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## #406: Treaty fatigue: International law meets the new globalized nationalism

VOICEOVER

This is *Up Close*, the research talk show from The University of Melbourne, Australia.

LYNNE HAULTAIN

Hello, I'm Lynne Haultain, welcome to *Up Close*. A complex web of international treaties has built up significantly since World War II. Despite the chill winds of the Cold War, a number of wobbles and instances of refusal or withdrawal, the foundations of this structure have remained relatively sound. Treaties and conventions have been developed on a huge range of things; human rights, environmental protection, species extinction, climate action, and trade of all kinds, both multilateral and bilateral. We've also seen the creation of new transnational creatures like the European Union. All of these set on the foundations of international engagement and a belief that building these kinds of connections is a good thing, that's in national and global interests. But now that view is under significant challenge and we're seeing some very high-profile withdrawals, like the US pulling out of the Paris Climate Accord and the UK going ahead with Brexit.

So where does that leave the project of international law? Have we seen peak treaty, like we've apparently seen peak oil? Joining us to discuss this is renowned jurist, Judge James Crawford of the International Court of Justice. Before joining the court, Judge Crawford was involved as counsel, expert or arbitrator in around 100 cases before the International Court and other international tribunals. He was Professor of International Law at Cambridge and he's held chairs of law at Adelaide, Sydney and La Trobe Universities, and was a member of the Australian Law Reform Commission through the 1980s. Judge Crawford is in Melbourne to give the 2017 Sir George Turner Memorial Lecture at The University of Melbourne and has very kindly given us some of his time. Welcome, great to have you with us.

JUDGE JAMES CRAWFORD

Thank you very much.

LYNNE HAULTAIN

Well, there have been treaties and agreements of these kinds for as long as there's been state representation I think. I mean we used to do it by marrying off the

royal sons and daughters, didn't we?

JUDGE JAMES CRAWFORD

Yes, that was largely done on a bilateral basis.

[Laughter]

LYNNE HAULTAIN

Although not always successfully.

JUDGE JAMES CRAWFORD

Not always successfully. But multilateral treaties developed more recently, multilateral law-making treaties in the early part of the nineteenth century. The web of treaties to which you referred is largely a function of the twentieth century, beginning in the late nineteenth and through the twentieth century. It was given a considerable impetus at the end of the Cold War where various things which had been worked on for some time either were concluded or came into force. The World Trade Organisation, for example, the International Criminal Court. It's a process of accretion.

LYNNE HAULTAIN

We should preface this conversation, of course, by saying that as a sitting judge in the International Court of Justice, you're very mindful not to talk about matters that are or might come before you. So we should bear that in mind as we speak.

JUDGE JAMES CRAWFORD

Thank you for that reservation. I'm not expressing any opinions, but merely describing the situation as I see it.

LYNNE HAULTAIN

Indeed. But have we now got to a point where we have more countries involved with more treaties than we've ever had before?

JUDGE JAMES CRAWFORD

Yes.

LYNNE HAULTAIN

Is that the case?

JUDGE JAMES CRAWFORD

We now have some treaties to which every state in the world is a party. The Paris Climate Change Agreement is an example; I think 190 out of 193, assuming the United States does go ahead and withdraw. There are some treaties - some of the Red Cross conventions on the Laws of War have 194, 195 and that's about the number states in the world.

LYNNE HAULTAIN

Which is a very impressive achievement.

JUDGE JAMES CRAWFORD

Well, it's an achievement. Impressive depends a bit on what your expectations are.

LYNNE HAULTAIN

I certainly remember this as a student, hearing that binding countries to treaties prevents them from shooting at each other.

JUDGE JAMES CRAWFORD

Well, hot wars are much less common than they used to be. The numbers of people killed in international armed conflicts has been reduced very substantially over the last 40 years. We've had a period of peace equivalent to the two main periods in the nineteenth century. It's very difficult to point to individual instruments, the United Nations Charter, and say that's the cause of this; there are various causes of it. But it's part of the regulatory process, it's part of the system.

LYNNE HAULTAIN

So the United Nations, or the advent of it post World War II, was clearly a very strong impetus for this acceleration.

JUDGE JAMES CRAWFORD

Yes, it was a process built on the failures of earlier institutions, in particular the League of Nations. The United Nations is a reflex of the lessons which people thought they had learnt from the 1930s, when the international system really did grind to a halt causing the death of 60 million or 100 million people, whatever the number might be.

LYNNE HAULTAIN

It would seem, on very, very unvarnished analysis, that this approach has worked then.

JUDGE JAMES CRAWFORD

Well, it's worked to an extent and it's very difficult to think what the alternative would be. If we look, for example, at extinction of species, if we didn't have a system of registering endangered species and seeking to protect them, the situation would be much worse than it is. It's not good because there are reasons why species are becoming extinct, but this is the way we address it. If you look at the great whales and the moratorium on the catching of whales under the Whaling Convention of 1946, there's no doubt that it's made a difference.

LYNNE HAULTAIN

You've recently pointed though to some pretty overt breaches. It would seem to me that there have been breaches of conventions and treaties and agreements; for as long as they've existed people have flouted them in various ways. In a recent paper you've pointed to this joint statement which was made between the Russian Federation and the Chinese last year, in which they both made very bold statements

about non-intervention in the affairs of other states and peaceful settlement of disputes. Both of them have breached those, in effect, in the last 12 months.

JUDGE JAMES CRAWFORD

Well, there's certainly serious allegations of breach of each of those rules which are referred to. But the fact that they're referred to indicates an awareness at least of their existence. It's a constraint, it's not a guarantee. In the field of human rights there's obviously no guarantees that these rights won't be violated, and that they are violated and people respond to that. But there's an overall process over time which one hopes will have a beneficial effect. That's a hope and it's an aspiration. It's better than the alternatives and no one has come up with very good alternatives, short of more resort to force.

LYNNE HAULTAIN

But it does strengthen the arm of the critics and the cynics who say they're not worth the paper they're written on.

JUDGE JAMES CRAWFORD

General de Gaulle once said that treaties are like young girls, they last while they last. Perhaps not a very attractive sentiment, but?

LYNNE HAULTAIN

But a very Gallic one.

JUDGE JAMES CRAWFORD

?a very Gallic one. Yet, it was a treaty which ensured that Concorde flew. The British wanted to withdraw from the Anglo-French agreement establishing Concorde - on quite good financial grounds, every time Concorde flew it lost money - and the French threatened to take them to court if they did. So we owe - the most beautiful modern aeroplane is a result of a treaty.

LYNNE HAULTAIN

I didn't know that.

JUDGE JAMES CRAWFORD

Yeah.

LYNNE HAULTAIN

What was the treaty?

JUDGE JAMES CRAWFORD

It was an Anglo-French treaty to build Concorde, it was a joint enterprise. Obviously only a certain number of planes were actually ever built, some French and some British, under a joint arrangement. But Concorde owes its existence in flight to a treaty.

LYNNE HAULTAIN

That is truly fascinating.

JUDGE JAMES CRAWFORD

Concorde didn't last either of course.

LYNNE HAULTAIN

Sadly, no. We don't see her beautiful shape any longer, but it was a brief and glorious moment.

JUDGE JAMES CRAWFORD

Yes, it was.

LYNNE HAULTAIN

But speaking of challenges to treaties, you've also quoted the recent statements made by two senior advisers in the Trump Administration - H R McMaster who's the National Security Advisor, and Gary Cohn who's the Chief Economic Advisor - making extraordinary statements saying that there is no such thing as the global community. There is, what they call, a competitive arena where basically governments, non-government actors and businesses just slug it out.

JUDGE JAMES CRAWFORD

Well, there is a competitive arena. It's an arena which extends to lots of entities which are not part of the formal international system - non-governmental organisations, liberation organisations, so-called terrorist groups and so on - and there's a great deal of slugging out going on. But governments have got functions other than slugging it out. They've got functions of regulating and actually improving the status of individuals. That statement, which I quote, seems to me to ignore that side of things entirely.

LYNNE HAULTAIN

It rang serious bells for me, when I read it, of Margaret Thatcher all those years ago maintaining that there was no such thing as society. There was just individuals and people must look after themselves, I think was her further statement.

JUDGE JAMES CRAWFORD

That was an extraordinarily atomistic account and it's one - she was saying it - it was a deliberate exaggeration in a way. Because she believed that the United Kingdom existed, and the United Kingdom is nothing if not a society, a rather complicated one.

LYNNE HAULTAIN

So this seems to me, on both fronts, to be an abrogation of that function of government.

JUDGE JAMES CRAWFORD

When it comes to the crunch, governments will use these sorts of instruments because they have no alternative. The United States at the same time denigrates the United Nations and uses the United Nations Security Council to impose sanctions on

North Korea. So you get a dual process going on of acceptance and rejection which is rather puzzling and rather complicated. But you have to be realistic about it; it exists, and one of the functions of international law is to emphasise and seek to interpret and enforce those parts of it which constitute the law.

LYNNE HAULTAIN

Has that duality, the use and the rejection, heightened in recent times, do you think? Or has it always had moments? Is this I suppose an existential threat, this kind of statement, or is this just part of the ebb and flow of treaties as they come and go?

JUDGE JAMES CRAWFORD

That's a very difficult question. The impression one gets is one of serious challenge at present. It's exacerbated by particular incidents such as the United States putative withdrawal from the Paris Agreement, for example. But the world has been in similar situations in the past. In the late '30s the international system ground to a halt, and there have been other examples of near breakdown. So looked at in the longer term, one hopes it's an episode, but it's an episode which is nonetheless causing a great deal of concern. A lot of efforts been put into these things. To take global warming, there seems very little doubt, (a) that there is global warming and (b) that it's anthropogenic and (c) that if it reaches its worst state, it will harm a lot of economic and human interests. So it seems rational to do something about it. Even if what we can do about it is limited, as it is, by the state of technology and the difficulties of coordination.

LYNNE HAULTAIN

But drawing 190-odd countries into some sort of an arrangement around that has to be, as you say, better than any alternative.

JUDGE JAMES CRAWFORD

There's the attempt that's been made. There were problems with Kyoto, the Framework Convention. The Paris Agreement addressed those problems in various ways. Largely out of concern for United States' interests it must be said, because the negotiation process was focused around what the United States could accept through executive processes. The indications are that it might have made a difference. We don't know for sure because the science is still contested and the extent to which global warming is built into the existing complex of arrangements is debatable. But it's there.

LYNNE HAULTAIN

You're listening to Up Close and today our guest is Judge James Crawford of the International Court of Justice. We're talking about changes in the way countries see international relations and what that might mean. I'm Lynne Haultain. James, let's explore the extrication, if you like, from the Paris Climate Accord a bit further. Because it's no simple thing getting out of these treaties, is it?

JUDGE JAMES CRAWFORD

Well, to listen to some of the actors involved, it would seem to be a simple matter of

just declining to be bound by them. It gives the impression of a deal which is defective and which can simply be remade by a process of negotiation. But there was a process of negotiation, it takes a lot of states to negotiate these things, and they can't simply be undone at the will of one state it seems. Moreover, the United States, having gone into the arrangement, has to extricate itself from it in accordance with the arrangement. The process for withdrawal in accordance with the Paris Agreement takes four years. Paradoxically, the United States would cease to be a member of the Paris Agreement shortly after the next United States presidential election, so we'll see what happens.

LYNNE HAULTAIN

Yes, indeed. But let's talk about that a wee bit, because the technicalities of getting out of treaties and agreements is quite intriguing. So you've got a number of layers of international law and domestic law that you need to take into account. There's the treaty itself, there'd be domestic law which applies, and then there's the Vienna Treaty on Treaties, if you like, that you need to apply. So in terms of your role, do you need to adjudicate at times on the extrication from treaties, has that come before you?

JUDGE JAMES CRAWFORD

It has indeed. The court had to deal with an attempt by Hungary to get out of the bilateral treaty with Czechoslovakia on the Danube dam system. Hungary was unhappy with the treaty for reasons which it thought were good. I was counsel for Hungary in the case and I make no comment on the decision [and] matter of substance. But the court held the treaty was still in force. It was a multi-billion-dollar project. There were some problems with it but the court said they could be dealt with in various ways through modification of the project, through negotiation and not by unilateral withdrawal. That's the approach which the court has normally taken to treaties. General de Gaulle might have been wrong.

LYNNE HAULTAIN

[Laughs]. But in amongst that you have all sorts of other complications, in terms of the agreement, around how you get out. I'm just thinking, in terms of the Paris Climate Accord there is the theory that you could shortcut the process of withdrawal by withdrawing from the United Nations Framework Convention on Climate Change. Would that short circuit the process?

JUDGE JAMES CRAWFORD

Well, that's an open question. The Framework Convention on Climate Change requires a year's notice for withdrawal. It's arguable - I don't express a view about it - it's arguable - that if you withdraw from the Framework Convention you automatically get out of the Paris Agreement as well. Which is a separate, freestanding agreement made under the umbrella - umbrella is probably an appropriate word - of the Framework Convention. The United States hasn't done that. The United States has said that it will remain a party to the Framework Convention. We can speculate as to why that may be so. But the result is that the United States intention, as so far expressed, is to withdraw from the Paris Agreement

in accordance with the Paris Agreement. That doesn't raise a constitutional problem for the United States because the United States acceded to the Paris Agreement through executive action, not through Congress; it couldn't be got through Congress at the time. Whereas the Framework Convention is a Senate treaty.

LYNNE HAULTAIN

Is perhaps that the reason why there is an open question, because getting it through the Congress might be more of a challenge?

JUDGE JAMES CRAWFORD

If it's required. It's a matter of American constitutional law, it's not clear whether it's required or not. But this was an issue with Brexit, because getting out of the EU obviously requires undoing a great deal of parliamentary legislation, parliamentary approval of British membership of the EU. The United Kingdom Supreme Court held, by a substantial majority, that the United Kingdom, having gone into the European Union as a result of this legislation, needed parliamentary approval to get out of it. The South African Supreme Court did the same thing with the Rome Statute on the International Criminal Court.

LYNNE HAULTAIN

So they have to go to their own highest court in order to withdraw from the international treaty.

JUDGE JAMES CRAWFORD

They have to go to the parliament. What lives by the parliament ceases by live by the parliament, that's the idea.

LYNNE HAULTAIN

But in the British instance that was challenged. They felt - or the leadership felt that they could do it be executive action.

JUDGE JAMES CRAWFORD

They did indeed, and so did the South African executive, and in both cases the court said, no, it requires parliamentary action. In the United Kingdom, parliamentary action followed. The United Kingdom Parliament approved the notification under Article 50 of the European Union Convention.

LYNNE HAULTAIN

Yes.

JUDGE JAMES CRAWFORD

That was satisfied. In the case of South Africa, it wasn't approved by parliament. Instead the South African executive accepted the decision and notified its withdrawal of its notification of withdrawal.

LYNNE HAULTAIN

[Laughs] Very neat.

JUDGE JAMES CRAWFORD

Very neat. The result is that, despite an executive decision, South Africa remains a party to the International Criminal Court.

LYNNE HAULTAIN

So the future structure of treaties, is that likely to change given the difficulties that some of these states have had in pulling out?

JUDGE JAMES CRAWFORD

Well, it's becoming more difficult to enter into multilateral treaties. Negotiating multilateral treaties is a difficult business and it requires a huge investment of effort. The multinational trade agreements that are being concluded often take up to 10 years to negotiate. The Law of the Sea treaty of 1982 took more than 10 years. The WTO (World Trade Organization) took a very long time, and renegotiations in the Doha Round have failed. So there's resistance to entering into new treaties. But it doesn't mean the existing system of treaties doesn't continue to survive and continue to have its effects.

LYNNE HAULTAIN

So does that indicate then that there is concern about engaging in new treaty arrangements? Does that, once again, underscore the existential threat to the system?

JUDGE JAMES CRAWFORD

Well, I don't think refusal to enter into new treaties is necessarily an existential threat to the system. The question is, how compelling is the need for the new treaty given all the treaties we've got? It's like the system of railway building in the nineteenth century. You came to a point where you had a network of railways and the failure to build new railways wasn't necessarily fatal, until technology changed and the need arose. With climate change there was a strong feeling that something more was needed and the Paris Agreement was it.

LYNNE HAULTAIN

I mentioned earlier peak treaty, like peak oil. Do you think we've got there, to use your railway analogy?

JUDGE JAMES CRAWFORD

To some extent, yes, and I think there's some level of treaty fatigue. There's also an attempt - and this is I think how we should read the European Union. The European Union was an attempt to improve upon the international system through a more integrated arrangement of a quasi-federal sort. Not federal in the sense that the European Union was a state, but federal in the sense that there were constitutional and adjudicatory arrangements which bound states to a relatively unitary system. A system, moreover, of direct effect so that it could be relied on by private individuals before local courts, and to a great extent was. That was an arrangement of an international character built on a perception of the deficiencies of the previous international system. One of the concerns in Europe is that Brexit is challenging that

and possibly undermining it.

LYNNE HAULTAIN

Do you think that's the case?

JUDGE JAMES CRAWFORD

I don't think I should express an opinion on that.

LYNNE HAULTAIN

Fair enough. The vacuum though that will be left with Brexit is very considerable. When you describe the direct effect that individuals in Britain can rely on a European system of rights and legal pathways, getting out of that and trying to construct something that will fill the breach and satisfy the need for ongoing relations between Britain and Europe, that's no easy matter, is it?

JUDGE JAMES CRAWFORD

No, and just how difficult it is has been shown by the attempts to negotiate up until now. We'll see what happens next, but it's proving quite a difficult process.

LYNNE HAULTAIN

I'm Lynne Haultain and on Up Close today we're discussing the state of treaties with Judge James Crawford of the International Court of Justice. Are we witnessing a turning point in international relations? That point that you've just made, James, around the rational response that the EU appeared to be to a failure of previous arrangements, was part of a movement of globalism which I think is also sitting beneath this growth of treaties over the last 70-odd years. Are we seeing the turning of that tide? I mean if we were to talk about both Brexit and the US withdrawal from Paris, they have both cited sovereignty as being a critical issue. That basically individual states have ceded too much ground to foreign interests and we must get it back, we must reassert our sovereignty by withdrawing from these treaties.

JUDGE JAMES CRAWFORD

That's undoubtedly a concern. It was cited by the President when he announced the United States intention to withdraw from the Paris Agreement. But sovereignty cuts both ways. You're sovereign when you enter into these agreements, just as much as when you withdraw from them. There are some things which you can't do by yourself. You can't solve the climate change problem as an individual state, assuming that it's a problem which most of us think it is. You can't solve the ozone layer through individual action. Individual action may be more effective in certain areas, and there's obviously a balance to be struck between the autonomy of individual states, which international law protects, and collective action. For example, in the field of migration, international law preserves the right of states to decide who enters its territory, subject to qualifications dealing with, for example, refugees. That balance is there. It changes over time and there's a struggle over time, but everyone would accept that there are genuine refugees and there are genuine needs of societies to retain control over the composition. The treaty system is the way we balance those conflicting demands over time.

LYNNE HAULTAIN

Often treaties are blamed for that lack of balance though. That they require a certain level of commitment that individual states are not prepared to offer.

JUDGE JAMES CRAWFORD

That's sometimes true. There's a tendency obviously for those supporting particular values to push the values as hard as they can using the treaties as a basis. Sometimes that's taken to excess. Sometimes the arguments are not persuasive. We've got to understand that the underlying societal processes that are going on are of considerable concern. Take the United States, for example, over two generations the composition of the United States population is changing dramatically away from an Anglophone majority to a much more diverse situation. It's understandable that people, especially those who feel they're not benefiting from globalisation, resent that and reject it. That's part of the pressure which is being felt in the rise of certain movements, certain populist movements, in a number of states. So international law exists to try to strike a balance between those conflicting demands, and to do so over time. It's not set in stone just because you have a treaty on refugees, for example, even if the fundamental principles of protection of refugees are fairly well established.

LYNNE HAULTAIN

I wondered too if there was something about the proximity to World War II, given the huge schism that that was in the middle of the twentieth century and the exhilaration afterwards. If the people who understood that driving motivation of never letting that happen again were more open to the globalist project, and that the further we get away from that the more nativist or separate we are prone to become.

JUDGE JAMES CRAWFORD

That's a possible interpretation, I don't know whether it's correct. The level of concerns that people have these days tend to be on other issues; economic concerns, concerns about the composition of communities and control over one's own life. There is, I suspect, a widespread concern that people feel that they've lost levels of control. It's got nothing to do with a desire by Germany to fight France or France to fight Germany, which of course underlaid the conflicts of the previous century.

LYNNE HAULTAIN

Fair enough. But I think there's a sort of mood of - you've certainly described this as well - a shift in the mood.

JUDGE JAMES CRAWFORD

There seems to be a shift in the mood, but I wouldn't myself over-emphasise it at this stage. I think the situation is precarious and we know that changes can occur. There's no rule that everything always has to continue in the same direction, everything always has to centralise. Things can decentralise, the centre can fall apart. Let's hope it doesn't. But it's a constructed centre. The international system is not a federation, it's not a system of government as such. It's a substitute for having

a government of the sort that we have at the national level. With the exception of the European Union which was a successful, reasonable arrangement which, in a sense, sought to transcend sovereignty, we haven't actually worked out any alternatives to it. Certainly not the increased use of force.

LYNNE HAULTAIN

No, preferably not. What does all that mean though for the court on which you sit and the structures around tribunals and international courts, and the ceding I suppose of adjudicative power to an international body?

JUDGE JAMES CRAWFORD

Well, the court on which I sit is 70 years old as such, and the idea of the court is 100 years old. It hasn't changed in its fundamentals during that period. It still consists of a permanent institution, an organ of the United Nations with adjudicatory authority which is conceded to it by states on the basis of consent. It's quite different from the Court of Justice of the European Union. If you want to be part of the European Union, you have to accept the Court of Justice's jurisdiction, including its jurisdiction over individuals. The International Court goes back to an earlier period where that level of acceptance didn't exist, and it still doesn't exist at the global level. That means that bodies like the International Court of Justice have to deal with the cases that come before them very much in an ad hoc way, and to deal with the particular that they confront, rather than to give effect to a general program.

LYNNE HAULTAIN

So there's not much precedent value then.

JUDGE JAMES CRAWFORD

Well, there's a precedent value in the decisions. The court has decided 160 or so cases in the modern period and many of those decisions are still referred to. It's determined maritime and land boundaries, it's decided cases involving disputes between states, for example the Danube case that I mentioned. Those are precedents for other cases involving rivers or boundaries of fisheries, or whatever the issue may be. But that operates at a sort of - what might be described as a secondary level. These cases are not normally individual crises. Individual crises arise very quickly and normally have to be dealt with by executive action through the Security Council and other methods.

Moreover, the international Court is not the only body in the [firmament]. It used to be when it was established in the 1920s, but now we have a whole range of international courts and tribunals and systems of arbitration. They operate in their own field, they intersect in various ways, they pay regard to each other's decisions. But it's not a constitutional system in the sense that you would have in a national arrangement. It's a series - it's a process of accretion by which institutions have been created over time and find a function within the overall array.

LYNNE HAULTAIN

So are you generally optimistic about the robustness of the international law? Or is

that a silly question to ask a man who's spent his life involved with it?

JUDGE JAMES CRAWFORD

Well, I'm not sure I'm optimistic or pessimistic. I'm cautious at present because I think we're facing a real challenge to the system and I think people need to be aware of the reality of that challenge. But there are responses. There have been responses to the United States intention to withdraw from the Paris Agreement. The question whether the International Criminal Court was a step too far is a serious question and it has to be addressed, even if the probability is that the International Criminal Court will continue in existence. Once these things exist they're very difficult to get rid of, and we'll see whether some of the attempts to get rid of them succeed or not.

LYNNE HAULTAIN

Thank you so much indeed for your time, it's been a great pleasure talking to you.

JUDGE JAMES CRAWFORD

Thank you very much.

LYNNE HAULTAIN

My guest today on Up Close was Judge James Crawford of the International Court of Justice, in Melbourne to give the Sir George Turner Memorial Lecture at The University of Melbourne Law School. He's the author and editor of numerous books and journals and you can find details of some of them on the Up Close website, together with a full transcript of this and all our other programs. You might want to check out another of our podcasts, The Policy Shop, which examines emerging public-policy questions in conversation with experts in the field. Up Close is a production of The University of Melbourne, Australia. This episode was recorded on 26 September 2017 and was produced by Eric van Bommel, with audio engineering by Gavin Nebauer. I'm Lynne Haultain, thanks for listening and I hope you can join us again soon.

VOICEOVER

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