

‘DREAMERS OF THE DAY’: AUSTRALIA AND THE INTERNATIONAL COURT OF JUSTICE

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This article reflects on Australia’s relationship with the International Court of Justice (‘the Court’), charting its influence as a ‘middle power’ on the development of international law and the peaceful settlement of disputes from the San Francisco Conference onwards. Over that time, Australia has both supported the Court and relied upon it as a tool to defend or advance its foreign policy. Australia has nonetheless had to traverse some difficult terrain, from the South-West Africa cases (controversially decided on the casting vote of the Australian judge, President Sir Percy Spender) to the East Timor case (won on a technicality). While Australia’s active engagement has ebbed and flowed, contributions to Australia’s links with the Court have been made, directly or indirectly, by such remarkable Australians as Dr Herbert Vere Evatt, Sir Kenneth Bailey (who twice missed out on being elected to the Court), Sir Paul Hasluck, Sir Percy Spender and Mr Edward Gough Whitlam).

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‘All men dream: but not equally. Those who dream by night in the dusty recesses of their minds wake in the day to find that it was vanity: but the dreamers of the day are dangerous men, for they may act their dream with open eyes, to make it possible. This I did.’¹

— T E Lawrence

I INTRODUCTION

The position of the International Court of Justice (‘ICJ’ or ‘the Court’) and its relationship to the system of international law since 1945 can be found abbreviated in the words of art 92 of the *Charter of the United Nations*

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¹ T E Lawrence, *Seven Pillars of Wisdom* (Wordsworth, 1997) 7.

(‘*Charter*’). This provides:

The International Court of Justice shall be the principal judicial organ of the United Nations. It shall function in accordance with the annexed *Statute*, which is based upon the *Statute of the Permanent Court of International Justice* and forms an integral part of the present *Charter*.²

And so it is and so it does. But my purpose before you here today is not to attempt to expand upon those rather elegantly drafted 46 words in general but, rather, to contextualise them in relation to Australia — a country generally perceived as less than central to international affairs, notwithstanding its recent election to the Security Council.³

In fact, Australia has had considerable involvement in the workings of the ICJ. An investigation of the history of that relationship reveals the presence and personalities of notable Australians of the past 50 years, including Sir Kenneth Bailey himself, in whose memory this lecture is held. He was the Dean of the Melbourne Law School from 1928–36 and then again from 1938–42. He was Commonwealth Solicitor-General from 1946–64 and twice a candidate for election to the Court, something he never achieved.⁴

Australia has played a significant role in the work of the ICJ from the beginning, participating in the United Nations Conference on International Organization at San Francisco in 1945 (‘San Francisco Conference’), nominating its nationals for the Bench (not always successfully) and participating in various cases and advisory proceedings.

This relationship reflects more generally Australia’s foreign policy priorities in the years following World War II, most notably a firm belief in a system for the peaceful settlement of international disputes including the ICJ. This demonstrates the capacity of a ‘middle power’ to influence the development of international law — even at the risk of being seen as one of the ‘dreamers of the day’.

II EVATT, BAILEY AND HASLUCK AT THE SAN FRANCISCO CONFERENCE

Australia’s connection to the ICJ begins at the San Francisco Conference. Although the UN’s predecessor, the League of Nations (‘League’), also had at its disposal a judicial organ in the form of the Permanent Court of International

² See also Hermann Mosler and Karin Oellers-Frahm, ‘The International Court of Justice’ in Bruno Simma et al (eds), *The Charter of the United Nations: A Commentary* (Oxford University Press, 2nd ed, 2002) vol 2, 1139, 1139–71 (on art 92 of the *Charter of the United Nations*).

³ Department of Public Information, General Assembly, ‘General Assembly Elects Argentina, Australia, Luxembourg, Republic of Korea, Rwanda as Non-Permanent Members of Security Council’ (Media Release, GA/11303, 18 October 2012) <<http://www.un.org/News/Press/docs/2012/ga11303.doc.htm>>.

⁴ Jack E Richardson, ‘Bailey, Sir Kenneth Hamilton (1898–1972)’ in John Ritchie and Christopher Cunneen (eds), *Australian Dictionary of Biography* (Melbourne University Press, 1993) vol 13, 89. See also Melbourne Law School, *Kenneth Bailey 1928–36, 1938–1942* (4 January 2013) <<http://www.law.unimelb.edu.au/melbourne-law-school/comm unity/history/people/deans/kenneth-bailey>>.

Justice ('PCIJ'),⁵ Australia took little interest in the drafting of its *Statute*,⁶ never nominated a judge to its Bench and never appeared before it — although in 1929 it made a declaration accepting the optional clause jurisdiction of the PCIJ.⁷ But Australia did take an interest in the workings of the League more generally and its delegations usually included a range of figures of high public profile, notably Stanley Bruce. Bruce's association with the League began as a young Member of Parliament in 1921 and he continued throughout his political career to address such issues as the Great Depression, the Italian conquest of Abyssinia, the Hoare-Laval Pact, the lead-up to World War II and the collapse of the League.⁸

Australia emerged from World War II with a foreign policy distinct from that of the United Kingdom. The Labor Governments of John Curtin and Ben Chifley sought to inject a liberal internationalism into Australia's external affairs, resulting in their support for international organisations which were then emerging.⁹ The principal architect of this shift was Herbert Vere Evatt, who served simultaneously as Australia's Attorney-General and Minister for External Affairs from 1941 to 1949.¹⁰ An extraordinarily divisive figure, Evatt's qualities as a visionary — albeit a deeply flawed one — need not be recounted here.¹¹ As a former judge of the High Court of Australia and as chief foreign representative of one of the victorious Allies, he was qualified to play a significant role at San Francisco.

The Conference took place from 25 April to 26 June 1945 and is widely

⁵ See generally Ole Spiermann, *International Legal Argument in the Permanent Court of International Justice: The Rise of the International Judiciary* (Cambridge University Press, 2005).

⁶ *Statute of the Permanent Court of International Justice*.

⁷ The declaration of 20 September 1929 was replaced by a new declaration of 21 August 1940. For the text of both, see *Protocol of Signature of the Statute of the Permanent Court of International Justice*, opened for signature 16 December 1920, 200 LNTS 494 (entered into force 1 September 1921).

⁸ Cecil Edwards, *Bruce of Melbourne: Man of Two Worlds* (Heinemann, 1965) 47, 53–6, 223, 230.

⁹ See generally David Lee, 'The Curtin and Chifley Governments, Liberal Internationalism and World Organisation' in David Lee and Christopher Waters (eds), *Evatt to Evans: The Labor Tradition in Australian Foreign Policy* (Allen & Unwin, 1997) 48.

¹⁰ Alan Watt, *The Evolution of Australian Foreign Policy 1938–1965* (Cambridge University Press, 1968) 61. On the wider sweep of Evatt's role in Australia's foreign policy in the immediate post-war era, see ch 4.

¹¹ Evatt's many achievements and his famously difficult character have made him the subject of numerous biographies: see, eg, Allan Dalziel, *Evatt: The Enigma* (Lansdowne Press, 1967); Kylie Tennant, *Evatt: Politics and Justice* (Angus and Robertson, 1970); Peter Crockett, *Evatt: A Life* (Oxford University Press, 1993); Ken Buckley, Barbara Dale and Wayne Reynolds, *Doc Evatt: Patriot, Internationalist, Fighter and Scholar* (Longman Cheshire, 1994). More relevantly for the present discussion, see Alan Renouf, *Let Justice Be Done: The Foreign Policy of Dr H V Evatt* (University of Queensland Press, 1983); Ashley Hogan, *Moving in Open Daylight: Doc Evatt, an Australian at the United Nations* (Sydney University Press, 2008).

regarded as Evatt's finest hour,¹² even by his critics, including Paul Hasluck.¹³ Hasluck was one of Evatt's principal aides at this time and later became Minister for External Affairs and Governor-General. Another aide Evatt relied upon heavily at San Francisco — but who was markedly more discreet in his recollections — was Kenneth Bailey, then attached to the Attorney-General's department as an advisor on constitutional and international law.¹⁴

Evatt arrived in San Francisco with a clear idea of Australia's position on the proposed successor to the PCIJ.¹⁵ The resolutions adopted in Wellington by the Australian and New Zealand Governments prior to San Francisco, called for 'the maximum employment of the International Court of Justice for the ascertainment of facts which may be in dispute'.¹⁶ Evatt reiterated and expanded on these sentiments during a press conference on 3 May 1945, in which he explained that one of Australia's key interests at the conference was not just the ascertainment of disputed facts, but

[t]o declare that justice and the rule of law shall be the principles guiding the action of the Security Council and for this purpose to require the maximum employment of the Permanent Court in determining the legal aspects of international disputes¹⁷

At the Conference itself, however, Evatt was principally occupied with other matters, most notably a failed campaign against the veto power of the permanent members of the Security Council,¹⁸ which has entrenched their position in international affairs to this day. Evatt was also concerned with establishing the

¹² Watt, above n 10, 71–2.

¹³ Paul Hasluck observed:

Consequently Evatt had a great achievement in making a distinctive Australian contribution to the shaping of the *Charter of the United Nations*. He made Australia better known on the international scene than it had ever been known before. He himself was recognized as one of the most forceful and active delegates at the conference and he won acclaim as the champion of the small powers. But in the intensity of battle, perspective and focus were lost.

Paul Hasluck, *Diplomatic Witness: Australian Foreign Affairs 1941–1947* (Melbourne University Press, 1980) 195. Hasluck's contemporary opinions appear to have softened after Evatt's death: see Paul Hasluck, *The Chance of Politics* (Text Publishing, 1997) 79–82.

¹⁴ Hasluck, *Diplomatic Witness*, above n 13, 63.

¹⁵ For an understanding of Australia's goals for the Conference as a whole, see British Broadcasting Corporation, 'Australia's Policy at San Francisco', 28 April 1945 (Herbert Vere Evatt), quoted in H V Evatt, *Australia in World Affairs* (Angus and Robertson, 1946) 25–7.

¹⁶ 'Fraser to Commonwealth Government' in W J Hudson (ed), *Documents on Australian Foreign Policy 1937–1949* (Australian Government Publishing Service, 1998) vol 7, 627. On the Wellington Conference generally, see Hasluck, *Diplomatic Witness*, above n 13, ch 14.

¹⁷ Watt, above n 10, 83.

¹⁸ *Ibid* 83, 86–7.

General Assembly as the central organ of the UN,¹⁹ an ambition which was also eventually thwarted — though this would not become clear in his lifetime. As a consequence, Evatt did not focus on the work of Commission IV, which was charged with the consideration of ‘judicial organization’. Rather, acknowledging Bailey’s expertise in this field, Evatt left him to sit as Australia’s day-to-day representative on the Commission²⁰ and, more importantly, on Committee IV/I, which was considering the draft statute prepared by the Committee of Experts in Washington DC prior to the Conference.²¹ Thus it was Bailey who was principally responsible for ensuring that Australia’s voice was heard in the drafting of the *Statute of the International Court of Justice* (‘Statute’).

The records of Commission IV reflect a mix of parochial concerns with the more statesmanlike impulses evidenced in Evatt’s earlier rhetoric. In light of Australia’s status as a former colony with close demographic ties to the United Kingdom, Evatt appears to have pushed for more precise drafting in relation to the provision stating that no two judges of the same nationality could sit on the ICJ at the same time — would this not, he asked, tend to exclude individuals holding dual Australian and British citizenship?²² The resulting amendment may be seen in art 3(2) of the *Statute*, which provides that ‘[a] person who for the purposes of membership in the Court could be regarded as a national of more than one state shall be deemed to be a national of the one in which he ordinarily exercises civil and political rights’. Australia is also recorded as voting in favour of the method of election now provided for in art 10(1), in accordance with which candidates for the ICJ must be elected by an absolute majority of votes in

¹⁹ Evatt’s continued interest in this can be seen in a cable to the Australian UN delegation from 1946: ‘Department of External Affairs to Australian Delegation, United Nations’ in W J Hudson and Wendy Way (eds), *Documents on Australian Foreign Policy 1937–1949* (Australian Government Publishing Service, 1991) vol 9, 46:

You are familiar with our general line of approach which is to emphasize and secure position of General Assembly as the central and basic organ of United Nations. The Minister is most anxious that the San Francisco achievements to this end are vigorously followed up.

Evatt would later pursue this interest more directly, being elected President of the General Assembly for the 1948–49 (third) session, where his signal achievement was securing the passage of the *Universal Declaration of Human Rights*: GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/RES/3/217A (10 December 1948). A bid for the Presidency the previous year was lost narrowly to Oswaldo Aranha of Brazil.

²⁰ Hasluck, *Diplomatic Witness*, above n 13, 26, 192–3; Richardson, above n 4, 89.

²¹ *The United Nations Dumbarton Oaks Proposals for a General International Organization*, Doc 1 G/F (1945) in *Documents of the United Nations Conference on International Organization* (United Nations Information Organizations, 1945) vol 3, 1, 10. This was followed by the draft statute as prepared by Committee IV/1: *Draft Statute of the International Court of Justice as Finally Approved in English by Both the Coordination Committee and the Advisory Committee of Jurists*, Doc 1158 CO/180(1) (22 June 1945) in *Documents of the United Nations Conference on International Organization* (United Nations Information Organizations, 1945) vol 15, 148.

²² *Summary Report of Second Meeting of Committee IV/1*, Doc 146 IV/1/5 (8 May 1945) in *Documents of the United Nations Conference on International Organization* (United Nations Information Organizations, 1945) vol 13, 142, 143; *Summary Report of Twelfth Meeting of Committee IV/1*, Doc 581 IV/1/44 (26 May 1945) in *Documents of the United Nations Conference on International Organization* (United Nations Information Organizations, 1945) vol 13, 208, 209.

the General Assembly and the Security Council, rather than just the former alone.²³

At the level of principle rather than detail, Australia was one of a number of states pushing for the new court to possess compulsory jurisdiction with respect to all justiciable disputes. Bailey made several constructive suggestions during the debate, contending that although widespread acceptance of the PCIJ's optional clause jurisdiction constituted progress of sorts, it was time for a further step to be taken. In response to arguments that the optional clause carryover of art 36(5) provided adequate protection, he noted that of the 51 states which had adhered to the original optional clause, 3 had ceased to be independent, 17 were unrepresented at the Conference and 10 of the extant declarations had expired — as a result, art 36(5) would not produce the predicted 40 accessions to the Court's jurisdiction, but only 20.²⁴ Moreover, he remarked, general reservations to the Court's jurisdiction were liable to cause confusion — a fear which has been amply borne out.²⁵ He preferred as a model art 39 of the *General Act (Pacific Settlement of International Disputes)*, which permitted reservations in a limited number of cases expressly stated.²⁶

But this was not to be. All the Great Powers (notably the United States and the Soviet Union) opposed the inclusion of compulsory jurisdiction in the *Statute* and this ensured that it would not succeed.²⁷ Australia itself voted for the formulation presently found in art 36 of the *Statute*, which perpetuates the earlier optional clause, though (along with China, New Zealand and Turkey) it expressly stated that its affirmative vote had been cast in order to avoid a stalemate.²⁸

Not every Australian amendment with wider horizons was rejected. Australia and Cuba campaigned for inclusion of an obligation in the *Charter* which expressly required states to carry out decisions of the Court in cases in which they were parties. This was eventually reflected in the terms of art 94(1) of the *Charter*²⁹ and is probably Australia's main contribution to the system of international justice as it currently stands.

²³ *Summary Report of Eighth Meeting of Committee IV/1*, Doc 418 IV/1/32 (18 May 1945) in *Documents of the United Nations Conference on International Organization* (United Nations Information Organizations, 1945) vol 13, 179, 180.

²⁴ *Summary Report of Seventeenth Meeting of Committee IV/1*, Doc 759 IV/1/59 (2 June 1945) in *Documents of the United Nations Conference on International Organization* (United Nations Information Organizations, 1945) vol 13, 246, 250.

²⁵ *Summary Report of Fourteenth Meeting of Committee IV/1*, Doc 661 IV/1/50 (29 May 1945) in *Documents of the United Nations Conference on International Organization* (United Nations Information Organizations, 1945) vol 13, 224, 225.

²⁶ *General Act of Arbitration (Pacific Settlement of International Disputes)*, opened for signature 26 September 1928, 93 LNTS 343 (entered into force 16 August 1929) art 39.

²⁷ The debate over compulsory jurisdiction is set out in: *Report of the Rapporteur (Nusrat Al-Farsy, Iraq) of Committee IV/1*, Doc 913 IV/1/74(1) (12 June 1945) in *Documents of the United Nations Conference on International Organization* (United Nations Information Organizations, 1945) vol 13, 381, 390–2. See also Renouf, above n 11, 219–20.

²⁸ *Summary Report of Seventeenth Meeting of Committee IV/1*, Doc 759 IV/1/59 (2 June 1945) in *Documents of the United Nations Conference on International Organization* (United Nations Information Organizations, 1945) vol 13, 246, 251.

²⁹ *Summary Report of Twentieth Meeting of Committee IV/1*, Doc 864 IV/1/71 (8 June 1945) in *Documents of the United Nations Conference on International Organization* (United Nations Information Organizations, 1945) vol 13, 296, 297; Mosler and Oellers-Frahm, above n 2, 1174–79 (on art 94 of the *Charter of the United Nations*).

A further contribution of Australia to the *Statute* came not through Bailey but through Evatt. Appearing before Commission IV on 15 June 1945, Evatt spoke in favour of a recommendation made by Iran to the effect that the San Francisco Conference as a whole recommend that all states make declarations under the optional clause.³⁰

But, more generally, he spoke of his satisfaction with the text of the *Statute* as a whole. His words bear quoting at length:

the work of this Commission has made very important advances in extending the place of law and justice in international affairs. We have provided for a new Court, firmly established as the judicial organ of the United Nations. We have made important practical changes in its constitution, making it flexible enough to undertake much business for which the old Court was not suitable. We hope that the new Court will speedily be able to replace the multifarious judicial and arbitrable tribunals before which so much international litigation has been conducted in the last generation. Our task now is to ensure that the Court will in fact be freely resorted to.

...

Mr President, I venture to predict that after some years have passed the work of the jurists in the Committee at Washington, and the work of the Jurists here in San Francisco, will be regarded as among the most enduring contributions to the cause of international peace and international justice.³¹

Evatt's optimism was also evident in an address he gave to the House of Representatives on 30 August 1945 when tabling the Bill approving the *Charter*.³² Here he declared that '[t]he court can play an important part in the development and strengthening of international law ... [and] the means whereby international disputes of a legal character may be settled in accordance with the principles of international law'.³³

III AUSTRALIA AND THE EARLY YEARS OF THE COURT

The high expectations for the ICJ, so elegantly expressed by Evatt, were not fulfilled. The disappointments were several. The first arose with the nomination

³⁰ *Revised Verbatim Minutes of Second Meeting of Commission IV*, Doc 1153 IV/12(1) (22 June 1945) in *Documents of the United Nations Conference on International Organization* (United Nations Information Organizations, 1945) vol 13, 90, 99.

³¹ *Ibid* 99–101.

³² See *Charter of the United Nations Act 1945* (Cth).

³³ Evatt, *Australia in World Affairs*, above n 15, 44.

of Bailey by the Australian national group³⁴ to fill one of the inaugural seats on the Court in the 1946 elections. At the time there was talk that Evatt himself might be nominated — his previous judicial experience certainly placed him in the category of persons ‘who possess the qualifications required in their respective countries for appointment to the highest judicial offices’.³⁵ But in the words of his biographer, he ‘had no intention of being the first Australian Minister for External Affairs to disappear into the obscurity of the International Court of Justice’.³⁶

Despite the goodwill that Australia had engendered among the smaller powers at San Francisco, Bailey’s campaign was not successful. The British indicated that the Commonwealth would back John Read of Canada, ostensibly on the basis that he was older by a decade,³⁷ which deprived Bailey of his largest bloc of support. Nonetheless, he polled strongly, gaining the requisite majority in the Security Council on the first ballot but falling just short in the General Assembly. On the second, third and fourth ballots, however, his support dropped unexpectedly relative to his chief rivals, Bohdan Winiarski of Poland and Helge Klaestad of Norway, both of whom were eventually elected and would serve as successive Presidents of the Court.³⁸

Meanwhile, Evatt was lamenting the second disappointment: the failure of the ICJ to achieve prominence as a centre of international dispute resolution. Given the relatively pedestrian docket of its predecessor — 29 contentious cases heard and 27 advisory opinions given over 18 years — it is difficult to know what he expected. But in a series of lectures given at Harvard Law School in 1947 he complained that the Court had ‘been denied almost totally the opportunity of working’.³⁹ In a bid to generate business for the ICJ, Australia introduced into the General Assembly a resolution 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

³⁴ See *Statute of the International Court of Justice* art 4 (‘Statute’). Bailey’s nomination and several others were by an ad hoc grouping under art 4(2), as Australia did not officially recognise its succession to the convention establishing the Permanent Court of Arbitration until 1960: *International Convention for the Pacific Settlement of International Disputes*, opened for signature 29 July 1899, [1901] ATS 130 (entered into force 4 September 1900). See also Permanent Court of Arbitration, *Member States* (2009) <http://www.pca-cpa.org/showpage.asp?pag_id=1038>. On the nominating process and the role of national groups, see Henry Burmester, ‘Australia and the International Court of Justice’ (1996) 17 *Australian Yearbook of International Law* 19, 26–8; Christopher Harland, ‘International Court of Justice Elections: A Report on the First Fifty Years’ (1996) 34 *Canadian Yearbook of International Law* 303, 350; Chittharanjan F Amerasinghe, ‘Judges of the International Court of Justice — Elections and Qualifications’ (2001) 14 *Leiden Journal of International Law* 335; Kenneth J Keith, ‘International Court of Justice: Reflections on the Electoral Process’ (2010) 9 *Chinese Journal of International Law* 49, 54.

³⁵ *Statute of the International Court of Justice* art 2.

³⁶ Tennant, above n 11, 185.

³⁷ See Edward McWhinney, ‘In Memoriam: Sir Kenneth Bailey’ (1972) 10 *Canadian Yearbook of International Law* 284, 284.

³⁸ ‘Australian Delegation, United Nations, to Department of External Affairs’ in W J Hudson and Wendy Way (eds), *Documents on Australian Foreign Policy 1937–1949* (Australian Government Publishing Service, 1991) vol 9, 118, 118–19. Klaestad was President from 1958–61, with Winiarski succeeding him from 1961–64: International Court of Justice, *Presidency* (2013) <<http://www.icj-cij.org/court/index.php?p1=1&p2=3>>.

³⁹ Herbert Vere Evatt, *The United Nations* (Oxford University Press, 1948) 42.

opinion.⁴⁰ More remarkably, Evatt's enthusiasm for the work of the ICJ included an unsolicited and embarrassing offer to act as counsel for the United Kingdom in the *Corfu Channel* case.⁴¹ After extensive hand-wringing in the Foreign Office, Evatt's offer was tastefully declined.⁴²

Despite the predilections of its Attorney-General and Minister for External Affairs (Evatt still held both positions),⁴³ Australia does not appear to have shown much interest in appearing before the ICJ in its formative years. In the first decade of the ICJ's operation, Australia appeared in no contentious matters and only provided written submissions in two of the Court's key early advisory opinions, some of which concerned vital issues connected to the operation of the

⁴⁰ *Need for Greater Use by the United Nations and Its Organs of the International Court of Justice*, GA Res 171(II)A, UN GAOR, 2nd sess, 113th plen mtg, Agenda Item 54, UN Doc A/RES/171(II)A (14 November 1947). It was adopted 46–6–2. See also: Evatt, *The United Nations*, above n 39, 137.

⁴¹ *Corfu Channel (United Kingdom v Albania) (Preliminary Objection)* [1948] ICJ Rep 15; *Corfu Channel (United Kingdom v Albania) (Merits)* [1949] ICJ Rep 4; *Corfu Channel (United Kingdom v Albania) (Assessment of the Amount of Compensation Due from the People's Republic of Albania to the United Kingdom of Great Britain and Northern Ireland)* [1949] ICJ Rep 244.

⁴² See generally Laurence W Maher, 'Half Light between War and Peace: Herbert Vere Evatt, the Rule of International Law, and the *Corfu Channel* Case' (2005) 9 *Australian Journal of Legal History* 47. Maher offers the following assessment of Evatt's character, at 62:

Evatt was a very demanding and difficult individual. He had a formidable intellect which in his formative years produced stellar academic achievements. He was both an outstanding legal scholar and an outstanding practising lawyer. He has been described as ambitious, petulant, driven, querulous, and mistrustful; and as very jealous, unscrupulous, and frantically disordered and confused in his work methods; and as a bully, as lacking depth of knowledge of international affairs, occasionally childish, and suspicious of anyone over the age of four. And, there was much more. As a politician, he was erratic and ruthless, a pragmatist and an opportunist. Yet, simultaneously, throughout his career, he was a tireless fighter for freedom and justice, for the under-privileged, and generally for the orderly and rational advancement of the human condition. His career was surely at its peak in the 1940s. It was this that made his slow and pitiful decline in the mid-1950s such a tragedy.

⁴³ Evatt's activities in the year 1948 demonstrate more than anything else his superhuman capacity for work. Whilst simultaneously holding two of the weightiest portfolios in the Australian Ministry, he also served as President of the General Assembly and appeared before the Privy Council in the *Bank Nationalisation* case: see *Commonwealth v Bank of New South Wales* (1949) 79 CLR 497; *Commonwealth v Bank of New South Wales* [1950] AC 235. On the latter, see Peter Johnston, 'The *Bank Nationalisation* Cases: The Defeat of Labor's Most Controversial Economic Initiative' in H P Lee and George Winterton (eds), *Australian Constitutional Landmarks* (Cambridge University Press, 2003) 85. For Barwick's recollection of the case as counsel for the banks, see his memoir: Sir Garfield Barwick, *A Radical Tory: Garfield Barwick's Reflections and Recollections* (Federation, 1995) ch 5.

UN.⁴⁴ This was, in part at least, reflective of Labor's defeat in the 1949 elections and the return to power of Robert Menzies — an avowedly more insular Prime Minister.⁴⁵ It was not until the *Certain Expenses* advisory opinion of 1962 that Australia played a substantial role before the Court, with Bailey — then Solicitor-General — appearing in order to argue at length that expenses incurred by the UN in the Suez and Congo constituted expenses of the United Nations Organization within the meaning of art 17(2) of the *Charter*, the consequence being that each member of the Organization was then under an obligation to pay its share thereof, as allocated by the General Assembly.⁴⁶ This position was ultimately accepted by the ICJ.⁴⁷ However, despite this early reticence, Australia was about to enter a new phase of engagement with the Court — one which would shape their relationship in unexpected ways for the next 50 years.

IV THE NOMINATION OF SIR PERCY SPENDER

Bailey's 1946 nomination was not renewed in 1948. At this point, the Australian nominating group appears to have been somewhat inconsistent in its practice. It made no nominations for the 1948 and 1954 elections; in 1951 it favoured Charles de Visscher of Belgium, Klaested of Norway, Green Hackworth of the United States and Sir Benegal Rau of India.⁴⁸ That is not to say, however, that Australia was totally bereft of candidates to the Court during this time — the Turkish national group saw fit to nominate Evatt in 1948.⁴⁹ This was predictably unwelcome — Evatt's views on candidacy had not altered appreciably from 1946 and he was disinclined to expend Australian diplomatic capital on reinforcing the bid. In the first ballot in the General Assembly, he

⁴⁴ Submissions were made in: *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter) (Advisory Opinion)* [1948] ICJ Rep 57, 59; *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (Second Phase) (Advisory Opinion)* [1950] ICJ Rep 221. But no interest was expressed in the following: *Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion)* [1949] ICJ Rep 174; *Competence of the General Assembly for the Admission of a State to the United Nations (Advisory Opinion)* [1950] ICJ Rep 4; *International Status of South-West Africa (Advisory Opinion)* [1950] ICJ Rep 128; *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion)* [1951] ICJ Rep 15; *Effect of Awards of Compensation Made By the United Nations Administrative Tribunal (Advisory Opinion)* [1954] ICJ Rep 47; *Voting Procedure on Questions relating to Reports and Petitions the Territory of South-West Africa (Advisory Opinion)* [1955] ICJ Rep 67; *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; *Admissibility of Hearings of Petitioners by the Committee on South West Africa (Advisory Opinion)* [1956] ICJ Rep 23.

⁴⁵ Ironically, this introverted approach was driven in part by Spender, then-Minister for External Affairs: Watt, above n 10, 112–17.

⁴⁶ *Certain Expenses of the United Nations (Article 17, Paragraph 2 of the Charter) (Advisory Opinion)* [1962] ICJ Rep 151. By this stage, the man who defeated Bailey for a position on the Bench in 1946, Winiarski, was President of the Court.

⁴⁷ Ibid 179–80.

⁴⁸ A full list of the nominations made by the Australian national group from 1945 to 1996 may be found in Burmester, above n 34, 36–7.

⁴⁹ 'Dr Evatt as UNO Head', *Sydney Morning Herald* (Sydney), 20 September 1948, 3.

secured two votes and only a single vote in the second ballot. He does not appear to have received any votes in the Security Council.⁵⁰

The next Australian nomination to receive the full backing of the Government was Sir Percy Spender.⁵¹ A conservative and King's (later Queen's) Counsel, Spender had been active in Australian politics since 1937, when he was elected to the New South Wales seat of Warringah as a member of the United Australia Party ('UAP'). He served as Treasurer and Minister for the Army in the early years of World War II until the fall of Arthur Fadden's Government in 1941. His continued membership of the Labor Government's Advisory War Council resulted in his exclusion from the UAP.⁵² This proved something of a blessing as it placed him in a position to steer clear of the internecine warfare that led to the creation of the Liberal Party.⁵³ Spender participated in the Menzies restoration of 1949, whereupon he succeeded Evatt (a fellow alumnus of Fort Street High School) at External Affairs. He was also Minister for External Territories. It was during this time that he was at his most influential, being central to the conclusion of the *ANZUS Treaty*⁵⁴ and the Colombo Plan⁵⁵ (formerly known as the Spender Plan) for cooperative economic and social development in the Asia-Pacific region.⁵⁶ He also played a central role in the conclusion of the Allied peace treaty with Japan.⁵⁷ A foreign policy realist in the Menzies tradition, he believed in the pre-war strategy of securing alliances between Australia and the Great Powers rather than in Evatt's vision of collective security — witness the *ANZUS Treaty*, which remains a weight-bearing beam in Australian foreign policy today. He was suspicious of international organisations such as the UN, which he felt might 'contain those who are working to disrupt the order we believe in'.⁵⁸ But Spender was on the whole extremely effective: Alan Renouf — sometime head of the Department of Foreign Affairs and Trade and Evatt admirer — remarked that Spender had accomplished more in his

⁵⁰ See the data presented in Harland, above n 34, 348 (Table 36). The election was eventually won by Hsu Mo of China, Abdel Hamid Badawi of Egypt, John E Read of Canada, Bohdan Winiarski of Poland and Milovan Zoričić of Yugoslavia.

⁵¹ Unlike Evatt, Spender's legacy was neither so prominent nor so divisive as to warrant many biographies, but for a useful exception, see David Lowe, *Australian between Empires: The Life of Percy Spender* (Pickering & Chatto, 2010).

⁵² David Lowe, 'Spender, Sir Percy Claude (1897–1989)' in Melanie Nolan and Paul Arthur (eds), *Australian Dictionary of Biography* (Melbourne University Press, 2012) vol 18, 445.

⁵³ Ibid 107–8.

⁵⁴ *Security Treaty between Australia, New Zealand and the United States of America*, signed 1 September 1951, 131 UNTS 83 (entered into force 29 April 1952) ('*ANZUS Treaty*').

⁵⁵ Department of Foreign Affairs and Trade, Australian Government, *Australia and the Colombo Plan 1949–1957* (23 May 2005) <https://www.dfat.gov.au/publications/colombo_plan/>.

⁵⁶ On Spender's recollection of his role: see generally Sir Percy Spender, *Exercises in Diplomacy: The ANZUS Treaty and the Colombo Plan* (Sydney University Press, 1969).

⁵⁷ *Treaty of Peace with Japan*, signed 8 September 1951, 136 UNTS 45 (entered into force 28 April 1952).

⁵⁸ David Lowe, 'Percy Spender, Minister and Ambassador' in Joan Beaumont et al (eds), *Ministers, Mandarins and Diplomats: Australian Foreign Policy Making, 1941–1969* (Melbourne University Press, 2003) 62, 70. Lowe suggests, however, that Spender was envious of Evatt's election as President of the General Assembly in 1948: Lowe, *The Life of Percy Spender*, above n 51, 116.

16 months as Minister for External Affairs than any other Australian Foreign Minister in history.⁵⁹

Spender's nomination to the ICJ in 1957, after having served as Australia's Ambassador to the United States on his retirement from politics in 1951, was perhaps something of a surprise. Certainly, it came at the expense of Bailey,⁶⁰ who aside from his role in drafting the *Statute* had been extremely active in international law during the intervening period. Bailey attended several sessions of the General Assembly and, from 1956 to 1958, led the Australian delegation to, and played a major role in, the first UN Conference on the Law of the Sea in Geneva.⁶¹ Indeed, there are hints that Bailey was the favoured candidate of the Australian national group in 1957 and that Spender was only nominated following the application of pressure by Menzies. In her memoirs, Spender's wife Jean recalls that Menzies 'thought it unthinkable that [Spender] should go back to private life' and suggested that he consider nomination to the ICJ.⁶² Moreover, Lady Spender relates that 'the Prime Minister believed that my husband was the one man who could bring it off'.⁶³ This rather breathless recollection overstates Spender's credentials. Bailey was then a prominent professional international lawyer and his reputation would only grow post-Geneva.⁶⁴ But it does appear that Menzies was minded to railroad the deliberations of the Australian national group. This was confirmed when, in response to a parliamentary question in 1957 by then-Member of Parliament Gough Whitlam, it was recorded that Chief Justice Sir Owen Dixon did not participate in the decision of the national group, instead indicating to the Attorney-General that 'as I understand you are to put forward a nomination on behalf of the Government, I would not consider it appropriate for me as Chief Justice to support or oppose the proposal'.⁶⁵ Spender was duly nominated by a group comprising the Attorney-General, the Acting Solicitor-General and the Dean of the Sydney Law School.⁶⁶

The election was held on 1 October 1957, with Spender being elected on the first ballot with 58 votes in the General Assembly and 10 in the Security Council

⁵⁹ Michael Wilson, Interview with Alan Renouf (Australian Diplomacy 1950–1990 Oral History Project, 13 November 1993), cited in Lowe, *The Life of Percy Spender*, above n 51, 123.

⁶⁰ Lowe relates that Bailey was 'infuriated' by Spender's nomination: Lowe, *The Life of Percy Spender*, above n 51, 160.

⁶¹ For Bailey's assessment of the Conference, see Sir Kenneth Bailey, 'Australia and the Law of the Sea' (1960) 1 *Adelaide Law Review* 1, 6. See also *Convention on the Territorial Sea and the Contiguous Zone*, opened for signature 29 April 1958, 516 UNTS 205 (entered into force 10 September 1964); *Convention on the High Seas*, opened for signature 29 April 1958, 450 UNTS 82 (entered into force 30 September 1962); *Convention on Fishing and Conservation of the Living Resources of the High Seas*, opened for signature 29 April 1958, 559 UNTS 285 (entered into force 20 March 1966); *Convention on the Continental Shelf*, opened for signature 29 April 1958, 499 UNTS 311 (entered into force 10 June 1964). These form a basis for the current legal regime under the *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 397 (entered into force 16 November 1994) ('*Convention on the Law of the Sea*').

⁶² Jean Spender, *Ambassador's Wife* (Angus and Robertson, 1968) 182.

⁶³ *Ibid.*

⁶⁴ Lowe, *The Life of Percy Spender*, above n 51, 160.

⁶⁵ Commonwealth, *Parliamentary Debates*, House of Representatives, 23 May 1957, 1894 (Gough Whitlam), quoted in Burmester, above n 34, 27.

⁶⁶ Burmester, above n 34, 27.

in what was at the time the largest majority ever attained by a candidate to the ICJ.⁶⁷ He took his seat in 1958 and participated in a number of decisions of the Court that remain significant today, notably *Interhandel*,⁶⁸ the *Right of Passage* case⁶⁹ and the *Certain Expenses* advisory opinion.⁷⁰ His dissenting opinion in the *Temple of Preah Vihear* case,⁷¹ in which he denied the Cambodian claim in its entirety, caused some mildly awkward moments for the Australian Government, with Sir Garfield Barwick (who later sat as an ad hoc judge of the Court in the *Nuclear Tests* cases)⁷² recording the displeasure of Prince Sihanouk on Barwick's arrival in Phnom Penh shortly after judgment was handed down.⁷³

As a judge, Spender's international jurisprudence reflected his background as a conservative, black-letter lawyer of the same character as Sir Gerald Fitzmaurice, who replaced the more broad-minded Sir Hersch Lauterpacht⁷⁴ as the UK judge on the Court in 1960.⁷⁵ But Spender was well-liked by his colleagues and, with Fitzmaurice lobbying on his behalf, was in 1964 elected President of the ICJ.⁷⁶ This was a significant achievement and one in which his wife seems to have taken particular pride.⁷⁷ As President, he introduced several important reforms to streamline the business of the ICJ, most notably simultaneous translation, which although first used at the San Francisco Conference in 1945 had unaccountably still not been introduced in The Hague two decades later. He also took to advertising the hearings of the Court, increasing public accessibility.⁷⁸

⁶⁷ Harland, above n 34, 339 (Table 29); Lowe, *The Life of Percy Spender*, above n 51, 160.

⁶⁸ *Interhandel (Switzerland v United States of America) (Preliminary Objections)* [1959] ICJ Rep 6, 54.

⁶⁹ *Right of Passage over Indian Territory (Portugal v India) (Preliminary Objections)* [1957] ICJ Rep 125; *Right of Passage over Indian Territory (Portugal v India) (Merits)* [1960] ICJ Rep 6, 97.

⁷⁰ *Certain Expenses of the United Nations (Article 17, paragraph 2 of the Charter) (Advisory Opinion)* [1962] ICJ Rep 151, 182.

⁷¹ *Temple of Preah Vihear (Cambodia v Thailand) (Preliminary Objections)* [1961] ICJ Rep 17, 39 (Judge Spender); *Temple of Preah Vihear (Cambodia v Thailand) (Merits)* [1962] ICJ Rep 6, 101.

⁷² *Nuclear Tests (Australia v France) (Judgment)* [1974] ICJ Rep 253, 391; *Nuclear Tests (New Zealand v France) (Judgment)* [1974] ICJ Rep 457, 525.

⁷³ Barwick, above n 43, 193–5.

⁷⁴ Lauterpacht was the seventh Whewell Professor at Cambridge. On Lauterpacht's judicial philosophy, see Sir Gerald Fitzmaurice, 'Hersch Lauterpacht — The Scholar as Judge' (Pt 1) (1961) 37 *British Yearbook of International Law* 1; Sir Gerald Fitzmaurice, 'Hersch Lauterpacht — The Scholar as Judge' (Pt 2) (1962) 38 *British Yearbook of International Law* 1; 'Hersch Lauterpacht — The Scholar as Judge' (Pt 3) (1963) 39 *British Yearbook of International Law* 133; Iain G M Scobbie, 'The Theorist as Judge: Hersch Lauterpacht's Concept of the International Judicial Function' (1997) 8 *European Journal of International Law* 264; Patrick Capps, 'Lauterpacht's Method' (2011) 82 *British Yearbook of International Law* 248. The views of Lauterpacht himself can be found in his classic text: H Lauterpacht, *The Function of Law in the International Community* (Oxford University Press, revised ed, 2011).

⁷⁵ Burmester, above n 34, 28; Lowe, *The Life of Percy Spender*, above n 51, 170.

⁷⁶ Lowe, *The Life of Percy Spender*, above n 51, 167.

⁷⁷ Spender, *Ambassador's Wife*, above n 62, 201.

⁷⁸ *Ibid* 201–2.

V SPENDER AND THE *SOUTH-WEST AFRICA* CASES

Spender's time on the Court, and Australia's relationship with it thereafter, was, however, indelibly coloured by his decision in the *South-West Africa* cases.⁷⁹ These concerned the situation in Namibia, which was a virtually continual feature on the Court's docket from 1950 to 1971 and the subject of several advisory opinions during that time.⁸⁰ This is not the place for a lengthy account of the cases.⁸¹ The situation broadly considered was that of Namibia — or, as it was then known, South-West Africa — a former German colony surrendered under the terms of the Versailles peace accords.⁸² Namibia was the subject of a class 'C' mandate within the meaning of art 22(6) of the *Covenant of the League of Nations*,⁸³ whereby, owing to the sparseness of its population and its proximity and geographical contiguity with the territory of a larger neighbour, it was placed under the latter's protection and governed as an province thereof. Namibia was thus placed under the protection of South Africa under the League of Nations *Mandate for German South-West Africa* ('Mandate').⁸⁴

Chapter XII of the *Charter* provided for the translation of the League's mandate regime into the UN trusteeship system, placing those territories on a path to independence. But with the election of the National Party of South Africa in 1948, South Africa indicated that it intended to annex Namibia. In 1950, the Court issued the *International Status of South-West Africa* advisory opinion, in which it found that South Africa remained bound by its obligations under the *Mandate*, which had survived the demise of the League itself.⁸⁵ By 1959, it was clear that no cooperation would be forthcoming from South Africa, prompting the General Assembly at the instigation of the Afro-Asian bloc to pass a

⁷⁹ *South West Africa (Ethiopia v South Africa; Liberia v South Africa) (Preliminary Objections)* [1962] ICJ Rep 319; *South West Africa (Ethiopia v South Africa; Liberia v South Africa) (Second Phase)* [1966] ICJ Rep 6.

⁸⁰ See *International Status of South-West Africa (Advisory Opinion)* [1950] ICJ Rep 128; *Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South-West Africa (Advisory Opinion)* [1955] ICJ Rep 67; *Admissibility of Hearings of Petitioners by the Committee on South West Africa (Advisory Opinion)* [1956] ICJ Rep 23; *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.

⁸¹ See generally Christof Heyns and Magnus Killander, 'South West Africa/Namibia (Advisory Opinions and Judgments)' (2007) *Max Planck Encyclopedia of Public International Law*.

⁸² *Treaty of Peace between the Allied and Associated Powers and Germany*, opened for signature 28 June 1919, [1920] ATS 1 (entered into force 10 January 1920).

⁸³ *Treaty of Peace between the Allied and Associated Powers and Germany*, opened for signature 28 June 1919, [1920] ATS 1 (entered into force 10 January 1920) pt I ('*The Covenant of the League of Nations*') art 22:

To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilisation ...

⁸⁴ Council of the League of Nations, 'Mandate for German South-West Africa' (1921) 2 *League of Nations Official Journal* 89.

⁸⁵ *International Status of South-West Africa (Advisory Opinion)* [1950] ICJ Rep 128, 131–4, 143.

resolution calling for member states to litigate against South Africa before the Court,⁸⁶ with the aim being to secure a judgment that could then be the subject of enforcement action by the Security Council. The mechanism by which the Court's jurisdiction was putatively to be engaged was art 7 of the original *Mandate*.⁸⁷ This required that where an unresolved dispute existed between the Mandatory (South Africa) and another member of the League concerning the interpretation or application of the *Mandate*, it was to be referred to the PCIJ for adjudication. Under art 37 of the *Statute*, such references to the PCIJ were deemed to attract the jurisdiction of its successor. Ethiopia and Liberia, two former members of the League, initiated proceedings in 1960.⁸⁸

In 1962, by a majority of eight votes to seven, the ICJ determined that it had jurisdiction. In brief, the majority reiterated the Court's earlier opinion in *International Status of South-West Africa* that: (i) the *Mandate* remained on foot as a treaty between South Africa and the other members of the League; and (ii) art 37 of the *Statute* served to grandfather art 7 of the *Mandate* into the Court's jurisdiction.⁸⁹ Moreover, it held that the fact that art 7 referred to members of the now-defunct League was not fatal to the claim, as an overly technical reading would be 'incompatible with the spirit, purpose and context of the clause'.⁹⁰

Spender and Fitzmaurice, as two black-letter conservatives, took a different view of the meaning of art 7. The *Mandate*, they said, had to be given the meaning it would have borne at the time it was concluded, which was to permit only those disputes brought in the national interest of the applicant. Thus

[a]rticle 7 must be understood as referring to a dispute in the traditional sense of the term, as it would have been understood in 1920, namely a dispute between the actual parties before the Court about their own interests, in which they appear as representing themselves and not some other entity or interest ...⁹¹

This approach, it may be said, was technically open: contemporaneous exposition was an available means of interpretation and remains a standard principle of the modern law of treaties, in contrast to the overtly teleological approach of the majority.⁹²

But despite admitting jurisdiction in 1962, the ICJ reversed course when considering the merits of the dispute in 1966. This was in large part connected to the changing composition of the Bench. The elections of 1963 had retained on paper the same balance of views that resulted in the Court's determination of jurisdiction. However, the untimely death of Badawi in 1965, the illness of José

⁸⁶ *Legal Action to Ensure the Fulfilment of the Obligations Assumed by the Union of South Africa in respect of the Territory of South West Africa*, GA Res 1361(XIV), UN GAOR, 14th sess, 838th plen mtg, Agenda Item 8, UN Doc A/RES/1361(XIV) (17 November 1959). See also Lowe, *The Life of Percy Spender*, above n 51, 167.

⁸⁷ See Council of the League of Nations, above n 84.

⁸⁸ See *Legal Action to Ensure the Fulfilment of the Obligations Assumed by the Union of South Africa in Respect of the Territory of South West Africa*, GA Res 1565(XV), UN GAOR, 15th sess, 954th plen mtg, Agenda Item 43, UN Doc A/RES/1565(XV) (18 December 1960). The General Assembly commended these states on their initiative.

⁸⁹ *South West Africa (Ethiopia v South Africa; Liberia v South Africa) (Preliminary Objections)* [1962] ICJ Rep 319, 334.

⁹⁰ Ibid 336.

⁹¹ Ibid 558–9 (Judges Spender and Fitzmaurice).

⁹² The matter is not, however, entirely straightforward: see James Crawford, *State Responsibility: The General Part* (Cambridge University Press, 2013) ch 8.

Luis Bustamante y Rivero of Peru and the withdrawal of Sir Muhammad Zafrullah Khan of Pakistan fundamentally altered the voting balance between the two phases of the proceeding.⁹³ Zafrullah Khan's recusal was notably controversial and was apparently occasioned by his having been appointed an ad hoc judge in the case by Ethiopia and Liberia, though he never served in that role.⁹⁴ After the decision had been handed down, Zafrullah Khan, through an interview given to London's *Dawn* newspaper and a memorandum issued by the Pakistani Mission to the UN, asserted that Spender had personally insisted on the recusal and, further, stated to Zafrullah Khan that a majority of the Court supported his views.⁹⁵ Whether this was the case will never be known — Zafrullah Khan's statement is the beginning and end of the public record. But if Spender did in fact apply pressure in this manner, it would have been in accordance with arts 24(2) and 24(3) of the *Statute*,⁹⁶ under which the President of the Court shall give notice to a judge of the Court if he considers 'for some special reason' that said judge should not sit.⁹⁷

Spender's intervention in requiring a prominent champion of South-West Africa to recuse himself was not well-received and reflected — fairly or unfairly — even less favourably on Spender in light of what happened next. When the Court handed down the judgment on the merits in 1966, it divided evenly. Moreover, the division appeared political: the Western European judges, plus Judge Winiarski and ad hoc Judge J T Van Wyk, voted in favour of South Africa. The judges from the developing world, plus Judges Phillip C Jessup of the United States, V K Wellington Koo of China, Kotaro Tanaka of Japan and Vladimir Koretsky of the Soviet Union, voted in favour of Ethiopia and Liberia. This division left Spender, as President, in the position of having the casting

⁹³ As the then-Legal Adviser of the British Foreign Office put it, '[f]ate was on the side of South Africa. Three judges who were likely to vote against the 1966 judgment were absent while all seven who were likely to vote for it were present': Sir Francis Vallat, 'The 1966 Judgment in the *South West Africa* Case and the Composition of the International Court of Justice', quoted in Lowe, *The Life of Percy Spender*, above n 51, 169.

⁹⁴ Rosalyn Higgins, 'The International Court and South West Africa: The Implications of the Judgment' (1966) 42 *International Affairs* 573, 578–88; William M Reisman, 'Revision of the South West Africa Cases: An Analysis of the Grounds of Nullity in the Decision of July 18th, 1966 and Methods of Revision' (1966) 7 *Virginia Journal of International Law* 1, 55–8; Detlev F Vagts, 'The International Legal Profession: A Need for More Governance?' (1996) 90 *American Journal of International Law* 250, 256.

⁹⁵ See Reisman, above n 94, 55–6, quoting Zafrullah Khan:

I never disqualified myself. There were no grounds for disqualifying me. The President of the Court was of the view that it would be improper for me to sit as I had at one time been nominated judge ad hoc by the Applicant States, though I never sat in that capacity. I disagreed entirely with that view and gave the President my reasons which I still consider were good reasons. But he told me that a large majority of the Judges agreed with him that I should not sit. So I had no option.

⁹⁶ See Leo Gross, 'The International Court of Justice: Consideration of Requirements for Enhancing Its Role in the International Legal Order' (1971) 65 *American Journal of International Law* 253, 294 (suggesting that the burden on the President in this respect is an unwelcome one). On the operation of art 24 of the *Statute* in general, see Shabtai Rosenne, *The Law and Practice of the International Court, 1920–2005* (Martinus Nijhoff, 4th ed, 2006) vol 1, 1057–65; Sir Robert Jennings, 'Article 24' in Andreas Zimmermann et al (eds), *The Statute of the International Court of Justice: A Commentary* (Oxford University Press, 2nd ed, 2012) 417.

⁹⁷ However, a similar objection with respect to Judge Luis Padilla Nervo of Mexico was rejected by Spender. Vagts, above n 94, 256.

vote.⁹⁸ He decided in favour of South Africa. The result came as a shock to most informed observers of the Court, who felt that having surmounted the jurisdictional hurdles in the Court's 1962 decision (however narrowly), Ethiopia and Liberia were in the possession of an extremely strong case on the merits.⁹⁹ But, as became apparent in the reading of the judgment, the majority did not address the merits of the case at all — rather, it coopted the reasoning of Spender and Fitzmaurice's 1962 dissent and reversed the teleological approach of the 1962 majority to find that although the Court possessed jurisdiction over the case, Ethiopia and Liberia had not established any legal rights opposable against South Africa in the context of the League system. The claim brought was thus inadmissible¹⁰⁰ and the Court thereby avoided a pronouncement on the legality of apartheid under international law. Liberia and Ethiopia — and the developing world in general — were thunderstruck. Not even to reach the merits due to a perceived technicality on the basis of the President's casting vote was extraordinary.¹⁰¹

Despite having every confidence in the judgment as an expression of the law, Spender seems to have apprehended the public reaction that the judgment would provoke and he appended a declaration urging the minority to confine any dissent to the ratio decidendi of the majority decision (being that the claim was inadmissible) and not to take the opportunity to advance argument on the merits proper.¹⁰² Despite this injunction, four of the dissidents considered the merits,¹⁰³ as did one member of the majority.¹⁰⁴

The fallout from the judgment was severe and deserved. The Afro-Asian bloc of the UN took the position that the decision was politically motivated, an inference quickly taken up by elements of the media so as to conclude that the ICJ was either pro-Western, irrelevant or both.¹⁰⁵ Certain African delegates made statements that the ICJ was a 'white man's' tribunal dispensing justice according to a 'white man's' law,¹⁰⁶ in the process converting South-West Africa into the international law equivalent of the *Dred Scott* case.¹⁰⁷ Spender was

⁹⁸ See *Statute of the International Court of Justice* art 55(2).

⁹⁹ Lowe, *The Life of Percy Spender*, above n 51, 169.

¹⁰⁰ *South West Africa (Ethiopia v South Africa; Liberia v South Africa) (Second Phase)* [1966] ICJ Rep 6, 28–9:

viewing the matter in the light of the relevant texts and instruments, and having regard to the structure of the League, within the framework of which the mandates system functioned, the Court considers that even in the time of the League, even as members of the League when that organization still existed, the Applicants did not, in their individual capacity as States, possess any separate self-contained right which they could assert, independently of, or additionally to, the right of the League, in the pursuit of its collective, institutional activity, to require the due performance of the Mandate in discharge of the 'sacred trust'. This right was vested exclusively in the League, and was exercised through its competent organs.

¹⁰¹ See, eg, *ibid* 443 (Judge Padilla Nervo).

¹⁰² *Ibid* 51–7.

¹⁰³ *Ibid* 250 (Judge Tanaka), 443 (Judge Padilla Nervo), 474 (Judge Forster), 484 (Judge Mbenefo).

¹⁰⁴ *Ibid* 67 (Judge Van Wyk).

¹⁰⁵ Lowe, *The Life of Percy Spender*, above n 51, 169.

¹⁰⁶ Edward McWhinney, *Conflict and Compromise: International Law and World Order in a Revolutionary Age* (Holmes & Meier, 1981) 60–1.

¹⁰⁷ *Dred Scott v Sandford*, 60 US 393 (1857).

singled out for criticism. Vague threats were apparently made on his life,¹⁰⁸ and those who knew that he had effectively usurped Bailey, the stronger international lawyer, in 1957 'might have been more likely to find traces of power politics and colonialism in [his] outlook'.¹⁰⁹ The prestige of the Court was damaged. Although it would partly redeem itself with the *Namibia* advisory opinion in 1971,¹¹⁰ the developing world viewed the Court with suspicion bordering on antipathy until the *Nicaragua* judgment of 1986.¹¹¹ The docket of the Court in the intervening years was notably free of cases in which a developing state brought a claim against a Western nation.

But more significantly, from the point of view of this lecture, Australia and Bailey were the collateral victims of the decision in South-West Africa. Guinea and other states targeted Spender 'as representative of a country where outmoded racism and colonialism prevailed',¹¹² and the goodwill generated by Australia's role at San Francisco evaporated. When Bailey, by then Australia's High Commissioner to Canada, was again nominated to the Court in 1966, his nationality automatically precluded any hope of a successful campaign.¹¹³ As William O'Connor, a Labor MP attending the General Assembly in 1966, related:

No amount of argument could convince a large number of delegates that the opinion of Sir Percy Spender was not the opinion of the Australian Government and when we tried to argue objectively with them they merely replied with a very polite smile ... [The decision in *South-West Africa*] was directly responsible for the defeat of our candidate when he stood for election to the World Court. ... I happened to speak to some delegates before the election and they spoke very highly of Sir Kenneth as a man and of his qualifications, but some of them said: 'He comes from Australia,' then smiled and changed the subject. There is no doubt whatever in my mind that the decision of the Court was directly responsible for his defeat.¹¹⁴

When the election was held on 2 and 3 November 1966, Bailey still polled extremely well given the circumstances: this was undoubtedly a reflection of the high esteem in which he was held personally. In the first round of polling in the General Assembly, he received 45 votes, but over the succeeding 6 rounds of balloting support shifted to Sture Petrén of Sweden and Antonio De Luna of Spain. A similar picture emerged in the Security Council, where Bailey survived 15 rounds of balloting over 2 days before support swung emphatically to Sture

¹⁰⁸ Lowe, *The Life of Percy Spender*, above n 51, 170.

¹⁰⁹ Ibid (citations omitted).

¹¹⁰ *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.

¹¹¹ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Jurisdiction of the Court and Admissibility of the Application) (Judgment)* [1984] ICJ Rep 392; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14.

¹¹² Lowe, *The Life of Percy Spender*, above n 51, 170.

¹¹³ Burmester, above n 34, 27–9.

¹¹⁴ Commonwealth, *Parliamentary Debates*, House of Representatives, 9 March 1967, 523 (William O'Connor).

Petrén and Cesar Bengzon of the Philippines, both of whom were eventually elected.¹¹⁵

Bailey was never nominated again and died five years later, in 1972. He remains relatively unknown, but that should not undermine his significant achievements as perhaps the best of Australia's 'dreamers of the day'.

VI AUSTRALIA BEFORE THE COURT, 1973 – PRESENT DAY

Following Bailey's failed candidacy, Australia did not attempt to place one of its nationals on the ICJ for the remainder of the 20th century.¹¹⁶ Although its national group continued to make nominations, the Government deemed other diplomatic efforts to be more worthy of attention. Nor did any Australian national overtly seek a position on the Court's Bench — with the exception of Gough Whitlam who, following his retirement from politics, expressed an interest in being nominated in the 1978 elections. The Coalition Government, for reasons that are perhaps understandable, declined his offer.¹¹⁷

Australia's relationship with the ICJ was instead as a party to contentious proceedings before it. Central to its appearances in this respect was Australia's submission to the Court's jurisdiction. Following on from its support of the notion of compulsory jurisdiction for the Court at San Francisco, Australia has continuously had in place an optional clause declaration¹¹⁸ under art 36(2) of the *Statute*, although this has from time to time been the subject of specific reservations. Some 66 other states have lodged similar declarations with the Court.¹¹⁹

The original 1954 declaration,¹²⁰ which supplanted Australia's earlier acceptance of the jurisdiction of the PCIJ,¹²¹ contained several substantial reservations, such as the exclusion of disputes concerning the continental shelf. Other reservations included disputes occurring in times of hostility and disputes with other members of the British Commonwealth. By 1975, however, the

¹¹⁵ Harland, above n 34, 331–3 (Table 23).

¹¹⁶ However, Stanislas Aquarone, the Court's Registrar from 1966–80 (and Deputy Registrar from 1960–66) possessed Australian nationality. His connection with this country, however, ended at primary school, after which he was educated in France, Canada and the United States. His parents were French nationals, and Aquarone himself seems to have identified as Canadian from time to time. His PhD dissertation was completed at Columbia University in the 1930s and was entitled *Emile Littré and French Positivism*. He appears to have had no formal legal training (although he served as a Court interpreter in the United States in the late 1930s) and his first involvement with the International Court of Justice ('ICJ' or 'the Court') was as a temporary secretary in the *Corfu Channel* case: (*United Kingdom v Albania*) (*Merits*) [1949] ICJ Rep 4. See also Stanislas Aquarone, *The Life and Works of Emile Littré (1801–1881)* (Leyden A W Sythoff, 1958).

¹¹⁷ Burmester, above n 34, 27.

¹¹⁸ See generally Malgosia Fitzmaurice, 'International Court of Justice, Optional Clause' (2011) *Max Planck Encyclopedia of Public International Law*.

¹¹⁹ International Court of Justice, *Declarations Recognizing the Jurisdiction of the Court as Compulsory* <<http://www.icj-cij.org/jurisdiction/?p1=5&p2=1&p3=3>>.

¹²⁰ *Declaration by Australia Recognizing as Compulsory the Jurisdiction of the International Court of Justice, in Conformity with Article 36, Paragraph 2, of the Statute of the International Court of Justice*, 186 UNTS 77 (signed and entered into force 6 February 1954).

¹²¹ As transferred to the Court: *Statute of the International Court of Justice* art 36(5).

Whitlam Government issued a new declaration¹²² excluding only those disputes 'in regard to which the parties have agreed or shall agree to have recourse to some other method of peaceful settlement', a common stipulation designed to avoid conflict between alternate methods of dispute resolution.¹²³ The fullest possible acceptance of the Court's jurisdiction appears to have been a deeply held wish of Whitlam's, having urged the revision of the highly qualified 1954 declaration from the opposition benches in 1961.¹²⁴ Prior to the adoption of the 1975 declaration and following his return from a state visit to the Netherlands, he remarked to the House of Representatives that:

I take this opportunity to inform the House that, as an earnest of our respect for the Court, Australia proposes to forgo her existing reservations and, in any dispute which we litigate before the Court, to accept its judgment unreservedly.¹²⁵

One effect of this was to withdraw the reservation concerning disputes between members of the Commonwealth, the outdated residue of the *inter se* doctrine, hence opening Australia up to the suit by Nauru, then an 'associate member' of the Commonwealth, in 1991.

Whitlam's unequivocal commitment to the Court was diluted somewhat by the Government of John Howard, which adopted a further declaration in 2002.¹²⁶ Although this contained fewer reservations than the 1954 declaration, it introduced, on advice, two key reservations. The first relates to disputes 'concerning or relating to the delimitation of maritime zones, including the territorial sea, the exclusive economic zone and the continental shelf'.¹²⁷ This reflects a policy that maritime boundary disputes are best settled by bilateral agreement and parallels a similar reservation with respect to the jurisdiction of the International Tribunal for the Law of the Sea.¹²⁸

The second reservation relates to:

any dispute in respect of which any other party to the dispute has accepted the compulsory jurisdiction of the Court only in relation to or for the purpose of the dispute; or where the acceptance of the Court's compulsory jurisdiction on behalf of any other party to the dispute was deposited less than 12 months prior to the filing of the application bringing the dispute before the Court.¹²⁹

This prevents opportunistic acceptances by countries of the jurisdiction of the Court on an *ad hoc* basis.¹³⁰

¹²² *Declaration Recognizing as Compulsory the Jurisdiction of the International Court of Justice, in Conformity with Article 36, Paragraph 2, of the Statute of the International Court of Justice*, 961 UNTS 183 (signed and entered into force 13 March 1975).

¹²³ *Ibid* 80; Burmester, above n 34, 30.

¹²⁴ *Ibid* 31.

¹²⁵ Commonwealth, *Parliamentary Debates*, House of Representatives, 11 February 1975, 64 (Gough Whitlam).

¹²⁶ *Declaration Recognizing as Compulsory the Jurisdiction of the International Court of Justice, under Article 36, Paragraph 2, of the Statute of the Court*, 2175 UNTS 493 (signed and entered into force 21 March 2002) ('*Declaration on ICJ's Compulsory Jurisdiction*').

¹²⁷ *Ibid* 494.

¹²⁸ Justine Garrett (ed), 'Australian Practice in International Law 2002' (2004) 23 *Australian Year Book of International Law* 289, 301.

¹²⁹ *Declaration on ICJ's Compulsory Jurisdiction* 494.

¹³⁰ Garrett, above n 128, 302.

It would be a mistake to see Australia's acceptance of the Court's jurisdiction as a luxury afforded to wealthy middle powers whose foreign policy produces little risk of litigious reprisal. For years, Australia has been a major power in Oceania and the South Pacific, a regional involvement which brings with it a distinct risk of legal action. This may be seen in the two cases in which Australia has been respondent, *Phosphate Lands*¹³¹ and *East Timor*.¹³² In both instances, Australia was aware that the relevant actions were contemplated and did not attempt pre-emptively to modify its optional clause declaration to frustrate jurisdiction. Rather, it defended both actions head-on before the Court.

The *Phosphate Lands* case was essentially an attempt to obtain monetary compensation arising out of Australia's involvement qua (joint) administering power in the phosphate industry in Nauru. Placed under a class 'C' mandate, Nauru was governed under a joint agreement between Australia, New Zealand and the United Kingdom.¹³³ Following World War II, it was brought under the UN trusteeship system¹³⁴ and eventually attained independence in 1968. Up to that time, Nauru's considerable phosphate resources were exploited by a body known as the British Phosphate Commissioners, in which all rights, titles and interests to the phosphates were vested and under whose control and management approximately one third of the island's phosphates were extracted to meet 'the agricultural requirements of the United Kingdom, Australia and New Zealand'.¹³⁵ Nauru claimed that mining activities under the control of the administering powers had caused irreparable damage to Nauru's territory. Moreover, it was alleged that the benefit derived by Nauru from this exploitation was minimal and the royalties dispensed were kept artificially low because the phosphate was sold well below the world price.¹³⁶

Australia raised a series of preliminary objections,¹³⁷ including two of some

¹³¹ *Certain Phosphate Lands in Nauru (Nauru v Australia) (Preliminary Objections)* [1992] ICJ Rep 240 ('*Phosphate Lands*').

¹³² 'Portugal: Application Instituting Proceedings', *East Timor (Portugal v Australia)*, International Court of Justice, General List No 84, 22 February 1992.

¹³³ *Agreement [between Australia, New Zealand and United Kingdom of Great Britain and Ireland] Relating to Nauru*, opened for signature 2 July 1919, [1920] ATS 16 (entered into force 4 August 1920).

¹³⁴ *Proposed Trusteeship Agreement for the Mandated Territory of Nauru*, GA Res 140(II), UN GAOR, 2nd sess, 104th plen mtg, Agenda Item 25, Supp No 10, UN Doc A/RES/140(II) (1 November 1947). See also *Mandate*, A/402/Rev.1.

¹³⁵ *Phosphate Lands (Nauru v Australia) (Preliminary Objections)* [1992] ICJ Rep 240, 263. On the Commissioners, see Maslyn Williams and Barrie Macdonald, *The Phosphateers: A History of the British Phosphate Commissioners and the Christmas Island Phosphate Commission* (Melbourne University Press, 1985). See also Ellen M Fitzgerald, 'Nauru v Australia: A Sacred Trust Betrayed?' (1990) 6 *Connecticut Journal of International Law* 209; Christopher Weeramantry, *Nauru: Environmental Damage under International Trusteeship* (Oxford University Press, 1992); Anthony Anghie, "'The Heart of My Home': Colonialism, Environmental Damage, and the Nauru Case' (1993) 34 *Harvard International Law Journal* 445, 461.

¹³⁶ 'Nauru: Application Instituting Proceedings', *Phosphate Lands (Nauru v Australia)*, International Court of Justice, General List No 80, 19 May 1989, 12–14.

¹³⁷ 'Preliminary Objections of the Government of Australia', *Phosphate Lands (Nauru v Australia)* [1990] ICJ Pleadings 1. Both parties agreed that neither side would nominate a judge ad hoc. Australian nationals were retained as counsel for both Australia and Nauru.

substance.¹³⁸ The first concerned the earlier decision of the ICJ in the *Monetary Gold* case,¹³⁹ in which the Court found that, as it could not determine a particular issue without first determining the legal rights and obligations of a party not before it, the matter could not be heard. To do so would be to violate the 'well-established principle of international law embodied in the Court's *Statute*, namely, that the Court can only exercise jurisdiction over a State with its consent'.¹⁴⁰ Here, Australia argued that the Court could not determine Australia's liability vis-a-vis Nauru without also determining the liability of its co-administrators, New Zealand and the United Kingdom, who were not before the Court. But the Court gave a narrow interpretation to its earlier ruling, holding by a margin of 9 to 4 that unlike in the *Monetary Gold* case, the liability of New Zealand and the United Kingdom did not form a question antecedent to Australia's alleged breach of the *Trusteeship Agreement*,¹⁴¹ leaving it unencumbered to decide the issue on the merits.

A second objection concerned Nauru's claim to a share in the overseas assets of the Commissioners, some of which vested in Australia on dissolution of the Trusteeship.¹⁴² Australia argued that, as this head of claim was not included in its original application, it was untimely and thus inadmissible. The Court unanimously found for Australia, observing that these additional matters constituted an entirely new claim which, if heard, would transform the subject of the dispute originally submitted to the Court.¹⁴³ But this was not sufficient to knock Nauru's case out in its entirety and the bulk of its claims remained on foot. Moreover, the decision of the Court had exposed a certain sympathy towards Nauru's argument. On this basis, Australia decided to settle the matter, with a Prime Ministerial visit to Nauru as part of the South Pacific Forum serving as the

¹³⁸ See *ibid* 3. In essence, the objections were as follows:

- (i) any dispute between Nauru and Australia arose out of the UN trusteeship system and was therefore subject to the exclusive jurisdiction of the General Assembly and Trusteeship Council — thus, it fell within Australia's optional clause reservation regarding disputes to which an alternative form of resolution had been agreed as between the parties;
- (ii) Nauru had waived all claims for the rehabilitation of the phosphate lands prior to independence;
- (iii) termination of the trusteeship by the UN precluded allegations of breaches of the Trusteeship Agreement from being examined by the Court; and
- (iv) the bringing of Nauru's claim had been subjected to undue delay, so as to render it inadmissible.

¹³⁹ *Monetary Gold Removed from Rome in 1943 (Italy v France, United Kingdom of Great Britain and Northern Ireland and United States of America) (Preliminary Question)* [1954] ICJ Rep 19 ('*Monetary Gold*').

¹⁴⁰ *Ibid* 32.

¹⁴¹ *Phosphate Lands (Nauru v Australia) (Preliminary Objections)* [1992] ICJ Rep 240, 259–62. See also Department of Foreign Affairs and Trade, *Trusteeship Agreement — Nauru* (28 July 1946) <<http://www.dfat.gov.au/publications/historical/volume-10/historical-document-10-39.html>>.

¹⁴² See *Agreement between the Government of Australia, the Government of New Zealand and the Government of the United Kingdom of Great Britain and Northern Ireland to Terminate the Nauru Island Agreement 1919*, 1487 UNTS 53 (signed and entered into force 9 February 1987) art 1.

¹⁴³ *Phosphate Lands (Nauru v Australia) (Preliminary Objections)* [1992] ICJ Rep 240, 264.

occasion to do so.¹⁴⁴ New Zealand and the United Kingdom subsequently contributed to the final settlement amount.¹⁴⁵

The interest of Portugal as claimant in the *East Timor* case was symbolic rather than pecuniary, but it was no less real. The case concerned Australia's role in the occupation of East Timor by Indonesia in 1975 and its subsequent purported annexation. Specifically, under the terms of Portugal's application to the Court, Australia had 'failed to observe ... the obligation to respect the duties and powers of [Portugal as] the administering Power [of East Timor] [and] the right of the people of East Timor to self-determination'¹⁴⁶ in concluding with Indonesia the *Timor Gap Treaty*¹⁴⁷ relating the joint exploitation of petroleum resources in the Timor Sea. In reality the action was motivated by Portugal's desire to advance its negotiations with Indonesia regarding East Timor under the auspices of the UN Secretary-General, an attitude redolent of Australia's own approach vis-a-vis France in the *Nuclear Tests* cases.¹⁴⁸ Indonesia, however, had not made an optional clause declaration, prompting Portugal to fix on Australia as a proxy respondent.

For Australia, it was important that the matter be disposed of as soon as possible to avoid unsettling Australian hydrocarbon licenses in the Timor Sea. For this reason, the decision was made to take Australia's preliminary objections regarding the jurisdiction of the Court with the merits.¹⁴⁹ Sir Ninian Stephen was appointed Judge ad hoc. Again, Australia's primary objection was on the basis of the *Monetary Gold* case, a strategy rendered risky by the fact that the decision in *Phosphate Lands* was not yet available — thus Australia would be lodging its objections without the Court's most recent views on the subject to hand.¹⁵⁰ In this instance, however, the Court agreed with Australia, finding that in order to

¹⁴⁴ Burmester, above n 34, 24–5. See *Agreement for the Settlement of the Case in the International Court of Justice concerning Certain Phosphate Lands in Nauru*, Australia–Nauru, opened for signature 10 August 1993, 1770 UNTS 379 (entered into force 20 August 1993). A further agreement provided for the implementation of a program of rehabilitation and development: *Rehabilitation and Development Cooperation Agreement between the Government of Australia and the Government of the Republic of Nauru*, 1897 UNTS 265 (signed and entered into force 5 May 1994).

¹⁴⁵ See *Exchange of Letters Constituting an Agreement between the Government of Australia and the Government of the United Kingdom of Great Britain and Northern Ireland relating to Nauru*, 1820 UNTS 5 (signed and entered into force 24 March 1994); *Exchange of Letters Constituting an Agreement between the Government of Australia and the Government of New Zealand relating to Nauru*, 1820 UNTS 13 (signed and entered into force 23 May 1994).

¹⁴⁶ 'Portugal: Application Instituting Proceedings', *East Timor (Portugal v Australia)*, International Court of Justice, General List No 84, 22 February 1992, 3.

¹⁴⁷ *Treaty on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia*, Australia–Indonesia, opened for signature 11 December 1989, 1654 UNTS 105 (entered into force 9 February 1991) ('*Timor Gap Treaty*'). With the withdrawal of Indonesian occupation and the establishment of East Timor as a state, the *Timor Gap Treaty* has been replaced by the *Timor Sea Treaty between the Government of East Timor and the Government of Australia*, opened for signature 20 May 2002, 2258 UNTS 3 (entered into force 2 April 2003).

¹⁴⁸ Burmester, above n 34, 24.

¹⁴⁹ *Agreement for the Settlement of the Case in the International Court of Justice concerning Certain Phosphate Lands in Nauru*, Australia–Nauru, opened for signature 10 August 1993, 1770 UNTS 379 (entered into force 20 August 1993).

¹⁵⁰ Burmester, above n 34, 25.

determine Australia's liability, it would need to rule on the lawfulness of the occupation by Indonesia, a non-party to the dispute.¹⁵¹

I turn now to Australia's experience as claimant. Australia has appeared before the ICJ twice in this capacity: first, in the *Nuclear Tests* cases, decided in 1974; and second in the case concerning *Whaling in the Antarctic*,¹⁵² presently before the Court. The former — brought in conjunction with another, virtually identical, set of proceedings initiated by New Zealand — ended '[n]ot with a bang but a whimper'.¹⁵³ Considering that the case involved nuclear weapons, that may be no bad thing. The case concerned the French regime of atmospheric nuclear testing in the South Pacific between 1966 and 1972. Justifiably concerned by the possibility of radioactive fallout, Australia and New Zealand¹⁵⁴ launched actions before the Court on the basis of France's optional clause declaration in 1973.¹⁵⁵ In essence, the two states argued that fallout from the tests that drifted into their airspace violated their sovereignty and, further, asserted that France's exclusion of aircraft and shipping from the testing zones violated the freedom of the seas. Moreover, whilst the matter was being heard, the claimants claimed interim relief in the form of an injunction to prohibit further testing until a final decision on the merits was rendered.

In so far as the hearing of the case was concerned, we have the benefit of the recollections of Chief Justice Sir Garfield Barwick, who was appointed Judge ad hoc by the Whitlam Government. This appointment was accepted by New Zealand, notwithstanding an early preference for Philip C Jessup, a former judge of the Court.¹⁵⁶ Aside from remarks as to the composition of the Court — Barwick seems to have considered Eduardo Jiménez de Aréchaga of Uruguay to be 'the best equipped both intellectually and professionally'¹⁵⁷ — the principal figure in Barwick's recounting of events is the then-Attorney-General Lionel Murphy, whom Barwick vehemently disliked and who appeared as counsel for Australia.¹⁵⁸ Notwithstanding the fact that, as Barwick put it, '[t]he

¹⁵¹ *East Timor (Portugal v Australia) (Judgment)* [1995] ICJ Rep 90, 102.

¹⁵² 'Australia: Application Instituting Proceedings', *Whaling in the Antarctic (Australia v Japan)*, International Court of Justice, General List No 148, 31 May 2010.

¹⁵³ T S Eliot, 'The Hollow Men' in *Poems: 1909–1925* (Faber & Faber, 1932) 123, 128.

¹⁵⁴ For the wider history of New Zealand's involvement with the case, as well as a discussion of its longstanding antipathy to all forms of nuclear activity, see Malcolm Templeton, *Standing Upright Here: New Zealand in the Nuclear Age, 1945–1990* (Victoria University Press, 2006) chs 4–6.

¹⁵⁵ A further potential basis of jurisdiction was art 17 of the *General Act for the Pacific Settlement of International Disputes*, opened for signature 26 September 1928, 93 LNTS 344 (entered into force 16 August 1929). This was revised during Evatt's tenure as President of the General Assembly: *Revised General Act for the Pacific Settlement of International Disputes*, opened for signature 28 April 1949, 71 UNTS 102 (entered into force 20 September 1950). This was brought to the attention of Australia via an advice by D P O'Connell in 1972, who was retained as counsel for Australia along with Elihu Lauterpacht and Roberto Ago: Templeton, above n 154, 201–2.

¹⁵⁶ Templeton, above n 154, 210; Kenneth Keith, Personal Recollection (19 February 2013), on file with author.

¹⁵⁷ Barwick, above n 43, 255.

¹⁵⁸ France refused to participate in the proceedings and did not appear, but ensured that its arguments were before the Court through the agency of Judge André Gros, its representative on the Bench.

Australian case really rested in trespass',¹⁵⁹ in his view Murphy's argument 'put some ground which ... was unsustainable, emotional and ideological rather than legal'.¹⁶⁰ Moreover, Murphy appears to have insulted the Court by not adhering to its dress code. The custom of the Court was (and still is) that an advocate appearing before it should dress as would be required by the highest court of his or her own country, but Murphy (unlike the rest of the Australian delegation) did not wear a wig. When asked about it by Barwick, Murphy claimed that he had received the permission of the President of the Court, Manfred Lachs of Poland, to appear in a state of undress. Considering that, according to Barwick, Lachs had already berated Barwick over the episode, this seems unlikely.¹⁶¹

Barwick then turns to the Court's internal deliberations, in particular the circumstances leading up to the granting of interim measures in the claimants's favour in 1973.¹⁶² After the decision to award an injunction against France had been taken, but before the order was written and published, he flew to London to sit in the Privy Council. When he returned for the reading of the order, he found the Court in uproar. Whitlam, in the course of an informal address at the Law Institute of Victoria's Annual Dinner on 21 June 1973, had declared that Australia had won its application for interim measures and nominated almost exactly the margin within the Court (8 votes to 6). These remarks later turned up in *The Times* and elsewhere,¹⁶³ causing Barwick considerable embarrassment: all eyes within the Court — and particularly those of Judge Gros — focused on him as the source of Whitlam's intelligence. Barwick recalls that '[Whitlam] well knew of course that the judgment had not been published. A moment's consideration would have indicated the peril in which he placed me in making such a premature and unwarranted public statement' and further labels the incident 'egotistical exhibition of a very poor kind'.¹⁶⁴ He further denied to the Court — and reiterated this denial in his memoirs¹⁶⁵ — that he was the source of

¹⁵⁹ Barwick, above n 43, 256. Cf Templeton, above n 154, 207 (referring to New Zealand legal advice that under international law, such a domestic analogy was 'a gossamer thread').

¹⁶⁰ Barwick, above n 43, 256.

¹⁶¹ Ibid 255–6.

¹⁶² *Nuclear Tests (Australia v France) (Request for the Indication of Interim Measures of Protection)* [1973] ICJ Rep 99; *Nuclear Tests (New Zealand v France) (Request for the Indication of Interim Measures of Protection)* [1973] ICJ Rep 135.

¹⁶³ Christopher Sweeney, 'Scientists Protest at Pacific Atom Tests' *The Times* (London), 22 June 1973, 6. See also 'Correspondence', *Nuclear Tests (Australia v France; New Zealand v France)* [1973] ICJ Pleadings 396, 386–95 (the Court's own consolidated report on premature disclosures in the *Nuclear Tests* case).

¹⁶⁴ Barwick, above n 43, 256.

¹⁶⁵ Ibid. Whitlam, in response to a Parliamentary question, also denied Barwick's involvement: Commonwealth, *Parliamentary Debates*, House of Representatives, 12 September 1973, 1 (Gough Whitlam):

I did not become aware of the Court's judgment before it was delivered. I regret reports of a passing remark I made as a lawyer, among lawyers, at a legal dinner in speculating, as lawyers do, on the possible close outcome of this case. One television commentator even said that there could be no doubt that I had got information from Australia's representative on the Court, as he described him — the Chief Justice of Australia. I had not received any information from the Chief Justice directly or indirectly as to the result of the voting by the Court. In fact, I had had no communication with the Chief Justice between the time that I asked him whether he would accept nomination as judge ad hoc and some days after the publication of the Court's judgment when he wrote to me personally. I might add that the television station has apologised to the Chief Justice for this newscast.

the information. In fact the source is not generally known, but I can say categorically that it was not Barwick. Whitlam for his part maintained in a letter to the Court of 27 June 1973 that his remarks were 'purely speculative';¹⁶⁶ it is, however, one thing to speculate on the outcome of a case and quite another to intuit the result of a split vote.

But despite this initial victory, final satisfaction for Australia and New Zealand did not materialise. Following the close of three months of hearings in 1974, the French President, Valéry Giscard d'Estaing, gave a press conference in which, in the course of responding to a journalist's question, he stated that France was abandoning its program of atmospheric nuclear testing.¹⁶⁷ This admission was interpreted by a majority of the Court as rendering the case before it 'moot' and seized upon as a means of avoiding answering the question put to it on the legality of nuclear testing in general.¹⁶⁸ As the majority put it, '[t]he object of the claim having clearly disappeared, there is nothing on which to give judgment'.¹⁶⁹ Barwick reacted with outrage, condemning the majority's view as 'unjudicial'¹⁷⁰ and recording his views in dissent as follows:

This, in my opinion, is an unjustifiable course, uncharacteristic of a court of justice. It is a procedure which in my opinion is unjust, failing to fulfil an essential obligation of the Court's judicial process. As a judge I can have no part in it, and for that reason, if for no other, I could not join in the Judgment of the Court. However I am also unable to join in that Judgment because I do not accept its reasoning or that the material on which the Court has acted warrants the Court's conclusion.¹⁷¹

Barwick's disquiet appears to have affected other members of the Court, leading to a strong joint dissent by some of its most capable members, Judges Charles Onyeama of Nigeria, Hardy Cross Dillard of the United States, Sir Humphrey Waldock of the United Kingdom and Barwick's favourite judge, Jimenez de Arechaga. It is also striking that all of the common law judges on the Court (with the exception of Judge Nagendra Singh of India) apprehended a serious breach of natural justice. But despite the arguably disappointing legal result, Australia and New Zealand's adventure before the Court secured its

¹⁶⁶ 'Correspondence', *Nuclear Tests (Australia v France)* [1971] ICJ Pleadings 336, 381. See also at 381–2 (the correspondence by Australia's co-agent to the Registrar of the same date, furnishing further explanation).

¹⁶⁷ This was one of the 'consistent public statements' to which the Court referred: see *Nuclear Tests (New Zealand v France) (Judgment)* [1974] ICJ Rep 457, 468.

¹⁶⁸ Ironically, this seems to have been motivated in part by the Court's desire to avoid a repeat of South-West Africa: President Lachs apprehended that a majority of the Court was minded to find in favour of France on quite proper legal grounds, but realised the damage that this would do to the Court's reputation: P H Kooijmans, 'In Memoriam Manfred Lachs' (1993) 6 *Leiden Journal of International Law* i, i–ii.

¹⁶⁹ *Nuclear Tests (Australia v France) (Judgment)* [1974] ICJ Rep 253, 272; *Nuclear Tests (New Zealand v France) (Judgment)* [1974] ICJ Rep 457, 477.

¹⁷⁰ Barwick, above n 43, 257.

¹⁷¹ *Nuclear Tests (Australia v France) (Judgment)* [1974] ICJ Rep 253, 392 (Judge Barwick). Similar remarks were made with respect to the New Zealand judgment: *Nuclear Tests (New Zealand v France) (Judgment)* [1974] ICJ Rep 457, 528 (Judge Barwick).

diplomatic objective: the cessation of French atmospheric nuclear testing.¹⁷² In this sense, it determined that international law could, in the analogy employed most often in relation to the doctrine of promissory estoppel,¹⁷³ be used as a 'sword' as well as a 'shield' in the context of foreign policy.

I turn to Australia's action against Japan in the *Whaling in the Antarctic* case. The case is pending before the Court, with Australia's application having been filed on 31 May 2010 on the foreign policy initiative of Prime Minister Kevin Rudd and Foreign Minister Stephen Smith. Jurisdiction is founded on the terms of Australia and Japan's optional clause declarations.¹⁷⁴ In late 2012, New Zealand applied for permission to intervene under art 63 of the *Statute*.¹⁷⁵ It had previously declined the opportunity to participate as a full applicant in order to ensure that its sitting judge, Kenneth Keith, did not interfere with Australia's capacity to appoint a judge ad hoc. Australia appointed Hilary Charlesworth, Professor of International Law at the Australian National University, to that position. On 6 February 2013, the Court approved both the New Zealand application and Professor Charlesworth's appointment.¹⁷⁶ Beyond this, Japan has not raised any separate challenge to the jurisdiction of the Court, though it may be reserving such arguments to be heard jointly with the merits.

Australia has not been before the Court since judgment was rendered in the *East Timor* case in 1991 and Japan has never appeared before the Court as applicant or respondent, although it has contributed a number of eminent judges to its Bench and has had an elected national on the Court more or less continuously since 1961.¹⁷⁷ This is not the first time that Australia has sued Japan over fisheries: it brought a case before the International Tribunal for the Law of the Sea and arbitration before a panel convened under annex VII of the

¹⁷² This can be contrasted with the results of New Zealand's attempt to reopen the matter: 'Request for an Examination of the Situation in accordance with Paragraph 63 of the Court's Judgment of 20 December 1974', *Nuclear Tests (New Zealand v France)* (Order of 22 September 1995) ICJ Rep 288.

¹⁷³ *Walton Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, 400 (Mason CJ and Wilson J).

¹⁷⁴ 'Australia: Application Instituting Proceedings', *Whaling in the Antarctic (Australia v Japan)*, International Court of Justice, General List No 148, 31 May 2010, 4 [4].

¹⁷⁵ 'Declaration of Intervention Pursuant to Article 63 of the *Statute* of the Court by the Government of New Zealand', *Whaling in the Antarctic (Australia v Japan)*, International Court of Justice, General List No 148, 20 November 2012.

¹⁷⁶ 'Declaration of Intervention of New Zealand: Order', *Whaling in the Antarctic (Australia v Japan)* International Court of Justice, General List No 148, 6 February 2013, 8.

¹⁷⁷ Judge Owada was first elected to the Court in 2003 and was President for its 2009–12 term. Other Japanese judges on the Court since 1945 include Shigeru Oda (1976–2003; Vice President 1991–94) and Kotaro Tanaka (1961–70). It also contributed several judges to the Bench of the Permanent Court, including Mineichirō Adachi (1930–34; President 1931–33), Yorozu Oda (1921–30) and Harukazu Nagaoka (1935–42). On some of these figures and their contribution to international law, see Kinji Akashi, 'Japanese Predecessors of Judge Oda in the World Courts: Works and Method' in Nisuke Ando, Edward McWhinney and Rüdiger Wolfrum (eds), *Liber Amicorum Judge Shigeru Oda* (Kluwer Law International, 2002) vol 1, 9; Michael Reisman, 'Judge Shigeru Oda: Reflections on the Formation of a Judge' in Nisuke Ando, Edward McWhinney and Rüdiger Wolfrum (eds), *Liber Amicorum Judge Shigeru Oda* (Kluwer Law International, 2002) vol 1, 570.

Convention on the Law of the Sea in the *Southern Bluefin Tuna* cases in 1999 and 2000,¹⁷⁸ although this campaign ultimately failed for procedural reasons.¹⁷⁹

Japan is one of the few states currently engaged in a substantial whaling program, despite being a member of the 1946 *International Convention for the Regulation of Whaling* ('Whaling Convention').¹⁸⁰ The *Whaling Convention* establishes an international organisation, the International Whaling Commission ('IWC'), which plays the role of an international regulator of whaling and whaling practices. In 1986, the IWC adopted an almost total moratorium on commercial whaling, now contained in para 10(e) of the *Whaling Convention's* Schedule. A further addition is to be found in paras 7(a) and (b) of the Schedule, which create an Indian Ocean Sanctuary and Southern Ocean Sanctuary in which all whaling — even the minimal amount allowed under the moratorium — is prohibited. Japan initially objected to these measures — along with Norway, Peru and the Soviet Union — but then dropped its reservations in order to pursue a program of 'scientific' whaling, putatively in accordance with art VIII(1) of the *Whaling Convention*.¹⁸¹ Its fleets have returned annually to the waters surrounding the Antarctic in order to conduct research operations, which require a large number of whales to be taken. Resolutions of the IWC urging Japan to revise its research program to include non-lethal methods of research have gone

¹⁷⁸ *Southern Bluefin Tuna (New Zealand v Japan; Australia v Japan) (Provisional Measures)* (1999) 117 ILR 148, 148–9; *Southern Bluefin Tuna (Australia and New Zealand v Japan)* (2000) 119 ILR 508 (Arbitration Tribunal). See also *Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 397 (entered into force 16 November 1994) annex VII ('Arbitration').

¹⁷⁹ See Alan Boyle, 'The Southern Bluefin Tuna Arbitration' (2001) 50 *International and Comparative Law Quarterly* 447, 448; Stephen M Schwebel, 'The Southern Bluefin Tuna Case' in Nisuke Ando, Edward McWhinney and Rüdiger Wolfrum (eds), *Liber Amicorum Judge Shigeru Oda* (Kluwer Law International, 2002) vol 1, 743, 747; Chusei Yamada, 'Priority Application of Successive Treaties relating to the Same Subject Matter: The Southern Bluefin Tuna Case' in Nisuke Ando, Edward McWhinney and Rüdiger Wolfrum (eds), *Liber Amicorum Judge Shigeru Oda* (Kluwer Law International, 2002) vol 1, 763, 766–7; David A Colson and Peggy Hoyle, 'Satisfying the Procedural Prerequisites to the Compulsory Dispute Settlement Mechanisms of the 1982 *Law of the Sea Convention*: Did the Southern Bluefin Tuna Tribunal Get it Right?' (2003) 34 *Ocean Development and International Law* 59.

¹⁸⁰ *International Convention for the Regulation of Whaling*, opened for signature 2 December 1946, 161 UNTS 72 (entered into force 10 November 1948) 74 ('*Whaling Convention*'), as amended by *Protocol to the International Convention for the Regulation of Whaling*, opened for signature 19 November 1956, 338 UNTS 336 (entered into force 4 May 1959). The other whaling nations are Norway (which objected to the whaling moratorium) and Iceland (which left the *Convention* in 1994 but returned in 2002 with a controversial reservation to the whaling moratorium): International Whaling Commission, *Iceland* (2013) <<http://iwc.int/iceland>>; International Whaling Commission, *Commercial Whaling* (2013) <<http://iwc.int/commercial>>. See also Peter G G Davies, 'Legality of Norwegian Commercial Whaling under the *Whaling Convention* and Its Compatibility with European Community Law' (1994) 43 *International and Comparative Law Quarterly* 270.

¹⁸¹ *Whaling Convention* art VIII(1). The scientific exception provides that

any Contracting Government may grant to any of its nationals a special permit authorizing that national to kill, take and treat whales for purposes of scientific research ... and the killing, taking and treating of whales in accordance with the provisions of this Article shall be exempt from the operation of this *Convention*.

unanswered.¹⁸² The current program, which goes by the name 'JARPA II', has been ongoing since 2005 and includes amongst its objectives: the monitoring of the Antarctic ecosystem; modelling competition amongst whale species and defining future management objectives; the elucidation of temporal and spatial changes in stock structure; and improving the management procedure for Antarctic minke whale stocks. The program calls for 50 humpback whales, 50 fin whales and between 765 and 935 Antarctic minke whales to be taken annually.¹⁸³

Australia's constant and strident opposition to Japanese whaling has been a feature of its foreign policy for decades and is laid out in detail in its 2010 application to the Court.¹⁸⁴ The application is thus an extension of Australia's longstanding position. Australia asserts that Japan has breached its obligations under the whaling moratorium and its additional obligation to act in good faith and respect the Southern Ocean Sanctuary.¹⁸⁵ Furthermore, Australia has asserted¹⁸⁶ that Japan has breached the *Convention on International Trade in Endangered Species of Wild Fauna and Flora*¹⁸⁷ and the *Convention on Biological Diversity*.¹⁸⁸ Insofar as remedies are concerned, Australia has asked that the Court order Japan to:

- (i) cease implementation of JARPA II;
- (ii) revoke any authorisations, permits or licences allowing the activities which are the subject of the application to be undertaken; and
- (iii) provide assurances and guarantees that it will not take any further action under JARPA II or any similar program until such a program has been brought into conformity with its obligations under international law.¹⁸⁹

VII PAST, PRESENT AND FUTURE

The Argentine author Jorge Luis Borges, in his short story *The Garden of Forking Paths*,¹⁹⁰ conceives of a novel that attempts to describe a world where all possible outcomes of an event occur simultaneously, with each outcome

¹⁸² International Whaling Commission, *Resolution on Southern Hemisphere Minke Whales and Special Permit Whaling*, IWC Res 2001-7, 53rd annual mtg, IWC Doc IWC/53/30 (2001) 7; International Whaling Commission, *The Berlin Initiative on Strengthening the Conservation Agenda of the International Whaling Commission*, IWC Res 2003-1, 55th annual mtg (2003); International Whaling Commission, *Resolution on JARPA II*, IWC Res 2005-1, 57th annual mtg, IWC Doc 2005 IWC 57 (4 July 2005) 1; International Whaling Commission, *Resolution on JARPA*, IWC Res 2007-1 59th annual mtg, IWC Doc IWC59 (4 June 2007).

¹⁸³ International Whaling Commission, *Scientific Permit Whaling: Special Permits to Kill, Take and Treat Whales for Scientific Research* <<http://iwc.int/permits.htm#recent>>.

¹⁸⁴ 'Australia: Application Instituting Proceedings', *Whaling in the Antarctic (Australia v Japan)*, International Court of Justice, General List No 148, 31 May 2010, 10 [17].

¹⁸⁵ *Ibid* 16 [36].

¹⁸⁶ *Ibid* 17–18 [38].

¹⁸⁷ *Convention on International Trade in Endangered Species of Wild Fauna and Flora*, opened for signature 3 March 1973, 993 UNTS 253 (entered into force 1 July 1975).

¹⁸⁸ *Convention on Biological Diversity*, opened for signature 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993).

¹⁸⁹ 'Australia: Application Instituting Proceedings', *Whaling in the Antarctic (Australia v Japan)*, International Court of Justice, General List No 148, 31 May 2010, 18 [41].

¹⁹⁰ Jorge Luis Borges, *Labyrinths: Selected Stories & Other Writings* (New Directions, 1962) 19.

leading itself to a disparate splintering of possibilities. These paths may, in turn, intersect with each other, leading to the outcome of the same event by different means. For example, at the conclusion of Borges's story, the learned sinologist Stephen Albert explains to the protagonist, Yu Tsun, that in one timeline Tsun comes to his house as a friend and in another as an enemy: Tsun responds by declaring his friendship and then shooting Albert in cold blood. Borges's thought experiment urges us to be aware of all possible choices we might make and their motivations.

The realities of foreign policy and international law may be thought to produce the same outcome as *The Garden of Forking Paths*: one timeline in which Australia approaches the ICJ as a friend, supportive of the effective operation of a rules-based system of international relations, and another, where the same approach is made in order to promote an agenda of national self-interest. But we have only one reality: since its inception Australia has both supported the Court and simultaneously relied upon it as a tool to defend or advance its foreign policy. Although it does not have the profile of some of the Court's more vigorous clients (such as Nicaragua), this approach has been more or less consistent and has given Australia a reputation for fairness and equanimity in international relations — at least now that the undeserved bruises from *South-West Africa* appear to have faded.

But at another level Australia's relationship with the Court has been built on the personal interactions of a series of remarkable individuals: H V Evatt, Paul Hasluck, Percy Spender and Kenneth Bailey. With other notable figures of Australian public life in the postwar era, they comprehended the value of the Court and — perhaps more importantly — its potential, such that the dream of a functioning system of international justice might be enacted with open eyes.