

OBITUARY

INTERNATIONAL COURT OF JUSTICE: TRIBUTES TO JUDGE JAMES CRAWFORD

An Australian glimpse of James Crawford

Bill Campbell QC*

Honorary Professor of Law, Australian National University College of Law and formerly General Counsel (International Law) and Head of the Office of International Law in the Australian Attorney-General's Department
Email: bill.campbell@anu.edu.au

James Crawford had many talents, not least as a poet. Perhaps his most famous poem – *Mr Kadi and Article 103 (A Poem)* – was published in 2013.¹

While wandering through a wadi
In the wastes of Saudi
I came across Mr Kadi
Cracking rather hardy.

I said 'you must feel blue
at what they've done to you'.
He said to me 'that's true
but I've got the CJEU,

lacking whose authority
the P5 sorority
are now a small minority,
who've lost their old priority'

And so went Mr Kadi
Wondering down his wadi
'it's all because of me;
I killed article 103!'

This poem was written by James when he was lead counsel for Australia in the oral argument phase of the *Whaling Case*² and at the same time presenting his seminal 2013 Hague Lecture series entitled *Chance, Order, Change: The Course of International Law*.³ The poem, and the circumstances in which it was written, are totally reflective of the character and capacities of James. As it turns out, certain members of the 'P5 sorority' felt that James' prowess as a poet was not enhancing his prospects in the then campaign for his election to the International Court of

*This tribute is based on a contribution to the Australian and New Zealand Society of International Law Tribute Panel for James Crawford of 6 July 2021.

¹*EJIL:Talk!*, www.ejiltalk.org/mr-kadi-and-article-103-by-james-crawford-a-poem/.

²*Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, Judgment of 31 March 2014, [2014] ICJ Rep. 226.

³J. Crawford, *Chance, Order, Change: The Course of International Law, General Course on Public International Law* (2014).

Justice. Being ever-cautious – something James could not be accused of – I asked him to forgo writing poetry until after the election – and he duly obliged with one exception.

The Kadi poem has an Australianness about it both in content and humour. And this is not surprising, as James was Australian to the core. He was ready to help his home country at a moment's notice even if to do so might have had adverse consequences for him. In that respect, I was concerned that appearing as counsel for Australia before the ICJ in the *Documents* case⁴ brought by Timor-Leste during the last throes of his electoral campaign would do nothing for his electoral prospects. He dismissed these concerns noting that he was always available to advise and represent Australia – and he was.

This tribute to James Crawford will focus on his close connection to Australia and, in particular, his work for the Australian Government prior to his election in 2014 as the second Australian Judge to sit on the ICJ.

I first met James when I was a student at University College, London in 1979. Several students studying the law of the sea at various colleges across the University of London, including my own, decamped to the London School of Economics when James spent a semester teaching the subject there. Even then his reputation preceded him. However, our principal period of interaction was between 1999, commencing with the *Southern Bluefin Tuna* cases before the International Tribunal for the Law of the Sea (ITLOS) in Hamburg, and November 2014 when James was elected to the ICJ.

Our mutual efforts had many highs and some lows. I still have the note James passed to me at the bar table when, in 1999, ITLOS ordered provisional measures favourable to Australia and New Zealand in the *Tuna* cases⁵ – it simply read 'Brilliant!' – I am sure there would have been a similar note had James been present when the ICJ rendered its decision in the *Whaling* case – a case in which he played such a pivotal role for Australia both through provision of his underpinning initial legal advice and as lead counsel. It is striking how similar the outcome and aftermath of that case were to that predicted by James in his initial advice.

On the other side of the ledger he was somewhat devastated by Australia's loss on jurisdiction in 2000 before the first-ever Annex VII Arbitral Tribunal established under the 1982 United Nations Convention on the Law of the Sea – again the *Southern Bluefin Tuna* cases.⁶ He did gain a degree of comfort from the ongoing critical analysis of the decision of the majority⁷ in that case and this was reflected in his subsequent comment concerning 'the jurisdictional disorder created by the unnecessary and unhappy finding of that Tribunal'.⁸ James and I did have our differences – the most serious being over the advice to Government, given both here and in the UK, concerning intervention in Iraq in 2003. Those differences, though strongly held, were never personal.

The breadth and the importance of the scholarly legacy left by James in the fields of both domestic and international law cannot be underestimated.

Without doubt his major contribution 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). The most frequently mentioned, and perhaps most important in an Australian context, is that concerning the recognition of aboriginal customary laws.⁹ The then Chair of the ALRC, Justice Michael Kirby, notes that 'the conduct of the investigation, under Professor Crawford, materially altered the national *Zeitgeist* on the interface of law and our indigenous people'.¹⁰ Simon Chesterman recently

⁴*Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)*, Provisional Measures, Order of 3 March 2014, [2014] ICJ Rep. 147.

⁵*Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan)*, Provisional Measures, [1999] ITLOS Rep. 280.

⁶*Southern Bluefin Tuna (New Zealand - Japan; Australia - Japan)* Vol. XXIII RIAA 1 (2000).

⁷Sir Kenneth Keith gave a separate dissenting opinion.

⁸See *Whaling* case, *supra* note 2, Verbatim Record, CR 2013/19 at 65, para. 21.

⁹The Recognition of Aboriginal Customary Laws, (1986) ALRC Rep. 31.

¹⁰The Hon. Michael Kirby AC CMG, 'International Law and the Common Law: Conceptualising the New Relationship', Fourth James Crawford Biennial Lecture on International Law, University of Adelaide (2009).

commented that in that report ‘lay, perhaps, early signs of the progressivism [James] brought to his scholarship, his advocacy and (more subtly) his judgments’.¹¹

The two other ALRC Reports concerning foreign state immunity¹² and civil admiralty jurisdiction,¹³ both with connections to international law, resulted in comprehensive federal statutes. ‘Resulted in’ is perhaps an understatement as each report annexed a draft of a recommended statute and an explanatory memorandum, which was duly enacted by the Federal Parliament with little change. This very practical and useful form of reporting was a portent of things to come in the form of the International Law Commission’s (ILC) *Draft Articles on the Responsibility of States for Internationally Wrongful Acts* (Draft Articles) and associated commentaries for which James was the final Special Rapporteur from 1997–2001.¹⁴

The Draft Articles are one of many enduring and important legacies of James Crawford at the international level. James himself somewhat modestly noted that the second reading of the Draft Articles was a ‘collective process and many members contributed to the final result. As I was formally responsible for the shaping of the work on second reading, I may not be the best person to comment on the outcome’.¹⁵ In terms of outcome it would not be an overstatement to say that the Draft Articles have had a profound influence since their completion. In addition to their substantive content, that influence, in part, is a result of James’ foresight in steering a path that avoided both substantial debate on the substance of the Draft Articles in the Sixth Committee and their consideration by a diplomatic conference for transformation into a treaty (see below).

Another legacy is that of scholar and a teacher. The Australian Government was a direct beneficiary of his teaching. James taught many Australians in the course of his two decades at Cambridge. He was assiduous in directing some of the best of these Australian scholars to the Office of International Law in the Australian Attorney-General’s Department and to the Department of Foreign Affairs and Trade where many remain providing advice on international law to the Australian Government. His legal texts are staples for those practising in the field of international law. His very first text, ‘The Creation of States in International Law’,¹⁶ is as relevant today as when it was first published in 1979.

Finally, I should mention some of the qualities of James Crawford, in part drawn from my work with him.

The first is the direction and opportunity he gave to the younger lawyers in various Australian litigation teams – James encouraged contributions from every member of the delegation, including at delegation meetings. In the same vein, James recognized that each person had a role to play. He insisted, against my initial hesitance, that as Agent for Australia it was my role to take the lead in preliminary meetings with then ICJ Acting President Tomka in the *Whaling* case. I suppose this was an example of his directness as well. His actions and words evinced honesty and integrity – the examples of which I know of personally are many.

James Crawford had an enormous capacity for work, as illustrated by his simultaneous appearance before the ICJ in the *Whaling* case and presentation of the Hague lectures. As Agent, I was somewhat worried about the effects of this dual commitment on the presentation of the *Whaling* case – but I should not have been.

Courts and tribunals respected and listened to James – this was very evident and very important to his clients, including Australia. His presentations to international courts and tribunals

¹¹S. Chesterman, ‘Scholar, advocate, judge: James Crawford 1948–2021’, *The Interpreter*, 2 June 2021, available at www.lowyinstitute.org/the-interpreter/scholar-advocate-judge-james-crawford-1948-2021.

¹²Foreign State Immunity, (1984) ALRC Rep. 24.

¹³Civil Admiralty Jurisdiction, (1986) ALRC Rep. 33.

¹⁴Annex to A/Res/56/83, 12/12/2001; see also *Yearbook of the International Law Commission*, 2001, Vol. II (Part Two). The subject of state responsibility had been on the agenda of the ILC since 1949.

¹⁵J. Crawford, ‘The ILC’s Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect’, (2002) 96 AJIL 874, at 874.

¹⁶J. Crawford, *The Creation of States in International Law* (1979).

evinced his superior intellectual and analytical skills and the same ever-present sense of humour as the Kadi poem mentioned above, but always with purpose.¹⁷

Victoria Hallum, Chief Legal Adviser at the New Zealand Ministry of Foreign Affairs and Trade, evidences what she refers to as James' skills as a 'wily navigator of the shadowy and complex ways in which states engage in the development of international law and, in particular, customary international law'.¹⁸ Ms Hallum was New Zealand delegate to the UN Sixth Committee at the time its consideration of the Draft Articles in 2001. She was expecting to help James achieve a strong endorsement of the Draft Articles by the Committee. Ms Hallum was somewhat taken aback when, in her words, James indicated 'he wanted them simply "noted" and appended to the General Assembly Resolution and that they be left to sit on the shelf'. He told Ms Hallum (again in her words) that 'the beauty of this solution was that the draft articles would stand on their own merits and over time would prove their value and gain prominence'. This is exactly what happened.¹⁹ As noted by Ms Hallum, the Draft Articles have a prominent place on the shelves and desks of foreign ministries, international courts and tribunals and international organizations, as 'an authoritative go-to guide for practitioners of international law'.²⁰

Ms Hallum also notes that James was a person 'who knew what he wanted and was very capable of navigating to his destination'.²¹ This was no more so than when the destination was to achieve what he considered to be the right legal outcome. This quality can be illustrated by his approach to an argument put forward by Australia in the *Whaling* case that Japan's pursuit of so-called 'scientific whaling' was an abuse of right and an exercise of bad faith. There was disagreement amongst counsel for Australia as to whether these arguments should be made, and James was certainly in the negative camp.

His first shot over the abuse of right bow came in the form of the Eighth Edition of *Brownlie's Principles of Public International Law* of which James was the author. This edition was published after Australia filed its Memorial in the *Whaling* case but before oral argument. The new edition cast real doubt on abuse of right as a principle of international law – an assertion not entirely helpful to Australia's case:

In conclusion while the doctrine [of abuse of right] is a useful agent in the progressive development of the law as a general principle, it is not part of positive international law. Indeed, it is doubtful if it could be safely recognized as an ambulatory doctrine, since it would encourage doctrines as to the relativity of rights and would result, outside the judicial forum, in instability.²²

The second shot came in the course of his oral argument in the case:

Mr. President, Members of the Court, allegations of bad faith should be made only with very great caution, especially when the question is an objective one. It does not contribute to continued good relations between States for protestations of good faith or allegations of bad faith to be thrown around.²³

¹⁷See, for example, his oral submissions in reply in the *Whaling* case utilizing a black holes analogy – so adept for a case with science at its heart. See *Whaling* case, *supra* note 2, Verbatim Record, CR 2013/19 at 57–61, paras. 2–11.

¹⁸V. Hallum, 'Reflections on James Crawford's contribution to international law', Australian and New Zealand Society of International Law Tribute Panel for James Crawford, 6 July 2021.

¹⁹UNGA 56/83 - A/Res/56/83, 12/12/2001.

²⁰See Hallum, *supra* note 18.

²¹*Ibid.*

²²I. Brownlie and J. Crawford, *Brownlie's Principles of Public International Law* (2012), at 562.

²³See *Whaling* case, *supra* note 2, Verbatim Record, CR 2013/19, at 64, para.19.

Needless to say, this caused a degree of consternation within the Australian delegation though James rapidly recovered the position after lunch in the following terms:

I said earlier on that, allegations of bad faith can create problems for courts and tribunals . . .
But of course, if bad faith is shown, then it is highly relevant.²⁴

In the result the Court accepted James' argument that the case involved 'a normal instance of treaty interpretation and application'²⁵ and that it did not need not address Australia's good faith/abuse of right arguments.²⁶

So that takes me back to where I began – the one exception to his undertaking to forgo writing poetry before the ICJ elections. After the final Australian oral submissions in the *Whaling* case, James wrote a poem entitled *You Are Old, Agent William (with apologies to Lewis Carroll)*. The poem bore all the hallmarks of honesty, directness, and humour mentioned above. It remains, one of my most prized, if not secret, possessions.

²⁴See *Whaling* case, *ibid.*, Verbatim Record, CR 2013/20, at 28–9, para.76.

²⁵See *Whaling* case, *ibid.*, Verbatim Record, CR 2013/19, at 67, para. 27.

²⁶See *Whaling* case, *supra* note 2, at 298.