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OCCASIONAL SERIES

Perspectives of International Law: Some Examples from Conversations with Judge James Richard Crawford

Abstract: James Richard Crawford was born in Adelaide in November 1948, where he went to school and eventually graduated from Adelaide University with an LLB and a BA in 1971. His political views were coloured by his country's involvement in the Vietnam War, and these were reflected in his vision of international law, which he researched under Ian Brownlie for his LLD at Oxford (1972–73). The result was his seminal text *The Creation of States in International Law*. After returning to Australia, James Crawford spent the next 18 years pursuing a career in academia and government legal service, culminating in his occupying the Challis chair at Sydney in 1986. Further recognition of his standing in international law came when Cambridge appointed him to the Whewell Chair in 1992, and the Directorship of the Lauterpacht Centre 1997–2003 and 2006–2009. After 23 years in Cambridge, Professor Crawford was elected to the bench of the International Court of Justice (ICJ) in 2015, where, in May 2018, Lesley Dingle recorded nearly 4 hours of conversation with him in his chambers at the Peace Palace. The audio and transcript records of these interviews have been presented in the Eminent Scholars Archive, along with a narrative biography. During his parallel careers, academic and juristic, James Crawford wrote extensively on international law. His works reveal a distinctive vision of the law's legacy and future prospects. In the present article, Lesley Dingle expands on some of the perspectives that underpin this Crawfordian vision of international law, inter alia: historical contingency, human enhancement, the legal polymath, personal priorities, and constraints on ICJ judges.
Keywords: public international law; academic lawyers; judges; International Court of Justice; legal biography

PREAMBLE

In May 2018 I was privileged to conduct two lengthy interviews with Judge James Richard Crawford at the Peace Palace in The Hague. The audio and written transcripts of these are available on the Eminent Scholars Archive (ESA) website[1].

James Crawford is one of the pre-eminent international lawyers currently active. He has reached his position on the bench of the ICJ (Member of the Court since 6 February 2015) after a highly acclaimed academic career in Australia and the UK, and over three and a half decades of practice in international litigation that includes 29 cases before the International Court of Justice. I have previously summarised the trajectory of these intertwined careers in a biography attached to the ESA audio and textural record of our interviews, and I refer readers thereto for details. However, it is germane to reiterate aspects of this to appreciate the background against which Judge Crawford's legal perspectives have evolved.

James Crawford acknowledges that he had grown up and received his undergraduate training in a milieu that "*felt very parochial*" (Q6) and was "*remote from other parts of Australia*" (Q15). He was born in Adelaide in 1948, and after a schooling that he recalled was happy, if containing "*nothing especially distinguishing*" (Q4), James took his first steps on the pathway marked "international law" by taking a BA and LLB at Adelaide University between 1966 and 1971. Here he fell under the tuition of Professor Dan O'Connell[2], who taught courses in international law. A critical factor in their relationship was that it coincided with the Vietnam War, to which the Liberal/Country government of the day had committed

Australian involvement (1962–73). James was a strong critic thereof, and had taken part in at least one demonstration against it – a silent vigil on the steps of Parliament House organised by the Quakers. His father, although a businessman, was a Labor party supporter, and the family were of a republican disposition. O'Connell, on the other hand was a supporter of the then government's actions in Vietnam, and he and James were "*never close*" (Q8), partly for that reason.

It was unsurprising therefore that when he went to Oxford on a Shell scholarship to study for his doctorate in international law in 1972, James chose not to study under O'Connell, who simultaneously had also moved there to take up the Chichele Chair of Public international law. James chose to work with Ian Brownlie[3], then a lecturer at Wadham College, who was also left-leaning politically, and with whose legal interpretation of things international James was "*much more in line*" (Q10). [Coincidentally, Brownlie succeeded O'Connell in the Chichele Chair, when the latter died prematurely in 1980, although this was after James had completed his Oxford stay and was back in Adelaide].

An important crossroad in James Crawford's legal journey came with his decision to return, somewhat prematurely, to Adelaide in late 1973. This decision was made for family reasons and caused him some heart-searching, with James admitting his fears that it would, or at least could, have resulted in his becoming stuck in a "*home town*" dead end (Q15). As it was, the move to a lectureship in 1974 at his alma mater provided the foundation from which he was able to launch his remarkably successful academic career in international law.

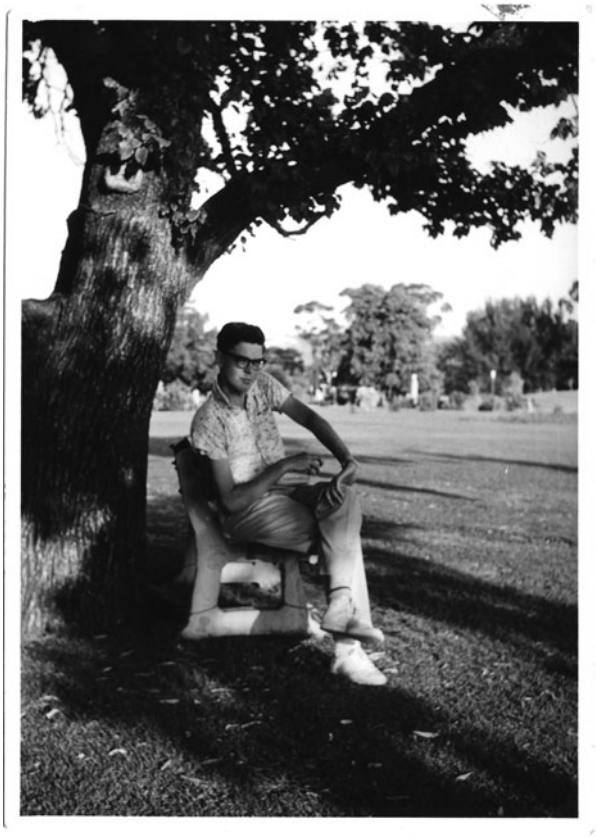

Figure 1: Schooldays. Veale Gardens, Adelaide, January 1964.

Key to this was the chance appointment of Eli Lauterpacht[4] (whom James had met briefly when he visited Cambridge during his Oxford days) to a three-year post (1975–77) as Legal Advisor to the Australian Department of Foreign Affairs, based in Canberra (although Eli spent a good deal of his time on international legal duties in New York and elsewhere). Lauterpacht, as Legal Adviser (on leave from Cambridge), initiated two meetings of interested international law scholars in Canberra, and James attended these. [Coincidently, he was writing up his Oxford doctorate and establishing his famously arduous work regime]. The Lauterpacht-inspired meetings allowed James to acquaint himself with various government officials - "*younger members of the Department of Foreign Affairs and the Attorney General's Department…*" and he had "*…quite a lot to do with them later on.*" (Q16), although at that time he had no professional contact with Eli himself during these meetings.

These governmental ties persisted over the years. Initially they led to James' appointment as a Member of the Australian Law Reform Commission (1982–84), in what Judge Crawford described as his "*first breakthrough into what I might call public affairs*" (Q15). Later in 1991, they led to his retainment as legal counsel for, initially, Nauru (ironically against Australia) and then for Australia against Portugal, in his first two ICJ cases. These were his breakthrough into the rarified regime of ICJ counselling, and formed the launch-pad for his remarkable record in international litigation: "*that was the beginning of my international law practice.*" (Q32).

For the purposes of identifying some of the roots of the Crawfordian vision of international law, his work on the Australian Law Commission is important. Two of the References he was given were directly related to international law matters, state immunity and admiralty jurisdiction, but it was the third, his first serious exposure to human rights issues, that I wish to note here. Although I shall expand on this later, suffice to say here that this Reference, on which he produced a major collective study[5], provided James Crawford with practical (in the form of field work) and philosophical exposure to the thorny issues bearing on human rights and the interrelated problem of group rights. Although the immediate questions related to aboriginal customary law, (or native title laws as discussed by Justice Paul Finn[6] in a further ESA interview 2010, Q24), the underlying fundamental problems loom large in international human rights law. His early Australian experiences informed his understanding of the complexities of such matters when he later had to wrestle with them at the international level.

His government contacts, and the long-standing personal relationships established at this time, stood James in good stead. He revealed in our conversations (Q86) that

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it was during the mid-1980s (he moved permanently from Adelaide to Sydney in 1986 to take up the Challis chair of international law), that he was first approached by government officials with the proposal of having an Australian on the ICJ bench. A plan with a gestation period of 30 years!

At the relatively young age of 44, James Crawford became the 10th Whewell Professor of international law at Cambridge in 1992, and during the next 23 years he played a full role in the academic life of the Faculty of Law, lecturing and supervising post-graduate students, and being *inter alia* Faculty Chairman, as well as serving on the Library Sub-syndicate. More pertinently for our interest here, he was Director of the Lauterpacht Centre for International Law on two occasions (1997–2003 and 2006–2009). This facility was the direct development of a notional and subsequently substantive Research Centre for international law started by Eli (later Sir Eli) Lauterpacht in 1983. It was from this prestigious base, with its through-put of world-class international lawyers and thinkers, that Professor Crawford conducted a parallel research operation based on his great variety of legal cases, arbitrations etc.

The Cambridge period of his career built on the solid foundations of academic and practical work in Australia. His installation at Cambridge also coincided with his election to the UN International Law Commission (1992–2001), which expanded his horizons and allowed him to put his stamp on issues that, in retrospect, he looks upon as some of his crowning achievements. Clearly, during the two decades he spent on the edge of The Fens, Professor Crawford prospered intellectually, and greatly extended the reach of his professional experience. His output of 12 textbooks and monographs, and 111 other written offerings during his Whewell years represents a veritable flowering of scholarly achievement. In the *Liber Doctorandorum* to honour Professor Crawford's retirement from the Whewell Chair in 2015, Philippe Sands[7] called him "the principal public international lawyer of our age."[8]

From this melange of intellectual endeavour emerged the second Australian incumbent of the ICJ bench. James Crawford took up his post on 6 February 2015 at the Peace Palace in The Hague, where I was fortunate enough to interview him and spend two uplifting days in interviews in May 2018.

SOME ASPECTS OF THE CRAWFORDIAN VISION OF INTERNATIONAL LAW

According to Chinkin and Baetens, James Crawford "is not associated with any 'school' of international law, rather, his commitment is to international law as an "open system", a practical tool for the resolution of often apparently intractable international problems."[9]

Judge Crawford has written at great length and in depth on international law, and it was a privilege to hear him encapsulate succinctly how he perceives it to function, based on the broad spectrum of his legal experiences. It would be impossible to do justice to his scholarly writings in a short space, but fortunately he set out his ideas in his Hague Lectures (in 2013) which were separately published as *Chance, Order, Change* (in 2014)[10].

These 15 lectures gave him the opportunity to expound on the nature of international law, and although he eschews characterisation as a theoretician ("*I had a choice to work in theory of international law and turned it down*" (Q94)), he did agree that *Chance, Order, Change* allowed him to theorise more than in his earlier writings. His Hague Lectures were an opportunity that he welcomed (see answer to Q150), as he was able "*to address questions which advanced students….habitually ask,*" (Q142); in other words, to explain some of the fundamental paradoxes of international law, as we now know it,. As one of *Chance, Order, Change* 's reviewers posited, it gave Professor Crawford the opportunity to "[defend] his vocation from doctrinal attack…..it is a personal work"[11].

To do this in *Chance, Order, Change*, Professor Crawford stepped back and looked from a higher vantage point at the topic to which he had (then) devoted over forty years of his life. He dissected it under "*three big questions: international law as law; international law as a system;* [and] *international law and its relationship to the idea of the rule of law,*" (Q141). To paraphrase, he tried to answer the questions: is it "law"?, is there a "system"?, and on what conditions could there be the "rule of law" at the international level?

Despite the categorization that James Crawford used, he knew that these "big questions" subsume immensely complex notions in what he described as "*a dynamic kaleidoscope*" from which a "*form of order…arises out of something approximating to chaos*" (Q93).

Further, as he sets out in *Chance, Order, Change*, at its heart international law is the "product of a process of claim and counter claim, assertion and reaction by Governments as representative of States….[and in this process] rights are asserted and duties are relied on by reference to norms based on express agreement or custom. International law is both a process of assertion and reliance *and* a system of principles and rules"[12]. So it is law, but "*a special sort of law, because of the circumstances of international relations.*" (Q94).

These notions show that Judge Crawford acknowledges there is a high degree of subjectivity in interpretation, which implies that personal attitudes will play an important role in the law's interpretation. Each practitioner will have their own vision of its scope and emphasis within the plexus of formal restraints.

Below I shall focus some observations of James Crawford's personal perspectives on what is encompassed within international law as revealed from our ESA conversations: this will help define a Crawfordian vision,

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although I suspect he will eschew such personalisations. I shall pick out topics and aspects where readers can hear his rationales in his own words, and catch the nuances and appreciate the self-deprecating, but authoritative manner, in which he explains certain topics that I have chosen to highlight.

THE HEART OF INTERNATIONAL LAW: HISTORICAL CONTINGENCY

Professor Crawford presented his Hague *Chance, Order, Change* Lectures as a conception based on an evolutionary pathway: the result of historical happenstance, ordered by a system, and adapted by change to suit its purpose. The system of international law is seen from a Darwinian perspective; it is an ongoing story of the law's evolutionary development.

He explained that "*International law* [is] *a system which is not preordained, which is not determined ultimately by any set of formulas or principles, which is extremely contingent, but nonetheless has an ordering force*." (Q93).

The theme of contingency is paramount. "*I think that there's more history in international law than there is theory* - [it] *is more determined by its history than it is by any systematic body of a priori thinking*" (Q94). He emphasised this a propos a question on his 2012 revision of the famous text *Brownlie's Principles*[13] that "*particular international rules came into existence quite often by chance…or in response to specific needs, which may change. You've got to acknowledge that international law is profoundly contingent in historical character. That makes me, I suppose, a constructivist… The international law we have is different because certain people did things on certain days and you've got to acknowledge that, and it doesn't amount to a metaphysics of international law except to the extent that in any field of human endeavor, if you do something you are implying a certain version of human life. I come back to saying it's contingent*." (Q120).[14]

His vision of the contingency of international law implies that under different circumstances, the constraints under which international lawyers now operate would have varied. He gave an example from human rights law. "*Is ethnic cleansing genocide?" …..."If you had been drafting the Genocide Convention you could have defined the term 'genocide' to include ethnic cleansing. By 'ethnic cleansing' I mean the clearing out of people from a certain territory without necessarily exterminating them, or exterminating only a very few of them.* [But] *as a general matter you cannot equate ethnic cleansing and genocide as it has been defined… .maybe we could have a better definition but we're not going to get a better definition*." (Q122).

But this definition, the one we have, not necessarily the best one, is the one that has to be applied. In this sense, James Crawford is a positivist "*international law is a discipline or a profession, I don't mind which you call it, in which a certain range of techniques going back to heuristic devices of interpretation and historical analysis of what happened to produce certain outcomes…. one of the functions of an international lawyer is to be honest about the history of the subject and what the consequences of that history have been and to believe that there are consequences. The world looks like a free-for-all; it's not as much a free-for-all as all of that*." (Q122). In the end, though, international lawyers "*are forced to use international law because that's what's there*." (Q93)

This pragmatism, tinged with subtle humour, led him to comment that "*there is widespread doubt in the general community about whether international law is law, and you've got to acknowledge that, and there are reasons for the doubt and there are so many areas of disorder and so many cases of defiance of international law. The ordinary person, the ordinary intelligent onlooker would expect a legal system to have consequences and it's possible to say international law doesn't have consequences. It's not possible to do it if you look very carefully at the subject, but I still think that proposition has to be defended and it matters, particularly because the question, "what is the role of the international lawyer?": an international lawyer isn't the same as the governor of the world, but if someone comes to you, irrespective of whether they are a state or a non-state entity, and says, "What's the international law of X?" if you can't provide an answer, a credible answer, then you shouldn't be doing what you are doing, you should be doing something else, perhaps becoming governor of the world*." (Q122).

When I put it to him that the "course" of international law mentioned in his book's title is an allusion to the law evolving as practical problems present themselves, and suggested that this evolutionary process is dependent on contingency, he responded "*Absolutely, it's precisely what I'm trying to say*" (Q147). In James Crawford's vision, pragmatism and contingency lie intertwined at its heart. Rephrased, he said that "*my image of international law* [is] *something which happens to some extent by chance, but creates order out of it, and it's then subject to change*." (Q149).

Judge Crawford's vision, which is so informed by contingency, is guided by his appreciation of the historical pedigree of international law. This probably has its roots in his own interests in history. He studied the subject (along with English and international relations) as part of his BA at Adelaide, and mused that had he not gone into law, the only other academic subject he could have envisaged teaching was history (see Q75). In a subject where James Crawford saw international law for reasons of "*happenstance….develop*[ing] *in Western and Central Europe*" (Q93), a knowledge of European history is essential to appreciate fully its evolution, and particularly its links with European colonial development.

His works are peppered with historical references and examples, ranging from the Peloponnesian Wars, through the Middle Ages, the Victorian era and the 20th century. His deep interest and knowledge of these historical roots speaks through his understanding and interpretation; a studious combination of pragmatism and a search for morality. He never loses sight of what is possible, "what is", as written in the texts (where there is

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certainty, it must be applied), it is a way of "*telling the truth about the ought in international relations*" (even if we don't like it) (Q123), but also where "what ought" can be finessed. After all, as Philippe Sands said, Crawford's views are applied by one noted for his "generosity of spirit and humility", while his law is one that demands a "commitment to [a] system of international law *for all*."[15]

James Crawford concluded in *Chance, Order, Change* that the essence of modern international law is its universality, a goal towards which we are struggling. It is within its embrace that any "clash of civilizations" should be fought out[16]. Such a utopia will have to come into place by "happening". "*It won't be implemented because someone holds a conference and says ; 'Let's agree to this'. It* [will] *be implemented because over a range of situations it's found to be the best way of addressing problems….and will happen as an evolutionary matter because we don't have any choice. The alternative to evolution is war, and it doesn't seem to be a realistic solution now that we have nuclear weapons.*" (Q155).

INTERNATIONAL LAW AS THE LAW OF HUMAN ENHANCEMENT

James Crawford's vision of international law is deeply embedded in his concern for the human condition, but as a lawyer he knows that this concern has to be moderated by the rules and texts that apply to a particular time and place. It manifests itself as concern for both individuals and groups: "*international law is a law of coordination addressed to human problems*" (Q115).

What influences may have reinforced James's inherently humanistic outlook? First, he was exposed early in life to his family's progressive views on labour relations, and there was his own association with the church as a youth where he ran the local boys' club (he was also head sacristan at his local parish church (Q5)). In addition, his reaction to the political and humanitarian excesses of the Vietnam War had a great effect on him; "*I was much affected by the Vietnam War*" (Q5) , which apart from his parents and school, probably had the "*strongest influence*" on his youth, and certainly influenced his relationship with Professor Dan O'Connell during his undergraduate days. Later, at Oxford, and subsequently, his close friendship with Ian Brownlie, who was an advocate of human rights law as part of international law[17] was very influential: "*I knew Ian very well and worked a lot with him and my attitude* [to international law] *was not that far away from his*." (Q119).

His first close encounter with the subject of human rights in the field, in action, was a component of his work for the Australian Law Reform Commission. His work on the Aboriginal Customary Laws Reference was an indirect result of acquaintances made in the 1970s, and in particular his long-term friendship with the "*active and dynamic*" Michael Kirby,[18] ᵗfounding resident of the Commission. His brief for the recognition of Aboriginal

Figure 2: Dr James Crawford, with Pintubi men, during field work for the Australian Law Reform Commission for the Recognition of Aboriginal Customary Law. Circa 1982.

Customary Laws was to consider the basic question set out on 9 February 1977, by the then Federal Attorney-General, Mr RJ Ellicott QC[19]. It was summarised in ALRC Report 31 (1986) as "*whether it would be desirable to apply either in whole or in part Aboriginal customary law to Aborigines, either generally or in particular areas or to those living in tribal conditions only.*"

On the occasion of the 40th anniversary of the ALRC, Judge Crawford penned a somewhat tongue-in-cheek comparison of his present situation with a photograph of himself in the bush gathering data for his report on Aboriginal Customary Laws. But of course, there was a very serious message behind the two images. He summed up the field trip he made with the late Alice Tay[20], another of the Commissioners.

> "[W]e produced, a genuine debate on issues which may now seem somewhat dated, but nonetheless was [a] genuine debate that contributed, I hope, to an understanding of the questions."
>
> "I have vivid memories of the consultation process. To give you a vignette, Professor Alice Tay was one of the members of the division on Aboriginal Customary Laws. She was a Singapore Chinese Professor of Jurisprudence at Sydney. Soigné was an understatement when it came to Alice. She was extremely well-groomed, and she came with me to conduct the women's meetings in a remote part of the Northern Territory with a

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> group of Pintubi under the roughest conditions imaginable. We had a rough flight in a small plane during which she was airsick, we had a rough drive 20km on unmade roads to get to the meeting. It was a very hot day. I, for one, had to sit in the sun because all the shade was taken by the consultees, very sensibly, and I developed heat stroke as a result. At the end of the day Alice, having conducted her meeting and gone lizard hunting with the women, was immaculate as ever, a remarkable achievement. I was dishevelled at the beginning of the day and must have looked unspeakable at the end of it."[21]

Judge Crawford characterised the complexity of the problems with which this Reference was posed. "*Aboriginal customary laws…..*[was] *one of the biggest projects I have ever done. It was a two-volume report and I understand of all the reports…of the Australian Law Reform Commission, it's the one which has been most referred to by scholars and the most cited. It was a very difficult project and it was one of those projects I really needed to do it twice. Once to learn how to do it, and the second time to do it properly, but that didn't happen.*"(Q26)[22]

A sense of the legal and sociological problems with which any legislators would have to wrestle can be gauged by even a cursory reading of paragraphs 114–126 of ALRC 31, where the Commissioners set out "Arguments against Recognition of Aboriginal Customary Laws"[23].

While the Commissioners were cogitating, and before the 1986 report appeared, the Australian National Commission for UNESCO organised two symposia in 1985, and papers resulting from this were published in 1988 in a volume that (then) Professor Crawford edited.[24] His two contributions do not mention Aboriginal Customary Laws[25], but it is clear that by this stage James Crawford's views on these human rights topics had expanded well beyond the local (Australian) context. The focus of the symposium was on the broader issue of "third generation" of collective or peoples' rights, in contrast to established human rights.

His chapter shows that he was already thinking about the way the notion of rights was becoming blurred. "[A] *lot of the things ….put forward as rights to peoples, were really individual rights exercised in conjunction with others. Minority rights are an example of that. At the time, and even, I think, now, we don't attribute rights to minorities as such, we attribute rights to members of minorities to do things in conjunction with other members of a minority. So a lot of the discussion about rights of peoples was very woolly, lacking in rigour, and I was really attempting to introduce some rigour to it.*" (Q31).

This focus on rigour is a feature of the Crawfordian vision. For James Crawford, the law has to be accurately portrayed - "woolliness" is an anathema to him. Clients seeking his advice, or recipients of his adjudications need to know precisely where they stand, even in the world of human rights, James Crawford is a pragmatist. This was emphasised in an answer apropos his adding an "historical and doctrinal" introductory chapter into his revision of Brownlie's 7th edition of *Principles*[26].

"*I don't think it's possible to say there is such a thing as an immanent and categorical conception of any particular right. If that makes me a positivist then I'm a positivist.*"

I'm not an unalloyed positivist, but there's no rule or theory or concept that the human right to property has to be the same in Europe as it is in South America. It depends on the formulations in the texts and sovereignty, as applied to treaty-making, allows states to come up with different formulations. They may be good formulations, they may be bad formulations, but they are what we have and if your function as an adjudicator is to apply those treaties then you start with a text and you are constrained by the text. I'm very strongly opposed to the view which you get in some versions of critical legal studies, and some versions of realism, that texts are not a constraint. If texts are not a constraint then we are out of business." (Q 119)

In effect, this allows the notion of relativity into the process of interpreting human rights, but only to a certain extent. Context will be crucial, but examine the issue. It certainly brings the subject down to forensic analysis, rather than popular perception.

A POLYMATH'S VISION

Philippe Sands, in his eulogy for Crawford's retirement from the Whewell chair speaks of his "openness to ideas", while Chinkin and Baetens refer approvingly to him as a "generalist". Both hint at an aspect of the Crawfordian vision that helps explain why in court and in teaching he gained a reputation for being "the principal international lawyer of our age," and "the most brilliant performer of his generation".[27] One of the reasons for this degree of confidence, versatility, and ability was highlighted by his answer to questions relating to memorable features of his career in practice.

"*The "Gabčíkovo-Nagymaros" case*[28] *for Hungary was my first lead in the court and it was very important in my formation as an international lawyer. It gave rise to the experience of working with technical experts on environmental and scientific matters which is something I love doing and continued to do in the whaling case, for example, for Australia against Japan*[29]*, in the two Indus waters arbitrations for Pakistan against India and in a number of other cases, and in several of the Costa Rican cases against Nicaragua, and one of the Colombian cases against Ecuador.*

That's something I greatly enjoyed - working with experts in other fields, geomorphology, water-sediment transport, things like that. Generally environmental sciences, fishery science, that was a great experience." (Q66)

In short, James Crawford is a legal polymath, who is very well-informed, not just from necessity, but also deep personal interest.

This versatility meant that James was able to handle a great range of briefs: "….*across the field of international*

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law; boundary cases, some advisory opinions, [and] *cases to do with international organisations. I was expert in the Canadian Supreme Court in the Quebec reference*[30] *and that was a significant influence and has given rise to a very important judgment of the Canadian Supreme Court, fundamental in its significance, which then fed back into the Kosovo advisory opinion*[31] *where I was counsel for the United Kingdom with Daniel Bethlehem*[32], *and also the work I did in relation to the Scottish Independence referendum*[33]".

In addition, he undertook a lot of work in investment arbitration "*both as counsel and as arbitrator*….[where] *I contributed to the modern formation of the field of investment arbitration which is a contentious area*." (Q66).

It is no wonder that the firm of barristers Professor Crawford helped to found in 2000 was highly successful: "*Matrix Chambers*[34] *was unusual in trying to bring together academic lawyers and practitioners*" (Q55). Although Crawford was keen to stress that the cases that came his way were "*largely happenstance - whatever happens next, whatever comes in the door*" (Q66), a result of the "*cab rank rule*" (Q32), the salient fact was, that his great success in such a diversity of cases was primarily down to his effectiveness - a result of his great depth of knowledge, attention to detail and understanding of the subject in hand. As Philippe Sands, again writing in his eulogy on Professor Crawford's retirement, wrote in 2015: "To international litigation he has brought a distinct style of advocacy….direct, subtle, and fearsome."[35]

Through his polymath approach, James Crawford has been able to bring his breadth of interest to bear on his overall perspective of international law, and not just in the courtroom. In his concluding sections of *Chance, Order, Change*, he bemoans the failure of the UN's New International Economic Order (proclaimed in 1974), and the "common heritage of mankind"[36] as international legal concepts controlling fair access to universal natural resources such as access to oil, water rights, and resources of the sea-bed, the moon and Antarctica. Nevertheless, despite its failings, international law "in the race for order…. is part of our common heritage, and a vital one."[37]

PERSONAL PRIORITIES IN INTERNATIONAL LAW

In his answers to two questions a propos his personal achievements as an international lawyer, Judge Crawford provided a window on his vision for international law as a vehicle for good global order. In Questions 59–60 we were considering the completion of the UN international law Commission's second draft on State Responsibility when he was the Special Rapporteur: "*my greatest single achievement as an international lawyer* [was] *to finish the articles on* [state] *responsibility and the associated work, commentaries, the books and so on*."[38]

Within that context he singled out one item. "*Article 48 was an attempt to bring together strands of international law in various cases. The concept of peremptory norms, the concept of obligations erga omnes, the concept of obligations erga omnes partes, in a systematic way, and if I had to identify the single most important contribution, which I have tried to make, to international law it's Article 48 of the ILC Articles*." (Q143).

For a scholar who has already achieved so much, this focus on a particular topic within an area of endeavour tells us much about his vision of his own role in the panoply of "the rage for order" in international law. He saw this as his contribution to the building of the great edifice of international law. The decision of the ICJ in *Belgium v Senegal* tacitly accepted Article 48, without directly referring to it. Judge Crawford referred to the ICJ as applying "customary law by stealth"[39]

"*Article 48 was an attempt to bring together strands of international law in various cases…Well, it's perhaps a rather over dramatised way of saying it, but the key question in* Belgium v Senegal *was*, "*What was the legal interest of Belgium in respect of allegations of torture against the head of state of a third state in proceedings in Senegal. Hissène Habré*[40], *since convicted, and you might say that the legal interest of Belgium was because of their taking a specific procedural role under the Torture Convention in seeking trial or extradition. The Court didn't do that. The Court said that by virtue of the provisions of the Torture Convention the prohibition on torture is a collective interest, erga omnes partes they used the phrase, and that's what Article 48 says….I was very pleased that in Belgium v Senegal the Court, in effect, endorsed Article 48 without mentioning it, and that's what I meant by stealth*." (Q143).

THE CRAWFORDIAN VIEW OF LIMITATIONS OF AN ICJ JUDGE

The final chapter (XV) of James Crawford's 2014 *Chance, Order, Change* is entitled "An irremediably unjust world". It seems a bleak prospect for one who, to quote Philippe Sands again,[41] has "a driving belief in the rule of law and ….. a commitment to the system of international law *for all*."

In this chapter, which was cited in the Index under "Justice", Professor Crawford explored to what extent the law can "serve to remedy substantive inequality and other forms of injustice". Significantly, he simultaneously cited the "decentralized structure of international law as permitting "substantive inequality"[42], implying, ironically, that international law contains the seeds of some of the very injustices it seeks to combat. He concluded that notwithstanding its inbuilt injustices and despite its many weaknesses, international law is a vital part of our common heritage. To requote again a phrase he used in Q93, we "*are forced to use international law because that's what's there*." It may be a flawed tool, but it is the instrument we have for the foreseeable future.

Given the urgency to advance what he calls "The search for human flourishing"[43], Judge Crawford might be

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forgiven for seeing a role for ICJ judges as pro-active champions, using their positions directly to address instances of "substantive inequality".

But not so. James Crawford, while intuitively being such a champion, is also a man of the law. In his vision, "*It's not the function of individual judges in the International Court to solve the problems of the world. It*['s] … *to decide individual cases. I bring my attitudes to responsibility to the decisions of individual cases and so do the other judges in the Court, but the Court's process is a collective process. I have whatever influence on the Court I am entitled to have by virtue of the strength of the arguments in the cases in which I am entitled to sit. That's the beginning and end of it.*" (Q138).

The above quotation is taken from a response to a citation I had made to him of Katja Creutz's review of his *State Responsibility: The General Part*[44] to the effect that "For a scholar dedicated to [the general law of state responsibility] there is no better place than the World Court; the position will help him clarify obscurities and inadequacies"[45].

Again Judge Crawford disagreed. He is averse to tinkering with the law, even to achieve noble ends. "[Y]*ou are constrained by the text* [of treaties]. *I'm very strongly opposed to the view…..that texts are not a constraint. If texts are not a constraint, then we are out of business.*" (Q119).

This stance was reiterated when commenting on an article by his successor in the Whewell chair, from which I paraphrased to the effect that on viewing international law "as a legal system rather than a mix of discrete treaties," this empowers "courts to develop international law beyond the intention of governments," amounting to "evolutionary interpretation". This would allow judges to promote what "is legal" rather than what is "good and efficient"[46].

Judge Crawford responded that, as he saw it: "*The role of a judge in international law is to apply the applicable texts and I can tell you as an international lawyer which texts are applicable. I know what the rules are about, who has entered into treaties, and who has not, and how those treaties have been interpreted. They're not necessarily right on all those questions but the questions are capable of an answer. The function of the court is not to produce a global synthesis of legal norms, it's to apply the applicable legal norms in an appropriate way and the secondary rules have the feature that as secondary rules of interpretation and so on, they assist in your doing so in a way that's appropriate having regard to the coexistence of other norms, but they don't give you a licence to go and improve things as you think fit.*" (Q157).

Some of the views Judge Crawford expressed had echoes in comments made by two of the former ICJ judges I had previously interviewed for ESA.

Sir Eli Lauterpacht (Ad hoc Judge)[47] whom I interviewed in 2008, referred back favourably to the 70s and the days of the Cold War, when international politics were played out in the ICJ[48]. He spoke of Manfred Lachs[49], a Polish international lawyer who was President of the ICJ (1973–76). "[He] *was a very shrewd lawyer, but very politically inclined,* [and] *tended to find political solutions to the cases…* [in contrast to] *somebody like, say, McNair*[50] *or Fitzmaurice*[51], *who would approach a case in strictly legal terms.*" To illustrate this, Sir Eli gave an example, which, coincidently, involved Australia. "[In] *the Nuclear Test case in* [1974[52]] [he] *produced the solution that involved the court saying that the case had become mute by virtue of the various statements made by the highest authorities in France that this would be the last of their atmospheric nuclear tests. This was not a point that had been raised by the Australians at all, but Lachs seized on it and he persuaded the Court to go along with him, to produce a solution that avoided the necessity for the Court to pass upon the legality or illegality of nuclear testing. That issue, I believe, he felt would have divided the Court in an unacceptable way. So the Court escaped from the situation by this approach that the case had become mute: there was no need to go into the merits on account of the statements made by the French authorities.*" (Q159).

Figure 3: Sir Eli Lauterpacht and Professor James Crawford laying the foundations for the Finley Library extension to the Lauterpacht Centre in 1996.

Sir Eli recognised that Lachs had avoided a damaging split in the Court.

Dame Rosalyn[53] (in an interview in 2011[54]) speaking as a "liberal judge" commented that " [m]*y inclinations are to find things are possible if one can, rather than impossible, and always to have in mind the people we are trying to benefit with what you are doing.*" (Q98). She added that "*I*

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believe you, as a judge, should not opine on anything except when Counsel have had a chance to argue in front of you and the other side come back on it. Otherwise you should keep your thoughts to yourself." (Q112).

On dissenting, she believed that "*a dissenting opinion should in my view not be what you would have done. You should merely, I think, say why you can't agree with what has been done and a separate opinion should not be a long academic article*." (Q116).

Speaking of international law as a system, she looks upon it "[as a way] *of making decisions. You have always got the tools to answer a particular problem even if you can't pull out of the drawer a prior decision on that problem. So I don't agree with Philip's views that there are topics on which you can't answer. I would certainly agree that the fact there can be, in my view, a legal answer to every legal problem does not necessarily mean you are on your own way to better international relations or better compliance…*" (Q117). (Her reference to Professor Philip Allott was apropos his views on the laws of war which he described in his 2011 ESA interview as "*You can't have a law of war. It's ridiculous. War is mass murder and indiscriminate destruction of property; you can't have a law of that.*"[55]).

On the issue of policy vs rules she considered that "*There are rules that you find in treaties, or qualified extent in prior case law, or in custom when you identified it, and the job of the international lawyer is to locate that and apply it….. but I think that there are a very, very limited number of rules. Rules are things that simply cannot be gainsaid, and there's not much of that in international law….. So almost everything you could say to me bears another thing. The job of the international lawyer is to be aware of that, to look at the facts of the present case and at the policy issues involved, and to find the preferred and better answer in that case*." (Q138). So for her, policy is an integral part of decision making.

These views are, in the final analysis, pragmatic, and are neatly summed up by Judge Crawford apropos another comment made by Philippe Sands in his eulogy to Professor Crawford's retirement to the effect that "the world of practice and process offers particular attractions"[56].

"*I don't think there is any value in denying the legal character of international law, though you have to keep your powder dry and you have to realise that laws are not always complied with. There are acute problems of compliance and performance, but in the end, if something has to be done for the future in international relations, international law is one of the instruments we have, one of the few instruments we have*." (Q94).

SUMMARY

The Crawfordian vision of international law was nurtured by world events while he was still a schoolboy, and more than half a century later he still pursues his goal of a "search for human flourishing". He identified its root cause in a 2017 interview at a meeting of the Australian Bar Association in London in answer to a question by Hogan-Doran SC as to why he had chosen to follow a career in international law[57].

"My interest goes back to 1962, the Cuban Missile Crisis and the feeling that there could've been thermonuclear war, which we know now to have been true, there could have been, and the feeling that we've got to do something to arrange these things more sensibly than we have done, so that was the real reason."

Such an answer has overtones of his career, perhaps his life, being a mission to improve the ordering of the world for the benefit of all - his "*law of coordination addressed to human problems*" (Q115). Notwithstanding this visionary aim, James Crawford's main achievements, in his eyes, reflect an underlying appreciation of the complexity of what the umbrella of international law embraces. Hence its advancement can only be incremental, the Order and Change of his trilogy, so that his "greatest/most important" achievements in international law, as a jurist and a teacher, entail, respectively, solid advances in legalistic and personal relationships; the finishing of the ILC articles on state responsibility and in particular Article 48 (Q143); and his success in supervising his many PhD students (Q82).

What other traits could I discern from our interviews that characterise his vision of international law?

- An appreciation, amounting to the joy that an affiicionado feels for their subject, of a knowledge and understanding of the quirks and eccentricities of its pedigree in historical contingency (Q149), and upon which he drew for *Chance, Order, Change*. In a sense, his immersion in history is another facet of his legal character - the diverse interests of the polymath which include environmental, biological and physical sciences.

- A sense of restrained optimism. Despite all the weaknesses that he admits in the international order, James Crawford's overall vision is optimistic. Koskenniemi[58] comments on this in his review of Crawford's 8th edition of *Brownlie*, and it shows in the final paragraph of Chance *Order Change*. But realism is always to the fore in Judge Crawford's appreciation of the law: "*My optimism is distinctly qualified, and qualified more sharply by developments since I wrote the book* [Brownlie, 2012]. *To some extent it's a question of what one would like to believe. I have to be honest about that. But* [apropos global problems]…. *we need coordination, and legal devices are a key method of coordination. Not the only method, of course, thank god, but a method. Let's not trash what we've got because what we've got creates problems and the problems would be worse if we didn't have it.*" (Q156).

And he tempers his optimism with what he infers to be alloyed positivism, where the law has its *Order* instilled, summed up in his memorable phrase that I repeat "*If texts are not a constraint then we are out of business*" (Q119).

- Finally, his steadfast belief in the parameters of his role as an ICJ judge: to decide individual cases in a collective manner (Q138); and to apply the applicable texts

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Figure 4: Judge Crawford prior to interview for the ESA in his Chambers at the International Court of Justice, May 2018.

and norms in an appropriate way (Q157). Emphatically, it is not his individual function to "solve the problems of the world", or to have "a licence to improve things as you think fit."

I am sure there are many others, but these came across in our interviews, and I leave it to James Crawford's biographers to tease out them all.

My visit to the Peace Palace to interview Judge Crawford was one of the highlights of my compiling the ESA since 2005, and as a parting comment I can only repeat what I wrote in the biography that appears at the end of his ESA entry. Paraphrasing words of Philippe Sands's[59] 2015 tribute to his mentor: "for the humour, for the generosity, and for the sheer power of his intellect we have reason to be grateful that this Australian came to Cambridge".

James Richard Crawford: Career highlights

- 1948: born, 14th November, Adelaide
- 1959–65: Brighton High School, Adelaide
- 1966–71: Adelaide University BA, LLB
- 1972–73: Oxford, University College
- 1974–76: Adelaide University, Lecturer
- 1977: LLD Oxford
- 1977–81: Adelaide University, Senior Lecturer
- 1979: The Creation of States in International Law (1st ed, OUP)
- 1979: Bar, High Court Australia
- 1981: American Society of International Law Certificate of Merit
- 1982–84: Australian Law Reform Commission Member
- 1982: Adelaide University, Reader
- 1983–86: Adelaide University, Professor of International Law
- 1986–92: Sydney University, Challis Professor of International Law
- 1989–1992: First ICJ Case, "Nauru v. Australia"
- 1992–2015: Cambridge University, Whewell Professor of International Law
- 1992–2001: UN International Law Commission, Member
- 1997–2001: Special Rapporteur on State Responsibility
- 1997–2003: Director, Lauterpacht Centre International Law
- 2002: The International Law Commission's Articles on State Responsibility, CUP
- 2003- : Curatorium of Hague Academy of International Law
- 2006–09: Director Lauterpacht Centre International Law
- 2012: Brownlie's Principles of International Law (8th ed, OUP)
- 2012: Manley Hudson Medal (American Society of International Law).
- 2013: State Responsibility: the general part (CUP)
- 2013: Hague International Law Lectures
- 2013: Companion of the Order of Australia (AC) .
- 2014: Chance, Order, Change: the Course of International Law AIL pocket
- 2015- : International Court of Justice: Judge

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Footnotes

[1] https://www.squire.law.cam.ac.uk/eminent-scholars-archive/judge-james-crawford Direct citations herein to the transcript are indicated by reference to question numbers (Qxx).

[2] Daniel Patrick O'Connell (1924–1979), Professor international law Adelaide (1964–72), Chichele Professor of Public international law, All Souls College, Oxford (1972–79). A former student of Sir Hersch Lauterpacht at Trinity College Cambridge.

[3] Sir Ian Brownlie CBE, QC, FBA (1932–2010), Chichele Professor of Public international law Oxford (1980–99). In Crawford's time at Oxford, Brownlie was a Fellow at Wadham College. Later (1976) he moved to LSE to take the chair of international law.

[4] Sir Elihu Lauterpacht, (1928–2017), Hon. Professor of international law (1994–2017), Judge *ad hoc*, International Court of Justice (Bosnia *v* Yugoslavia) 1993–2002. Then ('75–77) a lecturer in international law at Cambridge.

[5] *ALRC Report 31*, 1986, 2 vols. *Recognition of Aboriginal Customary Law.*

[6] Paul Desmond Finn (b.1946-), Judge Federal Court of Australia (1995–2012).

[7] Philippe Sands (b. 1960-) Professor of Laws, Director Centre on International Courts and Tribunals UCL.

[8] In Chinkin, C & Baetens F (Eds), 2015, *Sovereignty, Statehood and State Responsibility* CUP, 479pp., p.xxii.

[9] Op cit. Preface, p.xi,.

[10] *Chance, Order, Change* : *The Course of international law.* 2014, AIL Pocket, Hague Academy of international law, 537pp.

[11] J W Nelson 2016, Book review, *Asian Jl. Int.* Law, 6(2), 379.

[12] *Chance, Order, Change*, 2014, item 2, p.20–21.

[13] *Brownlie's Principals of international law*, 8th Edit. 2012, OUP.

[14] This comment followed a Koskenniemi citation about Brownlie's idiosyncratic views implying that they had metaphorically "fallen from the sky" *Brit Yearbook Int. Law, 2013, 83(1), 137–201*, at p. 138.

[15] Sands, 2015, In: *Sovereignty, Statehood and State Responsibility*, p.xxiv.

[16] 2014, *Chance, Order, Change*, p. 313, item 399.

[17] E.g. his *Brownlie's Documents on Human Rights*, OUP, 6th Ed 2010, 1296pp.

[18] Michael Donald Kirby AC CMG (b. 1939-), Justice, High Court of Australia (1996–2009), United Nations Human Rights Council inquiry on human rights abuses in North Korea (2013–14). The citation is from Q15.

[19] Robert James "Bob" Ellicott, (b. 1927-). Attorney-General (1975–77), Minister for Home Affairs (1977–80), Judge of Australian Federal Court (1981–83).

[20] Alice Ehr-Soon Tay (1934–2004), President, Human Rights and Equal Opportunity Commission (HREOC) (1998- 2003), Challis Professor of Jurisprudence, Sydney (1975–2003).

[21] https://www.alrc.gov.au/dr-james-crawford Dated 13th March 2015.

[22] *Recognition of Aboriginal Customary Laws* (ALRC Report 31), 12 June 1986, Commissioner in Charge 1982-completion, J R Crawford https://www.alrc.gov.au/sites/default/files/pdfs/publications/ALRC31.pdf.

[23] https://www.alrc.gov.au/publications/8.%20Aboriginal%20Customary%20Laws%3A%20Recognition%3F/arguments-against-recognition-aboriginal-cus.

[24] *The Rights of Peoples*, Clarendon Press, 236pp.

[25] This issue was covered in the chapter by the late Professor Garth Nettheim (1933–2018), University NSW.

[26] Citing Koskenniemi, 2013/14 *Brit Yearbook Int Law* 137–143.

[27] 2015, In: *Sovereignty, Statehood and State Responsibility*, p. xxiv, p. xi, p. xxii, p. xxiv respectively.

[28] See Press Release 2017 http://www.icj-cij.org/files/case-related/92/092-20170721-PRE-01-00-EN.pdf.

[29] See video of James Crawford talking about this case: https://www.matrixlawinternational.com/interviews/.

[30] Adviser to and expert witness on behalf of the Department of Justice, Government of Canada, Reference re Secession of Quebec (Canada, Supreme Court), 115 ILR 536.

[31] Kosovo Advisory Opinion (Senior Counsel for the United Kingdom of Great Britain and Northern Ireland), "Accordance with international law of the unilateral declaration of independence in respect of Kosovo (Request for Advisory Opinion)", http://www.icj-cij.org/en/case/141.

[32] Sir Daniel Bethlehem, QC (b. 1960-), barrister, Principal Legal Advisor to the Foreign and Commonwealth Office UK (2006–11), Visiting Professor in the Department of War Studies, Kings College London.

[33] Expert opinion (with Professor Alan Boyle), in: *Scotland analysis: Devolution and the Implications of Scottish Independence* (Cm 8554, February 2013), pp. 63–108. Annex A Opinion: Referendum on the Independence of Scotland – International Lawinternational law Aspects https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/79408/Annex_A.pdf.

[34] Matrix Chambers is a barristers' chambers located in London, Geneva and Brussels. https://www.matrixlaw.co.uk/.

[35] Op cit. p.xxii.

[36] A propos minerals on the deep-sea bed.

[37] *Chance, Order, Change*, p504–506, Items 654–657.

[38] See Judge Crawford's discourse "On the ILC Articles on State Responsibility" on the UN video website: http://webtv.un.org/watch/james-crawford-on-the-ilc-articles-on-state-responsibility/2609200570001.

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[39] 2104, *Chance, Order, Change*, item 342–3.
[40] Hissène Habré, (b. 1942-) President of Chad (1982–90), first former head of state to be convicted for human rights abuses in the court of another nation (Senegal, 2016). In 2012 the ICJ ordered Senegal to put him on trial or extradite him to face justice overseas.
[41] 2015, p. xxiv.
[42] Item 605, p. 468.
[43] Items 605–611, p. 468–476.
[44] 2013, CUP 825pp.
[45] Senior Research Fellow, Global Security Research Programme, Helsinki. In *Nordic Journal of international law*, 2015, 84, 605–612, at p.611. This was apropos human rights law.
[46] Eyal Benvenisti (b. 1959) Whewell Professor of international law (2016-), Professor of Human Rights, Tel Aviv University (2002–16). In: "The Conception of International Law as a Legal System" *German Yearbook of International Law*, 2008, 50, 393–405, at 396–7.
[47] Ad hoc Judge, ICJ, *Bosnia v Yugoslavia*, (1993–2002).
[48] See Sir Eli's discourse "On the Role of the International Judge" in a UN video http://webtv.un.org/watch/sir-elihu-lauterpacht-on-the-role-of-the-international-judge/2600845464001/?term=.
[49] Manfred H Lachs (1914–93), Polish diplomat and jurist. Professor of International Law, University of Warsaw (1952–93), Judge ICJ (1967–93).
[50] Lord, Professor Sir Arnold Duncan McNair (1885–1976), Whewell Professor (1935–37), Member, Permanent Court of Arbitration (1945–65), Judge ICJ (1946–55), President (1952–55), President ECHR (1959–65).
[51] Sir Gerald Gray Fitzmaurice (1901–82), Judge ICJ (1960–73), Judge ECHR (1974–80).
[52] https://www.icj-cij.org/en/case/58.
[53] Judge ICJ (1995–2006), President (2006–09).
[54] With Otto Spijkers, Assistant Professor, Utrecht University School of Law.
[55] At Q92. Also set out in his Alec Roche Lecture 2006 at New College, Oxford, under the title 'The Idea of International Society' - see https://www.squire.law.cam.ac.uk/sites/www.law.cam.ac.uk/files/images/www.squire.law.cam.ac.uk/legacy/Media/Eminent%20Scholars%20Archive%20Transcripts/Curing%20the%20Madness%20of%20the%20Intergovernmental%20World.pdf.
[56] In Chinkin, C & Baetens F (Eds), 2015, *Sovereignty, Statehood and State Responsibility* CUP, 479pp., p.xxi.
[57] Dominique Hogan-Doran SC, a senior barrister at the Independent Bar in Australia. https://static1.squarespace.com/static/568c9f234bf1182258eb9fbc/t/5a20b1898165f51b7db7bcb2/1512092043849/James%2BCrawford%2BInterview.pdfsummary.
[58] Page 143 of his review.
[59] *Liber Doctorandorum*, p. xxv.

Biography

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