

RESPONSE BY AUSTRALIA

REQUEST FOR INFORMATION CONTAINED IN CHAPTER III OF THE REPORT OF THE SIXTY-SEVENTH SESSION OF THE INTERNATIONAL LAW COMMISSION (2015)

Australia welcomes the International Law Commission's requests for information on the issues contained in Chapter III of the report of the Sixty-Seventh session of the International Law Commission (2015). Australia provides the following responses on the issues of

- Subsequent agreements and subsequent practice in relation to the interpretation of treaties
- Immunity of State officials from foreign criminal jurisdiction
- Provisional application of treaties
- Crimes against humanity

Australia trusts this information will be helpful in informing the respective reports of the Special Rapporteurs

Subsequent agreements and subsequent practice in relation to the interpretation of treaties

26. It would assist the Commission if States and international organizations could provide it with

- (a) any examples of decisions of national courts in which a subsequent agreement or subsequent practice has contributed to the interpretation of a treaty, and
- (b) any examples where pronouncements or other action by a treaty body consisting of independent experts have been considered as giving rise to subsequent agreements or subsequent practice relevant for the interpretation of a treaty

AUSTRALIA'S RESPONSE

The relevance of subsequent practice to the interpretation of a treaty was considered by the High Court of Australia in its recent decision in *Macoun v Commissioner of Taxation* (2015) 90 ALJR 93; [2015] HCA 44

The High Court considered the proper construction of sections 18 and 19 of the 1947 Convention on the Privileges and Immunities of the Specialized Agencies, 33 UNTS 261 (the Agencies Convention) In the course of its reasoning, the Court referred to Article 31(3) of the 1969 Vienna Convention on the Law of Treaties, 1155 UNTS 331

The High Court stated that State practice and the preparatory works to the Convention 'assist in the interpretation of the Agencies Convention' (at [75]) The Court went on to consider examples of State practice, including decisions of the Administrative Tribunal of the United Nations, domestic courts in France and the Netherlands, and an arbitral tribunal constituted by the Government of the French Republic and UNESCO (at [80]-[81], see also the judicial decisions in footnote 83) Ultimately, the Court found that there is no generally accepted State practice with regard to the exemption of retirement pensions from taxation (at [82]) This conclusion informed the Court's decision that it

could not be said that the Agencies Convention, properly construed, required Australia not to tax the appellant's pension (at [82])