



INVITATION TO JOIN THE *MELBOURNE JOURNAL OF INTERNATIONAL LAW*

21 February 2020

Dear Melbourne Law School students,

The *Melbourne Journal of International Law* ('MJIL') is currently seeking applications from Melbourne Law School students wishing to become General Members of our Editorial Board.

About MJIL

MJIL is a student-run law journal published on a biannual basis. *MJIL* is Australia's premier peer-reviewed international law journal and is recognised internationally as a leading publication in the field. Our past contributors have included former Justices of the High Court, former Prime Minister Sir Malcolm Fraser AC CH, Professor Hilary Charlesworth AM, Phillippe Sands QC, Associate Professor Frédéric Mégret, Professor Richard Garnett, Professor James Crawford and Gillian Triggs.

MJIL is run entirely by Melbourne Law School students. The Journal is led by three Editors, who coordinate the work of approximately 10 Assistant Editors and numerous other specialist Editorial and Non-Editorial Executive members. A further 30-40 General Members make up the Committee and community of 70-80 students in total.

Advantages of being involved with MJIL

Being a part of *MJIL* is a fantastic way to become involved in a fulfilling extra-curricular activity, through which you will acquire a range of skills and knowledge useful to your future professional endeavours, whether they be corporate, public, academic or something else entirely.

In addition to gaining familiarity with the *Australian Guide to Legal Citation* (4th ed), involvement with *MJIL* also provides you with the opportunity to meet and socialise with a friendly and diverse group of law students through the strong community of current and past members. As a Journal member, you can attend exclusive events including evenings conversing with prominent academics such as Professors Frédéric Mégret and Martti Koskenniemi, sponsorship evenings where you can converse with human resources representatives from sponsor corporate firms, and the annual Cocktail Night.

Through *MJIL*'s alumni program and events, current members can meet past members who are enjoying successful careers in private legal practice, public service, international organisations, non-government organisations and academia.

General Members also have the opportunity to get take on new roles within the Journal, whether as a part of the Editorial or Non-Editorial Executive board. Such roles include Sponsorship Manager, Events Coordinator, Alumni Coordinator, Submissions Coordinator, Solicitations Coordinator, Production Editor, and Business Manager.



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About the General Member position

General Members form the foundations of *MJIL*'s success. For each article published in the Journal, a team of General Members will work under the guidance of an Assistant Editor to proofread for general sense and conformity with the Australian Guide to Legal Citation and source-check the veracity of the citations.

Responsibilities of General Members include:

- physically locating all the sources in the footnotes that are assigned to you (this both requires and develops strong legal research skills);
- ensuring that each source cited by an author supports the relevant proposition in the body of their article;
- checking that all articles comply with the Australian Guide to Legal Citation; and
- other tasks as may be required from time-to-time to support the editorial process and operations of *MJIL*.

Who we are looking for

We are looking for people who are enthusiastic about international law and *MJIL*, and who can commit the time to work towards its continued success and strong sense of community.

Desirable characteristics in a General Member include:

- High attention to detail and care in carrying out work.
- Excellent time management and communication skills.
- Interest in proofreading, editing and source-checking.
- High levels of accuracy and reliability.
- Previous editing experience (beneficial but not mandatory)
- Interest in (learning about and engaging with) international law.

All successful applicants must attend a **training session** on a Saturday in week 3 or 4 of semester (TBC).

How to apply

Applications are open to all Melbourne Law School students (JD and MLM), commencing or continuing their degree in 2020.

To apply, you must submit the following:

- A cover letter of no longer than one page in length outlining short answers to the following questions:
 - Why are you interested in being involved in *MJIL*?
 - What area of international law are you interested in and why?
 - What could you bring to *MJIL*?
 - How much time can you devote to *MJIL*?
 - What year of law school are you currently in and what year do you expect/plan to graduate?
- A CV detailing your skills and experiences; and
- A completed practical exercise (both the marked-up article and the footnote table).



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The Practical Exercise is available in hard copy format from the MJIL notice board table in front of their office on the east side of Level 2 of the Law Building. A digital copy of the Practical Exercise be available on the JD Facebook pages, the [MJIL Facebook page](#) and via email distribution services.

The Footnote Table is only available in digital format and is available from the same digital locations as the Practical Exercise.

Applications are due by 11pm on 6 March 2020.

To submit your application, you may either send it to mjilrecruitment@gmail.com or submit a hardcopy in the box outside the *MJIL* office on the east side of Level 2, with all documents attached together or in a plastic slip (and in which case we advise that you retain electronic copies of your documents)

Interviews and notification of successful applicants

Once all the submitted practical exercises have been assessed by the Editors, selected candidates will be invited to attend an interview late in week two or in week three of semester. Successful applicants will be notified shortly thereafter.

If you have any questions about the application process or about being a member of the Journal, please do not hesitate to contact the Editors by sending an email to mjilrecruitment@gmail.com, visiting our office on the east side of Level 2 of the Law School, or reaching out to any of us on [Facebook](#) or [LinkedIn](#).

Kind regards,

Betty Choi, Jake Fava and Sophie Ward
2020 Editors



INSTRUCTIONS FOR COMPLETING THE PRACTICAL EXERCISE

The Practical Exercise involves editing a short extract about international law. You do not need any prior knowledge of international law to complete the exercise. The exercise is designed to give you a taste of what editing is like and to allow us to see your editing skills at work.

We place significant weight on the quality of the exercise when evaluating your application, so please take the time to do a thorough job. In any event, do not worry if you have trouble with some aspects of the exercise as *MJIL* provides you with thorough training if your application is successful. It is important that you apply a methodical approach to the task - attention to detail is something we value highly at *MJIL*.

Please note that collaboration is strictly prohibited.

The Practical Exercise requires completing the following two tasks:

1. Proofreading

- Proofread the entire exercise for spelling, grammar and formatting errors.
- Make sure all footnotes and text comply with the *AGLC* (4th ed). Where appropriate, you should cite the relevant *AGLC* rule. Sections of the *AGLC* we would like to draw to your attention include:
 - Chapter 1 (footnote position, multiple sources, spans of pinpoint references, introductory signals, subsequent references, quotations, punctuation, spelling)
 - Chapter 4 (general rules for secondary sources);
 - Chapter 5 (journal articles);
 - Chapter 6 (books);
 - Chapter 7 (internet materials; other secondary sources);
 - Chapter 8 (treaties);
 - Chapter 9 (United Nations materials); and
 - Chapters 10–13 (ICJ, PCIJ, International Arbitral and Tribunal Decisions, International Criminal Tribunals and Courts, African Supranational Materials).
- If you are unsure about how to cite a particular source, you should check for precedent in previous volumes of *MJIL* and *MULR*.
- Text *AGLC* suggestions should be completed by hand (red pen). Please ensure your writing is legible. If there is insufficient space to fit your comments on the pages of the Practical Exercise, feel free to write/type your findings on a separate page attached to the Practical Exercise, referring to the line numbers where necessary (any non-explanatory marks can be made directly on those lines if there is space for them)
- Footnote *AGLC* suggestions must be completed digitally in the Footnote Table document with Track Changes on.

2. Footnote Verification

- This involves checking whether the source cited by the author provides the relevant support for the proposition in respect of which it is cited, as well as making sure that quotations are accurate.
- To verify the footnotes, you must locate the original and official copy of the source (eg the hardcopy version of the 3rd edition of a book or statute or legislation from an official and legitimate site).



MELBOURNE JOURNAL
of INTERNATIONAL LAW

- This is very important to doing well in the Practical Exercise.
- If you cannot locate a source, make a list of the steps you took to try to locate it.
- If a source does not support the author's proposition, please note this and make the source *AGLC* compliant anyway.
- If you need to check a hardcopy book from the MLS Library, please consult it from the Melbourne Law School library shelf and **do not borrow it**, so that other applicants are able to access the book during the application period. Applicants can also consult online versions via the Unimelb Library catalogue, request to borrow via Bonus+, visit another library (such as the State Library of Victoria) or search for a freely available version or preview online (such as via Google Books).

The *AGLC4*

- If applicants do not possess a hard copy *AGLC4*, it can be found in the Law Library and online in PDF format (<https://law.unimelb.edu.au/mulr/aglc/about>).

Logistics and process

The Practical Exercise is available in hard copy format from the MJIL notice board table in front of their office on the east side of Level 2 of the Law Building. A digital copy of the Practical Exercise be available on the JD Facebook pages, the [MJIL Facebook page](#) and via email distribution services.

The Footnote Table is only available in digital format and is available from the same digital locations as the Practical Exercise.

All corrections (or suggestions for changes) for in-text issues should be made on a hardcopy of the Practical Exercise in red pen. Please ensure all marks are neat, clear and legible. If there is insufficient space to fit your comments on the pages of the Practical Exercise, feel free to write/type your findings on a separate page attached to the Practical Exercise, referring to the line numbers where necessary (any non-explanatory marks can be made directly on those lines if there is space for them)

The footnote table must be edited electronically with Track Changes on.

Once you have finalised all changes, scan the document and either forward it to mjilrecruitment@gmail.com together with your CV and cover letter or submit a clearly named hardcopy of your application (with all documents attached together or in a plastic slip) in the box outside the *MJIL* office on the east side of Level 2.

1 **MORE THAN A MERE DISPUTE? THE CHAGOS OPINION,**
2 **STRUCTURAL BIAS AND THE INTERNATIONAL COURT**
3 **OF JUSTICE’S DISCRETION IN ADVISORY PROCEEDINGS**
4

5 MJIL APPLICATION TASK - SEMESTER 1, 2020
6

7 CONTENTS

8 I Introduction..... 1
9 II Advisory Jurisdiction Of The International Court Of Justice 1
10 A Overview 1
11 B The Development of the ‘Compelling Reason’ Doctrine 2
12 III The *Chagos* Advisory Opinion 3
13 B Institutional Context Decline of Multilateralism 4
14 C Why Did the Court Refuse to Exercise Discretion? 6
15

16 I INTRODUCTION

17 The advisory opinion of the International Court of Justice (‘Court’) on the
18 *Legal Consequences of the Separation of the Chagos Archipelago from*
19 *Mauritius in 1965* (‘*Chagos*’)¹ made a powerful contribution to the law of self-
20 determination and decolonization.² It undermined the legality of Britain’s
21 claimed sovereignty over the British Indian Ocean territory. Yet equally, if not
22 more, controversial than the substantive opinion was the issue of whether the
23 Court should have given its opinion at all, due to the existence of a bi-lateral
24 dispute between Mauritius and the UK over sovereignty of the Chagos
25 Archipelago.

26 II ADVISORY JURISDICTION OF THE INTERNATIONAL COURT OF JUSTICE

27 A Overview

28 Art 96(2) of the *Charter of the United Nations* confers the ability on the
29 General Assembly and the Security Council to request the Court to give an
30 advisory opinion on any legal question.³ A key element of the Court’s
31 jurisdiction to give advisory opinions is the term ‘may’ in art 65(1) of the *ICJ*
32 *Statute*, which reads as follows: ‘The Court may give an advisory opinion on any

¹ *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) (International Court of Justice, General List No 169, 25 February 2019)

² On self-determination, see eg *International Covenant on Civil and Political Rights*, 999 UTNS 172 (signed and entered into force 23 March 1976) art 1(1).

³ *Charter of the United Nations*, art 96(2); For the General Assembly’s request for the *Chagos* advisory opinion see *Request for an Advisory Opinion of the ICJ on the Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1966*, GA Res 71/292, UN GAOR, 71st sess, Agenda Item 87, UN Doc A/RES/71/292.

33 legal question at the request' of authorised bodies.⁴ This has essentially been
34 interpreted as a discretion on the part of the Court to decline to give an opinion.⁵
35 As articulated in the Thomas Lubanga Dyilo advisory opinion, art 65(1) should
36 be interpreted as giving the court a discretionary power to decline 'even if the
37 conditions of jurisdiction are met'.⁶ The *ICJ Statute* itself gives no guidance as to
38 when this discretion should be exercised. Further, the Court in its present
39 iteration has never exercised its discretion to decline to give an advisory opinion;
40 the Permanent Court of International Justice did so once in the in the *Status of*
41 *Eastern Carelia* ('*Eastern Carelia*') advisory opinion⁷. Since the argument that
42 the Court should exercise its discretion to refuse is regularly raised, there have
43 been a number of pronouncements giving content to this discretion in the course
44 of the Court's refusal to exercise it.⁸

45

46 B The Development of the 'Compelling Reasons' Doctrine

47 The earliest jurisprudence from the Court on when it should exercise its
48 discretion to refuse giving an advisory opinion comes from *Eastern Carelia*,
49 where the Permanent Court Of International Justice decided to give an advisory
50 opinion on a matter that bore on 'an actual dispute between Finland and Russia'.⁹
51 The Court reasoned that because Russia, not being a member of the League of
52 Nations, had declined to accept the obligations of membership in the League for
53 the purposes of the dispute in question, it would be 'possible' for the Court to
54 give an advisory opinion without contradicting the principle that 'no State can,
55 without its consent, be compelled to submit its disputes with other States' to
56 judicial determination.¹⁰

57 In 1956, the modern iteration of the court first raised the 'compelling reasons'
58 doctrine in its advisory opinion on the *Judgments of the Administrative Tribunal*
59 *of the International Labour Organisation upon Complaints Made Against the*
60 *United Nations Educational, Scientific and Cultural Organisation*, proclaiming
61 that despite the 'permissive character' of art 65 of the *ICJ Statute*, 'only
62 compelling reasons' should lead the court to 'adopt a negative attitude' towards
63 its advisory function.¹¹

64 In the *Legal Consequences for States of the Continued Presence of South*
65 *Africa in Namibia (South West Africa) Notwithstanding Security Council*
66 *Resolution 276(1978)* ('*Namibia*') advisory opinion, the Court distinguished
67 *Eastern Carelia* on the basis that South Africa (a party to the dispute in question)

⁴ Statute of ICJ art 65(1).

⁵ Hugh Thirway, *The International Court Of Justice* (OUP, 2016) 61-2.

⁶ *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo (Advisory Opinion)* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06, 14 March 2012) [44].

⁷ *Status of Eastern Carelia (Advisory Opinion)* [1923] PCIJ (Ser B) No 5, 25-9 ('*Eastern Carelia*').

⁸ Thirway, above n 5, 68.

⁹ *Ibid*, 27.

¹⁰ *Ibid* 27-8.

¹¹ *Judgements of the Administrative Tribunal of the International Labor Organisation upon Complaints Made Against the United Nations Educational, Scientific, and Cultural Organisation (Advisory Opinion)* [1956] ICJ Rep 77 [86].

68 was, contrary to Russia's situation, a member of the United Nations and bound
69 by art 96 of the *UN Charter*.¹² Further, the Court found that the question did not
70 relate to a dispute, but rather was requested by the Security Council 'with
71 reference to its own decisions'.¹³

72 The Court then elucidated the relationship between the 'consent principle',
73 'judicial propriety' and the discretion to refuse giving an advisory opinion in
74 *Western Sahara*. According to the Court there are circumstances in which lack of
75 consent may render an advisory opinion 'incompatible with the Court's juridical
76 character', such as when it would 'have the effect of circumventing the principle
77 that a State is not obliged to allow its disputes to be submitted to judicial
78 settlement without its consent'.¹⁴

79 III THE CHAGOS ADVISORY OPINION

80 A Existence of a Dispute

81 The key reason identified by the United Kingdom for the Court to exercise its
82 discretion to refuse giving an advisory opinion was 'judicial popularity', given
83 the 'longstanding bilateral dispute' between the UK and Mauritius.¹⁵ The UK
84 submitted that for the Court to answer the proposed question, it would need to
85 pronounce on a bilateral dispute and thereby circumvent the principle of state
86 consent to judicial settlement.¹⁶ The UK set out the contentious history between
87 itself and Mauritius from the 1980's to the present, noting that a dispute had
88 been pursued by Mauritius in 'bilateral exchanges', 'statements made to the
89 General Assembly',¹⁷ and in 'various threatened and actual inter-state
90 proceedings'.¹⁸ For example, in 2011, Mauritius initiated an arbitration under
91 annex VII of the *UN Convention of the Law of the Sea*, in which it argued that
92 the UK does not have sovereignty over the *Chagos Archipelago*; the tribunal
93 decided that it did not have jurisdiction over the sovereignty question.¹⁹

94 Mauritius, on the other hand, did not deny the existence of the dispute.
95 Instead, using the language of *Western Sahara*, Mauritius located the question

¹² *Legal Consequences For States Of The Continued Presence Of South Africa In Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion)* [1971] ICJ Rep 14, 23 [28].

¹³ *Ibid* 12 [32].

¹⁴ *Western Sahara (Judgment)* [1975] ICJ Rep 12, 25 [33].

¹⁵ 'Written Statement of the United Kingdom of Great Britain and Northern Ireland', *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Advisory Opinion)* (International Court of Justice, General List No 169, 15 February 2018) 1 [1.3] ('Written Statement of the UN').

¹⁶ *Ibid*, cited in *Western Sahara* (n 12) 25 [32]—[33].

¹⁷ See for example UN GAOR, 14th plen mtg, 59th sess, UN Doc A/59/PV.14 (28 September 2004) 19 '[W]e shall use all avenues open to us in order to exercise our full sovereign rights over the Chagos Archipelago.'

¹⁸ 'Written Statement of the UN' (n 15) 105 [7.13(d)].

¹⁹ *Chagos* (n 1) [8] (Dissenting Opinion of Judge Donoghue), discussing *Chagos Marine Protected Area Arbitration (Award)* (PCA, 18 March 2015) [221]. See also *UN Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994) art 298(1)(a)(i), Annex VII, art 1.

96 within a ‘frame of reference that is far broader than a mere bilateral dispute’,²⁰
 97 characterising the request as the General Assembly’s ‘commitment to ... the
 98 completion of the decolonisation process, wherever it remains incomplete’.²¹ In
 99 oral argument, Philippe Sands argued that ‘with colonialism ended, the colonial
 100 Power’s claim that this is a mere bilateral territorial dispute simply evaporates’.²²
 101 By de-emphasising the colonial aspect of the history of the dispute, Sands both
 102 created the necessary broader frame of reference for the Court and shifted the
 103 Court’s focus away from the negative subject of limits on its jurisdiction to its
 104 positive ability to play an emancipatory and progressive role. Sands argued that
 105 decolonisation ‘is not, and cannot logically be, a bilateral dispute
 106 decolonisation is not about title to territory. Decolonisation *transcends any*
 107 *bilateral relationship*’.²³ In doing so, Sands made the crucial submission that
 108 appeared to convince the Court to look beyond its established precedent on the
 109 exercise of discretion and instead play its perceived role in the liberation of
 110 Mauritius from the after effects of colonial subjugation.

111 B Institutional Context: Decline of Multilateralism

112 There is almost a consensus that the international legal order—or more
 113 relevantly, the ‘liberal international order’²⁴—is faced with some kind of crisis,
 114 manifesting as a decline of multilateralism. Hallmark events like the election of
 115 populist President Trump, the first president in recent years to be openly hostile
 116 to the liberal international system, and the Brexit vote, suggest an end to the
 117 great post-war project of building a united international community.²⁵ Karen
 118 Adler describes this climate of a ‘broadly shared loss of faith in the old order’ as
 119 a ‘critical juncture’ for international institutions.²⁶

120 A key concern for international lawyers is the pushback occurring against
 121 international courts and tribunals. On January 31, 2017, the Assembly of the
 122 African Union set out its deep concerns with the perceived targeting of Africans
 123 by the International Cricket Council (‘ICC’) and adopted the ‘ICC Withdrawal
 124 Strategy’.²⁷ At this stage, Burundi, The Gambia and South Sudan had already
 125 deposited formal notifications of withdrawal.²⁸ However, The Gambia and South
 126 Sudan eventually revoked their notices of withdrawal, and only Burundi

²⁰ ‘Written Statement of the Republic of Mauritius, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Advisory Opinion)* (International Court of Justice, General List No 169, 1 March 2018) 181 [5.30] (‘Written Statement of Martinique’), quoting *Western Sahara* (n 12) 56 [126].

²¹ *Ibid* 181 [5.30].

²² ‘Verbatim Record 2018\20’, *Legal Consequence of the Separation of the Chagos from Mauritius in 1965 (Advisory Opinion)* (International Court of Justice, General List No 169, 8 September 2018) 77 [11].

²³ *Ibid* 78 [13] (emphasis in original).

²⁴ G. John Ikenberry, *The End of Liberal International Order?* (2018) 94 *International Affairs* 7, 7.

²⁵ Ikenberry (n 24).

²⁶ Karen Adler, ‘Critical Junctures and the Future of International Courts in a Post-liberal World Order’, in Avidan Kent et al (ed), *The Future of International Courts: Regional, Institutional and Procedural Challenges* (Routledge, 2019) 8, 9.

²⁷ African Union, Assembly of the Union, *Decision on the International Criminal Court (ICC)*, Doc No Assembly/AU/Dec622(XXVIII), 28th ord sess, 30–1 January 2017.

²⁸ Rebecca J Hamilton & Joost Pauwelyn, ‘Exit from International Tribunals’ (2018) 9(4) *Journal of International Dispute Resolution* 681.

127 followed through.²⁹ In March 2018, the Philippines deposited their notice of
128 withdrawal, the first non-African country to do so.³⁰ The notice came a month
129 after the ICC's announcement of a preliminary examination into extra-judicial
130 killings by the Philippines authorities.³¹ 'The Court regrets this decision', read an
131 ICC statement; 'States' participation in the Rome Statute ought not only be
132 maintained and reinforced, but enlarged.³² The Philippines' withdrawal was
133 completed in March 2019.³³ The UK and Russia have threatened to leave the
134 European Court of Human Rights, with Russian concerns about decisions
135 regarding prisoners' voting rights and the deportation of terrorists, and British
136 dissatisfaction with decisions about its conflicts with Georgia and Ukraine.³⁴ The
137 desire to leave the Court of Justice of the European Union was a 'central rallying
138 point' in the Brexit campaign.³⁵

139 The United States in particular has not shied away from expressing its
140 discontent with the multilateral dispute resolution system in political discourse.
141 The World Trade Organization's Appellate Body ('WTO AB') is down to 1
142 member, as the US continues to exercise its veto to block reappointments.³⁶ As a
143 result, the WTO AB essentially ceased to function on 10 December 2019 and
144 remains so until a 'permanent solution' to restore the WTO AB is agreed by
145 WTO Members.³⁷ In response to the ICC prosecutor's requests to investigate US
146 service members and intelligence officials for acts committed during the
147 Afghanistan war, then-National Security Adviser John Bolton unleashed fury
148 upon the ICC in a speech to the Federalist society, describing the ICC as 'a free-
149 wheeling global organization' operating without 'consent' and with 'flagrant
150 violation of our national sovereignty', and proclaiming, 'we will let the ICC die
151 on its own ... the ICC is already dead to us'.³⁸ Nor did the International Court of
152 Justice escape Bolton's wrath; a few weeks later, in response to Iran's victory in
153 securing an order for provisional measures from the Court in October 2018,
154 Bolton attacked the Court as 'politicized [sic] and ineffective', labelling the
155 process an 'abuse' of the Court.³⁹ His language emboldens the legitimacy of the

²⁹ Ibid 682

³⁰ Ibid 682

³¹ International Cricket Council, 'ICC Statement on The Philippines' Notice of Withdrawal: State Participation in Rome Statute System Essential to International Rule of Law (Blog Post 20 March 2018) <https://www.icc-cpi.int/Pages/item.aspx?name=pr1371>.

³² Ibid.

³³ 'Philippines Out Officially of the International Criminal Court', *Al Jazeera* (online, 18 March 2019) <<https://www.aljazeera.com/news/2019/03/philippines-officially-international-criminal-court-19031717105619.html>>

³⁴ Hamilton & Pauwelyn (n 28) 682.

³⁵ Ibid 681.

³⁶ Johnathan Josephs, 'WTO Chief: 'Months' Needed to Fix Disputes Body' (online, 10 December 2019) <<https://theunionjournal.com/wto-chief-months-needed-to-fix-disputes-body/>>.

³⁷ Ibid, Hamilton & Pauwelyn (n 28) 683, Emma Farage, 'WTO Chief Very Hopeful for 2020 Deals After Appeals Body Dies', *Reuters* (online, 11 December 2019) <<https://www.reuters.com/article/trade-wto-future-idAFB5N27Y02U>>.

³⁸ 'Full Text of John Bolton's Speech to the Federalist Society', *Al Jazeera* (online, 11 September 2018) <<https://www.aljazeera.com/news/2018/09/full-text-john-bolton-speech-federalist-society-180910172828633.html>>.

³⁹ 'Press Briefing by Press Secretary Sarah Sanders, Small Business Administrator Linda McMahon, and National Security Advisor' (Press Release, White House, 3 October 2018) <<https://www.youtube.com/watch?v=YUUTXehdXjk>>.

156 Court and emphasises a policy of “over 30 years” of “respecting jurisdiction of
 157 these courts”.⁴⁰ Bolton announced a review of international agreements that
 158 ‘expose the United States to purported binding jurisdiction’, criticising these ‘so-
 159 called puppeted international courts’.⁴¹

160 C Why Did the Court Refuse to Exercise Discretion?

161 In his latest annual speech to the opening session of the International Law
 162 Commission, President Abdulqawi Yusuf painted a picture of a court at the
 163 height of productivity, relevance and support. He celebrated the ‘sheer breadth
 164 and diversity’ of cases before Court and the ‘importance’ of the legal issues with
 165 which they dealt.⁴² In what could be read as an implied reply to the Bolton
 166 critique of the Court, the President proclaimed:

167 It is thus clear that countries from all over the globe continue to place their trust
 168 and confidence in the Court to settle their disputes, including disputes that raise
 169 particularly thorny issues in a politically sensitive context.⁴³

170 The President also discussed the process undertaken by Guatemala and Belize
 171 in holding successful referenda regarding bringing a territorial and maritime
 172 dispute before the Court; the President reflected that never before have two states
 173 in dispute ‘express such trust in the Court’.⁴⁴ When concluding his speech, the
 174 President reflected that the Court: ‘always aims to offer tangible practical
 175 solutions’ and ‘ensure peace and stability among nations’.⁴⁵ These statements
 176 provide important insight into the underlying factors that influenced the Court’s
 177 choice in *Chagos*.

178 The Court, in contrast to most other international tribunals, has always
 179 enjoyed a relative stability and confidence. ‘Amidst all the turbulence’, write the
 180 editors of a recent book on the future of international courts, ‘the reputation and
 181 authority of the ICC has remained relatively solid.’⁴⁶ However, this is largely
 182 due to a perception that it is conservative and risk-averse, and thus rarely puts
 183 states offside. The Court has a ‘tendency ... to duck’ particularly thorny cases.⁴⁷
 184 According to Sands, the Court has ‘skirted around the difficult issues that really
 185 mattered’, in the face of political divisions.⁴⁸ On previous occasions when the
 186 Court has shirked opportunities to pronounce on important legal issues — such
 187 as in the *Obligations Concerning Negotiations Relating to Cessation of the*
 188 *Nuclear Arm Race and to Nuclear Disarmament* case based on a failure to

⁴⁰ Idib.

⁴¹ Idib.

⁴² Abdulaqwi Ahmed Yusuf, ‘Keynote Address by H.E. Mr Abdulaqwi Yusuf, President of the International Court of Justice’ (Speech, International Law Commission, 5 July 2018) 1 <<https://www.icj-cij.org/files/press-releases/0/000-20180705-STA-01-00-EN.pdf>>.

⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ Avidan Kent, Nikos Skoutaris and Jamie Trinidad, ‘What Does the Future Hold for International Courts?’ in Avidan Kent et al (eds) (n 26) 5.

⁴⁷ A Mark Weisburd, ‘Failings of the International Court of Justice’ (Oxford University Press, 2016), 368.

⁴⁸ Philippe Sands QC, ‘Climate Change and the Rule of Law: adjudicating the future in international law’ (2016) 20(1) *Journal of Law, Environmental and Development* 19, 20.

189 establish a dispute,⁴⁹ or in the *Legality of the Threat or Use of Nuclear Weapons*
190 advisory opinion that was almost a non-liquet (it is not clear)⁵⁰ — it has faced
191 biting criticism of having ‘weaselled its way out of cases in multifarious ways’
192 by relying on purely technical and conservative arguments.⁵¹ Though this
193 conservative practice may have carried the Court largely unscathed through the
194 current climate of pushback, these critiques of its courage have likely left the
195 Court rather self-conscious about its role and purpose in the international legal
196 order. Further, it has been suggested that following the Court’s more
197 conservative decisions, the Court’s dock ‘dried up’ and was only rejuvenated
198 after it came back, ‘hat in hand’, with decisions such as *Namibia*.⁵² In the current
199 context, it would be a blow to the Court’s institutional confidence if it were to
200 disrupt its ‘tendency to give precedence to the multilateral aspects of requests’
201 and avoid participating in the UN’s activities as its ‘principal judicial organ’.⁵³

⁴⁹ Andrea Bianchi, ‘Choice and (The Awareness of) Its Consequences: The ICJ’s “Structural Bias” Strikes Again in the Marshall Islands Case’ (2017) *American Journal of International Law* 81, 82 (‘Choice and (The Awareness of) Its Consequences’). See gingerly *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v United Kingdom) (Preliminary Objections)* (International Court of Justice, General List No 1107, 5 October 2016) 833.

⁵⁰ Andrea Bianchi, ‘Choice and (The Awareness of) Its Consequences’ (m 49) 82: See generously *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* (1996) PICJ Report 226.

⁵¹ Budweiser 93.

⁵² *Ibid* 95.

⁵³ Fernando Lusa Bordain, ‘Reckoning with British Colonialism: The *Chagos* Advisory Opinion’ (1969) 78(2) *Yale Law Journal* 253, 255.