

## BOOK REVIEW

*BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* BY JAMES CRAWFORD (OXFORD UNIVERSITY PRESS, 9<sup>TH</sup> ED, 2019) 872 PAGES. PRICE GBP49.99 (PAPERBACK) ISBN 9780198737445.

*INTERNATIONAL LAW* BY GLEIDER HERNÁNDEZ (OXFORD UNIVERSITY PRESS, 2019) 664 PAGES. PRICE GBP35.99 (PAPERBACK) ISBN 9780198748830.

The two textbooks of public international law under review between them represent several generations of scholarship. The first book, *Brownlie's Principles of Public International Law* ('*Brownlie's Principles*'),<sup>1</sup> is the ninth edition of a book first published by Sir Ian Brownlie in 1966, which has been considered in many ways authoritative and has been widely celebrated in its earlier incarnations.<sup>2</sup> Its author, James Crawford, here writing his second edition of this text, is a doyen (for many, *the* doyen) of international law and a leading thinker in, as well as practitioner of, international law since the last millennium. The second book, *International Law*,<sup>3</sup> is the first (but one suspects not the last) edition of this title and is written by a rising star in international law, Gleider Hernández. Together, these contributions represent the 'state of the art' in the textbook of public international law as we enter the third decade of the current millennium. As such, they give cause for much appreciation, and even some tentative celebration, in dark times.

This review will focus in particular on a teacher's perspective of both titles. With *International Law*, this is straightforward in that the book's intended readership is defined as students and newcomers to international law.<sup>4</sup> In that respect, it may be thought of as an introduction to the subject, albeit a most comprehensive and theoretically informed one. Hernández carefully disclaims the label of practitioner's manual.<sup>5</sup> With *Brownlie's Principles*, as with Brownlie's earlier editions, readership is defined more widely as including students and practitioners; as stated in the preface, it is well described as being designed for 'advanced undergraduates, graduate students and legal professionals'.<sup>6</sup>

The structure of Crawford's *Brownlie's Principles* is in most respects inherited from Brownlie's own and will in its broad outlines be familiar to many of its readers. The structure is unchanged from the eighth edition. Thus, 33 chapters are divided into 11 parts as follows: 'Preliminary Topics', 'Personality and Recognition', 'Territorial Sovereignty', 'Law of the Sea', 'The Environment and Natural Resources', 'International Transactions', 'State Jurisdiction', 'Nationality and Related Concepts', 'The Law of Responsibility', 'The Protection of

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<sup>1</sup> James Crawford, *Brownlie's Principles of Public International Law* (Oxford University Press, 9<sup>th</sup> ed, 2019).

<sup>2</sup> Colin Warbrick, 'Brownlie's *Principles of Public International Law*: An Assessment' (2000) 11(3) *European Journal of International Law* 621.

<sup>3</sup> Gleider Hernández, *International Law* (Oxford University Press, 2019).

<sup>4</sup> *Ibid* vii.

<sup>5</sup> *Ibid*.

<sup>6</sup> Crawford (n 1) xv.

Individuals and Groups' and 'Disputes'. True to the Brownlie tradition, the chapters in *Brownlie's Principles* vary greatly in length from nearly 60 pages down to around 10 pages.

Compared to Crawford's first edition of the text, published in 2012, *Brownlie's Principles* is somewhat shorter in terms of pages of text. In part, this is the result of the editing of footnotes (along with the adding of new entries) as well as the downsizing of some sections. There has been some judicious trimming of discursive text, for example, in Chapter 1. In any case, this is to be welcomed when other textbook authors have the habit of expanding the scale of their books with each edition by a process of accretion. The front matter is slightly increased from 80 to 85 pages, with more pages now being devoted to the 'Table of Treaties and Other International Instruments' and 'Table of Cases'. 'Punchy' conclusions have been added to chapters and, for the eagle-eyed, the book's front cover features a new and ostensibly more pacific colour lithograph by Eric Ravilious.<sup>7</sup> Instead of the windswept skies, troubled waters and barrage balloons of 1940, as featured on the previous edition's cover,<sup>8</sup> we have a bleached, modernist harbour with a liner entering.

Textbooks of international law in the 21<sup>st</sup> century, as in the 20<sup>th</sup> century, tend to share many features as to the division of material and as to the sequence with which topics are presented to the reader. Unsurprisingly then, there is considerable similarity in the organisation of material across these two books, especially in the early chapters. Thus, Hernández organises his text into five parts. The first part, 'The Structure of International Law', comprises an introductory overview as well as the topics of the sources of international law and the distinction between international and municipal law. Part II, 'Subjects of International Law', includes chapters on statehood and on international organisations, including the United Nations. Up to this point, content areas broadly correspond with Parts I and II in *Brownlie's Principles*, albeit with an important exception in favour of *International Law* in the opinion of this teacher, as discussed below. Part III of *International Law*, 'International Law in Operation', comprises the substantive topics of jurisdiction, immunity and state responsibility, as well as the law of treaties. Part IV is concerned with international dispute resolution, including diplomatic protection, the role of the International Court of Justice and the law of the use of force. In Part V, six 'specialized regimes' of international law are discussed. These are the law of armed conflict (international humanitarian law), human rights and refugee law, international criminal justice, the law of the sea, environmental law and economic law.

The structure of *International Law* works extremely well both for clarity of exposition and for practicality of student (and teacher) use. The structure is certainly more straightforward and in some respects more intuitive than *Brownlie's Principles*, which, as noted, does not have the (mixed) blessing of starting from scratch with a first edition. In any event, Crawford's text is not so

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<sup>7</sup> Eric Ravilious, 'Newhaven Harbour' (Colour Lithograph, 1937) <<https://collections.vam.ac.uk/item/O1039129/newhaven-harbour-print-ravilious-eric/>>, archived at <<https://perma.cc/CN99-HZ39>>.

<sup>8</sup> Eric Ravilious, 'Barrage Balloons Outside a British Port' (Oil Painting, 1940) <<https://web.archive.org/web/20200202211448/http://www.leedsartgallery.co.uk/gallery/listings/10038.php>>.

pedagogically driven as *International Law*. To put it differently, Brownlie's primary objective — maintained by Crawford — was a systematic exposition of the discipline, which is not the same thing as prioritising delivery to students in the classroom. However, if Crawford's text is thought of as the more traditional of the two, it is of interest that it is Crawford who, following Brownlie, locates the law of the sea and the international law of the environment and of natural resources centrally, rather than treating them as 'specialized regimes' in a final part as does Hernández. It was Brownlie who had thus highlighted the importance of what he had called from the earliest editions 'Common Amenities and Co-Operation in the Use of Resources',<sup>9</sup> a topic that included the regulation of outer space.<sup>10</sup> The consideration of the international use of force was rather reluctantly included by Brownlie in his sixth edition as a final part.<sup>11</sup> Crawford has from his eighth edition included use of force as a longer final chapter in a final part on disputes, which significantly improves on Brownlie while remaining true to Brownlie's intuition that international law is predominantly the law of peace.<sup>12</sup> Crawford's treatment of traditional and contemporary issues in the international circumscription of force is, needless to say, impressive.

A related matter, which to some degree differentiates *Brownlie's Principles* and *International Law*, is that to give the law of international armed conflict a somewhat more integrated position in the text (as does the latter) is to foreground multilateral regulation and its techniques, as contrasted with the conduct of a plurality of states as such. State practice was an avowed focus of Brownlie,<sup>13</sup> notwithstanding his attention to 'common amenities' as noted above. Despite beginning with the topic of sources of international law as his first chapter, and in particular with art 38 of the *Statute of the International Court of Justice* ('*ICJ Statute*'), Brownlie's emphasis was not on disputes as such. Rather, it was on the routine business of the conduct of states and the relevant conduct of selected natural persons. This quotidian orientation of Brownlie, to a considerable extent carried forward by Crawford, has the virtue of counterbalancing the hegemonic effect of the conduct, including the litigious conduct, of more powerful states. In the Brownlie–Crawford approach, attention is paid to what are presumed to be wider, deeper and slower-moving features of the international legal landscape. This is an extensive, rather than an intensive, approach to what might loosely be termed 'custom-based conduct'. This approach is exemplified by the observation that 'the state is itself a customary law phenomenon'.<sup>14</sup> It should thus be observed that state conduct, as the central phenomenon under study, is not directly or intensively connected with customary international law as provided in art 38(1)(b) of the *ICJ Statute*. The latter would seem to represent a special, forensic selection of the former, a tip of the iceberg of state practice.<sup>15</sup> It is presumably the former,

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<sup>9</sup> See, eg, Ian Brownlie, *Principles of Public International Law* (Clarendon Press, 2<sup>nd</sup> ed, 1973) ch 12 ('*Principles of PIL (2<sup>nd</sup> ed)*'); Ian Brownlie, *Principles of Public International Law* (Oxford University Press, 7<sup>th</sup> ed, 2008) ch 12 ('*Principles of PIL (7<sup>th</sup> ed)*').

<sup>10</sup> Brownlie, *Principles of PIL (7<sup>th</sup> ed)* (n 9) 255–9.

<sup>11</sup> See Ian Brownlie, *Principles of Public International Law* (Oxford University Press, 6<sup>th</sup> ed, 2003) v, pt XIII ('*Principles of PIL (6<sup>th</sup> ed)*').

<sup>12</sup> See Brownlie, *Principles of PIL (2<sup>nd</sup> ed)* (n 9) v.

<sup>13</sup> See *ibid.*

<sup>14</sup> Crawford (n 1) 44.

<sup>15</sup> *Ibid.*

not the latter, that gives rise to or manifests ‘principles’ of international law.<sup>16</sup> Consistent with this approach, the recipe set out by the International Court of Justice in demanding an *opinio juris* (revised now, pedants will note, from the earlier typography of *opinio iuris*) is still somewhat disparaged.<sup>17</sup>

For the teacher of international law, some topics stand out as difficult to convey in that their practical importance seems to be accompanied by a formal obscurity, so that it may be difficult to fit such topics into the most familiar frameworks. The peremptory norm (the norm *jus cogens*) is a good example. It fits awkwardly into the art 38 scheme of sources: not really a custom, not really a principle, but so much more than the musings of a publicist or the purported ratio decidendi of an international bench. Apart from flagging the existence of peremptory norms in his Chapter 2 on sources of international law, Crawford follows Brownlie in locating his examination of the peremptory norm within the context of ‘The Law of Responsibility’ (Part IX). Some observations on peremptory norms and on obligations *erga omnes* are included under ‘Consequences of an Internationally Wrongful Act’ (Chapter 26),<sup>18</sup> but the main discussion is located in Chapter 27 under the rubric of ‘multilateral public order’.<sup>19</sup> That is to say, examination is deferred for some 25 chapters. Such cautious treatment is justified in many respects, even if activist advocates and jurists might blench. But Hernández’s contrasting strategy is a pedagogical masterstroke. He dissects the peremptory norm and the obligation *erga omnes* as examples of the hierarchy of norms in a chapter that immediately follows his own Chapter 2 on sources of international law.<sup>20</sup> In this way, Hernández gives proper recognition to the importance of such purported norms and provides a succinct overview of contemporary candidates for the status involved, while grasping the nettle of the complex questions that arise concerning status vis-à-vis the canonical sources.

A topic that arises for the teacher of international law, and not least in Australia, is that of the treatment of refugees. Many students of international law are interested in human rights law in general and the rights of refugees in particular. In common with most textbooks of international law, Crawford deals with refugee law quite briefly as an example of the treaty-based protection of specific groups.<sup>21</sup> Hernández helpfully devotes around a third of a chapter on human rights to refugees, stateless persons and other pressing issues of migration.<sup>22</sup> Turning to practical matters, and well exemplified by boxes on the preceding topics, Hernández’s use of colour for headings and boxes works very well and does not distract as one might fear. Contents of boxes, which indicate historical background, theoretical debate, contemporary developments and cases, are very well selected. The systematic enumeration of sections is also very effective and online resources are made available by the publisher. Further reading at the end of each chapter in *International Law* is very well selected and will provide those students with more time and with specialised interests or curiosity with plenty of

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<sup>16</sup> See Brownlie, *Principles of PIL* (6<sup>th</sup> ed) (n 11) 18–19.

<sup>17</sup> Crawford (n 1) 23.

<sup>18</sup> Ibid 564–5, 569, 571.

<sup>19</sup> Ibid 577–9, 581–3, 585, 587.

<sup>20</sup> Hernández (n 3) ch 3.

<sup>21</sup> Crawford (n 1) 617.

<sup>22</sup> Hernández (n 3) 426–37.

food for thought. Providing such suggested readings in a pedagogic manner is of course a function of a teaching-focused text. Wideranging, contemporary resources are also to be gleaned from *Brownlie's Principles* but with more readerly effort being required.

One teaching aspect on which Hernández might perhaps have devoted a few more pages is the modes of acquisition of sovereign title to territory. This topic, admittedly a little arcane in some respects, is treated as more of historical than of contemporary interest.<sup>23</sup> But even if one would not wish for the design of a new textbook to be driven by conservative practices of examination (as many typical problem questions would call for such knowledge), it does seem that a brief and systematic overview of legitimate modes of acquisition would add value. While providing considerably more than most undergraduate students would need, such students would find *Brownlie's Principles'* Chapter 9 on this topic admirably lucid.

One aspect where inverse decisions have been made by the two authors is on the scale of the historical overview of international law that both present in their respective introductory chapters. Crawford is, it must be noted, writing somewhat against the Brownliean grain in adding (first in the eighth edition) an introductory chapter that includes a very brief historical overview. Hernández, in some contrast, provides a little more detail on developments across the last half millennium or so. In this context, surely international lawyers will never agree as to what weight, if any, to place on the various peace treaties made at Westphalia. Both Crawford and Hernández establish a critical distance from the fetishisation of those agreements.<sup>24</sup> Hernández has space to briefly overview 20<sup>th</sup> century developments and to point to the significance of Third World Approaches to International Law.<sup>25</sup> Indeed, both authors are (as one now says) 'woke' to the Eurocentrism of public international law as the world knows it. In that connection, Crawford's observation on early modern Europe's definition of global membership of the international system as 'not chauvinistic'<sup>26</sup> is perhaps in need of somewhat more nuance. The example of the Ottoman Empire as a recognised international power is indeed a corrective to any naive account of European elitism.<sup>27</sup> However, while the relationship of the Ottoman Empire with the European powers indeed included formal alliances and various forms of diplomatic intercourse, it was more often an uneasy and selective collaboration of convenience than an expression of mutuality.<sup>28</sup> Even in a brief introductory paragraph a little more might be said on this important and illuminating question.

Returning to the 'dark times' referred to above, both of these texts demonstrate an acute awareness of global dangers such as climate change facing all the world's populations. Of course, some communities are more precarious than others. The scourge of inequality persists and, in terms of the democratic constraint of individuals in positions of power, it remains the case that tyrants may 'safely graze,

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<sup>23</sup> Ibid 110–11.

<sup>24</sup> Ibid 5–6; Crawford (n 1) 4.

<sup>25</sup> Hernández (n 3) 13–20, 26–7.

<sup>26</sup> Crawford (n 1) 4.

<sup>27</sup> See *ibid.*

<sup>28</sup> Noel Malcolm, *Useful Enemies: Islam and the Ottoman Empire in Western Political Thought, 1450–1750* (Oxford University Press, 2019) 104–5.

sometimes for decades'.<sup>29</sup> At the same time, both books are written in the sobering awareness of the dark sides and the limits of public international law, and of its intimate interconnections with a global economy. In his concluding remarks on international economic law, Hernández points to the 'need for serious reflection on the structure and purpose of the global economic order, with an understanding of which actors are privileged and which are marginalized'.<sup>30</sup> Hernández continues: 'Perhaps this might help finally to shatter some of the enduring structures which have hindered the possibilities of human development.'<sup>31</sup> The cover of the eighth edition of *Brownlie's Principles* was strikingly illustrated by Ravilious' 'Barrage Balloons Outside a British Port'.<sup>32</sup> Ravilious' liner in 'Newhaven Harbour',<sup>33</sup> an ostensibly peaceful scene on the cover of *Brownlie's Principles*, might always be bringing the plague. But the overall tone for both authors is positive concerning the potentialities for solidarity and collective care that international law offers. The glass of public international law is half-full for both Crawford and Hernández.<sup>34</sup>

Both books are written with some elegance and a lightness of touch that does not belie gravitas. Both manifest humility in the face of world events and the limits of scholarly analysis. As Crawford's nod to *Hamlet* — that persistent objector to mere custom — might remind us, that which is common is not necessarily inevitable.<sup>35</sup> Students of international law will be grateful for these volumes. The teacher of an introductory class in international law, where the capacities and the relevant previous training of students may vary significantly, could not do better than to employ *International Law*. It succeeds splendidly. It is student-friendly in ways that do not compromise accuracy or the recognition of complexity, and it will be the catalyst for many future careers and contributions. A class of students with an advanced undergraduate or postgraduate profile will respond to the greater detail, depth and authority of *Brownlie's Principles*. Practitioners, it is respectfully suggested, would greatly benefit from paying close attention to both.

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<sup>29</sup> Crawford (n 1) 16.

<sup>30</sup> Hernández (n 3) 549–50.

<sup>31</sup> Ibid 550.

<sup>32</sup> Ravilious, 'Barrage Balloons Outside a British Port' (n 8).

<sup>33</sup> Ravilious, 'Newhaven Harbour' (n 7).

<sup>34</sup> See, eg, Crawford (n 1) 748; Hernández (n 3) 29.

<sup>35</sup> Crawford (n 1) xv n 2, citing William Shakespeare, *Hamlet* (First Folio, 1623) act 1 sc 2 ln 77.

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