Australia and the International Court of Justice

An Australian Research Council-funded research project (DP180101318)

Working Paper No. 1

AUSTRALIA'S ENGAGEMENT WITH THE INTERNATIONAL COURT OF JUSTICE

Margaret A. Young

Melbourne Law School

January 2020

Australia's engagement with the International Court of Justice

Margaret A. Young*

Supreme and Federal Courts Judges' Conference, Canberra, 22 January 2020

Australia's relationship with the ICJ is defined by two positions: the pursuit of collective interests and the respect for state consent. That these two positions are sometimes harmonious and sometimes opposing reflects the substance of public international law. Today, I wish to show how the history and present relationship between Australia and the ICJ has cycled through these two positions. Some of my findings are based on the Australian Research Council project that I am currently undertaking with Professor Hilary Charlesworth at the Melbourne Law School,[1] though our work is still in its preliminary stages. I will add to that work today with a provocation about the future role of international adjudication in addressing the most complex, globally connected problems of our time: given current events, it seems appropriate to use the example of climate change.

I. THE PURSUIT OF COLLECTIVE INTERESTS

Let me begin with the first position: the pursuit of collective interests by states at the World Court. Australia has shown leadership in enforcing rights on behalf of a group of treaty parties, or indeed on behalf of 'the international community as a whole'. Australia's claim against Japan in the *Whaling* case[2] was framed as a collective, rather than individual, state interest. The case was based on the interest of every party to the

* Professor, Melbourne Law School, University of Melbourne. Contact: m.young@unimelb.edu.au. This paper draws on research conducted for the Australian Research Council-funded project on 'The Potential and Limits of International Adjudication' (DP180101318), and the author is grateful for assistance from her co-investigator Professor Hilary Charlesworth and project research fellow Dr Emma Nyhan.

[1] Margaret Young, Emma Nyhan and Hilary Charlesworth, 'Studying Country-Specific Engagements with the International Court of Justice' (2019) 10 *Journal of International Dispute Settlement* 582.

[2] *Whaling in the Antarctic (Australia v. Japan: New Zealand Intervening) (Judgment)* [2014] ICJ Rep 226.

International Convention on the Regulation of Whaling[3] to ensure compliance by every other party.[4] It was Australia's collective interest in Japan's treaty compliance, rather than any specific injury, that was presented to the ICJ by Australia's legal team, which included Bill Campbell QC and James Crawford SC, now Judge of the ICJ.

Australia thereby avoided some of the diplomatic sensitivities that had accompanied earlier *domestic* litigation on whaling. In 2004, the Humane Society brought proceedings against a Japanese whaling firm based on violation of Australian federal environmental law in the Australian Whale Sanctuary of the Australian Antarctic Territory.[5] The potential for the domestic proceedings to disrupt Australia's long-term national interests, including its relations with Japan and the delicate balance of the Antarctic Treaty System, was noted by the domestic judges and in submissions by the Attorney-General,[6] though on appeal it was held that these interests did not trump the intention in the federal law to provide full access to domestic courts.[7] Ultimately, leave was granted to effect service in Japan.[8] This case gives rise to many interesting questions about the relationship between international and domestic proceedings, which I do not have time to address, but it is worth noting that the Humane Society waited until the conclusion of the ICJ proceedings before relaunching its own enforcement action. In late 2015, its application was heard at the Federal Court and the Japanese whaling firm was found to be in contempt and fined.[9]

---

[3] *International Convention for the Regulation of Whaling*, Washington, 2 December 1946, 161 UNTS 74.

[4] As stated in Australia's oral submissions to the Court, delivered on 9 July 2013 (https://www.icj-cij.org/en/case/148/oral-proceedings): 'Every party has the same interest in ensuring compliance by every other party ... Australia is seeking to uphold its collective interest, an interest it shares with all other parties.' CR 2013/18, p. 28, para. 19 (Burmester).

[5] *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2004] FCA 1510 (Allsop J); (2004) 212 ALR 551.

[6] *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2005] FCA 664 (Allsop J).

[7] *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2006] FCAFC 116 (Black CJ, Moore and Finkelstein JJ); (2006) 154 FCR 425.

[8] *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2007] FCA 124 (Allsop J); *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2008] FCA 3 (Rares J).

[9] *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2015] FCA 1275. Jagot J ordered the respondent to pay fines together totalling $1,000,000.

Let me return to the 2014 *Whaling* case, and the pursuit by Australia of the collective interest. As a variant of public interest litigation, Australia was seeking to act for all state parties in enforcing the Whaling Convention. But is there a concept of 'public interest' standing of states in international law? Historically, the Court has been reluctant to accept such a concept, perhaps most infamously with the 1966 *South West Africa* case,[10] which denied the legal right for Ethiopia and Liberia to claim performance by South Africa of obligations under the League of Nations Mandate. Australian judge Sir Percy Spender was President of the Court at that time and it was his casting vote that dismissed as inadmissible the claim, to the long-lasting dismay of much of the developing world which had anticipated a pronouncement on the legality of apartheid under international law.[11] 'Collective' interests arose also in the unsuccessful claim brought by Portugal concerning certain activities of Australia with respect to East Timor in 1995.[12] The Court considered 'irreproachable' Portugal's assertion that the right of self-determination of the East Timorese was of an *erga omnes* character,[13] but nonetheless found it did not have jurisdiction to hear the claim given Indonesia's non-participation.

Putting these examples to one side, other cases show leadership by Australia in promoting claims based on collective interests. Together with New Zealand, Australia sought to pursue a collective interest of the international community in the banning of nuclear tests in 1973, although both states combined the 'collective' claims with an emphasis on the special impact of France's nuclear testing on *their* respective territories.[14]

---

[10] *South West Africa, Second Phase*, Judgment, I.C.J. Reports 1966, p. 6.
[11] James Crawford, 'Dreamers of the Day: Australia and the International Court of Justice' (2013) 14 *Melbourne Journal of International Law* 520; see also Victor Kattan, '"There Was an Elephant in the Court Room": Reflections on the Role of Judge Sir Percy Spender (1897–1985) in the South West Africa Cases (1960–1966) after Half a Century' (2018) 31 *Leiden Journal of International Law* 147.
[12] *East Timor (Portugal v Australia)* [1995] ICJ Rep 90.
[13] Ibid, para 29.
[14] *Nuclear Tests (Australia v France)* [1974] ICJ Rep 253 and *Nuclear Tests (New Zealand v France)* [1974] ICJ Rep 457. Fiji also sought to participate: see *Nuclear Tests Case (New Zealand v France)*, Application by Fiji for Permission to Intervene; Order of 12 July 1973. On the collective nature of the claims, see further Malgosia Fitzmaurice, 'The International Court of Justice and International Environmental Law' in Christian Tams and James Sloan, *The Development of International Law by the*

The Court in *Whaling* did not delve into the nature of such standing before international courts. It was satisfied as to its jurisdiction based on the acceptance by both Australia and Japan of the optional clause, and left it at that.[15] There will, of course, be future opportunities for the Court, especially given the International Law Commission's express recognition in 2001 that 'any state other than an injured state is entitled to invoke the responsibility of another state' for breaches of obligations owed *erga omnes*.[16] Although the Marshall Island's 2016 claim that the UK, India and Pakistan were failing to meet nuclear disarmament obligations was ruled inadmissible by a bare majority of the Court, Judge Crawford in dissent emphasised that '[s]tates can be parties to disputes about obligations in the performance of which they have no specific material interests.'[17] We await the ruling on the claim of Myanmar's breach of the Genocide Convention, brought by The Gambia, which was heard by the Court a few weeks ago.[18]

To conclude, then, on this first position of Australia's engagement with the ICJ: Collective interests in international law *do* exist, and there *is* a role for dispute settlement in ruling upon them. Over time, though not consistently, Australia has shown leadership in this area.

International Court of Justice (OUP 2013) at 358–359. On the Australian involvement, see generally Henry Burmester, 'Sir Elihu Lauterpacht QC and the Nuclear Tests Case' (2017) 35(1) *Australian Yearbook of International Law* 41.

[15] See further Christian Tams, 'Roads not Taken, Opportunities Missed; Procedural and Jurisdictional Questions Sidestepped in the *Whaling* Judgement' in Malgosia Fitzmaurice and Dai Tamada (eds) *Whaling in the Antarctic: The Significance and the Implications of the ICJ Judgment* (Brill 2016) 193; Margaret Young and Sebastian Rioseco Sullivan, 'Evolution Through the Duty to Cooperate: Implications of the Whaling Case at the International Court of Justice' (2015) 16 *Melbourne Journal of International Law* 310.

[16] Article 48 of the International Law Commission's Articles on State Responsibility, reproduced in UN Doc A/56/10. See also James Crawford, 'Responsibility to the International Community as a Whole' (2001) 8 *Indiana Journal of Global Legal Studies* 303.

[17] *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v U.K)*, Preliminary Objections, Judgment, 2016 I.C.J Rep. 833, para. 22 (Oct. 5). at 1093, 1102 para 22 (Crawford, J. Dissenting).

[18] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar) (hearings concluded 12 December 2019: see https://www.icj-cij.org/en/case/178). [Note: orders indicating provisional measures were made the day after this presentation, on 23 January 2020: https://www.icj-cij.org/files/case-related/178/178-20200123-ORD-01-00-EN.pdf.]

II. THE RESPECT FOR STATE CONSENT

Let me now turn to the second position discernible from Australia's engagement with the ICJ: that of respect for national sovereignty and state consent. This, at times, sits uncomfortably with its leadership on collective interests, as is most evident within the realm of the Court's advisory jurisdiction, where the Court functions as an expert body providing advice on legal questions placed before it.[19]

That community needs underpin advisory opinions seems to be safeguarded by the requirement that it be prompted by a request from the UN General Assembly, Security Council or specialized agency so authorized.[20] Australia considered that this collective aspect was misused in the 2019 Advisory Opinion on the legal consequences of the separation of the Chagos archipelago from Mauritius in 1965.[21] Australia urged the Court to use its discretion to refuse the General Assembly's request, arguing that the Advisory Opinion was wrongly sought in the context of a live dispute between two states, Mauritius and the United Kingdom.[22] These submissions were not accepted, and the Court concluded that 'the process of decolonization of Mauritius was not lawfully completed when that country acceded to independence'.[23] The General Assembly has since welcomed the Court's opinion and requested the United Kingdom to bring to an end its administration of the Chagos Archipelago.[24]

---

[19] Statute of the International Court of Justice, Chapter IV (Articles 65-68).
[20] United Nations Charter, Article 96.
[21] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion of 25 February 2019.
[22] Written Statement of the Government of Australia submitted on 27 February 2018, https://www.icj-cij.org/files/case-related/169/169-20180227-WRI-06-00-EN.pdf; Oral Statement of the Government of Australia delivered on 4 September 2018, CR 2018/22 p.49ff https://www.icj-cij.org/files/case-related/169/169-20180904-ORA-01-00-BI.pdf (Campbell and Donoghue).
[23] Advisory Opinion of 25 February 2019, para 174.
[24] https://www.un.org/press/en/2019/ga12146.doc.htm (May 2019) (116 states voted in favour of the May resolution (with 6 against, including Australia, the UK and the US) and 56 abstentions.) https://www.un.org/press/en/2019/gaspd696.doc.htm (Oct 2019). The United Kingdom has responded that it will continue its activities in the Chagos archipelago, including the strategic military base it leases to the United States, while also designing a $50 million support package to improve livelihoods in the Chagos archipelago.

Australia's concern about the subversion of consent must be placed alongside its recognition that states hold interests in strictly national affairs (such as certain activities on its territory) as well as collective matters, such as the prohibition of slavery *wherever* it occurs. Sometimes these interests seem clearly divisible. The request for advice on certain expenses of the United Nations for the keeping of the peace in 1962 was irrefutably multilateral (when Sir Kenneth Bailey made astute oral submissions about UN institutional arrangements on behalf of Australia).[25] At other times, the line is impossible to draw. In the *Western Sahara* Advisory Opinion, whose statements on *terra nullius* were invoked by our High Court in the *Mabo* case,[26] Spain submitted that the Court should exercise its discretion *not* to answer the legal question, referring especially to the bilateral dispute between it and Morocco.[27] In reply, the Court stressed the difference between the contentious and advisory jurisdictions, especially noting that advisory opinions are not intended to have binding force. The Court emphasised the way in which Advisory Opinions are directed to the UN organ that made the request, rather than to states. If the United Nations views it as desirable to obtain enlightenment on a course of action, the reply of the Court should not, in principle, be refused.[28]

One way that Australia has sought to reconcile the collectivist orientation of the Advisory Opinion with the individual wishes of participating states is to take one line on jurisdiction and another on the substance. Australia's oral submissions on the legality of nuclear weapons in 1996 is an example. Gavan Griffith QC first submitted that the Court should, in the exercise of its discretion, decline to give the advisory opinion.[29] He was followed by Senator Gareth Evans QC, who argued forcefully that the illegality of nuclear weapons was now finally established as *lex lata*.[30]

---

[25] Oral Statement of the Government of Australia delivered on 18-29 May 1962 (at p. 372): https://www.icj-cij.org/files/case-related/49/049-19620514-ORA-01-00-BI.pdf.
[26] *Mabo v Queensland (No 2)* [1992] HCA 23; (1992) 175 CLR 1 (3 June 1992), para 40 (Brennan J; Mason CJ and McHugh J agreeing); see also para 18 (Toohey J).
[27] *Western Sahara*, Advisory Opinion, I.C.J. Reports 1975, p. 12, at p. 21 (para 24ff).
[28] Ibid, p 24 (at para 51, citing *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase*, I.C.J. Reports 1950, p. 72).
[29] Oral statement of the Government of Australia delivered on 30 October 1995 (from page 29 of the Oral Statements) https://www.icj-cij.org/files/case-related/95/095-19951030-ORA-01-00-BI.pdf.
[30] Ibid, pp. 44-45 (para 25)

In *Chagos,* Australia engaged only in the jurisdictional aspects, calling for the Court to exercise discretion *not* to deliver the Advisory Opinion. Was this a lost opportunity to engage substantively with issues of decolonisation, especially given our own colonialist trajectory? Contemporary scholars reject the labelling of the decolonisation of the *Chagos* archipelago as 'merely a legacy of Empire' and instead claim that it 'constitutes an ongoing site of injustice that reaches into the present and into the structures and norms of the contemporary British State'.[31] Australia might have engaged more closely with these issues, especially given its experience settling Nauru's phosphate mining claim at the ICJ in 1993,[32] and even as part of a mature reflection informing current domestic developments such as the 2017 Uluru Statement of the Heart.[33]

Advisory opinions are significant, even if they are non-binding. They exhibit the expressive function of the law. Cases matter, even where there is difficulty, if not impossibility, of enforcement. Though the underlying legal order is vastly different, domestic judges are well-aware of how the judicial function can accommodate this. I quote the Full Court of the Federal Court in the whaling litigation:

> Although 'deterrence' is more commonly used in the vocabulary of the law than 'education', the two ideas are closely connected and must surely overlap in areas where a statute aims to regulate conduct. [34]

III. FUTURE ICJ ENGAGEMENT

Allow me to conclude by asking what the two poles of Australia's engagement with the ICJ, the pursuit of collective interests and the respect for state consent, might mean for

---

[31] Stephen Allen and Chris Monaghan, 'Introduction' in Stephen Allen and Chris Monaghan (eds), *Fifty Years of the British Indian Ocean Territory: Legal Perspectives* (Springer, 2018), 1, 2. See also Anthony Anghie, 'Race, Self-Determination and Australian Empire' (2018) 19 *Melbourne Journal of International Law* 423.

[32] *Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections*, Judgment, I.C.J. Reports 1992, p. 240; Antony Anghie, 'The Heart of My Home: Colonialism, Environmental Damage, and the Nauru Case' (1993) 34 *Harvard International Law Journal* 445

[33] First Nations National Constitutional Convention, 'Uluru Statement from the Heart' (Statement, 26 May 2017) archived at <https://perma.cc/CF2S-5XRK>.

[34] *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2006] FCAFC 116 (Black CJ and Finkelstein J), at para 22.

the future. But first, I want to be clear that I am not arguing that *any* state launching claims for international dispute settlement is exhibiting leadership of the kind I have attributed to Australia. To move outside of the ICJ context for a moment, the 2015 WTO case brought by the United States against India for its protectionist support of a fledgling national solar cell industry[35] seemed tone-deaf at a time when the majority of states were trying convince India to sign the Paris Agreement.[36] Similarly, a *challenge* to jurisdiction may be wholly appropriate to maintain the public interest, as was apparent in Australia's response to the investor-state dispute brought by Philip Morris.[37] Chief Justice French was prescient to observe at this conference in 2014 the risk of such dispute settlement in 'call[ing] into question the decisions of national courts'.[38] Though the forums of the WTO and investor-state dispute settlement are outside my remit today, it cannot fail to be observed that there are massive shifts in compulsory jurisdiction at present, most evidently in the now inactive Appellate Body, given the blocking of new appointments by the United States.

So to end with a provocative example. Could Australia, in theory, further the collective interests of states by participating in ICJ litigation on climate change? It will not surprise you to know that as a professor of public international law, I am often asked this question. There is much in Australia's national interest to show leadership on this global problem, as the catastrophic fires here have made clear.

But more likely, given current positions within the Australian government, Australia will be on the receiving end of another country's leadership. Prime Minister Morrison is distrustful of what he called in his 2019 Lowy Lecture a 'reflex towards negative globalism that coercively seeks to impose a mandate from an often ill defined borderless

---

[35] *India – Certain Measures Relating to Solar Cells and Solar Modules*, WT/DS456/AB/R 16 September 2016 (adopted on 13 October 2016) https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds456_e.htm
[36] Paris Agreement, done at Conference of the Parties to the United Nations Framework Convention on Climate Change, Paris, 12 December 2015, entered into force 4 November 2016.
[37] *Philip Morris Asia Limited v The Commonwealth of Australia*, Award on Jurisdiction and Admissibility, 17 December 2015 (Böckstiegel, Kaufmann-Kohler and McRae).
[38] Chief Justice RS French AC, 'Investor-State Dispute Settlement – A Cut Above the Courts?' Supreme and Federal Courts Judges' Conference, Darwin, 9 July 2014, p. 6.

global community'.[39] With all due respect, climate change does not fall within borders, and it is within everyone's interest to require states to transition to a low carbon economy. In its perceived national interest in promoting fossil fuel extraction, Australia has already reportedly been the subject of an ICCPR complaint by Torres Strait Islanders.[40] And I fully expect that any free trade agreement entered into by Australia with the European Union or the United Kingdom will impose obligations on Australia to better address its mitigation responsibilities.

A request for an advisory opinion on climate responsibilities is being canvassed informally by states such as the Philippines at the behest of their citizens.[41] It would follow a wave of domestic litigation seeking enhanced climate action in countries such as the Netherlands, Belgium, New Zealand, Switzerland and the United Kingdom.[42] As a court of general jurisdiction, the ICJ could provide an integrative role for norms developed in different contexts, including human rights, environmental law and of course treaty commitments under the Paris Agreement. The ICJ could also strengthen the understanding of inter-generational equity that it provided in the 1996 *Nuclear Weapons* Advisory Opinion.[43] How Australia might engage in such ICJ proceedings is far from obvious given the positions it has historically taken, but it is a question for our times.

---

[39] The 2019 Lowy Lecture: Prime Minister Scott Morrison, 3 October 2019 https://www.lowyinstitute.org/publications/2019-lowy-lecture-prime-minister-scott-morrison; see also https://www.pm.gov.au/media/speech-lowy-lecture-our-interest

[40] Petition of Torres Strait Islanders to the UN Human Rights Committee Alleging Violations Stemming from Australia's Inaction on Climate Change (filed 05/13/2019) (see Press Release from ClientEarth detailing alleged violations of the International Covenant on Civil and Political Rights, undated).

[41] See eg 'Youth climate justice advocates file petition at the Department of Foreign Affairs on Earth Day', 22 April 2019 https://world.350.org/philippines/press-release/youth-climate-justice-advocates-file-petition-at-the-department-of-foreign-affairs-on-earth-day/

[42] Most famously, *State of the Netherlands v Urgenda*, Supreme Court (20 December 2019), (ECLI:NL:HR:2019:2006; Case number 19/00135) https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2019:2006; for unofficial English translation, see https://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Hoge-Raad-der-Nederlanden/Nieuws/Paginas/Dutch-State-to-reduce-greenhouse-gas-emissions-by-25-by-the-end-of-2020.aspx. See also https://www.biicl.org/events/11335/climate-change-litigation-comparative-and-international-perspectives.

[43] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, p. 226, at pp. 241-2 (para 29) ('The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.').