

IN MEMORIAM

IN MEMORIAM DAVID D. CARON (1952–2018)

*By Charles N. Brower**

David was my first Iran-United States Claims Tribunal law clerk when I arrived in The Hague at the end of 1983. In preparing this *In Memoriam*, I identify with the words of our late colleague, Detlev Vagts, when writing about a favorite graduate student who, like David, suddenly had been taken from us far too early in life. Adapting those words to David:

It is always a shock to a teacher when one of his students predeceases him. It seems to be an inversion of the natural order of things. That is particularly true of the death of [David D. Caron] who was so very alive, vigorous and, at least from this octogenarian's perspective, so very young at [65].¹

This reversal of “the natural order of things,” especially when a lifelong friendship has resulted from the initial relationship, inevitably renders this *In Memoriam* highly personal.

Hence, I begin with David's origins and early life. His parents, simple folk, had emigrated from Quebec to Connecticut, where David was preceded in birth by two rather older siblings, a brother and a sister. The first critical turning point in David's life came when he was 12 years old and his father suffered a crippling stroke. Since the eldest of David's siblings already had left the family home and the next eldest followed not long thereafter, a very heavy burden fell upon David. Money was short and in the summers, David supplemented the family income by working as a common laborer in the shade-grown tobacco fields of Connecticut under the burning sun and in the relentless humidity. The forced maturing of these difficult years converted David from “the class clown” to being voted by his graduating Class of 1970 at J.C. Penney High School in East Hartford the most mature, the most studious, and the most likely to succeed.

College education presented the next challenge. Lacking money for the education he desired, David targeted the United States Coast Guard Academy, but was rejected, medically, due to a disqualifying underbite. At that point there was but one solution: David submitted to surgical fracturing and resetting of his jaw. His widow Susan Spencer recalls him recounting how during that summer nourishment was taken largely through a straw. David always knew where he wanted to go, and he got there.

David was a success at the Academy. He graduated with High Honors in physics and political science. Previewing later roles at home and abroad, he sang (second bass) in the Academy

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¹ Detlev F. Vagts, *Introduction: Memories of Thomas Wälde*, in *NEW DIRECTIONS IN INTERNATIONAL ECONOMIC LAW: IN MEMORIAM THOMAS WÄLDE* 153 (Todd Weiler & Freya Baetens eds., 2011).

Glee Club, with which he performed both at the Memorial Service for President Truman at the National Cathedral in Washington, D.C. and later at the White House at the second inauguration of President Nixon. Most significantly, David became the Commander of the Academy's Cadet Corps, a sure sign of outstanding leadership. (David and I later agreed that the acid test in judging the leadership strength of others was "Would I willingly follow this person as my platoon commander into combat?" We felt that this "simple" question embodied all the elements of leadership in twelve words.)

David was further tested during his five years' service as a Coast Guard officer. His first assignment was on the icebreaker *Polar Star*, in the Arctic. When David told me that there he had been the ship's Navigation and Diving Officer, I replied "Certainly you didn't go diving in the Arctic!" to which he responded "I certainly did, as it was necessary, for example, if a propeller was fouled." In fact, David recounted the instance in which he nearly lost his life while diving in the Arctic. Being the totally grounded person that he was, however, that experience did not prevent David from taking his family on diving vacations in later years.

David's second assignment as a Coast Guard officer was in San Francisco as the Assistant Chief of Marine Environmental Protection for California. Always the singer, he sang with the Oakland Symphony Orchestra. I have always thought that his service in San Francisco led, at least in part, to his later attending Boalt Hall, as it then was known, the Law School of the University of California at Berkeley.

Before Boalt, however, David spent a year on a Fulbright Scholarship at the University of Wales in Cardiff earning a Master of Marine Law and Policy degree. He was told on arrival there that in order to "fit in" in Wales he would have to either play rugby or sing. Though David definitely had the build of a rugby player, true to his love of music he chose to sing with the Cardiff Polyphonic Choir.

At Berkeley, David fell under the guidance and mentorship of the legendary Professor Stefan A. Riesenfeld, who later described David as "the best student I have ever had!" David graduated Order of the Coif and was both editor-in-chief of the *Ecology Law Quarterly* and co-recipient of the Thelen Marrin Prize for outstanding student scholarship. In addition, he sat on the Executive Council of the American Society of International Law *ex officio* as the head of what became the International Law Students Association.

Then our lives together began. After David had clerked several months for Judge Richard Mosk, whose resignation took effect January 15, 1984, David and I inherited each other. Being David, and he having had nine years of military life, in addition to Wales and Berkeley, he was disciplined, organized, focused, hardworking, and, of course, very, very knowledgeable already in public international law. I never regarded myself as his teacher; he almost certainly taught me, then and definitely over the years, more international law than I ever could have taught him. Also, he was a very fluent, graceful, indeed elegant writer, receiving fewer corrections of grammar, punctuation, and usage than other law clerks of mine over the years. Also, at thirty-one, he was older than the usual law clerk, hence only seventeen years separated us. Realistically, he was too old to be my son, and I was too old to be his brother. In some respects, I became a kind of avuncular mentor, being consulted by him at decision points in his career, but in other respects he became my mentor.

Even while holding down more than a full-time job clerking for me at the Tribunal, David managed to attend The Hague Academy of International Law in the summer and earn the Academy's Diploma, a rare achievement for anyone, and only the twenty-fifth Diploma

awarded up to then to an American. (His association with the Academy continued thereafter, serving one summer as Director of Studies (English), later as Director of Research (English), and finally as Lecturer in the Academy's summer course.) At the same time, he earned the Dutch degree of Doctorandus at the University of Leiden, which five years later was followed there by his Doctor of Laws. And of course, David had time to sing at the wedding in Scheveningen of one of his clerking colleagues.

From the Tribunal, David's trajectory continued onward, upward, and speedily. Following his clerkship David spent time as senior research fellow at the Max Planck Institute for Comparative Public Law and International Law in Heidelberg, Germany, then a short period with the law firm of Pillsbury, Madison & Sutro in San Francisco, the latter while awaiting Boalt Hall's action on his application to join its faculty. I vividly recall David asking me during that period whether I could write a letter to the law school's dean explaining why a clerkship at the Tribunal was the equivalent of one at the United States Supreme Court. The fact that in those days, and later as well, a number of former Supreme Court clerks came to the Tribunal to clerk made it easy to provide the requested letter. In any event, David was hired and spent twenty-six years there, being chaired at an early stage as the C. William Maxeiner Distinguished Professor of Law. His relationship with his students can best be summarized by the acknowledgment footnote to one of his articles: "A teacher's joy is his students."²

During those Berkeley years David was extraordinarily active in a plethora of international law-related activities, beyond those at The Hague Academy of International Law noted above, and always at the top:

Awarded the Deák Prize of the American Society of International Law for the outstanding article in the year's volumes of the American Journal of International Law by a scholar under the age of forty;
 Recipient of the Stefan A. Riesenfeld Award of the University of California for outstanding achievement and contribution to the field of international law;
 President of the American Society of International Law;
 Chairman of the Institute for Transnational Arbitration of the Center for American and International Law;
 Chairman of the International Law Section of the Association of American Law Schools;
 Commissioner of the United Nations Compensation Commission (member of the Precedent Panel) for claims against Iraq arising out of the First Gulf War;
 Co-Director of the Law of the Sea Institute;
 Co-Director of the Miller Institute on Global Challenges and the Law;
 Member, Board of Editors, *American Journal of International Law*;
 The International Law Association (various committees);
 The American Law Institute;
 The American Bar Association (various capacities); and
 Chairman of the World Economic Forum's Global Agenda Council on the International Legal System.

² David D. Caron, *Towards a Political Theory of International Courts and Tribunals*, 24 BERK. J. INT'L L. 401, 401 n. * (2006).

In addition to all of that, David became much sought after as an expert witness on international law, advocate, and arbitrator in major international arbitrations, including his roles for the Marshall Islands Nuclear Claims Tribunal and before the Eritrea-Ethiopia Claims Commission. When 20 Essex Street Chambers in London had an unexpected gap on its traditional bench of former Legal Advisers to Her Majesty's Foreign and Commonwealth Office (and, in one case, to the Australian Department of Foreign Affairs and Trade), David was invited to join, but first had to qualify as a Member of the Bar of England and Wales (barrister), which he did. In the years that followed, his wig was always on prominent display in his office.

Ever the lover of music, especially song, David also entertained his Berkeley and Hague Academy students, particularly with his imitations of Elvis Presley, with the words altered to suit the occasion, for example, "Amazing Grades" and "Grade Me Tender."

In 2013 lightning struck, and David left Berkeley to become executive dean of the newly renamed Dickson Poon School of Law at King's College London. The year before, Sir Dickson Poon, a Hong Kong businessman, had given King's law school twenty million pounds. David was chosen as the new dean for the purpose of spending that money wisely for the improvement and expansion of the school, at which, according to all sources, he was enormously successful. While doing so, David became a prominent fixture of the London Bar. Already a barrister and therewith a member of The Honourable Society of the Inner Temple, he was made a Bencher of that Inn of Court. True to his musical spirit, David also sang with the Parliament Choir, largely composed of Members of Parliament (both Houses) and assorted other worthies.

At the same time his star continued to rise in the firmament of international law. In the summer of 2015, he was elected to the prestigious Institut de Droit International, and shortly later he was appointed Judge *ad hoc* of the International Court of Justice (ICJ) by the Republic of Colombia in *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, a case on which he sat until his death. It is noteworthy that he was one of only four Americans ever appointed as ICJ Judges *ad hoc*.

Then, at the very end of 2015, lightning struck again, as David's most cherished wish, that of achieving an international judicial position in The Hague, was granted. He and I had worked for years toward that end, failing twice, but it turned out to be "three times lucky." My own resignation from the Iran-United States Claims Tribunal upon attaining the age of eighty finally had been accepted, and David was appointed as my successor, to our mutual great joy, taking office on the second of December 2015. Shortly after, he and his wife Susan Spencer bought a classic four-story old Dutch house and settled in for what they hoped would be the next fifteen years. All who have known and observed David following his move back to The Hague were struck by his very evident, palpable pure joy upon arriving at the destination for which he had longed. And once more, fortune shone upon him still further when he was appointed for a second time as ICJ Judge *ad hoc*, this time by the United States in *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*, thereby becoming the only American ever to be appointed more than once as Judge *ad hoc* of the ICJ.

Turning to David's academic legacy, his writings closely intersected with his professional experiences. He was not one to write from the purview of theoretical abstractions, but rather from lived experience. He had that rare talent of taking discrete experiences—be they while in

the Coast Guard or at the Iran-United States Claims Tribunal—and extracting from them the larger questions with which the life of international law would have to come to grips. In doing so, he spoke to both academics and practitioners. At an Annual Meeting of the American Society of International Law, he articulated the principle that underlay this approach: elegance.³

For David, “elegant” solutions were simple, highly effective, and workable in the face of complexity.⁴ The academic in him appreciated the complexity of problems, while his practitioner side sought simple and workable solutions to them. He knew that elegant solutions were far more difficult to achieve than complex ones—they demanded “skill, devotion, insight, and even inspiration.”⁵ Typically, he would take a step back from complexity to show readers “the shape and direction of the current that contains it.”⁶ As he explained, faced with a current that pointed to both promising and disastrous futures, leadership was “the work of bridging the present with the best of possible futures.”⁷ This concept of leadership infused David’s writings, and was evident in the subjects that flowed from his professional experiences, becoming lifelong pursuits: the law of the sea and international courts and tribunals. This was true as much of his later writings as of those he produced as a young professor at Berkeley.

And let there be no doubt that David was a true intellectual, ranging well beyond the law. His speech on *Confronting Complexity, Valuing Elegance*, for example, drew on the works of two American mathematicians, a Canadian biologist, “the eight thresholds of complexity” posited by Professor David Christian,⁸ Joseph Tainter’s *The Collapse of Complex Societies*,⁹ Alain de Botton’s *The Architecture of Happiness*,¹⁰ the works of computer science expert Chad Perrin,¹¹ and C.A.R. Hoare’s *The Emperor’s Old Clothes*.¹²

David’s early experience at the Coast Guard fuelled a long string of publications on the law of the sea and international environmental law. In 1990, David published *When Law Makes Climate Change Worse: Rethinking the Law of Baselines in Light of a Rising Sea Level* in the *Ecology Law Quarterly*,¹³ the journal on which as a student he had served as editor-in-chief. In that article, David waded through the complexities of global climate change and precisely identified its effects on the law of the sea. He explained that the Law of the Sea Convention rested on the assumption that there would be no important rise in sea levels and thus no movement of maritime boundaries. David suggested that a means to address this challenge would be to fix certain maritime boundaries on the basis of presently accepted baselines. Decades later, with the increasing reality of rising sea levels, David continued to

³ David D. Caron, *Confronting Complexity, Valuing Elegance*, 106 ASIL PROC. 21 (2012).

⁴ *Id.* at 25.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* at 26.

⁸ *Id.* at 23.

⁹ JOSEPH A. TAINTER, *THE COLLAPSE OF COMPLEX SOCIETIES* (1988).

¹⁰ ALAIN DE BOTTON, *THE ARCHITECTURE OF HAPPINESS* (2006).

¹¹ Chad Perrin, *ITLOG Import: Elegance*, CHAD PERRIN: SOB (Aug. 16, 2006), at <http://sob.apotheon.org/?p=113>.

¹² C.A.R. Hoare, *The Emperor’s Old Clothes*, 24 COMMS. ACM 75 (1981).

¹³ David D. Caron, *When Law Makes Climate Change Worse: Rethinking the Law of Baselines in Light of a Rising Sea Level*, 17 ECOLOGY L. Q. 621 (1990).

raise the alarm,¹⁴ while the solution he put forward was being debated by the International Law Association.¹⁵

International courts and tribunals formed the core of David's academic and professional pursuits. Rich with insights from his time at the Iran-United Claims Tribunal, David had written his doctoral dissertation on the Tribunal under the supervision of Pieter Kooijmans at the University of Leiden. The results of his research were first published in the *American Journal of International Law* and won him the prestigious Francis Deák Prize.¹⁶ When David published *The Nature of the Iran-United States Claims Tribunal*, the Tribunal was still in its early days, and many academics and practitioners struggled to categorize this experiment in international dispute settlement. Yet for David this struggle had practical consequences, as the "pigeon hole" chosen would affect challenges to, and enforcement of, the Tribunal's awards. David explained that the struggle to identify the nature of the Tribunal was the result of positions that rested on intuitions supported only by analogies to then existing international dispute settlement mechanisms, such as state-to-state arbitration and international commercial arbitration. Instead, David focused on what the state parties had intended the Tribunal to be and how that intent should be ascertained. David was allowing the theory of international dispute settlement to evolve together with the rise of international arbitration generally. The article was typical David, the academic speaking to the practitioner, and the practitioner to the academic, together pointing to the best of possible futures.

Several years later, David would reconnect with his experience at the Iran-United Claims Tribunal with the publication of his commentaries on the 1976 and 2010 UN Commission on International Trade Law (UNCITRAL) Arbitration Rules.¹⁷ The Tribunal was the first major arbitral institution to adopt a modified version of the 1976 Rules, and its practice applying them "represents the most extensive body of practice concerning the UNCITRAL Rules because the Tribunal's docket was so large and most importantly because the practice of the Tribunal is public."¹⁸ The contributions of the Iran-United Claims Tribunal are at the heart of both volumes. With practitioners in mind, the volumes moved away from the usual article-by-article analysis and adopted an innovative structure that instead reflected the arbitral process. They brought clarity—indeed David's elegance—as to how the Rules were being applied in practice. The volumes easily became the leading authorities on the UNCITRAL Rules.

¹⁴ See David D. Caron, *Climate Change, Sea Level Rise and the Coming Uncertainty in Oceanic Boundaries: A Proposal to Avoid Conflict*, in MARITIME BOUNDARY DISPUTES, SETTLEMENT PROCESSES, AND THE LAW OF THE SEA 1 (Seoung-Yong Hong & Jon M. Van Dyke eds., 2009); David D. Caron, *Time and the Public Trust Doctrine: Law's Knowledge of Climate Change*, 35 U. HAW. L. REV. 441 (2013).

¹⁵ See, e.g., International Law Association Committee on Baselines Under the International Law of the Sea, Sofia Conference Report (2012), available at <http://ilareporter.org.au/wp-content/uploads/2015/07/Source-1-Baselines-Final-Report-Sofia-2012.pdf>.

¹⁶ David D. Caron, *The Nature of the Iran-United States Claims Tribunal and the Evolving Structure of International Dispute Resolution*, 84 AJIL 104 (1990).

¹⁷ DAVID D. CARON, LEE M. CAPLAN & MATTI PELLONPÄÄ, THE UNCITRAL ARBITRATION RULES: A COMMENTARY (2006); DAVID D. CARON & LEE M. CAPLAN, THE UNCITRAL ARBITRATION RULES: A COMMENTARY (2d. ed. 2013).

¹⁸ CARON, CAPLAN & PELLONPÄÄ, *supra* note 17, at 7.

After serving as a commissioner of the United Nations Compensation Commission and sitting on a number of arbitrations, David produced his magnum opus, *A Political Theory of International Courts and Tribunals*, for his lectures at the Hague Academy in 2006.¹⁹ In his lectures, parts of which were published in different fora,²⁰ David sought to reconnect legal thought about international courts and tribunals to their political foundations. He was interested in explaining the “life” of these institutions, as a theoretical framework on which the experiences of the practitioners and diplomats involved in the formation and actions of such courts and tribunals could be hung. This was to be a framework that individuals working in these institutions could consult—the one he had tried to find while preparing to depart for his clerkship at the Iran-United States Claims Tribunal. Enriched by insights drawn from political science, and in particular by the work of Martin Shapiro in the domestic context,²¹ David offered a framing theory that served as a simple model with which to approach the politics of the creation, structure, operation, and closing down of these institutions. In the process, he sought to provide answers to the questions that arose as the number of international courts and tribunals continued to increase: why are they created, why do they fail or succeed, how do we measure their effectiveness, and why do they look like they do?

David suggested that international courts and tribunals are created for reasons far more complicated than simply the resolution of disputes as might be suggested by the label “court” or “tribunal.” The political decision to create an international court or tribunal needs to be distinguished from the task of implementing that decision, a task undertaken by the legal staffs of these institutions who operationalize it along the lines of what is normally meant by the label “court” or “tribunal.” This understanding means that in some cases, the political functions of these institutions may cripple at the outset the function of resolving disputes. Yet, when assessing the value or effectiveness of international courts and tribunals, these political functions, according to David, could not be ignored, as international adjudicatory institutions were in general more dependent on continuing political support from participating states than their domestic counterparts.

The design and operation of international courts and tribunals were reflected, wrote David, in the “interactions of five or less different groups of actors *within* and *against* the bounded strategic space defined by the constitutive instrument establishing the international court or tribunal.”²² The five different actor types—the parties, the adjudicators, the community, the secretariat, and other interested parties—are present across many international adjudicatory bodies. They are each defined by distinct institutional positions and a particular logic. The competition for influence by these different groups requires the construction of a set of rules that animates the operation and development of the institution over its life. As a result, the constitutive instrument creates boundaries and “rules of the game” that give rise to a relatively fixed system, i.e., the bounded strategic space. For David, this dynamic view of international

¹⁹ David D. Caron, *A Political Theory of International Courts and Tribunals*, RECUEIL DES COURS (forthcoming).

²⁰ David D. Caron, *Towards a Political Theory*, *supra* note 2; David D. Caron, *Framing Political Theory of International Courts and Tribunals: Reflections at the Centennial*, 100 ASIL PROC. 55 (2006); David D. Caron, *International Courts and Tribunals: Their Roles Amidst a World of Courts*, 26 ICSID REVIEW – FOR. INV. L.J. 1 (2011); David D. Caron, *The Multiple Functions of International Courts and the Singular Task of the Adjudicator*, 111 ASIL PROC. 231 (2017).

²¹ See MARTIN SHAPIRO, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS* (1981).

²² David D. Caron, *Towards a Political Theory*, *supra* note 2, at 411 (emphasis in original).

courts and tribunals described how political contests continue past the moment of creation and inside the bounded strategic space that was created with the institution.

Looking back upon David's life and legacy, he lived it all, as I see it, according to the words of a barely twenty-three-year-old Abraham Lincoln, written in the March 15, 1832 issue of the *Sangamo Journal* when announcing his candidacy for the Illinois State Legislature:

Every man is said to have his peculiar ambition. Whether it be true or not, I can say for one that I have no other so great as that of being truly esteemed of my fellow men, by rendering myself worthy of their esteem.

Regrettably, David succumbed to septicemia on the twentieth of February of this year. The message I received announcing David's death read as follows:

Now cracks a noble heart.
Flights of angels have sung our
Prince to his rest.

These words of Horatio, uttered on the death of Hamlet in Shakespeare's play, encapsulated all of the sentiments that all who knew David held in respect of him. A noble heart, a prince of international law, who overcame much to become everything.