the law, a court's interpretation nevertheless contributes to the creation of what it finds.[18]

The Court's clarifications and interpretations of law constitute a form of legal development, even though judges have characterised this process as incidental rather than intentional.[19]

[14] *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, 237–38 [18].

[15] E.g., *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* (Judgment) [2012] ICJ Rep 422, 457 [99] ["the prohibition of torture is part of customary international law and it has become a peremptory norm (*jus cogens*)"].

[16] *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 174, 185; *Reservations to the Convention on Genocide* (Advisory Opinion) [1951] ICJ Rep 15, 22–25, 29.

[17] Jean d'Aspremont, 'The International Court of Justice as the Master of the Sources' in *The Cambridge Companion to the International Court of Justice* (CUP 2021) 1; Sir Franklin Berman, 'The International Court of Justice as an 'Agent' of Legal Development?' in Christian Tams and James Sloan (eds), *The Development of International Law by the International Court of Justice* (OUP 2014) 7–21; *Barcelona Traction* (n. 2) 32 [33].

[18] Gleider Hernández, *The International Court of Justice and the Judicial Function* (OUP 2014) 90.

[19] Shany and Giladi (n. 12) 168.

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This developing function, while not formally prescribed, is inevitable for two reasons. First, many judgments will be applicable to the wider network of states. This is obvious in advisory opinions often stemming from requests by the UN General Assembly. But even in contentious disputes, matters under consideration will likely be relevant to other prospective future state litigants. The Court's interpretation of multilateral treaties in bilateral disputes will impact all state parties to those treaties.[20] Moreover, both the Court and its predecessor have, at times, addressed or issued instructions to other states in their judgments on contentious disputes.[21]

Second, the gap created in the infrastructure of the international legal order positions the Court as a (reluctant) legislator. In the absence of a 'world government' or 'world parliament' producing binding law, and given the slow establishment of custom and of widely accepted multilateral treaties capable of developing international law, the World Court is looked at to perform somewhat of a legislative function.[22] These two circumstances contribute to the Court's incidental development of international law.

To conclude, to legislate outright and to demonstrate undue zeal and provide an authoritative narrative on broader issues may weaken the Court, as opposed to strengthen it, by causing states to take their distance if they perceive that the Court is taking excessive liberties within its assigned duties.[23] However, this is not what has been proposed in Part II, where, in numerous instances, state litigants have sought to draw the Court's attention to the relevance of their populations. Accommodating such concerns would involve an adjustment in the roles of stability and formalism within the judicial function. Additionally, while the Court does not have a formal law-making function, it develops international law nonetheless through its interpretations and clarifications and should not hesitate to do so when clarification is sought by state litigants on matters relating to the affected individuals in such disputes.

[20] E.g., *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 43, 120 [183].

[21] E.g., *Corfu Channel (United Kingdom v. Albania)* (Merits) (Judgment) [1949] ICJ Rep 15, 28; *PS.S. "Wimbledon"* (Judgment) [1923] PCIJ Series A 22; *Case Relating to the Territorial Jurisdiction of the International Commission of the River Oder* (Judgment) [1929] PCIJ Series A 27.

[22] Alan E. Boyle and Christine Chinkin, *The Making of International Law* (OUP 2007) 116.

[23] Herch Lauterpacht, *The Development of International Law by the International Court* (CUP 1982) 75; Judge Joan Donoghue, 'The Role of International Courts in Global Governance' (Conference at the Graduate Institute of International and Development Studies, 8 October 2018) https://youtu.be/De4unNaIOjs (at 24:00 minutes).

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