

JUDGE JAMES CRAWFORD AC SC FBA (1948–2021)

MARGARET A YOUNG*

Scholars and practitioners of international law mourned a true great in 2021 with the passing of James Richard Crawford AC SC FBA, Judge of the International Court of Justice. Crawford's encyclopedic command of international law and his enduring influence on its development inspire awe in generations of international lawyers. He served as judge, academic, advocate, expert (for both international and domestic law reform bodies), teacher and mentor. Crawford's intellectual legacy continues in many fields, including state responsibility, statehood and the law of the sea. He was made Companion of the Order of Australia in 2013 for 'eminent service to the law through significant contributions to international and constitutional legal practice, reform and arbitration, and as a leading jurist, academic and author'.¹

Crawford was elected to the position of judge of the International Court of Justice ('ICJ') in November 2014, taking office in February 2015 for a nine-year term. It was a fitting and natural progression after an illustrious career in international law, which began with law and arts degrees from the University of Adelaide and a DPhil at Oxford. His doctoral thesis on the subject of statehood in international law was published as *The Creation of States in International Law* in 1979 and is now in its second edition with Oxford University Press. Another classic is the masterful *Brownlie's Principles of Public International Law*, currently in its ninth edition with Oxford University Press; Crawford took over the authorship from Ian Brownlie, who had been his DPhil supervisor at Oxford. In these works, and in his career, Crawford applied precision and originality to foundational questions about the entities that participate in modern global relations, and the rules that govern them.

In Adelaide, the place of his birth, Crawford took up his first academic role as Lecturer in 1974, becoming Professor in 1983. He was Challis Professor of International Law from 1986 and Dean of Sydney's Faculty of Law from 1990 to 1992. These appointments were combined with stints with the Australian Law Reform Commission; his recommendations as a commissioner became, in effect, the *Admiralty Act 1988* (Cth) and the *Foreign States Immunities Act 1985* (Cth). A third reference was one he regarded as the most important: it concerned the recognition of Aboriginal customary law. Crawford continued to display a keen sensitivity to matters relating to colonisation throughout his career, including as counsel for Mauritius in the 2011 arbitral proceedings concerning the establishment by the United Kingdom of a marine protected area in the waters

* Professor, Melbourne Law School, University of Melbourne.

¹ Department of the Prime Minister and Cabinet, Australian Government, 'Professor James Richard CRAWFORD', *Australian Honours Search Facility* (Web Page) <<https://honours.pmc.gov.au/honours/awards/1147729>>, archived at <<https://perma.cc/G6XD-XRLM>>.

surrounding the Chagos Archipelago.² These proceedings prefigured the ICJ's Advisory Opinion relating to the Chagos Archipelago, delivered in 2019.³

Crawford had a laconic demeanor, often associated with Australians, yet he was perhaps better described as a citizen of the world. He took up the positions of Whewell Professor of International Law and fellow of Jesus College, University of Cambridge, in 1992. Crawford served as Director of the Lauterpacht Centre for International Law from 1995–2003 and again from 2006–10. He counted his supervision of PhD students — which totalled over 70 — as one of the most significant contributions of his academic career. Many of his students have assumed academic, arbitral, advocacy and other roles in international law. The present writer, for one, gained insights into the fragmentation of international law during Crawford's sharp supervisions; the doctoral thesis became *Trading Fish, Saving Fish: The Interaction of Regimes in International Law*,⁴ for which Crawford wrote the foreword.

Crawford's mastery of public international law saw him elected to the International Law Commission ('ILC') in 1992. As Special Rapporteur on State Responsibility (1997–2001), he famously brought the ILC's longstanding ambitions to successful completion. Crawford considered the release of the draft articles on state responsibility, together with the associated work, commentaries and books, as his greatest single achievement as an international lawyer. The *Draft Articles on Responsibility of States for Internationally Wrongful Acts* ('ILC Articles') were adopted by the ILC on 3 August 2001 and annexed to General Assembly Resolution 56/83 of 12 December 2001.⁵ One of its foundational provisions relates to multilateral legal rights and obligations, which formed the topic of Crawford's 1997 lectures for the Hague Academy of International Law. Crawford's work for the ILC also included chairing the ILC working group responsible for the development of a draft statute for an international criminal court, now the *Rome Statute*.⁶

Crawford's untimely death after a long illness cut short his term at the ICJ, but the judgments he delivered are significant. For example, writing in dissent, Crawford would have allowed the Marshall Islands to proceed with its claim against the United Kingdom, India and Pakistan in 2016.⁷ The Marshall Islands

² *Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom) (Award)* (UNCLOS Arbitral Tribunal, 18 March 2015).

³ *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Advisory Opinion)* [2019] ICJ Rep 95.

⁴ Margaret A Young, *Trading Fish, Saving Fish: The Interaction between Regimes in International Law* (Cambridge University Press, 2011).

⁵ *Responsibility of States for Internationally Wrongful Acts*, GA Res 56/83, UN GAOR, 56th sess, 83rd plen mtg, Agenda Item 162, Supp No 10, UN Doc A/RES/56/83 (28 January 2002, adopted 12 December 2001) annex ('*Responsibility of States for Internationally Wrongful Acts*').

⁶ *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 3 (entered into force 1 July 2002).

⁷ *Obligations concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v United Kingdom) (Preliminary Objections)* [2016] ICJ Rep 83; *Obligations concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v India) (Jurisdiction and Admissibility)* [2016] ICJ Rep 255; *Obligations concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v Pakistan) (Jurisdiction and Admissibility)* [2016] ICJ Rep 552.

submitted that these states — and, separately, China, Korea, France, Israel, Russian Federation and the United States of America — had breached their obligations concerning negotiations relating to the cessation of the nuclear arms race and to nuclear disarmament. The majority rejected the case on the ground that there was no dispute. One of the difficulties for the Marshall Islands was that its opposition to these states had been recorded in multilateral fora, rather than directly. Crawford, in contrast with the majority, emphasised that ‘disputes can crystallize in multilateral fora involving a plurality of States’.⁸ Crawford expressly sought to correct the inferences commonly drawn from the merits phase of the *South West Africa* cases.⁹

Those cases, brought by Ethiopia and Liberia, concluded spectacularly in 1966 with the Court declining to rule against apartheid South Africa concerning its treatment of what is now Namibia. It was Sir Percy Spender, the other Australian to have held judicial office at the ICJ, who, as President, used his casting vote against Ethiopia and Liberia’s claim, on the basis that those states had not established any legal rights opposable against South Africa in the context of the League system. Those close to Crawford in the Peace Palace remember him walking past the bust of Sir Percy, which was located outside his chambers, and reflecting on this famous incident. Crawford’s judicial deftness with the notion of states’ common interests (and the relationship between truly multilateral obligations and bundles of bilateral relations — conveyed, in part, by the *ILC Articles* themselves) will better serve the international community. Disputes of the future arising from contemporary global problems, such as climate change and COVID-19, are less likely to be opposable between just two states, and international adjudication will depend on appropriate flexibility in matters of jurisdiction and admissibility.

Crawford’s influence in the jurisprudence of the ICJ and other international tribunals preceded his appointment. Crawford acted as counsel or advisor in approximately 30 cases before the ICJ, in dozens more before other international courts and tribunals and in around 40 arbitrations. He sat as judge or arbitrator in about 25 cases. As an arbitrator who deferred proceedings to the European Court of Justice in the MOX Plant dispute between Ireland and the United Kingdom, his consideration of mutual respect and comity provided a practical solution to fragmentation.¹⁰ In extra-curial writings he emphasised a general principle of cooperation between international jurisdictions, a ‘meta-principle’ which would be praised by those ‘in favour of order in the international system’.¹¹ As counsel for Australia in the *Southern Bluefin Tuna* dispute with Japan, Crawford succeeded before the International Tribunal for the Law of the Sea at the provisional measures stage in 1999.¹² He was confounded by the annex VII

⁸ Ibid 1102.

⁹ *South West Africa (Ethiopia v South Africa) (Second Phase)* [1966] ICJ Rep 6.

¹⁰ *MOX Plant Case (Ireland v United Kingdom) (Order on Suspension of Proceedings on Jurisdiction and Merits, and Request for Further Provisional Measures)* (UNCLOS Arbitral Tribunal, 24 June 2003) [28].

¹¹ James Crawford and Penelope Nevill, ‘Relations between International Courts and Tribunals: The “Regime Problem”’ in Margaret A Young (ed), *Regime Interaction in International Law: Facing Fragmentation* (Cambridge University Press, 2012) 235, 243.

¹² *Southern Bluefin Tuna (New Zealand v Japan, Australia v Japan) (Provisional Measures)* (1999) ITLOS Rep 280.

arbitral tribunal ruling in 2000 that it lacked jurisdiction to hear the merits of the case,¹³ in what he described as an ‘unnecessary and unhappy finding’, which created ‘jurisdictional disorder’.¹⁴ In the 2015 ruling on jurisdiction in the *South China Sea Arbitration*, the arbitral tribunal declined to adopt the interpretation of 2000,¹⁵ in effect supporting Crawford’s view.

Crawford’s work ethic was legendary. He delivered his 2014 General Course on Public International Law at the Hague Academy of International Law at the same time as his appearance before the ICJ for Australia in *Whaling in the Antarctic*; colleagues remember him rushing from the main court room and to the Academy lecture theatre located in the grounds of the Peace Palace. The resulting text of his General Course, *Chance, Order, Change: The Course of International Law*,¹⁶ tackles the most difficult questions of the discipline. The compilation of Crawford’s career achievements, produced for his judicial election, reveal further feats. This is available on the ICJ’s website;¹⁷ also online is an interview recorded with Cambridge University’s Squire Law Library’s Lesley Dingle and Daniel Bates,¹⁸ together with other compilations such as the collection of essays in his honour edited by Christine Chinkin and Freya Baetens.¹⁹

At the Melbourne Law School — the home of this journal — Crawford’s towering intellect was and continues to be an inspiration and guide. He supervised, mentored and worked with academics and students. Crawford delivered the thirteenth Kenneth Bailey Memorial Lecture in 2013. This became the much-cited article ‘Dreamers of the Day’, published in volume 14 of this journal, which chronicles the contributions of selected Australians to the ICJ.²⁰ Its legal-historical analysis is furthered in this journal’s special issue on ‘National Encounters with the International Court of Justice’, published in volume 21, which is dedicated to him. Crawford’s successor at the Court, Melbourne Laureate Professor Hilary Charlesworth, was elected in November 2021. Judge Crawford’s profound contribution to the ideal of a just and secure international order will continue to be remembered and advanced in these pages.

¹³ *Southern Bluefin Tuna Case (Australia and New Zealand v Japan) (Award on Jurisdiction and Admissibility)* (2000) 39 ILM 1359.

¹⁴ ‘Verbatim Record’, *Whaling in the Antarctic (New Zealand v Japan; New Zealand intervening)* (International Court of Justice, General List No 148, 10 July 2013) 65.

¹⁵ *South China Sea Arbitration (Philippines v China) (Award on Jurisdiction and Admissibility)* (Permanent Court of Arbitration, Case No 2013–19, 29 October 2015) [223].

¹⁶ James Crawford, *Chance, Order, Change: The Course of International Law* (Brill, 2014).

¹⁷ ‘Judge James Richard CRAWFORD’, *International Court of Justice* (Web Page) <https://www.icj-cij.org/public/files/members-of-the-court-biographies/crawford_en.pdf>, archived at <<https://perma.cc/R587-FFT4>>.

¹⁸ Conversations with Judge James Crawford (Lesley Dingle and Daniel Bates, Squire Law Library, 3–4 May 2018) <<https://www.squire.law.cam.ac.uk/eminent-scholars-archive/judge-james-crawford/conversations-judge-james-crawford/>>, archived at <<https://perma.cc/6XNK-VHVW>>.

¹⁹ Christine Chinkin and Freya Baetens (eds), *Sovereignty, Statehood and State Responsibility: Essays in Honour of James Crawford* (Cambridge University Press, 2015).

²⁰ James Crawford, “‘Dreamers of the Day’: Australia and the International Court of Justice” (2013) 14(2) *Melbourne Journal of International Law* 520.