

OBITUARY

INTERNATIONAL COURT OF JUSTICE: TRIBUTES TO JUDGE JAMES CRAWFORD

James Crawford AC SC FBA (Adelaide, 14 November 1948–The Hague, 31 May 2021)

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James Crawford in his time played many parts, as student, scholar, law reformer, counsel and adviser, arbitrator and judge and family man, all in terms of his High School motto – *fac omnia bene* (do everything well).

James Richard Crawford was the oldest of the seven children of Josephine Margaret Crawford (née Bond) and James Allen Crawford. His school record was outstanding, ending high school as co-head prefect. In his valedictory editorial in the school magazine, the 17-year-old James defined education as ‘something like this: a leading out, through discipline and balance, of latent abilities in youth, and thus a preparation for life’.

In 1966 James entered the University of Adelaide to study arts and law. He excelled in both, gaining prizes in literature and English and in law, graduating in both in 1972. While these were early days in the expansion of full-time teaching in Australia, the law school already had some notable scholars, including the Australians Alex Castles, Horst Lucke, David Kelly and Michael Detmold, and the New Zealander, D. P. O’Connell, who taught James international law, and was in 1972 elected to be the Chichele Professor of International Law at Oxford.

It was during James’ study at the Adelaide law school that our paths first crossed, unbeknown to each of us. As a member of the Codification Division of the Office of Legal Affairs of the United Nations Secretariat in 1968–1969, I prepared supplements to the Digests of the decisions of international tribunals and proposals submitted to and decisions of various United Nations organs, both relating to state responsibility (A/CN.4/208 and 209).

While James Crawford and Daniel O’Connell arrived in Oxford at much the same time, James chose Professor Ian Brownlie as his supervisor. His willingness to engage with large topics was demonstrated by his study of States, which led to his Oxford D Phil in 1977, and in 1979, to the publication of *The Creation of States in International Law* by Oxford University Press. That work was widely acclaimed and was awarded the Certificate of Merit by the American Society of International Law. In 2006, an expanded and updated second edition was published. James’ publications went beyond international law as appears from his valuable *Australian Courts of Law* (1982), with a fourth edition in 2004, a book that demonstrates James’ understanding of Australian constitutional law.

*I have made extensive use of Ivan Shearer and Philippe Sands’ biographical accounts in Christine Chinkin and Freya Baetens (eds.), *Sovereignty, Statehood and State Responsibility: Essays in honour of James Crawford* (2015), the tributes given at the session of the Australian and New Zealand Society of International Law on 6 July 2021, and the website of the Lauterpacht Centre for International Law, www.lcil.cam.ac.uk/memoriam-he-judge-james-crawford-ac-sc-fba.

Following his study in Oxford, James returned to the University of Adelaide to join the law school and began to rapidly build up a most impressive set of publications. I select just one early article, published in the *American Journal of International Law* for 1979, which I read at the time, on the international law standard in Australian and United Kingdom statutes; it makes some reference to Canadian and New Zealand legislation.¹ As with his major book published in the same year, we find an exhaustive collection of the detail, in this case of legislative practice, some of it intruding into areas of law which many might have thought as being essentially within domestic jurisdiction, matched by valuable analysis. James may be seen as providing a message to young scholars, as valid now as it was then, about the importance of examining national legislation which gives effect, or does not, to international law. Such legislation is too often neglected in commentary.

From early in 1982 until the end of 1984, James took leave from the law school to be a full-time member of the Australian Law Reform Commission, under the leadership of Michael Kirby, and was in charge of three references. He remained a part time member until 1990. His work on foreign state immunity led to legislation enacted in 1985, one piece of state practice cited in the judgment of the International Court of Justice in the case between Germany and Italy. The second reference concerned the law of admiralty, a colonial relic, and again led to new legislation. The third was the most challenging- the recognition of aboriginal customary laws. The report, prepared following extensive consultation across the country, made recommendations to be considered or implemented at appropriate levels of government. This was before the leading decisions of the High Court of Australia in the *Mabo* case (citing the *Western Sahara* opinion of the International Court of Justice) and the *Wik* case.

I was a member of the New Zealand Law Commission over much of that period and met James frequently, and very much to my advantage, at meetings of the Australian (state as well as federal) and New Zealand law reform commissions. That was also the case at the international law weekends, held in Canberra, first established by Elihu Lauterpacht in the 1970s. Those meetings were later transformed into a revived Australian and New Zealand Society of International Law.

In 1985, James was elected as an associate member of the *Institut de Droit International*, the youngest in recent years, and in 1986, was appointed as Challis Professor of International Law at the University of Sydney. There, in addition to his teaching and supervision, he undertook the challenge of the Deanship for three years, instituting international law as a compulsory first year subject. James stressed the value of academics being involved in the practice of law, and in 1987, he was called to the New South Wales Bar, becoming Senior Counsel in 1997. He was later to be a founding member of Matrix Chambers in London.

In 1992, after 15 years of teaching and law reform work in Australia, James was elected to the Whewell Chair of International Law at Cambridge and became a member of the United Nations International Law Commission, each a clear recognition of his real and rising eminence in international law. He appears to be the first non-UK citizen elected to the first and was certainly the first Australian elected to the second.

At Cambridge, James again took up the administrative burden of heading the faculty as chair of the law faculty board and was Director of the Lauterpacht Centre for International Law for two lengthy periods. I can testify to his generous support for me at the Centre when I had a sabbatical from my judicial responsibilities in New Zealand and, among many things, with Jocelyn also a good friend, we made the walk to Grantchester. Through his 23 years at Cambridge, in addition to his heavy teaching responsibilities, James undertook the supervision of about 70 doctoral students. And beyond that was his growing international practice, his ILC work and research, and his publications. Notable among the publications are the two editions of Ian Brownlie's *Principles of International Law* and his Hague lectures, *Chance, Order, Change*. I also refer to

¹J. Crawford, 'The International Law Standard in the Statutes of Australia and the United Kingdom', (1979) 73 *American Journal of International Law* 628–46.

the first Justice Michael Kirby lecture, given by James in 2008, comparing the record of the House of Lords with that of the High Court of Australia in dealing with matters of international law between 1996–2008.² He found the balance very much in favour of the House of Lords, with only Justice Kirby being excepted from the criticism of his Court. Lord Bingham, the senior Law Lord during that time, I can report, was very pleased by James' conclusions.

James must be seen as one of the most successful of the members of the ILC since it was established in 1947. In his first five-year term, he became chair of the working group on the draft statute for the International Criminal Court which the Commission completed in 1994 and which provided the basis of the Rome Statute of 1998. That topic, along with the related draft Code of Crimes against the peace and security of mankind, had long been on and off the Commission's agenda.

In his second term, James was appointed as special rapporteur on State Responsibility for Internationally Wrongful Acts, the fifth to hold that office and the first common lawyer. Work had been undertaken on that topic by his predecessors since 1956, but much of it amidst considerable controversy. With real skill and the support of the Commission, he brought the project to a completion in 2001. The articles have been used by states in their practice, by international courts and tribunals in their rulings in over 350 cases, and by scholars, over the following 20 years.³ The articles must be seen as having great authority, notwithstanding the fact that they have not been put into treaty form through the 'intermediate purgatory' of a diplomatic conference or a Sixth Committee working group – something James rightly opposed, but which may still be in prospect.⁴

States had had extensive opportunities to comment on drafts as they appeared through the lengthy Commission process. Further, the first reading text and earlier drafts had been tested in litigation. I take just two examples preceding the completion of the final text. In the *Gabcikovo-Nagymaros* case in the ICJ, in which James and his predecessor in the Whewell chair, Derek Bowett, appeared on opposite sides, they invoked as authority the rules in the earlier drafts relating to circumstances precluding wrongfulness.⁵ That also happened in the *Rainbow Warrior* arbitration (Professor Bowett was in the New Zealand team, and I was a member of the tribunal) and also in respect of other early drafts. In both, the rulings largely accepted the texts although in the latter the tribunal thought the earlier formulation of the necessity test for precluding wrongfulness was 'controversial'.⁶ In its final commentary on that matter, the ILC was careful to emphasise the tight limits it had placed on the test, having very much in mind the destructive dogma invoked, as the Commission recalls, by Germany to justify its invasion of Belgium in 1914 in breach of its neutrality, that 'necessity knows no law'.⁷ The ILC was able to cite those rulings and several others to support its final formulations.

I come finally to James' very successful work as counsel before the International Court of Justice. That experience began in 1989 on behalf of Nauru in the claim brought against Australia. That was the first of a long list of cases. Do James and his good friend and frequent opponent, Alain Pellet, between them, hold the record for appearances (not that James was into counting)? My last professional involvement with James was the joy of hearing him present oral

²J. Crawford, 'International law in the House of Lords and the High Court of Australia 1996–2008: A Comparison', (2008) 28 *Australian Yearbook of International Law* 1.

³Report of the Secretary-General, Responsibility of States for internationally wrongful acts: Compilation of decisions of international courts, tribunals and other bodies, UN Doc. A/74/83 (2019).

⁴See UNGA Res 74/180 on Responsibility of States for internationally wrongful acts, UN Doc. A/RES/74/180 (2019), para. 9.

⁵*Gabcikovo-Nagymaros Project (Hungary/Slovakia)*, Judgment of 25 September 1997, [1997] ICJ Rep. 7.

⁶Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements concluded on 9 July 1986 between the two States and which related to the problems arising from the *Rainbow Warrior* affair, (*New Zealand v. France*) (1990) UNRIIAA, vol. XX 215, at 254.

⁷ILC Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), at 80, fn 373.

argument in the Great Hall of Justice in the Peace Palace. I had earlier heard him as counsel for Australia and New Zealand against Japan in the *Southern Bluefin Tuna* arbitration, in which he and Eli Lauterpacht, for Japan, had stimulating exchanges, and during my ICJ time in an investment arbitration.

I was on the bench for about half of James' cases in the ICJ. I am sure that I can also speak for my former colleagues when I say how much I admired James' advocacy and no doubt his contributions to the written pleadings. It was a joy to hear the clarity, ease and wit of his presentation. In my experience, too many counsel, certainly not all, droned on, with their heads down, making no attempt to engage with the judges. I take one example from the many that I could have chosen. In the advisory proceedings relating to the declaration of independence of Kosovo, James, appearing for the United Kingdom (another first for a non-UK national), looking at all members of the Court – no easy task – said this:

I am a devoted but disgruntled South Australian. "I hereby declare the independence of South Australia." What has happened? Precisely nothing. Have I committed an internationally unlawful act in your presence? Of course not. Have I committed an ineffective act? Very likely. I have no representative capacity and no one will rally to my call.⁸

With his phenomenal record of achievement there could be no doubt that James would be elected to the International Court of Justice as he was at the end of 2014, following his final appearances for Australia as counsel in the *Whaling* and *Timor Leste* cases. But his time on the bench, which he had begun to adorn, was cruelly cut short.

An overall comment on this remarkable life. James was a true generalist lawyer and not just in international law. Consider his advice in relation to Québec and Scotland. We need more like him.

In my country we would say that a mighty Totara has fallen in the forest of Tane. Haere, haere, James, haere, haere ra.

⁸Accordance with international law of the unilateral declaration of independence in respect of Kosovo, Verbatim Record, CR 2009/32, at 47, para 5.