AUSTRALIAN ENCOUNTERS WITH THE ADVISORY JURISDICTION OF THE INTERNATIONAL COURT OF JUSTICE

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States encounter the International Court of Justice ('ICJ') through its advisory jurisdiction, in ways that are often less visible than encounters with the Court's contentious jurisdiction. This article surveys Australian practice on advisory opinion requests to the ICJ, drawing on archival material where available, identifying eras of caution, ambivalence and reticence. It describes Australia's interest in, and resort to, the advisory jurisdiction in the first two decades of the ICJ's experience and contrasts Australia's later practice of challenging jurisdiction and encouraging the Court to exercise its discretion to reject requests for advisory opinions. Australia participated in early cases that dealt with the interpretation of Charter of the United Nations provisions, drawing on its involvement in the drafting of the Charter. It has long been wary, however, of advisory opinions on matters that raise broader and contentious issues of substance in international law. While the ICJ operates with a strong presumption of jurisdiction over advisory requests, Australia has argued for a narrower approach, so far unsuccessfully. We suggest that Australia's position is ripe for reconsideration.

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I INTRODUCTION

While most discussion of national encounters with the International Court of Justice ('ICJ') focuses on contentious cases, states also engage with the Court in the context of advisory opinions. Requests for advisory opinions are made by United Nations organs and agencies, primarily the General Assembly and the Security Council.[1] Aside from participating in decision-making within these

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[1] *Charter of the United Nations* art 96.

organs and agencies, individual states are entitled to participate in hearings before the Court. The *Statute of the International Court of Justice* ('*ICJ Statute*') allows written and oral statements to be submitted by states 'likely to be able to furnish information on the question'.[2] The opinions, which are not binding, provide legal advice to the organs that requested them, thus providing support for the UN system.[3] Encounters by states with this advisory jurisdiction reveal assumptions about, and attitudes towards, the international judicial function within international law.

In this article, we investigate Australian encounters with the ICJ's advisory jurisdiction over seven decades, drawing, where possible, on archival sources. Our account is inevitably partial and episodic: available archival material is patchy on Australia's decisions to participate in advisory opinion proceedings. Some of the early cases have negligible records or are only partly opened,[4] and there is a 30-year lag before official records are available.[5] In other advisory opinion cases in which Australia participated, we have simply drawn on the Court record. There are some ICJ advisory opinion cases for which we could not locate any material to explain Australia's non-participation.

We begin our survey with an overview of the advisory jurisdiction, comparing the earlier procedure adopted by the Permanent Court of International Justice ('PCIJ'). We then discuss Australia's encounters with the ICJ's advisory jurisdiction chronologically, dating from the UN General Assembly's early requests for advice on its competence on UN membership and peacekeeping. Next, we investigate an apparently increasingly diffident Australia and examine the advisory opinion in which it did not participate, which came to have an influence in Australia's constitutional law. The non-appearance in *Western Sahara* is contrasted with the *Nuclear Weapons* opinions, where Australia submitted that the Court should exercise its discretion to decline jurisdiction yet also engaged on the merits of the legality of the threat or use of nuclear weapons. We then suggest that this ambivalence has firmed into reticence, in the context of General Assembly requests for advice on issues such as the legality of Israel's barrier wall and the status of the Chagos Archipelago. We conclude with an assessment of Australia's recent position, contrasting it with the widespread expectations of states and with the Court's own assessment of how best it can perform its role as the 'principal judicial organ' of the UN.

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2 *Statute of the International Court of Justice* art 66(2).

3 *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (Advisory Opinion)* [1950] ICJ Rep 65, 71 ('*Peace Treaties*').

4 There is the further complexity of cataloguing practices. For example, papers relating to the two advisory opinions on UN membership (*Conditions of Admission of a State to Membership in the United Nations Article 4 of the Charter)* (1948) and *Competence of the General Assembly for the Admission of a State to the United Nations* (1950)) were archived as Part 1 and Part 2 of *Conditions of Admission*.

5 This period is in the process of transition to 20 years: see 'Access to Records under the Archives Act', *National Archives of Australia* (Web Page) <https://www.naa.gov.au/help-your-research/using-collection/access-records-under-archives-act#open-access-period>, archived at <https://perma.cc/GWM5-RJFN>.

II THE ADVISORY JURISDICTION

Establishing the PCIJ, the *Covenant of the League of Nations* conferred on it an advisory jurisdiction in relation to 'any dispute or question' to support the work of the League of Nations' main organs — its Council and Assembly.[6] The *Statute of the Permanent Court of International Justice* ('*PCIJ Statute*') itself did not include any reference to the advisory jurisdiction,[7] but the PCIJ's *Rules of Court*, adopted in 1922, did so.[8] The revision of the Statute in 1929 eventually inserted a chapter devoted to this mechanism.[9] The PCIJ issued 27 advisory opinions to the League over the 18 years of its operation, offering views to the League Council on a range of international disputes.[10] The PCIJ's de facto 'advisory arbitration' between states became popular because of its efficiency, speed and success.[11] The single occasion on which the PCIJ declined to render an advisory opinion was in the *Status of Eastern Carelia* ('*Eastern Carelia*') case, the first request by the League. This involved a dispute between Finland and Russia about the terms of a bilateral treaty relating to Eastern Carelia, a Russian-administered region. Russia insisted that the issue at stake, the right to autonomy of communities within Eastern Carelia, was not within the treaty terms but rather a matter of domestic jurisdiction. The Court held that the League Council did not have the competence to request the opinion because Russia, which was not a member of the League, had not consented to the Court's jurisdiction.[12] This case was to become important in country submissions to the ICJ in later decades, including Australia's, as we discuss below.

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6 *Treaty of Peace between the Allied and Associated Powers and Germany*, signed 28 June 1919, 225 ConTS 188 (entered into force 10 January 1920) pt I ('*Covenant of the League of Nations*') art 14:

> The Council shall formulate and submit to the Members of the League for adoption plans for the establishment of a Permanent Court of International Justice. The Court shall be competent to hear and determine any dispute of an international character which the parties thereto submit to it. The Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly.

7 Panos Merkouris describes the debates over this issue in the Advisory Committee of Jurists drafting the *PCIJ Statute*: Panos Merkouris, 'The Advisory Jurisdiction of the Permanent Court of International Justice in Practice: A Tale of Two Scopes' in Christian J Tams and Malgosia Fitzmaurice (eds), *Legacies of the Permanent Court of International Justice* (Martinus Nijhoff Publishers, 2013) 69, 74–6. See also Marika Giles Samson and Douglas Guilfoyle, 'The Permanent Court of International Justice and the "Invention" of International Advisory Jurisdiction' in Christian J Tams and Malgosia Fitzmaurice (eds), *Legacies of the Permanent Court of International Justice* (Martinus Nijhoff Publishers, 2013) 41, 51, 58. At around the same time, the High Court of Australia ruled constitutionally invalid a legislative attempt to vest that domestic court with advisory jurisdiction, a position that can be found in other common law jurisdictions that require an immediate right, duty or liability to be at issue before a domestic court can exercise jurisdiction: *Re Judiciary and Navigation Acts* (1921) 29 CLR 257. See also Helen Irving, 'Advisory Opinions, the Rule of Law, and the Separation of Powers' (2004) 4 *Macquarie Law Journal* 105.

8 Permanent Court of International Justice, *Rules of Court* (adopted 24 March 1922) arts 71–4.

9 *Statute of the International Court of Justice* ch IV.

10 See Stephen M Schwebel, 'Was the Capacity to Request an Advisory Opinion Wider in the Permanent Court of International Justice than It Is in the International Court of Justice?' (1992) 62 *British Year Book of International Law* 77, 81–2.

11 See Samson and Guilfoyle (n 7) 56–7, 63–5.

12 *Status of Eastern Carelia (Advisory Opinion)* [1923] PCIJ (ser B) No 5. Cf *Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne (Advisory Opinion)* [1925] PCIJ (ser B) No 12.

The ICJ was granted an advisory jurisdiction without much debate.[13] The *Charter of the United Nations* ('*UN Charter*') broadens the category of institutions that can request an advisory opinion, compared to the *Covenant of the League of Nations*. Not only can the General Assembly and the Security Council make such a request,[14] but the General Assembly can also authorise other UN organs or specialised agencies to request an advisory opinion 'on legal questions arising within the scope of their activities'.[15] The voting procedure for the request (and what kind of majority is needed) is not set out in the *ICJ Statute* but is to be determined by the rules governing voting by the respective organisation.[16] The confining of requests to 'legal' questions contrasts with the comparable article in the *PCIJ Statute*.[17] A further difference between the *PCIJ Statute* and *ICJ Statute* is that the latter grants the ICJ a discretion on whether or not to answer the question submitted to it.[18]

The ICJ has taken an expansive approach to its advisory jurisdiction, based on its dual role as a judicial body and as an organ of the UN.[19] It has adopted a robust 'presumption of jurisdiction',[20] insisting that it 'should not, in principle, refuse to give an advisory opinion'.[21] It has emphasised the Court's role as a guide to UN entities that seek 'to conduct their activities in accordance with law'.[22] In the *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* ('*Peace Treaties*') proceedings in 1950, the Court articulated the rationale of advisory opinions as that of providing 'enlightenment' of deliberations of the UN,

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13 See 'Report of the Informal Inter-Allied Committee on the Future of the Permanent Court of International Justice' (1945) 39(1) *Supplement to the American Journal of International Law* 1, 20–3 [65]–[75], cited in Sir Kenneth Keith, 'The Advisory Jurisdiction of the International Court of Justice: Some Comparative Reflections' (1996) 17 *Australian Year Book of International Law* 39, 41 ('The Advisory Jurisdiction of the International Court of Justice').

14 *Charter of the United Nations* art 96(1). On the use by the Security Council of the advisory jurisdiction, see below n 71. See also Robert Kolb, *The International Court of Justice* (Hart Publishing, 2013) 1044–5.

15 *Charter of the United Nations* art 96(2).

16 In the General Assembly, for example, voting occurs by simple majority or two-thirds majority: ibid art 18. See also Mahasen M Aljaghoub, *The Advisory Function of the International Court of Justice 1946–2005* (Springer, 2006) 247–9.

17 *Statute of the Permanent Court of International Justice* art 65.

18 *Statute of the International Court of Justice* art 65(1) provides: 'The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the *Charter of the United Nations* to make such a request.' Marika Samson and Douglas Guilfoyle observe that the PCIJ 'seems to have assumed that it could refuse to give an opinion': Samson and Guilfoyle (n 7) 49. This discretion is implied in the wording of art 14 of the *Covenant of the League of Nations*.

19 See also Kenneth James Keith, *The Extent of the Advisory Jurisdiction of the International Court of Justice* (AW Sijthoff/Leyden, 1971) 239.

20 Ibrahim FI Shihata, *The Power of the International Court to Determine Its Own Jurisdiction: Compétence de la Compétence* (Springer, 1965) 46.

21 See *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226, 235 [14] ('*Nuclear Weapons*'). See also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136, 156 [44] ('*Wall*').

22 *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations (Advisory Opinion)* [1989] ICJ Rep 177, 188 [31] ('*Privileges and Immunities*').

when requested to do so.[23] The Court has acknowledged that an advisory opinion may bear on a legal dispute between states, but it has observed that '[a]s the opinions are intended for the guidance of the United Nations, the consent of States is not a condition precedent to the competence of the Court to give them'.[24] The Court has also underlined the non-binding character of such an opinion.[25]

The ICJ has acknowledged in theory that, even if a question came within the scope of its advisory jurisdiction, 'compelling reasons' might dictate the exercise of its discretion not to give an advisory opinion.[26] These include breaches of 'judicial propriety' in cases where giving an advisory opinion 'would have the effect of circumventing the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent'.[27] Despite regular submissions by states urging the Court not to exercise its advisory jurisdiction in particular cases, the Court has so far never exercised its discretion *not* to answer an advisory request, although it has once refused a UN body's request for an advisory opinion on the basis of a lack of jurisdiction.[28]

Up to 2020, the ICJ has given 27 advisory opinions. Requests for advisory opinions in its first few decades often related to the functioning of international organisations, but they have also increasingly raised major issues of international political significance and of substantive questions of international law. In this context, some observers have criticised the Court's willingness to respond to requests for advisory opinions, warning that it could readily 'jeopardis[e] its

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23 *Peace Treaties* (n 3) 71:

> The consent of States, parties to a dispute, is the basis of the Court's jurisdiction in contentious cases. The situation is different in regard to advisory proceedings even where the Request for an Opinion relates to a legal question actually pending between States. The Court's reply is only of an advisory character: as such, it has no binding force. It follows that no State, whether a Member of the United Nations or not, can prevent the giving of an Advisory Opinion which the United Nations considers to be desirable in order to obtain enlightenment as to the course of action it should take. The Court's Opinion is given not to the States, but to the organ which is entitled to request it; the reply of the Court, itself an 'organ of the United Nations', represents its participation in the activities of the Organization, and, in principle, should not be refused.

For further references to the ICJ's advisory jurisdiction as enlightening the UN, see, eg, *Western Sahara (Advisory Opinion)* [1975] ICJ Rep 12, 24 [31]; ibid 189 [31]. See also *Wall* (n 21) 157–8 [47].

24 *Privileges and Immunities* (n 22) 188–9 [31].

25 Ibid.

26 Ibid 191. See also *Western Sahara* (n 23) 21 [23]; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Advisory Opinion)* [2010] ICJ Rep 403, 416 [29]–[30]; *Wall* (n 21) 156 [44]; *Judgments of the Administrative Tribunal of the International Labour Organisation upon Complaints Made against the United Nations Educational Scientific and Cultural Organization (Advisory Opinion)* [1956] ICJ Rep 77, 86; *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 16, 27 [41] ('*Legal Consequences for States of the Continued Presence of South Africa in Namibia*').

27 *Western Sahara* (n 23) 25 [32]–[33]. See also *Privileges and Immunities* (n 22) 191 [38].

28 The Court refused the WHO's request for an advisory opinion on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* in 1996. The Court decided that the question of the *legality* of such action was not within the scope of the activities of the WHO: *Legality of the Use by a State of Nuclear Weapons in Armed Conflict (Advisory Opinion)* [1996] ICJ Rep 66 ('*Legality of the Use by a State of Nuclear Weapons*').

own prestige and [cast] doubt on its own impartiality'.[29] Some have argued that the Court has exploited the advisory jurisdiction in effect to circumvent the requirement of state consent to adjudication in particular cases.[30] Others have gone further and have urged 'abstinence' on the Court, recommending that it should decline to give an advisory opinion if the subject matter is 'politically controversial … [and unable to] be resolved except by difficult and lengthy political negotiations'.[31] Australia's encounters with the ICJ's advisory jurisdiction, moving from caution, through ambivalence to reticence, reflect these concerns.

III CAUTION

Australia's diffidence about the international advisory jurisdiction emerged early. In 1936, following Great Britain's lead, Australia responded to an invitation to comment by the League of Nations Secretary-General, maintaining that requests for advisory opinions by the League Council or Assembly should be unanimous if 'the question relates to a substantive dispute or to the validity of material legal contentions'.[32] It added that '[i]f the question is definitely one of procedure then the Commonwealth Government feels that a simple majority should be sufficient'.[33]

In the first years of the ICJ, however, Australia evinced considerable interest in the advisory jurisdiction. In an effort to generate business for the fledgling Court in 1947, Australia introduced a resolution in the UN General Assembly recommending that 'each UN organ and specialised agency regularly review challenging questions of international law generally within their competence and refer them to the ICJ seeking an advisory opinion'.[34] When UN organs began to seek advisory opinions, Australia was keen to provide interpretations of institutional and legal matters.

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29 DW Greig, 'The Advisory Jurisdiction of the International Court and the Settlement of Disputes between States' (1966) 15(2–3) *International and Comparative Law Quarterly* 325, 327. For similar warnings, see Michla Pomerance, *The Advisory Function of the International Court in the League and UN Eras* (Johns Hopkins University Press, 1973).

30 See, eg, Israel's arguments in the *Wall* advisory opinion.

31 Anthony Aust, 'Advisory Opinions' (2010) 1(1) *Journal of International Dispute Settlement* 123, 123.

32 Cablegram from the Prime Minister of the Commonwealth of Australia to the Secretary-General of the League of Nations, 3 November 1936 ('3 November 1936 Cablegram'), reproduced in *Conditions of Voting Requests for Advisory Opinions from the Permanent Court of International Justice: Observations Received from Governments and from the International Labour Office*, League of Nations No C.543.N.351.1936.V. (4 January 1937) (National Archives of Australia, A981, LEAGUE PCIJ 13).

33 3 November 1936 Cablegram (n 32).

34 James Crawford, '"Dreamers of the Day": Australia and the International Court of Justice' (2013) 14(2) *Melbourne Journal of International Law* 520, 527–8, citing *Need for Greater Use by the United Nations and Its Organs of the International Court of Justice*, GA Res 171 (II), UN GAOR, 2nd sess, 113th plen mtg, Agenda Item 54, UN Doc A/RES/171(II) (14 November 1947). The resolution was adopted 44 votes in favour, six votes against and two abstentions: UN GAOR, 2nd sess, 113th plen mtg, UN Doc A/PV.113 (14 November 1947). During the drafting of the *UN Charter*, Australia had proposed to confer power on the ICJ to conclusively interpret the Charter. This was not adopted: UN Conference on International Organization, *Amendments to the Dumbarton Oaks Proposals Submitted on Behalf of Australia*, Doc No 2/G/14(1) (1945) 3 *Documents of the United Nations Conference on International Organization* 543, cited in James Fergusson Hogg, 'Peace-Keeping Costs and Charter Obligations: Implications of the International Court of Justice Decision on *Certain Expenses of the United Nations*' (1962) 62(7) *Columbia Law Review* 1230, 1247.

A *Conditions of Admission to the United Nations (1948)*

Disputes over membership marked the early years of the UN, reflecting tensions between the Soviet Bloc and Western states. The *UN Charter* made membership available to all 'peace-loving states which accept the obligations contained in the present Charter and … are able and willing to carry out these obligations'. The General Assembly was mandated to vote on membership 'upon the recommendation of the Security Council'.[35] One issue was whether each applicant state's credentials should always be assessed separately; in particular, could a UN member make its support for one country's membership conditional on the admission of other states at the same time? The question of the admission of Bulgaria, Finland, Hungary, Italy and Romania caused a political impasse in 1947, with the Soviet Union ('USSR') and Poland supporting the five states' admission en bloc, while Australia, the United States and the United Kingdom insisted on individual consideration of each case.[36] This led to a Belgian proposal to seek the ICJ's advice on the proper interpretation of the Charter.

Australia opposed the Belgian initiative, maintaining that art 4 of the *UN Charter* was clear on the matter of admission. The Polish representative appeared to share this view on art 4. The USSR and India also opposed the request, arguing that it was not a proper matter for the ICJ to consider.[37] The General Assembly nevertheless proceeded to adopt the Belgian resolution.[38]

Australia submitted a written statement in the proceedings, as did 14 other states. It argued that the conditions of eligibility for admission were as set out in art 4 of the *UN Charter*.[39] Australia countered the arguments made by the USSR,

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35 Article 4 of the *UN Charter* provides:

> 1. Membership in the United Nations is open to all other peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations.
>
> 2. The admission of any such state to membership in the United Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council.

36 Yuen-Li Liang, 'Conditions of Admission of a State to Membership in the United Nations' (1949) 43(2) *American Journal of International Law* 288, 289. Liang notes that the US had made a similar proposal in 1946 in relation to eight countries seeking admission to UN membership. Australia and the USSR had both successfully opposed that initiative on the basis that the Security Council was required to consider each application separately: at 290.

37 China and Argentina were among the other states opposing the Belgian proposal: ibid 291.

38 'Request for Advisory Opinion', *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)* (International Court of Justice, General List No 3, 12 December 1947) 9:

> Is a member of the United Nations which is called upon, in virtue of Article 4 of the Charter, to pronounce itself by its vote, either in the Security Council or in the General Assembly, on the admission of a State to membership in the United Nations, juridically entitled to make its consent to the admission dependent on conditions not expressly provided by paragraph I of the said Article? In particular, can such a Member, while it recognizes the conditions set forth in that provision to be fulfilled by the State concerned, subject its affirmative vote to the additional condition that other States be admitted to membership in the United Nations together with that State?

39 'Letter from the Australian Minister at the Hague to the Registrar of the Court', *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter) (Advisory Opinion)* [1948] ICJ Pleadings 30, 30.

which had sought to apply extraneous criteria not listed in art 4 in some membership decisions — for example, a state's non-participation in the Second World War or its attitude and behaviour during that war.[40] The concluding part of Australia's written submission noted that its position on UN membership 'is summarised by' Dr Herbert Vere Evatt's address before the General Assembly's First Committee and his 'published Harvard addresses'.[41] Australia's participation in the advisory opinion was thus a vehicle to promote the views of its illustrious Minister for External Affairs, a former President of the UN General Assembly. The ICJ's advisory opinion was consistent with Australia's position, and Australia then proceeded to commend it to all UN members, over the objections of the USSR.[42]

B *Competence of the General Assembly (1950)*

The 1948 advisory opinion did not resolve the politics of UN membership, with the permanent members of the Security Council exercising their respective veto powers to prevent certain states from gaining admission. As a way around the veto, Argentina, which had been a non-permanent member of the Security Council in 1948–49, argued that the phrase 'upon the recommendation of the Security Council' in art 4(2) of the *UN Charter* should be interpreted as encompassing both favourable and non-favourable recommendations.[43] Australia abstained on a proposal to seek an ICJ advisory opinion on this issue at the General Assembly in November 1949, but the resolution was adopted.[44] A month later, in December 1949, the Liberal Party of Australia took power after a general election, and Robert Menzies became Prime Minister. On 6 January 1950, recommending that Australia submit neither a written nor an oral statement in the case, the Department of

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40 Ibid 31.

41 Ibid 32. These were the Oliver Wendell Holmes Lectures delivered at Harvard Law School in 1947 and published by Harvard University Press in 1948 as Herbert Vere Evatt's *The United Nations*.

42 The Court declared that the conditions laid down for the admission of states were exhaustive and that if these conditions were fulfilled by a state that was a candidate, the Security Council ought to make the recommendation that would enable the General Assembly to decide upon the admission. Australia sponsored a resolution that recommended all UN members adhere to the Court's opinion: Australia, *Draft Resolutions on Opinion of the ICJ*, UN Doc A/AC.24/6 (1948). See the discussion in Liang, 'Conditions of Admission of a State to Membership in the United Nations' (n 36) 295–7.

43 See 'Statement of the Government of the Republic of Argentina', *Competence of the General Assembly for the Admission of a State to the United Nations (Advisory Opinion)* [1950] ICJ Pleadings 123. For further details of Argentina's draft resolution to the General Assembly for consideration by the Ad Hoc Political Committee on 21 October 1949, see 'Written Statement Submitted by the Secretary-General of the United Nations', *Competence of the General Assembly for the Admission of a State to the United Nations (Advisory Opinion)* [1950] ICJ Pleadings 33, 36–7.

44 The question posed was:

> Can the admission of a State to membership in the United Nations, pursuant to Article 4, paragraph 2, of the Charter, be effected by a decision of the General Assembly when the Security Council has made no recommendation for admission by reason of the candidate failing to obtain the requisite majority or of the negative vote of a permanent Member upon a resolution so to recommend?

See resolution adopted by the General Assembly on 22 November 1949, quoted in *Competence of the General Assembly for the Admission of a State to the United Nations (Advisory Opinion)* [1950] ICJ Rep 4, 5 ('*Competence of the General Assembly*').

External Affairs advised Menzies, as the Acting Minister for External Affairs,[45] that

> Australia has no close interest in the reference of this question to the Court for advisory opinion. … It seems fairly clear that the answer to the question will be in the negative. A recommendation by the Security Council is a condition precedent to the admission of a new member. A recommendation requires concurring votes of 7 members of the Security Council, including 5 permanent members (Article 27(3)). On the other hand, Australia would probably not be displeased if the question were answered in the affirmative.[46]

The Australian prediction about the ICJ's views was accurate, with the ICJ ruling in its advisory opinion on the *Competence of the General Assembly for the Admission of a State to the United Nations* ('*Competence of the General Assembly*') by 12 votes to two that admission to UN membership under art 4 required a positive recommendation by the Security Council.[47]

An undated External Affairs memorandum around this time noted that the ICJ was seized with a request not only in the *Competence of the General Assembly* proceedings but also in the *International Status of South West Africa* and *Peace Treaties* proceedings. The memorandum recommended a policy on Australian participation in advisory opinions: 'It would seem desirable that as a general rule Australia should avail itself of this right only where it is closely interested in the question referred to the Court.'[48]

Australia never officially adopted such a policy. In any event, any new policy would not have affected Australia's participation in *Peace Treaties*, because Australia had filed a written statement a few months beforehand.

C *Peace Treaties (1950)*

In 1949, a group of Western states, including Australia, New Zealand, the UK and the US, referred the human rights situation in Bulgaria, Hungary and Romania to the UN General Assembly.[49] The General Assembly then called on these Eastern European states to abide by the terms of peace treaties entered into at the end of the Second World War and to engage in a formal dispute settlement process through participation in treaty commissions. The three states refused to do so, and in October 1949, the General Assembly referred the question of the states'

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45 The Minister for External Affairs at the time was Percy Spender.

46 Memorandum for the Acting Minister of External Affairs, 6 January 1950 (National Archives of Australia, A1838, 1558/1/3 PART 2) [3]. The memorandum also observed that '[t]he United Kingdom, which to date have intervened on each occasion that a question has been referred to the International Court for an advisory opinion, do not intend to submit either a written or an oral statement in this case': at [4].

47 *Competence of the General Assembly* (n 44) 10.

48 Memorandum from the Department of External Affairs to the Acting Minister of External Affairs (National Archives of Australia, A1838, 1558/1/3 PART 1) [6].

49 See Yuen-Li Liang, 'Observance in Bulgaria, Hungary and Rumania of Human Rights and Fundamental Freedoms: Request for an Advisory Opinion on Certain Questions' (1950) 44(1) *American Journal of International Law* 100, 111 ('Observance in Bulgaria, Hungary and Rumania'); Manley O Hudson, 'The Twenty-Eighth Year of the World Court' (1950) 44(1) *American Journal of International Law* 1, 25.

legal obligations to the ICJ.[50] Australia, with Bolivia, shaped the request to the Court, drawing particular attention to the trials of Catholic Church leaders in Bulgaria and Hungary.[51] Bulgaria, Hungary and Romania urged the ICJ to decline the request on the bases that it amounted to an intervention in matters essentially within the domestic jurisdiction of a state, in violation of art 2(7) of the *UN Charter*, and that it breached the *Eastern Carelia* principle that the Court should not give an advisory opinion involving a decision on the subject matter of a dispute between states.[52]

Australian archives hold limited records on the advisory opinion on the *Peace Treaties*, yet Australia was an active participant, filing a written statement on 7 November 1949 supporting the ICJ's competence to give an advisory opinion in this context.[53] It did not, however, make an oral statement. Over the dissents of judges from the Soviet Bloc, the Court delivered an advisory opinion observing that the interpretation of the terms of a treaty could not be considered within the domestic jurisdiction of a state. The Court dismissed Bulgaria, Hungary and Romania's contentions that it should decline to exercise jurisdiction because those states did not consent to it, on the grounds that the Court was responding to a request from the UN General Assembly about dispute resolution procedures rather than ruling on the merits of the dispute.[54]

D *Certain Expenses of the United Nations (1962)*

Australia did not participate in the advisory proceedings relating to *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* in 1951. This is surprising, given that Australia had objected to the Soviet Bloc and Philippine reservations to the convention that had prompted the request.[55] Australia, however, was an enthusiastic participant in *Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter)* ('*Certain Expenses*') (1962).[56] In the face of Security Council inaction because of disagreement among its permanent members, the General Assembly had authorised expenditure for UN peacekeeping operations in the Suez Canal and in the Congo between 1956 and 1961. After various member states, most notably the USSR, refused to pay their UN membership dues on this ground, in December 1961, the General Assembly

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50 *Observance in Bulgaria, Hungary and Romania of Human Rights and Fundamental Freedoms*, GA Res 294 (IV), UN GAOR, 4th sess, 235th plen mtg, Agenda Item 27, UN Doc A/RES/294(IV) (22 October 1949) 16.

51 Liang, 'Observance in Bulgaria, Hungary and Rumania' (n 49) 111.

52 *Peace Treaties* (n 3) 70–1.

53 'Written Statement Presented by the Australian Government under Article 66 of the Statute of the International Court of Justice and the Order of the Court Dated 7 November, 1949', *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (Advisory Opinion)* [1950] ICJ Pleadings 203.

54 *Peace Treaties* (n 3) 72.

55 *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion)* [1951] ICJ Rep 15, 16. The Philippines submitted that the ICJ should decline to give an opinion as to the question because it directly related to a dispute actually pending between the Philippines and Australia: 'Written Statement of the Government of the Republic of the Philippines', *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion)* [1951] ICJ Pleadings 295, 296.

56 *Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter) (Advisory Opinion)* [1962] ICJ Rep 151.

sought the ICJ's advice on whether the costs were validly incurred under art 17 of the *UN Charter*.[57]

Certain Expenses is the apogee of Australia's encounters with the advisory jurisdiction; the only case in which Australia has made both written and oral statements that supported the ICJ's competence and engaged with the substance of the request. It is also the only advisory opinion in which Australia made submissions to a bench that included its own national — Sir Percy Spender, Minister for External Affairs in the Menzies government, had been elected to the Court in 1958.[58] Australia supported the Court providing the advice sought by the General Assembly on the interpretation of UN budgetary provisions.[59] Australia was also keen to provide guidance on how best to interpret the phrase 'expenses of the Organization' in art 17 of the *UN Charter*, supporting the use of General Assembly-authorised expenditure for UN peacekeeping operations, as did Australia's Western allies. The ICJ's advisory opinion, adopted with five dissents, was consistent with Australia's arguments in all major respects.

Australia's engagement on the substance of the request suggests an orientation towards multilateralism at a time of escalating Cold War tensions between UN Security Council members.[60] A contemporaneous news piece in *The Age*, appended to the government file, endorsed the value of a fully resourced General Assembly:

> The Australian Government has already taken up a share of the first bond issue, and it is supporting the Acting Secretary-General (U Thant) both in a written submission and by sending the Solicitor-General (Sir Kenneth Bailey) to appear

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57 Article 17 provides:

> 1. The General Assembly shall consider and approve the budget of the Organization.
>
> 2. The expenses of the Organization shall be borne by the Members as apportioned by the General Assembly.
>
> 3. The General Assembly shall consider and approve any financial and budgetary arrangements with specialized agencies referred to in Article 57 and shall examine the administrative budgets of such specialized agencies with a view to making recommendations to the agencies concerned.

58 While there was an Australian on the bench during the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* advisory opinion hearings in 2017, Judge Crawford had to recuse himself from that case due to an earlier court appearance for Mauritius.

59 The General Assembly request was as follows:

> Do the expenditures authorized in [specified General Assembly resolutions] relating to the United Nations operations in the Congo undertaken in pursuance of the Security Council resolutions of 14 July, 22 July and 9 August 1960 and 21 February and 24 November 1961, and [specified General Assembly resolutions] relating to the operations of the United Nations Emergency Force undertaken in pursuance of [specified General Assembly resolutions], constitute 'expenses of the Organization' within the meaning of Article 17, paragraph 2, of the *Charter of the United Nations*?

Administrative and Budgetary Procedures of the United Nations, GA Res 1731 (XVI), UN GAOR, 16th sess, 1086th plen mtg, Agenda Item 62, Supp No 17, UN Doc A/RES/1731(XVI) (20 December 1961) para 1.

60 'Our decision to submit a statement was prompted partly by the fact that we have taken an active and prominent part in Fifth Committee debates on issues involved on which we hold firm views': Letter from IG Bowden to the Australian Legation, Stockholm, 16 February 1962 (National Archives of Australia, A1838, 901/3/2 PART 1) [3] ('16 February 1962 Letter').

> before the court. The legal issues may appear complex, but the overriding political question is simple. If the Assembly, which is not subject to veto by a single great Power, cannot call on its members for troops to enforce its decisions, then its effective authority will be diminished to exhortations, which any number of members may disregard if they wish. [The General Assembly's] duty will be to put down street fighting without a police force.[61]

As well as Australia's participation in the advisory opinion, its support for the peacekeeping expenditure extended to a commitment to purchase UN bonds (which was large relative to Australia's size)[62] and further voting in favour of resolutions to support peacekeeping operations.

Australia's arguments in the case centred on setting the record straight on its position at the 1945 San Francisco Conference that drafted the *UN Charter*.[63] At the time of the UN General Assembly resolution requesting an advisory opinion, Mexico had relied on the withdrawal of Australian-proposed Charter amendments during the San Francisco Conference to support its arguments that the expenses of Congo peacekeeping operations did not amount to 'expenditure' in Charter terms. The Australian written statement rejected the inference made by Mexico, submitting that 'discussions at San Francisco do not justify the writing into Article 17 of any implied exclusion of expenses'.[64]

Sir Kenneth Bailey, who had been instrumental in the drafting of the *ICJ Statute*, was Solicitor-General at the time. He was closely involved with drafting Australia's written submission and delivered Australia's oral statement 'by arrangement with others'.[65] Bailey concentrated on two points. First, the refutation of interpretations about the San Francisco Conference debates (which by now had also appeared in written statements of the Soviet group and South Africa). Second, Australia submitted that this was 'not a proper case anyhow for resort to preparatory work'. Bailey reported to the Australian government that this latter position 'seemed to interest the Court and was commended by colleagues from other states'.[66]

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61 'Legal Dispute Vital to UN Authority', *The Age* (Melbourne, 23 May 1962) 2, quoted in 'Index to Press Opinion No 22/62' (National Archives of Australia, A1838, 901/3/2 PART 1).

62 See Office of Public Information, United Nations Press Services, 'Note to Correspondents: Contributions Received since 30 June 1962' (20 July 1962) (National Archives of Australia, A1838, 901/3/2 PART 1), showing that Australia's financial contribution of USD510,355 was almost half the UK contribution and significantly more than most countries.

63 16 February 1962 Letter (n 60):

> There was also the fact that one of the major arguments in opposition/in great measure upon an interpretation of an amendment to the Dumbarton Oaks proposals submitted to the San Francisco Conference in 1945 by the Australian Delegation. You will see that the refutation of this particular argument occupies much of our statement.

64 'Written Statement of the Government of Australia', *Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter)* [1962] II ICJ Pleadings 230, 236 [20].

65 Inward Cablegram from the Solicitor-General to the Attorney-General Department, the Treasurer and the Treasury, and the Prime Minister's Office, 21 May 1962 (National Archives of Australia, A1838, 901/3/2 PART 1) [3].

66 Ibid.

Bailey began his statement by 'confess[ing] the trepidation and the pleasurable excitement … of addressing this august tribunal for the first time'.[67] He was candid about the difficulties and resources required for Australia to appear before the ICJ, telling the Court:

> I have been asked … what has led the Government of Australia, in view of the factors involved in distance, time and expense, to participate in these oral hearings. The answer lies partly in the greatness of the issue raised, and the importance to every Member of the United Nations, in our view, of the answer that the Court will give to the question submitted for advice. A negative answer would, in our submission, threaten the immediate financial solvency of the Organization; it would threaten the ability of the United Nations to bring these two great current peacekeeping operations to their proper conclusion; it would threaten the ability of the Organization to deal with similar problems of peace and security in the future, and indeed would entirely change the character of the Organization. Such an issue, in our judgment, challenges Members of the United Nations to offer whatever assistance lies in their power in clarifying the matters on which this Advisory Opinion is sought. The Government of Australia feels itself to have a great, indeed a vital, investment in the maintenance of an effective international organization.[68]

The correct use of the historical record of San Francisco was also clearly in the front of Australian minds.[69] Reflecting on the advisory opinion a few years later, Bailey celebrated the way in which Australia's submissions had persuaded the ICJ not to refer to Australia's proposed *UN Charter* amendments at San Francisco:

> It is I think significant that though the Australian amendments had been canvassed both in the written statements and in the oral arguments, no reference whatever was made to them in any of the judgements, not even by the Soviet judge. It was the general opinion of counsel for the Western countries that Australia's rebuttal had killed the argument 'stone dead'.[70]

IV AMBIVALENCE

Australia's cautious support for the ICJ's advisory jurisdiction waned in the century's third quarter. Australia did not participate in the UN Security Council-requested advisory opinion on the legal consequences of South Africa's continued presence in Namibia in 1970.[71] While the reasons for this are unclear, Australia's position was distinct from that of the UK, which had abstained on Security Council *Resolution 284* requesting the opinion. Australia's reluctance may have been due to its sensitivity about the role of Sir Percy Spender, as President of the Court,

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67 'Oral Statement of Sir Kenneth Bailey', *Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter) (Advisory Opinion)* [1962] II ICJ Pleadings 372, 372.

68 Ibid 372–3.

69 The archival record reveals that 'the files of the [Australian] Delegation [to the San Francisco Conference] itself are not available … their fate is not known': Letter from WT Doig, Acting Assistant Secretary, Department of External Affairs, to the Australian Mission to the United Nations, New York, 17 February 1965 (National Archives of Australia, A1838, 901/3/2 PART 2).

70 Inward Cablegram from Bailey, Australian High Commission, Ottawa, to the Department of External Affairs, 23 November 1964 (National Archives of Australia, A1838, 901/3/2 PART 2) [3].

71 *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (n 26). This is the only Security Council request for an advisory opinion to date.

in dismissing proceedings against South Africa in the *South West Africa* cases in 1966.[72] In oral argument, the Organization of African Unity ('OAU') indeed cited statements made by Australia in the 1966 General Assembly debate on the termination of South Africa's mandate over Namibia as support for the OAU's arguments. Taslim Elias, appearing for the OAU, paraphrased the Australian view as:

> [T]he General Assembly should be active in the pursuit of justice by all lawful means, and justice clearly required that South West Africa should be administered by an authority fully committed to such principles as enjoyment, in freedom and without racial discrimination, of the basic human rights, the principle of self-determination of peoples, and so on.[73]

A *Western Sahara (1975)*

Another question of decolonisation and self-determination came before the ICJ in the *Western Sahara* advisory opinion. Australia's ambivalence towards these proceedings may seem incongruous for contemporary Australian lawyers. *Western Sahara* came to be highly influential in the momentous ruling on native title rights by the High Court of Australia in the *Mabo v Queensland [No 2]* case.[74] Yet in the mid-1970s, Australia's civil service did not anticipate its relevance, at least within the Department of Foreign Affairs.

At that time, sovereignty over what was then known as Spanish Sahara was keenly contested. Spain had colonised the territory in 1884, but when Morocco became independent in 1957, it launched a formal claim to much of Western Sahara. In 1965, the UN General Assembly called for the decolonialisation of the territory.[75] The Saharawi political movement, the Polisario Front, had been founded in 1973 and launched a struggle for independence, initially against Spain. After Spain withdrew in 1975, Morocco annexed almost two thirds of Western Sahara. Spain supported the holding of a UN-supervised referendum to determine the wishes of the Saharawi people, citing the principle of self-determination. Morocco was determined, however, to incorporate the region into its territory. Neighbouring Mauritania also claimed a portion of the territory.

Morocco sought to derail the referendum seeking the views of the Saharawi people by lobbying the UN General Assembly to request the ICJ to render an advisory opinion. In December 1974, the General Assembly asked the ICJ for its opinion on two questions: first, was Western Sahara 'terra nullius' at the time of

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[72] *South West Africa (Ethiopia v South Africa) (Second Phase)* [1966] ICJ Rep 6. See Victor Kattan, '"There Was an Elephant in the Courtroom": 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(1) *Leiden Journal of International Law* 147.

[73] 'Oral Statement by Mr Elias', *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* [1971] II ICJ Pleadings 88, 105. For analysis of Australia's attitudes to apartheid in South Africa at this time, see Roger Bell, *In Apartheid's Shadow: Australian Race Politics and South Africa, 1945–1975* (Australian Scholarly, 2019).

[74] *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 40–1 (Brennan J, Mason CJ and McHugh J agreeing at 15), 181–2 (Toohey J). See also Shirley Scott, 'The Australian High Court's Use of the *Western Sahara* Case in *Mabo*' (1996) 45(4) *International and Comparative Law Quarterly* 923.

[75] *Question of Ifni and Spanish Sahara*, GA Res 2072 (XX), UN GAOR, 20th sess, 1398th plen mtg, Agenda Item 23, Supp No 14, UN Doc A/RES/2072(XX) (16 December 1965).

its colonisation by Spain; if the answer to this question was in the negative, what were 'the legal ties' between Western Sahara, Morocco and Mauritania?[76] Australia abstained from the vote at the General Assembly.[77]

The ICJ's invitation to UN members in January 1975 to participate in the proceedings came to Elihu Lauterpacht, who had just been appointed as Legal Adviser to the Department of Foreign Affairs.[78] Lauterpacht's advice, written in March 1975, recommended that Australia not make a written statement in the proceedings. Australia had no specific political stake in the issues raised in the request for an advisory opinion, apart from ensuring that 'processes of self-determination are genuinely carried out in such circumstances as require them'.[79]

Lauterpacht's memorandum pondered the potential impact of an advisory opinion to Australia's territorial claims in the Antarctic: 'if the Court makes observations about the law relating to *terra nullius* and the circumstances in which States may acquire territory thereto, such observations are bound to have some relevance to Australia's Antarctic claims'.[80] On balance, however, he noted that the parties to *The Antarctic Treaty*, who had met recently in Oslo, 'might have felt uncomfortable about causing their concern regarding their "frozen" rights in Antarctica to impede consideration of a "hot" question in Africa'.[81] Lauterpacht went on to canvas the possibility of informally alerting 'Australia's Antarctic colleagues' that the advisory opinion 'could touch upon matters which might embarrass us all'.[82] Lauterpacht reported that he had given some thought to whether an advisory opinion might be relevant to Papua New Guinea, at that time moving from being under Australian administration towards independence, but had dismissed this.[83] He proposed that Australia monitor the written statements submitted to the ICJ that might be relevant to the Antarctic claims and then

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76 *Question of Spanish Sahara*, GA Res 3292 (XXIX), UN GAOR, 29th sess, 2318th plen mtg, Agenda Item 23, Supp No 31, UN Doc A/RES/3292(XXIX) (13 December 1974) para 1.

77 UN GAOR, 29th sess, 2318th plen mtg, Agenda Item 23, UN Doc A/PV.2318 (13 December 1974) 1438. Australia was concerned that the resolution 'did not do justice to the principle of self-determination nor to the proper basis on which a reference should be made to the ICJ'. According to the Australian Mission to the United Nations, New York, '[t]he text establishes a dangerous precedent for settling problems on decolonization on the basis of historical and legal territorial claims rather than on the established principles of self-determination': Letter from PC Reid, Australian Mission to the United Nations, New York, to the Secretary, Department of Foreign Affairs, 12 March 1975 (National Archives of Australia, A1838, 1702/3/46 PART 1) 4 [13], 7 [21] ('12 March 1975 Letter').

78 Lauterpacht's appointment apparently came about after the *Nuclear Tests* cases, when his advocacy impressed the Australian Prime Minister Gough Whitlam: Stephen M Schwebel, 'In Memoriam: Sir Elihu Lauterpacht (1928–2017)' (2017) 111(2) *American Journal of International Law* 437, 438. See also James Crawford, 'The Sir Elihu Lauterpacht International Law Lecture 2017: International Law and the Public Service' (2018) 35 *Australian Year Book of International Law* 17, 19–24 ('International Law and the Public Service'); Henry Burmester, 'Sir Elihu Lauterpacht QC and the *Nuclear Tests Case*' (2018) 35 *Australian Year Book of International Law* 41, 41.

79 E Lauterpacht, 'International Court of Justice: Advisory Opinion on the Status of Western Sahara' (Memorandum No 1558/1/46, 3 March 1975) (National Archives of Australia, A1838, 1702/3/46 PART 1) 1 [3], 3 [13(i)].

80 Ibid 2 [9].

81 Ibid 3 [10]. Lauterpacht added, '[a]nd why should we proclaim to an as yet unaware world that every judicial gust on the subject of title to territory is going to cause a flutter in Antarctic dove (or should I say "penguin") cotes?': at 3 [11].

82 Ibid 3 [12(ii)].

83 Ibid 2 [8].

consider whether Australia should seek to make oral submissions in relation to them.[84]

Lauterpacht briefly touched on the possibility that the ICJ might dismiss the request for an advisory opinion on the ground that the question was in fact a contentious dispute over Spain's title to Western Sahara. As Spain had not accepted the Court's contentious jurisdiction, it could not be a party to the litigation. This was, in fact, the argument pursued by Spain in its submissions before the ICJ.[85] If the Court took such a course, Lauterpacht noted, it would '[dispose] of all problems for Australia'.[86]

The view of Lauterpacht as Legal Advisor to the Department of Foreign Affairs contrasts with earlier advice received by Australia's Attorney-General. To understand the different sources of advice, it is useful to note that the Australian civil service divides the allocation for responsibility for international law between the Department of Foreign Affairs and Trade and the Attorney-General's Department.[87] This is based on the historic recognition that the Attorney-General and the Solicitor-General, 'as first and second law officers of the Crown … [advise] the Government on the law (whether this be international or domestic in origin)', while 'the politico-legal nature of public international law demands a major involvement of the Department of Foreign Affairs'.[88] These arrangements, which were formally noted in prime ministerial correspondence during the 1970s, continue in a flexible manner today.[89]

So it was that the ICJ's notification of Australia's ability to provide a written or oral statement for the Advisory Opinion came to the Attorney-General in January 1975. Pat Brazil, then Acting Deputy Secretary of the Attorney-General's Department, advised that, in contrast to *Certain Expenses*, the present case 'is simply concerned with a territorial dispute in North Africa' and would not

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84 Ibid 3 [13(iii)]–[13(iv)]. For an example of the monitoring, see Letter from E Lauterpacht to Hugh Gilchrist, 14 April 1975 (National Archives of Australia, A1838, 1702/3/46 PART 1), commenting on Mauritania's written statement in the advisory proceedings. Lauterpacht wrote that he was looking for 'anything that might have some direct bearing on the position in either Papua New Guinea or Antarctica' but had found nothing. He also referred to a letter to the ICJ from Guatemala, which asserted that the resolution of territorial claims took precedence over claims to self-determination, reflecting on its relevance to Papua New Guinea. Australia regarded Guatemala's argument as a cynical move to support the latter's territorial claim to Belize: 12 March 1975 Letter (n 77) 6 [19].

85 *Western Sahara* (n 23) 20 [21], 21–3 [24]–[28]. The Court responded to Spain's argument on this issue by noting that the legal dispute 'arose during the proceedings of the General Assembly and in relation to matters with which it was dealing. It did not arise independently in bilateral relations': at 25 [34]. The Court stated further:

> The legitimate interest of the General Assembly in obtaining an opinion from the Court in respect of its own future action cannot be affected or prejudiced by the fact that Morocco made a proposal, not accepted by Spain, to submit for adjudication by the Court a dispute raising issues related to those contained in the request.

at 27 [41].

86 Lauterpacht (n 79) 2 [7(i)].

87 Crawford, 'International Law and the Public Service' (n 78) 20, quoting Prime Minister (Cth), 'Legal Advisor to the Department of Foreign Affairs' (Press Statement No 395, 4 December 1974) <https://pmtranscripts.pmc.gov.au/sites/default/files/original/00003521.pdf>, archived at <https://perma.cc/3WF4-79GQ>.

88 Crawford, 'International Law and the Public Service' (n 78) 37, reproducing Letter from the Prime Minister to the Attorney-General, 12 April 1977.

89 Crawford, 'International Law and the Public Service' (n 78) 26.

appear to be of general importance.[90] Yet the broader relevance of the opinion was not lost on the Acting Deputy Secretary. Brazil, referring to the first of the two questions posed by the General Assembly, which asked whether Western Sahara at the time of colonisation was a 'territory belonging to no one (*terra nullius*)',[91] wrote:

> 6. [I]t is clear that, from the way in which question (a) is framed, certain of the Third World powers may be seeking from the Court an authoritative pronouncement on the international law applicable to the acquisition of territory. For instance, it could be hoped that the Court will, in its opinion, criticize the principle on which most eighteenth and nineteenth century colonial territory acquisitions were made ie that land inhabited by natives whose community is not considered to be a State can be the object of occupation and thereby be acquired.
>
> 7. Therefore, although Australia would appear to have no interest in the particular subject-matter of the dispute, the more general issues involved could have a certain bearing on the legal aspects of the mode in which the Australian continent was acquired from the aboriginal inhabitants.[92]

Ultimately, Australia did not participate in the opinion, either through written or oral submissions. The ICJ advisory opinion held that Western Sahara was not terra nullius in 1884 when it became a Spanish protectorate and, thus, Spain could not have acquired sovereignty over it through occupation. The Court accepted that there were legal ties between Western Sahara and both Morocco and Mauritania, but it considered that these were not ties of the type that gave territorial sovereignty to either state. It reinforced the applicability of the principle of self-determination to the people of Western Sahara.[93]

The Australian Department of Foreign Affairs kept a close eye on arguments before the ICJ, and officials noted that there were no references to Antarctica. One official briefly recorded: 'Mauritian statement, page 39: The situation of Australia prior to settlement is cited as an example of a territorium nullius.'[94] The significance of the advisory opinion for Australia's Indigenous people was of course realised 20 years later with the High Court of Australia ruling on the fiction of terra nullius in Australia (and the relevance of international law to domestic law) in *Mabo v Queensland [No 2]*.[95]

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90 Pat Brazil, 'International Court of Justice: Status of the Western Sahara' (Memorandum, 16 January 1975) (National Archives of Australia, M132, 162).

91 Ibid 1 [1(a)].

92 Ibid 2 [6]–[7].

93 After the ICJ delivered its advisory opinion, Morocco launched a 'Green March' of some 350,000 Moroccans into Western Sahara. Polisario declared the Saharan Arab Democratic Republic and then began a guerrilla campaign against Moroccan troops. Its government in exile is now based in Algeria. The UN managed the unrest by brokering a ceasefire in 1991, but it has made little progress since in sponsoring a political settlement.

94 JG Fennessy, UN Legal Section, Foreign Affairs, 'International Court of Justice: Advisory Opinion on the Status of Western Sahara' (Memorandum No 1558/1/46, 23 May 1975) (National Archives of Australia, A1838, 1702/3/46 PART 1). A handwritten note on the memorandum from its addressee, Jeffrey Browne, confirmed: 'I have not noticed anything of particular interest other than the references noted by John [Fennessy].'

95 See above n 74.

B *Nuclear Weapons (1996)*

The ICJ continued to deliver advisory opinions in the 1970s and 1980s, yet it took another two decades for Australia to resume its participation in such proceedings.[96] In May 1993, the World Health Organization ('WHO') requested an advisory opinion on the question: 'In view of the health and environmental effects, would the use of nuclear weapons by a State in war or other armed conflict be a breach of its obligations under international law including the WHO Constitution?'[97] Eighteen months later, in December 1994, the UN General Assembly sought an urgent advisory opinion on the question: 'Is the threat or use of nuclear weapons in any circumstance permitted under international law?'[98] Australia abstained from the General Assembly vote, in contrast to New Zealand and other Pacific states.[99] The two cases were heard simultaneously in October and November 1995.

These requests were the culmination of civil society campaigns over the previous decade. In 1987, Harold Evans, a retired New Zealand magistrate who came to be associated with the 'The World Court Project',[100] sent a series of letters to government leaders in the Pacific, including Australia, encouraging them to seek an advisory opinion from the ICJ on the legality of the build-up of nuclear arsenals by the USSR and the US. Evans had obtained opinions in support of such a venture from six international lawyers and jurists, including two based in

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96 In this period, the ICJ delivered five advisory opinions to the UN General Assembly: *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt (Advisory Opinion)* [1980] ICJ Rep 73; *Application for Review of Judgment No 273 of the United Nations Administrative Tribunal (Advisory Opinion)* [1982] ICJ Rep 325; *Application for Review of Judgement No 333 of the United Nations Administrative Tribunal (Advisory Opinion)* [1987] ICJ Rep 18; *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947 (Advisory Opinion)* [1988] ICJ Rep 12; *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations (Advisory Opinion)* [1989] ICJ Rep 177. We have found no records of Australia's positions on these proceedings.

97 World Health Assembly, *Health and Environmental Effects of Nuclear Weapons*, 46th sess, 13th plen mtg, Agenda Item 33, WHO Doc WHA46.40 (14 May 1993).

98 *General and Complete Disarmament*, GA Res 49/75, UN GAOR, 49th sess, 90th plen mtg, Agenda Item 62, Supp No 49, UN Doc A/RES/49/75 (15 December 1994) pt K ('Request for an Advisory Opinion from the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons').

99 UN GAOR, 49th sess, 90th plen mtg, Agenda Item 62, UN Doc A/49/PV.90 (15 December 1994) 35–6. On the link between the advisory opinion requests and the contentious cases against France's nuclear tests in 1974 (*Nuclear Tests (Australia v France) (Judgment)* [1974] ICJ Rep 253; *Nuclear Tests (New Zealand v France) (Judgment)* [1974] ICJ Rep 457) and 1995 (*Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v France) Case (Order)* [1995] ICJ Rep 288), see Keith, 'The Advisory Jurisdiction of the International Court of Justice' (n 13) 55–8.

100 On the World Court Project, see Laurence Boisson de Chazournes and Philippe Sands, 'Introduction' in Laurence Boisson de Chazournes and Philippe Sands (eds), *International Law, the International Court of Justice and Nuclear Weapons* (Cambridge University Press, 1999) 1, 8–10; Robert Green and Kate Dewes, 'The World Court Project: How a Citizen Network Can Influence the United Nations' (1996) 15(3) *Social Alternatives* 35.

Australia, Edward St John QC and Christopher G Weeramantry, professor of international law at Monash University.[101]

Australia was proud of its record on nuclear disarmament and non-proliferation and supported the development of international agreements on these matters. Australian Prime Minister Bob Hawke brushed off Harold Evans' suggestion by pointing to the existing arms control treaty regime, writing that

> [t]he [*Nuclear Non-Proliferation Treaty*] … provides an important framework for exerting pressure on the United States and the Soviet Union to protect the integrity of the existing nuclear arms control regime and to conclude new agreements to reduce their nuclear arsenals, ultimately to zero.[102]

Hawke added his doubts about the use of international judicial forums over politics:

> Even if the ICJ were to conclude that nuclear weapons are illegal under international law, the practical impact of its judgement would be ambiguous. The existence of nuclear weapons is not simply a legal question. Their existence has direction implications for the security situation and defence planning of many countries. This state of affairs has existed for many years and the goal of the reduction and ultimate elimination of existing nuclear arsenals and preventing the emergence of new nuclear weapons states is most productively pursued in negotiating forums where these considerations and related matters such as effective means of verification can be addressed.[103]

Civil society was not dissuaded from its advocacy for an advisory opinion request. The World Court Project maintained its campaign within the WHO.[104] Its role in the ICJ proceedings activities was noted by Australian government advisers.[105]

In relation to the WHO request, Australia filed a written statement in September 1994 urging the ICJ to exercise its discretion not to provide an opinion.[106] As Prime Minister Hawke had foreshadowed in his correspondence with Evans, Australia argued that the subject matter of the WHO question was too abstract and thus inappropriate for adjudication. It also warned that an advisory opinion could retard ongoing disarmament negotiations and that any opinion would have no

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101 Harold James Evans, *Case for the World Court Being an Open Letter to the Prime Ministers of New Zealand and Australia* (March 1987) (National Archives of Australia, A463, 1987/2244) app 1 (Mr Edward St John QC), app 4 (Prof Christopher G Weeramantry). Professor Weeramantry was elected to the Court in 1991, on the nomination of Sri Lanka.

102 Letter from Bob Hawke, Prime Minister of Australia, to Harold Evans, 1 June 1987 (National Archives of Australia, A463, 1987/2244) 1.

103 Ibid 2.

104 The International Physicians for the Prevention of Nuclear War, which formed part of the World Court Project, requested that it be allowed to submit information to the ICJ in relation to the WHO request, but this was declined: see Dinah Shelton, 'The Participation of Nongovernmental Organizations in International Judicial Proceedings' (1994) 88(4) *American Journal of International Law* 611, 624.

105 See, eg, Gillian Bird, *World Court Project: Legality of Nuclear Weapons* (Ministerial Submission No 90/1174) (National Archives of Australia, A9737, 1993/60825 PART 4) .

106 'Written Statement of the Government of Australia', *Legality of the Use by a State of Nuclear Weapons in Armed Conflict (Advisory Opinion)* (International Court of Justice, General List No 93, 20 September 1994).

practical effect and thus would be 'devoid of object or purpose',[107] undermining the Court's judicial character.[108]

Though it was slow to decide whether to make an oral statement, Australia kept a keen eye on public sentiment. Placed on the government file in mid-1995 was a statement by Justice Michael Kirby, then President of the New South Wales Court of Appeal.[109] Kirby called for Australia to reconsider its stance, '[e]specially in the light of the resumption in our region of nuclear testing by France'.[110] He drew attention to Australia's recent participation in the contentious cases brought against it by Nauru[111] and Portugal:[112]

> It would be a great pity if Australia were not to have its voice heard on this important issue for international law. One way or the other we should have an opinion on the legality of the use of nuclear weapons and we should express that opinion. Otherwise we will only ever be in the International Court as a defendant (as in the *Nauru* and *East Timor* cases).[113]

The Australian government subsequently decided to make an oral submission in the joint hearing on the two requests.[114]

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107 Ibid [17], citing *Western Sahara* (n 23) 37.

108 The written statement discusses 'judicial appropriateness' and 'judicial propriety'. See also Gavan Griffith and Christopher Staker, 'The Jurisdiction and Merits Phases Distinguished' in Laurence Boisson de Chazournes and Philippe Sands (eds), *International Law, the International Court of Justice and Nuclear Weapons* (Cambridge University Press, 1999) 59, 60 n 7, noting the difference between 'judicial propriety' and 'admissibility'.

109 International Commission of Jurists, 'Kirby Calls for Reference of Nuclear Weapons to World Court', (Media Release, 15 July 1995) (National Archives of Australia, A9737, 1993/60825 PART 5). Justice Kirby was Chairman of the Executive of the International Commission of Jurists, Geneva. He was later appointed to the High Court of Australia. The statement can also be found at Michael Kirby, 'Kirby Calls for Reference of Nuclear Weapons to World Court' (Press Release, Law and Justice Foundation, 16 June 1995) <http://www.lawfoundation.net.au/ljf/print/B3F19CA844E68CD1CA2571A800223E99.html>, archived at <https://perma.cc/M53N-T9MF>.

110 International Commission of Jurists (n 109) 1.

111 *Certain Phosphate Lands in Nauru (Nauru v Australia) (Preliminary Objections)* [1992] ICJ Rep 240.

112 *East Timor (Portugal v Australia) (Judgment)* [1995] ICJ Rep 90.

113 International Commission of Jurists (n 109) 1.

114 'Verbatim Record 1995/22', *Legality of the Use by a State of Nuclear Weapons in Armed Conflict (Advisory Opinion)* (International Court of Justice, General List No 93, 20 September 1994); *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* (International Court of Justice, General List No 93, 30 October 1995) 29 [3]. Archival correspondence reveals that Australia's attempt to ascertain details about oral appearances from the ICJ registry was delayed because the registry was preoccupied with its judgment in the *Nuclear Tests (New Zealand v France)* case, in which Australia did not participate: Inward Cablegram from The Hague to Canberra, 21 September 1995 (National Archives of Australia, A9737, 1993/60825 PART 5). Australia and New Zealand had filed proceedings against France in 1973. New Zealand's decision to file further contentious proceedings in 1995 is discussed by Kenneth Keith in this volume: Kenneth Keith, 'New Zealand and the International Court of Justice' (2021) 21(3) *Melbourne Journal of International Law* 516, 529–31. Australia did not participate in the further proceedings because it had doubts whether the Court would have jurisdiction, on account of France's 1974 withdrawal of its declaration accepting the Court's compulsory jurisdiction. See also Philip Dorling, 'French Nuclear Testing: International Court of Justice' (Memorandum, 22 June 1995) (National Archives of Australia, A9737, 1993/60825 PART 5); Letter from Ian Maddocks, Chairman of National Consultative Committee on Peace and Disarmament, to Senator Gareth Evans, 21 January 1995 (National Archives of Australia, A9737, 1993/60825 PART 4).

Australia's Solicitor-General, Gavan Griffith QC, opened Australia's arguments with its procedural objections to both requests, not differentiating between them. He repeated the three contentions set out in Australia's written submission on the WHO request. Anticipating that the ICJ might nevertheless decide to give one or both of the requested opinions, Australia had a second string to its bow — an argument on the substance that 'customary international law has now developed to the stage where the threat or use of nuclear weapons would be contrary *per se* to international law'.[115] Australia's Minister for Foreign Affairs, Senator Gareth Evans QC, presented the substantive case in unusually passionate terms.[116] Drawing on a range of legal fields, he detailed the customary and conventional law bearing on nuclear weapons, speaking for an hour and a half. Evans seemed to contradict Australia's encouragement to the Court to resist offering an advisory opinion on the grounds that it could undermine progress towards nuclear disarmament.[117] Evans indeed assured the Court that its 'unique ability to advise on the law in this context is of the deepest historic importance' and that 'if you are minded to address the substantive issues raised in the questions before you, your advice can and will materially affect the achievement of that nuclear disarmament'.[118] The gulf between Australia's narrow procedural arguments and its expansive substantive arguments during oral proceedings astonished some courtroom observers.[119]

The advisory opinion endorsed a broad account of the advisory jurisdiction.[120] The ICJ was unpersuaded by the argument that the issue was essentially a political one: '[T]he political nature of the motives which may be said to have inspired the request and the political implications that the opinion given might have are of no relevance in the establishment of [the ICJ's] jurisdiction'.[121] The Court also quickly dispatched arguments, such as that of Australia, that it should exercise its discretion against giving an advisory opinion. One commentator observed that the

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115 'Verbatim Record 1995/22' (n 114) 29 [4]. See also at 44–5 [25].

116 Ibid 36–60.

117 In preparations for the oral argument, Evans had apparently told the Solicitor-General that he was uncomfortable with the technical procedural arguments and concerned about how they would appear to the Australian public. In a letter to Evans on 23 October 1995, Gavan Griffith wrote:

> As to my first statement, I accept your initial comments that you feel uncomfortable. But this is the part for smart sounding lawyers arguments. This technically is a very strong submission. It is a solid argument for the no-answer result. Your suggestions on how it may pass the political scrutiny test are welcome.

Letter from Solicitor-General Gavan Griffith to Senator Gareth Evans, 23 October 1995 (National Archives of Australia, A9737, 1993/60825 PART 7).

118 'Verbatim Record 1995/22' (n 114) 60 [73].

119 Green and Dewes (n 100) 36 records that 'Australia startled and delighted [World Court Project] supporters with its dramatic, if schizophrenic statement'.

120 *Nuclear Weapons* (n 21) 232–8 [10]–[19]. In *Legality of the Use by a State of Nuclear Weapons* (n 28), the ICJ did not examine the authority to give an advisory opinion. The Court rejected the WHO's request, but not on the basis of Australia's arguments; it rejected the WHO request rather on the basis that the question was not 'within the scope of [the WHO's] activities' as required by art 96 of the *UN Charter*: at 74–81 [18]–[26]. The Court regarded the WHO's activities as confined to the sphere of public health and that they did not extend to questions relating to the use of force or the regulation of weapons.

121 *Nuclear Weapons* (n 21) 234 [13].

Court had 'hammered yet another, if not the last, nail in the coffin of the theory of discretion'.[122]

The ICJ was less decisive on the substantive question, unable to identify a specific prohibition of the use of nuclear weapons in customary or treaty law. It stated that

> the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict …. However, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake …[123]

This equivocal conclusion split the ICJ, seven votes to seven, and was adopted on the President's casting vote. Gareth Evans did not hide his disappointment with the substance of the advisory opinion, and the Court more generally, recalling that the Court 'did not do as much to change the world's behaviour as we would have liked'.[124] One direct trace of Australia's advocacy in favour of nuclear disarmament appears, however, in the advisory opinion, with the Court unanimously finding that '[t]here exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control'.[125]

Australia's encounter with the ICJ's advisory jurisdiction in the *Nuclear Weapons* proceedings is, then, an ambivalent one. Australia attempted both to reel in the Court's broad account of the jurisdiction and to exploit it to further the project of nuclear disarmament.

V RETICENCE

Australia's ambivalence about the advisory jurisdiction resolved into reticence in the 21st century as the UN General Assembly referred longstanding disputes to the ICJ. In this era, Australia has participated in advisory opinion proceedings only when the interests of its allies have been directly implicated.

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122 Georges Abi-Saab, 'On Discretion: Reflections on the Nature of the Consultative Function of the International Court of Justice' in Laurence Boisson de Chazournes and Philippe Sands (eds), *International Law, the International Court of Justice and Nuclear Weapons* (Cambridge University Press, 1999) 36, 50.

123 *Nuclear Weapons* (n 21) 266. For discussion of the substance of the Advisory Opinion, see Dapo Akande, 'Nuclear Weapons, Unclear Law? Deciphering the *Nuclear Weapons* Advisory Opinion of the International Court' (1998) 68 *British Year Book of International Law* 165; Martti Koskenniemi, 'The Silence of Law/The Voice of Justice' in Laurence Boisson de Chazournes and Philippe Sands (eds), *International Law, the International Court of Justice and Nuclear Weapons* (Cambridge University Press, 1999) 488.

124 Gareth Evans, 'International Law at the Coalface: Three Decades of Learning by Doing' (2012) 30 *Australian Year Book of International Law* 1, 10.

125 *Nuclear Weapons* (n 21) 267.

A *Construction of a Wall (2004)*

In 2003, in an emergency session, the General Assembly requested an advisory opinion on the legal consequences of Israel's construction of a barrier wall in the Occupied Palestinian Territory.[126] Australia was one of eight states to vote against the resolution.[127] Forty-five states, including Australia, (and four international organisations) filed a written statement to the ICJ; Australia did not make an oral submission.

Australia pressed the ICJ to exercise its discretion not to give an opinion in a case that, it contended, 'raises the issue of [judicial] propriety in an acute form',[128] resorting to well-worn arguments. While specifically reserving its position on the substance of the question, Australia identified three 'compelling reasons' against the advisory jurisdiction. First, Australia pointed to the lack of consent by Israel, which, it argued, would render the giving of an advisory opinion incompatible with the Court's judicial character, specifically because the request implicated Israel's rights and duties.[129] Second, Australia claimed that an advisory opinion would have no 'practical or contemporary effect' and would be 'devoid of object and purpose',[130] especially in light of ongoing UN efforts to settle the Israeli–Palestinian conflict.[131] Australia's third submission was that an advisory opinion would have a detrimental effect on negotiations and initiatives aimed at settling the Israeli–Palestinian conflict, and on the work of the UN and the interests of the international community as a whole.[132]

The ICJ once again firmly and methodically rebuffed arguments such as Australia's. It presented the advisory jurisdiction as part of the ICJ's responsibilities as the 'principal judicial organ of the United Nations'. In line with its consistent jurisprudence, the Court found no reason compelling it to decline the request. The Court went on to advise, by 14 votes to one,[133] that Israel's construction of the barrier wall was contrary to international law.

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126 *Illegal Israeli Actions in Occupied East Jerusalem and the Rest of the Occupied Palestinian Territory*, GA Res ES-10/14, UN GAOR, 10th emergency special session, 23rd plen mtg, Agenda Item 5, UN Doc A/RES/ES-10/14 (12 December 2003, adopted 8 December 2003).

127 The recorded vote in the Assembly, which consists of all 191 UN member states, was 90 in favour, eight against, with 74 abstentions: UN GAOR, 10th emergency special sess, 23rd plen mtg, Agenda Item 5, UN Doc A/ES-10/PV.23 (8 December 2003). Nineteen member states did not vote.

128 'Written Statement of the Government of Australia', *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* (International Court of Justice, General List No 131, 19 December 2003) 5 [7].

129 Ibid 6–9 [9]–[16].

130 Ibid 9 [17], citing *Western Sahara* (n 23) 20, 37.

131 'Written Statement of the Government of Australia' (n 128) 9–11 [17]–[21].

132 Ibid 11–12 [22]–[27].

133 The sole dissenter was Judge Buergenthal.

B *Chagos Archipelago (2019)*

The most recent ICJ advisory opinion in which Australia has participated concerned the legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965. Other articles in this Special Issue describe the background to and outcome of this case in some detail.[134] Australia was one of the 15 states that voted against the UN General Assembly request for an advisory opinion in June 2017.[135] In explaining its vote, Australia cited its concern that there was a live dispute between the UK and Mauritius, and referred to its 'long-standing position … that it is not appropriate for the advisory opinion jurisdiction of the Court to be used to determine the rights and interests of States arising in a specific context'.[136] Australia also commented upon the substantive issues in the case:

> We … note that the Diego Garcia military base plays a pivotal role in the global fight against terrorism. We consider that it is in the interest of all members of the General Assembly to ensure that there is no uncertainty about the status of that base that could jeopardize its contribution to international peace and security.[137]

Australia was one of 31 UN members to file a written statement and one of 22 to make oral submissions to the ICJ.[138] The intensity of Australia's engagement was unusual, given that it confined its arguments to the question of jurisdiction and the exercise of the Court's discretion, without reference to the substantive issues.[139]

Australia was alone in contesting the ICJ's jurisdiction,[140] although five other states joined it in challenging the propriety of the Court giving the opinion.[141] On jurisdiction, it argued that the General Assembly request did not contain a precise statement of the legal questions referred to the Court and thus did not meet

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134 Douglas Guilfoyle, 'The Chagos Archipelago before International Tribunals: Strategic Litigation and the Production of Historical Knowledge' (2021) 21(3) *Melbourne Journal of International Law* 749; Philippa Webb, 'The United Kingdom and the *Chagos Archipelago* Advisory Opinion: Engagement and Resistance' (2021) 21(3) *Melbourne Journal of International Law* 726.

135 *Request for an Advisory Opinion of the International Court of Justice on the Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, GA Res 71/292, UN GAOR, 71st sess, 88th plen mtg, Agenda Item 87, Supp No 49, UN Doc A/RES/71/292 (22 June 2017); UN GAOR, 71st sess, 88th plen mtg, Agenda Item 87, UN Doc A/71/PV.88 ('Meeting Record 22 June 2017') (adopted 94 votes in favour; 15 against; 65 abstentions).

136 Meeting Record 22 June 2017 (n 135) 18.

137 Ibid.

138 The African Union also made written and oral statements.

139 Australia resisted answering a question put to it during oral argument by Judge Cançado Trindade on the legal consequences of certain UN General Assembly resolutions on the basis that Australian arguments were limited to jurisdiction and discretion to decline alone: 'Written Reply of Australia to the Question Put by Judge Cançado Trindade at the End of the Hearing Held on 5 September 2018', *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Advisory Opinion)* (International Court of Justice, General List No 169, 6 September 2018). Australia's avoidance of the substantive legal issues may have been due in part to its close relations with many postcolonial states in its region.

140 Mauritius drew attention to this in its comments on written submissions: 'Written Comments 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, 15 May 2018) vol I, 3 [1.5] ('Mauritius Written Comments').

141 Chile, France, Israel, the UK and the US.

the requirements of art 65 of the *ICJ Statute*.[142] Australia claimed that while the General Assembly questions 'ostensibly concern decolonization, their true purpose and effect is to seek the Court's adjudication over a question of sovereignty'.[143]

Even if jurisdiction were not in doubt, Australia called on the ICJ to exercise its discretion to decline to render an advisory opinion. The three elements of Australia's claim that 'judicial propriety' would require the Court to decline to give an advisory opinion were: that an opinion would entail adjudicating upon a bilateral dispute between the UK and Mauritius without both parties' consent;[144] that an opinion would not in fact assist the UN General Assembly in performing any functions with respect to the Chagos Archipelago;[145] and that there were doubts about the sufficiency of evidence available to the Court.[146] It is striking that Australia relied on the *Eastern Carelia* case in support of its argument on the absence of consent, although the ICJ itself has long explained the PCIJ's refusal to give an advisory opinion in that case as dependent on the fact that Russia was not a member of the League of Nations.[147]

The ICJ rejected Australia's argument on jurisdiction unanimously.[148] It also rejected the submissions encouraging it to decline jurisdiction,[149] by 12 votes to two, rehearsing its familiar jurisprudence on the issues. It proceeded to find that the separation of the Chagos Archipelago from Mauritius before the latter's independence in 1968 was unlawful and that the UK was under an obligation to

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142 'Written Statement of the Government of Australia', *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Advisory Opinion)* (International Court of Justice, General List No 169, 27 February 2018) 3–6 [17]–[25] ('Australia Written Statement'). See also Australia's oral statement in 'Verbatim Record 2018/22', *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Advisory Opinion)* (International Court of Justice, General List No 169, 4 September 2018) 50–4 [4]–[18] (Bill Campbell).

143 'Verbatim Record 2018/22' (n 142) 51 [8]. Mauritius characterised this argument as impugning the good faith of the General Assembly: see 'Mauritius Written Comments' (n 140) 31 [2.2]. Mauritius' counsel, Philippe Sands, made the dramatic claim that Australia was displaying 'child abuse syndrome, in which the victim becomes the oppressor' by ignoring its own historic experience as a former colony: 'Verbatim Record 2018/20', *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Advisory Opinion)* (International Court of Justice, General List No 169, 3 September 2018) 78 [12].

144 'Australia Written Statement' (n 142) 1 [5], 8–14 [32]–[49].

145 Ibid 1 [5], 14–16 [50]–[54].

146 Ibid 1 [5], 16–17 [55]–[58].

147 *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (n 26) 23 [31]; *Western Sahara* (n 23) 23–4 [30]; *Nuclear Weapons* (n 21) 235–6 [14]. Australia drew sustenance for its position from the separate opinion of Judge Owada in the *Wall* opinion: *Wall* (n 21) 262–3 [6]–[7] (Judge Owada); 'Verbatim Record 2018/22' (n 142) 60–3 [19]–[23]. The Advisory Opinion does not refer to *Eastern Carelia* at all. It is also notable that Australia relied on the *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* case to support its contention that there was insufficient General Assembly interest in the situation of the Chagos Archipelago: 'Australia Written Statement' (n 142) 14 [52]. The ICJ rejected the Philippines' argument in *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* that it should decline to give an opinion because the relevant question directly related to a dispute, ironically enough, between the Philippines and Australia.

148 *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Advisory Opinion)* [2019] ICJ Rep 95, 112 [60]–[61].

149 Ibid 113–18 [63]–[91].

end its administration of the Archipelago.[150] The UN General Assembly has since welcomed the Court's opinion and called on the UK to act on it.[151] A judgment of the International Tribunal for the Law of the Sea ('ITLOS') has found the Court's determinations to be 'authoritative'.[152] In views that will have continuing resonance for the ICJ's advisory jurisdiction, ITLOS found the ICJ's opinion regarding the decolonisation of Mauritius to 'have legal effect and clear implications for the legal status of the Chagos Archipelago'.[153]

VI CONCLUSION

This survey, based on a study of cases for which there is archival material and/or a court record, has illustrated a variety of Australian attitudes to the ICJ's advisory jurisdiction. Australia has evinced support for advisory opinions on questions of interpretation of the *UN Charter* as well as caution about, or even distrust of, the mechanism. The chronology of cases reveals Australia's early pragmatic approach to the advisory jurisdiction, endorsing it as a method to break Cold War logjams in the UN Security Council. By the 1970s, as UN organs began to request advisory opinions on substantive matters of international law such as decolonisation and self-determination, Australia displayed an increasing diffidence about the jurisdiction. The Australian engagement in the *Nuclear Weapons* advisory opinion (1996) manifests an intriguing ambivalence. This ambivalence has since firmed into reticence, bordering on suspicion, in the face of requests to the Court for advice on issues such as the legality of Israel's barrier wall and the status of the Chagos Archipelago. Australia's position on the Court's advisory jurisdiction makes it now an outlier in the international community. This contrasts with Australia's attitude towards the Court's contentious jurisdiction, in which it has been fully prepared to act as both applicant and

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150 Ibid 137 [174]. For discussion of the substance of the case, see Victor Kattan, 'The Chagos Advisory Opinion and the Law of Self-Determination' (2020) 10(1) *Asian Journal of International Law* 12.

151 United Nations, 'General Assembly Welcomes International Court of Justice Opinion on Chagos Archipelago, Adopts Text Calling for Mauritius' Complete Decolonization' (Media Release No GA/12146, 22 May 2019) <https://www.un.org/press/en/2019/ga12146.doc.htm>, archived at <https://perma.cc/DU7E-DRBV>. 116 states voted in favour of the May resolution — with six against, including Australia, the UK and the US — and 56 abstentions: UN GAOR, 73rd sess, 83rd plen mtg, Agenda Item 88, UN Doc A/73/PV.83 (22 May 2019, adopted 22 May 2019); United Nations, 'Delegates Call upon United Kingdom to Comply with Ruling by International Court of Justice that Chagos Archipelago's Decolonization Was Never Lawfully Completed' (Media Release No GA/SPD/696, 15 October 2019) <https://www.un.org/press/en/2019/gaspd696.doc.htm>, archived at <https://perma.cc/XQ7M-YLRD>. The UK has responded that it will continue its activities in the Chagos Archipelago, including the strategic military base it leases to the US, while also designing a USD50 million support package to improve livelihoods in the Chagos Archipelago.

152 *Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean (Mauritius v Maldives) (Preliminary Objections)* (International Tribunal for the Law of the Sea, Case No 28, 28 January 2021) [248].

153 Ibid [246].

respondent.[154] Some of these contentious cases have been heard by the Court in a similar time period as the advisory opinion proceedings in which Australia has taken such a restricted position.[155]

Australia's transit through caution, ambivalence and reticence towards the ICJ's advisory jurisdiction raises questions about the international judicial function: has the Court changed or has the international community changed with respect to the role and character of advisory opinions? Some observers have divided requests for advisory opinions into categories such as 'housekeeping' versus 'political'.[156] As the cases that we have discussed show, however, a dispute underlies all requests, which are inevitably imbued with some kind of 'political intensity'.[157] The ICJ's approach to its advisory jurisdiction has been remarkably consistent. The Court has reiterated a commitment to providing legal guidance to the requesting UN organ while maintaining its independence and judicial character. The one case where it found that it had no jurisdiction rested on deficiencies in the request by the relevant UN organ (the WHO),[158] although the ICJ engaged with the substance of the request in the separate opinion sought by the General Assembly. While gesturing at a category of 'compelling reasons' that would dictate the exercise of its discretion not to give an advisory opinion,[159] the Court has never exercised its discretion not to deliver an advisory opinion.

The trajectory of requests to the ICJ for opinions indicates that the advisory jurisdiction has provided an avenue for the UN General Assembly in particular to raise questions that the Security Council sidesteps, because of the operation of the veto of its permanent members.[160] In this sense, the advisory jurisdiction can be seen as a mechanism that restores some deliberative power to the most representative UN forum. In the early years of the UN, the membership of the General Assembly largely aligned with Western interests, and advisory opinion requests reflected this. The rapid increase in membership from the 1960s changed the General Assembly's agenda, with many of its members seeking greater political and economic influence, including redress for colonial exploitation. This changed agenda is echoed in requests for advisory opinions.

In light of these factors, we suggest that Australia should reconsider its reticent approach to encounters with the ICJ's advisory jurisdiction. Its attempts to rein in both the scope of the jurisdiction and the Court's exercise of discretion in acceding to requests for opinions have made no headway jurisprudentially. Indeed,

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154 As explored in this Special Issue, especially by Henry Burmester, Bill Campbell and Richard Rowe: Henry Burmester, 'Civil Society and the Instigation of International Court Litigation: The Australian Experience' (2021) 21(3) *Melbourne Journal of International Law* 772; Bill Campbell, 'Australia's Engagement with the International Court of Justice: Practical and Political Factors' (2021) 21(3) *Melbourne Journal of International Law* 596; Richard Rowe, 'The Diplomatic Dimension: Australia and the *Nuclear Tests* Case' (2021) 21(3) *Melbourne Journal of International Law* 536.

155 For example, the Chagos request came to the Court in 2017, a few years after Australia had been an applicant in the *Whaling in the Antarctic* case and a respondent in the *Seizure and Detention of Certain Documents and Data* case: *Whaling in the Antarctic (Australia v Japan; New Zealand intervening) (Judgment)* [2014] ICJ Rep 226; *Seizure and Detention of Certain Documents and Data (Timor Leste v Australia) (Discontinuance)* [2015] ICJ Rep 572.

156 Aust (n 31).

157 This phrase is used in Kolb (n 14) 1038.

158 *Legality of the Use by a State of Nuclear Weapons* (n 28).

159 See above n 26.

160 On the Security Council's 'deafening silence' on requests, see Kolb (n 14) 1045.

Australia seems to have carved out a radical and lonely legal position on the question of jurisdiction. It could play a more valuable role supporting the General Assembly, and other UN organs, to pursue legal questions that relate to issues of international justice, some of which are longstanding. With pressing questions of law continuing to arise in a highly fractured world, from pandemics to climate change, it is important that the UN be able to call on the Court to enlighten its deliberations.