

Obituaries, pages 270-278

**IN MEMORY OF JAMES CRAWFORD:
JUDGE, JURIST AND SCHOLAR (1948-2021)**

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The publication of this issue of *Amicus Curiae* coincides with the opening of the 77th session of the UN General Assembly (UNGA 77). During the 77th session, the Sixth Committee is scheduled to meet from 3 October to 18 November 2022 where it will consider, amongst other issues, the possibility of an international convention on the Responsibility of States for Internationally Wrongful Acts. This item has been on the Assembly's agenda triennially since its 59th session (resolutions 59/35, 62/61, 65/19, 68/104, 71/133 and 74/180), but after nearly two decades of inactivity the prospect of a multilateral treaty on state responsibility is open to renewed debate.

It is, then, a fitting moment to honour the memory of James Crawford (1948-2021) who, in his role as Special Rapporteur, was responsible for the final text of the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts (hereafter the Articles). Crawford was appointed to the role in 1996, some 40 years after the UN International Law Commission (ILC) had begun the task of codifying the rules on the wrongdoing of states. His appointment marked the close of the first phase of the ILC's work on state responsibility from 1955 to 1996 under the successive supervision of special rapporteurs Roberto Ago, Willem Riphagen, and Gaetano Arangio-Ruiz. Five years after his appointment, the Draft Articles were submitted for their second reading and subsequently adopted by the General Assembly in resolution 56/83 of 12 December 2001.

Crawford's work at the helm of the ILC was but one part of his highly influential career as an international jurist, academic and judge.

Born in Sydney, Australia, in 1948 he was educated at the University of Sydney and at Balliol College, Oxford. From 1977, he lectured in international law and constitutional law at the University of Adelaide,

where he was awarded a personal chair in 1983. In 1985, Crawford was elected an associate of the Institut de Droit International, at the notably young age of 37, attaining full membership in 1991. In 1986, he became the Challis Chair of International Law at the University of Sydney. During this period, he completed several significant reports for the Australian Law Reform Commission on subjects such as foreign state immunity, admiralty law and the recognition of aboriginal customary law, the latter of which was to have an enduring impact upon Crawford's approach to international law.

This is evident in specific publications, such as *The Rights of Peoples* (Crawford 1988), as well as in a wider commitment to the concept of a right to self-determination that underpinned this work (Crawford 2001). It is also possible to see a reflection of this early work in Crawford's later professional practice. Over the course of his career, he advised on Quebec's secession from Canada (Crawford 1997) and Scottish independence (Boyle & Crawford 2013). On several occasions he served as counsel for small island states, representing Mauritius against the United Kingdom in *Case concerning a Marine Protected Area around the Chagos Archipelago* (2015) before the Permanent Court of Arbitration, and the Solomon Islands on the *Legality of the Threat or Use of Nuclear Weapons* (1996) before the International Court of Justice (ICJ).

His first case before the ICJ was *Certain Phosphate Lands in Nauru (Nauru v Australia)* (1992), in which he acted as Counsel for Nauru. The case raised the prospect of an array of issues being brought directly before the court in a manner previously unwitnessed, not only issues arising from the postcolonial context but also issues such as permanent sovereignty of natural resources and responsibility for environmental damage. Whilst the ICJ did not reach the merits of the case on account of the parties reaching settlement, its judgment on Australia's preliminary objections clarified important issues regarding jurisdiction and established, for the first time, the court's capacity to consider a breach of trusteeship obligations.

It is not necessary to speculate on what judgment the court might have reached in order to recognize the continued significance of the issues raised by the case, particularly in relation to matters concerning environmental protection. Seen from the context of the Trusteeship system, these issues have been framed as international fiduciary duties. However, Crawford's legacy in international legal scholarship and practice has established broader grounds for state responsibility to the international community

as a whole. Indeed, drawing analogy between the common law and international law is something that Crawford (2002: 876) resisted:

Whether the original imperative was natural law or the sanctity of promises, there seems to be no trace of a formulaic approach to responsibility in early international law. Neither natural law nor treaty practice distinguished some specific domain where responsibility for breach applied, as compared with others where it did not. Rather, there emerged a general conception of the rights and duties of states, and of the consequences of breaches of those rights.

This is not to suggest that Crawford promoted a normative vision of international law, for he took care to make a distinction on this point: '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' (Dingle & Bates 2013b: Q119). Rather, it points to a particular characteristic of Crawford's work, which is a focus on historical contingency. Over the course of his career, he argued that the law is not an immutable set of rules but is instead the product of human action and interaction. This means that the law is always open to change, and that its development is contingent on the course of history. This characteristic is evident in Crawford's early work on the rights of peoples and is also visible in his work on the Articles of State Responsibility. Throughout, he gave weight to how the law has evolved over time, and how it has been shaped by the changing needs of states and other actors (see also Crawford 2013). This appreciation for history was fused with a commitment to maintaining the integrity of the textual modalities of international law. Thus, in Crawford's view

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 (Dingle & Bates 2018b: Q119).

The Articles on State Responsibility were the product of a larger undertaking to codify international law that predated Crawford and remains ongoing under the oversight of the ILC. Given the scope of the project it is, perhaps, not surprising that the undertaking encountered some controversy. It is testament to Crawford's pragmatic approach that, in their final form, the Articles met with general acceptance from states, and that the principles therein have subsequently been applied

in the actual decision-making process of states and in the judgments of international courts and tribunals.¹

The Commission's final decision to recommend that the Articles *not* be made into a treaty was in keeping with Crawford's own pragmatism and paved the way for the text to be referenced in processes and procedures as a summation of general principles of international law. Crawford (2002: 889) saw the ILC's work in this regard as 'part of a process of customary law articulation' and pointed to a lack of appetite amongst governments for legislative implementation of the Articles which, as secondary rules of state responsibility, are only indirectly applicable in national courts and which, in the form of a binding instrument, would raise inevitable objections from individual governments seeking to protect self-interest in relation to substantive issues.

In the work of drafting the text, Crawford expressed a specific attachment to article 48, which addresses the 'invocation of responsibility by a State other than an injured State'.² The distinction established the principle that states may have a legal interest in compliance with an obligation irrespective of whether or not they have been individually harmed by a breach (Crawford 2002: 881). The manner in which article 48 formulates concepts of peremptory norms, obligations *erga omnes* and obligations *erga omnes partes* marked a progressive development in the law of state responsibility. It was also an explicit rejection of the position adopted by the ICJ in *South West Africa* (1966), which asserted a famously narrow definition of rightful legal interests.

¹ Article 48 was explicitly referred to by the International Tribunal for the Law of the Sea (ITLOS) in *Responsibilities in the Area* (2011: para 180). In the ICJ, the principle of article 48 has been maintained: *Whaling in the Antarctic* (2014: paras 30-50); *Questions Relating to the Obligation to Prosecute or Extradite* (2012: paras 64-70); *The Gambia v Myanmar, Provisional Measures* (2020: paras 39-42).

² Article 48—Invocation of responsibility by a State other than an injured State.

1. Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if:
 - (a) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or
 - (b) the obligation breached is owed to the international community as a whole.
2. Any State entitled to invoke responsibility under paragraph 1 may claim from the responsible State:
 - (a) cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 30; and
 - (b) performance of the obligation of reparation in accordance with the preceding articles, in the interest of the injured State or of the beneficiaries of the obligation breached.
3. The requirements for the invocation of responsibility by an injured State under articles 43, 44 and 45 apply to an invocation of responsibility by a State entitled to do so under paragraph 1.

Crawford stated that article 48 ‘was approaching the margins of acceptability for some influential states’. In particular, he spoke of how the ILC defended the article’s reference to obligations ‘owed to the international community as a whole’ and how it opposed demands from states to amend the wording to ‘the international community of States as a whole’ (2002: 888). The more inclusive phrase allows for a broader interpretation of how international responsibility can arise. This carries practical implications for issues where a precise pinpointing of damage is impossible, but where a breach may contribute to a general degradation of the collective wellbeing.

The outcome of the Sixth Committee’s deliberations on the possibility of transforming the non-binding text of the Articles into a binding legal instrument remains to be seen, and it is not the purpose here to consider the ways in which the form might alter the function of international state responsibility. It is, perhaps, enough to note that the principles expressed in the Articles have retained their authority in subsequent years. Arguably, regardless of the conclusion, article 48 will continue to play a significant role in defining the parameters of state responsibility going forwards, particularly in relation to issues such as climate change, pollution and biodiversity.³

Alongside his work for the ILC, Crawford fulfilled other academic and professional roles. In 1992, Crawford was elected Whewell Professor of International Law at the University of Cambridge, and a Fellow of Trinity College, Cambridge. In 1996, Crawford was appointed director of the Lauterpacht Centre for International Law at Cambridge, a role he assumed twice from 1997–2003 and 2006–2010. He was admitted to the English bar in 1999 as a member of Gray’s Inn, and co-founded Matrix Chambers. From 2015, he served as a judge on the ICJ. It would, then, be a disservice to Crawford’s prolific corpus of juristic work to imply that his legacy can be wholly characterized by his work on the Articles on State Responsibility. Nonetheless, the Articles’ significance is inescapable, not least because they are, alongside their associated work and commentaries, what Crawford himself saw to be his ‘greatest single achievement as an international lawyer’ (Dingle & Bates 2018a: Q39).

³ Of interest here is the initiative led by Vanuatu to request an advisory opinion from the ICJ on the obligations of states under international law to protect the rights of present and future generations against the adverse effects of climate change. The resolution will be tabled during the current UNGA 77.

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