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## Aspiring States

Shana Tabak

*Georgia State University, College of Law*

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# Aspiring States

SHANA TABAK†

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## INTRODUCTION

In 1971, the International Court of Justice in The Hague (“the Court” or “ICJ”) heard arguments in an Advisory Opinion regarding the legal status of Namibia (South-West Africa).<sup>1</sup> At the crux of the issue was whether South Africa was legally permitted to occupy the territory of Namibia, and relatedly, whether the people of Namibia enjoyed the right to self-determination. In the course of the proceedings, the Court heard statements by South Africa, a number of other African states, and the Organization of African Unity. No representative of the people of Namibia was present, nor was any invited to address the tribunal in defense of the position of the people of Namibia in a case that would likely impact their standing in the international community. In contrast, in 2010, when the Court heard arguments in the Advisory Opinion regarding the legal status of Kosovo, the Peace Palace witnessed a dramatically different scene. There, the UN General Assembly asked the Court to determine whether the unilateral declaration of independence of Kosovo was in accordance with international law. Similar to the Namibia advisory opinion, the Court was asked to opine on a matter that affected the rights of a people seeking to exercise the right to self-determination in pursuit of national independence. Yet in the Kosovo opinion, the Court invited the Authors of the Declaration of Independence of Kosovo to address the Court. Further, it granted Kosovo three hours to present evidence and convey legal arguments, thereby allowing the representatives of Kosovo a seat at the table, literally, across from the representatives of Serbia from whom they sought independence.

The choice to exclude Namibia—a non-state actor (“NSA”)—from ICJ proceedings startled no one; the statute of the Court offers no means for an NSA to participate in proceedings of an advisory opinion, even if those proceedings substantially affect the rights of that NSA. The Statute of the ICJ did not change between 1971 and 2010, yet, the Court’s procedural allowances reveal a dramatic shift with regard to

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1. Legal Consequences for States of Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, ¶ 13 (June 21).

the Court's view of the proper role of actors such as Namibia, Kosovo and other "aspiring states" at the ICJ.

I introduce the term "aspiring states" to describe NSAs within these groundbreaking advisory opinions, referring to a sub-group of NSAs who do not meet the legal criteria for statehood, yet who aspire to do so, such as Palestine and Kosovo. These actors are territorial entities that may be under the governance of sovereign nations or the United Nations, but which are not UN members. They aspire to exercise their right to self-determination and to establish separate, independent states, free from the control of their parent nations. Aspiring states, though often characterized as NSAs by scholars and jurists due to their *lack* of membership in the club of statehood, in actuality share more similarities with states than they do with other NSAs such as NGOs or multi-national corporations.

With this Article, I propose that the ICJ's treatment of aspiring states offers a critical signal that the Court's jurisprudence—and international law more broadly—is evolving from its state-centric origins, evidenced by its increased willingness to legitimate the right to self-determination of peoples. Is it simple coincidence that at a Court where standing relies upon statehood, the Court has allowed participation by the very non-state entities aspiring to achieve statehood? By permitting aspiring states to appear before it, the Court positions them to have a voice, to submit pleadings, and in effect, positions them—procedurally—similarly to State parties in contentious cases. The judges' procedural determination to allow non-state participation in these very limited circumstances, though largely overlooked by scholars and sometimes by the judges themselves,<sup>2</sup> is significant. NSA participation is critical to understanding the substance of decisions regarding the right to self-determination, a right that is at the crux of each of these matters, and which entitles certain peoples to be free from

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2. While clerking at the ICJ from 2009–2010, I had conversations with judges who indicated that participation of non-state actors, such as the representatives of Kosovo in the Kosovo advisory opinion, was "fair," though there was no statute-based reason to allow it. While I do not dispute the importance of "fairness" in judicial proceedings, the evolution of the Court's attitude toward the inclusion of aspiring states is remarkable considering the statutory restrictions, and merits further exploration.

persecution and discrimination, and to collectively determine their political future in a democratic fashion. Not only does this phenomenon shed new light on the ever-elusive legal concept of self-determination, but it also offers important indicators of the ways in which the Court has evolved over decades, from a state-centric approach to international law, to one that is more encompassing of the current international legal order.

The ICJ is perhaps the *grande dame* of an international legal system rooted in a state-centric approach to international law. The ICJ, or World Court, draws its authority from the UN charter, as the "principal judicial organ" of the United Nations.<sup>3</sup> It enjoys general jurisdictional reach, and it "remains the most prestigious legal decision-maker within the system."<sup>4</sup> Because of its explicit connection to the United Nations and its reliance on state parties to support its judicial function, the Court has consistently been attentive to the legal position of states. Indeed, for centuries, legal scholars considered states to be the only relevant actors within the international legal scene. This state-centric approach to international law is perhaps most embodied by the law and practice of the ICJ, where only states (and occasionally international organizations) have the capacity to engage with the Court.

Yet international law is arguably no longer dominated exclusively by a state-centric approach. Non-state actors, including international organizations, NGOs, multi-national corporations, and other actors not contemplated by the drafters of many foundational international legal instruments play a significant role in today's changing legal environment. The increased relevance of NSAs within international law has created tension for the ICJ; if NSAs are barred from participation in proceedings, they must be represented by states if their rights are to be reflected in the

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3. D.W. Bowett, *The Court's Role in Relation to International Organizations*, in FIFTY YEARS OF THE INTERNATIONAL COURT OF JUSTICE 181, 186 (Vaughan Lowe & Malgosia Fitzmaurice eds., 1996).

4. Maurice Mendelson, *The International Court of Justice and the Sources of International Law*, in FIFTY YEARS OF THE INTERNATIONAL COURT OF JUSTICE 63, 82-83, 88 (Vaughan Lowe & Malgosia Fitzmaurice eds., 1996).

proceedings. Phenomena such as the rise of human rights, anti-colonialism, and increased participation of NSAs in international law demonstrate that numerous affinity groups may not be best represented by the nation-state.<sup>5</sup> Take for example, a minority group who seeks to realize its right to self-determination, such as the Palestinian people. Although for years they may have been formally represented by Israel in international judicial fora, it is improbable that Israel would have brought a claim representing the rights of the Palestinian people, since it would necessarily be brought against the state's own interest. When considering the right to self-determination of aspiring states, it is unlikely that the state from which an NSA seeks to secede will represent its interests at the ICJ. This tension raises significant concerns regarding the legitimacy of the ICJ, a court meant to have universal jurisdiction, but where such groups' interests have no potential for representation.

The legitimacy of any judicial body is undermined when it adjudicates the rights and obligations of actors who are not parties to a dispute. In particular, the right to self-determination has been adjudicated at the court vis-à-vis a number of important advisory opinions in which NSAs' rights have been at the heart of the dispute. According to the Rules of the Court, NSAs have no right to appear before the ICJ. Yet in a number of instances, the Court has seen fit to include their voices in proceedings. Thus, I argue that although the ICJ may be a bastion of the state-centered approach to international law, the Court—overtly in its procedure and subtly in the substance of its jurisprudence—has acknowledged and grappled with this paradox of modern international law.

Rich discussions abound regarding the role of non-state actors at the ICJ. Scholars have analyzed the treatment of human rights by the ICJ. Others still have lamented the lack of the Court's capacity to discuss self-determination and its insistence on evading this thorny issue. This Article engages these discussions by explicitly linking aspiring states'

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5. See Karen Knop, *Why Rethinking the Sovereign State is Important for Women's International Human Rights Law*, in *HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES* 153, 154-57 (Rebecca J. Cook ed., 2011).

procedural positioning at the ICJ with substantive findings regarding their right to self-determination at the heart of these cases. In the course of this Article, I offer a descriptive account of a fascinating procedural story, describing the three instances in which the ICJ has created the procedural space to allow aspiring state actors a role at the Court through the advisory opinion mechanism. I propose that the Court's ruptures with statute-based procedure in the aspiring state cases can be understood through applying a legitimacy framework. Although legitimacy pulls the Court in multiple directions, I propose that a legitimacy analysis rooted in democratic theory explains the Court's favorable procedural treatment of aspiring states who are nearing international recognition as independent entities. Finally, I explore the normative implications of these procedural choices on the Court's substantive analysis of the balance between a people's right to self-determination and a state's right to sovereignty, which sheds new light on the Court's jurisprudence concerning the controversial and much-contested right of self-determination.

Understanding the inclusion or exclusion of aspiring states within the international legal system is important on multiple levels. Aspiring states have landed at the epicenter of a variety of international law conflicts, and will likely continue to do so. From a practice and procedure perspective, it is crucial that we understand what the Court is doing here with regard to its procedure. Is there an incongruity between the Court's procedure and substance? What does this procedural rupture tell us about the value judgments and choices that the Court is making? Second, from a legitimacy perspective, the ICJ should not be perceived as determining the rights of actors who have no basis for participation, which undermines procedural fairness and democratic principles of law. Lastly, this query is important to the extent that it may assist legal scholars in interpreting the ICJ's approach to NSAs and self-determination, an area of the law in which it has been reticent to take an assertive position. I explain that although the Court is not yet ready to create positive law regarding the right to self-determination, procedure does allow the Court to make concessions to the new world in which it is adjudicating, a world in which the interests of states are no longer necessarily dominant over those of

individuals or groups. That new world is one in which the right to self-determination, in certain circumstances, can and must be effectuated at the ICJ, despite the challenge to statehood that it may pose.

This Article provides a novel observation regarding procedure at the ICJ: the ICJ is carving out a role for certain aspiring states where none previously existed. This contribution, in and of itself, is crucial in that it signals a change in the Court's practice that is different from that contemplated by its statute and quite distinct from decades of established practice. But, as is often the case, procedural shifts may correlate with substantive shifts in the interpretation of the law. I argue that this trend is indicative of larger phenomena in international law, specifically that the Court's procedural treatment of aspiring states reflects its increased willingness to engage with the balance between the right to self-determination and the right to territorial sovereignty. Despite the Court's reticence to create positive law on the issue of self-determination, these opinions reflect the Court's longstanding concern for ensuring that its judgments are considered fair and legitimate by state actors and non-state actors alike. This procedural treatment suggests a more favorable, legitimating approach to aspiring states and their right to self-determination. Thus, these procedural allowances permit the Court to continue to operate with a state-centered approach, while maintaining its legitimacy within an international legal regime that is increasingly dominated by NSAs, and where the right to self-determination still remains elusive for many.

In making this argument, this Article proceeds in four Parts. Part I describes the historically orthodox view of international law in which states were the only relevant actors, and in which NSAs have been marginalized. This perspective lays the groundwork for understanding why the participation of non-state actors at the Court has traditionally been curtailed. Part II focuses on the ICJ and the specific statutory elements that regulate the participation of actors before the Court. Statutory limitations explicitly limit the capacity of NSAs to participate within the Court's procedure, which is why it is so remarkable that on three occasions, the Court has allowed aspiring states to participate. In order to evaluate to what extent these



anomalies are linked to a shift in the Court's substantive evaluation of the right to self-determination, this Part also reviews the limited analysis of self-determination at the Court—the human right that is of utmost importance to aspiring states. This right is one of the most commonly referenced and codified within international law, yet very few courts have made efforts to clarify the scope or definition of this right, including the ICJ. Part III identifies the jurisprudence at the ICJ pertaining to aspiring states. I first explain why it is rare, considering the procedural restrictions within the statute, for NSAs to find a role at the Court, and then I describe three instances during which the Court and its predecessor, the Permanent Court of International Justice (“PCIJ”), have allowed aspiring states access to the ICJ. I examine commonalities between these instances and summarize the explanations for how the Court rationalizes this allowance, despite the lack of procedural mechanisms sanctioning such acts.

Part IV moves from the how to the why. Why would a Court that is state-centered and reliant on a constituency of states within the international system take pains to include, even marginally, the perspectives of aspiring state actors? In answering this question, I propose that this procedural move is a legitimacy enhancing choice for the Court. I explore how normative legitimacy theory contextualizes the Court's adoption of this procedurally odd position with regard to aspiring states. Legitimacy theory, in multiple variants, offers a perspective on how and why international courts maintain their legitimacy in the international realm. Aspiring states pose an existential challenge to the legitimacy of the ICJ. On the one hand, courts such as the ICJ must consider their mandate-providers, their constituency, and their state parties, which may lead the Court to retain its state-centered position and its reticence to develop radically positive law regarding self-determination. On the other hand, the ICJ's legitimacy may be affected by perceptions of the Court as operating in accordance with values such as fairness and justice, which, I argue, has resulted in the Court's decisions to engage with aspiring states through the adoption of unorthodox procedural choices.

Of course, participation in proceedings at the Peace Palace also significantly affects the legitimacy of aspiring states themselves in their quest toward statehood. This Article concludes by exploring the normative implications of these trends on the right to self-determination and sovereignty. I conclude that the Court's procedural allowances are reflective of a court that is grappling with its role within a changing international legal framework, in which states are no longer exclusively dominant. This finding has important conclusions for aspiring states in conflicts across the globe, and implications for the ICJ as it adjudicates and has the potential to legitimize the desires for the independence of aspiring states.

#### I. STATE-CENTERED INTERNATIONAL LAW AND NON-STATE ACTORS

The orthodox view remains that the state is the only relevant unit in the conduct of international relations.<sup>6</sup> This perspective has dominated international law since its early days, “[s]ince . . . the Law of Nations is a law between States only and exclusively, States only and exclusively are the subject of the Law of Nations.”<sup>7</sup> The “states-only” view of international law reflects the world-picture of international law at the time the Court was created in the 1920s. Then, the international community was referred to as a “Lotus Society,”<sup>8</sup> a reference to the famous *Lotus* Decision of the PCIJ reaffirming that international law “governs relations

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6. Gleider I. Hernandez, *Non-State Actors From the Perspective of the International Court of Justice*, in PARTICIPANTS IN THE INTERNATIONAL LEGAL SYSTEM: MULTIPLE PERSPECTIVES ON NON-STATE ACTORS IN INTERNATIONAL LAW 140, 140 (Jean d'Aspremont ed., 2011) [hereinafter MULTIPLE PERSPECTIVES].

7. 1 L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE 456 (Ronald F. Roxburgh ed., 3d ed. 2008); see also Humphrey Waldock, *General Course on Public International Law*, in 2 RECUEIL DE COURS 1, 138 (1962) (quoting DIONISIO ANZILOTTI, IL DIRITTO INTERNAZIONALE NEI GIUDIZI INTERNI 44 (1905)) (“[I]t is inconceivable that there should exist subjects of international rights and duties other than [s]tates.”).

8. Pierre-Marie Dupuy, *L'unité de L'Ordre Juridique International*, in 297 RECUEIL DE COURS : COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 1, 93 (2002).

between independent States” anchored in notions of state sovereignty.<sup>9</sup>

Yet a number of trends have emerged since the rise of the United Nations that have challenged the exclusive dominance of state sovereignty within international law. These trends include, most prominently, the rise of an anti-colonialist movement and an increased awareness, codification, and enforcement of human rights norms. Inherent in these phenomena is the recognition that a state may not always be the best representative of the interests of the individuals and groups that it represents.<sup>10</sup> This becomes particularly clear when individuals and groups make claims against states for violations of their rights. As a result of these developments, non-state actors have come to play an increasingly significant role within international law, challenging what had for centuries been a state-exclusive domain.<sup>11</sup>

Scholars have employed the umbrella term “non-state actors” to reference a variety of potential actors who cannot be defined as states within international law, such as: international organizations, non-governmental organizations, corporations, minority groups, terrorist groups, individuals, armed groups, and groups that aspire to become states, or pre-state territorial entities.<sup>12</sup> The term is often utilized as a catchall to describe a variety of actors in very different circumstances, and with varying degrees of capacity to affect change within the international legal system. It has also been subject to critique by prominent

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9. S.S. “Lotus” (Fr. v. Turk.), Judgment, 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7).

10. See generally Cedric Ryngaert & Math Noorthmann, *New Actors in Global Governance and International Human Rights Law*, 4 HUM. RTS. & INT’L LEGAL DISCOURSE 5 (2010) (discussing the role of non-state actors in international relations).

11. See NON-STATE ACTORS AND HUMAN RIGHTS (Philip Alston ed., 2005); Andrew Clapham, *Human Rights Obligations of Non-State Actors in Conflict Situations*, 88 INT’L REV. RED CROSS 491, 491-94 (2006). See generally NON-STATE ACTORS AND INTERNATIONAL LAW (Andrea Bianchi ed., 2009); MULTIPLE PERSPECTIVES, *supra* note 6.

12. Ryngaert & Noorthmann, *supra* note 10, at 6.

scholars including Philip Alston, who has levied the concern that the umbrella term obfuscates any debate about status through the insistence on defining an actor by what it is not, rather than what it is. This approach “combines impeccable purism in terms of traditional international legal analysis with an unparalleled capacity to marginalize a significant part of the international human rights regime from the most vital challenges confronting global governance at the dawn of the twenty-first century.”<sup>13</sup> Thus, the term NSA, though often utilized to acknowledge these entities’ increased role in international law, may only serve to reinforce a state-centric approach within the field.

The process of how a “state” comes to exist is contested among legal scholars. As a starting point, the Montevideo Convention of 1933 discusses the criteria and requirements of statehood. It is widely understood as the codification of customary law, indicating that four criteria must be met as requirements for statehood.<sup>14</sup> An entity must meet the following requirements in order to be considered a state: it must have a stable population, the ability to engage in relations with other states, set borders, and an effective governmental power. Although these four criteria are relatively undisputed, debate still remains as to whether these criteria are sufficient to become a state, or whether a state must also be recognized as such by the international

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13. Philip Alston, *The 'Not-a-Cat' Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?*, in NON-STATE ACTORS AND HUMAN RIGHTS 3, 3 (Philip Alston ed., 2005). Alston’s eighteen-month-old daughter came up with the term “not-a-cat” to describe any animal she saw that was not a cat, whether it was a mouse, kangaroo, et cetera. Alston’s critique borrows from his daughter’s methodology of naming something not by the characteristics that define it, but by those to which it is in opposition. *Id.*

14. Convention on the Rights and Duties of States, art. 1, Dec. 26, 1933, 49 Stat. 3097, 165 L.N.T.S. 19 [hereinafter Montevideo Convention] (“The state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other states.”); see, e.g., JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 36-47 (Oxford Univ. Press, 2d ed., 2006) (discussing the four accepted criteria before exploring other proposed state characteristics, such as independence and sovereignty).

community.<sup>15</sup> The Montevideo Convention rejects the inclusion of recognition as a criteria, stating that, “[t]he political existence of the state is independent of recognition by the other states.”<sup>16</sup>

The Montevideo Convention represents only one of two central theories within international law regarding state recognition: the declaratory theory. The declaratory theory of state recognition simply requires that a state be able to meet the four criteria laid out by the convention, and “looks to the purported state’s assertion of its sovereignty within the territory it exclusively controls to determine if it can access the international plane.”<sup>17</sup> State recognition is irrelevant. The constitutive theory, on the other hand, places great emphasis on recognition by other states, determining that only upon recognition by other states can a new state come to exist legally. Although the declaratory view is regarded as the more prominent approach, some scholars have identified the ambivalence of authorities that articulate support of the declaratory view, but then appear to apply a constitutive approach to balance complicated political tensions that invariably arise when a new state declares itself.<sup>18</sup> Although states have always been dominant actors within international law, how exactly they come to exist remains in dispute.

This Article focuses its attention on one sub-group of NSAs who do not meet the legal criteria for statehood, yet who aspire to do so. In this Article, I utilize the term “aspiring states” to describe particular NSAs: those territorial entities, which, although they are technically governed by a sovereign

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15. For a canvassing of the various scholarly opinions regarding whether state recognition is crucial for an entity to be considered a state, see William Thomas Worster, *Law, Politics, and the Conception of the State in State Recognition Theory*, 27 B.U. INT’L L.J. 115, 119-43 (2009).

16. Montevideo Convention, *supra* note 14, at arts. 3, 6.

17. Worster, *supra* note 15, at 119.

18. *Id.* at 118, 125-27. Worster discusses this ambivalence as particularly evident within the opinions of the Badinter Commission, set up by the European Economic Community to assess the status of the states constituting the former Yugoslavia, and the Commission’s need to balance the desires of the European nations. *Id.* at 125-27.

nation, aspire to exercise their right to self-determination and to establish separate, independent states.<sup>19</sup> Examples of aspiring state actors include (in the Court's recent history) representatives from Palestine and Kosovo; entities that have declared their independence but are not universally recognized as states.

Drawing on Alston's critique, I propose the term "aspiring states" to identify a sub-group of NSAs that is more nuanced, descriptive, and more limited than NSAs. This term defines these actors by their commonalities, and not only by their lack of membership in the club of statehood. Aspiring states can be defined in that they meet two of the four so-called Montevideo criteria: they can claim (a) a permanent population and (b) a defined territory. Yet, they are "aspiring" because at the time of their intervention at the ICJ, they do not fully meet the other criteria: (c) a government with effective control and (d) capacity to enter into relations with other states. These two criteria are (temporarily) unreachable for aspiring states because, significantly, these entities are governed under international supervision as they seek to exercise their right to self-determination through secession, or because they have not been widely recognized by other nations. These actors, however similar they may be to states, are not states. As a result, aspiring states, according to the statute of the ICJ, should be barred from participation in all adjudication at the ICJ. Curiously, however, the Court has managed to create a space for these non-state actors to access the procedure of the Court.

The increased importance of NSAs within the international scene have led some to conclude that the state-centric system of international relations is endangered

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19. Andrew Clapham correctly points out the awkwardness of referring to these groups, whom he refers to as national-liberation movements ("NLMs"). NLMs, he highlights, may reject the NSA label as they "may . . . wish to stress their putative state-like aspirations and status, [but] they may sometimes already be recognized as a state member in certain regional intergovernmental organizations." Clapham, *supra* note 11, at 494; *see also* Hernandez, *supra* note 6, at 140, 147-49 (analyzing the role that NSAs have played in the jurisprudence of the International Court of Justice, and referring to these groups as "entit[ies] striving toward statehood").

irrevocably, jeopardizing the dominance of the sovereign state.<sup>20</sup> Some scholars have argued that NSAs have engendered such a radical shift within the international legal order that it has been dramatically transformed from its origins as the law of nations.<sup>21</sup> Couched within those debates, this Article seeks to tackle the much more precise issue of the role of aspiring states at the ICJ. It is an issue that has broad implications and intersects with these larger questions about whether international law has fundamentally shifted away from its state-based foundations.

## II. THE INTERNATIONAL COURT OF JUSTICE, HUMAN RIGHTS AND NON-STATE ACTORS

The ICJ, known as the World Court, is the principal judicial body of the United Nations. Consideration of the ICJ in its historical context reveals the degree to which the international juridical function was embedded within the broader institutional framework of the United Nations.<sup>22</sup> State representatives at the Hague Peace Conference who founded the ICJ's predecessor judicial body, the Permanent Court of International Justice, envisioned a judicial body that would adjudicate inter-state legal disputes. The transition from the PCIJ to the ICJ in 1946 was largely seamless, and

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20. Jürgen Habermas, *The European Nation State: Its Achievements and Its Limitations*, 9 *RATIO JURIS* 125, 135-36 (1996); Martti Koskenniemi, *The Future of Statehood*, 32 *HARV. INT'L L.J.* 397, 406-10 (1991); Oscar Schachter, *The Decline of the Nation-State and its Implications for International Law*, 36 *COLUM. J. TRANSNAT'L L.* 7, 7-8 (1998); Christoph Schreuer, *The Waning of the Sovereign State: Towards a New Paradigm for International Law?*, 4 *EUR. J. INT'L L.* 447, 449-50 (1993); Anne-Marie Slaughter, *The Real New World Order*, 76 *FOREIGN AFF.*, 183, 183-85 (1997); James D. Wilets, *The Demise of the Nation-State: Towards a New Theory of the State under International Law*, 17 *BERKELEY J. INT'L L.* 193, 193-94 (1999).

21. Remi Bachand, *Non-State Actors in North American Legal Scholarship*, in *MULTIPLE PERSPECTIVES*, *supra* note 6, at 97, 98; A. Claire Cutler, *Critical Reflections on the Westphalian Assumptions of International Law and Organization: A Crisis of Legitimacy*, in *NON-STATE ACTORS AND INTERNATIONAL LAW* 19, 19-20 (Andrea Bianchi ed., 2009); *see also* Clapham, *supra* note 11, at 523. *See generally* *NON-STATE ACTORS AND HUMAN RIGHTS*, *supra* note 11.

22. Yuval Shany & Rotem Giladi, *The International Court of Justice*, in *ASSESSING THE EFFECTIVENESS OF INTERNATIONAL COURTS* 161, 161-62 (Ruth Mackenzie et al. eds., 2012).

the ICJ was intentionally designed to model the PCIJ both in structure and functionality.<sup>23</sup>

At the Court, two primary types of disputes may be heard. Most common are contentious cases, in which states may bring a case before the ICJ against another state with a claim that international law has been violated.<sup>24</sup> The Court may also hear advisory opinions.<sup>25</sup> In those instances, the General Assembly or certain international organizations of the United Nations may refer a question of international law to the Court for its opinion. Although advisory opinions are non-binding and in principal, only consultative, they can have a wide-ranging impact from a political perspective. They have frequently addressed controversial international law questions.

The ICJ, unlike subsequently-developed regional and subject-specific judicial bodies, has universal subject matter jurisdiction for questions brought before it. The Court's jurisprudence therefore covers matters of international law as described in its statute, allowing it to interpret international law broadly, including matters of *jus cogens*, international treaties, and other traditional sources of international law.<sup>26</sup>

#### A. *Non-state Actors at the ICJ*

In contrast to the breadth of matters that the Court may consider under its subject matter jurisdiction, the statute of the Court delineates narrow and specific limitations on personal jurisdiction, both for contentious cases and for advisory opinions of the Court. Indeed, the right of access to a court or a tribunal colors the entirety of its activities, and the subjects which have the right to bring and defend cases before it may be largely determinative of the type of

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23. U.N. Charter art. 92

24. Statute of the International Court of Justice arts. 36, 38.

25. *Id.* art. 65.

26. *Id.* arts. 36 (governing subject matter jurisdiction generally), 38 (governing subject matter jurisdiction for contentious proceedings), 65 (governing subject matter jurisdiction for advisory proceedings).



substantive law that it decides.<sup>27</sup> Article 34, paragraph 1 and Article 35 of the Statute limit the participation of parties in contentious proceedings to state parties.<sup>28</sup> Thus, the ICJ's foundational documents did not contemplate the participation of NSAs in contentious cases, which is unsurprising considering the era in which the international community drafted the statute. The Court is designed to function as a state-to-state dispute resolution mechanism only, and this limitation is explicitly clear in the articles of the statute outlining the rules for contentious cases, which are binding on parties to the dispute.<sup>29</sup>

Advisory opinions at the ICJ, however, offer an entirely different approach to law-making and participation. The advisory role of the Court is not limited to inter-state disputes, and instead, allows the Court to offer legal counsel to UN organs and other international organizations on a variety of legal matters. Although they have no binding force as such, advisory opinions can have far-reaching legal consequences.<sup>30</sup> For example, after the Palestine and the Kosovo advisory opinions, international organizations took specific actions adopting resolutions and facilitating processes that were in accordance with these decisions.<sup>31</sup> Furthermore, advisory opinions may become binding through specific conventions or acts of international organizations. In the Namibia advisory opinion, the Court held that South

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27. See ROBERT KOLB, *THE INTERNATIONAL COURT OF JUSTICE* 258 (2013).

28. Article 34, paragraph 1 reads that “[o]nly states may be parties in cases before the Court,” while Article 35 offers more clarification around those states which are not parties to the Statute, but who may still participate in contentious cases at the Court. Notably, paragraph 3 of Article 34 recognizes that contentious cases may affect the constituent instrument of a public international organization, and indicates that in such situations, the “Registrar shall so notify the public international organization concerned and shall communicate to it copies of all the written proceedings.”

29. Contentious cases of the Court are binding upon state parties to a dispute. Statute of the International Court of Justice art. 59.

30. Jochen Abr. Frowein & Karin Oellers Frahm, *Advisory Opinions: Article 65*, in *THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY* 1605, 1621, 1623 (Andreas Zimmermann et. al. eds., 2d ed., 2012) [hereinafter *STATUTE OF THE ICJ: A COMMENTARY*].

31. *Id.* at 1621-22.

Africa was not legally entitled to administer the territory of Namibia, and indicated that the UN member states were obligated to recognize the illegality and invalidity of South Africa's continued presence there.<sup>32</sup> This decision, despite its lack of authority, had a significant impact on states' responses toward the South African occupation of Namibia.

The Rules of the Court offer procedures for advisory opinions distinct from those governing contentious cases. Because the Court lacks the benefit of the parties' pleadings in advisory opinions, on which it relies in contentious cases, Article 66 allows the Court a means by which to collect information regarding the legal issue at hand.<sup>33</sup> The statute permits the Court to solicit the input of states or of "international organizations," though in these instances these opinions are not technically binding upon the parties.<sup>34</sup>

The Court has consistently taken a strict approach to interpreting the Article 66 term "international organizations" as only applying to state-based, principally UN, international organizations. The ICJ affirmed a narrow reading of the term in 1945 when the Court revised its Rules and bypassed the opportunity to re-evaluate the role of non-state actors within its adjudication.<sup>35</sup> During these debates, the judges at the PCIJ struggled with the proper interpretation of "international organizations," concerned that the term was overly inclusive or exclusive, depending on how it was to be interpreted.<sup>36</sup> At this time, the President of the Court indicated that he had hoped to propose the deletion or alteration of the term "international" when referencing "international organizations," thereby potentially opening

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32. See *Legal Consequences for States of Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 1971 I.C.J. 16, ¶ 133 (June 21).

33. See Andreas Paulus, *Advisory Opinions: Article 66*, in *STATUTE OF THE ICJ: A COMMENTARY*, *supra* note 30, at 1638, 1638-40.

34. *Id.* at 1638.

35. Statute of the International Court of Justice art. 34.

36. *Elaboration of the Rules of Court of March 11th, 1936*, 1936 P.C.I.J. (ser. D) No. 2, at 701-02.

the door to non-state participation under Article 66.<sup>37</sup> This ultimately proved impossible, though, because Rule 73 of the rules of the court (in which the word “international” qualified the word “organization”) was anchored in Article 66 of the statute and thus could not be altered.<sup>38</sup> Thus, “international organizations” as referenced by the statute are limited to state-based international organizations, such as the International Labor Organizations (“ILO”) or the World Health Organization (“WHO”), each of which has participated in and requested advisory opinions before the court.<sup>39</sup>

The 1949 *Reparation* advisory opinion marked the first occasion on which the Court concluded that the UN possessed international legal personality, thus dramatically shifting the previous understanding that only states could claim international legal personality.<sup>40</sup> This advisory opinion contemplated the participation of NSAs despite the lack of explicit inclusion in the Court’s foundational instruments.<sup>41</sup> Although the UN is an NSA, it is comprised of states and thus cannot be said to entirely shift away from state-centric international law. Gleider Hernandez stresses the importance of tempering this holding with the clarification that any perceived expansion upon the relevance of NSAs must hinge upon “the interests and needs of states to interact with such non-state actors.”<sup>42</sup> Thus, *Reparation* was a shifting point in the jurisprudence of international law in that it contributed to articulating the functional role of NSAs, but this role did not significantly shift the focal point of

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37. *Id.* at 702.

38. Statute and Rules of Court and Other Constitutional Documents, Rules and Regulations, 1931 P.C.I.J. (ser. D) No. 1, at 48.

39. See, e.g., Maureen Bezuhly, *International Health Law*, 31 INT’L LAW. 645, 645-46 (1997); Jacob Katz Cogan, *The 2012 Judicial Activity of the International Court of Justice*, 107 AM. J. INT’L L. 587, 587 (2013).

40. *Reparation for Injuries Suffered in Service of United Nations*, Advisory Opinion, 1949 I.C.J. 174, 178 (Apr. 11).

41. *Id.* (“Throughout its history, the development of international law has been influenced by the requirements of international life, and the progressive increase in the collective activities of States has already given rise to instances of action upon the international plane by certain entities which are not States.”).

42. Hernandez, *supra* note 6, at 142.

international law. The *Reparation* decision, though it granted the UN international legal personality, retained the Court's vision of the international law universe: the sun of the international legal system is the state (or state-created international organizations, such as the United Nations). Any other actors, such as international organizations or NSAs, must rotate around that sun and serve its needs.

Judges' opinions on the Court's exclusion of NSAs have ranged from confirming the *status quo* to explicitly challenging it. The silent majority of the Court accepts the dominant approach of officially disallowing their participation, and has not attempted to pry open the door to allow NSAs to engage in the Court's process, which has remained closed to NSAs for decades. Yet some have expressed concern that the exclusion of NSAs from the Court's process is unduly restrictive. Judge Cancado Trindade has indicated that in certain circumstances, individuals have a role to play at the ICJ.<sup>43</sup> Judge Peter Kooijmans bemoaned the absence of NSAs in the Court's jurisprudence,<sup>44</sup> stating that a better relationship with civil society is essential to bolster the Court's capacity to discharge its function as the principal judicial organ of the United Nations in a "shrinking and increasingly interdependent world society."<sup>45</sup> Judge Rosalyn Higgins' scholarship indicates that the question requires further attention, recognizing that the lack of involvement of NSAs will continue to present challenges to the Court.<sup>46</sup> Due to the inherent shifts in the nature of international law, including

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43. ANTÔNIO AUGUSTO CANÇADO TRINDADE, *THE ACCESS OF INDIVIDUALS TO INTERNATIONAL JUSTICE* 16 (2011).

44. Peter H. Kooijmans, *The Role of Non-State Actorss and International Dispute Settlement*, in *FROM GOVERNMENT TO GOVERNANCE: THE GROWING IMPACT OF NON-STATE ACTORS ON THE INTERNATIONAL AND EUROPEAN LEGAL SYSTEM: PROCEEDINGS OF THE SIXTH HAGUE JOINT CONFERENCE HELD IN THE HAGUE, NETHERLANDS, 3-5 JULY 2003*, 21, 23-24, 26-27 (Wybo P. Heere ed., 2004).

45. *Id.* at 26.

46. ROSALYN HIGGINS, *PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT* 200 (1994). *But see* *Legality of Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, 287-88, ¶ 2 (July 8) (separate opinion by Guillaume, J.) (expressing reservations over the possible influence of individuals on the judgement of the court).

the rise of human rights, and movements promoting self-determination and anti-colonialism, it is unlikely that the concerns raised by these three prominent judges will silently disappear from the Court's jurisprudence.

Despite never finding a home within the statute, NSAs have played a role within the matters adjudicated by the Court since it came into existence. While NSAs technically have no statutory *ius standi*, their rights and obligations have been at the heart of the Court's handling of certain disputes.<sup>47</sup> Although NSAs are technically excluded from the juridical processes at the Court, in multiple instances the Court has allowed them to participate, in various shapes and forms, with implications for the substance of these cases. Most significantly, NSAs have furnished the Court with information in several advisory opinions, as discussed in Part IV of this Article.

### B. *Human Rights at the ICJ*

The rise of the global human rights movement has undoubtedly affected the ICJ's relationship to NSAs. Its impact has had such far-reaching effects that some scholars have described it as the human rights "revolution."<sup>48</sup> Human rights have historically been enforced against governments, granting rights to individuals and groups that may not be protected by the state itself. As human rights gained prominence on the world stage, the novel concept emerged in that states acknowledged that a supra-national schema of protection for individual, minority and peoples' rights was necessary. This development led to today's complicated system of international and regional human rights treaties and conventions. States, in creating these international agreements, it has been argued, ceded some of their own sovereignty in the interest of international norms and the greater international good. Jinks and Goodman explain that states obey these laws despite their inherent need to cede

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47. Paulus, *supra* note 33, at 1646.

48. THE HUMAN RIGHTS REVOLUTION: AN INTERNATIONAL HISTORY (Akira Iriye et al. eds., 2012); Amy Gutman, *Introduction* to MICHAEL IGNATIEFF, HUMAN RIGHTS AS POLITICS AND IDOLATRY, at vii, vii-viii (Amy Gutman ed., 2001).

some sovereignty because of the need to seek legitimacy in the international community.<sup>49</sup> The state has always been the means by which individuals engage with other groups on a global scale—the state was expected, through international law, to protect the rights of its citizens.

Due to the dominant role of states at the ICJ, the appropriate role for the Court to play with regard to adjudication of human rights claims has been complex. This is largely because human rights treaties have been primarily designed as a means for individuals and groups to protect their rights vis-à-vis states, if and when states violate them. Therefore, it is not entirely obvious how a human rights case might arrive at the ICJ, since individuals and groups do not have standing to bring cases to the Court. Yet in a number of cases, the Court has examined issues with significant human rights externalities, or has interpreted states' obligations as per human rights norms.

There are two principal means by which human rights matters come to be adjudicated by the ICJ, since individuals and groups are barred from bringing these issues to the Court's attention. One common method is that a state raises the issue of human rights within a contentious case against another state. ICJ and PCIJ jurisprudence exhibits a long history of cases in which states sought diplomatic protection for citizens who were abroad; indeed, the need for state diplomatic protection of its nationals underlies a central concept of international law.<sup>50</sup> In 2001, the ICJ emitted its ruling in the *LaGrand* judgment, a watershed case for vindication of the rights of individuals at the Court, in which the Court determined that individuals are indeed holders of rights under international law, even if only conferred through multilateral treaties.<sup>51</sup>

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49. Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621, 641 (2004).

50. Enrique Milano, *Diplomatic Protection and Human Rights Before the International Court of Justice: Re-Fashioning Tradition?*, 35 NETH. Y.B. INT'L L. 85, 86, 109, 119-22 (2004).

51. *LaGrand* (Ger. v. U.S.), Judgment, 2001 I.C.J. 466, ¶ 77 (June 27) (evaluating whether a German citizen on death row in the United States had the right to consular access under the Vienna Convention on Consular Relations; the

In a number of other recent cases, however, states have explicitly sought to vindicate the individual human rights of citizens. In one case, Georgia lodged a complaint against Russia, alleging that Russian treatment of Georgians had violated its obligations under the Convention to End Racial Discrimination ("CERD").<sup>52</sup> Certainly, the indirect beneficiaries of the case were the individuals themselves who had been discriminated against, but the claimant, or the actor within the Court's proceedings, was the state of Georgia. A similar example arises in the case of *Ecuador v. Colombia*, in which Ecuador brought suit against Colombia, alleging a violation of the International Covenant on Civil and Political Rights ("ICCPR") as a result of the aerial spraying of coca plants in furtherance of the battle against illegal narcotics.<sup>53</sup> Colombian spraying, Ecuador alleged, had severe human rights and environmental consequences for the indigenous populations living in Ecuador along the border.<sup>54</sup> These are only two examples of numerous cases in which states, in these instances, Georgia and Ecuador, utilized the ICJ as a forum in which to vindicate its citizens' human rights when states alleged that they had been violated by other states. To be sure, those states may have been partially motivated by an interest in human rights, but these cases also furthered important political and policy goals.

Advisory opinions offer another forum for the consideration of human rights concerns by the Court. The General Assembly has sought the opinion of the Court regarding human rights concerns. One of the most important cases to do this was the *Legality or Threat of Nuclear Weapons* advisory opinion, in which the General Assembly asked the Court to determine whether the use of nuclear

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Court determined that the Convention "creates individual rights, which . . . may be invoked in this Court by the national State of the detained person.")

52. Application of International Convention on Elimination of all Forms of Racial Discrimination (Geor. v. Russ.), Judgment, 2008 I.C.J. 642 (Dec. 2).

53. Memorial of Ecuador, Aerial Herbicide Spraying (Ecuador v. Colom.), 2009 I.C.J. Pleadings 330 (Apr. 28, 2009).

54. Aerial Herbicide Spraying (Ecuador v. Colom.), Judgment, 2008 I.C.J. 174 (May 30).

weapons was permissible under international law, implicating, for example, the right to life under the ICCPR.<sup>55</sup>

As scholars and jurists have observed, with the proliferation of human rights treaties, the ICJ has emerged as a primary locus of their adjudication, in addition to the regional and topic-specific human rights tribunals whose incidence has similarly increased over recent years.<sup>56</sup> Rosalyn Higgins has similarly predicted that human rights will continue to occupy the concerns of the judges at the Court as an inescapable component of its docket.<sup>57</sup> Yet despite the numerous cases implicating human rights concerns adjudicated at the ICJ, on very limited occasions has the Court explored questions regarding the human right of peoples to self-determination.

### C. *The ICJ's Treatment of the Right to Self-Determination*

In light of the limited options for NSAs to engage with process at the Court, the paucity of cases grappling with the right to self-determination is perhaps unsurprising. Requirements enshrined in the ICJ statute allow only states to bring contentious cases and allow only states or international organizations to participate in advisory opinions. As a result, consideration of any legal issue at the Court must be initiated by states or through the UN General Assembly.

The right to self-determination of peoples is a relatively new concept of international law when contrasted with the long-standing principle of sovereignty of states. The concept first gained prominence as a political concept through

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55. *Legality of Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 232, 238-39 (July 8). For a comprehensive canvassing of ICJ cases relating to human rights, see Gentian Zyberi, *Human Rights in the International Court of Justice*, in *INTERNATIONAL HUMAN RIGHTS LAW: SIX DECADES AFTER THE UDHR AND BEYOND* 289, 303 (Mashood A. Baderin & Manisuli Ssenyonjo eds., 2010).

56. Thomas Buergenthal, Remarks at the 103rd Annual Meeting of the American Society of International Law, Plenary Session (Mar. 27, 2009) (remarking on the increase of cases at the Court and linking this increase to the rise of human rights treaties enforced there).

57. Rosalyn Higgins, *Human Rights in the International Court of Justice*, 20 *LEIDEN J. INT'L L.* 745, 746-48 (2007).



President Wilson's inclusion of the right in his post-World War I Fourteen Points, which intended to provide relevant guidance in an era characterized by emerging nations advocating decolonization.<sup>58</sup> Though subject to multiple definitions and debates, one definition agreed upon by the UN General Assembly indicates that the right to self-determination entitles all self-defined groups or peoples with a coherent identity and a connection to a defined territory to collectively determine their political future in a democratic fashion, and to be free from persecution and discrimination.<sup>59</sup> This human right is reified as one of the highest collective rights protected by the UN Charter.<sup>60</sup> It is listed as the first of many rights in the human rights treaties, including the ICCPR and the International Covenant on Economic, Social and Cultural Rights ("ICESC"), as well as in the Universal Declaration of Human Rights ("UDHR").<sup>61</sup>

Despite its near-universal codification, the right to self-determination has been characterized as one of the most controversial norms of international law.<sup>62</sup> The controversy is rooted in the notion that enforcing the right is oppositional to the right of states to territorial sovereignty. This right can be

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58. Jan Klabbers, *The Right to Be Taken Seriously: Self-Determination in International Law*, 28 HUM. RTS. Q. 186, 186-87 (2006).

59. G.A. Res. 2625 (XXV), at 121 (Oct. 24, 1970).

60. U.N. Charter arts. 1, 55, 73. Article 73 states that:

[m]embers of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories.

61. Article 1, common to both the ICCPR and the ICESCR reads: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." International Covenant on Civil and Political Rights art. 1, ¶ 1, Dec. 16, 1966, 999 U.N.T.S. 171; International Covenant on Economic, Social, and Cultural Rights art. 1, ¶ 1, Dec. 16, 1966, 993 U.N.T.S. 3.

62. Klabbers, *supra* note 58, at 186-87 (recounting that, despite President Wilson's enthusiasm for the concept, his Secretary of State Robert Lansing cautioned against promotion of the right to self-determination because it was "simply loaded with dynamite" (citation omitted)).

formulated within a spectrum: either as a right to internal self-determination, in which a people may be granted self-rule within the boundaries of a sovereign state, or as the right to external self-determination, in which a people actually seek full legal independence or secedes from its "parent state."<sup>63</sup> Any context in which a state might seek enforcement of the right to self-determination of a people may also result in an inherent challenge to that state's sovereignty.<sup>64</sup> Thus, this right has been considered to have potentially destabilizing effects on the position of states within international law, and as such, states have resisted seeking its enforcement or defining its scope.

Ultimately, self-determination is a much more complex concept than one that simply opposes the order and stability that states provide. Indeed, self-determination "both supports and challenges statehood."<sup>65</sup> Jan Klabbers highlights the concept's democratic appeal: it promotes self-rule, government by and for the people, and thus is viewed as a beacon of hope for oppressed peoples.<sup>66</sup> But from the perspective of a state, the concept may be considered subversive: it may foment revolution, and undermine stability.

Yet the balance between sovereignty and self-determination can be interpreted so that they need not be viewed as oppositional to one another, as discussed by Gerry Simpson.<sup>67</sup> Klabbers also posits that self-determination can no longer be viewed simply within the context of decolonization, and that judicial and quasi-judicial bodies have had to reconceptualize the principle which has essentially evolved into a right of peoples to take part in decisions affecting their future. Thus, he positions the right

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63. *Id.* at 188-89.

64. It should be noted that a state could raise a self-determination claim for a people not on its territory, so in theory these territorial implications of a self-determination claim could be avoided in some limited situations.

65. Martti Koskenniemi, *National Self-Determination Today: Problems of Legal Theory and Practice*, 43 INT'L & COMP. L.Q. 241, 249 (1994).

66. Klabbers, *supra* note 58, at 187.

67. Gerry Simpson, *The Diffusion of Sovereignty: Self-Determination in the Post-Colonial Age*, 32 STAN. J. INT'L L. 255 *passim* (1996).

as a procedural right: “entities have a right to see their position taken into account whenever their futures are being decided.”<sup>68</sup>

It is commonly understood that state hesitation to enforce the right to self-determination is rooted in the concern that it may directly challenge and potentially undermine a state’s right to territorial sovereignty. For example, if an aspiring state, existing within the national boundaries of a parent state, seeks to realize the right to self-determination, then the secession of the aspiring state might significantly reduce the territory, resources, or population of the parent state. The ICJ, as the UN’s principal judicial organ and thus, essentially, the principal judicial organ of the community of states, has hesitated to take a stance on this right which can be viewed as jeopardizing the right of states to territorial sovereignty. Scholars have interpreted the Court’s hesitation to create positive law in this area as reflecting a concern about applying the right in a way that would further destabilize or challenge the legal order.

Of the human rights adjudicated at the ICJ, self-determination has a special resonance for a court designated to adjudicate matters between states. Despite this, scholars dispute the importance of this right. It has been suggested that state parties included the right to self-determination within various treaties not as a genuine right intended to be valued and enforced by states, but instead, as a concession to the anti-colonial movement by colonial powers who were not yet ready to grant full independence.<sup>69</sup> However the right found its place within these treaties, the right to self-determination is one of the most commonly listed and least-enforced rights of the human rights cannon.

This Article does not aim to provide comprehensive treatment of the right to self-determination under international law, a task that has been well undertaken by

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68. Klabbers, *supra* note 58, at 189.

69. See SAMUEL MOYN, *THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY* 95-98 (2010). *But see* Antony Anghie, *Whose Utopia? Human Rights, Development, and the Third World*, 22 *QUI PARLE* 63, 66-69 (2013) (acknowledging the appeal of Moyn’s analysis but questioning his conclusions regarding human rights).

others.<sup>70</sup> Yet relevant background demonstrates the effects of recent procedural allowances at the ICJ on the evolution of the substantive right. Under international law, there exists general agreement that the right of peoples to self-determination is a norm of *jus cogens* standing,<sup>71</sup> codified in numerous human rights treaties. Yet despite the nearly universal reification of the right to self-determination, the right is an extremely controversial when seeking enforcement in an international court.

Very few courts have created positive law outlining the scope and content of the right to self-determination.<sup>72</sup> When confronted with this issue, judicial bodies have either sought to disassociate the right of self-determination from actual secession, or they have declined to define any enforceable scope or implications of the right.

In multiple cases the Court has addressed the right to self-determination, reiterating that it is a right *erga omnes*, which all nations have an obligation to enforce.<sup>73</sup> Despite this,

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70. See, e.g., Simpson, *supra* note 67; see also Klabbbers, *supra* note 58. See generally THE NEW WORLD ORDER: SOVEREIGNTY, HUMAN RIGHTS, AND THE SELF-DETERMINATION OF PEOPLES (Mortimer Sellers ed., 2006).

71. Int'l Law Comm'n, Rep. on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10, at 284 (2001); see also Activities on Territory of The Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, ¶ 24 (Dec. 19); East Timor (Port. v. Austl.), Judgment, 1995 I.C.J. 90, ¶¶ 10, 15 (June 30); STEVEN WHEATLEY, THE DEMOCRATIC LEGITIMACY OF INTERNATIONAL LAW 213 (2010).

72. Jens Ohlin, Address at ASIL International Legal Theory Workshop: The Elusive Concept of Peoples, (Nov. 2012) (on file with author) (discussing the Quebec decision extensively).

73. *Erga omnes* obligations within international law refer to obligations owed by states toward the community of nations, and thus which any nation may complain of if breached. See Barcelona Traction, Light and Power Company (Belg. v. Spain), Judgment, 1970 I.C.J. 3, ¶ 33 (Feb. 5); see also Accordance with International Law of Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 403, ¶¶ 79, 82-83 (July 22); Legal Consequences of Construction of Wall in Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 155 (July 9); Legal Consequences for States of Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276, Advisory Opinion, 1971 I.C.J. 16, ¶ 126 (June 21); Western Sahara, Advisory Opinion, 1975 I.C.J. 12 (Oct. 16); Rosalyn Higgins, *The International Court of Justice and Human Rights*, in INTERNATIONAL LAW: THEORY AND PRACTICE 691, 694 (Karel Wellens ed., 1998).

the ICJ has taken pains to avoid clarifying the scope of this law in any practical sense. It has feverishly resisted opining on the right to self-determination in a manner that might lead parties to believe that they have a cognizable right to secede from a state. The Court was grappling with this right as early as 1949 in reference to the question of South African control of Namibia. It was during this era when nations were beginning to acclimate (some less so than others) to the notion of decolonization.<sup>74</sup> The Court first recognized the right to self-determination in *Namibia*, reaffirmed it in *Western Sahara*, and discussed it further in the *East Timor* contentious case, where it was found by the Court that the right to self-determination was an *erga omnes* right. The *Wall* advisory opinion is emblematic of the Court's hesitation on this point. This case demonstrates clearly why the right to self-determination and the right to territorial sovereignty have historically been described as oppositional to one another. In the course of its decision, the Court was required to balance the interests of the Palestinian right to self-determination on the one hand, which it recognized as legitimate.<sup>75</sup> On the other hand, at the time of the *Wall* opinion, the Israeli sovereign state governed the territory claimed by the Palestinian right to self-determination. As a sovereign state, it retains the right to self-defense and the right to territorial sovereignty, sacrosanct under the UN Charter Article 51.<sup>76</sup> In this case, although the Court acknowledged the existence of the right to self-determination, it refused to discuss the practical consequences of the existence of that *erga omnes* right, or how it might be enforced on behalf of the Palestinian people.<sup>77</sup>

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74. Higgins, *supra* note 73, at 694.

75. *Wall*, 2004 I.C.J. at 184, ¶ 22. The other court to pass a significant judgment on the right to self-determination was the Canadian Supreme Court's decision on the question of whether Quebec had a legal right to secede. *In re Secession of Quebec*, 2 S.C.R. 217 (S.C.C. 1998).

76. Article 51 provides in part: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security." U.N. Charter art. 51.

77. *Wall*, 2004 I.C.J. at 199, ¶¶ 155-57.

Similarly in the *Kosovo* advisory opinion, the Court remained largely silent on matters regarding self-determination. In that opinion, the Court was asked to determine whether the unilateral declaration of independence of Kosovo was in accordance with international law. Relying upon a narrow reading of the question posed, the Court determined that it was not necessary for it to resolve any legal question regarding self-determination, leaving it open to the critique—levied by external as well as internal voices—that it had missed a historic opportunity to clarify the scope of this right.<sup>78</sup> In the *Kosovo* decision, the Court reiterated that during the second half of the twentieth century, the “international law of self-determination developed in such a way as to create a right to independence for the peoples of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation.”<sup>79</sup> In this case, the Court had an opportunity to clearly address the balance between the right to self-determination and the right to territorial sovereignty. It is clear that the Court was attempting not to stumble into complex and difficult legal issues, avoiding *non liquet*.<sup>80</sup> The Court instead read the question posed to it literally and did not consider a purpose-driven or contextual reply to the question. Instead, it answered only whether the declaration itself was legal. This

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78. *Kosovo*, 2010 I.C.J. at 478 ¶ 7 (separate opinion by Simma, J.). Judge Simma calls for a more comprehensive answer to whether the Declaration of Independence violated international law and one that would include both a prohibitive and a permissive analysis. As Judge Simma states, “This would have included a deeper analysis of whether the principle of self-determination or any other rule (perhaps expressly mentioning remedial secession) permit or even warrant independence (via secession) of certain peoples/territories.” *Id.*; see also Robert Howse & Ruti Teitel, *Delphic Dictum, How has the ICJ Contributed to the International Rule of Law with its decision on Kosovo?*, 11 GERMAN L.J. 841, 841-42 (2010). See generally THE LAW AND POLITICS OF THE KOSOVO ADVISORY OPINION (Marko Milanovic & Michael Wood eds., 2015).

79. *Kosovo*, 2010 I.C.J. at 436, ¶ 79; cf. Legal Consequences for States of Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276, Advisory Opinion, 1971 I.C.J. 16, 31-32, ¶¶ 52-53 (June 21); East Timor (Port. v. Austl.), Judgment, 1995 I.C.J. 90, ¶ 29 (June 30); *Wall*, 2004 I.C.J. at 171-72, ¶ 88.

80. Bjorn Arp, *The ICJ Advisory Opinion on the Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo and the International Protection of Minorities*, 11 GERMAN L.J. 847, 847 (2010).

narrow (and some say pedantic) reading of the question allowed the Court to avoid opining on the particular legal and policy questions raised by an act of secession, including questions regarding the right to self-determination of peoples.<sup>81</sup>

As such, the Court's approach has contributed little that is concrete to the development of international law on the right to self-determination. Although the approach may appear to be haphazard, it appears upon closer examination that it is carefully calibrated to avoid saying anything of substance on the right to self-determination; a deliberate indeterminacy, perhaps. If the Court seeks to resist taking a position on this question, then any willingness on the part of the Court to engage with aspiring states seeking to exercise their right to self-determination must be examined carefully. As this Article demonstrates, the Court's procedural treatment of those entities seeking the right to self-determination demands that scholars take a second look at the Court's contribution to this law.

### III. THE OBSERVATION: AN ACCOUNT OF ASPIRING STATE PARTICIPATION AT THE COURT

The Court's reticence to develop positive law on the right to self-determination notwithstanding, in several cases the Court has confronted the right to self-determination of aspiring states. It is in these instances that the Court has elected to allow participation of aspiring states at the Court. I begin by explaining what typically happens procedurally at the ICJ when a non-state actor attempts to engage in advisory opinions at the Court. Second, I describe the atypical: three instances in which aspiring states have been invited by the Court to participate in advisory opinion proceedings. I draw some basic observations about these situations, distinguishing the first, which occurred in 1930s, from the second and third occasions that occurred during the 2000s. Third, I examine the tentative explanations offered by the Court in these situations in attempts to explain why NSAs were allowed to participate when the rules of the Court do not allow such participation.

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81. Howse & Teitel, *supra* note 78, at 841, 845 (2010).

A. *The Typical: Limited Participation of NSAs in Advisory Opinions*

As discussed above, the jurisdiction *rationae personae* of the Court is clearly proscribed: only states may participate in contentious cases under Article 34 of the Court's statute. By design, the League of Nations excluded NSAs from participating in contentious cases from the birth of the international juridical project of the Permanent Court of International Justice.<sup>82</sup> International organizations, including the UN, have limited rights of participation in contentious cases, governed by Article 34(2) and (3) of the Statute. In contentious cases, the Court, "subject to and in conformity with its [r]ules, may request of *public* international organizations information relevant to cases before it, and shall receive such information presented by organizations on their own initiative."<sup>83</sup> Importantly, the rules of the Court define public international organizations as international organizations of states.<sup>84</sup> Scholars such as Dinah Shelton have proposed modification of this provision to broaden the participation of international organizations and allow non-government organization ("NGO") access to the Court.<sup>85</sup>

Advisory opinions offer a bit more flexibility with regard to the participation of NSAs, but only marginally so. Article 66(2) of the Statute, governing requirements for advisory opinions, allows for the participation of states or international organizations who may contribute to

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82. JAMES BROWN SCOTT, *THE PROJECT OF A PERMANENT COURT OF INTERNATIONAL JUSTICE AND RESOLUTIONS OF THE ADVISORY COMMITTEE OF JURISTS* 92 (1920).

83. U.N. Charter art. 34, ¶ 2 (emphasis added); *see also* SHABTAI ROSENNE, *THE WORLD COURT: WHAT IT IS AND HOW IT WORKS* 83 (5th ed. rev. 1995).

84. Statute of the International Court of Justice art. 69, ¶ 4.

85. Dinah Shelton, *The Participation of Nongovernmental Organizations in International Judicial Proceedings*, 88 AM. J. INT'L L. 611, 625-27 (1994) (proposing that Article 34 be modified to define international organizations so as to include not only organizations comprised of states, but also to add to it nongovernmental organizations with consultative status with the United Nations.).



proceedings through submitting amici to the Court.<sup>86</sup> Amici are supposedly neutral bystanders with no direct interest in the matter being adjudicated. Their function is first, to bring to the attention of the Court matters of fact or law within their knowledge, and second, as requested by the Court, to present legal arguments which are otherwise unrepresented by other parties. The party assists the Court with ideas of "broad public interest which transcend the narrow issues or concerns as delimited by parties."<sup>87</sup>

The Article 66(2) restriction to states and "international organizations" does not further define the latter term. Thus the Court is left with considerable interpretive flexibility.<sup>88</sup> Yet as discussed in Part II, its interpretation of the term "international organization" has consistently been narrow, most often construing it to refer to state-based international organizations rather than considering the term to include international non-governmental organizations, for example. Thus, the meaning of "international organizations" within advisory opinions closely tracks the meaning of the rules governing contentious cases, limiting IOs to organizations that are part of the United Nations. Only once in the Court's history has it allowed the participation of an international NGO under Article 66—in the 1950 advisory opinion *International Status of South West Africa*, when the Court allowed the International League of the Rights of Man to submit information.<sup>89</sup> Yet in subsequent situations, the Court

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86. Article 66(2) states:

The Registrar shall also, by means of a special and direct communication, notify any state entitled to appear before the Court or international organization 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.

U.N. Charter art. 66, ¶ 2.

87. Hernandez, *supra* note 6, at 140, 146.

88. *Id.* at 150 (discussing Practice Directions at the Peace Palace).

89. The League had ECOSOC consultative status. See *International Status of South-West Africa, Advisory Opinion*, 1950 I.C.J. 128, 130 (July 11) ("On March 7th, 1950, the Board of Directors of the International League of the Rights of Man sent a communication to the Court asking permission to submit written and oral

has utilized its discretion to prevent NGO participation in other advisory opinions, including that of the very same League that it had previously granted participation.<sup>90</sup> Although the Court technically has the power to broaden the interpretation of “international organization” under advisory opinions to include non-state actors such as aspiring states, it has not done so. The Court has resisted expanding the category even to international NGOs.

Professor Dinah Shelton indicates that many national groups and individuals have expressed interest in participating in the proceedings at the Court, yet at the time her seminal article on the topic was published in 1994, none other than the League had been invited to do so.<sup>91</sup> In the 1970 *Namibia* advisory proceedings, Professor Michael Reisman inquired whether an amicus brief might be submitted before the Court.<sup>92</sup> In doing so, he invoked the previous permission granted in the 1950 South-West Africa case, and also referenced the fact that neither the Statute nor the rules of the Court bar the registrar from accepting a document from an interested group or individual, “despite the fact that such group or individual could neither initiate a case nor plead

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statements on the question. On March 16th, the Court decided that it would receive from this organization a written statement to be filed before April 10th and confined to the legal questions which had been submitted to the Court. On the same day, the League was notified accordingly, but it did not send any communication within the time-limit prescribed.”). Later, the Court refused to allow the League to submit in the *Asylum* or *Namibia* cases. See Hernandez, *supra* note 6, at 149-50. For further discussion of other NGOs who were refused the right to provide information in a variety of advisory opinions as a result of the Court’s exercise of discretion, see generally *id.*

90. Shelton, *supra* note 85, at 623 (describing the subsequent attempts of the League to intervene in the *Asylum* contentious cases between Peru and Colombia, when it was prohibited from doing so by the Court based on the distinct definition of public international organization within the Statute as defined for contentious cases and for advisory opinions).

91. *Id.* at 624.

92. Legal Consequences for States of Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276, Request for Advisory Opinion, 1971 I.C.J 16; see 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*, 3 HUM. RTS. Q. 101, 119 n.76 (1981).

orally." The Court's Registrar rejected this attempt to engage with the Court: "With reference to your suggestion that there seems to be no explicit bar in the Statute or Rules to accepting a document from an interested group or individual," the Registrar wrote, "the Court's view would seem to have been that the expression of its powers in Article 66, paragraph 2, is limitative, and that *expressio unius est exclusio alterius*."<sup>93</sup> Thus, despite the attempt to include non-state voices within this advisory opinion, the Court explicitly rejected the proposition based on the principle that if non-state actors were not expressly mentioned, they were to be excluded from the statute.

Reisman's request to intervene on behalf of the people of Namibia appears to have been approximately thirty-five years ahead of its time, as demonstrated by the Court's willingness in two cases in the early 2000s that allowed the intervention of aspiring states at the Court.

B. *The Atypical: Advisory Opinions in which Aspiring States Participated in Proceedings*

In two instances the Court, and in one instance its predecessor, the PCIJ, has allowed the direct involvement of NSAs in advisory proceedings. In each of these matters, the right of NSAs to self-determination was at issue in the advisory opinion. Although the number of times in which this occurred is limited, each of these instances reflects a juncture at which the Court could have taken the decision as strictly adhering to the rules of procedure and denied the NSA a role in the proceedings, yet in each instance, the Court permitted the participation of these aspiring states. Each of these circumstances is distinguished by two important commonalities. First, it was the attempt to exercise the right to self-determination that was the underlying issue under consideration by the Court. Second, the international community had become involved to such a degree that these "peoples" were no longer under the rule of a parent nation, yet were under international UN supervision.

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93. Legal Consequences for States of Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1970 I.C.J. Pleadings 639.

Critically, each of these three situations involves concerns regarding minority rights of peoples living under the control of a majority, seeking to exercise the right to self-determination. In each of those situations, a “people” has determined that self-rule is a more desirable option than the current governing framework. It is important to distinguish the early *Danzig* case at the PCIJ from the latter two cases. In *Danzig*, the actors do not meet the definition of aspiring states since the goal of the NSAs in that case was not secession from a sovereign nation. Rather, certain peoples sought integration into other sovereign nations. Still, this Article analyzes the Court’s choice to allow non-state participation in the advisory opinion at the PCIJ, because the Court’s decision in that case demonstrates the logic of why the court allowed participation.

The first instance in which an aspiring state played a role in the proceedings took place in an advisory opinion regarding the Free City of Danzig. The PCIJ’s opinion declined to specifically mention the issue of self-determination, yet it provides critical subtext for the dispute. After World War I, Poland and Germany both made claim to the seaport of Danzig.<sup>94</sup> The Treaty of Versailles assigned governance and protection of the city to the League of Nations (“The League”), the predecessor to the United Nations. Thus, the city became a semi-autonomous city-state, technically under the rule of the League, from 1920 to 1939. At the time, the majority of Danzig’s population was made up of ethnic Germans who favored reincorporation into Germany, and in 1935, elected the National Socialist or Nazi party to govern the Free City. The National Socialist party then implemented legislation that was perceived by the minority parties as targeting its political opposition. The legislation allowed prosecutors and judges to punish individuals for crimes not expressly stipulated by law, if punishment was merited according to “fundamental conceptions of a penal law and sound popular feeling.”<sup>95</sup> The minority parties of the Free State of Danzig brought a claim

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94. Danzig is currently known as Gdansk, a seaport on the Baltic coast of Poland.

95. Consistency of Certain Danzig Legislative Decrees with Constitution of Free City, Advisory Opinion, 1935 P.C.I.J. (ser. A/B) No. 65, ¶ 12 (Dec. 4).

to the High Commissioner of the League of Nations, arguing that the legislation was unconstitutional under the municipal law of the Free State. The League turned to the PCIJ for guidance seeking an opinion regarding "whether the said decrees [amending the Danzig Penal Code and the Danzig Code of Penal Procedure] are consistent with the Constitution of Danzig, or, on the contrary, violate any of the provisions or principles of that Constitution."<sup>96</sup>

In the course of the proceedings of the advisory opinion to evaluate whether the legislation referenced was consistent with the constitution, the PCIJ invited the Senate of the Free City of Danzig, represented by the National Socialist Party, to participate by submitting a written memorial and an oral statement at the public sitting.<sup>97</sup> The communication by which the Court invited the Senate referenced that the Senate fulfilled the requirements laid out in Article 73, paragraph 1 of the Rules of the Court. The minority parties were not invited as they did not meet the requirements of the Rules of the Court for such participation.<sup>98</sup> The Court made this determination because it indicated that the Free City was considered, notably, "a *State* admitted to appear before the Court and likely to be able to furnish information on the question."<sup>99</sup> In its findings, the PCIJ determined that the legislation was not constitutional, validating the concerns of the minority group.<sup>100</sup>

The *Danzig* advisory opinion marks the first instance in which the Court made an ad hoc procedural decision to allow

96. *Id.* ¶ 26.

97. *Id.* ¶ 7.

98. Judge Anzilotti describes with much chagrin in his individual opinion that the President of the Court

contented himself with acquainting them that, having regard to the shortness of the time that had elapsed between the publication of the decrees and the despatch [sic] of the petition, and to the possibility that information which might be of importance in regard to the issue refer to the Court had been omitted from the petition, the Court would be willing to receive an explanatory note from the petitioners in case they desired to elaborate the statements they had made in the petition.

*Id.* ¶ 86 (separate opinion by Anzilotti, J.).

99. *Danzig*, 1935 P.C.I.J. (ser. A/B) No. 65, ¶ 4.

100. *Id.* ¶ 54.

the participation of an NSA. In this instance, the Senate of the Free City of Danzig, represented by the Nazi Party, sought for Danzig to be reintegrated into Germany. Therefore, it cannot be clearly described as an aspiring state. Neither are the minority parties, necessarily, since presumably their political aim was reintegration with Poland. Yet, this advisory opinion is instructive in that it offers an example of the PCIJ employing *ad hoc* procedures to allow the procedural participation of an NSA with many of the same characteristics as an aspiring state. Remarkably, the President of the Court, in his determination to invite the participation of the Free City of Danzig, refers to it as a state.

Although one non-state actor—the Free City of Danzig—was permitted to appear before the Court, the representatives of the minority parties were not granted the same allowance. Judge Anzilotti's individual decision describes his concern that one party was allowed to participate while the other was not, leading to the perception of a lack of due process and the Court's failure to provide equal representation. He explains:

the essential point to my mind is that the Court, in order to be able to give this Opinion, was obliged either to set aside its Rules and create a procedure *ad hoc*, or to deviate from a rule so fundamental as that of the equality of the parties; and the reason for this was that the case concerned a question of municipal law arising in connection with a domestic political dispute.<sup>101</sup>

The rationale reflected in Judge Anzilotti's opinion emphasizes his preoccupation that the Court's decision to set aside its rules and allow an NSA to participate deviated from the principle of equal representation for the parties involved. Equality and fairness are his primary concerns, rather than the explicit deviation from the rules. In this advisory opinion, although the minority parties were not granted a voice at the proceedings, the issue nonetheless resolved in their favor, as the legislation they opposed was ultimately invalidated by the Court.

Over seventy-five years elapsed between the *Danzig* decision and the next occasion during which the Court allowed an aspiring state to participate in proceedings. In the

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101. *Id.* ¶ 90 (separate opinion by Anzilotti, J.).

interim, the Court had denied the participation of a number of aspiring states in the advisory opinions that affected their interests, as discussed *supra*, specifically involving Namibia in the *South West Africa* advisory opinion. Yet in 2003, the General Assembly requested that the ICJ evaluate the legality of Israel's construction of a security wall in the Occupied Palestinian Territory.<sup>102</sup> In a highly controversial decision, the Court held, among other findings, that the route of the security barrier constructed by Israel was in violation of international law.<sup>103</sup> In the course of its decision, the Court referenced that Palestinians were a "people" under international law, and as such, Israel was obligated to respect the Palestinian right to self-determination.<sup>104</sup> In so doing, the Court reiterated its finding in the *East Timor* case—that the right to self-determination qualified as a right *erga omnes*,<sup>105</sup> citing extensively its decisions in the *Southwest Africa* cases and the *East Timor* case.<sup>106</sup>

Despite the great deal of international attention drawn to this case, scholars and media generally overlooked one potentially controversial aspect of this advisory opinion. The Court determined that Palestine was eligible to submit a written statement regarding the advisory opinion to the

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102. The text of the request for the advisory opinion read:

What are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, as described in the report of the Secretary-General, considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions?

Request for an Advisory Opinion from the Gen. Assembly to Mr. Shi Jiuyong, President of the Int'l Court of Justice (Dec. 8, 2003).

103. Legal Consequences of Construction of Wall in Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 201 (July 9).

104. The Court found that, "[t]he obligations *erga omnes* violated by Israel are the obligation to respect the right of the Palestinian people to self-determination, and certain of its obligations under international humanitarian law." *Id.* at 199, ¶ 155.

105. *East Timor (Port. v. Austl.)*, Judgment, 1995 I.C.J. 90, ¶ 29 (July 9).

106. Legal Consequences for States of Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, ¶¶ 52-53 (June 21).

Court.<sup>107</sup> Palestine's international legal status at the time, however, did not meet the requirements of statehood under international law.<sup>108</sup> In the *Wall* case, the Court rationalized its flexible approach to the participation of Palestine by indicating that:

in the light of resolution [A/RES/ES-10/14 and the report of the Secretary-General transmitted [to the Court] with the request, and taking into account the fact that the General Assembly had granted Palestine a special status of observer and that the latter was co-sponsor of the draft resolution requesting the advisory opinion, Palestine might also submit [to the Court] a written statement on the question within the above time-limit.<sup>109</sup>

In addition to offering Palestine this mode of participation, the UN member states furnished copies of the question to the League of Arab States, and the Organization of the Islamic Conference. But the Court never explicitly requested that these organizations participate in the proceedings. Further, the Court allowed Palestine to participate in the oral proceedings, allowing that aspiring state three hours time to present its claims, four times longer than other member-states who participated in the proceedings.<sup>110</sup> Israel chose not to participate in the proceedings, although the Court also offered that state a time

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107. Legal Consequences of Construction of Wall in Occupied Palestinian Territory, Request for Advisory Opinion, 2003 I.C.J. 428, ¶ 2 (Dec. 19) (“[T]aking into account the fact that the General Assembly has granted Palestine a special status of observer and that the latter is co-sponsor of the draft resolution requesting the advisory opinion, Palestine may also submit to the Court a written statement on the question within the above time-limit.”).

108. See, e.g., Montevideo Convention, *supra* note 14; JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 40-43 (2d ed. 2006).

109. Legal Consequences of Construction of Wall in Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 141 n.4 (July 9). Notably, the Court highlights in its order that Palestine took part in the drafting of the advisory opinion request itself, and that it held “observer” status at the UN. *Id.* The United Nations General Assembly Resolution 52/250 of July 13, 1998, gave Palestine the right to sponsor resolutions. G.A. Res. 52/250, Annex ¶ 5, U.N. Doc. A/Res/52/250 (July 13, 1998).

110. Legal Consequences of Construction of Wall in Occupied Palestinian Territory, Verbatim Record, at 17 (Feb. 23, 2004, 10:00 AM), <https://unispal.un.org/DPA/DPR/unispal.nsf/0/94E8ED18CFA868C585256E4A00582D91>.



slot of three hours, parallel to that offered to the aspiring state, Palestine.<sup>111</sup>

The most recent instance in which the Court allowed an aspiring state to participate in the proceedings occurred during the 2010 *Kosovo* advisory opinion.<sup>112</sup> This adjudication arose in the wake of the 2008 Declaration of Independence of Kosovo, purporting to establish an independent republic of Kosovo seceding from the control of the Republic of Serbia after years of UN control. In this instance, the UN General Assembly, prompted by Serbia, requested an opinion from the ICJ responding to “whether the unilateral declaration of independence of Kosovo [was] in accordance with international law.”<sup>113</sup> Although the word “self-determination” does not appear in the question put to the Court, commentators largely agree that the Kosovar people’s right to self-determination was at stake and ultimately was at the heart of the issue.<sup>114</sup> The case was viewed, as was the *Wall* decision, with great interest by the international community and news media, due to the perceived potential for the Court to determine the proper balance under international law between the Kosovar people’s right to self-determination and the Serbian Republic’s right to territorial integrity and sovereignty.<sup>115</sup> Disappointing some, however, the Court determined that it was only required to answer the question posed in a narrow fashion, thus finding that any assessment of the right to self-determination or remedial secession was outside the scope of the question.<sup>116</sup>

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111. *Id.*

112. Accordance with International Law of Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 403, ¶¶ 79, 82 (July 22).

113. G.A. Res. 64/298, U.N. Doc. A/RES/64/298 (Sept. 9, 2010).

114. Alain Pellet, *Kosovo—The Questions Not Asked: Self-Determination, Secession, and Recognition*, in *THE LAW AND POLITICS OF THE KOSOVO ADVISORY OPINION* 268, 269-71 (Marko Milanovic & Michael Wood eds., 2013).

115. See, e.g., Melissa Gray, *Kosovo’s Independence is Legal, Court Finds*, CNN (July 23, 2010), <http://www.cnn.com/2010/WORLD/europe/07/22/kosovo.independence.court>.

116. *Kosovo*, 2010 I.C.J. 403, ¶ 83 (“The General Assembly has requested the Court’s opinion only on whether or not the declaration of independence is in

Although its decision did not offer a finding regarding the right to self-determination, the Court's treatment of Kosovo during the proceedings prompts a more careful reading of the decision. Upon accepting the case, the Court invited the Authors of the Declaration of Independence of Kosovo to submit a written observation to the Court within the same time limits imposed on the states of the UN.<sup>117</sup> By order of October 17, 2008, the Court indicated that "taking account of the fact that the unilateral declaration of independence . . . is the subject of the question submitted to the Court for an advisory opinion, the authors of above declaration are considered likely to be able to furnish information on the question."<sup>118</sup>

Numerous states argued for an explicit stipulation by the General Assembly that the authors of the declaration should be permitted to participate in their own name, so as to ensure fairness in the proceedings.<sup>119</sup> As in the *Wall* case, the authors of the Declaration of Independence of Kosovo were invited to participate in the oral proceedings. Similar to the representatives from Palestine, the representatives from Kosovo were also invited by the Court to present for a longer period of time in comparison with the other parties: all

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accordance with international law. Debates regarding the extent of the right of self-determination and the existence of any right of 'remedial secession', however, concern the right to separate from a State. As the Court has already noted . . . , and as almost all participants agreed, that issue is beyond the scope of the question posed by the General Assembly.").

117. Accordance with International Law of Unilateral Declaration of Independence in Respect of Kosovo, Request for Advisory Opinion, 2008 I.C.J. 407, 410 (Oct. 17).

118. *Id.* For an archive of all case materials, see INTERNATIONAL COURT OF JUSTICE, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, <http://www.icj-cij.org/docket/index.php?p1=3&p2=4&case=141&p3=0cij.org> (last visited May 23, 2016).

119. United Kingdom: "[W]e would expect that, as a matter of basic fairness, Kosovo will be permitted to participate in the proceedings and present arguments to the Court." Letter from John Sawers, Permanent Representative of U.K. of Gr. Brit. and N. Ir. to United Nations, to President of the Gen. Assembly, U.N. Doc. A/63/461 (Oct. 2, 2008); see also U.N. GAOR, 63d Sess., 22d plen. mtg. at 13-14, U.N. Doc. A/631/PV.22 (Oct. 22, 2008).

member states were given forty-five minutes, while Kosovo and Serbia were each granted three hours.<sup>120</sup>

C. *Explaining the Court's Procedural Inclusion of Aspiring States*

We can draw a number of basic observations about each of these “atypical” advisory opinions at the ICJ in which the Court (or the PCIJ) took the unorthodox step of allowing the participation of aspiring states to participate in the advisory opinions. In each, the Court makes a number of procedural allowances not explicitly contemplated by the Court’s Statute or the Rules of the Court. First, it invites an NSA—neither a state nor an international organization—to participate in the proceedings through written submissions. Second, it invites an NSA to participate in oral submissions, and grants that entity three hours as opposed to the forty-five minutes offered to all other member states. Third, the court chooses to refer to the aspiring state by a name that cannot be confused with a state: Kosovo is not “Kosovo” but the “Authors of the Declaration of the Independent State of Kosovo” or “The Provisional Institutions of Self-Government of Kosovo”; Palestine is not “Palestine” but the “Representatives of Palestine”; and Danzig is “Representatives of the Free City.”

I propose that the Court is using the flexibility inherent in advisory opinions to do procedurally what it is not yet ready to do substantively: to suggest a more favorable, legitimizing approach to self-determination for certain aspiring states. Through these three procedural choices, the Court has positioned aspiring states as essential adversaries to the states from which they seek independence. In doing so, these advisory opinions mimic contentious cases in format including the invitation of aspiring states and the time allocated to each. The court tempers its treatment of aspiring states, however, by taking care to refer to the actors through language that clarifies they are not *actually* states, and through, of course, the larger framework of the advisory

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120. Accordance with International Law of Unilateral Declaration of Independence in Respect of Kosovo, Verbatim Record, at 30 (Dec. 1, 2009, 10:00 AM), <http://www.icj-cij.org/docket/files/141/15710>.

opinion. In contentious cases, each of the two state parties in a conflict is allowed three hours to argue its own position against its adversary. In advisory opinions, the Court typically permits “interested states” to submit comments regarding the legal question at hand. Once the time comes for hearings on the matter, those same states are invited to present their positions before the Court. A review of the record of recent advisory opinions reveals that states are typically granted a forty-five minute oral intervention before the Court. Yet in the two recent advisory opinions addressing aspiring states, time allotment has not followed this pattern. In the Palestine advisory opinion both Palestine and Israel were allotted three hours to present their case, while all other state parties were granted only forty-five minutes, as is typical.<sup>121</sup> Similarly, in the Kosovo advisory opinion, both Serbia and the Authors of the Provisional Declaration of Independence in Kosovo were each granted three hours of presentation time. The twenty-eight other member states that presented were allowed forty-five minutes for their interventions.<sup>122</sup>

Below, I discuss three explanations for how the Court rationalizes participation of aspiring states. These include first, the option that the statute does indeed allow for inclusion of NSAs under Article 66(2); second, that the need to gather information demands inclusion; and third, that fairness requires inclusion. Each of these possibilities stems from the inherent flexibility of the advisory function.

Article 66(2) of the ICJ statute offers the only potential for a statute-based explanation for inclusion of aspiring states.<sup>123</sup> Indeed, one scholar, Yaël Ronen, indicates that

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121. Legal Consequences of Construction of Wall in Occupied Palestinian Territory, Verbatim Record, at 17, ¶ 3 (Feb. 23, 2004, 10:00 AM), <http://www.icj-cij.org/docket/files/131/1503.pdf>. Importantly, Israel declined to participate in the proceedings for this advisory opinion, arguing that the Court lacked jurisdiction to adjudicate the case and as such it was a non-justiciable issue because of the political nature of the question asked by the U.N. General Assembly. *Id.* ¶ 1.

122. Accordance with International Law of Unilateral Declaration of Independence in Respect of Kosovo, Verbatim Record, at 30, ¶ 3 (Dec. 1, 2009, 10:00 AM), <http://www.icj-cij.org/docket/files/141/15710.pdf>.

123. Article 66(2) reads:

Article 66(2) offers a clear rationale for the Court's allowance, claiming that "there is no doubt that this provision is the basis for the invitation."<sup>124</sup> Yet as I demonstrate below, this explanation is inadequate. Article 66(2) grants authority for the Court to invite states and international organizations to participate in advisory opinions. None of the entities of Danzig, Palestine, nor Kosovo meet the limited legal standard of international organizations defined by the Court, which requires them to be international organizations comprised of states.<sup>125</sup> These aspiring states are more similar to states than to international organizations. Palestine's status at the time of the advisory opinion is best described as an aspiring state or a quasi-state, meeting some of the criteria of statehood which the Court referenced in its decision to allow its participation. Kosovo, at the time of the advisory opinion, had declared independence and had been recognized by a number of nations as a state, but did not yet have universal international recognition as required by international law. Indeed, in the Danzig decision, the President of the Court even referred to the Free City of Danzig as a state—presumably mistakenly though reiterating that these aspiring states share many more characteristics with states than with international organizations.

Thus, in both the *Wall* advisory opinion and the *Kosovo* advisory opinion, the Court formally invited aspiring states to participate in proceedings completely at the discretion of the Court, acting outside the authority granted to it in the statute or the rules of procedure of the Court. I propose that

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The Registrar shall also, by means of a special and direct communication, notify any state entitled to appear before the Court or international organization 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.

U.N. Charter art. 66, ¶ 2.

124. Yaël Ronen, *Participation of Non-State Actors in ICJ Proceedings*, 11 *LAW & PRAC. INT'L CTS. & TRIBUNALS* 77, 95 (2012).

125. See *supra* pp. 529-30 (discussing ICJ statutory criteria for allowing amici in the course of advisory opinions); see also Shelton, *supra* note 85, at 620.

these cases offer evidence of situations in which—relying on the flexible nature of the advisory function—the Court shepherded in the participation of NSAs without any statute-based explanation.<sup>126</sup> Indeed, Gleider Hernandez references the opaqueness of the Court’s decision, which offered no explanation as to the legal basis upon which it relied.<sup>127</sup> If Article 66(2) were the basis, would the Court not be inclined to simply articulate this basis? Instead, the Court explicitly avoided inclusion under Article 66(2), since were it to have done so, it might have been forced to overtly characterize these bodies as either states or international organizations.

If Article 66(2) does not offer a satisfying explanation for the inclusion of aspiring states in the Court’s process, the Court offers two other explanations for the inclusion of NSAs. In the *Kosovo* advisory opinion, the Court explained its choice to include NSAs with a utilitarian logic stemming from language in Article 66(2), citing its interest in including those parties as being “likely to be able to furnish information on the question.”<sup>128</sup> This may be accurate, as these entities certainly did provide information to the Court, yet the explanation offers no legal basis for the procedural allowance. The entire reason the dispute found itself before the Court was the attempt by the aspiring state to become such a state. Therefore, such an innocuous, information-gathering explanation by the Court is certainly accurate, yet scholars should find it suspicious that a Court so rooted in procedure and in the state-centric approach to international

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126. *Process verbal* are the documentation of the proceedings from these confidential meetings. Based on confidential conversations with judges and legal staff present in these meetings, it was clear that none of the judges were of the opinion that Article 66(2) offered an easy solution to the involvement of aspiring states.

127. Hernandez, *supra* note 6, at 140, 143.

128. G.A. Res. 63/3 (Oct. 8, 2008). By order of October 17, 2008, the Court found that, “taking account of the fact that the unilateral declaration of independence . . . is the subject of the question submitted to the Court for an advisory opinion, the authors of above declaration are considered likely to be able to furnish information on the question.” Accordance with International Law of Unilateral Declaration of Independence in Respect of Kosovo, Order of 17 October 2008, 2008 I.C.J. 409, 410 (Oct. 17, 2009).

law should offer such a simple explanation for contradicting that procedure.

A somewhat more satisfying explanation for the procedural inclusion of aspiring states is the Court's preoccupation with the notion of "fairness."<sup>129</sup> Although this term is never specifically defined, the Court has embraced this concept on numerous occasions in reference to the role of aspiring states at the Court. This concept was first explicitly discussed in ICJ jurisprudence when it emerged from Judge Anzilotti's individual opinion in the *Danzig* decision, criticizing the majority for allowing the Free City of Danzig to submit a written statement and to make oral statements.<sup>130</sup> Anzilotti's concern with the exclusion of the minority parties reiterates the longstanding principle of *audiatur et altera pars*—"a general principle of procedural law which serves in the interpretation of the Statute's provisions" and indicates that no person should be judged without fair hearing in which each party is given the right to be heard.<sup>131</sup>

Concerns about procedural fairness also arose in a number of other ICJ cases. In the *Wall* advisory opinion the Court relied on the concept in its invitation to Palestine to participate; presumably the concern was that fairness dictated that it would be unfair for Israel, a state, to participate in the proceedings of an advisory opinion while Palestine was excluded from the opportunity. The fairness logic as rationale for Palestine's participation is potentially undermined by Israel's ultimate refusal to participate in the proceedings, though perhaps it is the opportunity to participate, not the participation itself that is crucial to the perceived fairness. The Court also referenced the need for

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129. THOMAS FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* 8-11 (1995). Franck's seminal work on the appropriate role of fairness within the field of international law addresses this question, positing that the notion of fairness must be central to the development of international law.

130. Consistency of Certain Danzig Legislative Decrees with Constitution of Free City, Advisory Opinion, 1935 P.C.I.J. (ser. A/B) No. 65, ¶¶ 82, 84, 87 (Dec. 4) (separate opinion by Anzilotti, J.) (arguing that the Court should have refused to give its opinion due to—among other reasons—the manifestly unequal positions of the parties due to the Court's invitation to participate to the Senate (the National Socialist Party) but not to the three minority parties).

131. Ronen, *supra* note 124, at 97-98.

fairness within the Kosovo proceedings. As state members of the General Assembly debated whether to refer the question to the ICJ, some argued for an explicit stipulation that the authors of the declaration should be permitted to participate in their own name, so as to ensure fairness in the proceedings.<sup>132</sup>

If the value of “fairness” allows participation of aspiring states within some recent advisory opinions, then aspiring states have clearly not fared as well in the context of contentious cases at the ICJ. Generally, advisory opinions offer the Court flexibility with regard to procedural requirements that it does not enjoy in contentious cases. This flexibility can be attributed to a number of factors, including the non-binding nature of advisory opinions, or the “information-gathering” allowances permitted in Article 66. This flexibility is exemplified by comparison with the *Portugal v. Australia* contentious case.<sup>133</sup> This case, often referred to as the “East Timor” case because of the subject matter in dispute, offers an excellent foil to the Court’s treatment of aspiring state actors, especially when considering the question of fairness toward parties involved in the proceedings.

In that case, Portugal, the initial colonizer of East Timor, initiated a contentious case at the ICJ claiming that Australia violated the rights of the peoples of East Timor to self-determination when Australia and Indonesia signed an agreement allocating East Timorese natural resources. At the time that the Court adjudicated this case in 1994, East Timor fit the description of an aspiring state, as it had not yet been recognized on a widespread basis as a state. In 1975, the nation declared independence from Portugal, but was subsequently invaded and occupied by Indonesia.<sup>134</sup> Thus,

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132. For example, the United Kingdom took the position that “[they] would expect that, as a matter of basic fairness, Kosovo will be permitted to participate in the proceedings and present arguments to the Court.” Letter from John Sawers, Permanent Representative of U.K. of Gr. Brit. and N. Ir. to United Nations, to President of the Gen. Assembly, U.N. Doc. A/63/461 (Oct. 2, 2008); see also U.N. GAOR, 63d Sess., 22d plen. mtg., *supra* note 119, at 11-14.

133. East Timor (Port. v. Austl.), Judgment, 1995 I.C.J. 90 (June 30).

134. *Id.* ¶ 13.



although the central question asked whether the right to self-determination of East Timor had been violated while the nation was under occupation by Indonesia, the Court did not consult with East Timor or offer that aspiring state any role in the proceedings.

The Court's decision on admissibility relied on a well-established principle of international law: that a court can only exercise jurisdiction over a state with its consent.<sup>135</sup> The Court found that Australia's behavior could not be assessed without Indonesia being a party to the case, and thus it declined to hear the case based on lack of jurisdiction.<sup>136</sup> This principle, first articulated in the *Monetary Gold* case, reinforces the Court's stated interest in the value of fairness, in particular with regard to representation before the Court. *Monetary Gold* stands for the proposition that if a party's legal interests form the very subject-matter of a decision, then the Court cannot take a decision without the input of the state. Thus, this case reinforces the important basic principles of procedural fairness and due process at the Court.<sup>137</sup> There, the Court explained that the "very-subject matter" test as articulated by the Court was the ruling determination, and not the mere fact that a case "might affect the legal interests" of another state.<sup>138</sup> Despite the Court's reliance on this principle, however, the question of whether East Timor should be party to the case was never addressed in the proceedings.

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135. *Monetary Gold* first articulated this principle, later confirmed in subsequent court jurisprudence. *Monetary Gold Removed from Rome in 1943 (It. v. Fr.)*, Judgment, 1954 I.C.J. 19, 32 (June 15). The Court distinguished between cases in which a non-participating country's legal interests would be affected by a decision, as opposed to one in which a non-participating country's legal interests would form the very subject matter of a decision. The Court held that in the former instance it was acceptable to make a decision without the input of that state, but not in the latter instance. *Id.*

136. *East Timor*, 1995 I.C.J. 90, ¶ 35 (June 30).

137. *Id.* ¶ 24 (quoting *Monetary Gold*, 1954 I.C.J. at 32). In *Monetary Gold*, the Court ruled that the legal interests of Albania could not be adjudicated at the Court in the course of a contentious case to which Albania was not a party. The Court could not take any decision on the case because "Albania's legal interests would not only be affected by a decision, but would form the very subject-matter of the decision." *Monetary Gold*, 1954 I.C.J. at 32.

138. See *Monetary Gold*, 1954 I.C.J. at 32.

None of these explanations as to how the Court permitted the procedural inclusion of aspiring states proves entirely satisfactory. This Article argues that the principle of fairness in representation, as articulated throughout the jurisprudence of the ICJ, offers crucial insight into the Court's choice to include certain aspiring states in its process in recent years. This principle is not a new one, as it can be traced to the *Danzig* decision as well as to the formative *Monetary Gold* case. If there is no clear statute-based rationale for the Court's inclusion, we must inquire why the Court engages in judicial rulemaking to include aspiring states in the advisory opinions. This question is tackled in Part V.

#### IV. THE ICJ AS A FORUM FOR ASPIRING STATES

As discussed above, there is no statute-based explanation as to why the Court allows aspiring states to be included in its process. Yet an exploration of the rationale that the Court has offered in these instances reveals two important hidden consequences of the aspiring state advisory opinions. First, the centrality of the right to self-determination in these opinions indicates that the procedural inclusion of non-state actors may have a substantive consequence. Second, these opinions offer important insight with regard to legitimacy within international law—both of the International Court of Justice as an institution, and of the non-state actors who aspire to gain legitimacy within the international community, through recognition as states.

##### A. *The Centrality of Self-Determination and of International Sponsorship*

Each of the aspiring state advisory opinions contains odd features not seen in any other advisory opinion at the Court. An aspiring state is first invited to participate. It is then granted time to present arguments as if it were a party in a contentious case. Finally, that aspiring state is referred to by a name that cannot be confused with a state. These oddities result from the choice that the Court has made to include the aspiring state in its process. In order to understand these choices, we must work backwards from the instance when these aspiring states are granted status at the Court. What

factors do they share in common that might lead to the Court's choice to include them?

In order for the Court to decide to include an aspiring state in its process, three important pre-conditions must be met. First, the right to self-determination of peoples lies at the crux of each case. Yet, simply because an NSA or a "people" seeks to validate its self-determination, the Court will not necessarily approve participation. These actors, by the time the matter at hand arrived at the ICJ, had achieved international sponsorship from the international community of state actors, or some segment thereof, thus validating aspirations toward statehood of an NSA. Finally, the questions regarding an aspiring state must arrive at the Court through the mechanism of an advisory opinion, rather than through a contentious case (as in the instance of the *East Timor* case). When these three elements are present, the Court has used the flexibility of the advisory opinion mechanism to position aspiring states as if they were states for the purpose of the proceedings, offering procedural fairness and legitimization of its claim to self-determination, even if the Court is reticent in substantively validating this right through positive law.

In each of the circumstances discussed in Part III, the entity in question—at the time it was invited to participate in ICJ proceedings—was under the administration of the international community or had been formally recognized by the international community in one way or another. I refer to this status as international "sponsorship" of one form or another. Danzig was governed by the League of Nations, an arrangement set up under the Treaty of Versailles. In 1974 the Palestinian Liberation Organization was granted non-state entity observer status at the UN;<sup>139</sup> in 1994 under the Oslo Agreements and as a result of UNSCR 242 and 338, Palestine was granted territorial control of parts of the West Bank.<sup>140</sup> In the *Wall* decision, the Court explicitly referenced

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139. G.A. Res. 3237 (XXIX) (Nov. 22, 1974) (granting observer status to the PLO). The PLO has established a permanent observer mission since 1974 at U.N. headquarters in New York and another one in Geneva.

140. See Declaration of Principles on Interim Self-Government Arrangements, Isr.-P.L.O., Sept. 13, 1993, 32 I.L.M. 1525 (1993); Interim Agreement on the West

Palestine's "special status."<sup>141</sup> Kosovo, since the NATO intervention and the passage of UN SR 1142, had been governed by the provisional government there, and owed its existence to international legal framework.<sup>142</sup>

Thus, in instances where the sponsorship of the international community already exists, this serves as a signal to a court whose constituency consists of that same international community. The Court takes its lead from the international community, which has already made a choice to intervene and govern the NSAs through the international legal structures imposed in each setting. As a result, the Court's choice to grant standing is not actually as controversial as it might otherwise be, since it was preceded by international sponsorship of the aspiring state and thus sanctioned by international community of states. This then allays the concern that any rogue state might decide to have its claim to self-determination put before the Court. Unless that rogue state had the sponsorship of a significant part of the international community, there is little danger that it would be permitted to appear before the Court. While the Court's move is unorthodox, it is still sanctioned by states, allowing the Court to continue to balance the interests of the state itself though authorizing a procedural choice that appears to undermine the centrality of the state.

The procedural choice to allow aspiring states to participate allows the Court to acknowledge the special interest that these parties have in the outcome of the proceedings. Perhaps most importantly, in each of these cases, the NSA's right to self-determination plays a crucial role within the legal questions being adjudicated at the court. The state-centric Statute explicitly prohibits the Court from hearing a contentious case between a state and a non-state (Serbia v. Kosovo, or Palestine v. Israel, for example). Yet the Court and the international community have used the advisory opinion function to explore the legal aspects of these

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Bank and the Gaza Strip, *Isr.-P.L.O.*, Sept. 28, 1995, 36 *I.L.M.* 551 (1997); S.C. Res. 242 (Nov. 22 1967); S.C. Res. 338 (Oct.22 1973).

141. *Legal Consequences of Construction of Wall in Occupied Palestinian Territory*, Advisory Opinion, 2004 *I.C.J.* 131, ¶ 4 (July 9) ("[T]he General Assembly had granted Palestine a special status of observer.").

142. S.C. Res. 1244, ¶¶ 10-11, U.N. Doc. S/RES/1244 (June 10, 1999).

disputes at the ICJ, recognizing that international law must allow aspiring states a voice within these proceedings. Certainly, a number of other tribunals exist (such as human rights or investment dispute bodies) which may be better suited to address the concerns of NSAs, obviating the need for the ICJ to be accessible to actors other than states. Regardless of the existence of other fora, these advisory opinions directly affect the rights and futures of peoples pertaining to aspiring states. Therefore, it is appropriate and legitimacy-enhancing for the ICJ to allow these NSAs to be heard in this context. Klabbers' argument that the right to self-determination is actually a procedural right, is reinforced by the actions of the Court here; it is the "right to see their position taken into account whenever their futures are being decided."<sup>143</sup> Although in the substance of its decisions in these cases the Court is reticent to forcefully delineate the balance between self-determination and territorial sovereignty, its procedural choices with regard to allowing NSAs a voice at the table belie a more progressive posture than the holding in the judgment itself. Allowing aspiring states to participate also demonstrates that the Court is acutely aware of the relevance of NSAs within international law, the values of fairness and human rights, and the impact these choices may have on the normative legitimacy of the Court itself.

### B. *Balancing Legitimacy*

The Court's ruptures with previous statute-based procedure in the aspiring state cases can be understood through applying a legitimacy framework. Although legitimacy pulls the Court in multiple directions, I propose that a legitimacy analysis, rooted in democratic theory, explains the Court's treatment—both procedurally and substantively—of aspiring states. Below, I discuss the ways in which the aspiring state cases intersect with legitimacy questions first with regard to the legitimacy of the Court itself, and second, with regard to the legitimacy of the aspiring states as they strive to become states.

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143. Klabbers, *supra* note 58, at 189.

Contextualizing the Court's treatment of aspiring states within a legitimacy framework offers insight into these unorthodox choices for a Court that is commonly considered the most traditional of international courts. Legitimacy is central within international law because of the principle that courts' work must be rooted in justified authority, and if it is not, their interpretation of the law is endangered and subsequently, delegitimized. One scholar reiterates the importance of legitimacy by cautioning that,

[t]o the extent we want international courts to continue to serve as a forum for the resolution of disputes involving sovereigns, we must preserve their legitimacy. Because no world legislature exists to counterbalance the decisions of international courts, and no worldwide police force enforces them, international courts' legitimacy is all the more essential to their success.<sup>144</sup>

Despite its universal jurisdiction, the ICJ is not exempt from these concerns.

Scholars typically classify legitimacy as either normative or sociological. Legitimacy in the sociological sense indicates that an institution is legitimate if "it is widely *believed* to have the right to rule." It "depends on [actor] perceptions and is agent-relative."<sup>145</sup>

Meanwhile, a court's normative legitimacy hinges upon whether it has the right to rule—in the case of the ICJ, a right that is explicitly conferred upon the Court by states. This is "the 'right to rule[,] the exercise of which 'binds' its subjects by imposing duties of obedience."<sup>146</sup> The UN Charter indicates that the Court is the primary judicial organ of the United Nations. Certainly, the Court continues to have a strong connection to the United Nations and the states that comprise it. Academics frequently critique the Court's

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144. Nienke Grossman, *The Normative Legitimacy of International Courts*, 86 TEMP. L. REV. 61, 63 (2013).

145. Allen Buchanan & Robert O. Keohane, *The Legitimacy of Global Governance Institutions*, 20 ETHICS & INT'L AFF. 405, 405 (2006); see also Yuval Shany, *Assessing the Effectiveness of International Courts: A Goal-Based Approach*, 106 AM. J. INT'L L. 225, 246-47 (2012).

146. John Tasioulas, *The Legitimacy of International Law*, in THE PHILOSOPHY OF INTERNATIONAL LAW 97, 97-98 (Samantha Besson & John Tasioulas eds., 2010).

conservative outlook and its highly formalistic procedure and decision-making process, frequently linking these criticisms to the Court's excessive deference to state sovereignty.<sup>147</sup> As explained by Yuval Shany, the relationship between the Court and states can be characterized by viewing states as "mandate providers" to the Court.<sup>148</sup> Because states provide the Court with its mandate through the United Nations, in order to retain its legitimacy, the Court cannot completely disregard their perspective.

Maintaining legitimacy in the eyes of the Court's mandate-providers has clearly played a significant role in the Court's jurisprudence. None of the structural attributes of the Court necessarily suggest that states actively exert control over the judges. Yet there does exist the perception that states may try to control judicial perspectives through appointment of judges, a highly political process carried out through the UN General Assembly. Interviews with judges indicate that the ICJ is largely composed of judges who are by and large, respectful of (if not deferential to) states' interests and sovereignty.<sup>149</sup> The ICJ continues to be perceived as legitimate while at the same time having in place structures and processes that ensure a degree of responsiveness to "client preferences."<sup>150</sup>

The ICJ's reliance on protecting the interest of states has led to judicial avoidance of legal issues that may be controversial from a state-based perspective, including the right to self-determination. This right has for decades been perceived to be in direct opposition to the right of territorial sovereignty enshrined in the UN Charter. The Court has typically approached this right with avoidance and hesitation, most likely due to a concern that a more definitive stance might further destabilize or challenge the dominant

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147. See, e.g., Michael Reisman, *Metamorphoses: Judge Shigeru Oda and the International Court of Justice*, 33 CAN. Y.B. INT'L L. 185, 206-07 (1995); see also ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 43-46 (1998).

148. See Shany, *supra* note 145, at 240.

149. *Id.* at 246; see also Rosalyn Higgins, *Respecting Sovereign States and Running a Tight Courtroom*, 50 INT'L & COMP. L.Q. 121, 127 (2001).

150. See Shany, *supra* note 145, at 260.

legal order.<sup>151</sup> Other high profile cases in various subject areas at the ICJ illustrate “judicial avoidance techniques,” and also reflect judges’ “apprehension of alienating important players or major segments of the international community.”<sup>152</sup> Yet these judicial avoidance techniques, though they may be genuinely responsive to concerns regarding its mandate-providers, may simultaneously jeopardize the Court’s legitimacy in the eyes of critics (including some of the Court’s very own judges) who express concern that the Court is out of touch with the most pressing legal issues of the day.<sup>153</sup>

Yet a legitimacy framework also pulls the Court in the opposite direction, away from the interests of mandate-providers who undergird the international system of law. Certainly, legitimacy relies on the right that an institution has to rule—in the ICJ’s case, the legitimacy it derives from the state-granted authority through the UN Charter. Despite this, some non-state groups and individual citizens may sometimes reasonably question the legitimacy of an international institution even though their own states have consented to its jurisdiction and its presumptive right to rule.<sup>154</sup> This phenomenon may be particularly acute in instances when a state does not appear to be acting in the best interests of individuals or groups within its boundaries.

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151. Hernandez, *supra* note 6, at 140, 143-44.

152. Shany & Giladi, *supra* note 22, at 176 (referencing the *Nuclear Weapons* and *Oil Platforms* decisions, inter alia, as examples).

153. In the wake of the Kosovo advisory opinion, harsh criticism was launched upon the court, as it was widely perceived to have done very little when it could have been much more relevant had it engaged more actively with the issues at stake: “If the fate of Kosovo – and the entire Balkan region – is to be guided by the global rule of law, these questions need to be answered, not swept under the table. Under existing procedures, framing questions to the World Court is entirely a prerogative of states, either as contending parties or, as with the Kosovo opinion, operating through the UN. But the rights of persons and peoples, not just interests of states, are at stake in controversies such as this one. To fulfill international justice today, we need a new kind of World Court, open to other voices.” Robert Howse & Ruti Teitel, *Viewpoint: The World Court and Secessionism*, KOREAN JOONANG DAILY (Aug. 3, 2010), <http://koreajoongangdaily.joins.com/news/article/Article.aspx?aid=2924035>.

154. Allan Buchanan, *Legitimacy in International Law*, in *THE PHILOSOPHY OF INTERNATIONAL LAW*, *supra* note 146, at 79, 87.



The aspiring state cases are emblematic of these situations, in that the states from whom aspiring states seek to secede are typically not supportive of enforcement of the right to self-determination for those peoples who make up the aspiring state.

Democratic models vary, yet can be characterized by and large by emphasis on representation, participation by affected actors, accountability, and deliberation.<sup>155</sup> When applying democratic theory to the question of legitimacy, a court's legitimacy relies on "institutions publically committed to the equal advancement of the interests of the persons who are affected by those institutions."<sup>156</sup> Beyond this, democratic conceptualization of legitimacy would require both procedural and substantive adequacy. A key principle provides that those parties who are affected by institutions should have a voice in relevant judicial proceedings. Democratic theory implies that to maintain legitimacy, a court must consider not only whether its role is legitimate from the perspective of its mandate providers, but also from that of entitlement holders—those actors which are affected by judgments but which do not grant the institution authority. These entitlement holders, such as non-state actors in the case of the ICJ, are nonetheless affected by the Court's course of action.

The ICJ, then, is faced with a crisis of legitimacy from the perspective of democratic theory. Aspiring states are entitlement holders at the Court, although they are not mandate providers. Yet they are denied procedural access to the Court under the Statute, which has the potential to undermine the Court's legitimacy from a democratic theory analysis. The state-based system relies on the notion that states represent the interests of their citizens; however, clearly states do not always best represent the interests of

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155. See Gráinne de Búrca, *Developing Democracy Beyond the State*, 46 COLUM. J. TRANSNAT'L L. 221, 227 (2008) (discussing participation and representation of affected parties); J.H.H. Weiler, *The Geology of International Law – Governance, Democracy and Legitimacy*, 64 HEIDELBERG J. INT'L L. 547, 560 (2004) (referencing representation, accountability, and deliberation as democratic values).

156. Thomas Christiano, *Democratic Legitimacy and International Relations*, in THE PHILOSOPHY OF INTERNATIONAL LAW, *supra* note 146, at 119, 121.

people in those states. Professor Christiano highlights three variants of incidents in which states may fail to represent the individuals living within their boundaries.<sup>157</sup> The context of non-state actors, who are peoples representing minorities within sovereign states, can be described as the minority variant, in that minority groups are not adequately represented by states. Not only do states sometimes fail to best represent their citizens, but scholars have demonstrated convincingly that international litigation affects the rights and interests of states beyond only those states that litigate disputes.<sup>158</sup> In several recent cases (both contentious and advisory) at the ICJ, non-litigants' rights were directly affected by proceedings in which they had no right to appear.<sup>159</sup>

These challenges to the legitimacy of the Court represent a sea-change for a court traditionally wedded to a state-centric concept of international law. The recognition that state consent is insufficient grounding for the legitimacy of international law is becoming more and more widespread.<sup>160</sup> Not only are NSAs increasingly important globally, but further, the "idea that state sovereignty itself is conditional on the protection of human rights seems to be taking hold."<sup>161</sup> This indicates that that the position of states may also be in

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157. *Id.* Christiano classifies these occasions on which states do not best represent this interests of its people as the authoritarian variant, the minority variant, and the secrecy variant. *Id.*; see also Knop, *supra* note 5, at 153-55 (discussing specifically the minority variant with respect to affinity groups—including feminist or women's groups—whose interests may not be well-represented by the nation-state).

158. Grossman, *supra* note 144, at 68 (claiming that international law affects constituency broader than only states who are litigating, and secondly that international law decisions are not intended to be one-time decisions, affecting only the litigants at hand).

159. See, e.g., Jurisdictional Immunities of State (Ger. v. It.), Judgment, 2012 I.C.J. 99, ¶¶ 18-19 (Feb. 3). Numerous other cases at the ICJ also provide evidence of non-state actors' interests being affected by the court's decisions, including, Activities on Territory of The Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, ¶ 24 (Dec. 19) and Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo), Judgment, 2010 I.C.J. 639 (Nov. 30).

160. Buchanan, *supra* note 154, at 91 ("It is something of a commonplace that the international legal order is becoming less exclusively state-centered and more concerned with human rights.").

161. *Id.* at 95.

jeopardy within the international legal order if they are not compliant with human rights norms.

Although the Court offers aspiring states procedural access to the Court in these advisory opinions, thus potentially bolstering the legitimacy of the Court from a democratic theory perspective, the Court nevertheless refuses to engage substantively with those actors' right to self-determination. This pattern is perhaps best evidenced in the Kosovo Advisory Opinion. This omission might serve to undermine the legitimacy of the Court. Might the lack of syncretism between the Court's procedural posture and its substantive posture indicate a failing to truly provide representation to aspiring states, and thus further jeopardize its legitimacy? Yuval Shany explains that two types of legitimacy must be linked to notions of fairness and justice. First, *source* legitimacy relies on the concept of democratic consent, stemming from the democratic conceptualization of legitimacy. Consent may be rooted in a theory that justifies government power as an expression of the will of the people,<sup>162</sup> or invokes another theory of justice or fairness.<sup>163</sup> The other type of legitimacy, *process* legitimacy, focuses on whether regular and proper procedures are followed throughout the judicial decision-making process. Here, the key standard for evaluation appears to be fairness of the process—that is, whether the process meets our pre-existing expectations of institutional conduct that conform to specific standards of procedural justice.<sup>164</sup>

Shany concludes that a specific judicial decision would be typically regarded as legitimate if it is issued by a properly established international court, applying its legal procedures in a regular manner.<sup>165</sup> If regular application of legal procedures is required for legitimacy, this might lead to the conclusion that the aspiring state advisory opinions are illegitimate due to the unorthodox application of procedure

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162. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), art. 23, ¶ 3 (Dec. 10, 1948).

163. See, e.g., JOHN RAWLS, A THEORY OF JUSTICE, 11-17 (1971); see also Phillip Pettit, *Legitimate International Institutions: A Neo-Republican Perspective*, in THE PHILOSOPHY OF INTERNATIONAL LAW, *supra* note 128, 139, 142-43.

164. Shany, *supra* note 145, at 253-54.

165. *Id.* at 266-69.

and the allowance of aspiring states' participation. Yet legitimacy exists on a continuum, whereby decisions lacking in process legitimacy can be compensated for in source legitimacy, and vice versa. Thus, the court may take the unorthodox step to compromise its process legitimacy by allowing aspiring states to participate, in the eyes of its primary constituency of states. Yet, there may be an uptick in the perception of source legitimacy (rooted in democratic theory) when aspiring states are treated with fairness, and afforded the chance to represent themselves within the procedures that affect their interests. Hence we see a Court seeking to achieve a balance between these two groups: states, its mandate-providers, and aspiring states, who hold rights. If legitimacy is evaluated on this continuum, taking into account both source legitimacy and process legitimacy, the Court's choice to include aspiring states in its process is, on the whole, legitimacy enhancing.

My theory that the Court's actions are rooted in democratic legitimacy with regard to aspiring states garners support not only from these scholarly and theoretical accounts, but also from ICJ case law. The Court's jurisprudence, traced back to as far as to the PCIJ, demonstrates that the Court views democratic legitimacy as a crucial consideration in its deliberations, although not explicitly referenced as such.

Yet the Court does use other language to rely on democratic legitimacy: in *Monetary Gold* the Court affirms it cannot exercise its jurisdiction without state consent, a position that is reiterated in such cases as *East Timor*. Perhaps most tellingly, the above-referenced individual opinion voiced by Judge Anzilotti in the Danzig Advisory Opinion emphasizes the centrality of the need for fair representation echoing democratic principles.<sup>166</sup> Anzilotti's concern with the exclusion of the minority parties in that case speaks to the need for procedural equality within the Court in order to emphasize the principle of *audiatur et altera pars*—a general principle of procedural law which indicates that no person should be judged without fair hearing in which

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166. See Consistency of Certain Danzig Legislative Decrees with Constitution of Free City, Advisory Opinion, 1935 P.C.I.J. (ser. A/B) No. 27, ¶¶ 87-91 (Dec. 4) (separate opinion by Anzilotti, J.).

each party is given the right to participate. In addition to these ideals articulated in *Monetary Gold* and by Anzilotti in *Danzig*, the Court's jurisprudence has also relied on notions of democratic representation fairness, though more abstractly so, in the Court's orders in the aspiring state advisory opinions themselves. As discussed *supra*, the request to Palestine to participate explicitly reference the need for "fairness."<sup>167</sup> Though the Court does not further explain this reference, democratic representation is rooted in the same central interest of fairness. Finally, in *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, the ICJ stressed the importance of the "fundamental principle of consent,"<sup>168</sup> which also reiterates the centrality of democratic principles of legitimacy. Although the Court never explicitly articulates that the choice to include aspiring states procedurally in these cases is due to a need to preserve its normative legitimacy, its jurisprudence coupled with scholarly analysis demonstrates the centrality of this notion for the Court.

As described above, the aspiring state cases prompt a new reading of the Court's legitimacy and right to rule, but beyond this, these cases also affect the legitimacy of the aspiring states themselves. If one views these cases from the constitutive theory of statehood, then without a doubt, the recognition of a new state by other states is critical. Yet, even those who adhere to the declarative theory of statehood must acknowledge the importance of recognition by other states from a political perspective. It would be impossible for an aspiring state to qualify as a state under the declaratory theory if it were entirely unable to meet the Montevideo Convention's requirement of engaging in relations with other states, thus necessitating at least some level of recognition from other states, even if one relies exclusively on the declaratory theory.<sup>169</sup> As a result, the Court's choice to legitimize aspiring states in the eyes of the international

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167. See *supra* at p. 543.

168. Judgment, 2011 I.C.J. 70, ¶ 131 (Apr. 1).

169. For a brief discussion of the constitutive and declaratory theories of state recognition, see *supra* p. 505.

community might lead to realization of the states' vision of statehood. One of the goals of any court is to confer legitimacy on the norms and institutions that constitute the regime in which they operate.<sup>170</sup> Thus, the Court is engaged in regime legitimization. As a result, "external legitimization [of international governance] . . . constitute[s] one of the ultimate ends of international [adjudication]."<sup>171</sup> In the aspiring state cases, the ICJ can be considered to be conferring legitimacy on aspiring states by allowing them to engage in the process at the ICJ. This conference of legitimacy is evidenced throughout the discussion in Part III of this Article, including the Court's decision to allow aspiring states such as Kosovo and Palestine to submit written and oral statements in timeslots that position them as if they were in contentious cases with their parent states as adversaries.

In this regard, the expressive value of advisory opinions for non-state actors is substantial with regard to the legitimacy of aspiring states as they seek recognition within the international community. Expressive value refers to the value in a legal judgment above and beyond a court's holding; rather, a court's treatment of actors procedurally and substantively makes a statement more broadly, beyond the legal holding itself.<sup>172</sup> Certainly, had the Court's holding found unequivocally that aspiring states had the right to exercise their right to self-determination, this would have greatly affected their legitimacy much more than through their inclusion. Yet, the mere fact of their inclusion is procedurally important.

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170. Nienke Grossman, *Legitimacy and International Adjudicative Bodies*, 41 GEO. WASH. INT'L L. REV. 107, 108-09 (2009).

171. Shany, *supra* note 145, at 265 (emphasis omitted).

172. See, e.g., Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2024 (1996) (defining "the expressive function of law [as] the function of law in 'making statements' as opposed to controlling behavior directly"). For discussion of the expressive value within the context of international law mechanisms, see Diane Marie Amann, *Group Mentality, Expressivism, and Genocide*, 2 INT'L CRIM. L. REV. 93, 113-43 (2002).

Historically, advisory opinions affect the norms by which the international community interacts.<sup>173</sup> As described by Professor Nienke Grossman, “[a]dvisory opinions not only shape political conditions but also contribute to the development of international legal principles.”<sup>174</sup> World events have played out in such a way that the aspiring state actors in many of these cases have effectively “won” their advisory opinions at the ICJ. Clearly, an advisory opinion does not declare a victor and a loser, yet if we understand the Court’s procedural admittance of aspiring states as positioning them as essential adversaries to the countries from which they wished to secede, they have largely emerged victorious in the court of world opinion. This pattern is evidenced by Palestine’s ever-increasing recognition as a state as it continues to bid for UN membership. On November 29, 2012, Palestine was accorded “non-member observer state” status, which was an upgrade from its previous position of “observer status.”<sup>175</sup> Further, it has been accorded the status of observer state by the ICC’s Assembly of State Parties on December 8, 2014. It has also signed on to seven of the nine core human rights treaties as of April 2014.<sup>176</sup>

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173. As an example, a series of ICJ Advisory Opinions regarding the legality of South Africa’s rule over Namibia culminated in a 1971 Advisory Opinion which held that the continued presence of South Africa in Namibia was illegal and that South Africa was under an obligation to withdraw from Namibia. Further, it held that no UN member state was to recognize as valid South African actions or presence in Namibia, a territory that was at the time known as South-West Africa. See *Legal Consequences for States of Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, 1971 I.C.J. 16, ¶¶ 118-19 (June 21). These advisory opinions at the ICJ were soon followed by the termination of the UN supervisory mandate that had been in place since the end of the First World War, and the ultimate declaration of independence of the sovereign state of Namibia in 1990.

174. Grossman, *supra* note 144, at 70.

175. G.A. Res. 67/19, at 1, 2, U.N. Doc. A/RES/67/19 (Nov. 29, 2012).

176. See General Assembly Votes Overwhelmingly to Accord Palestine ‘Non-Member Observer State’ Status in United Nations (Nov. 29, 2012), <http://www.un.org/press/en/2012/ga11317.doc.htm>; Rupert Colville, Press Briefing Notes on Palestine for Spokesperson for the United Nations High Commissioner for Human Rights (May 2, 2014), <http://unispal.un.org/UNISPAL.NSF/0/262AC5B8C25B364585257CCF006C010D> (indicating that the

The Kosovo advisory opinion has also undoubtedly affected the legal and political reality with regard to Kosovo. Although the Kosovo and Palestine cases and situations cannot be equated directly to one another, and each aspiring states' bid toward statehood is developing daily, Kosovo has also advanced in its aim toward achieving statehood. Kosovo has been recognized as a state by 109 of 193 states of the United Nations, and has begun to normalize relations with Serbia through the 2013 signing of the Brussels Agreement, in which the two nations agreed to normalized relations and to refrain from attempting to inhibit progress in the other's attempts to join the European Union.<sup>177</sup> Thus, although neither Kosovo nor Palestine enjoys universal recognition by UN member states, since the time at which the relevant advisory opinions were adjudicated, they have each made considerable progress toward recognition as states. Although it is impossible to quantify the effect that an advisory opinion might have on the perceived legitimacy of a state in its attempts to seek international recognition, there does appear to be a positive correlation between a "favorable" advisory opinion from the ICJ and an increase in state recognition and legitimacy in the global community.

Perhaps because the Court is so often perceived as an artifice of the state-centered, old-world approach to international law, its legitimacy is not subject to question when it takes an unorthodox step such as the procedural inclusion of NSAs. Despite criticism to the contrary, the ICJ may actually be more progressive than it has been perceived to be in this regard. Although procedural inclusion of aspiring states may be a small step, the Court has used its rulemaking authority to achieve the delicate balance required to maintain its legitimacy from both ends of the spectrum, as states and aspiring states are both relevant constituencies to consider from a legitimacy perspective. It is doubtful that the balance will tip anytime soon such that the Court would

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"State of Palestine deposited with the Secretary-General its instruments of accession to a number of international treaties").

177. See *Ban Welcomes 'Landmark' Agreement Between Serbia and Kosovo Negotiators*, UN NEWS CENTRE (Apr. 19, 2013), <http://www.un.org/apps/news/story.asp?NewsID=44708&Cr=kosovo&Cr1#.VJ3BIUAOcNh>.



allow aspiring states to participate fully in contentious cases<sup>178</sup> or to modify the Statute to officially allow more broad-based participation from such entities.

As the Court endeavors to preserve its normative legitimacy or its "right to rule," with regard to the position of aspiring states, it has arrived at a compromise position between acceding entirely to a state-centric position or to one that would give all aspiring states full access to the Court. This solution may be an imperfect one, in that it lacks statute-based authority, yet it is one that preserves the Court's legitimacy from the perspective of both its mandate holders (states) and its entitlement holders (aspiring states). Critics of the ICJ find the current approach to aspiring states, the right to self-determination, and to human rights disheartening. Yet these critics should be assuaged by the evidence provided in the aspiring state cases that the Court does not lag far behind current trends in these areas as it may appear at first. These cases do not foretell the end of state-centered international law. Indeed, only those state-like NSAs who hope to become players in the state-centered vision of international law are able to gain access to the Court, assuming they meet the criteria laid out above of being under international sponsorship, qualify to realize their right to self-determination, and do so through the advisory opinion mechanism. That they are permitted to do so vis-à-vis the ICJ reveals, if not the end of state-centered international law, an international law that is willing to facilitate a role for these NSAs gaining access to the international community.

### CONCLUSION

Through the evolution of the Court's jurisprudence described here, it is evident that the Court is treating aspiring states in a quite different manner than it might have two or three decades ago. If there exists a spectrum between self-determination and sovereignty, the Court is shifting more in the direction of respect for self-determination, recognizing that it may not rely solely on states to enforce human rights, including the right to self-determination.

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178. See Paulus, *supra* note 33, at 1650 (indicating that states are still reticent to support an initiative that allows non-state participation).

Legitimacy of international law relies on representation, yet at the International Court of Justice, the human right of self-determination is adjudicated without consultation with many of the parties who are affected by its decisions. Revealing its state-centric roots, international law does not provide for enforcement of the right to self-determination. And reasonably so, considering that it clashes inherently with the right to state sovereignty. The centrality of states as actors lies at the heart of international law, and the capacity of the individual to bring claims against the state lies at the heart of international human rights law. Yet the human right to self-determination creates an existential crisis for these systems. By its very definition, the right to self-determination of peoples challenges the very existence of a state by challenging its right to territorial sovereignty and revealing the difficulty of locating an international legal body where the right to self-determination can be adjudicated.

The treatment of aspiring states at the ICJ is in fundamental tension with the Court's Statute. According to its Statute, these non-state actors play no specific role within proceedings. Yet, during several instances in which the right to self-determination is at issue, the court has allowed NSAs a significant role in the proceedings. Thus, despite the antiquated and state-centric nature of the statute of the ICJ and the foundations of international law, the ICJ has done procedurally what it is not yet ready to do substantively. As such, the ICJ is carving out a space, tentative though it may be, to recognize the critical role that aspiring states play in the international law arena. This recognition of a non state-centric approach to international law, along with it the centrality of the narrative of human rights and in particular, the right to self-determination, reflect critical shifts within the jurisprudence of this court and within public international law more broadly.

This Article also provides a new observation with regard to the Court in the light of numerous critiques lobbied against it that it is entirely driven by state interests. Instead of a Court that is entirely state-based, this analysis reveals that the Court, concerned with the democratic legitimacy of the institution, has used the flexibility of the advisory opinion as a solution to the problem of lack of representation of aspiring states at the ICJ. In the cases of aspiring states, the

choice to allow process-engagement at the Court represents a slow-moving solution. This solution is flawed, certainly. It is ad hoc, it appears haphazard, and it is poorly documented. Yet, this choice reveals that despite its state-reliant and state-centric origins, and indeed, despite the original source of its normative legitimacy, the Court is struggling to adapt to a rapidly changing world. The principal judicial organ of the United Nations lacks the agility to change course quickly in the choppy waters of international law—but it is slowly and carefully evolving to a changing world of international law that is populated by a rich diversity of actors and no longer dominated by states alone.