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Introduction

> *The law can never be oblivious to the changes in life, circumstance and community standards in which it functions.*
>
> —Philip Jessup, 1966[1]

The International Court of Justice (ICJ, the Court) is the principal judicial organ of the United Nations.[2] Based in The Hague, its subject matter jurisdiction extends across all areas of international law. The ICJ was modelled on its predecessor, the Permanent Court of International Justice (PCIJ), which was the first international judicial body empowered to settle legal disputes between states during the era of the League of Nations.[3] With a temporal advantage over the more recent judicial constructions as the 'only survivor of the League's institutional framework',[4] it was therefore the archetype for all judicial bodies that came after it in the twentieth century. Because of this, not only is the ICJ the *primus inter pares* in the system of international judicial fora, but it is the stronghold of state sovereignty, most prominent during the era of its predecessor. This is indicated by its personal jurisdiction ('*ratione personae*'): it only accepts disputes between states.[5]

The Court's personal jurisdiction is a key feature that has become one of the cornerstones of its identity. However, it has led to misconceptions about its judicial function. Many would purport that, as the ICJ deals

[1] *South West Africa (Liberia v. South Africa; Ethiopia v. South Africa)* (Second Phase) (Judgment) [1966] ICJ Rep 6, 439 (Dissenting opinion of Judge Jessup).
[2] Charter of the United Nations, 1 UNTS XVI (24 October 1945), Article 92 [hereafter, UN Charter].
[3] Karin Oellers-Frahm, 'Chapter XIV: The International Court of Justice, Article 92' in Bruno Simma et al (eds), *The Charter of the United Nations: A Commentary* (3rd edn, OUP 2012) 1902.
[4] Gleider Hernández, *The International Court of Justice and the Judicial Function* (OUP 2014) 4.
[5] Statute of the International Court of Justice, Article 34(1) [hereafter, ICJ Statute].

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with disputes between states, individuals are irrelevant in such cases and have no reason to be considered in its decisions or involved procedurally.

This book challenges such an assertion. Academic literature has successfully documented and commented on the Court's jurisprudence in contentious disputes whose essence is the violation of international human rights treaties.[6] Such analyses offer understandings of how the Court has handled human rights issues in its case law, such as genocide, racial discrimination, or reparations for human rights violations.[7] Yet the focus of this book lies elsewhere.

This book takes a twofold interest in the relationship between the World Court and the individual. First, it takes an interest in comprehensively exploring the individual's procedural participation in contentious and advisory proceedings before the Court where such individuals are in focus. Such is the case for injured individuals in diplomatic proceedings, United Nations (UN) staff members wronged by their employers, or a community whose fate, health, or well-being is under discussion.

Second, it takes an interest in analysing the consideration for individuals in the Court's legal reasoning in contentious disputes beyond the violation of multilateral human rights treaties where they are nonetheless impacted. In territorial boundary disputes, for instance, individuals may have to change their nationality, their identity, their home, lose family ties, or lose property as a result of a decision to alter a boundary or to attribute a piece of land to another state. Similarly, in maritime delimitation disputes, individuals may lose access to waters and fishing rights that are necessary for their livelihood, as the result of the alteration of a maritime boundary. In environmental disputes, individuals may have to suffer the consequences of environmental degradation in their surround-

[6] Selected examples include: Rosalyn Higgins, 'Human Rights in the International Court of Justice' (2007) 20(4) *Leiden Journal of International Law* 745; Sandesh Sivakumaran, 'The International Court of Justice and Human Rights' in Sarah Joseph and Adam McBeth (eds), *Research Handbook on International Human Rights Law* (Elgar 2010) 299; 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* (OUP 2013) 300–25.

[7] E.g., *Interpretation and Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Republic of Azerbaijan v. Republic of Armenia)* (Request for the Indication of Provisional Measures of Protection) [2021]; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)* (Judgment) [2015] ICJ Rep 3.

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ings without having been sufficiently consulted when the damaging government conducted environmental impact assessments. In other contexts, individuals may be affected due to the ruling of a certain practice as custom – they may be denied or granted rights to navigate a certain river for tourism or financial purposes. They may also be affected by the conferral or non-conferral of certain direct rights in international treaties – such as having the right to consular assistance. In such disputes, certain human dimensions may potentially be overlooked as they are not the principal focus of the dispute.

The objective of this study is therefore to assess the degree to which individuals are integrated in the procedural law of the Court, on the one hand, and considered in decisions of the Court, on the other hand. On the basis of these findings, the study also aims to analyse the reasons for state litigants' and the Court's choices. It argues that individuals impacted by the repercussions of inter-state disputes dealt with by the Court should and can be further integrated into its procedure and considered in its legal reasoning.

I.1 The 'Why'

Some of the most authoritative chroniclers on the World Court – such as Hersch Lauterpacht, Shabtai Rosenne, and Rosalyn Higgins – have expressed concern that its law and practice is not adapted enough to modern-day realities regarding individuals in the international legal order.[8] Members of the Court have expressed similar concerns regarding the limited involvement of, or consideration for, individuals in certain instances.[9]

[8] Hersch Lauterpacht, 'The Revision of the Statute of the International Court of Justice' (2002) 1(1) *The Law & Practice of International Courts and Tribunals* 55; Rosalyn Higgins, 'Conceptual Thinking about the Individual in International Law' (1978) 1(1) *British Journal of International Studies* 1; Shabtai Rosenne, 'Reflections on the Position of the Individual in Inter-State Litigation in the International Court of Justice' in Pieter Sanders (ed), *International Arbitration Liber Amicorum for Martin Domke* (Springer 1967) 240.

[9] Selected examples include: *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* (Judgment) [2012] ICJ Rep 99, 291–308 (Dissenting opinion of Judge Yusuf); *Frontier Dispute (Burkina Faso/Niger)* (Judgment) [2013] ICJ Rep 45, 95 (Declaration of Judge Bennouna); *Judgment No.2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development* (Advisory Opinion) [2012] ICJ Rep 10, 51–93 (Separate opinion of Judge Cançado Trindade).

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The arguments of this book are underpinned by social idealism, a unique theoretical lens developed by Professor Philip Allott that calls for a change in the world's social organisation.[10] Social idealism retains faith in state sovereignty and in the inter-state system – yet disagrees with Vattelian positivism, which created the foundations of 'international unsociety': a world tailored exclusively to the interests of states as opposed to humanity.[11] Rather, it invites a shift of focus from an international community dominated by states and their interests to one centred 'on the claims, aspirations, and expectations of individual human beings, whose goals and values should matter more than the interests of states'.[12]

Social idealism therefore considers that the international community, while still organised on the basis of states, should 'discharge its community functions increasingly through international and regional institutions, and conferring rights and obligations on individuals'.[13] This is because individuals are not perceived as 'subjects of international law in the traditional positivist sense, but rather as members of an international society in which they are *the* subjects of all law'.[14] This reconceptualisation reflects an international society of all-humanity,[15] which prioritises the unity of mankind.[16]

Adopting the perspective of social idealism, I argue that the Court is compromising its effectiveness and legitimacy due to its reluctant approach towards including and considering relevant individuals in proceedings and disputes, respectively.

[10] Philip Allott, *Eunomia: New Order for a New World* (OUP 1990); Philip Allott, *The Health of Nations: Society and Law beyond the State* (CUP 2002); Iain Scobbie, 'The Holiness of the Heart's Affection: Philip Allott's Theory of Social Idealism' in Alexander Orakhelashvili (ed), *Research Handbook on the Theory and History of International Law* (Edward Elgar Publishing 2011) 168.

[11] Allott, *The Health of Nations* (n. 10) 56–58; Iain Scobbie, 'Slouching towards the Holy City: Some Weeds for Philip Allott' (2005) 16(2) *European Journal of International Law* 299, 301.

[12] Andrea Bianchi, *International Law Theories: An Inquiry into Different Ways of Thinking* (OUP 2016) 246.

[13] Clarence Wilfred Jenks, *The Common Law of Mankind* (Praeger 1958) 7.

[14] Bianchi (n. 12) 247. See also Hersch Lauterpacht, 'The Subjects of International Law' in Elihu Luaterpacht (ed), *International Law: Being the Collected Papers of Hersch Lauterpacht* vol I (CUP 1970), 136, 149.

[15] Allott, *Eunomia* (n. 10) xxvi–xxvii (quotation at xxvi), and also Allott, *The Health of Nations* (n. 10) 152–53, 5.60–5.61.

[16] Clarence Wilfred Jenks, *A New World of Law?* (Longmans, Green and Company 1969) 292–98.

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I.1.1 Effectiveness

The first reason to strengthen the relationship between the individual and the Court is to enhance the effectiveness of the Court. The assessment of effectiveness is the measurement of the degree to which a court accomplishes its specific objective aim.[17] Several aims can be advanced, which may lead to different conclusions about its effectiveness.[18] Beyond the aim to encourage the respect for international law, three aims are identified and discussed here:

First, the Court aims to peacefully resolve inter-state disputes. This is inferred by the UN Charter's aim to, *inter alia*, settle international disputes 'which might lead to a breach of the peace'.[19] However, it is submitted here that the dispute must be resolved in a way that ensures peace not only between states but also with respect to their populations. For instance, the Court's judgment rendered in 2002 ordering a transfer of sovereignty of the Bakassi peninsula from Nigeria to Cameroon may have curbed inter-state conflict but had nonetheless resulted in physical and structural violence on the ground.[20] Peace, in the words of one author, is 'a process or an institution that is not alien to the environment it is serving'.[21] It stems beyond the physical security that a boundary offers and encompasses human security, namely, 'respect for the fundamental human rights of the persons concerned and their protection, including by international justice', as Judge Bennouna has aptly stated.[22] The Court's effectiveness therefore hinges on its ability to adopt an all-encompassing approach to resolving disputes to ensure lasting peace.

[17] Yuval Shany, 'Assessing the Effectiveness of International Courts: A Goal-Based Approach' (2012) 106(2) *The American Journal of International Law* 225, 230.

[18] Joan E. Donoghue, 'The Effectiveness of the International Court of Justice' (2014) 108*The Effectiveness of International Law* 114, 117.

[19] UN Charter, Article 1(1). See also UN Charter, Article 2(3); ICJ Statute, Article 36(3). See also *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)* (Request for the Indication of Provisional Measures) [2002] ICJ Rep 219, 241; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (Jurisdiction of the Court and Admissibility of the Application) [1984] ICJ Rep 392, 434.

[20] Ndubuisi N. Nwokolo, 'Peace-Building or Structural Violence? Deconstructing the Aftermath of Nigeria/Cameroon Boundary Demarcation' (2020) 29(1) *African Security Review* 41.

[21] Ibid 49.

[22] *Frontier Dispute (Burkina Faso/Niger)* (Judgment) [2013] ICJ Rep 44, 95 (Declaration of Judge Bennouna).

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A second aim of the Court is to contribute to the operation of the UN thereby supporting this regime.[23] Given its status as the principal judicial organ of the UN, the Court's goals have a 'high degree of proximity' to those of the UN.[24] These broadly include maintaining international peace and security – which, as explained before, should be interpreted to include human security – and encouraging respect for human rights. The Charter's preamble also indicates that individuals are at the forefront of the UN's mandate. Its opening sentence reads, 'We *The Peoples* of the United Nations',[25] referring to the populations of the UN Member States.[26] This reference is what divides the preamble into two parts. Only the second part refers to governments to address the Charter's contractual element.[27] The first part, however, declares that people – as opposed to governments – have established the Charter's object and purpose.[28] This interpretation of the UN's objectives should therefore be reflected in the Court's own mandate. Its ability to meet this aim, and therefore ensure its own effectiveness, hinges on its ability to adopt the UN's own preoccupation with people as reflected in its Charter's preamble.

The Court most clearly fulfils its aim of supporting the UN regime through its advisory function.[29] Advisory opinions have been recognised as means to respond to community interests[30] in the socially ideal sense: they have presented opportunities for the Court to respond to questions not only of interest to a collective of states but to a wider public of individuals.[31] Examples include the series of questions relating to the

[23] UN Charter, Article 96 and ICJ Statute, Articles 65–68.
[24] Yuval Shany and Rotem Giladi, 'International Court of Justice' in Yuval Shany (ed), *Assessing the Effectiveness of International Courts* (OUP 2014) 166.
[25] UN Charter, preamble (emphasis added).
[26] André Salomon, *Le préambule de la Charte: base idéologique de l'ONU* (des Trois Collines 1947) 72.
[27] The second part starts at "Accordingly, our respective Governments. . ."). See further Bruno Simma et al (eds), *The Charter of the United Nations: A Commentary* (3rd edn, OUP 2012) 102.
[28] The Court has relied on the preambular provisions of a treaty to interpret its object and purpose. See *Reservations to the Convention on Genocide* (Advisory Opinion) [1951] ICJ Rep 15, 23.
[29] UN Charter, Article 96 and ICJ Statute, Articles 65–68.
[30] James Crawford, *State Responsibility: The General Part* (CUP 2013) 374–75; Patricia W. Birnie, Alan E. Boyle and Catherine Redgwell, *International Law and the Environment* (4th edn, OUP 2021) 266–67.
[31] Yusra Suedi and Justine Bendel, 'Public Interest Litigation: A Pipe Dream or the Future of International Litigation?' in Justine Bendel and Yusra Suedi (eds), *Public Interest Litigation in International Law* (Routledge 2023) 43.

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self-determination of specific populations[32] or the abstract legal questions about the well-being of individuals.[33] The Court's advisory function, through which it offers support to the UN regime, has indicated the degree to which its mandate serves and impacts individuals. In this sense, meeting this aim to ensure its effectiveness hinges on this consciousness.

A third aim of the Court is, more broadly, to confer legitimacy to the UN regime by positioning itself as a custodian of international law and justice.[34] This legitimacy does not stem from the sole fact of being a judicial body. Rather, the Court must be *perceived* as legitimate, in order to confer legitimacy to the UN.[35] I argue here that the Court's reticent approach to individuals may compromise its legitimacy.

I.1.2 Legitimacy

Legitimacy may broadly be understood as a 'right to rule'[36] or an 'authority (. . .) perceived as justified'.[37] This can be based on many competing standards, such as justice, fairness, democracy, or technocratic

[32] *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; *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem* (Request for Advisory Opinion) [2023] ICJ Rep 2024; *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) [2019] ICJ Rep 95; *Western Sahara* (Advisory Opinion) [1975] ICJ Rep 12.

[33] *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226; *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (Advisory Opinion) [1996] ICJ Rep 66; *Obligations of States in respect of Climate Change* (Request for Advisory Opinion) [2023].

[34] Shany and Giladi (n. 24) 167.

[35] Yuval Shany, *Assessing the Effectiveness of International Courts* (OUP 2014) 137.

[36] Allen Buchanan, 'The Legitimacy of International Law' in S. Besson and J. Tasioulas (eds), *The Philosophy of International Law* (OUP 2010) 79; Daniel Bodansky, 'Legitimacy in International Law and International Relations' in J. L. Dunoff and M. A. Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (CUP 2013) 321, 324; Daniel Bodansky, 'The Concept of Legitimacy in International Law' in R. Wolfrum and V. Röben (eds), *Legitimacy in International Law* (Springer-Verlag 2008) 309, 313; Harlan Grant Cohen, Andreas Follesdal, Nienke Grossman and Geir Ulfstein, 'Legitimacy and International Courts – A Framework' in Harlan Grant Cohen, Andreas Follesdal, Nienke Grossman and Geir Ulfstein (eds), *Legitimacy and International Courts* (CUP 2018) 1, 3.

[37] Daniel Bodansky, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?' (1999) 93(3) *American Journal of International Law*

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expertise.[38] Assessing both the process and the outcome of a decision of the Court against these standards, this book illustrates how the Court's legitimacy may be compromised.

The process at the Court is legitimate insofar as it has been generated 'by way of a proper legal procedure'.[39] This is typically assessed by standards of fairness: whether the Court has met standards of procedural justice, such as the principle of the equality of parties. In contexts such as advisory proceedings reviewing decisions of certain administrative tribunals, this book demonstrates how the Court's legitimacy is compromised through its struggle to uphold this principle.[40] Procedural legitimacy can also be assessed by standards of democracy, concerned with giving voice to as many constituencies of international courts as possible.[41] Inter-state courts and tribunals have been observed to include non-state actors in their procedure to uphold democratic standards and therefore preserve their legitimacy.[42] The chapters in Part I demonstrate that the absence of individuals in proceedings where they are directly impacted may have repercussions on the Court's legitimacy in this sense. Finally, the Court's process can also be flawed when technocratic expertise is measured. This is derived from the judges' competence, knowledge, skills and reputation. When the judicial process does not incorporate the necessary procedural tools at disposal to incorporate individuals, such as oral witness testimony, this might impact the judges' ability to reach well-informed decisions. Indeed, enhanced participation may allow for more evidence that could facilitate the successful resolution of the dispute. Chapter 2 (in Part I) demonstrates instances in which greater participation of individuals may have led to more evidence being provided and therefore more satisfactory outcomes for the Court.[43] Such situations suggest that inadequate procedural tools might ultimately

596, 600; Nienke Grossman, 'Legitimacy and International Adjudicative Bodies' (2009) 41 (1) *George Washington International Law Review* 107, 115.

[38] See further Cohen et al (n. 36). 'Moral legitimacy' has also been separately identified in Grossman (n. 37) 115.

[39] Shany (n. 35) 141.

[40] Thomas M. Franck, *Fairness in International Law and Institutions* (Clarendon Press 1998) 26, 27.

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

[42] Ibid 144–47.

[43] Conditional request of Paraguay for an order conclusively established facts (9 October 1998) [1], [6]; *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)* (Compensation) (Judgment) [2012] ICJ Rep 324, 332–33 [19].

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undermine the judges' technocratic expertise, and therefore, the Court's legitimacy.

While legitimacy stems from the Court's process, it also comes from its decisions, which may give rise to challenge when the outcome 'sharply conflicts with the basic notions of justice'.[44] Justice is therefore a typical yardstick by which to assess judicial outcomes. A complex notion, justice can denote 'restoration of a "proper balance", fit[ting] with the idea of the "golden mean", the desirable middle between two extremes'.[45] In Part II of this book, many scenarios are examined that can be characterised as unjust from the perspective of social idealism, which aspires for more balance between states and individuals. Certain outcomes in territorial or maritime disputes, for instance, may cause disruption to peoples' lives, and in environmental disputes may exclude significant human factors.

Therefore, the absence of individuals in the Court's process – compromising technocratic expertise, fairness, and/or democracy – may impact the Court's legitimacy. Similarly, the lack of consideration for individuals in the Court's judgments may be characterised as unjust and therefore compromise the Court's legitimacy.

One further point should be raised with respect to legitimacy. Generally, the Court strives to maintain its legitimacy by ensuring that it meets the expectations of states. However, it may unknowingly be compromising its long-term legitimacy as a key player in the wider context of the international legal order, characterised by two relevant factors. First, the order is increasingly characterised by its variety of actors. Indeed, the capacity of individuals in international law has impressively evolved over the course of the twentieth century, and participation of a variety of actors is now a basic feature of modern international relations.[46] The Court's limitations *ratione personae* are therefore considered to be 'disconnected' from such developments.[47] This is not helped by the perception that it is 'isolated physically, symbolically, and systematically from the rest of international legal and social reality'.[48] The second characterisation impacting the Court's

[44] Shany (n. 35) 144.
[45] Patrick Keyzer, Vesselin Popovski and Charles Sampford, 'What Is "Access to International Justice" and What Does It Require?' in Patrick Keyzer, Vesselin Popovski and Charles Sampford (eds), *Access to International Justice* (Routledge 2015).
[46] Robert McCorquodale, 'An Inclusive International Legal System' (2004) 17(3) *Leiden Journal of International Law* 477.
[47] Pierre-Marie Dupuy and Cristina Hoss, 'Article 34' in Andreas Zimmermann et al (eds), *The Statute of the International Court of Justice: A Commentary* (3rd edn, OUP 2019) 666.
[48] Allott, *Eunomia* (n. 10) 240.

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legitimacy is its application of international law, which has the purpose, *inter alia*, of 'giving a voice to those who have been excluded from powerful positions and are regularly treated as the objects of other peoples' policies'.[49] The Court often finds itself at the receiving end of such an objective: many cases examined in this book involve a community, population, or individual striving to overcome imposition by a more powerful force and vindicate their rights. A failure to engage with this to some degree reflects a failure to acknowledge the reality in which international law operates: that is, not in an intellectual vacuum.[50]

In sum, this book proposes a strengthening of the relationship between the Court and individuals for the Court's effectiveness and legitimacy. Both, from the perspective of social idealism, require greater acknowledgement of the relevant stakeholders.

The choice to focus on the Court is explained by my interests in the tensions between the nature of cases to come before its docket – many of which yield stakes for individuals – and the Court's often conservative or formal approach, deferential to state sovereignty.[51] This choice is also grounded in its prominence in the international legal order, historical longevity, and general subject matter jurisdiction, which results in the 'cast[ing of] a tremendous shadow on the development of international law'.[52]

I.2 Method

The method adopted in this book is, as indicated in its title, the analysis of the law and practice of the Court. 'Law' refers to the procedural law of the Court, which is determined by three key sources. The first is the Statute of the Court, which expounds the broad principles related to it featured in Articles 92–96 of the UN Charter, to which the Statute is annexed. The second is the Rules of the Court, which supplement the broad provisions of the Statute on technical procedure and practical details. The third is the Practice Directions, which supplement the Rules of the Court by specifying the Court's preferred practice in certain

[49] Martti Koskenniemi, 'What Is International Law For?' in Malcolm Evans (ed), *International Law* (5th edn, OUP 2018) 28.
[50] Iain Scobbie, 'A View of Delft: Some Thoughts about Thinking about International Law' in Malcolm Evans (ed), *International Law* (5th edn, OUP 2018) 51.
[51] Shany and Giladi (n. 24) 177.
[52] Hernández (n. 4) 4.

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