JAMES CRAWFORD

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James Crawford was, at various points in his career, the Whewell Professor of International Law at the University of Cambridge, Director of the Lauterpacht Centre in Cambridge, and holder of the Challis Chair in International Law at Sydney University. He was an immensely productive and influential scholar (his most important contributions are his books on state responsibility and the creation of states) and a prodigious and admired litigator. Latterly, he served as a Judge at the International Court of Justice from 2015 to 2021.

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James Crawford was born in Adelaide, 'a not very large capital city' (as he put it himself) in South Australia, and he spent his entire early life and undergraduate student days there before becoming a lecturer in International Law at the University of Adelaide Law School. The eldest of seven siblings, he seems to have lived a conventional and happy middle-class life in Adelaide (his parents were a nurse and a Labor Party-supporting company director), though his 'very intellectual' maternal grandmother was only the second woman to graduate in law from Adelaide University.

But if the city was then known for being parochial (nowadays it hosts one of Australia's biggest literary festivals), the young James was keenly aware of the national and international politics of the time. He was an undergraduate (1966-71) during the Vietnam War and participated in a handful of protests against it. The end of his studies in Australia coincided with the end of decades of conservative administration in 1972 and the election of the Whitlam Government (its campaign slogan was 'It's Time'), and the years of 1972-75 are remembered as salad days for a reconstructive, redistributive and progressive politics in Australian political life. There were major legal changes in this period, too (a new Family Law, the ending of conscription and, in government circles, a much keener interest in international law and diplomacy).

James emerged out of this with an LLB along with a BA in International Relations, History and Literature and, among his numerous honours, he was the recipient of the Bundley Prize for English Verse (this, perhaps, inspiring a later poem about Mr Kadi in the *European Journal of International Law*) as well as other prizes in law and English. It doesn't require much, then, to imagine James as an eminent English or History don. Indeed, his submissions to the International Court of Justice (ICJ) many years later – peppered with witty literary allusions – very much bear the imprint of these early interests.

One of his teachers at Adelaide was a fellow South Australian, John Finnis, and it is thought that James pursued further study at Oxford with Finnis's encouragement though without the aid of a Rhodes Scholarship, which he was awarded and then obliged to relinquish after marrying in his final year at Adelaide. In Oxford, he worked under neither Finnis nor Dan O'Connell (a fellow antipodean and the new Chichele Chair), but instead gravitated towards Ian Brownlie. It was Brownlie who first advised him against tackling the creation of states as a PhD topic (too large a subject) but then subsequently agreed that perhaps James could pull it off (of which more later).

On his return to Australia, he consolidated his reputation and career at Adelaide Law School, moving swiftly through the academic ranks, completing and submitting his doctoral dissertation and becoming a professor within nine years of joining the Law School.

He became – of course – a leading figure in Australian international law, something recognised by the Australian Government when it awarded him the Companion of the

Order of Australia in 2013. This early part of James's career coincided with a rich period for law and diplomacy inspired partly by Eli Lauterpacht's tenure as the Legal Adviser to the Australian Government on International Law and the ensuing dynamism among the Australian international law cohort. J.G. Starke, Don Greig, Ivan Shearer and Henry Burmester were active at that time, and the Australian scene was already one in which there were regular exchanges between the diplomatic and foreign affairs service, and the world of international legal academia. James – deeply respected in government circles – was instrumental in all this. As a result of his growing reputation, James was then appointed to a three-year position at the Australian Law Reform Commission in Sydney, where he was commissioned to write a groundbreaking report on Aboriginal Customary Law. In 1984, he returned to Adelaide to take up his Chair in international law, before being lured back to Sydney for the Challis Professorship in International Law in 1986. He became the Dean of the Sydney Law Faculty in 1990 (where he no doubt had a hand in making international law become a compulsory subject for LLB students).

It was at this point, too, that James became much more involved in international legal practice through two cases each involving an aspect of Australia's postcolonial relations with its regional neighbours. In *Certain Phosphate Lands in Nauru*, James acted for the Nauruan Government and against Australia in a dispute over the mining of Nauru's phosphate reserves during the period in which Australia (and its partners, New Zealand and the United Kingdom) had exercised a United Nations trusteeship over Nauru.[1] The preliminary phase of the case was decided in Nauru's favour and eventually settled (for just over a million dollars). Shortly after this, Portugal instituted proceedings against Australia in the East Timor case. Again, James was on the winning side with Australia persuading the court that it could not proceed to the merits of the case (and, for example, consider in any depth the question of Timorese self-determination) in the absence of Indonesia, an indispensable, absentee third party.

Just before I (Gerry) arrived in Australia in 1991 as a tyro international lawyer I received a letter from Professor Hilary Charlesworth (then a lecturer in law at Melbourne University, now James's successor on the Court) welcoming me to the Law Faculty and mentioning something about a forthcoming 'International Law Weekend' in Canberra. This – a predecessor to the now well-established Australia-New Zealand Society of International Law Annual Conference – had been convened, in an early golden age of Australian international law, by Eli Lauterpacht in collaboration with various members of the Department of Foreign Affairs and the Attorney-General's Office. James had played a leading role in the weekends since his return from Oxford. Meanwhile, I had just emerged from undergraduate study at Aberdeen (where Dr Catriona Drew – now at SOAS, and later an examinee of James's when studying at LSE with one of his own

[1] International Court of Justice, *Certain Phosphate Lands in Nauru* (Nauru v. Australia) Reports 1992/1993.

former doctoral students, Professor Christine Chinkin – had pointed out to me in the library a book called *The Creation of States* describing it as a must-read on self-determination). Professor Philip Alston called me up one day and invited me to speak at the International Law Weekend. Philip was on my panel and tore into my 'theory of secession' mercilessly, and justifiably. By the time the questions came round I was convinced my career was in tatters. But by far the worst thing was that this whole fiasco had happened in front of the legendary Professor James Crawford who I hadn't yet even met. But then James raised his hand and defended my (probably indefensible) paper with such generosity and robustness that I began to think perhaps the paper had been a triumph.

Of course, scores of people have stories like this about James's energy, attentiveness and generosity. After he left Australia again in 1992, James took up the Whewell Chair of International Law at Cambridge, and in 1997 succeeded Sir Eli Lauterpacht as the director of the recently founded Lauterpacht Centre. Along with his talented academic colleagues and hard-working administrative staff, he established a centre of excellence for the study of international law. An extraordinarily large number (over 60) of doctoral students (many of them now themselves prominent international lawyers) studied under James at the Lauterpacht Centre. Professor Douglas Guilfoyle has spoken with great warmth and wit about James the supervisor in a published eulogy. Meanwhile, others have spoken of his prodigious energy, his work ethic, his intellectual discipline – emails would fly in from all over the world at all times of the day or night. This was a period, after all, in which James also was becoming a leading litigator in the field and had revived, as co-editor, the *Cambridge Studies in Comparative and International Law* series (arguably the most prestigious series of monographs in international law), while at the same time acting for several years as Faculty Chairman of the Cambridge Law Faculty.

James was also and perhaps principally, of course, a scholar of distinction. He received the Hudson Medal for non-American contributions in international law, and for a number of decades his work in the field carried enormous weight and authority. He would not have described himself as a legal theorist and at no point did he set down his 'concept of law', at least not in any explicit sense. In a way, then, he was a 'rigourist', someone who appreciated the virtues of legal positivism, and married that appreciation to an acute eye for detail and an extensive knowledge of the operation of international law as a legal system embedded in a world of diplomacy and states.

His two signal contributions to the academic field are his books on, respectively, the creation and responsibility of states, and they are unlikely to be readily surpassed.[2]

[2] Lesley Dingle's interview with James, published by the Squire Law Library and a very useful source of information for this obituary, lists 92 journal articles, 82 book chapters, and 14 books (these included – aside from his works on statehood – the eighth edition of Ian Brownlie's *Principles of International Law* and his Hague Lectures, published as *Chance, Order, Change* (2018).

The Creation of States, published in its first edition in 1977, is already a monumental piece of scholarship but it could have been and became (in its second edition) much longer. Completed under the supervision of Ian Brownlie (whose line about theory being a 'bank of fog on a clear day' had been a greater curse on the study of statehood than the targets of this aphorism, the declaratory and constitutive theories themselves), it is described, by Brownlie, as a 'fairly reduced version of a substantial text'. The substantial text was James's draft doctoral dissertation at Oxford and that text, too, had been whittled down for submission prior to being examined by Maurice Mendelson and James Fawcett. Here, then, we already have evidence of its author's industry. (Little wonder the thesis was so long. James even makes the decision to include a concluding section in which he takes up matters such as extinction and reversion that might seem incidental to the creation of states (in that phrase's strictest sense)).

Brownlie's Foreword begins with the sentence: 'A major study of the creation of States has long been wanted'. Public international law is understood in its commonplace textbook iterations as the law regulating inter-state relations, and yet perhaps the state itself had been, at this point, a little taken for granted. This was certainly Crawford's intuition as he set about writing his first book. States created international law but did international law go about creating states (and if so, how)? If we return to the Foreword again, we have Brownlie saying that there has been a 'reserve in the face of material which is said to be "political" and, therefore, not a proper subject of legal analysis'. This idea – indeed, those quotation marks – haunt the pages of the original book. Of course, as James himself points out, statehood has been neglected but hardly ignored entirely. Writers have tended to come to the question at an angle (Marek on identity) or they had disposed of it as part of a larger treatise (think of Lorimer's obsessive taxonomising).

Very often, it had been considered as part of a discussion of recognition (in Hersch Lauterpacht's study, most obviously). James takes on the question of recognition right from the off. The constitutive theory (with recognition at its core) 'does not correspond with state practice' (Preface). 'On the other hand' [and this may be one of the most useful phrases in statehood scholarship], '… in this as in other areas … recognition practice … is of considerable importance'. Here we find ourselves in an 'oscillatory' (to repurpose a Nathaniel Berman word) mode. At the end of the Preface is a note to the effect that 'The State is not allocated a sex'. Even this apparently innocuous phrase seems to prefigure a whole world of feminist scholarship on statehood ('Sexing the State' and so on).

But this was a book that may have seemed a bit old-fashioned for its time. By the late '70s, there had already been a large scholarship urging a more expansive view of international legal personality. The human rights treaties (or at least their protocols) offered standing to individuals; corporations were, since *Barcelona Traction*, said to be subjects of international law; decolonisation had more or less taken its course; and the talk was all about NGOs and institutions. Along came James with his 500-odd-page treatise on

states. And yet, it turned out that like so many old-fashioned thoughts it was ahead of its time. Ten years after publication, statehood, and the methods of acquiring or gifting it, became a very hot subject with the dissolution of the Soviet Union and Yugoslavia. Anyone trying to work out how to think about the personhood of Bosnia, Macedonia, Kosovo, Lithuania or Chechnya might have been very strongly inclined to consult *The Creation of States*.

A great deal hangs on the word 'creation'. It leaves tantalisingly open the question of how, or indeed whether, states are formed in any way legible to law. There are the quasi-religious origin myth associations of the word, for a start. If states are the result of some romantic idea of *Volk*, then what price the Montevideo Convention? In the face of this, James is keen to establish criteria, of course, to support the application of a more fully realised declaratory theory. But again, the watchword is flexibility; in some cases, these conditions will be strictly applied, at other times they will be 'nominal'.

James might be characterised as a pragmatist of the intelligence and formalist of the will. He takes the rules (the law) seriously in order, perhaps, that they be taken seriously elsewhere. States then are not mere facts but nor are they entirely artificial entities. Or at least states are not facts in the sense that chairs are facts, but are facts 'in the sense in which a treaty is fact' (p. 4). This has on occasion, in the international law classroom, prompted a lengthy digression on the question of whether chairs are in fact facts, but what James means is that a territory's stateness can only be comprehended in its material factness through the application of a set of legal norms. This then is how the questions of fact and law are brought into some kind of alliance. According to James, declaratists don't pay enough attention to the rules that govern the creation of states, while constitutivists (one wonders if it was the nomenclature of statehood thinking that Brownlie took such objection to rather than the theories themselves, which seem rather innocuous) overvalue the act of recognition and especially diplomatic recognition. In the end, James is arguing against two different ways of over-elevating 'facts'. In one case it is the material conditions of community that are the target, in the other the fact of cognition or identification by another state or states. In either case, we are all at sea without a legal regime to guide us. Or, to put this another way, the situation is incoherent. This was the case, according to James, in the 19th century when there were no rules governing the creation of states (or the use of force, according to an accompanying footnote): 'formal incoherence was an expression of its radical decentralisation' (this view of the 19th century is questionable and Antony Anghie's early work constitutes an alternative reading).

The book's historical sections are a rather thin gruel. James tells us that Grotius and Pufendorf write philosophy not law, and there are brief capsule descriptions of Vattel and Vitoria. This is followed by a page and half of historical practice (Aragon and Castille, the Union of Scotland and England) and a nod to revolutionary states followed by a

summary of the 19th-century position (admission to the society of states was more significant than the possession of what we might call ‘bare statehood’). This is all rather throat-clearing (one can imagine a conversation in which Brownlie and Crawford agree that there needs to be ‘some history’) and it is obvious that James wants to get started on the nitty-gritty of English case-law as rapidly as possible.

The ‘modern position’ (the book itself, in effect) then begins with the English courts: *The Arantzazu Mendi*, *Duff Development*, *Luthor v Sagor*, *Carl Zeiss Stiftung v Rayner and Keeler* – famous names to those who have taught or written on the ‘domestic effects of recognition’, but perhaps provincial as an opening gambit on a book about the creation of states. It continues with a redescription of the great debate. Constituvists (the most convincing is Lauterpacht) are prone to, or permit too much, relativism (a state here but not a state there), and too much decentralisation (international law reduced to a ‘system of imperfect communication’ (p. 20)). In any case the practice does not bear them out. The declaratory theory (or at least a declaratory theory that can accommodate a role for recognition) is favoured then with all its flaws. And it is favoured too among writers: ‘Brownlie states the position succinctly ...’ (p. 22).

But the prospects of such a theory depend very much on the availability of a set of criteria. Are these available? Can they offer certainty and coherence? That is the book’s major task (taking up over 140 pages). The Montevideo criteria are of course familiar. In the case of territory and permanent population there are quirks (How permanent is the ‘professional’ population of the Vatican State? ‘What about border states’?), but mostly it is a case of knowing it when we see it.

In the case of ‘government’, James had the difficult task of working his way around ideas of effectiveness (apparently dominant in this area of law where states had little interest in the virtuousness of a government when it came to assessing statehood) and legitimacy (the increasingly influential claim that statehood might depend on the quality of government). This tangle is approached through the case of the Congo (now the DRC) and an ineffectiveness of government (unable to govern without UN aid, unable to control a breakaway province, anarchic) that does not stand in the way of recognition (the sheer legal power of the decolonisation norm meant independence had to be granted). We are led through this material (often by necessity decontextualised) with a steady and careful hand and the right answer is reached.

There is something about James’s early voice that is revealed here. He is always keen to position himself between the extremes of facticity on one hand and otherworldly formalism on the other: neither fact nor law; the chair, always a thing *and* a construct of language and law. I began counting the ‘one hands’ and ‘other hands’ in the book (James is like Tevye from *Fiddler on the Roof* but without the anguish). He asserts or defends the autonomy of law from the political realm and then chastises those who cannot appreciate the play of practice and politics in the legal world. A commonsense position of

jurisprudential precision and cautious worldliness thus emerges. Maybe this is the voice of the discipline's mainstream; maybe it is the voice of a certain way of doing law, but whatever it is James was a master exponent.

Sometimes, though, the exactness of the categorisations gives the work the feeling of a set of mathematical formulae. In the passages on independence, we are confronted with one of the most ornate numbering systems in international legal scholarship. Falling under Chapter 2 (sub-heading II) we have criteria no 5 (Independence) under which there are four different forms of separate existence (i-iv), one of the forms of which (ii) 'absence of subjection' is further divided into different types of independence (a-c), one of which (a) is formal independence. But there are many factors relevant to formal independence (1-3), one of which 'situations not derogating from formal independence' contains eight (1-8) sub-types. By this time, James's mind has far outstripped any existing numbering system and the reader is reduced to flicking back and forth through the text while keeping score on a proximate sheet of paper. It is all rather marvellous, as if James is determined to capture every last nuance of independence through an unapologetic cataloguing of legal forms. In Borges' (one paragraph) short story, 'On Exactitude in Science', a state comes into existence that can only be mapped by a form of cartography in which the maps are on a 1:1 scale. In the story, what remains of the map are mere fragments left to future scholars and historians. Sometimes, it seems as if James is engaging in a kind of juristic cartography in which everything is mapped. *The Creation of States* may indeed be a fragment of the fully scaled-up map (the original dissertation, or perhaps the unexpurgated first draft of the original dissertation).

In the midst of this mapping, some concepts get very short shrift from him. Sovereignty, for example, keeps popping up uninvited like a barely tolerated second cousin. The reader soon receives the impression that it would be 'preferable' (a very Crawfordian term meaning 'the correct and only reasonable' as in 'the preferable view is …') if the term fell out of usage. It has a 'long and troubled history' (p. 26) and 'the dangers of drawing implications from the term are evident' (p. 27). Alas it obstinately refuses to go away. And so, James, a Canute holding the tide of language at bay, can merely importune against unfortunate usages. Thus, '… it seems preferable to restrict "independence" to the prerequisite for statehood and "sovereignty" for its legal incident' (p. 71). Nevertheless, James did not belong to those international lawyers who were ready to simply throw sovereignty overboard (a position never on the cards anyway). It had 'protected status' as an offshoot of the right of a people to decide on its government and resist external interference. True, sovereignty also protected authoritarian forms of rule. But foreign efforts to import democracy, for instance, had not been encouraging. And increasing functional co-operation had lowered the boundaries of sovereignty so that, for example, the protection originally offered to states by the reservation of domestic jurisdiction under the UN Charter had radically limited its scope. Instead, he

wrote in a later essay, new notions such as that of the margin of appreciation, aimed to balance the interests of state governments with individual and group rights under the human rights treaty network.[3]

Decolonisation is confronted more fully in the sections on Statehood and Self-Determination. In 1977, James was still able to say that the relationship between statehood and self-determination was 'to some extent, a neglected problem' (p. 84). In the post-Badinter, post Quebec/Scotland/Catalonia, post-Soviet era, that is no longer the case. Indeed, in 1977, viewed a certain way, the relationship of statehood to self-determination was *the* question of the post-war era. This was what lay at the heart of 'decolonisation'. For James, the issue is self-determination's status as a criterion for statehood. But first, there is a discussion of its status in general international law. As late as 1973, Gerald Fitzmaurice is still calling the principle of self-determination 'juridical nonsense'. James, needless to say, prefers the 'studied ambiguity' of the International Court of Justice's opinions on self-determination. Judges Dillard and Petrén are quoted at great length on this subject, and the gloss on these pronouncements gives us a further glimpse into James's concept of law. There are, as ever, two interpretations. On one hand, it may be that there are too many loose ends, too many textual gaps, so little certainty as to how to apply these so-called principles that the whole field is, if not quite juristic nonsense, then at least *de lege ferenda*.

The other (preferable) view is that a law of decolonisation has emerged with a core of applicable principles and a fuzzy margin of developing norms: a concept of law, then, and one that in the context of a history of post-war decolonisation, it is 'rather late in the day to contest' (p. 100). Elsewhere, the law of self-determination, apart from permitting a certain flexibility in the condition of effectiveness when it comes to newly independent post-colonial aspirant states, can work to prevent a State (the Smith Government's UDI in Rhodesia was the proximate event) coming into being in violation of the norm of self-determination itself (p. 105). James ends his discussion of Rhodesia by saying that '… it can hardly be regretted that a rule which merely ratifies the international position of effective but totally unrepresentative regimes is open to change' (p. 106). This is as close to 'personal opinion' as we get.

Because the law of self-determination is often approached as a law of abnormal relations or through a relationship between normal cases and abnormal instances, *Creation* is a vital resource for those trying to make their way around the question of Taiwan or the Holy See. James is a sure-footed guide in these cases, as he remains heroically focused on the sometimes decontextualised legal position, carefully refusing to get drawn into any Cold War manoeuvring on the disposition of Taiwan. He concludes:

[3] James Crawford, 'Sovereignty as a Legal Value', in James Crawford & Martti Koskenniemi, *The Cambridge Companion to International Law* (Cambridge University Press, 2012), 119-22.

'Taiwan is not a State, because it does not claim to be, and is not recognised as such: its status is that of a consolidated local *de facto* government in a civil war situation' (p. 151). On first reading, this seems to de-emphasise the territorial nature of Taiwan and its material and diplomatic position but, in the light of recent shadow boxing in the Gulf of Taiwan, the idea of a civil war situation may seem less artificial than it did in 1977. Elsewhere, there are marvellously elaborate encapsulations of the relationship between The Holy See and the Vatican State, and sometimes-definitive statements of the law of devolution or extinction. Students of international law and politics surprisingly often interested in such questions can, with confidence, be directed towards *The Creation of States* and its technical masterclasses.

Was James one of those mysterious publicists whose work forms part of the legal order? An Article 38 figure invested with law-making authority? His work manifests a certainty (even as early as 1977). His descriptions of the legal rules are invested with the kind of confident omniscience that gives the reader the sense that laws are being given their definitive treatment.

At the ICJ, James had several opportunities to expand on his thinking in *Creation of States*. To take one example, in the Advisory Opinion on *The Declaration of Independence of Kosovo*, he can be read in full flight over five pages on the question of the legality of this declaration. This is James at his barbed and penetratingly witty best. It would be impossible to read this submission in ignorance of the identity of its author. The problem here was a kind of Hohfeldian mix-up on the part of those who thought about independence and secession under international law. How to bring into alliance the apparently (but only apparently) contradictory norms that seem to exist in this area of law? People have a right to self-determination under international law. Yet attempted secessions have often been condemned by states and the UN itself. As U Thant had said in 1970, 'As far as the question of secession ... is concerned, the United Nations attitude is unequivocable. As an international organization, the UN has never accepted, does not accept and I do not believe will ever accept a principle of secession of a part of a member-state'. And acts of secession are often illegal under domestic (constitutional) law (this question may soon be put to the test in the case of Scotland). There is certainly no right of secession under international law (this much was made clear in another case regarding the attempted secession by Quebec in 1994, to be dealt with below). But this body of law led some states to argue before the court that declarations of independence were somehow illegal under international law. James wants to put a stop to this and he does it with a parsimonious elegance. Was the Declaration by the Kosovo Assembly illegal?

'Mr President, Members of the Court, 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 wrongful act in your presence? Of course not.' (para 5).

One can hear the gears cranking up a few paragraphs later. 'Mr President … it is said that declarations of independence are, as such, unlawful. Historically, they were the main method by which new states came into existence. Since when, and by what legal processes, have they been outlawed?' (para 9). This sets James off on an Article 38 hunt for prey he knows does not exist. Sure enough there are no treaties and no relevant state practice and no general principles. What of the doctrine? The leading jurists are in unanimous agreement (Frank, Abi-Saab, Chinkin, Pellet). 'All the experts agreed' (para 18). The textbooks, too, speak with a single voice. 'Malcolm Shaw – to take a random example – says …'.

This of course is one of James's little jokes, because Professor Shaw has just spoken for Serbia arguing that declarations of independence are illegal. The quotation from Shaw's leading textbook goes as follows:

'There is, of course [there is, of course], no international legal duty to refrain from secession attempts: the situation remains subject to the domestic law'.

James, rather over-egging it, not only puts the whole part of the quote in italics but he repeats the offending and clinching phrase in square brackets. It is a little unnecessary then for him to end the discussion by saying: 'I particularly like the phrase "of course".' Of course he did. The whole submission is an exercise in legal analysis that is both ice-cold and yet full of sentiment. A very Jamesian combination. Needless to say, the Court followed this line of reasoning in its final judgement.

Statute of ICC

Two further great contributions to international law came about as a result James's becoming elected as member of the United Nations International Law Commission (ILC) in 1992, a specialist body of 34 members, elected by the UN General Assembly every five years. Established in 1947, the ILC was intended to become a centre for the 'codification and progressive development of international law'. Though the members were to act in principle as independent experts, they are elected strictly following the regular UN practice of regional representation. As an Australian James was elected in the slot reserved for the WEOG (Western European and Others) group.

His first assignment in the ILC was to finish the drafting of the proposal for a statute of the future International Criminal Court (ICC). The proposal had been on the UN's agenda ever since the organisation had begun to elaborate the so-called 'Nuremberg principles' in 1947. But any meaningful development on the topic had been prevented owing to the Cold War. However, the political situation had changed by the early 1990s when civil war and ethnic violence in the Balkans and in Africa led to the establishment by the UN Security Council of two ad hoc international criminal jurisdictions of

Yugoslavia in 1993 and Rwanda in 1994. This led the General Assembly to request the ILC to produce a draft treaty for the statute of a permanent international criminal court. In 1994, James became the Chairman of the Commission's working group on the matter. From that position he was able to direct the finishing of a draft statute with his customary diplomatic skill and with astounding speed (in a UN context) already at the very same session.[4] The draft became eventually the starting-point for the work of the diplomatic conference that adopted the Statute of the International Criminal Court in 1998. Following the original draft, the court was set up by a treaty and it would try crimes of individuals only. The contentious question about the existence and treatment of 'State crimes' – left out of the draft statute – was to occupy James extensively in his later work on State responsibility. The Court was to have jurisdiction over international crimes laid out in specific treaties – namely the 1948 Genocide treaty as well as the 1949 and 1977 Geneva Conventions on the laws of armed conflict. Much of the ILC draft would eventually be incorporated in the Rome Statute of 1998. The Court began its operations in 2002 with 60 ratifications, and now directs its operations from its headquarters at The Hague.

State responsibility

Having finished the draft statute for the ICC, James received perhaps the most massive task of his career. The item of the responsibility of States had been on the agenda of the ILC since 1948, but its career went into the early years of the League of Nations. The Commission had initially limited its treatment of the subject to injuries to aliens, until in 1969 the Italian Roberto Ago had expanded it to all the breaches of international law's substantive obligations. The theoretically complex topic involved widely diverging doctrinal positions and a heterogenous practice. Although it had been slightly narrowed by separating the question of environmental liability from it, subsequent rapporteurs had treated it with perhaps excessive ambition for systemic coherence. When James became the rapporteur in 1997, his instructions were to finish the topic in four years – an almost inhuman task he carried out by focusing intensively on parts where agreement was possible and setting aside the most controversial themes, above all the question of crimes of State (Draft Article 19). The final draft codified customary laws scattered in diplomatic practice and doctrine on issues such as attribution of responsibility and its consequences, as well as a theme of especial interest at the time, namely collective reaction to especially serious violations of international law.

[4] See James Crawford, 'The ILC's Draft Statute for an International Criminal Tribunal', 88 *American Journal of International Law* (1994), 141-2, and *Yearbook of the International Law Commission*, 1994 vol II, 26-87.

James went to work with enthusiasm and determination. With respect to attribution, the outcome was that a state would be responsible for all the acts of its organs, including normally their *ultra vires* acts. No subjective 'guilt' on the part of the organ was required, though a broad standard of due diligence might sometimes be relevant – a consideration of eventually great relevance in determining if a state bore responsibility for acts of terrorists operating from within its territory. Nor would actual damage be required as a condition of responsibility. A breach of an obligation was sufficient to bring about a duty to compensate or provide some other type of suitable redress.[5]

Apart from polishing the draft, James's principal achievement was to develop the notion of *erga omnes* obligations – obligations owed to 'the international community as a whole', an item sometimes mentioned in case-law and doctrine, but so far without systemic authority. The hardest nut to crack was that of 'state crimes' – a theme that had accompanied ILC debates since the adoption of the Nuremberg principles. While many states, and perhaps a majority of jurists supported the idea that a state might commit a crime – one typically thinks of aggression or genocide – serious doubts had been voiced against the idea of a collective crime and its place in an essentially delictual concept of international responsibility. The very notion of punishing a state seemed objectionable to many. Through skilful manoeuvring, James was able to finalise article 48 of the draft – what he himself identified as his 'single most important contribution … to international law' – in a way that aligned the *erga omnes* notion with the more well-known concept of breaches of peremptory norms (*ius cogens*). The result was that rarest of things in the law between sovereigns – namely normative hierarchy. There would now be obligations of such importance that every state would be entitled to invoke a breach against them even if they themselves had suffered no direct injury. James himself gave the example of the 2012 case at the ICJ between Belgium and Senegal where the International Court of Justice had briefly characterised the obligations under the 1984 Torture Convention as so important that their violation may be invoked by every party to the convention.[6] Belgium would thus be in its rights to claim that Senegal had violated its obligations by failing to bring proceedings against Chad's former dictator Hissene Habré, present in the country.[7] The idea of 'invocation' was a novelty that allowed James to engage all states parties to a convention or every state in the case of a customary rule of an *erga omnes* character to be concerned of serious violations, even if a matter was not of direct interest to them.

[5] On fault and damage, see further James Crawford, *State Responsibility. The General Part* (Cambridge University Press, 2013), 54–62.

[6] Biography of James Crawford, Squire Law Library, Eminent Scholars Archive, prepared by Lesley Dingle and available at https://www.squire.law.cam.ac.uk/eminent-scholars-archivejudge-james-crawford/biography-judge-james-crawford

[7] International Court of Justice, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Reports 2012, paras 68-9.

In this way, every state was turned into a guardian of international legality. They would even in some cases be entitled to take countermeasures against the violator.[8]

The Draft Articles on Responsibility of States for Internationally Wrongful Acts were provisionally accepted by the UN General Assembly in 2001 and have become an often-referenced source on this hugely important part of international law. No attempt has been made to fulfil the original ambition to turn these articles into an international treaty. The text has instead remained a kind of restatement of this part of the law, as James himself preferred. Going by way of a treaty conference might have opened up carefully drafted compromises. Failure of a conference would have left the world in a worse place than agreeing to regard the draft articles as a competent, UN-endorsed statement of the customary content of this branch of the law.

Human rights and self-determination

James had also a keen interest in human rights law and he was an active participant in debates over of the work of human rights institutions – especially of the role and substance of the human right to self-determination, as noted above. He shared the worry of his Australian colleague, Professor Philip Alston, that the proliferation of human rights institutions, especially at the universal level, had not been matched with the increase of resources and personnel, so that the treatment of periodic reports and individual communications was often disappointingly superficial. Attention was on countries that were ready for constructive debate and rarely on countries with the greatest problems.[9] This was a systemic problem that brought to surface the relative hypocrisy of states in human rights matters where they had so utterly failed to put their money where the mouths were often loudest. James was never one to condone such hypocrisy, and least of all when it came from countries closest to him.

As described above, James had demonstrated his interest in the important but ambivalent notion of self-determination already in the *Creation of States*. This became, of course, one of the fighting notions in the post-Cold War turbulences from Eastern Europe to the Balkans in the 1990s. But the New Continent would not stay aside. The question of possible secession of the province of Quebec had come up already in the 1980s but had failed to attain majority support of the Canadians. Legal consultations at the time had concluded that the right of self-determination provided no automatic right of

[8] As explained in James Crawford, *Brownlie's Principles of International Law* (Oxford University Press, 2012), 580–4.

[9] See e.g. James Crawford, 'The UN Human Rights Treaty System: A System in Crisis?', in Philip Alston & James Crawford, the Future of UN Human Rights Treaty Monitoring (Cambridge University Press, 2000), 1–12.

secession. Having won a provincial election in 1994, the *Parti Québecois* put forward a new proposal for independence. The federal government then initiated a 'reference' to the Canadian Supreme Court, requesting its opinion on 'is there a right to self-determination under international law' that would entitle Quebec to secede? Upon the government's request, James prepared a detailed report on state practice on unilateral secession. There he stated what was probably the majority view at least among Western scholars that, while international law did support the ending of colonial regimes, the same could not be said of non-colonial situations such as Quebec. Being able to use the extensive survey of practice he had collected in the *Creation of States*, he showed that it had been a 'common feature' in post-1945 state practice that 'such attempts have gained virtually no international support or recognition … even when other humanitarian aspects of the situation have triggered widespread concern and action'.[10] In a conclusive statement at the end of his report, James observed that there had been not one non-colonial situation after 1945 where a territory would have received independence owing to the force of the self-determination principle alone. 'In fact, no new state formed since 1945 outside the colonial context has been admitted to the United Nations over the opposition of the predecessor state'.[11]

But matters were different in colonial cases, of course. Acting as Australia's counsel in the *East Timor* case before the ICJ, James insisted that the fact that the court did not, in Australia's view, have jurisdiction (because a third state was involved, Indonesia, that had not consented to it), did not at all mean that the East Timorese were deprived of the right of self-determination. On the contrary, Australia fully recognised that the East Timorese did enjoy the right of self-determination – a position eventually also taken by the court, while it nevertheless declined subject-matter jurisdiction for the very reason invoked by Australia.[12] Another colonial self-determination situation concerned the fate of the Chagos islands, originally a part of the archipelago of Mauritius that had been administered as a non-self-governing territory by the United Kingdom until 1965. At the time of independence, the UK had severed the islands from Mauritius in order to lease them to the United States as a military base; inhabitants were forcibly removed. This aroused huge protests in the UN at the time, but the UK action came under legal scrutiny only in 2010 in the context of its having declared a 'Marine Protection Area' (MPA) around Chagos in a way that could be challenged by arbitration under the UN Convention on the Law of the Sea.[13] In his extensive and at times angry pleading before the Arbitration

[10] Report by James Crawford, 'State Practice and International Law in Relation to Unilateral Secession', in Anne Bayefsky, *Self-Determination in International Law: Quebec and Lessons Learned* (The Hague: Kluwer, 2000), 31-61, 53.
[11] Ibid. 57.
[12] International Court of Justice, *East Timor* case (Portugal v. Australia), Reports 1995, 102 (para 29).
[13] Permanent Court of Arbitration, *Chagos Marine Protected Area Arbitration* (Mauritius v. United Kingdom), 2015. https://pca-cpa.org/en/cases/11/

Tribunal, James had little difficulty to show the utter illegality (not to speak of the imperialist arrogance) of severing Chagos from the rest of Mauritius. Any 'consent' by Mauritian leaders, referenced by the UK, had been vitiated by duress. UK negotiators, James showed, had cynically exploited the country's economic dependency to severe a part of it to lease that part (and especially the largest island, Diego Garcia) to its Cold War ally, the US. The tribunal did not have jurisdiction on all of the claims, but it unanimously followed James – the declaration of the MPA was illegal owing to the original illegality of the act of severance. In the end, the principal issue came to the ICJ in the form of a request of an advisory opinion by the UN General Assembly in 2017. Though member of the court at that time, James was compelled to recuse himself owing to his earlier involvement in the case. But he must have been satisfied with the Court's agreement with the arguments he had earlier made; the UK's continued rule over Chagos islands was 'a wrongful act entailing [its] international responsibility'.[14]

Other case-law

James developed very extensive practice as counsel, in later years usually as lead counsel, to altogether 29 cases before the International Court of Justice – including some of the most important cases in recent international legal history. It is impossible to review his activity in an exhaustive way here. Perhaps we can note, however, that he often and quite characteristically argued for an evolutive understanding of international legal obligations in view of present-day needs and concerns. He was also frequently found on what most observers would regard as the 'right' side of history, especially in such politically important cases as the advisory opinions on the use and threat of *Nuclear Weapons* (1996), *Palestine Wall* (2004), and *Kosovo's Declaration of Independence* (2010). Acting as counsel for the Solomon Islands in *Nuclear Weapons*, one of the initiators of the case, he argued from the strategically formulated position that the intention was not to put the whole post-war system of nuclear deterrence on trial. The initiators had not intended to undermine the great powers' defence policies or the nuclear non-proliferation system. Only an *actual* threat or use of such weapons was at issue. The law prohibited the indiscriminate killing of civilians. Surely it could not remain silent when such killing was threatened or committed by nuclear weapons. As part of his elegant and powerful performance, James cited the refusal by Dylan Thomas to mourn the death of a child by fire in London – 'After the first death, there is no other' – thus inviting the judges to reflect on the incomprehensible magnitude of killing by nuclear weapons. *Palestinian Wall* (2004)

[14] International Court of Justice, *Legal Consequences of the Separation of Chagos Archipelago from Mauritius in 1965* (Reports 2017).

gave James the opportunity to make the classical point that the fact of a case having *political* dimensions did not prevent and had never prevented the court from pronouncing on its *legal* aspects. It had been perfectly within the General Assembly's powers to request an advisory opinion; after all, the Palestinian question had been on the Court's roster of cases from a time preceding the establishment of the State of Israel. In the case concerning the *Unilateral Declaration of Independence of Kosovo* (2010), referred to above, he found himself in a situation where all sides were using his *Creation of States* to argue their respective positions. It was with unrivalled authority, therefore, that he demonstrated that international law 'of course' had nothing against such declarations. They were only of concern to the domestic legal system. If in *Nuclear Weapons*, the Court left a small opening for 'extreme circumstances … in which the very survival of the State would be at stake', in the latter two cases, the court eventually took the position represented by James.

Unsurprisingly, James would frequently be entrusted with environmental cases. In the *Nauru* case, referred to above, he argued against Australia that its obligations regarding the protection of Nauru's natural resources survived the termination of the 1947 trusteeship agreement.[15] In a 2014 case against Japan's whaling practices he insisted on the need to understand and interpret the relevant 1946 convention in view of present-day needs for the conservation and recovery of whale populations.[16] In his first case as lead counsel, the *Gabcikovo-Nagymaros Dam* case (1997 Hungary v. Slovakia), he integrated great amounts of complex technical data in his pleading on the environmental effects of the planned water diversion project on the Danube. His interest in scientific and technical aspects of his cases was demonstrated by his skilful employment of statistics and other empirical data that were often at the heart of his cases. In the *Southern Bluefin tuna* cases (Australia & New Zealand v. Japan, 1999, 2000), for example, both at the interim measures stage in the International Tribunal on the Law of the Sea (ITLOS) as well in the subsequent Arbitral Tribunal, he based his argument about the reasonableness of the applicants' position on complex and sometimes disputed scientific projections on the development of Southern Atlantic tuna stocks.

Environmental problems were also raised in the *Land Reclamation* case (Malesia vs. Singapore, 2003) where James assisted Malesia to seek from the ITLOS provisional measures against Singapore's construction works the Straits of Johore. The main issue was delimitation – the first such case brought to the tribunal. What James decided to label Singapore's 'land grab at sea' would seriously prejudice the future delimitation of the countries' respective maritime territories. The court did grant interim measures, calling upon Singapore not to act 'in ways that might cause irreparable prejudice to the

[15] International Court of Justice, *Certain Phosphate Lands in Nauru* (Nauru v. Australia) Reports 1992/1993.
[16] International Court of Justice, *Whaling in the Antarctic* (Australia v. Japan), Reports 2014.

rights of Malaysia or serious harm to the marine environment'. The case was eventually terminated by agreement. In the *Delimitation of the Maritime Boundary in the Bay of Bengal* (ITLOS, Bangladesh vs. Myanmar, 2011), James used to good effect the old principle from the North Sea continental shelf cases (1969) that using the equidistance line would have cut off Bangladesh from large areas of the bay; equitable principles were to be used to determine each riparian's share of the shelf and its resources.

In a case concerning the fate of a Russian vessel *Volga* (2002) apprehended by Australia for its allegedly illegal fishing activity, James was again putting forward conservation concerns as the justification for what the ITLOS would eventually regard as excessive conditions for the release of the vessel and its crew. Where the rules regarding prompt release, he argued, were intended to protect freedom of transit and navigation, here the issue concerned neither the one nor the other, but the operation of regional fisheries agreement. Although the ITLOS showed sympathy towards conservation concerns in its judgment, it decided the case by following the detailed procedures in the 1982 UN Convention on the Law of the Sea Law of the Sea for release of vessel as against the deposit of a bond it determined.

James is likely to have been, perhaps alongside Alain Pellet from Paris, the most widely used litigator at the ICJ and other international tribunals, often collaborating with colleagues from the Matrix chambers he joined in the early 2000s. The biography with the Squire Law Library lists his involvement in the stunning number of 135 cases. But of course, this is unsurprising. One would wish to have him on one's side – not least in order to avoid having him as adversary. James would always be a good choice, in part owing to the extreme thoroughness of his pleading, but also partly owing to the lightness and literary manner that disguised the sharpness of his attacks invariably on the adversary's most vulnerable points. When he found his 'old adversary and friend' Alain Pellet on the opposite side, as he did in *Bay of Bengal*, for example, he would remark on 'his best hard-boiled manner' and address him with a paraphrase from W.H. Auden: 'Law, says [Professor Pellet] as he looks down his nose, speaking clearly and most severely … Law is the Law'. We receive a glimpse of his style from that same case where he referenced Sherlock Holmes and Mr Watson, reminisced on Alexander Pope's lines, and compared Myanmar counsels' effort to minimise the *North Sea* cases (on which Bangladesh relied) with an effort to suggest that Claudius was really just a bystander in Hamlet – 'all he did was kill Hamlet's father, usurp the throne and married Hamlet's mother'. He knew how to address his audience in an entertaining fashion – though sometimes forgetting that his audience consisted also of sometimes elderly non-native English speakers so that the president was frequently obliged to invite him to speak a little more slowly.

*

When did James sleep? This was an utter enigma for colleagues. We would receive messages from him by email at any time of the day, often in the very early hours of the morning, always with an informally formulated but extremely pertinent response to whatever the question or the concern we had expressed. He was an altogether admirable colleague. But his professionalism went beyond technical knowledge and subtle pleading; it was supplemented by personal qualities that were immediately visible for those who came to know him. Sands is right to remember him as 'direct, subtle and fearlessly independent'.

The energy with which James worked not only with his cases but also with his doctoral students was likewise legendary. Students were repeatedly struck by the rapidity with which he responded to questions about draft chapters in a thesis or other tricky points along the way to a doctorate. The seriousness with he took students' concerns, as well as his accessibility and informality, earned him, as countless reminisces from his students testify, their unabated devotion. There was love on both sides, however – James having regarded the interactions he had with his students as 'the most significant thing in [his] academic career'.

Note on the authors: Martti Koskenniemi is Emeritus Professor of International Law, and Director of The Erik Castrén Institute of International Law and Human Rights at the University of Helsinki; he was elected a Corresponding Fellow of the British Academy in 2014. Gerry Simpson is Professor of Public International Law at the London School of Economics; he was elected a Fellow of the British Academy in 2019.

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