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[Pay No Attention To That Man Behind The Curtain: The Role of Civil Society and Other Actors in Decisions to Litigate at the International Court of Justice]

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Pay No Attention To That Man Behind The Curtain: The Role of Civil Society and Other Actors in Decisions to Litigate at the International Court of Justice

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The Statute of the International Court of Justice provides that only states may appear as parties before the Court. But other types of actors (non-governmental organizations, corporations, international organizations) can play a key role in persuading states to initiate ICJ proceedings, whether in the form of a contentious case or by supporting an advisory opinion request. Historically, the ICJ has shown little concern with the behind-the-scenes role played by civil society groups or other actors. The overarching question is whether the Court's approach has been sound, or whether there are scenarios that might justify the Court taking a different approach to policing its jurisdiction or the admissibility of claims when behind-the-scenes actors have successfully exerted a degree of influence over a decision to initiate proceedings.

1 Introduction

At the end of the 1939 film *The Wizard of Oz*, Dorothy and her three travelling companions (the Scarecrow, Tin Man, and Cowardly Lion) return triumphantly to the Emerald City seeking another audience with the Great and Powerful Wizard. When the disembodied head of the Wizard begins to obfuscate, Dorothy's little dog Toto pulls back a curtain and reveals the 'Wizard' to be nothing more than an ordinary middle-aged man. He tries to keep up the charade, beseeching them to 'pay no attention to that man behind the curtain'.[1] But the jig is up.

The Statute of the International Court of Justice (the 'ICJ' or 'the Court') provides that '[o]nly states may be parties in cases before the Court'.[2] But states are not necessarily the only actors involved in the decisions to bring those cases.[3] Other actors may operate

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[1] *The Wizard of Oz*, dir. by V. Fleming (MGM, 1939).

[2] Art. 34 Statute of the International Court of Justice.

[3] UN organs and duly authorized specialized agencies may initiate advisory opinion proceedings. Art. 96 Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS 16 ('UN

'behind the curtain'—turning dials or pushing buttons—in an effort to influence state decision-making. Non-governmental organizations (NGOs) with advocacy mandates (for example, relating to human rights or the environment) may be obvious examples.[4] The efforts of corporations, law firms, or academics may be less visible. There is also the possibility of third-state involvement. The overarching question is whether any of this should matter to the Court. Is it relevant to jurisdiction or admissibility whether an NGO, a private company, or a third state has pressed upon the applicant state to sue or is financing the litigation, choosing the legal team, or supplying the legal arguments? Taking account of recent ICJ practice, this piece examines the Court's approach to these questions and whether it has reason to pay attention to those other actors 'behind the curtain'.[5]

2 An Overview of the Court's Approach

The ICJ has historically shown little concern with the behind-the-scenes role of non-parties in decisions to initiate proceedings, whether contentious or advisory. More broadly, the Court has consistently taken the position that 'it cannot concern itself with the political motivation which may lead a State at a particular time, or in particular circumstances, to choose judicial settlement'.[6] It reaffirmed this stance most recently in the judgment on preliminary objections in *The Gambia v Myanmar*, discussed below.[7] But given trends in the Court's docket (namely, the rise of 'public interest' litigation relating to community

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Charter'). But advisory opinion requests are typically the product of state decision-making, with the exception of requests relating to administrative tribunal decisions.

[4] NGOs have long played a role in the development of international law, including by seeking to persuade 'governments or international agencies to seek authoritative judgments'. S. Charnovitz, 'Two Centuries of Participation: NGOs and International Governance' (1997) 18 Michigan Journal of International Law 183, 272-73.

[5] Scholars have paid far more attention to the formal restrictions on participation by non-state actors in contentious cases at the ICJ, including the non-acceptance of *amicus* briefs. See, e.g., D. Shelton, 'The Participation of Nongovernmental Organizations in International Proceedings' (1994) 88 AJIL 611, 619-28, 641-42; R. Ranjeva, 'Les ONG at la mise en oeuvre du droit international' (1997) 270 Recueil des Cours 9, 52-65; A. Lindblom, *Non-Governmental Organisations in International Law* (Cambridge University Press 2005) 303-310; Y. Ronen, 'Participation of Non-State Actors in ICJ Proceedings' (2012) 11 Law and Practice of International Courts and Tribunals 77.

[6] *Border and Transborder Armed Actions (Nicaragua v Honduras) (Jurisdiction and Admissibility)* [1988] ICJ Rep 91, para 52.

[7] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar) (Preliminary Objections)*, Judgment of 21 July 2022, paras 42-46 ('*The Gambia v Myanmar (Preliminary Objections)*').

interests) these questions are likely to persist, especially because influence campaigns may be easier to identify in such cases.[8]

2.1 *Behind-the-Scenes Actors and Advisory Opinion Requests*

The *Legality of the Threat or Use of Nuclear Weapons* advisory opinion provides a logical starting point.[9] In the 1990s, a coalition of NGOs undertook a campaign (the self-styled 'World Court Project') to put the legal status of nuclear weapons before the Court.[10] These efforts led to parallel advisory opinion requests from the World Health Organization (WHO) and the UN General Assembly (UNGA). In 1996, the Court ruled that it lacked jurisdiction to entertain the WHO request because the question did not arise 'within the scope' of that organization's activities,[11] but it acceded to the General Assembly request. By the President's casting vote, the Court determined that 'the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict' but that it could not 'conclude definitively' whether nuclear war would be unlawful 'in an extreme circumstance of self-defence'.[12]

Whatever the merits of that oft-criticized result, a sub-issue was whether the role played by advocacy groups provided grounds to decline to give the advisory opinion.[13]

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[8] On 'community interest' litigation, see: M. Longobardo, 'The Standing of Indirectly Injured States in the Litigation of Community Interests Before the ICJ' (2022) 24 International Community Law Review 476; M. Ramsden, 'Strategic Litigation before the International Court of Justice: Evaluating Impact in the Campaign for Rohingya Rights' (2022) 33 European Journal of International Law 441; C. Rose, 'Enforcing the "Community Interest" in Combating Transnational Crimes: The Potential for Public Interest Litigation' (2022) 69 Netherlands International Law Review 57; P. Urs, 'Obligations *erga omnes* and the question of standing before the International Court of Justice' (2021) 34 Leiden Journal of International Law 505.

[9] *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 266 ('*Legality of the Threat or Use of Nuclear Weapons*').

[10] See Lindblom, *Non-Governmental Organisations in International Law*, at 219-221. The World Court Project was the outgrowth of civil society activity dating to the 1980s, but the timing of the requests was linked to the then-imminent 25-year review of the Treaty on the Non-Proliferation of Nuclear Weapons (adopted 12 June 1968, entered into force 5 March 1970) 729 UNTS 169, art X. S. Ranganathan, 'The *Nuclear Weapons* Advisory Opinions (1996)' in E. Bjorge and C. Miles (eds), *Landmark Cases in Public International Law* (Hart 2017) 409, 414-417.

[11] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict (Advisory Opinion)* [1996] ICJ Rep 66, para 31.

[12] *Legality of the Threat or Use of Nuclear Weapons*, at para 105(E).

[13] The Court has consistently held that it may exercise its discretion to decline to give a requested advisory opinion only in the face of 'compelling reasons'. *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Advisory Opinion)* [2019] ICJ Rep 95, para 65.

States had put forward other reasons for the Court to exercise its discretion to reject the request, such as the 'vague and abstract' nature of the question, the likelihood that an opinion would 'provide no practical assistance' to the General Assembly, and the risk that it would undermine disarmament negotiations.[14] The Court was unpersuaded by these concerns, and no state argued that civil society pressure was in itself grounds for dismissal. The closest the Court came to the issue was to explain that so long as the question posed had a legal character, 'the political nature of the motives which may be said to have inspired the request . . . are of no relevance to the establishment of its jurisdiction to give such an opinion'.[15]

It was instead individual members of the Court—Judges Guillaume and Oda—who focused on the behind-the-scenes role of civil society. Judge Guillaume voted in favour of the decision to issue the opinion but suggested that the Court could have declined to do so given the 'circumstances of the seisin'.[16] He noted the intensive work of advocacy groups to secure the resolution and 'to induce States hostile to nuclear weapons' to appear in the proceedings.[17] According to Judge Guillaume, the Court might have considered 'piercing the veil' and declaring the request inadmissible on the ground that it could not be regarded as coming from the General Assembly itself or even Member States, but instead from the 'powerful pressure groups which besiege them today with the support of the mass media'.[18] Despite these misgivings, he 'dare[d] to hope' that governments retained 'sufficient independence of decision' to resist such campaigns and to act on their own behalf.[19] He did not elaborate upon why or when a lobbying campaign would amount to undue influence, or how efforts to persuade anti-nuclear weapons states to participate was legally problematic. The subtext of Judge Guillaume's comments seemed to be that certain states might be dangerously susceptible to manipulation by activists and academics and fooled into acting against their own interests.

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[14] *Legality of the Threat or Use of Nuclear Weapons*, at para 15.

[15] ibid para 13.

[16] *Legality of the Threat or Use of Nuclear Weapons*, Sep Op Judge Guillaume, at para 2.

[17] ibid.

[18] ibid.

[19] ibid.

By contrast, Judge Oda voted against the Court's decision to give the advisory opinion for 'reasons of judicial propriety and economy'.[20] He also took an even dimmer view of the World Court Project. Noting that the NGOs involved had failed for many years to persuade UN member states to support 'the *total prohibition* of nuclear weapons' in a General Assembly resolution, Judge Oda saw the campaign for an advisory opinion as an attempt 'to compensate for the vainness of their efforts' by getting the ICJ 'to determine the *absolute illegality* of nuclear weapons' instead.[21] For Judge Oda, this was an improper attempt to short-circuit the political process. He also suggested that NGO involvement had contributed to the very inadequacy of the question put to the Court, which 'did not reflect a meaningful consensus'.[22]

Ultimately, Judges Guillaume and Oda found themselves in the minority on this issue. The lesson from *Legality of the Threat or Use of Nuclear Weapons* seemed to be that while some judges might be uncomfortable with civil society's influence on state decision-making processes, this was not a legally relevant factor for the Court, let alone a 'compelling reason' to decline a duly-submitted request.[23] More than a quarter of a century later, the ICJ faces another advisory opinion request on a subject of global concern: climate change.[24] Once again, civil society has played a significant role in persuading states to support that initiative.[25] Yet it is already apparent that the far-reaching questions posed to the ICJ are likely to generate some of the same types of objections and criticisms that featured in

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[20] *Legality of the Threat or Use of Nuclear Weapons*, Diss Op Judge Oda, at para 1.

[21] ibid para 8.

[22] ibid para 14. Writing in a non-judicial capacity, Rosalyn Higgins took the view that the Court 'rightly rejected this suggestion' because when '[a]ll is said and done, it is up to the Members of the General Assembly whether or not they act on the lobbying efforts of the NGOs'. R. Higgins, *Themes & Theories: Selected Essays, Speeches and Writings in International Law* (Oxford University Press 2009) 893, 894.

[23] *Legality of the Threat or Use of Nuclear Weapons*, at para 14.

[24] UNGA, Res 77/276 'Request for an Advisory Opinion of the International Court of Justice on the Obligations of States in Respect of Climate Change' (29 March 2023).

[25] The small island state of Vanuatu spearheaded the advisory opinion request, but law students from the University of the South Pacific are widely credited with jump-starting the campaign. V. Volvovici, 'Pacific Islands students target UN Court as Key Weapon to Fight Climate Change' (Reuters, 16 September 2022), https://www.reuters.com/world/asia-pacific/pacific-islands-students-target-un-court-key-weapon-fight-climate-change-2022-09-16/ (last visited 21 June 2023). An alliance of over 1,500 civil society organisations also pledged support for the campaign. Climate Action Network International, 'Thousands of Civil Society Organisations Call on Countries to Support Vanuatu Climate Justice Initiative' (5 May 2022), https://climatenetwork.org/2022/05/05/thousands-of-civil-society-organisations-call-on-countries-to-support-vanuatu-climate-justice-initiative/ (last visited 21 June 2023).

Legality of Nuclear Weapons, from states if not also from the bench.[26] History may well repeat itself.

2.2 *Behind-the-Scenes Actors and the Initiation of Proceedings by Injured States*

While considerations of jurisdiction and admissibility differ between advisory and contentious proceedings, nothing in the Court's practice since *Legality of the Threat or Use of Nuclear Weapons* suggests a change in the Court's disinterest in the behind-the-scenes role of civil society or other actors. This holds true for 'traditional' disputes involving injured states as well as novel disputes involving claims by states other than injured states in response to the alleged breach of obligations *erga omnes* or *erga omnes partes*.

When a state has been injured directly by another state's alleged wrongful conduct, it may often be 'crusading NGOs that lead the way for states to see the international dimension of what was previously regarded a domestic matter.'[27] For example, the civil society response to Uruguay's decision to construct pulp mills along the River Uruguay galvanized public opposition in Argentina and escalated the bilateral dispute in the lead-up to Argentina's decision to initiate ICJ proceedings.[28] In particular, the Center for Human Rights and Environment (CEDHA), an Argentina-based NGO, played a prominent role. Before Argentina went to the ICJ, CEDHA triggered a 'compliance audit' at the International Finance Corporation (a major investor in the project) and brought a complaint against Uruguay at the Inter-American Commission on Human Rights.[29] These efforts, combined with disruptive protests that blocked major roads and bridges, created conditions ripe for the seisin of the Court. It is questionable whether Argentina would otherwise have initiated the *Pulp Mills* litigation against Uruguay in 2006.[30]

But when Argentina did so, the role that NGOs had played along the way had no bearing on questions of jurisdiction or admissibility. The parties disagreed about the scope

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[26] See D. Bodansky, 'Advisory Opinions on Climate Change: Some Preliminary Questions' (2023) Review of European, Comparative, and International Environmental Law (early view).

[27] S. Charnovitz, 'Nongovernmental Organizations and International Law' (2006) 100 AJIL 348, 348.

[28] M. Lee, 'The Uruguay Paper Pulp Mill Dispute: Highlighting the Growing Importance of NGOs and Public Protest in the Enforcement of International Environmental Law'(2006) 7 Ocean & Fisheries Law 71, 72.

[29] C. Payne, 'Environmental Impact Assessment as a Duty Under International Law: The International Court of Justice Judgment on Pulp Mills on the River Uruguay' (2010) 1 European Journal of Risk Regulation 317, 318.

[30] *Pulp Mills on the River Uruguay (Argentina v Uruguay) (Merits)* [2010] ICJ Rep 14.

of the compromissory clause on which Argentina based the Court's jurisdiction, but neither Uruguay nor the Court questioned Argentina's standing to sue or the admissibility of claims based on the pre-litigation actions by civil society groups. [31] This was unsurprising. When state interests collide and cause or threaten direct forms of harm, it is predictable that interested parties will lobby government officials to take action, including by litigating at the ICJ if that option exists. It has come to be expected and 'within the rules of the game' that states may 'acced[e] to civil society pressure' in such scenarios, even perhaps choosing ICJ litigation. In this way, 'civil society pressure' may contribute to a redefinition of state interests. Nonetheless, the decision to litigate remains a sovereign act.[32]

Whereas civil society-led campaigns that encourage ICJ litigation might be highly public, other types of influence campaigns may be less visible. Consider territorial sovereignty and maritime delimitation disputes, which have long been a staple of ICJ activity. In that context, business entities may have clear reasons to push states to resolve their disputes if uncertainty over title effectively prevents the exploitation of natural resources. But such entities might operate largely 'behind the curtain' when it comes to pushing a state to bring an ICJ case. For example, Guyana's pending litigation against Venezuela at the ICJ over the Essequibo region is reportedly supported by US-based energy giant ExxonMobil, which has oil and gas interests in Guyana (and a fraught relationship with Venezuela).[33] More specifically, Guyanese officials have stated that funds secured from ExxonMobil as part of a broader agreement are covering some litigation costs.[34] But

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[31] ibid paras 48-66.

[32] E. Szazi, *NGOs: Legitimate Subjects of International Law* (Leiden 2012) 117. The factors contributing to Argentina's decision to bring the *Pulp Mills* case can be compared with the factors that led Australia and New Zealand to initiate proceedings in 1970 in response to atmospheric nuclear testing by France in the South Pacific. *Nuclear Tests (Australia v France) (Jurisdiction and Admissibility)* [1974] ICJ Rep 253; *Nuclear Tests (New Zealand v France) (Jurisdiction and Admissibility)* [1974] ICJ Rep 457. Shaped by anti-nuclear activism, public opinion in Australia and New Zealand reflected a broad consensus strongly against France's actions; labour unions in Australia were even prepared to boycott French shipping. These factors created considerable pressure to take action. D. Fischer, 'Decisions to Use the International Court of Justice: Four Recent Cases' (1982) 26 International Studies Quarterly 251, 258.

[33] After Venezuela effectively nationalised its oil industry, ExxonMobil commenced arbitration against Venezuela in 2007 that resulted in a US$1.6 billion award to ExxonMobil. *Venezuela Holdings, B.V. et al v Venezuela*, ICSID Case No ARB/07/27, Award, 30 September 2014. The award was later reduced to approximately US$188 million. *Venezuela v Venezuela Holdings, B.V. et al*, ICSID Case No ARB/07/27, Decision on Annulment, 3 March 2017.

[34] Press reports indicate that Guyana's contract with ExxonMobil included a US$18 million 'signing bonus' but left unclear how much of that amount has been allocated to the ICJ case. A. Gordon, 'Exxon money for ICJ legal

Venezuela did not raise the relationship between ExxonMobil and Guyana in its unsuccessful challenge to jurisdiction and admissibility.[35] Nor has the Court shown any interest in the possibility that Guyana's interests may be aligned with those of ExxonMobil or that ExxonMobil may in some way be facilitating Guyana's case, financially or otherwise.

2.3 *Behind-the-Scenes Actors and Initiation of Proceedings by Non-Injured States*

The behind-the-scenes role of non-parties may be more prominent in cases brought by states other than injured states ('non-injured' states).[36] Recent years have seen an unprecedented number of ICJ cases based on alleged breaches of obligations *erga omnes* or *erga omnes partes.* NGOs and other actors have played a role leading up to the seisin of the Court in each of these cases, but this involvement has yet to raise concerns about jurisdiction or admissibility for the Court.

In 2009, Belgium initiated ICJ proceedings in response to Senegal's failure to extradite Hissène Habré, the former dictator of Chad, to face criminal charges in Belgium.[37] This situation arose because Chadian victims had previously sought to initiate criminal proceedings against Habré in Belgium in 2000. That effort was facilitated by a coalition of NGOs, including human rights groups in Chad and Senegal, Human Rights Watch, and the *Fédération International des Ligues des Droits de l'Homme*.[38] Moreover, the combined

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fees' (Guyana Chronicle, 9 December 2017), https://guyanachronicle.com/2017/12/09/exxon-money-for-icj-legal-fees/ (last visited 21 June 2023). A Guyanese minister stated that it 'would be wrong' for Guyana to help ExxonMobil settle a score with Venezuela but it was 'appropriate and right' for Guyana to use its earnings from ExxonMobil 'to fortify its positions vis-à-vis the challenge by Venezuela to the 1899 arbitral award'. 'Guyana denies use of "special funds" from Exxon to settle border issue with Venezuela' (Kaieteur News, 2 December 2017), https://www.kaieteurnewsonline.com/2017/12/02/guyana-denies-use-of-special-funds-from-exxon-to-settle-border-issue-with-venezuela/ (last visited 21 June 2023).

[35] *Arbitral Award of 3 October 1899 (Guyana v Venezuela) (Preliminary Objections)*, Judgment of 6 April 2023.

[36] The International Law Commission referred to the invocation of responsibility 'by a State other than an injured State' in Article 48 of the 2001 Draft Articles on the Responsibility of States for Internationally Wrongful Acts. UNGA Res 56/83, Annex 'Responsibility of States for Internationally Wrongful Acts' (12 December 2001) ('UNGA Res 56/83, ILC Articles on State Responsibility'). Some scholars and practitioners use the term 'non-injured states' to capture this idea while others assert that 'indirectly injured states' better conveys that 'every state in the international community or every state party to certain treaties is injured as a result of violations of these kinds of obligations'. Longobardo, 'The Standing of Indirectly Injured States', at 477. The ICJ has not itself adopted the terminology distinguishing between an 'injured state' and a 'state other than an injured state'. See *The Gambia v Myanmar (Preliminary Objections)*, Decl. Judge Kress, at paras 7-11.

[37] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal) (Merits)* [2012] ICJ Rep 422, para 1 ('*Questions relating to the Obligation to Prosecute or Extradite*').

[38] R. Brody, 'Bringing a Dictator to Justice: The Case of Hissène Habré' (2015) 13 Journal of International Criminal Justice 209, 210-11. The NGO coalition also lobbied Belgian officials to insert a 'grandfather clause'

efforts of individual victims and NGOs helped to generate the interest within Belgium to make it politically and legally feasible to bring the eventual ICJ case, once the dispute between Belgium and Senegal had crystallized.[39] At the ICJ, Senegal's preliminary objections did not concern the role of victim associations and NGOs in the lead-up to the seisin of the Court.[40] There was no serious question that Belgium was acting in a sovereign capacity by seeking the prosecution or extradition of Habré pursuant to the 1984 Convention Against Torture,[41] despite some judges objecting to the Court's determination that Belgium's standing arose from the nature of the obligations *erga omnes partes* that Belgium sought to enforce.[42]

Civil society actors also played a key role in the lead-up to Australia's decision to bring an ICJ case against Japan in 2010. The dispute concerned whether whaling activity authorized by Japan was 'for purposes of scientific research' under the terms of Article VIII of the 1946 International Convention on the Regulation of Whaling,[43] or whether that activity contravened the moratorium on commercial whaling.[44] While NGOs such as Greenpeace and the Sea Shepherd Conservation Society used direct action tactics to hinder Japanese whaling vessels, the International Fund for Animal Welfare (IFAW) played a more direct role in laying the foundation for ICJ litigation.[45] After Japan launched a new 'scientific

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when repealing Belgium's broad universal statute following the decision in *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium) (Merits)* [2002] ICJ Rep 3. This kept the possibility of a prosecution in Belgium alive. Brody, 'Bringing a Dictator to Justice', at 210-11.

[39] In 2002, the NGO coalition arranged for Chadian victims to meet with government ministers and other politicians; this helped to create the 'political backing' needed for Belgium to later pursue the matter at the ICJ. Brody, 'Bringing a Dictator to Justice', at 211, 213.

[40] *Questions relating to the Obligation to Prosecute or Extradite*, at paras 55, 122.

[41] Art. 7 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85.

[42] *Questions relating to the Obligation to Prosecute or Extradite*, at paras 64-70; see also Sep Op Judge Skotnikov, at paras 3-31; Sep Op Judge Xue, at paras 11-23; Sep Op Judge Sur, at paras 26-46.

[43] Art VIII International Convention for the Regulation of Whaling (adopted 2 December 1946, entered into force 10 November 1948) 161 UNTS 72.

[44] *Whaling in the Antarctic (Australia v Japan: New Zealand intervening) (Merits)* [2014] ICJ Rep 226, paras 48-50 ('*Whaling in the Antarctic*').

[45] D. Rothwell, 'The Antarctic Whaling case: Litigation in the International Court and the Role Played by NGOs' (2013) 3 Polar Journal 399, 401, 404. Humane Society International, another NGO, also helped set the stage for the ICJ case by challenging Japanese whaling activity in the Australian courts. Rothwell, 'The Antarctic Whaling Case', at 404; N. Klein, 'Whales and Tuna: The Past and Future of Litigation between Australia and Japan' (2009) 21 Georgetown International Environmental Law Review 143, 180-81.

whaling' program in 2005 involving higher catch limits, IFAW convened a series of high-level expert panels to study potential legal strategies to challenge Japan's actions, including an ICJ case.[46] The effort to draw upon professional expertise (rather than IFAW simply proposing that Australia take Japan to the ICJ) gave the idea enhanced credibility. IFAW also found itself in the right place at the right time. Japanese whaling became an issue in the 2007 Australian election as the opposition Labor Party made a pledge to pursue litigation if elected.[47]

When the Labor Party then prevailed, Australia, after some delay, took the weighty decision in 2010 to bring the case against Japan, a close ally and trading partner.[48] Australia did not claim to have suffered any material injury as a result of Japan's whaling activity. Instead, the case was intended to enforce Japan's obligations *erga omnes partes* under the ICRW.[49] In reality, there may have been additional considerations.[50] Nonetheless, it is difficult to imagine the case happening in the absence of the NGO-led efforts to study and promote ICJ litigation as a credible response to Japan's deeply unpopular whaling program.[51] When Japan unsuccessfully challenged the Court's jurisdiction, it did so on grounds unrelated to either the behind-the-scenes role played by civil society or the fact that Australia was not an injured state,[52] and the Court's judgment showed no interest in any role that civil society actors had played in Australia's decision to litigate.

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[46] Rothwell, 'The Antarctic Whaling Case', at 404-407; S. Scott, 'Australia's Decision to Initiate Whaling in the Antarctic: Winning the Case Versus Resolving the Dispute' (2014) 68 Australian Journal of International Affairs 1, 4-5.

[47] Rothwell, 'The Antarctic Whaling Case', at 410-11.

[48] Donald Rothwell explains that no government would want 'to be seen to have been influenced into making such a decision by external forces such as NGOs' and it was therefore understandable that the government sought its own legal advice and considered further options before moving ahead. ibid at 412.

[49] See *Whaling in the Antarctic*, at para 40.

[50] These included the possibility that a loss might have usefully created political space for Australia to shift towards a compromise position of 'sustainable whaling' rather than continuing to push a 'hard-line' anti-whaling policy; the government may also have sought to consolidate support from groups unhappy with its environmental policies. Scott, 'Australia's Decision to Initiate Whaling in the Antarctic', at 8-11. This illustrates that even when a behind-the-scenes actor has successfully promoted the idea of ICJ proceedings, the state initiating litigation may have independent reasons for doing so.

[51] The 'precise impact' of IFAW's campaign on Australia's decision cannot be known, but Australia's legal arguments tracked two of the IFAW-commissioned reports, and three of the experts recruited by IFAW later served on Australia's ICJ legal team. Rothwell, 'The Antarctic Whaling Case', at 409.

[52] *Whaling in the Antarctic*, at paras 30-41.

In April 2014, the Republic of the Marshall Islands filed separate applications against the nine states that possess (or are believed to possess) nuclear weapons, alleging a failure by those states to pursue in good faith and conclude negotiations leading to complete nuclear disarmament.[53] A site of extensive nuclear testing by the United States in the 1950s, the Marshall Islands made clear that it was not acting as an injured state and instead sought to enforce the obligations *erga omnes* or *erga omnes partes* of the respondent states. Only the cases against India, Pakistan, and the United Kingdom were added to the General List.[54] Those cases ended in October 2016 when the Court determined that the non-existence of a dispute between the Marshall Islands and any respondent state on the date the applications were filed meant the Court lacked jurisdiction.[55]

While many civil society groups had collaborated in the World Court Project in the 1990s, the key behind-the-scenes player here was the Nuclear Age Peace Foundation (NAPF), a small California-based NGO. In a media guide for campaigners, NAPF explained that it 'had been working since 2012 to assemble a world-class pro bono legal team' to represent the Marshall Islands in the 'Nuclear Zero lawsuits', and that its official role was as a 'consultant' to the Marshall Islands.[56] NAPF's prominent involvement may have created the impression that these cases were engineered by an enterprising NGO seeking to get the issue of nuclear weapons back in front of the Court, with the Marshall Islands serving as the vessel to that end. Yet while there may be some truth to the idea that these were claims in search of a claimant, the ultimate decision to bring these cases belonged to the Marshall

[53] The Marshall Islands filed separate applications against China, France, India, Israel, North Korea, Pakistan, Russia, the United Kingdom, and the United States. ICJ, 'The Republic of the Marshall Islands Files Applications Against Nine States for Their Alleged Failure to Fulfill Their Obligations with Respect to the Cessation of the Nuclear Arms Race at an Early Date and to Nuclear Disarmament (No 2014/18, 25 April 2014).

[54] The Marshall Islands invited the other states to accept the Court's jurisdiction pursuant to Article 38(5) of the Rules of Court, but the offer was not taken up.

[55] *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v India) (Jurisdiction and Admissibility)* [2016] ICJ Rep 255; *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v Pakistan) (Jurisdiction and Admissibility)* [2016] ICJ Rep 552; *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v United Kingdom) (Jurisdiction and Admissibility)* [2016] ICJ Rep 833. See also M. Becker, 'The Dispute That Wasn't There: Judgments in the *Nuclear Disarmament* Cases at the International Court of Justice' (2017) 6 Cambridge International Law Journal 4.

[56] Nuclear Age Peace Foundation, Nuclear Zero Lawsuits: A Guide for Non-Governmental Organizations and Campaigners (2014) (on file with author).

Islands alone, and the late Tony de Brum, the applicant state's co-agent at the ICJ, was a natural fit to lead the effort.[57] De Brum was a long-time campaigner for nuclear disarmament and a skilled politician with the ability to consolidate the necessary political support at home (even if this meant litigating against the United States, a close partner). Because the cases were dismissed for the failure to meet the dispute requirement, one can only wonder whether some judges might otherwise have sought to resuscitate the arguments of Judges Guillaume and Oda from *Legality of the Threat or Use of Nuclear Weapons* to find another reason not to hear the cases.[58]

Finally, the pending case between The Gambia and Myanmar about alleged acts of genocide against the Rohingya ethnic minority has also raised questions of third-party involvement. In this instance, the objections to jurisdiction and admissibility concerned the behind-the-scenes role of the Organization of Islamic Cooperation (OIC), an intergovernmental organization, rather than civil society groups.[59] Specifically, Myanmar argued that The Gambia could not be considered the 'real applicant' in the case.[60] Instead, the Gambia was a mere 'proxy' that the OIC (and its member states) were using to 'circumvent the limits of the Court's jurisdiction'.[61] In support of that claim, Myanmar contended that The Gambia regularly briefed the OIC about the case and that the OIC was funding the litigation.[62] In response, The Gambia asserted that a state's 'motivation for

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[57] L. Friedman, 'Tony de Brum, Voice of Pacific Islands on Climate Change, Dies at 72' (New York Times, 22 August 2017).

[58] See text accompanying notes 16-22.

[59] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)*, Preliminary Objections, Judgment of 22 July 2022, paras 35-50.

[60] ibid para 35.

[61] ibid..

[62] ibid para 37. The relationship between The Gambia and the OIC arguably bears some resemblance to the circumstances leading to the 1960s-era *South West Africa* cases, in which Liberia and Ethiopia sought to challenge South Africa's continuing administration of South West Africa (now Namibia). Following years of mobilisation carried out under the auspices of the Conference of Independent African States and the All-African People's Convention, Ethiopia and Liberia brought those cases with the strong backing of the African bloc within the United Nations. See T. Barnes, '"The Best Defense Is to Attack": African Agency in the South West Africa Case at the International Court of Justice, 1960–1966' (2017) 69 South African Historical Journal 162, 166-68. Because Ethiopia and Liberia had been members of the League of Nations, they were viewed as the only states capable of invoking the compromissory clause contained in the 1920 mandate for South West Africa, but other African states funded the litigation. R. Irwin, 'Apartheid on Trial: South West Africa and the International Court of Justice, 1960–66', (2010) 32 International History Review 619, 626. At the merits phase, the Court held narrowly that the applicants lacked standing because they 'could not be considered to have established any legal right or interest appertaining to them in the subject-matter of the present claims'. *South*

commencing litigation before the Court is irrelevant to matters of jurisdiction'.[63] It further explained that the decision to bring the case had been made 'at the highest levels of the Gambian government, which did not act under the pressure, coercion, or inducement of the OIC', and that it had been The Gambia that raised the issue within the OIC in the first place.[64]

The Court gave Myanmar's 'proxy state' argument short shrift:

> The Court observes that the fact that a State may have accepted the proposal of an intergovernmental organization of which it is a member to bring a case before the Court, or that it may have sought and obtained financial and political support from such an organization or its members in instituting these proceedings, does not detract from its status as the applicant before the Court. Moreover, the question of what may have motivated a State such as The Gambia to commence proceedings is not relevant for establishing the jurisdiction of the Court.[65]

The Court saw no reason to 'look beyond the fact that The Gambia has instituted proceedings against Myanmar in its own name', and it rejected Myanmar's further argument that the proceedings somehow constituted an 'abuse of process'.[66]

3 An Assessment of the Court's Approach

This survey of practice makes clear that the Court remains content 'to pay no attention to that man behind the curtain'. Nor is it immediately clear why, as a matter of judicial propriety, the Court should feel compelled to do so. In *Legality of the Threat or Use of Nuclear Weapons* and more recently in *The Gambia v Myanmar*, the Court has made clear

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West Africa (Ethiopia and Liberia v South Africa) (Judgment) [1966] ICJ Rep 6, para 99. This momentous decision did not expressly turn on the fact that Ethiopia and Liberia were acting on behalf of third states, but the judgment represented the Court's unwillingness at that time to entertain the type of 'public interest' litigation that has since become more common.

[63] *The Gambia v Myanmar (Preliminary Objections)*, at para 39.

[64] ibid paras 40-41. See also Ramsden, 'Strategic Litigation before the International Court of Justice', at 458-59.

[65] *The Gambia v Myanmar (Preliminary Objections)*, at para 44.

[66] ibid paras 45, 47-48.

that the motivations or machinations behind a state's decision to litigate are outside its purview. This is broadly consistent with the Court's liberal approach to the justiciability of disputes that have both political and legal aspects, regardless of the involvement of civil society or other actors.[67] Nonetheless, the uptick in cases relating to obligations *erga omnes* and *erga omnes partes* suggests that the Court will continue to face scenarios in which non-parties play a significant behind-the-scenes role in decisions to initiate proceedings. The question is therefore whether there are circumstances in which such involvement could be problematic.

As a doctrinal matter, the Court's approach to date appears sound. It is difficult to identify a legal basis in the UN Charter or the ICJ Statute that would justify the Court looking beyond the formal requirements to initiate a contentious case or request an advisory opinion. Furthermore, even if a state were to initiate a case at a someone else's behest, the Court's cautious approach to jurisdiction functions as another mechanism of control.[68] There is nothing 'magical' about a non-party's behind-the-scenes involvement that can bring into existence a bilateral dispute or jurisdictional title that could not, in principle, exist in the absence of that activity (whether or not a dispute *would* have materialized without the backstage actor's involvement is another matter). Moreover, the Court's *laissez-faire* approach to non-party influence on state decision-making processes is broadly consistent with the ICJ's 'long-standing deference to State sovereignty'[69] (whether in matters of procedure[70] or evidence[71]), its acceptance of the fact that legal disputes have political

[67] G. Hernandez, *The International Court of Justice and the Judicial Function* (Oxford University Press 2014) 68-74.

[68] ibid at 47. This extends to the Court's ability to address potentially 'frivolous' claims relating to obligations *erga omnes*—a possibility that might be deemed the necessary 'price' for a system better geared towards holding states accountable for 'breaching obligations owed to the international community as a whole'. E. Brown Weiss, 'Invoking State Responsibility in the Twenty-First Century' (2002) 96 AJIL 798, 805.

[69] C. Rose, 'Questioning the Silence of the Bench: Reflections on Oral Proceedings at the International Court of Justice' (2008) 18 Journal of Transnational Law and Policy 47, 57.

[70] R. Higgins, 'Respecting Sovereign States and Running a Tight Courtroom' (2001) 50 International and Comparative Law Quarterly 121.

[71] J. Devaney, *Fact-Finding Before the International Court of Justice* (Cambridge University Press 2016) 39-41.

aspects, and its deep reluctance to impugn the good faith of the states appearing before it, even when states are credibly accused of wrongful acts.[72]

Ultimately, the decision to initiate ICJ litigation or to support or participate in an advisory proceeding is an act of state sovereignty. This, in turn, could be understood to require 'independence of decision', recalling Judge Guillaume's assessment.[73] This suggests that the Court should be concerned about behind-the-scenes activity only if there are grounds to consider that a state's sovereignty has been compromised (i.e. that the decision-making process is not 'sufficiently' independent).[74] In other words, if an applicant were found to be acting under the 'direction or control' of a third state or a non-state actor, this would raise valid questions about the integrity of the judicial function.[75] Such a situation would risk circumventing the consent requirement that 'remains the lynchpin of the Court's jurisdiction'.[76]

However, such scenarios appear to exist more in the realm of fantasy than reality. This is not necessarily because states have not been encouraged (or even faced demands) to commence ICJ proceedings, but rather because it would seem close to impossible to establish that the ultimate decision to litigate was not the applicant's own. Short of a situation involving clear evidence of coercion or duress, the requisite degree of control would be difficult to prove, even if it could be shown that an applicant's decision to litigate

[72] Consider the Court's rejection of France's abuse of process argument in its dispute with Equatorial Guinea or its careful effort to avoid characterizing Japan's conduct at issue in the *Whaling* case as 'bad faith'. *Immunities and Criminal Proceedings (Equatorial Guinea v France) (Preliminary Objections)* [2018] ICJ Rep 292, paras. 144-152; *Whaling in the Antarctic*, Sep Op Judge Abraham, at para 28.

[73] *Legality of the Threat or Use of Nuclear Weapons*, Sep Op Judge Guillaume, para 2. See also G. Verdirame, 'Sovereignty' in J D'Aspremont and S Singh (eds), *Concepts for International Law: Contributions to Disciplinary Thought* (Edgar Elgar 2020) 827, 832.

[74] This was Judge Guillaume's implicit concern in *Legality of Nuclear Weapons*, but he did not explain how pressure from NGOs or the media could have been viewed as so disempowering the state.

[75] These are not questions of state responsibility but some concepts drawn from that body of law (effective control, complicity) are helpful in terms of identifying a relevant standard. See Arts 8, 17, UNGA Res 56/83, ILC Articles on State Responsibility.

[76] Hernandez, *The International Court of Justice and the Judicial Function*, at 47. The risk is that a state that has not expressed its consent to the Court's jurisdiction—and therefore has not opened itself up to suit—might use another state as its 'proxy' (recall Myanmar's argument) to work around the requirement of mutual consent.

was substantially motivated by some other factor (for example, a third-state's threat to withdraw development aid or another form of support).[77]

The ICJ has hardly engaged with the practice of third-party funding, even as states in cases before it may be receiving financial support from elsewhere. As noted above, the Court affirmed in *The Gambia v Myanmar* that seeking or obtaining financial support from a third party does not diminish a state's status as a party before the Court.[78] In the context of investor-state dispute settlement (ISDS), third-party funding has received far more attention.[79] The idea is that a non-party provides funding to the claimant in return for a portion of any eventual award (a form of champerty). This practice may enhance access to justice for claimants otherwise unable to bear the cost of litigation.[80] However, it has also raised concerns about undisclosed conflicts of interest, funders influencing the conduct of proceedings, and awards that may 'constitute unjustifiable wealth transfers from respondent host states (frequently, developing countries) and their citizens in favor of speculative finance'.[81]

None of these concerns are readily transferable to the ICJ context. As discussed above, an NGO or corporation might successfully persuade a state to sue. If the relationship remains undisclosed, it is difficult to see where the problem lies in terms of preserving the Court's impartiality. The possibility of a funder's interests somehow interfering with the proceedings is more conceivable (for example, if a state felt compelled to suddenly change its lawyers mid-litigation at the funder's behest). But this ultimately remains a matter between the applicant state and the behind-the-scenes actor, and it seems neither feasible nor necessary for the Court to police that relationship. Finally, with some exceptions, ICJ

[77] A different question might arise if bringing an ICJ case has been corruptly induced (e.g., through bribery). Even if these facts could be established, it might still be difficult to show that the decision to sue was not a sovereign act.

[78] *The Gambia v Myanmar*, at para 44.

[79] E. De Brabandere and J. Lepeltak, 'Third-Party Funding in International Investment Arbitration' (2012) 27 ICSID Review 379; J. Chaisse and C. Eken, 'The Monetization of Investment Claims: Promises and Pitfalls of Third-Party Funding in Investor-State Arbitration (2020) 44 Delaware Journal of Corporate Law 113.

[80] See R. Thrasher, 'Expansive Disclosure: Regulating Third-Party Funding for Future Analysis and Reform' (2018) 59 Boston College Law Review 2935, 2939.

[81] F. Garcia, 'Third-Party Funding as Exploitation of the Investment Treaty System' (2018) 59 Boston College Law Review 2911, 2914.

cases do not typically involve claims seeking the large damages awards that predominate in ISDS.[82] Considering the substantial jurisdictional obstacles to bringing an ICJ case, a market for third-party funding of ICJ litigation seems unlikely to take shape. Moreover, the redistributionist critique of ISDS seems inapposite to most inter-state litigation, where developing states might be the more likely party to seek financial assistance (and, if they were to do so, this seems squarely within their sovereign prerogative).

4 Conclusion

The ICJ would be wise to maintain its restrained approach to situations in which NGOs, other non-state actors, or even third states contribute to decisions to initiate ICJ proceedings. The Court has sufficient tools at its disposal to police its jurisdiction and the admissibility of claims without introducing a new category of 'improperly induced' cases. Even if a state has received a benefit (financial or otherwise) from another actor in consideration for bringing an ICJ case, this need not concern the Court if the case involves an actual legal dispute. Moreover, as a conceptual matter, there is always the possibility that an applicant state may have reasons to initiate ICJ litigation that are separate and distinguishable from the objectives of the behind-the-scenes actor. In short, there is no need for the Court to look behind the curtain.[83]

The lingering discomfort with NGOs or other actors influencing a state's decision to bring an ICJ case (including situations in which a state may freely offer itself as a vehicle to provide access to the Court) may have less to do with the fact of that involvement and more to do with the types of cases frequently involved—namely, litigation about community interests and shared obligations. While the last decade of ICJ practice suggests that cases aimed at enforcing obligations *erga omnes partes* are now broadly welcome, the sticky notion that influence campaigns somehow delegitimize the ensuing ICJ proceedings seems intertwined with a broader reluctance to accept the long-eschewed notion of *actio popularis* in public international law. This perspective runs counter to the competing idea that civil

[82] In an exceptional case, the Democratic Republic of Congo sought more than US$11 billion from Uganda in damages; it was awarded US$325 million. *Armed Activities on the Territory of the Congo (DRC v Uganda) (Compensation)*, Judgment of 9 February 2022, paras 45, 409.

[83] Recall the range of explanations for Australia's decision to litigate in the *Whaling* case. See note 50.

society participation—before, during, and after ICJ proceedings—may actually increase the Court's legitimacy and authority.[84]

The fact that the ICJ's hands-off approach to the role of behind-the-scenes actors is legally sound, however, does not mean that such campaigns—whether led by civil society or other actors—should be uncritically celebrated or unchallenged *outside* the Court. NGOs or other actors can play a critical role in creating the conditions that make it feasible to pursue justice at the ICJ, including by shaping how states define their interests and by promoting 'the rule of law from below'.[85] Such actors may also advocate for ICJ litigation that is unlikely to advance intended objectives, risks counter-productive outcomes, or asks the Court to resolve policy disputes not amenable to judicial solutions.[86] But it is not for the Court to determine whether a case should be brought or an advisory opinion requested. Rather, these decisions should be carefully weighed and grounded in a deliberative practice among the relevant stakeholders within the domestic sphere, with an emphasis on what can be realistically achieved through ICJ proceedings.[87]

[84] See, e.g., K. Alter, *The New Terrain of International Law: Courts, Politics, Rights* (Princeton University Press 2014) 23-24.

[85] A. Buyse, et al, 'The Rule of Law from Below—A Concept Under Development' (2021) 17 Utrecht Law Review 1, 4.

[86] See Bodansky, 'Advisory Opinions on Climate Change: Some Preliminary Questions'. Consider also the concern about 'international vigilantism' and 'spurious ends' that surrounded the inclusion of Article 48 in the ILC Articles on State Responsibility. Brown Weiss, 'Invoking State Responsibility in the Twenty-First Century', at 808.

[87] Such deliberations extend beyond whether litigation is likely to produce a 'victory' to its broader potential to meaningfully influence political outcomes. See D. Guilfoyle, 'Litigation as Statecraft: Small States and the Law of the Sea' (2023) British Yearbook of International Law [6] (forthcoming).