

James Crawford and the Australian Government

Bill Campbell

Honorary Professor, Australian National University College of Law. Formerly General Counsel (International Law) and head of the Office of International Law in the federal Attorney-General's Department; Agent and/or counsel for Australia in cases before the International Court of Justice and other international tribunals

Stephanie Ierino

Assistant Secretary, Office of International Law,
Attorney-General's Department

Many recent tributes to James Crawford attest to his consummate skills as a scholar, advocate, law reformer, adviser and judge.¹ He applied these skills to the benefit of Australia as principal external adviser to successive Australian Governments of both political persuasions on matters of international law for the period of 25 years prior to his election to the International Court of Justice (ICJ).

Professor Crawford was Australian to the core and was ready to help his own country at a moment's notice. This article will focus on the cases before international courts and tribunals in which Professor Crawford appeared as counsel on behalf of the Australian Government as well as advice he provided both in the course of those cases and on other matters. To paint the full picture, mention also will be made of a limited number of matters earlier in his career in which he acted against Australia.

His contribution to the practice of international law within the Australian Government was multifarious extending beyond the provision of advice and conduct of cases. Professor Crawford taught many Australian students whilst Whewell Professor of International Law at the University of Cambridge. During that time, he steered many of these Australian scholars to the Office of International Law in the Attorney-General's Department and the Department

1 Simon Chesterman, 'Scholar, advocate, judge: James Crawford 1948–2021', *Lowy Institute*, 3 June 2021; Ken Keith, 'James Crawford AC SC FBA (Adelaide 14 November 1948—The Hague, 31 May 2021)' (2022) 35 *Leiden Journal of International Law* 407–10 1; Margaret Young, 'Judge James Crawford AC SC FBA (1948–2021)' (2021) 22 *Melbourne Journal of International Law* i; Marise Payne and Michaelia Cash 'Australian Government saddened at the passing of James Crawford, Judge of the International Court of Justice' (Media Release, 1 June 2021).

of Foreign Affairs and Trade where they continue to provide advice and other international law services to the Australian Government. He remained a mentor to many of them.

1 Cases

1.1 *Phosphate Lands*

Certain Phosphate Lands in Nauru (Nauru v Australia) ('*Phosphate Lands*'),² brought by Nauru against Australia in 1989 marked the beginning of James Crawford's international practice and his long and distinguished association with the ICJ. Professor Crawford appeared as counsel for Nauru, later reflecting that:

at the ... time, Australia wasn't particularly enthusiastic about my being counsel for Nauru but they were reminded by, amongst others, the Chief Justice of Australia, Sir Anthony Mason, that the cab rank rule in the Australian bar meant that I was entitled to take any brief that came to me and really probably obliged to take it.³

² *Certain Phosphate Lands in Nauru (Nauru v Australia) (Preliminary Objections)* [1992] ICJ Rep 240 ('*Phosphate Lands*').

³ Lesley Dingle and Daniel Bates, 'A Conversation with Emeritus Professor Judge James Richard Crawford—Part 1: Early Life and Career' *The Squire Law Library and Faculty of Law*, (Interview, May 3, 2018) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3287715>. *Phosphate Lands* was not the only matter in which James Crawford acted against or had taken positions on public international law opposed to those of the Australian Government. Together with Monroe Leigh (former US State Department Legal Adviser) and Professor John Norton Moore of the University of Virginia, Professor Crawford gave an opinion on behalf of the Ure-Chan Group in 1996 supporting its ownership of Elizabeth and Middleton reefs adjacent to the east coast of Australia. This was on the basis that Ure-Chan had acquired proprietary rights over the islands as *terra nullius*, essentially by occupation, under either customary international law or as a general principle of law within the meaning of Article 38.1.c of the Statute of the ICJ that Australia was obliged to recognise. Some twenty years later, that asserted ownership of the Ure-Chan Group was rejected by the Full Federal Court in *Ure v Commonwealth of Australia* [2016] 236 FCR 458. Professor Crawford also provided advice to the Government of Norfolk Island in 1999 on the constitutional relationship between Norfolk Island and the Commonwealth of Australia, which was at odds with the view of the Commonwealth: see *Norfolk Island Electoral Matters*, Report of the Joint Standing Committee on the National Capital and External Territories, 26 August 2002, Chapter 2, 7. He also disagreed with the legal justification given by the then Australian Government for its 2003 armed intervention in Iraq. James Crawford *et al*, 'War would be illegal', *The Guardian*, 7 March 2003; James Crawford, *Chance, Order, Change; The Course of International Law* (Martinus Nijhoff, 2013) 132 [210]. His views on that matter were a little more nuanced than some other critiques of the

Professor Crawford's brief to appear in this matter came about following his advice to the Government of Nauru regarding its rehabilitation claim in relation to the phosphate lands that had been exploited by the British Phosphate Commissioners under the trusteeship of Australia, New Zealand and the United Kingdom. He advised Nauru to accede to the optional clause jurisdiction of the Court—which it did, in 1987—⁴ and eventually to bring proceedings against Australia alone, on the basis that there was probably no jurisdiction in relation to New Zealand or the United Kingdom.⁵

Nauru alleged that Australia had breached its trusteeship obligations under the *United Nations Charter* and the *Trusteeship Agreement for Nauru*,⁶ as well as certain general international law obligations related to the principle of self-determination and sovereignty over natural wealth and resources. It was said that Australia had failed to make adequate provision for the rehabilitation of the phosphate lands exploited under its administration and was bound to make restitution or other appropriate reparation to Nauru for the damage suffered as a result.⁷

Australia raised a series of preliminary objections in response to these claims,⁸ including an objection founded in the *Monetary Gold Removed from Rome in 1943 (Italy v France, United Kingdom of Great Britain and Northern Ireland and United States of America)* (*'Monetary Gold'*) principle,⁹ to the effect that the Court could not determine Australia's liability in relation to Nauru without also determining the liability of its co-administrators, New Zealand and the United Kingdom, who were not before the Court. That objection was viewed—by Australia, at least—as having a strong chance of success.¹⁰

Australian position: see, for example, Owen Bowcott, 'Was the War Legal? Leading lawyers give their verdict', *The Guardian*, (online, 2 March 2004) <<https://www.theguardian.com/politics/2004/mar/02/uk.internationaleducationnews>>.

4 *Declaration by Nauru recognizing as compulsory the jurisdiction of the International Court of Justice, in conformity with Article 36, paragraph 2 of the Statute of the Court*, done on 30 December 1987, registered on 29 January 1988, 1491 UNTS 199.

5 Dingle and Bates, (n 3).

6 *Trusteeship Agreement for the Territory of Nauru*, approved by the General Assembly of the United Nations on 1 November 1947, 10 UNTS 3.

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

8 'Preliminary Objections of the Government of Australia', *Phosphate Lands (Nauru v Australia)* (International Court of Justice, December 1990) ICJ Pleadings 1.

9 *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*').

10 Henry Burmester, 'Australia and the International Court of Justice' (1996) 17 *Australian Year Book of International Law* 19, 24.

Professor Crawford's first time on his feet in the ICJ—his first appearance in any court—occurred at the oral hearing on preliminary objections in November 1991. He was responsible for delivering Nauru's submissions in reply to Australia's *Monetary Gold* argument, among others.¹¹

His statement, termed 'brilliant' by counsel for Australia,¹² advocated in clear and effective terms for a narrow interpretation of the indispensable third-party principle and rejected its application to the facts of the Nauru case, submitting that:

The Court is entitled to hear a case otherwise properly brought between two States, unless the legal rights of another State would form the very subject-matter of the decision.

[...]

In the present case, it is not necessary for the Court to determine that any other State is legally responsible, before it is in a position to determine that Australia is legally responsible. It can simply proceed to consider the relevant legal instruments, and the implications of the acts and omissions of Australia, acting through its officials who carried on the administration of Nauru. Nothing more is required.¹³

For the first of many times, the Court agreed with Professor Crawford, rejecting Australia's *Monetary Gold* objection on the basis that the liability of New Zealand and the United Kingdom did not form a question antecedent to the Court's consideration of Nauru's claims against Australia. The Court also rejected the other preliminary objections raised by Australia, except one—which related to an attempt by Nauru to expand the scope of the dispute covered by its application.¹⁴ Consequently, at the conclusion of the preliminary objections phase, the bulk of Nauru's claims remained on foot, and Australia ultimately decided to settle the matter.¹⁵

11 'Verbatim Record' *Case concerning certain Phosphate Lands in Nauru (Nauru v Australia)* (International Court of Justice, CR 91/18, 15 November 1991) 49–79 (Mr Crawford).

12 'Verbatim Record' *Case concerning certain Phosphate Lands in Nauru (Nauru v Australia)*, (International Court of Justice, CR 91/21, 21 November 1991) 21 (Mr Jiménez de Aréchaga).

13 'Verbatim Record' *Case concerning certain Phosphate Lands in Nauru (Nauru v Australia)* (International Court of Justice, CR 91/20, 19 November 1991) 53–7 (Mr Crawford).

14 *Phosphate Lands* (n 2) 267 [70].

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

Professor Crawford later remarked that young international lawyers often asked him how to get a brief to appear before the ICJ. His answer was simple—‘You just have to have done it once before.’¹⁶ That statement was certainly true in Professor Crawford’s case. Not long after his engagement by Nauru, he—with the consent of the Government of Nauru—was briefed as counsel for Australia for the first time in *East Timor (Portugal v Australia)* (*‘East Timor’*), which had just begun.¹⁷

1.2 *East Timor*

In the *East Timor Case* Portugal asked the ICJ to find that in negotiating and concluding the 1989 *Timor Gap Treaty*¹⁸ with Indonesia, Australia had acted unlawfully by: infringing rights of the peoples of the East Timor—now the Democratic Republic of Timor-Leste—to self-determination and permanent sovereignty over its natural resources; infringing the rights of Portugal as the administering power; and contravening UN Security Council resolutions. Australia challenged the jurisdiction of the Court and the admissibility of Portugal’s application. Australia’s principal admissibility objection as described by the Court was that ‘the decision sought from the Court would inevitably require the Court to rule on the lawfulness of the conduct of a third State, namely Indonesia, in the absence of that State’s consent’.¹⁹

The Court accepted Australia’s argument and decided it could not exercise jurisdiction, ‘because in order to decide the claims of Portugal, it would have to rule, as a pre-requisite, on the lawfulness of Indonesia’s conduct in the absence of that State’s consent’.²⁰ This conclusion reflected the submissions on the application of the *Monetary Gold* indispensable third-party principle made by Professor Crawford on behalf of Australia. In a twist of irony, Professor Crawford was obliged to distinguish the circumstances of the *East Timor* case from that aspect of the Court’s decision in the *Nauru* case concerning the non-application the *Monetary Gold* principle, a matter he had successfully argued in that case.

16 Dominique Hogan-Doran, ‘In Conversation with Judge James Crawford, Judge of the International Court of Justice’, (Australian Bar Association Conference, 3 July 2017) (*In Conversation with Judge James Crawford*) <https://austbar.asn.au/uploads/pdfs/conference-papers/In_conversation_with_His_Excellency_Judge_James_Crawford.pdf>.

17 *East Timor (Portugal v Australia)*, (Judgment) [1995] ICJ Rep 90 (*‘East Timor’*).

18 *Treaty between Australia and the Republic of Indonesia on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia* [1991] ATS 9.

19 *East Timor* (n 17) 100 [24].

20 *Ibid* 105 [33].

In *East Timor*, Professor Crawford summarised Australia's arguments on the application of the *Monetary Gold* principle with characteristic simplicity and clarity:

Thus in order to show that Australia's conduct was unlawful, it is necessary to attack the legality of Indonesia's presence, its legal right, power or capacity to represent the territory and in particular to conclude the 1989 Treaty. In particular, in order to decide in favour of Portugal's claims, it is necessary to determine:

- (1) that Indonesia's control and administration of East Timor in 1989 was unlawful; *and*
- (2) that in consequence Indonesia had no right, power or capacity to conclude the 1989 Treaty.

In both respects this directly triggers the *Monetary Gold* principle, the principle of inadmissibility ... That principle applies if, in order to determine whether A's conduct is unlawful against B, it is necessary to make a finding against C.²¹

He subsequently characterised Portugal's response to these arguments, 'How does Portugal escape this straightforward, one is inclined to say, elementary conclusion? The answer—I hope this may not be thought too harsh a criticism—is by a series of evasions, equivocations and subtle distinctions.'²²

Professor Crawford well understood that the case was replete with sensitivities concerning the status of then East Timor and its peoples. In this respect, he made it clear to the Court that Australia agreed 'that the people of East Timor have a right to self-determination'. This acknowledgement was noted by the Court in its closing remark that 'for the two Parties, the Territory of East Timor remains a non-self-governing territory and its people has the right to self-determination'.²³

1.3 *Southern Bluefin Tuna*

Southern Bluefin Tuna (*Thunnus maccoyii*) (SBT) is a valuable, highly migratory species of pelagic fish. It ranges widely across the oceans of the Southern Hemisphere and traverses the Exclusive Economic Zones (EEZs) and territorial seas of countries including Australia and New Zealand, but not Japan.

²¹ 'Verbatim Record', *East Timor (Portugal v Australia)*, (International Court of Justice, CR 95/8, 7 February 1995) 51–2 [28]–[30] (Mr Crawford).

²² *Ibid* 56 [42].

²³ *East Timor* (n 17) 105 [37].

In 1993, those three countries entered into a trilateral *Convention for the Conservation of Southern Bluefin Tuna* (the 1993 Convention).²⁴ The Commission established under that Convention in 1994 set a Total Allowable Catch (TAC) of 11,750 tonnes, and national allocations of 6065, 5265 and 420 tonnes to Japan, Australia and New Zealand respectively. Despite the Parties agreeing the SBT stock was severely depleted and a cause for serious biological concern, Japan conducted a unilateral experimental fishing program (EFP) in 1998 under which it took an additional 1464 tonnes of SBT over and above its previously agreed national allocation.²⁵ It conducted a further EFP in 1999 to which Australia and New Zealand again objected. Diplomatic protests by Australia and New Zealand were followed by unsuccessful negotiations.²⁶

Australia and New Zealand each commenced arbitration under Annex VII of the *United Nations Convention on the Law of the Sea* ('1982 Convention')²⁷ on the basis that Japan's EFP program was contrary to Japan's obligations under the 1982 Convention, the 1993 Convention and customary international law. Australia and New Zealand also sought provisional measures from the International Tribunal for the Law of the Sea (ITLOS) pursuant to Article 290(5) of the 1982 Convention pending the hearing of the matter by the Annex VII Tribunal. Following an oral hearing, ITLOS granted extensive provisional measures including an order that the Parties refrain from the conduct of EFPs and only fish within their national catch limits.²⁸

Japan had raised preliminary objections to the jurisdiction of the Annex VII Tribunal.²⁹ The Annex VII Tribunal held a hearing of jurisdiction on 7–11 May 2000. In a highly controversial decision, a majority of the Tribunal held that the intent of the dispute settlement provision in Article 16 of the trilateral 1993 Convention was to remove the dispute from the compulsory dispute settlement procedures of Section 2 of Part xv of the 1982 Convention.

24 [1994] ATS 16.

25 It was discovered subsequently that Japan 'was deliberately and substantially overfishing' its agreed national allocation during the period of the SBT proceedings. 'Verbatim Record' *Whaling in the Antarctic (Australia v Japan: New Zealand intervening)*, (International Court of Justice, CR 2013/19, 10 July 2013) 64 [21] (Mr Crawford).

26 Mediation was suggested by Japan but rejected by Australia and New Zealand due to its lack of immediacy and the conditions Japan attached to it.

27 *United Nations Convention on the Law of the Sea*, signed 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994) ('1982 Convention').

28 *Southern Bluefin Tuna Cases (New Zealand v Japan; Australia v Japan)*, (*Provisional Measures*), *Order of 27 August 1999*, (1999) ITLOS Rep 280 ('*SBT Provisional Measures*').

29 The members of the Tribunal were Judge Stephen Schwebel (President), Judge Florentine Feliciano, Justice Sir Kenneth Keith, Judge Per Tresselt and Judge Chusei Yamada.

Thus, the Tribunal concluded that by reason of Article 281.1 of the 1982 Convention it lacked jurisdiction to hear the merits of the dispute.³⁰

James Crawford appeared as Counsel for Australia both before ITLOS and the Annex VII Tribunal. His input on procedural and substantive matters underpinned Australia's case. Procedurally, the SBT cases were the first to utilise the Annex VII arbitration procedures under the 1982 Convention and the concomitant right to seek provisional measures from ITLOS. Professor Crawford's insight into how those procedures should operate proved invaluable both in the SBT cases and in the many Annex VII arbitrations that followed.

Professor Crawford's presentation of the Applicant's scientific case to ITLOS was highly persuasive. He began with three simple propositions. First, the scientific issues were for the merits stage of the dispute and should not be pre-judged by ITLOS.³¹ Secondly, the scientific issues that were not in dispute were quite enough to underpin the Applicants' cases—'You may find that that is something of a relief but it is true.'³² Thirdly, '[o]nce the Applicants' scientific concerns are seen to be reasonable, the balance of risks and benefits tips sharply in favour of the provisional measures.'³³ In this respect, he noted that Japan would suffer little if its extra fishing was deferred for a while so as to accommodate genuine concerns about the stock, while a failure to defer might cause or contribute to a further stock collapse.³⁴ Professor Crawford's submissions are at one with the subsequent analysis by ITLOS of the scientific evidence and of the status of the SBT stock that underpinned its grant of provisional measures.³⁵

The ITLOS SBT provisional measures decision was one of the earliest applications of the precautionary approach by an international court or tribunal.³⁶

30 *Southern Bluefin Tuna (New Zealand-Japan, Australia-Japan) (Jurisdiction and Admissibility)* (2000) 23 RIAA 1 ('*SBT Jurisdiction*'). Justice Sir Kenneth Keith (dissenting) held that the Tribunal did have jurisdiction.

31 'Verbatim Record', *Southern Bluefin Tuna Cases (New Zealand v Japan; Australia v Japan)* (International Tribunal for the Law of the Sea/PV.99/20/Rev.2, 18 August 1999) 32 (Mr Crawford).

32 Ibid.

33 Ibid.

34 Ibid 33.

35 *SBT Provisional Measures* (n 28) 295–6 [67]–[79].

36 *SBT Provisional Measures* (n 28) 296 [77]–[80]. In this respect, Professor Alan Boyle has noted that '[d]espite the limited context of a provisional measures application, ITLOS's order appears to support the conclusion that the UN Convention on the Law of the Sea should be interpreted and applied taking account of the precautionary approach articulated by Principle 15 of the Rio Declaration ...': Alan Boyle, 'Southern Bluefin Tuna Cases', *Max Planck Encyclopaedia of Public International Law* (OUP, 2015).

Some initial reluctance on the part of the then Australian Government to place reliance on that principle was put aside on advice from Professor Crawford³⁷ as well as New Zealand's determination to rely upon the principle. In the course of argument Professor Crawford debunked Japan's approach to the application of the precautionary principle:

Japan's presentation yesterday took refuge in what can only be described as the reverse of the precautionary approach. We might call it the reactionary approach. Under the reactionary approach no action can be taken until there is scientific certainty that the action was necessary.³⁸

As noted elsewhere,³⁹ Professor Crawford was sorely disappointed by Australia's loss on jurisdiction before the first-ever Annex VII Tribunal. In a detailed analysis given to the Australian Government some days after the decision, he stated that he found it hard to be objective about the decision and 'on the key point it seems to me to be arguably wrong'. He further described the Tribunal's analysis of relevant articles of Part xv of the 1982 Convention and of the 1993 Convention as 'pure invention, a rewriting of Part xv and not an interpretation'. Nevertheless, he advised Australia and New Zealand to make further attempts to resolve the dispute through negotiation as there was need for continued co-operation in relation to the 1993 Convention 'now more than ever'.⁴⁰

Professor Crawford did gain a degree of comfort from the ongoing critical analysis of the decision of the majority⁴¹ and this was reflected in his

37 One of the early proponents of the principle, Philippe Sands, assisted the Australian delegation in the course of the oral hearings.

38 'Verbatim Record', *Southern Bluefin Tuna Cases (New Zealand v Japan; Australia v Japan)* (International Tribunal for the Law of the Sea/PV.99/24/Rev.2, 20 August 1999) 17 (Mr Crawford).

39 Bill Campbell, 'An Australian Glimpse of James Crawford' (2021) 35 *Leiden Journal of International Law* 411–415.

40 The quoted text in this paragraph is drawn from a note provided by Professor Crawford to the Australian Government which is not publicly available. In his opening submissions in the *'Volga' Prompt Release Case*, Professor Crawford recalled the decision of ITLOS in the *SBT* cases and how it had underpinned the revitalisation of the SBT Commission—Verbatim Record (*Russian Federation v Australia*), *Prompt Release (International Tribunal for the Law of the Sea PV.02/02*, 12 December 2002) 15–16 (Mr Crawford).

41 Starting with the Separate Dissenting Opinion of Sir Kenneth Keith referred to at n 30 and the jurisdictional ruling of the Annex VII Tribunal in the *South China Sea Arbitration (The Republic of the Philippines v The People's Republic of China) (Award on Jurisdiction and Admissibility)*, 29 October 2015, 105 [286].

subsequent comment concerning ‘the jurisdictional disorder created by the unnecessary and unhappy finding of that Tribunal’.⁴²

The *SBT* cases were a portent of things to come in *Whaling in the Antarctic (Australia v Japan: New Zealand intervening)* (*‘Whaling in the Antarctic’*)⁴³ before the ICJ. In both cases Japan argued that they were scientific disputes rather than legal disputes. Both ITLOS and the ICJ rejected this characterisation. Also, in both cases Japan sought to misuse ancillary processes relating to science and research to increase its commercial catch.⁴⁴ This subterfuge was stymied by the respective ITLOS and ICJ decisions.

1.4 *‘Volga’ Prompt Release*

A little over three years after the decision of ITLOS in *SBT Provisional Measures*, Professor Crawford appeared on behalf of the respondent Australia in *‘Volga’ (Russian Federation v Australia), Prompt Release (‘Volga Prompt Release’)*.⁴⁵

A Russian flagged fishing vessel, the ‘Volga’, was caught fishing illegally for Patagonian Toothfish (*Dissostichus eleginoides*) in that part of the Australian EEZ surrounding the Territory of Heard Island and the McDonald Islands. It was apprehended on the high seas following a hot pursuit under Article 111 of the 1982 Convention.⁴⁶ The Applicant Russian Federation commenced proceedings in ITLOS under Article 292 of the 1982 Convention which provides for the prompt release of vessels and crews (in this case the ‘Volga’ and three remaining crew) ‘upon the posting of a reasonable bond or other financial security’.

42 Verbatim Record CR 2013/19 (n 25) 65 [21] (Mr Crawford).

43 *Whaling in the Antarctic (Australia v Japan: New Zealand intervening), Judgment*, [2014] ICJ Rep 246 (*‘Whaling in the Antarctic’*).

44 Japan was quite open in doing so in relation to its so-called ‘scientific whaling’. Professor Crawford in oral argument referred to the following evidence of the Director of the Japanese Fisheries Agency to a Japanese parliamentary committee in October 2012: ‘Minke whale meat is prized because it is said to have a very good flavour and aroma ... [T]he scientific whaling program in the Southern Ocean was necessary to achieve a stable supply of minke whale meat’: Minutes of the Meeting of the Subcommittee of the House of Representatives Committee on Audit and Oversight of Administration, 23 Oct. 2012, Statement by Kazuyoshi Honkawa, Director, Japanese Fisheries Agency.

45 *‘Volga’ (Russian Federation v Australia), Prompt Release (Judgment)* ITLOS Reports [2002] ITLOS Rep 10 (*‘Volga Prompt Release’*).

46 The Tribunal made it quite clear, as argued by Australia, that the legality of the hot pursuit was not relevant to the issue of prompt release under Article 292 the 1982 Convention.

The primary issue before the Tribunal was of the reasonableness of the financial security sought by Australia, and whether it could include a condition that the 'Volga', when released, carry a vessel monitoring system (VMS) and that a financial security be posted to ensure that it did so. The Tribunal, found, amongst other matters, that the imposition of such a condition and supporting financial security was in breach of the 1982 Convention and ordered Australia to promptly release the 'Volga' on the posting of a security of AUS\$1,920,000.

In his submissions to the Tribunal, Professor Crawford had argued that:

[A]lthough [the role of the Tribunal] is a specific one and is subject ... to certain constraints, nonetheless [the Tribunal is] entitled, and we say bound, to act in the interests of the core values embodied in the Convention. Among these, the conservation and management of high seas resources and the special authority of coastal States to manage those resources are central ... What is at stake here is a systematic, unlawful exploitation of an EEZ fishery by financial interests which have given Russian authorities a false address.⁴⁷

Professor Crawford also warned the Tribunal that it should not become 'an unwitting accomplice to criminal activity'.⁴⁸

Apart from the Separate Opinion of Judge Cot and the Dissenting Opinion of Judge Shearer, Professor Crawford's plea to take the core values of the 1982 Convention into account in applying Article 292 was not taken up by the Tribunal. Despite understanding '... the international concerns about illegal, unregulated and unreported fishing ...', the Tribunal confined itself to a narrow role of assessing whether the bond set by the Respondent was reasonable in terms of Article 292 of the Convention.⁴⁹

Again, in a portent of language Professor Crawford was to use in his submissions in the *Whaling in the Antarctic* case, he pointed to the 'complete vacuum ... a factual and a legal vacuum' in the arguments put forward by Russia.⁵⁰ As to the factual vacuum, Russia put forward no evidence to support

47 Verbatim Record 'Volga' (12 December 2002) (n 40) 17 (Mr Crawford). By way of explanation, both addresses provided by Albers, the relevant fishing company, turned out to be false—one in an open field and the other in a residential apartment block.

48 Ibid 18.

49 'Volga' Prompt Release (Judgment) (n 45) 33, [68]–[69].

50 Verbatim Record, 'Volga' (Russian Federation v Australia), Prompt Release (International Tribunal for Law of the Sea PV.02/04, 13 December 2002) 17–18 (Mr Crawford) ('Verbatim Record 13 December 2002'). In oral argument in *Whaling in the Antarctic*, Professor Crawford

its contention that not all the fish on board the 'Volga' were illegally fished. As to the legal vacuum, Russia did not even attempt to demonstrate that the 'Volga' had complied with the conditions that must be complied with to fish lawfully under the *Convention on the Conservation of Antarctic Marine Living Resources* ('CCAMLR').⁵¹ Professor Crawford noted '[the] vacuum which Mr David [Counsel for Russia] seeks is ... a vacuum up of Patagonian toothfish to the point of commercial and perhaps biological extinction'.⁵²

The narrow decisions of ITLOS in the early prompt release cases seem at odds with its generally expansive view of its jurisdiction under, and of the content of the 1982 Convention. The recent preliminary objections decision of a Chamber of ITLOS in the maritime delimitation proceedings between Mauritius and the Maldives is an example of this approach.⁵³

1.5 *Whaling in the Antarctic*

The *Whaling in the Antarctic Case* argued before the Court in 2013 was the second case in which Australia was an Applicant in proceedings in the ICJ, the first being *Nuclear Tests (Australia v France)* ('*Nuclear Tests*').⁵⁴ It would not be an overstatement to say that Professor Crawford's role as Counsel in that case was fundamental to its success.⁵⁵

The case concerned the interpretation and application of Article VIII of the *International Convention for the Regulation of Whaling* ('ICRW')⁵⁶ which authorised contracting States to issue permits 'for purposes of scientific research'. In 1986 the International Whaling Commission ('the Commission') established under the ICRW imposed a global moratorium on commercial whaling. Following introduction of the moratorium, Japan, under its JARPA I

referred to the 'two black holes' in Japan's the theory of the case—the Pellet void' and the 'Lowe vacuity'; 'Verbatim Record' CR 2013/19 (n 25) 57–58 [2]–[4] (Mr Crawford).

51 [1982] ATS 9.

52 Verbatim Record 'Volga' (13 December 2002) (n 50) 17–18 (Mr Crawford).

53 *Dispute concerning a Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean (Mauritius v Maldives) (Preliminary Objections)* (International Tribunal for the Law of the Sea, Case No 28, 18 December 2019).

54 *Nuclear Tests (Australia v France) (Judgment)* [1974] ICJ Rep 253 ('*Nuclear Tests*').

55 The presentation of the case more generally from an Australian perspective has been covered elsewhere. See, eg, Bill Campbell, 'Kirby Lecture in International Law 2017—International Dispute Resolution: Australian Perspectives and Approaches' (2017) 35 *Australian Year Book of International Law* 1; Bill Campbell, 'Australia's Engagement with the International Court of Justice: Practical and Political Factors' (2021) 21(3) *Melbourne Journal of International Law* 596 ('Australia's Engagement with the ICJ').

56 *International Convention for the Regulation of Whaling*, opened for signature 2 December 1946, 161 UNTS 74 (entered into force 10 November 1948) art VIII.

and JARPA II programs, issued permits to take whales purportedly pursuant to Article VIII and allegedly for purposes of scientific research. Those permits authorised a take of whales equating to that which it had taken previously for commercial purposes.

Following a lengthy period in which Australia and other States raised concerns with Japan over its so-called scientific whaling, Australia commenced proceedings in the ICJ on 31 May 2010 seeking a declaration that the JARPA II program was in breach of Japan's obligations under the ICRW as it was commercial whaling pure and simple and not for purposes of scientific research. New Zealand intervened in the proceedings under Article 63 of the Statute of the ICJ in support of Australia's case. Japan argued that the Court lacked jurisdiction to hear the case, and that its JARPA II program fell within the scope of Article VIII.

The ICJ handed down its decision on 31 March 2014. The Court found that it did have jurisdiction and that Japan's JARPA II program was not 'for purposes of scientific research' within the meaning of Article VIII of the ICRW. And thus, Japan was found in breach of its obligations under the ICRW concerning the moratorium on commercial whaling, the Southern Ocean Sanctuary and the factory ship moratorium. The Court ordered Japan to revoke, and refrain from issuing further permits under JARPA II.

As noted above, James Crawford played a pivotal role for Australia through the provision of the underpinning legal advice and as lead counsel. Following the election of the first Rudd Government in late 2007, newly-appointed Attorney-General Robert McClelland (now Justice McClelland) requested advice from Professor Crawford on the potential causes of action and prospects of success in a case brought against Japan challenging its whaling activities. In advice given in January 2008, Professor Crawford concluded that a dispute characterised as one arising under the ICRW would fall within the jurisdiction of the ICJ by reason of the declarations made by Australia and Japan under Article 36(2) of the ICJ Statute,⁵⁷ but that broadening the dispute beyond the ICRW would not be without risk. On questions of admissibility, he rejected the notion that in order to have standing to bring an action, Australia would need to demonstrate a special interest in the subject matter of a dispute. In his view, where a multilateral treaty is adopted to protect some common interest, such as the management of a shared resource, all parties to the treaty

57 Notwithstanding Australia's reservation to its declaration concerning 'other methods of peaceful settlement'; *Declaration under the Statute of the International Court of Justice concerning Australia's acceptance of the jurisdiction of the International Court of Justice* [2002] ATS 5 (signed and entered into force 21 March 2002) para (a).

would have standing to protest a breach. He also rejected delay as a ground of inadmissibility.

He considered a number of potential causes of action including commercial whaling contrary to the ICRW; whether there was a breach of the *Convention on the International Trade in Endangered Species of Wild Fauna and Flora*⁵⁸ in relation to humpback whales; whether there was a breach of the *Protocol on Environmental Protection to the Antarctic Treaty*;⁵⁹ whether there was a breach of Article II of CCAMLR; whether there were breaches of the 1982 Convention (Articles 64, 65, 118, 119 and 120); whether there was a breach of the *Convention on Biological Diversity*⁶⁰ (Articles 5 and 14(1)(c)); and related rules of general international law.

Professor Crawford also addressed some procedural issues including possible intervention by another state, a request for provisional measures and the preparation of evidence. He concluded that:

this dispute is primarily to be characterised as one arising under the ICRW and its Schedule, although other treaty obligations might also be invoked ... The eventual outcome is difficult to predict. I do not share the optimism of earlier published reports which treated it as an open-and-shut-case. What can be said is that if Australia can substantiate the credible evidence of criticisms made of JARPA II, there is a good arguable case under the ICRW.⁶¹

Professor Crawford provided a supplementary note in March 2008 following meetings in Hobart with scientists of the Australian Antarctic Division. In that note, he considered new information on the conservation status of the JARPA II-targeted species. He continued to adhere to the view that Australia had a good arguable case. He noted that the new information weakened the likelihood of the ICJ ordering provisional measures. He further noted that Japan would seek to re-configure its ocean whaling program under Article VIII

58 *Convention on the International Trade in Endangered Species of Wild Fauna and Flora*, opened for signature 3 March 1973, [1976] ATS 29 (entered into force 1 July 1975).

59 *Protocol on Environmental Protection to the Antarctic Treaty*, opened for signature 4 October 1991, [1998] ATS 6 (entered into force 14 January 1998).

60 *Convention on Biological Diversity*, opened for signature 4 June 1992, 1760 UNTS 143 (entry into force 29 December 1993).

61 This quote is drawn from an opinion provided by Professor Crawford to the Australian Government which is not publicly available.

if Australia was wholly or partially successful in the case as the Court could not close off entirely the Article VIII avenue.⁶²

Professor Crawford, together with other counsel for Australia,⁶³ made key recommendations in relation to the conduct of the case. Principal amongst these was a recommendation in advice to Attorney-General Nicola Roxon in March 2012 that Australia not seek a second round of written pleadings. That advice considered the advantages and disadvantages of a second round. It concluded 'without much difficulty, that there is likely to be no disadvantage to Australia if it dispenses with a second round of pleadings, and that its arguments are likely to be assisted by moving directly to the oral phase'.⁶⁴ The principal advantages were that the absence of a second round would result in an earlier hearing of the case, it would avoid unduly telegraphing Australia's response to arguments made by Japan in its Counter-Memorial and, importantly, it would not give Japan an opportunity to raise new arguments or adduce expert evidence in its Rejoinder.

Following a meeting of the Parties with President Tomka in which Japan argued for, and Australia against a second round of pleadings, the Court decided that a second round 'is not necessary'.⁶⁵ Japan made clear its disappointment with that decision.⁶⁶ Judge Greenwood referred to Japan's disappointment in his Separate Opinion and set out the principles applying to the ordering of a second round and the content of rejoinders.⁶⁷ There is no doubt that the absence of the second round considerably reduced the total length of the case.

62 Japan did re-configure its program a year after receiving the adverse decision of the ICJ through the adoption of its NEWREP-A Program 2015 (which is now discontinued).

63 Philippe Sands QC, Laurence Boisson de Chazournes, then Solicitor-General Stephen Gageler SC (now Justice Gageler of the High Court of Australia), Henry Burmester QC and Bill Campbell QC.

64 This quote is drawn from joint advice to the Australian Government provided by Professor Crawford and the counsel referred to in the preceding footnote and is not publicly available.

65 International Court of Justice, 'Whaling in the Antarctic (Australia v Japan) Closure of written proceedings' (Press Release, No 2012/18, 18 May 2012) 1, [1].

66 See, for example, Japan, 'Written Observations of Japan on the Declaration of Intervention of New Zealand', Submission in *Whaling in the Antarctic (Australia v Japan: New Zealand Intervening)*, 21 December 2012.

67 *Whaling in the Antarctic* (n 43) 418–19, [32]–[38] (Judge Greenwood). In argument, Professor Crawford noted: 'Japan was evidently dismayed when Australia ... elected not to file a Reply. We thought the repeated protests of Japan must have implied an intention to include large quantities of expert evidence in its Rejoinder. It now seems there was no such intention, and no such evidence': 'Verbatim Record' *Whaling in the Antarctic (Australia v Japan: New Zealand Intervening)* (International Court of Justice, CR 2013/20, 10 July 2012) 31 [82] (Mr Crawford).

This was particularly important given continued whaling by Japan during the course of the case.

In oral argument, Professor Crawford addressed some of the key elements of Australia's case, including the meaning and application of Article VIII, and in so doing examined some difficult areas of international law.⁶⁸ Professor Crawford submitted that Article VIII operated as a limited exception to the general regulatory regime established under the ICRW and rejected Japan's argument that it was a self-contained provision left to the discretion of the relevant contracting Party.⁶⁹

He submitted that there were three requirements under Article VIII. First, 'that the activity authorised by the permit must properly be characterised as "scientific research"'. Secondly, "the purpose requirement" requires that a special permit authorise whaling "for purposes of scientific research", and not for other purposes'.⁷⁰ Thirdly, 'a good faith application of Article VIII requires ... due regard to the views of the IWC regarding the proper conduct of special permit whaling'.⁷¹ Professor Crawford further argued that Japan failed to meet these requirements and that Japan was thus in breach of the provisions of the ICRW referred to above.⁷²

The Court adopted the methodology submitted by Professor Crawford, although it did consider that the first requirement under Article VIII had been met, finding 'that JARPA II involves activities that can broadly be characterised as a scientific research'.⁷³ Nevertheless it found:

that the evidence does not establish that the programme's design and implementation are reasonable in relation to achieving its stated objectives. The Court concludes that the special permits granted by Japan for the killing, taking and treating of whales in connection with JARPA II are not 'for purposes of scientific research' pursuant to Article VIII, paragraph 1, of the Convention.⁷⁴

68 One of the difficult areas of international law examined by Professor Crawford in the course of his examination of the meaning and application of Article VIII was the relevance of the practice of international organisations in treaty interpretation: 'Verbatim Record' *Whaling in the Antarctic (Australia v Japan: New Zealand intervening)* (International Court of Justice, CR 2013/8, 26 June 2013) 35–7 [35]–[39] (Mr Crawford).

69 Ibid 42 [54].

70 Ibid 46 [68].

71 Ibid 53 [95]. The detail of this good faith requirement was argued by the Solicitor-General, Justin Gleeson SC.

72 'Verbatim Record' *Whaling in the Antarctic (Australia v Japan: New Zealand intervening)* (International Court of Justice, CR 2013/11, 28 June 2013) 21–4 [72]–[82] (Mr Crawford).

73 *Whaling in the Antarctic* (n 43) 293 [227].

74 Ibid.

Thus, Japan was found in breach of several Convention obligations.⁷⁵

Professor Crawford was adept at utilising Japan's own arguments to Australia's advantage. For example, he applied the seven characteristics identified by Japan for determining whether a program is conducted for commercial or scientific purposes, to establish that JARPA II was a whaling operation conducted for commercial purposes.⁷⁶ Crawford also used concessions to good effect. For example, he conceded that while Australia's translation of the statement of a Japanese official 'is defensible and not inaccurate, ... Japan's is better'. He then noted that the difference in translation was irrelevant to the point being made.⁷⁷

He also was adept at recognising and addressing perceived concerns of the Court. The *Whaling in the Antarctic* case was the first in decades in which evidence was given by witnesses through a process of examination and cross-examination. It was readily apparent that some members of the Court were concerned about the method of the very effective cross-examination of Japan's scientific witness Lars Wallöe by the Australian Solicitor-General Justin Gleeson sc. Professor Crawford addressed this perceived concern in a subtle manner:

Mr. President, Members of the Court, I understand the reservations some Members of the Court may have at what may seem the interposition of common law methods into the Court's fact-finding and evidence assessing process. The Court will no doubt find its own balance in these matters. But meanwhile, Japan has had access to senior members of the Bar, on both sides of the common law/civil law divide. Further, under your guidance, Mr. President, Japan has had a full opportunity to present its case and to be heard and the questions asked by the Court—on both sides of the common law/civil law divide—show, I hope I may say so, an acute understanding of the issues and a grasp of the dossier.⁷⁸

James Crawford was renowned for the humour he would inject into cases, but always with a substantive point in mind. For example, in analysing Japan's arguments as put in the first round of oral argument, he noted:

75 Ibid 298–9 [247].

76 Verbatim Record 2013/11 (n 72) 15–17 [48]–[57] (Mr Crawford). Yet another example was Crawford's analysis of the seven 'propositions which [Japan] attributed to Australia but which Australia does not actually put forward'. 'Verbatim Record' *Whaling in the Antarctic (Australia v Japan: New Zealand intervening)* (International Court of Justice, CR 2013/18, 9 July 2013) 38–40 [1]–[2] (Mr Crawford).

77 Verbatim Record CR 2013/20 (n 67) 21 [55] (Mr Crawford).

78 Ibid 31 [84] (Mr Crawford).

At the heart of Japan's theory of this case are two black holes. These I will name, in accordance with scientific practice, after their first discoverers, that is the Pellet void and the Lowe vacuity. Or perhaps they are the same black hole seen from different points of view—whether that is so might be a matter for further research, hopefully not lethal.

The Pellet void results from the proposition that the rest of the Convention has no application to Article VIII ... The Lowe vacuity results from the proposition that scientific whaling ... is governed by a permissive regime of customary international law under which the Court's power of review is limited to scrutiny for good faith, with a strong presumption in favour of the permitting State ... Do not enter the Lowe vacuity, Japan warns the Court, or you may never emerge.⁷⁹

Humorous though they were, these points made by Professor Crawford demonstrated that the relevant arguments of Japan were unsustainable.

It was unfortunate that he was unable to attend the delivery of the Court's judgment on 31 March 2014 due to a long-standing commitment in China. It is all the more unfortunate given the significance of the contribution he made to the prosecution of Australia's case.

1.6 *Certain Documents and Data*

The final occasion on which Professor Crawford appeared before the ICJ for Australia was in January 2014, in the provisional measures phase of the *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia)* ('*Certain Documents and Data*') Case.⁸⁰

These proceedings were instituted by Timor-Leste in December 2013, in relation to the seizure and subsequent detention 'by agents of Australia of documents, data and other property which belongs to Timor-Leste and/or which Timor-Leste has the right to protect under international law'.⁸¹ Timor alleged that the items seized included correspondence between the Government of Timor-Leste and its legal advisers relating to a pending arbitration with Australia under the 2002 Timor Sea Treaty,⁸² and sought provisional measures

79 Verbatim Record CR 2013/19 (n 25) 57–58 [2]–[4] (Mr Crawford).

80 *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia) (Provisional Measures)* [2014] ICJ Rep 147 ('*Certain Documents and Data*').

81 'Application instituting proceedings', *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia)* [2014] ICJ Pleadings 147, 2.

82 *Timor Sea Treaty between the Government of East Timor and the Government of Australia*, signed 20 May 2002, 2258 UNTS 3 (entered into force 2 April 2003).

to protect its rights and to prevent the use of the seized documents and data by Australia against its interests and rights in the pending arbitration.⁸³

As ever, Professor Crawford did not hesitate to accept the offered brief to advise and represent Australia as Senior Counsel, notwithstanding that his campaign for election to the Court was then entering its final months.⁸⁴ He played a critical role in shaping Australia's case and strategy for responding to Timor's claims. In particular, prior to the opening of oral argument on provisional measures, Australia provided a written undertaking to the Court, signed by the then Australian Attorney-General, Senator the Hon George Brandis QC, which provided a series of undertakings as to Australia's use of the seized documents and data until final judgment in the proceedings, or until further and earlier order of the Court.⁸⁵ That undertaking was a central plank of Australia's defence against Timor-Leste's provisional measures request, and was underpinned by Professor Crawford's advice. He later observed in his usual understated style that 'quite a lot of effort went into making those submissions'.⁸⁶

In his last speech before the ICJ as counsel for Australia, Professor Crawford brought to a close Australia's first round of oral argument on provisional measures. He advocated for the Court to decline to indicate provisional measures, on the basis that Timor-Leste had brought before the ICJ a matter of which another tribunal was already properly seised—submissions that he was uniquely placed to deliver, given his concurrent role in advising the Government in the separate proceedings pending between Australia and Timor-Leste before the Arbitral Tribunal constituted under the Timor Sea Treaty.⁸⁷ Although, on this occasion, he was unsuccessful in persuading the Court to accept his argument, James Crawford's dexterity in framing oral submissions, including his trademark bursts of unexpected levity, were nonetheless on full display in explaining that:

83 See 'Request for the Indication of Provisional Measures Submitted by the Government of Timor-Leste', *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)* [2013] ICJ Pleadings 147.

84 Campbell 'An Australian Glimpse of James Crawford' (n 39) 2.

85 'Written undertaking by Senator the Hon George Brandis QC, Attorney-General of the Commonwealth of Australia', *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)* [2014] ICJ Pleadings 147.

86 Hogan-Doran (n 16) 6.

87 'Verbatim Record', *Questions relating to the Detention of Certain Documents and Data (Timor Leste v Australia)* (International Court of Justice, CR 2014/2, 21 January 2014) 37–48 (Mr Crawford).

In the unfortunate circumstance where there are multiple procedures, an order by one judicial institution that affects the conduct of parallel proceedings before another judicial institution could result in conflict and confusion. The two judicial bodies would risk passing each other like ghosts in the corridors of the Peace Palace—corridors which, it might be thought, are already sufficiently haunted.⁸⁸

The Court ordered a series of provisional measures relating to Australia's use of the materials that were the subject of these proceedings, and the protection of communications between Timor-Leste and its legal advisers, in March 2014.⁸⁹ Australia subsequently returned the relevant materials to Timor-Leste, and the proceedings were discontinued in June 2015 prior to the oral hearings on the merits.⁹⁰

2 Advice

The advice provided by James Crawford to successive Australian Governments over a period of 25 years ranged from formal written advice to more informal advice on matters such as the relative merits of candidates for election to the ICJ and the International Law Commission (ILC). The advice that he gave in the course of the conduct of Australia's cases has been referred to earlier. Other matters on which he provided advice to Australia included an early advice on compulsory conciliation under the 1982 Convention; whether the ICJ would grant provisional measures halting the execution by Singapore of an Australian national Nguyen Tuong Van;⁹¹ and advice on the content of Australia's Optional Clause declaration under Article 36.2 of the ICJ Statute—to name but a few.

2.1 *Torres Strait Pilotage*

One instance in which the Commonwealth turned to Professor Crawford for advice was in relation to Australia's Torres Strait compulsory pilotage scheme, which was instituted in October 2006.

The Torres Strait lies to the north and north east of Cape York, separating Australia and Papua New Guinea. It is about 150 nautical miles long and

88 Ibid 45 (Mr Crawford).

89 *Certain Documents and Data* (n 80) 160–1 [74].

90 Questions Relating to the Seizure and Detention of *Certain Document and Data (Timor-Leste v Australia)* (*Order on 11 June 2015*) [2015] ICJ Rep 572.

91 Campbell, 'Australia's Engagement with the ICJ' (n 55) 601.

90 nautical miles wide, although useable routes for larger commercial vessels are limited to certain channels. The Strait is home to a unique marine ecosystem, including numerous vulnerable or endangered species. Because of the limited water exchange in and out of the Strait, any pollution incidents pose a risk of prolonged adverse impacts.⁹²

In 2005, the International Maritime Organisation (IMO) approved a joint proposal from Australia and Papua New Guinea to extend the pre-existing Great Barrier Reef Particularly Sensitive Sea Area to include the Torres Strait, and recommended compliance with Australia's proposed compulsory pilotage regime for vessels transiting the Strait.⁹³ Following that approval, the Australian Maritime Safety Authority (AMSA) introduced new regulations requiring all ships over a certain size to carry a professional pilot when navigating in the Strait.⁹⁴

The proposed system gave rise to heated debate in the IMO. Australia also received formal diplomatic protests from Singapore and the United States, claiming that the imposition of that regime would place Australia in breach of its obligations concerning the right of transit passage through international straits under the 1982 Convention.⁹⁵ It was in relation to these claims—and in particular the prospect of international litigation—that the Government sought and received advice from Professor Crawford and Professor Alan Boyle of the University of Edinburgh.

Australia strongly maintained that its system of pilotage was consistent with international law and necessary for the protection of the navigationally hazardous and sensitive marine environment in the Torres Strait. Nonetheless, in April 2009, Australia clarified that non-compliant vessels would not be arrested whilst undertaking transit passage through the Strait. Rather, the compulsory pilotage regime would only be enforced by Australian authorities as a port State measure—that is, upon entry into an Australian port.⁹⁶

Ultimately, and perhaps in light of this clarification, no international claim was brought. However, Professor Crawford's perspective on the arguments that

92 Marine Environmental Protection Committee, *Designation of the Torres Strait as an extension of the Great Barrier Reef Particularly Sensitive Sea Area*, Resolution No 133(53), annex 1.

93 Ibid 4–5.

94 Australian Maritime Safety Authority, *Further Information on Revised Pilotage Requirements for Torres Strait* (Marine Notice 8/2006, 2006); Australian Maritime Safety Authority, *Revised Pilotage Requirements for Torres Strait* (Marine Notice 16/2006, 2006); See also *Marine Orders 54 (Coastal Pilotage) 2014* (Cth).

95 *1982 Convention* (n 27) pt III s 2.

96 Australian Maritime Safety Authority, *Bridge Resource Management (BRM) and Torres Strait Pilotage*, (Marine Notice 7/2009, 2006).

could be made by Australia in response to a prospective claim, and issues of litigation strategy, were, as always, instrumental in shaping the Commonwealth's path.

3 Contribution to Australian Domestic Law

When asked 'what are the important qualifications necessary to becoming an international lawyer', the first always mentioned by Professor Crawford was a period of practice in domestic law on the basis that it provided a fundamental foundation to the practice of law more generally, so necessary to the successful practice of international law. His answer also recognised the fundamental connection between domestic law and international law, one not always appreciated by his colleagues on the Court.⁹⁷

Professor Crawford's principal contributions to Australian domestic law took the form of the three reports for which he was responsible as a Commissioner of the Australian Law Reform Commission (ALRC) from 1982 to 1984. The most frequently mentioned, and perhaps most important in an Australian context, is that concerning the recognition of aboriginal customary laws.⁹⁸ The then Chair of the ALRC, Michael Kirby, noted that 'the conduct of the investigation, under Professor Crawford, materially altered the national *Zeitgeist* on the interface of law and our indigenous people'.⁹⁹ The two other ALRC Reports concerning foreign state immunity¹⁰⁰ and civil admiralty jurisdiction,¹⁰¹ both with integral connections to international law, resulted in comprehensive federal statutes. 'Resulted in' is an understatement as each report annexed a draft of a recommended statute with accompanying explanatory memorandum, which was duly enacted by the Federal Parliament with little change. (This approach of the intellectual coupled with the practical, mirrored his approach to the issues for which he was rapporteur in the International Law

97 See *Certain Documents and Data* (n 80) 183 [41] (Judge Cançado Trindade).

98 Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws* (Report No 31, 6 November 1986).

99 Michael Kirby, 'International Law and the Common Law: Conceptualising the New Relationship' (Fourth James Crawford Biennial Lecture on International Law, University of Adelaide, 14 October 2009) 3.

100 Australian Law Reform Commission, *Foreign State Immunity* (Report No 24, 10 October 1984).

101 Australian Law Reform Commission, *Civil Admiralty Jurisdiction* (Report No 33, 14 December 1986).

Commission (ILC) concerning state responsibility¹⁰² and the Draft Statute for an International Criminal Court.¹⁰³)

4 Election to the International Court of Justice

The pinnacle of the career of James Crawford was his time as a Judge of the International Court of Justice following his election to the Court in November 2014. His outstanding and universally recognised qualifications for the position virtually assured his election to the Court. Those same qualities were recognised across the political spectrum in Australia with successive governments adopting a long-term plan to support his election to the Court, commencing with support for his election to the ILC in 1992.

5 Conclusion

It has quite rightly been observed that James Crawford was ‘the most influential Australian international lawyer of all time’.¹⁰⁴ Over the course of his distinguished career, Australia was the fortunate beneficiary of his forensic legal mind and outstanding advocacy skills whenever it had need.

As outlined in this article, Professor Crawford served Australia as adviser, counsel and advocate across the full breadth of international law, from law of the sea and international environmental law, to the law on diplomatic protection and the law of treaties. He was the counsel of choice for successive Australian Governments, and an inspiration, teacher and mentor to a generation of Australian Government lawyers. His contribution to Australia’s practice of international law, particularly before international courts and tribunals, is immeasurable.

¹⁰² International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries* (Report, 9 June 2001).

¹⁰³ International Law Commission, *Draft Statute for an International Criminal Court with commentaries* (Report, 7 April 1994).

¹⁰⁴ See Chesterman (n 1) 1.