5

Remarks on Law

Part I explored the extent to which individuals are integrated in the proceedings of the Court. It looked beyond contentious disputes concerning a state litigant's compliance with a multilateral human rights treaty, focusing instead on other thematic contexts in contentious and advisory proceedings where individuals are at the centre of the case. Explaining how historically the individual fell short of being granted *locus standi* (Chapter 1), it turned to diplomatic protection proceedings (Chapter 2), advisory proceedings (Chapter 3) and the involvement of individuals in advisory proceedings regarding the review of the decisions of administrative tribunals (Chapter 4). Each chapter emphasised the gap between the degree to which the individual is in focus, on the one hand, and the degree to which they are procedurally included, on the other hand. In brief, the individual is procedurally involved in such contexts to a minor extent. I offer some reflections on the reasons for this.

5.1 A Culture of State-Centrism

The key reason explaining this approach is the culture of state-centrism developed by both state litigants and the Court. Professor Susan Marks has argued that the term 'state-centrism' may take three forms. First, it is the technique by, and reason for which, international law is disregarded by states.[1] Second, it may reflect an undue preoccupation with states as opposed to non-state actors.[2] Third, a state-centric approach is one that places 'too much emphasis on state sovereignty in the validation and application of international legal norms'.[3]

[1] Susan Marks, 'State-Centrism, International Law, and the Anxieties of Influence' (2006) 19 (2) *Leiden European Journal of International Law* 339, 345.
[2] Ibid 343.
[3] Ibid 340.

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The preoccupation with states as opposed to non-state actors – such as individuals – is visible through the observations made in Part I. Indeed, states and non-state actors are classically distinguished by their legal status, capabilities, and resources on the international plane. The drafting of Article 34(1) would unknowingly define the milieu of the Peace Palace as one exclusively reserved for sovereign states and suggest that individuals have no place within those walls. At least partially because of this, the attitude of states has been set in stone: they are attached to their sovereignty and quite resistant to any type of potential interference with it.[4]

Although two viable options recurring in Part I were oral witness testimony or the inclusion of an individual in a government's delegation, these are far from being exploited by state litigants. For instance, in the context of diplomatic protection, despite the individual's central role in reality, state litigants limit their involvement to providing evidence for written pleadings. Yet, in such instances, the injured individuals could stand as witnesses or make statements as part of the states' delegation.

The relationship between states and non-state actors is more intertwined than the dichotomy at the World Court would suggest. Indeed, Marks reflects that there is a tendency to consider the state as if they 'had a reality and an agency all of their own', failing to acknowledge the extent to which states are already present within the other, and vice versa.[5] However, this dichotomy is maintained in the Court's culture not only due to state litigants' choices but also due to the Court's approach to its procedural mechanisms (Section 5.2) and fears (Section 5.3).

5.2 A Passive Approach to Procedural Mechanisms

Article 30 of the ICJ Statute confirms that it 'shall frame rules of carrying out its functions. In particular, it shall lay down rules of procedure'.[6] The freedom to determine its own procedural mechanisms was deliberately left to the Court by its Statute's drafters.[7] Furthermore, it has confirmed

[4] Sir Arthur Watts, 'Enhancing the Effectiveness of Procedures of International Dispute Settlement' (2001) 5 *Max Planck Yearbook of United Nations Law* 21.
[5] Marks (n. 1) 341.
[6] Statute of the International Court of Justice, Article 30 [hereafter, ICJ Statute].
[7] Hugh Thirlway, 'Article 30' in Andreas Zimmermann et al (eds), *The Statute of the International Court of Justice: A Commentary* (3rd edn, OUP 2019) 517.

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that state litigants are 'under a duty to comply with all decisions as to procedure, which [it] is specifically empowered to make'.[8]

The Court therefore has ample power to manage evidence, in particular oral witness evidence in contentious proceedings involving individuals – whether it is one key injured individual in the context of diplomatic protection or an entire community. Indeed, both the state litigants *and* the Court are empowered to request witnesses. Furthermore, the Court has the power to analogously apply Articles 48–52 of its Statute where it feels that this is necessary to acquire evidence from private persons in advisory proceedings. In such proceedings, where the Court reviewed decisions of certain administrative tribunals on disputes between certain international organisations and their injured staff members, the Court had the power to guarantee the equality of parties and place the staff member on par with the international organisation in a number of innovative ways that were not fully exploited. The Court is also responsible for allowing *amicus curiae* submissions in advisory proceedings, and even in contentious ones.

Yet, in a myriad of contexts, the Court does not sufficiently exploit the procedural mechanisms at its disposal. It has very rarely used its powers to request additional documents, appoint experts or witnesses, or make site visits.[9] This has been criticised by many judges in their dissenting opinions.[10] The Court's 'hands-off' attitude is likely due to its underlying belief that its primary function is the respect of states' wishes and that its own powers to manage its procedural mechanisms are secondary. This finds its roots in the principle of sovereignty: states that have chosen the Court as a means to resolve their disputes have the prerogatives to frame the case as they wish, to present the evidence that they wish to present,

[8] *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)* (Judgment) [1992] ICJ Rep 350, 581–82 [371].

[9] For more on powers of international courts regarding evidence, see Chester Brown, *A Common Law of International Adjudication* (OUP 2007) 102–18.

[10] Some examples include: *Oscar Chinn* (Judgment) [1934] PCIJ Series A/B 109 (Individual opinion of Judge Anzilotti); *Barcelona Traction Light and Power Company Ltd. (Belgium v. Spain)* (Preliminary Objections) (Judgment) [1964] ICJ Rep 6, 80 (Separate opinion of Judge Bustamante); *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)* (Merits) (Judgment) [1962] ICJ Rep 6, 100 [55] (Dissenting opinion of Judge Wellington Koo); *Kasikili/Sedudu Island (Botswana/Namibia)* (Judgment) ICJ Rep 1045, 1072–73 [43]; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (Merits) (Judgment) [1986] ICJ Rep 14 [132] (Dissenting opinion of Judge Schwebel); *Oil Platforms (Islamic Republic of Iran v. United States of America)* (Judgment) [2003] ICJ Rep 161, 322–23 [52] (Separate opinion of Judge Owada).

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and to decide how they aspire to have the proceedings handled. They may have perhaps even chosen the Court as the appropriate venue to settle their dispute *because* of their satisfaction with the Court's procedural framework and their ability to 'steer the wheel' in this sense, during proceedings. This approach therefore contributes to the culture of state-centrism. The Court's deference to states finds grounds in states' roles as the sole clients and funders of the Court (through the General Assembly).

However, a more proactive Court that still yields to states' demands is a viable prospect. Typically, the consultations held between governments and the President and the Registry before the course of proceedings – and the 'Notes for Parties' sent from the Registrar with any particular instructions and information – are opportune moments for the Court to prompt states to consider involving individuals through witness testimony. This is more straightforward than amending Practice Directions, which may easily be ignored.[11] Furthermore, in the scope of communication between parties and the Court, the latter may organise communication with the parties at the initiation of proceedings before written pleadings have been submitted. This approach allows the Court to better prepare itself if it anticipates that witnesses will be summoned.[12]

The Court has taken great strides to adapt its procedural mechanisms to its needs since its inception.[13] Anything done in favour of integrating individuals would merely be a continuation of the procedural adaptations in other areas that it has seamlessly made over the years.[14] In the words of international lawyer Wilfred Jenks, '[W]e must not underestimate the procedural resources specifically provided for in the Statute and already used, the procedural innovations and developments not specifically provided for in the Statute which have proved possible within its terms. Nor must we belittle the extent or effectiveness of the remedies available by the existing procedures'.[15]

[11] 'A Dialogue at the Court: Proceedings of the ICJ/UNITAR Colloquium Held on the Occasion of the Sixtieth Anniversary of the International Court of Justice' (2006) Registry of the Court UNITAR(063)/I16/2006, 25.

[12] Anna Riddell and Brendan Plant, *Evidence before the International Court of Justice* (British Institute of International and Comparative Law 2009) 76.

[13] Georges Abi-Saab, 'De l'évolution de la Cour internationale: Réflexions sur quelques tendances récentes' (1992) *Revue générale de droit international public* 273.

[14] Fernando Lusa Bordin, 'Procedural Developments at the International Court of Justice' (2021) 20 *The Law and Practice of International Courts and Tribunals* 395.

[15] Clarence Wilfred Jenks, *The Prospects of International Adjudication* (Stevens 1964) 125.

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5.3 Fears

The Court's culture of state-centrism can also be attributed to several concerns it holds. Firstly, it fears being overwhelmed with evidence and information if individuals were more fully integrated into its procedures. Indeed, initiating the inclusion of witnesses, accepting states' demands for potentially large amounts of witnesses or accepting *amicus curiae* briefs could strain the Court's judicial economy, the 'efficient management of the judicial office as regards human, financial or instrumental resources'.[16] This reflects the Court's concern to avoid unnecessary effort or expense.[17] This fear of floodgates is amplified by the 'thin end of the wedge' phenomenon, where one seemingly insignificant procedural action will set a precedent with potentially negative repercussions. However, this can be controlled with a more active approach to procedural mechanisms, as discussed earlier.

A second fear that the Court may have is the fear of favour. Chapter 2 discussed the growing practice of evidenced videotaped statements from victims, seen in *Chagos* and *DRC v Uganda* and attempted in *Jadhav*. The procedural inclusion of individuals may be perceived as a tool of courtroom persuasion. Indeed, Professor Philippe Sands described Elysé's intervention as a statement of impact[18] and that she was there to 'tell her story (. . .) in the hope that her account might encourage the fourteen judges in a direction that could allow her to return to the place of her birth'.[19] Courtroom persuasion stems from the common law tradition, where the Aristotelian *pathos* device is employed to engage sympathy and therefore persuade decision-makers. Judges – particularly those from a civil law background – may fear that considering such statements would detract from their task of applying the law without concern for other non-legal considerations, which will be discussed in more depth in Part II.

This culture of state-centrism has been reinforced by two key concerns: preserving both the Court's uniqueness and its tradition. First, the Court is distinguished on the international stage by its procedural exclusion of individuals. Elsewhere, individuals have infiltrated international

[16] Fulvio Maria Palombino, 'Judicial Economy', *Max Planck Encyclopedia of Public International Law* (2020).
[17] Jonathan Wallace, *Webster's New World Law Dictionary*. Susan Ellis Wild, ed. (Wiley Hoboken 2006).
[18] Verbatim record 2018/20, 71–72 [4] (Philippe Sands).
[19] Philippe Sands, *The Last Colony: A Tale of Exile, Justice and Britain's Colonial Legacy* (Weidenfeld & Nicolson 2022) 3.

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judicial fora in several ways. They are parties before human rights and international criminal courts, and may be parties in investor–state arbitration,[20] before the Iran–US Claims Tribunal[21] or before the International Tribunal for the Law of the Sea (ITLOS)'s Seabed Disputes Chamber.[22] Thus, the exclusion of individuals may stem from a desire to preserve the Court's unique character. Second, the Court's adherence to its traditions has upheld its state-centric approach. Like any court, whether domestic or international, the World Court is deeply rooted in its traditions. One ICJ judge has described that there is 'almost a pride in maintaining the rigidity and maintaining the way things were done 70 years ago'.[23]

However, procedural inclusion of individuals through the avenues discussed in Part I would not affect the Court's unique character, as its restriction of standing to states would remain unchanged. In some contexts, such as when reviewing decisions of certain administrative tribunals (Chapter 4), ensuring the equality of parties would reflect an application of the good administration of justice. In this sense, tradition cannot always be said to be helpful and, in the words of a judge, 'if [the Court] changed or modernised a bit, that wouldn't hurt really'.[24]

However, the culture of state-centrism may be challenged by a subtle shift in recent practice, where state litigants have arranged for relevant individuals to attend hearings, even if they did not actively participate. For example, a delegation of Chagossians were present during the Chagos oral hearings.[25] Similarly, during the oral hearings in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)* provisional measures phase,[26] H.E. Mr. Abubacarr Tambadou, then Attorney General and Minister of

[20] See, for example, International Centre for Settlement of Investment Disputes Convention, Article 25(1).

[21] Declaration of the Government of the Democratic Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States and the Government of the Islamic Republic of Iran (19 January 1981) Article III(3).

[22] United Nations Convention on the Law of the Sea, 1833 UNTS 3, Articles 187(d), 291(2); Statute of the International Tribunal for the Law of the Sea, 1833 UNTS 561, Rule 20(2).

[23] Nienke Grossman, 'Julia Sebutinde: An Unbreakable Cloth' in Josephine Jarpa Dawuni and Akua Kuenyehia (eds), *International Courts and the African Woman Judge: Unveiled Narratives* (Routledge 2019) 47.

[24] Ibid 47.

[25] Sands (n. 19) 1.

[26] Although this contentious case falls outside the scope of this study, this example is important to illustrate this trend.

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Justice of The Gambia, addressed the Court, stating, 'I am also pleased that The Gambia's delegation today includes members of the Rohingya community, including those who have travelled from the refugee camps in Bangladesh'.[27] Should this practice continue by state litigants, it might encourage more inclusion taking other forms in future.

Beyond state litigants, the Court could also take proactive measures to procedurally integrate individuals, as this would enhance its legitimacy from the perspective of social idealism. Each chapter in Part I demonstrated that the absence of individuals in proceedings where they are directly impacted may have repercussions on the Court's legitimacy, insofar as one or a combination of these standards are strained.

The Court's legitimacy may also stem from an ability to adapt to developments in the environment in which it operates. As discussed in the Introduction, the international legal order is now characterised by its multiplicity of actors. An inability to adapt to this reinforces a perception that the Court is isolated and disconnected from reality. It can be argued that legitimacy is only in the eyes of the Court's constituencies: UN organs, state litigants, and the wider international community with an 'interest in the proper application and development of international law'.[28] From the perspective of social idealism, the wider international community includes not only states but also individuals.

5.4 A Word on Transparency

Part I focused on the integration of individuals in certain proceedings before the Court. However, another means to complement – or compensate for the lack of – such practices is by enhancing transparency. Transparency and participation should not be confused; an institution may be transparent without enabling or enhancing participation of actors other than states. Transparency has become an increasing concern in international adjudication due to the interpenetration of human rights and the growing role of the individual in the international legal system.

Overall, the Court has good practices in transparency – especially compared to other inter-state adjudicatory bodies, such as at the World

[27] Verbatim record 2019/18, 16–17 [1].

[28] André Nollkaemper, 'The Court and Its Multiple Constituencies: Three Perspectives on the Kosovo Advisory Opinion' in Marko Milanovic and Michael Wood (eds), *The Law and Politics of the Kosovo Advisory Opinion* (OUP 2015) 219.

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Trade Organisation (WTO).[29] Written parties' submissions are not disclosed while the case is pending,[30] meaning that neither state litigant may disclose pleadings to their citizens during proceedings.[31] However, they are made public on or after oral proceedings with the parties' consent.[32] Oral hearings are made open to the public unless the Court or both parties decide otherwise[33] and are streamed live on the internet, thereby allowing concerned individuals to follow them wherever they are in the world.[34] External media crews may not record the entire hearings but are permitted during the first minutes of oral hearings.[35] Deliberations at the Court are highly confidential, as is the composition of the drafting committee, which is a common feature in all national and international courts.[36]

Yet, in view of further enhancing transparency towards procedurally excluded individuals, the Court could enhance its public relations efforts by explaining its judgments to broader audiences. For example, the Registrar could answer questions of the press after the public delivery of a judgment.[37] Former Registrar Eduardo Valencia-Ospina, however, opposed this suggestion, arguing in 1997 that more emphasis should be put on the needs and interests of the parties and that public interest cases are less intense than criminal cases brought before other courts.[38]

[29] At the WTO, written and oral pleadings are confidential. See Panagiotis Delimatsis, 'Institutional Transparency in the WTO' in Andrea Bianchi and Anne Peters (eds), *Transparency in International Law* (CUP 2013) 112–41.

[30] International Court of Justice, *Rules of Court*, Article 53 [hereafter, *Rules of Court*].

[31] Correspondence (28 September 1949) 628–29 ["it would be inconsistent with the proper administration of justice to expose the pleadings to public, perhaps even to polemical, discussion before the hearing."].

[32] *Rules of Court*, Article 53(2).

[33] ICJ Statute, Article 46; *Rules of Court*, Article 59.

[34] They are streamed on UN Web TV, available at: http://webtv.un.org/.

[35] International Court of Justice, 'Media Services' www.icj-cij.org/en/media-services cl A.4.

[36] Thore Neumann and Bruno Simma, 'Transparency in International Adjudication' in Andrea Bianchi and Anne Peters (eds), *Transparency in International Law* (CUP 2013) 457–62.

[37] Keith Highet, 'Problems in the Preparation of a Case: Perceptions of the Parties and the Court – Presentation' in 'A Dialogue at the Court: Proceedings of the ICJ/UNITAR Colloquium Held on the Occasion of the Sixtieth Anniversary of the International Court of Justice' (2006) Registry of the Court UNITAR (063)/I16/2006 126.

[38] Eduardo Valencia-Ospina, 'Financing, Administering and Making Known the Work of the Court' in 'A Dialogue at the Court: Proceedings of the ICJ/UNITAR Colloquium Held on the Occasion of the Sixtieth Anniversary of the International Court of Justice' (2006) Registry of the Court UNITAR(063)/I16/2006 216.

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This statement does seem accurate or reflective of the Court's current docket. Communities have been known to organise separate events alongside oral hearings to explain the significance of the dispute for their lives.[39] There are notable public interest dimensions in many cases on the Court's docket, and it has been documented that many cases are instigated by non-state actors.[40] Enhancing transparency practices in this direction could compensate for the absence of the individual in certain proceedings before the Court.

Bringing Part I to a close, the monograph turns to Part II, which addresses the degree to which the individual is considered in the practice of the World Court.

[39] E.g., Impunity Watch (@ImpunityWatch), 'Live from the Hague: Syrian Survivors of Torture and Families of Individuals Detained and Disappeared are Convening a Side-event as a "Right to Reply" to the Two Days of Oral Interventions at the #ICJ and What the Case Means to Them' (Twitter/X, 11 October 2023) https://x.com/ImpunityWatch/status/1712087915260420481?s=20.

[40] Michael A. Becker, 'Pay No Attention to that Man behind the Curtain: The Role of Civil Society and Other Actors in Decisions to Litigate at the International Court of Justice' (2023) 26 *Max Planck Yearbook of United Nations Law Online* 90.

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