



Sovereignty, Statehood and State Responsibility

Essays in Honour of
James Crawford

EDITED BY
Christine Chinkin
Freya Baetens

CAMBRIDGE

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SOVEREIGNTY, STATEHOOD AND STATE RESPONSIBILITY

This collection of essays focuses on the following concepts: sovereignty (the unique, intangible and yet essential characteristic of States), statehood (what it means to be a State, and the process of acquiring or losing statehood) and State responsibility (the legal component of what being a State entails). The unifying theme is that they have always been and will in the future continue to form a crucial part of the foundations of public international law.

While many publications focus on new actors in international law such as international organisations, individuals, companies, NGOs and even humanity as a whole, this book offers a timely, thought-provoking and innovative reappraisal of the core actors on the international stage: States. It includes reflections on the interactions between States and non-State actors and on how increasing participation by and recognition of the latter within international law has impacted upon the role and attributes of statehood.

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EDITORS' PREFACE

James Crawford has been a towering figure in international law and practice over the past decades, in universities (primarily in his native Australia and the United Kingdom), in international, regional and national courts and tribunals and in governmental (national and international) bodies. He has performed multiple roles in each of these sites: scholar, teacher, supervisor, dean, college fellow and director of a research centre; advocate, expert witness and arbitrator; and law reform commissioner in Australia and on the International Law Commission. His energy and work rate are legendary. He has given his time and expertise to non-governmental organisations, for instance as Director of Studies of the International Law Association. He has also received multiple honours including honorary doctorates, being elected a Fellow of the British Academy and, most recently, Companion in the General Division of the Order of Australia.

James's publications make clear that his academic research and writing interests are both prolific and range widely, especially across public international law, private international law and constitutional law. James 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. But he is also 'open' to diverse theories and methodologies of international law, traditional positivist approaches as well as historical, interdisciplinary and critical work – as is evident from even a brief look at the contents of the co-edited (with Martti Koskenniemi) *Cambridge Companion to International Law*. In an era of international legal specialisation, James is a 'generalist' who has illuminated foundational concepts of international law: sovereignty, States, statehood, territory, self-determination, State responsibility. But he is also a specialist, for as is said by one of the contributors to this volume, no one can be a specialist without first being a generalist. Unsurprisingly, the range of topics chosen by contributors for their doctoral work under James's supervision is great. The constraints

of commercial publication did not allow us to give a free hand to contributors, reflecting their past and current academic interests. Instead we sought to bring together a volume that reflects upon three concepts that have pervaded James's work over the past four decades and where he has made an outstanding intellectual contribution: sovereignty (the unique, intangible and yet essential characteristic of States), statehood (what it means to be(come) a State; the process of acquiring, or losing, statehood) and State responsibility (the legal component of what being a State entails). The unifying theme between these topics – apart from James's seminal work on each of them – is that they have always been, and will in the future continue to form, part of the foundation of public international law.

This volume is a tribute and token of gratitude to James Crawford on his retirement from academia in one of his many roles, that of doctoral supervisor and thus as scholar and mentor, rather than practitioner. All the contributors to the volume were former doctoral candidates under James's supervision at the law faculties at the University of Sydney and the University of Cambridge and are now themselves active in legal academia, in international legal practice, or both – hence its appellation as a *Liber Doctorandorum*.

We thank the authors for their contributions to the volume. We also give a special thank you to Elina Zlatanska and Sophie Starrenburg for their invaluable research and editing work which assisted us in finalising the volume. We also thank Cambridge University Press, and especially Finola O'Sullivan for her support and enthusiasm for this project.

Christine Chinkin, LSE

Freya Baetens, Leiden University

JAMES CRAWFORD: THE EARLY YEARS*

James Richard Crawford was born in Adelaide, South Australia on 14 November 1948. He is the oldest of the seven children of James Allen Crawford and Josephine Margaret Crawford (née Bond). He was educated first at Brighton High School, Adelaide, whose motto is *fac omnia bene* ('do everything well'), an admonition that James has evidently ever since taken to heart. The school also has a special focus on music, which remains an important part of James's life.

James's school record was one of outstanding achievement. He ended his time at school as co-head prefect. Along the way he was president of the Public Speaking and Debating Club, co-edited the school magazine and the school newspaper, played in the soccer A team and the cricket B team, was on the committee of the Senior French Club and acted in the Revue. His valedictory editorial in the 1965 issue of the school magazine demonstrates an early maturity of vision. Taking issue with a narrow definition of what education is about, the seventeen-year-old James wrote:

[Then] what is education? Something like this: a leading out, through discipline and balance, of latent abilities in youth, and thus a preparation for life . . . For the purposes of the school, balance must mean intelligent participation in a wide range of activities; participation that is both giving and receiving. This year the school has had a wider range than ever before, with increased prefect and house activities, more clubs and sports teams. Intelligent participation in all facets of school life, or, if you like, the correct balance between 'work' and 'play' on a creative level; this is the way to a good education. And a good education is the way to a good life; the fulfilment of the aims of the individual, the society and therefore the school.

* I wish to acknowledge with thanks the assistance I have received from members of James's family, the Principal of Brighton High School (now named Brighton Secondary School), Ms Olivia O'Neill and the Dean of the Faculty of Law of the University of Adelaide, Professor John Williams.

James left school to enter the University of Adelaide in 1966, with the support of a government scholarship waiving fees, as a student in the faculties of arts and law. He collected a number of prizes and awards in both faculties, including the Angas Parsons Prize in Law in his final year, which was at that time the nearest equivalent to a university medal. In the faculty of arts he was awarded the Sir Archibald Strong Memorial Prize for Literature and the Bunday Prize for English verse (poetry remains important to him). The degrees of Bachelor of Arts and Bachelor of Laws (Honours) were conferred in 1972.

The University of Adelaide is one of Australia's oldest universities, established in 1874. Its first vice-chancellor, Dr Augustus Short, came to South Australia in 1847, eleven years after the foundation of the colony, as the first Anglican Bishop of Adelaide, after a notable career as a Fellow of Christ Church, Oxford. Among Dr Short's famous pupils at Oxford was the later prime minister W. E. Gladstone. Short's vision for the University of Adelaide was not tied to the model of the ancient universities of Great Britain. He foresaw the need for the developing colony to allow for an exploration of fields of scholarship beyond the classical mode of his own university. Before the end of the nineteenth century, faculties were established, as well as in arts, in science (in 1882, the first Australian university to establish such a faculty), law, medicine and music. Mathematics, philosophy, languages and mining engineering were also taught. The law faculty at Adelaide ranks as the second oldest in Australia (1883).

The University of Adelaide remains an institution with liberal traditions and a spirit of free inquiry. The vice-chancellor just before James's time was A. P. Rowe, whose habit of personally dropping in on rooms whose lights were burning late at night to find out what interesting developments were being hatched, in whatever field, led to his being humorously dubbed 'the Abominable Rowe Man'. His successor, Sir Henry Basten, had similarly wide interests and peripatetic habits, which led on one occasion to his arrest as a suspected intruder. An anguished late-night telephone call to the university's registrar was needed to confirm his identity.

The law school in James's time included some notable scholars, although some subjects were still being taught by local barristers and solicitors. The days of major expansion in all Australian law schools were still to come. His teachers included Arthur Rogerson and John Keeler (recent arrivals from Oxford), Alex Castles, Horst Luecke, David Kelly and Michael Detmold. Some notable visiting teachers during James's time were David Williams of Cambridge and Rupert Cross of Oxford. Among

the part-time teachers were John Bray QC, a leading advocate and a classics scholar, who later became Chief Justice of South Australia, and Roma Mitchell QC, successively Australia's first female Queen's Counsel, first female Supreme Court judge and first female state governor.

James's teacher of international law was D. P. O'Connell, who in the year of James's graduation (1972) was elected to the Chichele Chair of International Law at Oxford. The teaching of international law at Adelaide had had an interrupted history. It was taught, both as public and private international law, from the early twentieth century by Sir John Salmond, better known for his treatise on torts, and later a judge of the Supreme Court of New Zealand, then by Professor Jethro Brown and, in the early 1920s, by Professor Coleman Phillipson, author of a magisterial work on international law in ancient Greece and Rome. A break of some thirty years in the teaching of public international law followed, although not of private international law. The subject was not revived until some years after the arrival of O'Connell in 1951.

O'Connell was a New Zealander who won a postgraduate scholarship to Cambridge where he read for a doctorate under Professor Sir Hersch Lauterpacht. His subject was State succession, and his thesis first appeared in print in 1956. It was later expanded into a two-volume work. He later became known for his work on the law of the sea, and for his general treatise on international law (second edition, 1970). O'Connell's teaching was clearly influential in James's intellectual development even while James was somewhat reserved as to its theoretical underpinnings in natural law. O'Connell's mastery of detail and the telling anecdote, based on his wide practice as counsel (he appeared for Australia before the International Court in the Nuclear Tests case), could not have failed to impress and inspire a young student.

James won a postgraduate Shell Scholarship to pursue his interest in international law at Oxford, where he became a member of University College. Although he and O'Connell arrived in Oxford at much the same time, James chose to be supervised by Professor Ian Brownlie (later to be O'Connell's successor in the Chichele Chair, after O'Connell's untimely death in 1979). Brownlie provided a contrast in style and substance to O'Connell; his influence is evident in James's work in a similar economy of style and rigorous method of doctrinal inquiry. However, it cannot be said that James was an avid disciple of either of his teachers: he soon developed a distinctive approach and voice of his own.

James's thesis at Oxford was on the subject of statehood. His choice was an early indication of his willingness, indeed eagerness, to tackle

large topics. He graduated as doctor of philosophy (DPhil) in 1977. An adaptation of his thesis was published in 1979 by Oxford University Press under the title *The Creation of States in International Law*. The work was greeted with wide acclaim and was awarded the Certificate of Merit by the American Society of International Law in 1981. A revised second edition was published in 2006.

James returned to Adelaide immediately after Oxford and taught international law and constitutional law. His rise through the academic ranks was rapid: he was awarded a personal chair in 1983. His students were understandably in awe of him; they dubbed him 'JC'. But like that other renowned teacher he combined authoritative and stimulating teaching with a kind nature.

Marriage followed, and the birth of two daughters, both of whom have followed him in outstanding scholarly careers.

James's second major publication appeared in 1982. *Australian Courts of Law* purported to be a student textbook but in reality it served a far wider audience. It was a comprehensive survey of the entire court system of Australia with all its many problems of federal, state and territory jurisdictions. Far from being a student text it came to be an essential library acquisition for judges and the practising legal profession. Its success can be measured by the fact that it is now its fourth edition (co-authored by Brian Opeskin, Oxford University Press, 2004).

In early 1982 James took leave from the University to accept a three-year appointment as a full-time commissioner of the Australian Law Reform Commission. This body had been established in 1974 by the Whitlam government to examine all matters referred to it that were appropriate to the exercise of Commonwealth (federal) powers and to make recommendations for reform. It conducted wide community consultation through the production of discussion papers and was supported by highly qualified research teams. The chairman during James's first appointment was Michael Kirby, later to become a Justice of the High Court of Australia. James was assigned as Commissioner-in-Charge of three major references: Foreign State Immunity, Civil Admiralty Jurisdiction, and the Recognition of Aboriginal Customary Laws.

Foreign State Immunity was clearly a subject for an international lawyer. At the time of the reference there was doubt in Australia whether the traditional common law approach of absolute immunity should give way to developing judicial trends elsewhere towards restrictive or qualified immunity. There was as yet no decision of the higher Australian courts on the question; the decision of the Judicial Committee of the Privy Council

in *The Philippine Admiral* case (1977) was considered persuasive but not binding since it did not come on appeal from Australia. James had the benefit of the experience of many other common law jurisdictions which had pronounced on the matter, some legislatively, in preparing his report and draft legislation. In recommending that Australia adopt the approach of absolute immunity subject to exceptions (especially with respect to commercial transactions) the report considered that such an approach would accord with practice elsewhere, including the likely approach of the International Law Commission. In unaltered form it was passed into law as the Foreign States Immunities Act 1985.

The second of the two references dealt with a relic of Australia's colonial history. Admiralty jurisdiction, both civil and criminal, was tied to English law and was unsuited to the needs of an independent nation. Already before James was appointed to the commission, admiralty criminal jurisdiction had been supplanted in Australia by the passage of the Crimes at Sea Act 1979 (now replaced by the Crimes at Sea Act 2000). That Act cured the anomaly of having to lay charges of crimes committed at sea under English law and not the criminal law of the adjacent Australian state. The civil admiralty jurisdiction, exercisable by state courts, was stuck in the mould of the Colonial Courts of Admiralty Act 1890 (Imp). It was necessary, on a national basis, to resolve uncertainties about, and unjustified limitations on, the scope of that jurisdiction. The Report, under James's direction, succeeded in forming the basis of the Admiralty Act 1988.

The third reference took James into relatively uncharted and potentially controversial areas, far removed from international law. At a time when it was increasingly being questioned whether Australia should be regarded as having been unoccupied, and thus as *terra nullius*, upon British settlement in 1788, or whether the Aboriginal population should be regarded as having retained root title to their lands (matters that were to be decided by the High Court of Australia later in the *Mabo* case in 1992), there were many other matters of a more immediately pressing nature to be examined. These included whether Aboriginal customary law could be invoked before Australian courts, or should be considered in administrative decisions, regarding such matters as the criminal law and sentencing, traditional marriage and family status, child custody, traditional hunting and fishing and many others. Consultations provided a rich source of experience as the Commission took soundings all around the country, including in aboriginal areas. The final report did not recommend comprehensive legislation (although, piecemeal at various levels, some state

and federal laws resulted) but rather proposed a set of recommendations to be implemented or considered at appropriate levels of government.

James returned to Adelaide at the conclusion of his full-time term on the commission at the end of 1984, but continued to be a part-time member until 1990. In 1985 he was elected an Associate Member of the *Institut de Droit International*, the youngest member to have been appointed in recent times. He was promoted into full membership in 1991. After the death of Julius Stone he was the only Australian member of the *Institut* until the recent election of Hilary Charlesworth.

It soon became clear that James would have greater opportunities on the eastern seaboard of Australia. Adelaide is hardly a backwater, but Australian public life tends to be dominated by the 'Sydney–Melbourne–Canberra triangle'. In 1986 he was appointed Challis Professor of International Law at the University of Sydney. That endowed chair has had an uninterrupted history from its first incumbent, Pitt Cobbett, in 1890. James succeeded D. H. N. Johnson, formerly of London (LSE), who in turn had succeeded Julius Stone. Johnson's appointment had seen the separation of the once unitary Chair of International Law and Jurisprudence into two separate Challis Chairs.

The departure of James, Marisa and their two daughters from Adelaide to settle permanently in Sydney was marked by an unfortunate event. All their possessions went into storage during the Christmas and New Year break. The storage facility caught fire and everything within it was destroyed. Their possessions included irreplaceable personal records, papers and photographs. The effects of that experience were highly unsettling to them all.

James was appointed dean of the faculty of law at the University of Sydney in 1990. During the three years that followed he instituted international law as a compulsory subject in the LLB curriculum, in place of the elective status enjoyed by that subject previously. An innovation was to view international law widely, embracing both public and private international law. As an introductory course it thus ensured that all students would have at least a nodding acquaintance with the basic sources and principles considered by James to be essential to the education of lawyers in a globalised world. Students inspired by this immersion were able to follow as separate elective subjects advanced courses in both branches of international law. Sydney's example has since been followed by many other Australian law schools, including Adelaide.

James always saw it as desirable that academic lawyers in Australia should have strong links with the practising legal profession. He was thus

called to the Bar of New South Wales in 1987. He was later appointed Senior Counsel (a rank that replaced, but is of equal status to, Queen's Counsel) in 1997. This distinction, unlike in Canada, is rarely conferred on Australian academic lawyers.

With James's election to the Whewell Chair of International Law at Cambridge in 1992, and his election in the same year to the International Law Commission of the United Nations, this account of the earlier years comes to an end.

Ivan Shearer

AN AUSTRALIAN IN ENGLAND

James Crawford arrived in Cambridge in the autumn of 1992, with the internet and globalisation, to take up the position of Whewell Chair of International Law and a Fellowship at Jesus College. I had come to know him five years earlier, at the 1987 meeting of the Institut de Droit International in Cairo, when he engaged actively with the secretariat on which I served. He was a razor-sharp and open Australian, direct, engaged and humorous.

For twenty-one years James's academic work has centred on the law faculty in Cambridge. This second life has included three years as Chair and two stints as Director of the Lauterpacht Research Centre for International Law (characterised by long hours spent in an office that is now on the first floor, regular visits to the kitchen and library on the ground floor and a work ethic so 'punishing' that the word does not begin to do justice to his personal style).

The Cambridge years have spanned both undergraduate and LLM teaching, across a range of international law subjects, and also embracing a remarkable *fifty-seven* doctoral students (not a typographical error). The engagement with the classroom reflects an undying commitment to the power of nurture and encouragement, irrespective of creed or culture or politics. The body of protégés crosses all these barriers, although it must be said that young Australians interested in international law are attracted to him like bees to honey (does any country today have more international lawyers per capita, or a greater proportion of its GNP devoted to international legal scholarship and other services?). Many of James's pupils have entered academic life across the UK and Australia and beyond, allowing the Crawford effect – international law as an 'open system', as he likes to put it, that is real and modern – to spread well beyond the Fens. His impact at Cambridge is hard to overstate: international law was already a central part of the life of the law faculty, but somehow it has expanded even further, a thriving part of the life of the faculty. The