

Provisional

For participants only

14 September 2021

Original: English

International Law Commission
Seventy-second session (second part)

Provisional summary record of the 3547th meeting

Held at the Palais des Nations, Geneva, on Thursday, 22 July 2021, at 11 a.m.

Contents

Tribute to the memory of James Crawford, former member of the Commission (*continued*)

Corrections to this record should be submitted in one of the working languages. They should be set forth in a memorandum and also incorporated in a copy of the record. They should be sent *within two weeks of the date of the present document* to the English Translation Section, room E.6040, Palais des Nations, Geneva (trad_sec_eng@un.org).



Present:

Chair: Mr. Hmoud

Members: Mr. Argüello Gómez
Mr. Cissé
Ms. Escobar Hernández
Mr. Forteau
Ms. Galvão Teles
Mr. Gómez-Robledo
Mr. Grossman Guiloff
Mr. Hassouna
Mr. Jalloh
Mr. Laraba
Ms. Lehto
Mr. Murase
Mr. Murphy
Mr. Nguyen
Ms. Oral
Mr. Ouazzani Chahdi
Mr. Park
Mr. Petrič
Mr. Rajput
Mr. Reinisch
Mr. Ruda Santolaria
Mr. Saboia
Mr. Šturma
Mr. Tladi
Mr. Valencia-Ospina
Mr. Vázquez-Bermúdez
Sir Michael Wood
Mr. Zagaynov

Secretariat:

Mr. Llewellyn Secretary to the Commission

The meeting was called to order at 11 a.m.

Tribute to the memory of James Crawford, former member of the Commission

(continued)

The Chair said that the 3547th meeting of the Commission was dedicated to the memory of James Crawford, former member of the Commission, who had made a tremendous contribution to the Commission's work and to the cause of international law more generally.

Mr. Valencia-Ospina, in a pre-recorded video statement, said that he was honoured to pay tribute, also on behalf of Mr. Saboia and Mr. Gómez-Robledo, to the memory of Mr. Crawford, who had made a remarkable contribution to the fulfilment of the Commission's mandate to progressively develop and codify international law. The draft statute for an international criminal court, adopted by the Commission in 1994 on the basis of a report prepared by a working group chaired by Mr. Crawford, had served as a basis for the Rome Statute of the International Criminal Court. The Rome Statute had, in turn, been at the heart of the work subsequently undertaken by the Commission on the topic "Crimes against humanity", which had culminated in the adoption of draft articles on the prevention and punishment of crimes against humanity.

The memory of Mr. Crawford would be forever associated with the Commission's adoption, on second reading, of the draft articles on responsibility of States for internationally wrongful acts. Having been appointed as Special Rapporteur for State responsibility in 1996, he had led the Commission to the successful conclusion of its decades-long work on that fundamental topic, which, together with the topic "Law of treaties", constituted the basic pillars on which international law was founded. His foresight and skill in proposing a solution to the controversial issue relating to the distinction between international crimes and international delicts, and persuading the Commission to endorse it, had cemented his well-deserved universal recognition as an outstanding international lawyer. The immense value attributed to the final product of the Commission's work on the topic in international law, including in the work undertaken subsequently by the Commission on other topics, was clear.

Mr. Crawford had continued to manifest interest in the Commission's work, even when he was no longer a member, including through the publication of several books on State responsibility. In 2007, having learned of his appointment as the Special Rapporteur on the topic "Protection of persons in the event of disasters", Mr. Crawford had organized a three-day symposium on the topic at Jesus College in the University of Cambridge, where he was a law fellow, in a self-declared effort to help set him, Mr. Valencia-Ospina, on the right path for the constructive discharge of his new functions, which would see him working on a cutting-edge and novel topic which Mr. Crawford deemed most likely to foretell the themes of the Commission's future programme of work.

Mr. Crawford's British academic home had indeed been the University of Cambridge, where he had held the prestigious Whewell Professorship of International Law for 22 years, succeeding Derek Bowett, his British colleague in the Commission, and where he had twice been made Director of the Lauterpacht Centre for International Law.

Mr. Crawford had also left an indelible mark as a litigator in cases brought before the International Court of Justice, to which he himself had been an immediate witness in his capacity as Registrar of the Court and, later, as co-counsel with Mr. Crawford. In the interim period before Mr. Crawford's formal nomination to the International Court of Justice, he had continued to work intensively on several major cases. Having been elected to a nine-year term at the Court, beginning in February 2015, he had sadly passed away nearly three years before the completion of his term as member of the Court, the institution which best encapsulated the various personal and professional traits that had made him one of the eminent international jurists of his time.

Mr. Tladi, speaking on behalf of the Commission members from African States, said that the phrase "a giant has fallen" was wholly appropriate in the current circumstances: Mr. Crawford had been an incredibly accomplished academic, practitioner of international law, judge and diplomat. His doctoral thesis and book, *The Creation of States in International Law*, had been nothing short of path-breaking, as virtually every publication on statehood

since then made reference to it. He had gone on to supervise over 80 doctoral theses in his lifetime, and by all accounts had taken his role as supervisor very seriously. His stature as one of the greatest international lawyers of his generation was also reflected in his election to the International Court of Justice.

It was, however, Mr. Crawford's work in the International Law Commission, on the articles on State responsibility, that had distinguished him as an exceptional jurist. To bring to a close a topic that had been under consideration by the Commission for decades and that brought together disparate aspects of international law took an exceptional amount of mastery, intellect and, most importantly, emotional intelligence. It was unsurprising that the articles had become as influential as they had, perhaps rivalled only by the Vienna Convention on the Law of Treaties.

Mr. Crawford had been surprisingly soft-spoken for such an accomplished person, reflecting kindness, patience and generosity of spirit. Some of his own last interactions with him had been related to a book he had co-edited in honour of Mr. Crawford's former colleague on the Commission, John Dugard. Mr. Crawford had graciously agreed to contribute to the book, even though at the time he had still been familiarizing himself with his new role at the International Court of Justice, and his chapter had been one of the first ones received from the contributing authors.

Ms. Galvão Teles said that she had had the privilege of meeting Mr. Crawford as a student, when he was counsel for Australia in the case concerning *East Timor (Portugal v. Australia)* before the International Court of Justice; as a participant in the International Law Seminar, when he had presented his first report on the topic of State responsibility; and as Director of Studies for the Anglophone Section at The Hague Academy of International Law when he had given the General Course on Public International Law.

Recalling Mr. Crawford's role as counsel for Australia in the *East Timor* case, she said that, at first glance, the East Timorese people seemed to have lost the case, together with Portugal, as the International Court of Justice had not declared that the Timor Gap Treaty was incompatible with international law, as argued by Portugal. In the long run, however, East Timor had won. In its judgment, the Court acknowledged that "for the two Parties, the Territory of East Timor [remained] a non-self-governing territory and its people [had] the right to self-determination"; it also stated that the right to self-determination had an *erga omnes* character. Those two pronouncements by the Court had likely been key to opening the door for the popular consultation of 1999, led by the United Nations, which had in turn paved the way for the independence of East Timor in 2002.

In the opening chapter of his General Course lecture series, entitled "Chance, Order, Change: The Course of International Law", Mr. Crawford had addressed the idea of international law as "soft law for a hard world", discussing the realist challenge according to which international law was too weak to be any good. Alluding to the Melian Dialogue, written by Thucydides in the fifth century, he had gone on to discuss East Timor as a modern analogue of Melos. Although international law had failed to prevent deadly conflict, it had, throughout many years of internal opposition and tacit external acquiescence, kept the issue on the international agenda and, when circumstances had changed, it had helped to provide the means – through the United Nations and with the involvement of Portugal as the administering authority – for addressing outstanding issues. Specifically regarding the *East Timor* case, Mr. Crawford had explained that the Court, in its judgment, had unequivocally endorsed the right of self-determination of the people of East Timor and how, in the course of defending itself, Australia had found it necessary to accept both the continued application of the right of self-determination from the people of East Timor and the fact that the Timor Gap Treaty would not be binding on an independent East Timor. Mr. Crawford had claimed that that had been a decision made at Cabinet level, but she had no doubt that he had been influential in that regard. He concluded the aforementioned chapter by stating that an account of international relations that systematically trivialized norms and values, including legal norms and values, was manifestly inadequate. The importance of upholding legal norms and values in international relations, through international law, was a continuing challenge for the international community and the wise words of James Crawford in that regard should not be forgotten.

Mr. Vázquez-Bermúdez said that it was with great sadness that he was paying tribute to the late Mr. Crawford, who had made an incalculable contribution to international law. Mr. Crawford had done pioneering work on a number of issues, including the creation of States, and had shed light on some of the fundamental principles of international law. He had acted in cases before an array of national, regional and international courts and tribunals, including the International Court of Justice, the International Tribunal for the Former Yugoslavia, the International Centre for Settlement of Investment Disputes and the International Tribunal for the Law of the Sea. He had also worked on seminal cases as a lawyer and had sat as an arbitrator and a judge at the International Court of Justice.

Possibly his most significant contribution to the international law community had come during his time as a member of the Commission, when he had taken on the role of Special Rapporteur for the topic “Responsibility of States for internationally wrongful acts”. In 1997, when he had been entrusted with the colossal task of guiding the Commission through its second reading of draft articles on that topic, it had already been working on them for 47 years. Mr. Crawford had skilfully navigated the Commission out of its stalemate and helped it to find solutions to a number of substantive issues, including a new approach to responsibility on the basis of existing obligations of the international community as a whole, as set out in article 48 of the articles on State responsibility. Mr. Crawford himself had identified article 48 as his most important contribution to international law. Thanks to his untiring efforts and pragmatic approach, the Commission had adopted the articles on second reading in 2001.

He himself had had the privilege of meeting Mr. Crawford for the first time in the Sixth Committee in October 2001, on the occasion of its consideration of the Commission’s annual report containing the articles on State responsibility. As the delegate of Ecuador to the Committee, he had presided over the negotiations on the resolution in which the General Assembly had welcomed the Commission’s work on the topic. The articles were regularly cited by tribunals and could be considered one of the pillars of the international law system. Mr. Crawford had undoubtedly left the international law community a great legacy.

Mr. Murphy said that Mr. Crawford had been an extraordinary lawyer who had made his mark as a scholar, a Commission member and a judge at the International Court of Justice. He had been delighted to introduce Mr. Crawford at the annual meeting of the American Society of International Law in 2012, when he had been awarded the Society’s highest honour, the Manley O. Hudson Medal.

He wished to reflect on Mr. Crawford’s role as an advocate before international courts and tribunals, as he had known him in that capacity for two decades. He had first met Mr. Crawford in 1996, when they had both appeared, on opposing sides, before the International Court of Justice in the case concerning *Oil Platforms (Islamic Republic of Iran v. United States of America)*. Mr. Crawford’s qualities as an advocate had immediately been apparent; in addition to being deeply informed about international law, he had possessed a warm and engaging manner, as though he had pulled up a chair with the judges for a cosy fireside chat about the case. He had had an admirable ability to make his own position seem the most obvious and to quietly demonstrate the illogic and potential absurdity of the opposing side’s views. In 2003, the United States had ultimately won the case. He himself had made the mistake of gloating a bit to Mr. Crawford about the victory; Mr. Crawford, ever the competitive advocate, had pointed out that the outcome had in fact been a draw, since the counterclaim submitted by the United States had been unsuccessful.

His principal interactions with Mr. Crawford, however, had taken place in the Eritrea-Ethiopia Claims Commission over a period of eight years. Mr. Crawford had been well-versed on every issue, from prisoners of war to armed conflict and the environment, and rules on treaty interpretation. Numerous issues concerning State responsibility had inevitably arisen, rendering the playing field ridiculously unfair, given that Mr. Crawford had been regarded by all as something of a god when it came to rules on attribution or breach, circumstances precluding wrongfulness, and reparation. He had regularly pointed to obscure cases as a means of establishing the correct rule, an approach that had made him seem at once maddening and incredibly impressive.

In 2009, he had witnessed Mr. Crawford produce the most brilliant three minutes of advocacy he had ever seen before the International Court of Justice. In the *Kosovo* advisory opinion hearing concerning the question of whether a group of actors who had issued a declaration of independence in February 2008 had violated international law, Mr. Crawford, representing the United Kingdom, had addressed the Court, stating “I hereby declare the independence of South Australia”. He had continued:

“What has happened? Precisely nothing. Have I committed an internationally wrongful act in your presence? Of course not. Have I committed an ineffective act? Very likely. I have no representative capacity, and no one will rally to my call ... It simply does not make any sense to say that unilateral declarations of independence are *per se* unlawful ... The reason is simple. A declaration issued by persons within a State is a collection of words writ in water; it is the sound of one hand clapping. What matters is what is done subsequently, especially the reaction of the international community.”

That type of pithy, dramatic, colourful and evocative argument had been the hallmark of Mr. Crawford as an advocate. In addition, almost every State that had appeared before the Court on either side of that case had quoted from Mr. Crawford’s publication *The Creation of States in International Law*, which was the definitive work on that issue.

He had both rejoiced and lamented when Mr. Crawford had been elected to the International Court of Justice in November 2014: rejoiced, because Mr. Crawford had deserved the position, and the Court had deserved him; and lamented, because the college of international lawyers would lose one of its best oral advocates. A short while later, he had realized that he had never had the opportunity to work with Mr. Crawford on the same side of a case. He likely had not noticed until that point owing to Mr. Crawford’s kindness and warmth, and his tendency to consider that he and his fellow international lawyers were all attempting to make the world a better place and were, therefore, all on the same side in the grand scheme of things.

Mr. Murase said that it had been with deep sorrow that he had learned of the untimely death of Mr. Crawford. His own students at Peking University and the Chinese Academy of Social Sciences joined him in expressing deep regret at the passing of Mr. Crawford, who had been very popular among Chinese students of international law.

He had first met Mr. Crawford in Tokyo in the early 1990s. They had discussed the Commission and instantly become close friends. While Director of the Lauterpacht Centre for International Law, Mr. Crawford had been kind enough to invite him to give a lunchtime lecture in 2001, and the following year had arranged for his article on Thomas Baty to be published in *The British Yearbook of International Law*, of which he had been editor at the time.

They had served together on the Curatorium of The Hague Academy of International Law for 13 years. On one occasion, in 2006, the members of the Curatorium, together with its President, Mr. Boutros-Ghali, had been invited to a dinner by Mr. Saboia, the Brazilian Ambassador to the Netherlands at the time, at his beautiful residence in The Hague. Mr. Crawford had been respected as the *de facto* “Dean” of the Curatorium and had always supported the professors he himself had put forward as candidates to deliver lectures at the summer courses. Together, they had made efforts to invite as many professors as possible from Asia and Africa, which had long been underrepresented in the Academy’s summer programme.

Unfortunately, on one occasion, a professor he himself had nominated for the summer courses had not adequately prepared for the task, leading to complaints from many students. Feeling responsible, he had tendered his resignation to the Curatorium. Mr. Crawford, together with Mr. Daudet, the Academy’s Secretary-General at the time, had persuaded him to withdraw his resignation, stating that if he proceeded, all the other members would have to resign as well, since they had all supported the nomination.

Mr. Crawford had given a special course at the Academy in 1997 and the general course in 2013, both of which featured prominently in *Collected Courses of The Hague*

Academy of International Law – Recueil des cours. Everyone had been surprised that he had submitted his manuscript of the general course in both English and French.

The French translation had likely been completed by Ms. Baetens, whom Mr. Crawford had married in 2014. He himself had first encountered Ms. Baetens in 2010 or 2011, when he had been invited to comment on part of her doctoral dissertation on the most-favoured-nation clause, which had been the subject of his own dissertation 40 years earlier. Ms. Baetens was now editor-in-chief of the journal *The Law and Practice of International Courts and Tribunals*, succeeding Mr. Valencia-Ospina, and was very much a part of the international law “family”.

Mr. Crawford had joined the Institute of International Law in 1985 as an associate member. At that time, he had been the Institute’s youngest member. In 2015, he had brought to the Institute’s conference in Tallinn his son, who, at the age of 1 year, was likely the youngest-ever attendee at the conference.

Mr. Crawford had made an immense contribution to the Institute’s work, actively participating in a number of commissions, including those on State immunity, the teaching of international law and the use of force. His most recent contribution had been to draft a chapter for the book that was to be published in 2023 to commemorate the Institute’s 150th anniversary.

Turning his focus back to the International Law Commission, he said that the Commission’s earliest years had been a glorious period of significant accomplishment. Following difficulties and declining productivity in the 1970s and 1980s, it had experienced a brief revival of fortunes, culminating in the completion of the Rome Statute of the International Criminal Court in 1994 and the articles on State responsibility in 2001. That revival had been possible only because of Mr. Crawford’s enormous contribution, and the Commission had been unable to reach the same heights since his departure from it in 2001. Indeed, since that time, the Commission had not been relevant to the pressing needs of the international community and had largely been marginalized.

Upon his own election to the Commission in 2009, Mr. Crawford had sent him a friendly note of congratulations, saying “You have big shoes to fill”. While he had been unsure of the meaning of the English idiom, he had understood Mr. Crawford to be indicating that the Commission was at a crossroads and facing many serious challenges. All current and future members of the Commission had a heavy responsibility to meet those challenges and fulfil, at least partially, the expectations placed upon them by Mr. Crawford. All Commission members, in other words, had “big shoes to fill”.

Mr. Grossman Guiloff said that the excellence that had characterized Mr. Crawford’s academic work as a student, first at the University of Adelaide in Australia and then at the University of Oxford in the United Kingdom, had also been a hallmark of his professional career. He had had the honour to work with Mr. Crawford from 2008 to 2014 on the team defending Chile before the International Court of Justice in *Maritime Dispute (Peru v. Chile)*. Mr. Crawford, who had already been involved in over 100 international cases – 30 at the International Court of Justice alone – had always made it a point to understand the arguments of all sides and listen to the comments of all colleagues, whether they were renowned practitioners or newcomers to the field, and had had a remarkable ability to draw connections between issues. His work had been marked by precision, sound reasoning, a goal-oriented approach and an indelible trace of humour.

Mr. Crawford had had hundreds of achievements to his name. He had been the architect of the articles on responsibility of States for internationally wrongful acts and the author of important texts on international law, including the gem *Chance, Order, Change: The Course of International Law*. For the preceding 40 years, He had been a key figure in the construction of the international legal system.

In his own professional career, which spanned dozens, if not hundreds, of cases, he had encountered no one else with Mr. Crawford’s powers of reasoning. James Crawford’s appearances in the Great Hall of Justice at the Hague had been eagerly anticipated, as it had been known that his words would transcend the specific case being heard, no fact would

escape him and no aspect of the case would go unaddressed. His statements before the Court had been of incomparable elegance and humour.

Despite his stature in academia and in the legal profession, Mr. Crawford had treated everyone who approached him with warmth and humility. The words of affection now being shared all around the world were evidence of his exceptional qualities not just as a jurist, but also as a human being. He had made a substantial contribution to an international system that was based on legal rules and that embodied the values necessary for human dignity. For all those reasons and more, he would continue to be an example and a source of inspiration to all.

Mr. Šturma said that, whenever he had had the chance to meet Mr. Crawford, he had always been struck by his kindness and friendliness. James Crawford had contributed to international law in many ways, including through the articles on State responsibility and his book *The Creation of States in International Law*. In that book, he had argued that international law drew a fundamental distinction between State continuity and State succession – that is, between situations where the same State could be said to continue to exist despite changes in its government, territory or people and situations where one State had replaced another with respect to a certain territory and people – and that the law of succession was predicated on that distinction. Although that idea had come to be commonplace, it had not always been recognized in the doctrine of international law. Mr. Crawford had paid significant attention to new developments in international law. He had also addressed State succession in the commentaries to the articles on State responsibility, where, demonstrating his open-minded approach, he had written: “In the context of State succession, it is unclear whether a new State succeeds to any State responsibility of the predecessor State with respect to its territory.” Mr. Crawford had left a legacy not only in terms of his work as a judge, professor and lawyer, but also in the inspiration that his writings and ideas would provide for the future work of the Commission.

Mr. Ruda Santolaria, speaking via video link, said that Mr. Crawford’s passing was a source of sorrow for all those who, like him, saw the late judge, one of the Commission’s most distinguished former members, as a true inspiration in the field of international law. Mr. Crawford had been a distinguished professor in his native Australia and in the United Kingdom; a member of the Curatorium of The Hague Academy of International Law; the author of a variety of texts that were required reading in international affairs; adviser to or a member of the legal teams representing various States, including Latin American ones, before the International Court of Justice and the International Tribunal for the Law of the Sea; legal counsel in investment disputes; an arbitrator; and a judge at the International Court of Justice.

Mr. Crawford’s substantial contributions to the work of the Commission included his involvement in the preparation of the draft text that had served as a basis for the Rome Statute of the International Criminal Court and his brilliant work on the responsibility of States for internationally wrongful acts. He himself had often consulted Mr. Crawford’s book *The Creation of States in International Law* and recommended it to his students. Mr. Crawford had inspired great respect and affection, including in those who, like himself in the maritime dispute between Peru and Chile, had represented the opposing side. He remembered not only the late judge’s meticulous arguments before the International Court of Justice, but also the dignity and subtle irony with which he would make them. Because of his professional achievements and personal qualities, James Crawford would be an example to generations of internationalists throughout the world.

Sir Michael Wood said that he would focus on Mr. Crawford’s time at Cambridge. Mr. Crawford had been an eminent lawyer in Australia before arriving at the University of Cambridge, where he would serve as Whewell Professor of International Law from 1992 until 2015, Director of the Lauterpacht Centre for International Law for 10 years and Chair of the University’s Faculty of Law from 2003 to 2006. He had taken a full part in the activities at Jesus College, playing cricket and taking full advantage of the College’s excellent dining facilities.

Mr. Crawford had greatly encouraged Cambridge University Press in the expansion of its publishing activities in the field of public international law and been a great supporter of student law reviews. He had been supervisor to a very large number of doctoral students

and friend and mentor to many more. A glance at the tributes to him on the Lauterpacht Centre's website gave a sense of the affection felt for him by all those whose lives he had touched. The same words appeared time and again in those tributes: approachable, supportive, generous with his time, warm, kind to all.

During Mr. Crawford's years on the Commission, his university and Commission activities had been closely intertwined. Much of the research done at that time at the Lauterpacht Centre had related to topics on the Commission's programme of work; much of Mr. Crawford's work for the Commission, first on the International Criminal Court, then on State responsibility, had been done from his office at the Lauterpacht Centre.

Mr. Crawford had said that he had regarded finishing the articles on responsibility of States for internationally wrongful acts as his greatest single achievement as an international lawyer and article 48 of those articles as the single most important contribution that he had made to international law. The importance of that article had been demonstrated yet again the previous year in the Order of the International Court of Justice in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar) – Provisional measures* and in Vice-President Xue's separate opinion.

At the University of Cambridge, as throughout his career, Mr. Crawford had combined the practice and theory of international law in an exemplary manner. He had been a great team player with a collegiate approach and had been ideally suited for the Commission. His deeply thoughtful yet practical approach to the law could be seen in his remarkable contributions to the work of the Commission in the decade from 1992 to 2001.

Mr. Reinisch said that his first interactions with Mr. Crawford had taken place via email, when he had been looking for a publisher for a thesis that he had written at the University of Vienna. When he had contacted Mr. Crawford, then editor of the Cambridge Studies in International and Comparative Law series, he had been struck by his reaction: he had responded promptly, providing feedback that was pertinent and supportive, even though he had been under no obligation to do so, and sharing his wisdom freely. That sharp intellect and tremendous efficiency were also apparent in their later encounters, in both academic and professional settings, including an arbitration case at the Permanent Court of Arbitration. With Mr. Crawford as presiding arbitrator, the tribunal in that case had started its work in early summer 2015, held a four-day hearing in April 2016 and rendered an award as early as June 2016. That arbitration case had also been a model in terms of its discussion of the articles on responsibility of States for internationally wrongful acts, a key component of Mr. Crawford's academic and professional legacy. He would also be remembered for his warmth, understanding, sense of humour and kindness.

The meeting rose at 12.30 p.m.