Joint Standing Committee on Treaties 20th Anniversary Seminar:

'In our best interest: treaty scrutiny in a connected world'

18 March 2016

Beyond scrutiny? - New developments in customary international law and treaty interpretation.

Bill Campbell QC[1]

Treaties are but one of the sources of international law referred to in Article 38 (1) of the Statute of the International Court of Justice, albeit a very important source. The other sources are customary international law, general principles of law recognised by civilised nations and, the subsidiary means of judicial decisions and the teachings of highly qualified public international lawyers.[2]

2. Today I will mention two matters relating to customary international law and another relating to treaties. All of these matters concern the development of international law and its application to Australia in ways that in the final analysis essentially are beyond Australian control. In part, this lack of control is because the matters involve the practice of States generally and not of Australia in particular. These factors may render consideration by the Joint Standing Committee difficult. In addressing these three matters I will mention the current relevant work of the International Law Commission (ILC), the United Nations body charged with the progressive development of international law[3].

3. The first matter is the continuing importance of the timely development of customary international law to meet certain of the challenges of today's world. The second concerns the negotiation of a treaty in an area already the subject of well-developed and/or developing customary international law. The third is the use of agreement and State practice subsequent to the adoption of a treaty in the interpretation of obligations under

[1] General Counsel (International Law), Office of International Law, Attorney-General's Department. The views expressed in this paper are my own and do not necessarily represent those of the Australian Government.

[2] These three sources have been considered by the Full Federal Court in *Ure v. Commonwealth* in a decision handed down in January of this year. The decision of the Full Federal Court is the subject of a special leave application to the High Court. The case concerns a claim to private rights to areas of land on Elizabeth and Middleton Reefs adjacent to New South Wales.

[3] Australia, together with New Zealand and Canada, has nominated Professor Chester Brown of the University of Sydney for the elections to the ILC that are to take place later this year.

that treaty - that being a matter referred to in Article 31 (3) of the Vienna Convention on the Law of Treaties.

4. It might be useful by way of introduction to give a quick précis of the constituent elements of customary international law. It is described in Article 38 of the Statute of the International Court of Justice in a somewhat opaque manner as "international custom, as evidence of general practice accepted as law". Classically it has two elements and these were identified by the Full Federal Court in its recent decision in the *Ure Case*[4] as involving twin inquiries – the first "into the existence of an 'a general practice' and [secondly] whether the practice reflects obedience to a perceived rule of law… [the latter] referred to as *opinio juris*". Judge Crawford of the ICJ has put those questions more simply: "is there a general practice" and "is it accepted as international law?" though he concludes: "The problem with establishing customary international law is that it seems impossible." [5]

5. To avoid ending this précis on that somewhat pessimistic note let me give a couple of examples of rules of longstanding customary international law. The first is *pacta sunt servanda* - that is, the principle that treaties are binding and are to be implemented in good faith - this principle now being reflected in Article 26 of the Vienna Convention. Also, much of the law of the sea as reflected in the 1982 UN Convention on the Law of the Sea is customary international law - for example, the right of innocent passage in the territorial sea and freedom of the high seas. While the content of many treaties is reflective of customary international law as these two examples demonstrate, treaties can themselves amount to practice contributing to the development of rules of customary international law – and rules of customary international law which are in part founded on treaty practice will bind States irrespective of whether they are parties to the relevant treaties.

6. Moving to the first of the two points I would make about customary international law - it is that customary international law is capable of developing reasonably quickly to respond to certain new challenges on the international plane, in circumstances where it may be unlikely that a treaty could be developed in the time necessary to meet those challenges.

[4] At paragraph 29
[5] Crawford, *Brownlie's Principles of Public International Law*, (8th Ed. OUP 2012) p 23; *Chance, Order, Change: The Course of International Law*, (Martinus Nijhoff 2013) p to 49

Let me give a recent example. It concerns the legal basis for responding to the threat posed by well organised non-state actors operating out of one country and carrying out armed attacks within the borders of another country. Ironically, it was just that circumstance that led to the seminal exchange of correspondence on the limits of self-defence between the US (Secretary of State Webster) and the UK (Lord Ashburton) following *The Caroline* incident in 1837. However, the law of self-defence as it had developed subsequently focussed on attacks, or an imminent threat of attack by one State upon another State. The position of Australia and that of a number of other countries is that the customary international law of self-defence has developed so as to enable action in self-defence to be taken not only against States but also against non-state actors provided certain criteria are met. Indeed, it is on this basis that Australia and a number other countries are conducting air operations against ISIS (Daesh) in Syria in the collective self-defence of Iraq.[6]

7. In addition to the standard criteria underpinning an action in collective self-defence[7], self-defence against non-state actors requires that the State in which they are based is either unable or unwilling to control the actions of the relevant non-state actors located within its borders.[8] In terms of State practice, application of that criterion is in part reflected in the notifications to the UN Security Council by a number of countries (including Australia) under Article 51 of the UN Charter in relation to their actions of collective self-defence of Iraq against ISIS (Daesh) in Syria.[9] No doubt this development in the customary international law of self-defence may not be uniformly accepted - least of all by Syria if its letters to the UN Security Council in response to the notifications I just mentioned is anything to go by[10] – or for that matter, if the academic debate is anything to go by.[11]

[6] This position of Australia is reflected in an article by the Attorney-General Senator the Hon George Brandis QC - 'It's a war of self-defence', *The Australian* 10 September 2015 p 12.

[7] An actual or imminent armed attack, no effective means to address the attack other than the use of force and a request for assistance from the state under threat. In addition, the right of self-defence once established is not unconstrained. The force used must be necessary to address the threat and be proportionate to it.

[8] An earlier enunciation of this criterion is to be found in the Chatham House *Principles of International Law on the Use of Force by States in Self-Defence*, Principle 6 (October 2005, ILP WP 05/01).

[9] See for example, letters to the President of the Security Council from Australia (9 September 2015, UN Doc. S/2015/693); the United States of America (23 September 2014, UN Doc. S/2014/695); and Canada (31 March 2015, UN Doc. S/2015/221).

[10] Letter dated 21 September 2015 from the Permanent Representative of Syria to the UN Secretary-General and the President of the Security Council.

8. Here it may be relevant to mention the distinction in international law between *lex lata* (that is, the law as it is) and *de lege ferenda* (that is, the law as it should be if it were to accord with good policy). States may differ genuinely as to whether a particular principle – for example, the unable or unwilling principle - has moved from being *de lege ferenda* to *lex lata* and perhaps this is in part reflective of the "impossibility" that Professor Crawford was referring to.

9. Be that as it may, there was an undoubted need for the development of the law in this area. The development of a treaty in a timely manner was not a realistic proposition. One only has to recall the stalled negotiations on the Comprehensive Convention on International Terrorism to understand why the timely negotiation and entry into force of a treaty regime dealing with self-defence against non-state actors was not a viable option. Nor, for obvious reasons, could it be assumed that there will be a UN Security Council Resolution authorising such action in many circumstances.

10. Other areas in which there either has been, or may be timely developments in customary international law include countering cyber-threats where the developing law seems to be going down the path of adopting principles analogous to the law of armed conflict; a second would be the law relating to the hot pursuit of vessels which is sorely in need of change to take account of developments in technology; and a third would be humanitarian intervention. Of course, there are some areas of international law which are more suited to development through custom than others. For example, the burgeoning area of the law relating to international trade seems more suited to development through bilateral and multilateral treaties than by custom.

11. The International Law Commission currently is considering the topic of the formation of customary international law and the rapporteur on that topic is Sir Michael Wood, a former Foreign and Commonwealth Office Legal Adviser. I would commend the work of the ILC on the topic.

[11] See Daniel Bethlehem QC, *Self-Defense Against an Imminent or Actual Armed Attack by Non-State Actors*, 106 AJIL769 (2012) and responses to that article by Akande, Lieflander, Tladi and Hamoud and a further brief response by Daniel Bethlehem QC in 107 AJIL (2013) 563-584.

13. Developments in customary international law can of course be overridden by a treaty at least as between parties to the treaty - unless the relevant rule of customary international law being overridden is a so-called peremptory rule of international law (or *jus cogens*) such as the prohibition on torture or the prohibition on genocide. This leads on to the second matter or, more accurately thought I wish to raise - it is, that the international community should exercise a degree of caution in attempting the negotiation of a comprehensive multilateral treaty on a topic where that topic already is the subject of well-developed rules of customary international law or where the development of those rules is proceeding in an orderly way.

14. In making this point, I have one particular and very important area of international law in mind. That is, the body of international law which determines the circumstances in which a State will be held responsible for its internationally wrongful acts – or, put more shortly, the rules relating to state responsibility. Pursuant to its charter, the International Law Commission adopted its comprehensive Articles on the Responsibility of the States for Internationally Wrongful Acts on the 31 May 2001. These draft articles were annexed to UN General Assembly Resolution 56/83 on 12 December of the same year and presented to States as being "without prejudice to the question of their future adoption." The Articles have been referred to and relied upon on innumerable occasions by international courts and tribunals as well as by Governments and the UN has catalogued these instances.[12] Individual articles are widely regarded as either reflective of customary international law or as likely to develop into customary international law.

15. Notwithstanding this, a live debate is in play as to whether a diplomatic conference should be convened to examine the draft articles with a view to concluding a convention on the topic. The matter is coming to a head with the UN General Assembly having decided to include the matter of state responsibility on its agenda for its meeting later this year with a view to taking a decision on "the question of a convention on responsibility of States for internationally wrongful acts or other appropriate action on the basis of the articles [on

[12] The UN has collected information, though not comprehensive, on references to the ILC Articles on State Responsibility in case law. For example, between 1 February 2010 and 31 January 2013 they collected references to 56 cases referring to the Articles – UN Doc A/68/72.

State responsibility]."[13] The move has its supporters and detractors and was the subject of a lively debate in the margins of the UN 6th (Legal) Committee last year.

16. Personally, I do not favour attempting to translate the ILC Articles on State Responsibility into a treaty. My reasons for this are no better encapsulated than in views expressed by the UK to the UN:

> [T]here is a real risk that in moving towards the adoption of a convention based on the draft articles issues may be reopened. This would result in a series of fruitless debates that may unravel the text of the draft articles and weaken the current consensus. It may well be that the international community is left with nothing… Even were a text to be agreed, it is unlikely that the text would enjoy the wide support currently accorded to the draft articles… If few States were to ratify a convention that instrument would have less legal force than the draft articles as they now stand, and may stifle the development of the law in an area traditionally characterised by State practice and case law. In fact, there is a significant risk that a convention with a small number of participants may have a de-codifying effect [and] may serve to undermine the current status of the draft articles.

17. One of the topics under current consideration by the International Law Commission is that of subsequent agreements and subsequent practice in relation to the interpretation of treaties and that is the third matter to which I will now turn in somewhat shorter measure.

18. I mention subsequent agreements and subsequent practice for three reasons. First, such agreements and practice will almost inevitably arise after the treaty in question has been considered by the Joint Standing Committee and may give rise to an interpretation which was not within the contemplation of the Committee. Secondly, I wanted to draw attention to the work of the International Law Commission on this topic. Finally, if there is time, I wanted to mention two recent instances where the matter of subsequent agreements and practice has arisen in two cases involving the Commonwealth, one international and one domestic.

[13] UNGA Resolution A/RES/68/104

19. On the first point, I note that there are instances where the Joint Standing Committee has considered subsequent agreements between the parties to a treaty which have the effect of altering the treaty. However, such changes normally flow from a formal mechanism recognised in the treaty itself under which the constituent organisation created by the treaty can adopt amendments to the treaty. For example, the Committee has considered amendments to the Schedule of the International Convention on the Regulation of Whaling adopted by a two thirds majority of the members of the International Whaling Commission.[14]

20. I suspect that the Committee is much less likely to consider changes to the interpretation of the treaty resulting from an informal agreement or the subsequent practice of the parties. The most quoted example of interpretation by subsequent practice is that concerning the interpretation of Article 27 (3) of the UN Charter which provides that decisions by the Security Council on non-procedural matters "shall be made by an affirmative vote of nine members including the concurring votes of the permanent members…". The interpretation that has been given to this provision through the practice of the Security Council is that 'if a permanent member wishes to block a decision it is not enough for it to abstain, or even be absent; it must cast a negative vote (known colloquially as "the veto")'.[15] I realise that the practice giving rise to this interpretation arose well before the creation of the Joint Standing Committee. Nevertheless it does illustrate that issues of great importance can be dealt with through subsequent interpretation. It also illustrates that not all States will necessarily be involved as part of the State practice giving rise to the interpretation.

21. In the context of examining the use of subsequent agreement and practice in the interpretation of treaties Aust, in his text on *Modern Treaty Law and Practice*, states that:

> "Foreign ministry legal advisers are familiar with the question: how can we modify the treaty without amending it? Even if the treaty does have a built-in amendment

[14] JSCOT Report 23, August 1999
[15] Aust, Modern Treaty Law and Practice, (3rd Ed. OUP 2013) p215

procedure, the process can be lengthy and uncertain, especially if it is a multilateral treaty and any amendment is subject to ratification."[16]

22. Sometimes a modification can be urgent, and a formal amendment impractical given that urgency. For example, the United Nations Convention on the Law of the Sea originally required a State intending to establish a continental shelf beyond 200 nautical miles to lodge a submission with the Commission on the Limits of the Continental Shelf within 10 years of the entry into force of the Convention for that State.[17] When it became apparent that most States with an extended continental shelf would miss that deadline, the States Parties to the Convention adopted an understanding at one of their annual meetings effectively extending the deadline. I doubt whether this extension was considered by the Joint Standing Committee even though it altered a right of Australia under the Convention. As it turned out, the Australian Government was determined to meet the original deadline given the uncertain legal effect of the understanding adopted by the Meeting of States Parties.

23. If JSCOT were to hold inquiries into treaties to which Australia already is a party – as it did in the case of the Convention on the Rights of the Child – then it would have the opportunity to examine subsequent interpretations of the relevant treaty.

24. For those interested in this issue of subsequent agreement and practice, I would commend again the current work of the International Law Commission which is led by Mr Georg Nolte of Germany. To date, the ILC has provisionally adopted 11 conclusions including on matters such as the definition and identification of subsequent agreement and subsequent practice, the weight it is to be given as a means of interpretation and the relevance of the practice of international organisations in the interpretation of treaties.

25. Finally, let me turn to the two cases mentioned earlier. The first is the *Whaling Case* taken by Australia in the International Court of Justice. In that case Australia relied upon the subsequent practice of the Parties to the International Convention for the Regulation of the Whaling, particularly in the forum of the International Whaling Commission. We argued that that practice confirmed that Article VIII of the Convention concerning whaling for scientific

[16] Aust, p 214.
[17] Annex II, Article 4

purposes – the very Article relied upon by Japan to support its whaling activities - was to be interpreted very much as an exception and only able to be relied upon in very limited circumstances. This argument based on subsequent practice was partially accepted by the Court in its finding that when recommendations of the International Whaling Commission are "adopted by consensus or by a unanimous vote, they may be relevant for the interpretation of the Convention or its Schedule."[18]

26. The second case, *Macoun v. Commissioner for Taxation*, was a case considered by the High Court late last year.[19] The Appellant was a former sanitary engineer with the International Bank for Reconstruction and Development which is part of the World Bank. For the purposes of his employment he was entitled to privileges and immunities under the Convention on the Privileges and Immunities of the Specialized Agencies. The question before the Court was whether the immunities under the Specialized Agencies Convention and under implementing Australian law rendered the pension that the Appellant received from the IBRD Retirement Fund immune from taxation in Australia.

27. The Court held that the income derived from the pension was not immune. In coming to that conclusion the Court applied the principles of interpretation set out in the Vienna Convention on the Law of Treaties, including that relating to subsequent practice. The practice referred to by the Court included decisions of the Administrative Tribunal of the United Nations, decisions of domestic courts in France and the Netherlands, an international arbitration and a statement by the UN Secretary-General. The Court concluded that while the State practice was not consistent 'there is still no generally accepted State practice with regard to the exemption of retirement pensions from taxation'. Accordingly it found that the Specialised Agencies Convention did not require Australia not to tax the Mr Macoun's pension.[20]

[18] *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)* Judgment of 31 March 2014, para 46
[19] (2015) 326 ALR 452
[20] Ibid at 468-9.