

**A Conversation with Emeritus Professor Judge James Richard Crawford
Part 2: Scholarly Works**

by
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This is an interview with the twenty-seventh personality for the Eminent Scholars Archive.

Judge James Richard Crawford is a judge of the International Court of Justice at the Peace Palace in The Hague, and is Emeritus Whewell Professor of International Law at the University of Cambridge. The interview was recorded in Judge Crawford's office at The Hague. The audio version is available on this website.

Questions in the interviews are sequentially numbered for use in a database of citations to personalities mentioned across the Eminent Scholars Archive.

Interviewer: Lesley Dingle, her questions are in **bold type**.
Judge Crawford's answers are in normal type.
Comments added by LD [in italics]. Footnotes added by LD.

93. Judge Crawford, in the previous interview we looked at your early life and your academic career and during this you produced a prodigious body of scholarly work stretching back to the 70s when you were a lecturer at Adelaide. It has to be remembered that this was in addition to your remarkable workload of teaching, supervising students, administration, cases and arbitrations. With such a vast array of publications to survey I have had to be selective and for this I apologise. I have confined myself to your ten books that are listed in your "Who's Who" entry.

We have already mentioned two, written while you were at Sydney, your "Australian Courts of Law" and "Rights of Peoples". Of the remaining eight I have looked in some detail at five. Your 1979 "The Creation of States and International Law", second edition, in 2006; your 2012 "Cambridge Companion to International Law"; 2012, "Brownlie's Principles of International Law", the eighth edition; 2013, "State Responsibility: The General Part"; and 2014, "Chance, Order, Change: The Course of International Law".

To start with a few general observations made by Professor Philippe Sands in 2015 in "Essays in Honour", he said that "The Creation of States" and "Brownlie", which he rated "a minor miracle", are your best books. Would you agree with his assessment?

Well, it's not really for me to agree or disagree. I think it's a matter for the users of a book to find if it's useful. I am fond of the second edition of *Statehood* because that reflects more what I had in mind when I wrote the original thesis, and it's been thoroughly updated and incorporates a lot of the material subsequent to 1979, of course. "Brownlie" is controversial in a way, in the sense that I made quite a lot of changes to the seventh edition. There's a problem with textbooks, at least in the English tradition. Many of the current textbooks go back a long way. I mean, most obviously, Oppenheim³ was first published in

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³ *International Law: volume I, Peace* (1905; second edition, 1912), *volume II, War and Neutrality*, (1906; second edition, 1912). Work on a 10th edition of vols I-II is underway, but in 2017 a new volume III was



1904 and there is very little, if anything, of the original “Oppenheim” left.

We’ve got a new edition of Brierly⁴. Brierly is a book which is almost impossible to edit because it was written at a certain very specific time with a certain very specific attitude towards the subject, an attitude which is really very difficult to replicate. It’s fair enough when authors continue to update their own work, as with the second edition of *Statehood*, but I don’t plan a further edition and you have got Shaw, for example, which is now, I think, in the seventh edition, each of those editions being done by Professor Shaw⁵, so it’s got authenticity from that point of view.

The problem, however, is when you get a general survey in a long book, it’s extremely difficult to keep it up to date. There are so many things that happen and the seventh edition of Brownlie had fallen behind. There is a book review by Vaughan Lowe⁶ of an earlier edition in which he makes that comment in a very measured way, that it hasn’t been kept up to date. It’s a very difficult thing to do because the approach to a particular topic which you take when you write a chapter, obviously, individual details can change but there can be so many changes in a particular field that the approach really needs to be rethought.

This is true, for example, in relation to international criminal law and probably in relation to jurisdiction, certainly in relation to immunity from jurisdiction and other topics as well, and dispute settlement. So this creates a problem for a new editor coming to a book. On the other hand, *Principles of International Law* was a major work. I used it myself when I was an undergraduate. It’s part of the bloodstream of the subject, you might say. There are still very important perceptions in the international system about sovereignty, about the role of law, which were implicit in the treatment and which, in my view, are still valid, and that and a sort of filial respect for Ian Brownlie⁷ made me agree to do the eighth edition.

I know there is a feeling amongst some that I went too far with the amendments. I’m glad that Philippe Sands doesn’t share that view and the reviewers in general don’t share that view. The reviewers have been very positive – Koskenniemi’s⁸ review in the *British Yearbook*, for example – and my attitude to that, which I have never disguised, is that the new editor really has to do what has to be done to keep the work current, not just in details but also in principle. And that’s what I did with some considerable help from research assistants – it was impossible to do it all myself – and it’s for readers of the book to judge whether it’s useful. There is a ninth edition planned; it’s at an advanced stage.

The other works that I would mention: *Chance, Order, Change* was my general course at The Hague Academy and it reflects the general view of international law and covers a range of topics within the field. It’s not a conventional general course. It’s not a textbook. It’s an attempt to try and solve a number of problems, looking at international law as a system which is not preordained, which is not determined ultimately by any set of formulas or

published: *Oppenheim’s International Law: United Nations*, Rosalyn Higgins, Philippa Webb, Dapo Akande, Sandesh Sivakumaran, and James Sloan, OUP. <https://www.ejiltalk.org/oppenheims-international-law-unt-nations/>.

⁴ Brierly’s *Law of Nations: An Introduction to the Role of International Law in International Relations*, 2012, (7th Edition) Edited by Andrew Clapham.

⁵ Malcolm Nathan Shaw, QC (b. 1947), Ironsides Ray and Vials Professor of Law, Leicester (1989-94), Sir Robert Jennings Professor of International Law, Leicester (1994-2011), Senior Fellow at the Lauterpacht Centre for International Law.

⁶ Alan Vaughan Lowe, (b. 1952-) Chichele Professor of International Law and Fellow of All Souls College, Oxford (1999-2012). Barrister Essex Court Chambers, London, QC 2008.

⁷ Sir Ian Brownlie, CBE, QC, FBA (1932-2010), Chichele Professor of Public International Law Oxford (1980-99).

⁸ Martti Antero Koskenniemi (b. 1953). Professor of International Law, University of Helsinki. Visiting Goodhart Professor of Legal Science (2008-09).



principles, which is extremely contingent, but nonetheless has an ordering force.

So “chance” is the original happenstance. International law happened to be developed in West and Central Europe, and it spread to the rest of the world because of the happening of colonisation, but having done so it provides much of the language of order in the international system if you are dealing with diplomatic relations or the immunity of foreign state property or any number of subjects – human rights, international criminal law, international cooperation in criminal law matters – you are forced to use international law because that’s what’s there.

It’s not that better systems can’t be devised. Europe is trying to devise a better system, with variable success, but considerable success. So you get a form of order which arises out of something approximating to chaos and you then get challenges to that order over time, as there have been challenges to the rules of immunity, the ultimate principle that states are the only subjects of international law, and dozens of other propositions and so the system reorders over time. It’s that dynamic kaleidoscope which I tried to capture in *Chance, Order, Change*. Again, it’s a matter for readers to judge.

The other book I would mention is *State Responsibility: The General Part*. I should start by saying that the reference to “the general part” is not because I’m going to write a special part on state responsibility. It is an acknowledgement of the great work of Glanville Williams⁹ in criminal law, a former Fellow of Jesus College, which was my college: *Criminal Law: The General Part*, which was his canonical statement of the general principles of liability in English criminal law, and I was copying that idea for *State Responsibility*, bearing in mind that the general part of state responsibility is the secondary rules of state responsibility as incorporated in the ILC Articles.

The attempt in *State Responsibility* was to justify the Articles to the profession, to explain what they mean, to put them into their perspective to deal with some issues which are not dealt with in the Articles – for example, succession to responsibility – and to provide a reasoned extended account of state responsibility as it has developed, including the development of the ILC Articles in practice since they were adopted. So I would mention those works as well.

94. Professor Sands¹⁰ also comments that you were more at home in what he calls the “world of practice and process” which offers particular attractions than in the realm of theory, and would you agree that this is an accurate reflection of your attitude/position on International Law?

Well, I’m not a theoretician. I had a choice to work in theory of international law and turned it down. I’m very interested in the history of international law and I think that there’s more history in international law than there is theory, in the sense that I think international law is more determined by its history than it is by any systematic body of *a priori* thinking. I try to keep abreast of general theories of international law and the literature of international law theory which has developed a great deal during the period of my career.

I taught a course at Cambridge and, in fact, my first change at Cambridge was to introduce a new LLM course called “History and Theory of International Law”, which I co-taught with Philip Allott¹¹ for quite some time. That was expressly based on the proposition that in order to understand international law you needed to understand the theory, but you

⁹ Glanville Llewelyn Williams (1911-97), Rouse Ball Professor of English Law University of Cambridge (1968-78).

¹⁰ Philippe Sands (b. 1960) Professor of Laws, Director Centre on International Courts and Tribunals UCL.

¹¹ Philip J Allott (b. 1937-), Professor of International Public Law, Cambridge (2000-04) Fellow of Trinity College (1973-present)



needed to also understand the history and bring the two together. It would be hard to deny that the contributions I have made are more to the general practice of international law and to its substantive content, than they are to general theories. We can say things about the theory of international law, the relationship to international law and international practice, international relations, and in *Chance, Order, Change* I deal with some central theoretical questions about custom and treaties and so on, but I do so from a perspective of someone who is a lawyer.

My attitude to international law is that it is law, though a special sort of law, because of the circumstances of international relations. I don't think there is any value in denying the legal character of international law, though you have to keep your powder dry and you have to realise that laws are not always complied with. There are acute problems of compliance and performance, but in the end, if something has to be done for the future in international relations, international law is one of the instruments we have, one of the few instruments we have.

People who are unhappy about particular aspects of international relations always or almost always propose new legal rules or new legal institutions or whatever it might be. A lot of the critical literature, a lot of the realist literature, is written by people who are acutely unhappy with the system and who would like to see it other than it is, and heavens above, they are right. So I think as an international lawyer you have got to stick to what you can do, what you can effectively do. When you are asked by clients to address a particular problem, you have got to tell them what the law is. I think it is meaningful to talk about what the law is in most areas. Obviously there are times when the law is subject to violent change and you may have to point that out. You've also got to point out to them that the fact that the law is X doesn't necessarily mean that the law will be complied with and you have got to come up with ideas in such cases, but the further fact is that the processes that exist for dealing with international legal issues do produce results, not always the best results, not always the results people want, but heaven knows the consequences of not complying, of ignoring international law can often be worse. So I certainly didn't deny theory. One of the changes I made to *Brownlie* was to produce an introductory chapter, which didn't exist in the seventh edition, which goes into the theory to some extent and certainly mentions the key theorists and key institutional writers in the subject over time.

95. Looking at the chronology of your book-writing record, there are some interesting features and perhaps I can just ask you about these as they reflect on the broad sweep of your creative book writing. If we could just use your publication dates as anchor points. Your first creative period was your Adelaide/early Sydney career. There were three books in '79, '82 and '88. Could you sum up those years?

Well, of course, at the time I was writing a lot of other stuff, 160 or 170 articles and some of those took me just as long as a book would have taken. I wrote quite a lot on state immunity during that period, including, of course, the Australia Law Reform Commission report on state immunity¹², which is in effect a monograph. It's a monograph leading to a particular Act of Parliament and it explains the Act of Parliament and has to be read with it. I wrote a long piece on O'Connell's¹³ work with special reference to state succession.

I never wrote a monograph on immunity and I never wrote a monograph on state succession, I did write substantial amounts, so the books are episodes in the course of a

¹² *Foreign State Immunity* (ALRC Report 24), 10 October 1984.

<http://www.austlii.edu.au/au/other/lawreform/ALRC/1984/24.html>

¹³ Daniel Patrick O'Connell (1924-1979), Chichele Professor of Public International Law, All Souls College, Oxford (1972-79), New Zealander.



general career of writing about international law. I wrote quite a lot about international law and English law, especially for the *Yearbook* in the course of doing the British cases, and some other things on that as well and, again, I never wrote, although I planned at one stage to write, a book about International law and English law, I never got round to doing it. So the books you write are sometimes epiphenomena of a career. I don't attach much importance to periods but that's for readers to comment on.

96. There followed a 14-year interlude before your next two works, both in 2002, and I assume that this book-free period coincided with your early Whewell tenure, your first term as the Director of the Lauterpacht Centre and then, very significantly, 14 International Court of Justice cases?

Well, obviously, that took up time. I think more significantly it coincided with my period on the International Law Commission when I wrote substantial works, collective works, of course, because I wasn't the only person involved, but I was leading the work on the International Criminal Court and then on State Responsibility and a lot of the work I have done since draws on that work. I didn't write a separate monograph during that period and I regret that, but there was a lot else going on; that's the way it happened.

97. So during the next eight years only, and I use the word relatively, one book appeared, but it was your 2006 revamping of your “*Creation of States*”, the second edition. Presumably, this lull coincided with the rigours of being the Faculty Chairman, your second term as the Lauterpacht Director, as well as revising the second edition?

Yes, the revision of the second edition was a substantial piece of work but, again, it incorporated a lot of material which I had produced in article or chapter form, for example, or in the form of opinions. The Scottish opinion¹⁴ and the Quebec opinion¹⁵ were covered in that period and they were incorporated in the book, the substance of them, as well as extra work on self-determination and secession. A major article on secession in the *Yearbook* which itself drew on the work I had done for the Canadian Supreme Court. So I was conscious of the book/non-book distinction but only to a certain extent; you write what has to be written. In some cases it took the form of general articles, *British Yearbook* articles and so on, American general articles.

98. This period was followed by a veritable outpouring of scholarly creativity. Five books in four years. 2010, 2012, there were two, '13 and '14, which included Professor Sands' “minor miracle” and this flourish coincided with the last years of your Whewell tenure while you had eight cases before the ICJ, so was a prodigious effort before you were elevated to the Court of Justice and I wondered to what you attributed this remarkable purple patch.

Well, I was conscious of the passage of time, so things I wanted to do, the things I agreed to do in response to requests, for example, the eighth edition of *Brownlie*, but I did want to summarise my experience on responsibility, hence, the *State Responsibility* book. And I had to give The Hague lectures, hence, *Chance, Order, Change*, so it was a

¹⁴ *Opinion: Referendum on the Independence of Scotland – International Law Aspects* Professor James Crawford SC & Professor Alan Boyle, 10 December 2012.

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/79408/Annex_A.pdf.

¹⁵ *State Practice and International Law in Relation to Unilateral Secession. Report to Government of Canada concerning unilateral secession by Quebec*. 19 Feb 1997.

<http://tamilnation.co/selfdetermination/97crawford.htm>.



combination of those things.

I got more used to doing International Court work and was able to do it perhaps with less effort, with the help of the teams of people who I worked with. I worked a lot with Philippe Sands, with Marcelo Kohen¹⁶, Nico Schrijver¹⁷ and others, and people from Matrix helped a lot, so I had support and I was conscious that the big change was coming up the end of my tenure at Cambridge and hopefully election to the Court, so I wanted to make some statements before I came here.

99. Perhaps we can turn now to your individual books and it goes without saying that I can't do justice to them here except in the broadest of terms and for the most I have relied heavily on learned reviews by experts in the field.

The first is *The Creation of States in International Law*, Clarendon Press, 1979, based on your Oxford thesis under Professor Brownlie, and you did touch on this yesterday, I wonder if there is anything more that you can add to how you became interested in this subject.

Well, statehood is a central subject of international law. It would be odd if, as a central subject, international law had nothing to say about it. International law has to categorise entities as states or non-states. South Australia is not a state in international law, Australia is, and there are reasons for that. New Zealand is a state in International Law, Tasmania is not. So I'm taking examples from close to home, but we can say the same thing about Scotland or about Catalonia or whatever it might be. The question is how that process occurred and it was an intensively historical process and it's true that the attitude of other states in the form of recognition perhaps played a major role.

The literature on statehood had got itself into a bind because of the dichotomy between the declaratory and the constitutive theories of recognition and as a general matter when some subject of international law gets categorised in that way, into either/or, there's something gone wrong analytically. It's true of the relationship between international law and English law, which was once formulated in terms of "incorporation" versus "transformation" were the terms that were used, and if you are forced to answer, "Is this incorporation or transformation?" you have got to reply, "Hang on, what's going on here? Why, why do I have to make that choice?"

The same thing was true of constitutive and declaratory theory. The constitutive theory was defective in the sense that it carried the proposition that recognition constitutes the state and although there may be circumstances in which collective recognition does constitute a state, individual recognition by one other state cannot possibly do so, because it would infringe the basic premises of international law. It would give quasi-legislative authority or actual legislative authority to one state and one sovereign in relation to the rights of others and that can't be correct. So there is a fundamental problem with it which is not solved by Lauterpacht's "obligation to recognise". There isn't an obligation to recognise in express terms and people say that he pulled that as a rabbit out of a hat in order to solve the dilemma.

On the other hand, a mere declaratory theory leaves the status of entities essentially up to themselves because they can say, "We exist because we have a certain level of power and you have no choice but to accept that," and the world does have a choice. Because the white majority government in Rhodesia had power in Rhodesia and wanted to be independent it didn't mean the rest of the world had to accept it, and it didn't accept it. And we had to say,

¹⁶ Marcelo Kohen, Professor of International Law at the Graduate Institute of International and Development Studies in Geneva (1995-), Argentine lawyer.

¹⁷ Nicolaas Jan (Nico) Schrijver (b. 1954-) Professor of Public International Law, Leiden Law School (2005-).



as a matter of international law and not simply as a matter of international politics, that there was no state of Rhodesia.

That had consequences, and it had consequences in terms of the way in which the Rhodesian crisis was settled. It was settled by the reassertion of British authority over Southern Rhodesia, leading to the creation of Zimbabwe. My instinct, which I have tried to justify in the book, was that this was a process which was just as much legal as other processes which we describe and qualify as legal in relation to treaties or other subjects of international law. Of course, there are problems, the general problems of international law of indeterminacy, uncertainty, authority, dispute, but that's true of across the field. It's not special to statehood and it didn't justify treating states as somehow extra-legal entities from outer space.

That's the thesis of the second edition (as it was of the first), and I think it's fair to say that it's widely accepted now. The Court, when it has problems of statehood, treats them in an orthodox way by applying the general principles of international law to them without adhering to the idea that there is some special about statehood. It goes back to a theoretical question, "What's special about sovereignty?" and if international law is a legal system, then sovereignty is part of international law and you can say things about it which are meaningful in terms of international law, and that I believe. The modern effort in international law has been the effort of qualifying sovereignty without denying it and my book was part of that process.

100. You mention sovereignty. A propos the EU's federalist vision, can you foresee its current nation states becoming mere components in a large federal state and is this what you were alluding to as "sovereignty pooling within the European Union" in your "Cambridge Companion" piece?

It's impossible to predict what will happen with the European Union in 50 years' time and we won't be there at the time, so I have no idea. I think it's a category mistake which some people make about the European Union, including some of the participants, to treat the European Union as if it was a state coming into existence. It's a very subtly pervasive tendency and it goes back to the idea that states are what matter and in the end gives the idea that unitary states matter more than divided states. I don't see any reason why that should be true. If we say that states are not the only subjects of international law, and international law can be developed and manifested in non-state ways, there's no reason why a non-state in which sovereignty is to some extent shared and controlled should feel the need to become a state. It may be that it will but I think it's very unlikely and I think the tendency to push it in that direction creates countervailing forces with nationalism and so on which are quite harmful. So I think a fairly relaxed attitude to decision making and regime formation is called for, under which the European Union is what it is.

We can't get away from the fact that we think of international relations, including European relations, in terms of existing categories: treaty, consent, adjudication. But these are general legal categories which have a measure of autonomy and they're not subject to an inevitable tendency of "progression" towards a final state of absolute authority, which is what sovereignty used to be thought of in the 19th century. We don't think of sovereignty as absolute authority now and thank heavens not, because we have seen what absolute authority does: it kills millions of people. We saw that very clearly in the Second World War.

101. Judge Crawford, coming back to your book, would you describe it as your most successful book, inasmuch as its been the longest running and perhaps the most original?



I would like to give *State Responsibility* a bit longer to see how it goes. It's not inconceivable I might do a second edition of that to incorporate subsequent developments, we will wait and see, but certainly that's the only competitor. Those are the two books. If you asked me which two books I'm proudest of, they are *Creation of States* and *State Responsibility*.

102. The publication of that book must have been a great event and the praising comments must have had quite an impact on your future writing strategy and your confidence at such an early age?

Yes, it's always nice to get an American Society award and it was nice to have such a wide range of reviews. In those days there were fewer books and individual books were much more reviewed because reviewing in international law has fallen into... it's not too much to call it a "slough of despond". It's not uncommon for quite good monographs on international law not to be reviewed at all or to be reviewed only a handful of times and I think that's a great pity.

103. It was very well received by the reviewers. Witkin¹⁸ in the *Harvard International Law Journal* said that it was the first comprehensive English book on the subject. Why had this topic not been tackled before?

I don't know. I said in our first talk that it was comments that it hadn't been tackled made by Brownlie and Jennings¹⁹ which led me to do it. It was partly the constitutive/declaratory distinction and the throttlehold that recognition had on the subject and a feeling that it was too difficult, I don't know. Lots of monographs hadn't been written in those days which have now been written because we've been through an intensive period of literature generation of international law, perhaps to excess.

John Louth²⁰ at Oxford University Press has been counting the number of international law books published each year in English and there are in excess of 400 in each of the last three years. That means every day a new international law book is published. They are not all good books but quite a lot of them are good books and it's an efflorescence of scholarship for good and evil.

104. She picks out one of your central points, "Is statehood a fact once it is recognised or does it have to fulfil normative rules?" On page 594 you claim the latter. Can you remember what determined this crucial view so early in your career, presumably, while you were a student at Oxford in the early 70s?

Well, it's this idea that statehood is not a fact in the sense that it's an object which you are obliged to accept. Just because Iain Smith in Rhodesia declared unilateral independence and had the police and the army under his control didn't mean we were obliged to accept white minority rule in Southern Rhodesia. Just because the South African apartheid regime was able to corral the African "tribal" groups into Bantustans, Transkei and so on, didn't mean we were obliged to accept that. If you say you were obliged to accept it then you were basically accepting white minority rule in South Africa in perpetuity and the rest of the international community was not compelled to do that.

Of course, in normal circumstances where an entity establishes itself with the support of its population over a significant period of time, it can come to be accepted by other states

¹⁸ Merrie Faye Witkin (b. 1953-), American corporate lawyer.

¹⁹ Sir Robert Yewdall Jennings (1913-2004), Whewell Professor (1955-81), Judge at ICJ (1982-91), President (1991-94).

²⁰ John Louth, Editor-in-Chief of *Academic Law*, Oxford University Press.



with the consequences that follow from that, but that's not a process which is determined by the category of "fact". When it is determined by the category of fact, there is no point in going around denying facts, but there is every point in going around denying that Southern Rhodesia was a state. To say that state was a question of fact was a form of unilateral disarmament on the part of the rest of the system, not just in respect of power but in respect of values such as majority rule by a population.

105. A point you have been mentioning was picked up by one of the reviewers, also very praising, Boyle²¹, about illegality thwarting self-determination as a criterion. I wondered whether if one state does recognise another where such criteria have been violated, are there currently any international sanctions that can be automatically applied to the recognising state?

International sanctions are never automatic, they are applied; but the question is, "What is the legal situation and can it change?" And the answer is, yes. One has to take a dynamic attitude. It's cognate to the questions of acquisition of territory by the use of force in interstate relations. If you took the view that East Timor was effectively subjugated by Indonesia, which it was, the result was the people of East Timor had lost their separate identity and we weren't compelled to take that view. Some states did, including Australia, for a while, but then the system changed and the people of East Timor were recognised as having a right to independent existence. You have to get over this myth that because someone shouts "sovereign", consequences automatically follow: it's not true.

106. Boyle also praised the great analysis and in-depth of individual cases. He said it was a very impressive, thorough study and this must have been very satisfying for you. You were 31 years at the time.

Well, that's the function of lawyers, to examine cases in detail and to reach conclusions and there is a great range of cases to look at, including some pretty eccentric ones. The Free City of Danzig, which was the subject of eight Permanent Court decisions, for example. I had to look at that. And the position of Cyprus, still regrettably unresolved, and so on. The position of Palestine. The function of the book was to establish some sort of general framework for thinking about statehood and then to illustrate that by reference to as many cases as possible, which is why it was so long.

107. Well, before we leave this book, one review is worth mentioning just for the record, and that's Michael Akehurst²² in the *Society for Public Teachers of Law*, who described it as, "A first rate piece of scholarship". It must have been very pleasing to you at the time?

I had very high regard for Michael Akehurst who I only met once. He was a very good, progressive scholar.

108. That brings us to your second edition and the obvious question, why you waited 27 years to produce this edition of what had been a groundbreaking book?

Well, life happens. Life happens to you when you're making plans. The reason I did the second edition was my being forced to leave out so much from the first edition and I thought in the end it was most undesirable that the leading book on statehood should not have

²¹ Alan Boyle, Emeritus Professor International Law, University of Edinburgh (1995-2018), practices at Essex Court Chambers.

²² Michael Akehurst (1940-89), Professor of Law University of Keele, Memb Editorial Board, British Yearbook International Law.



an account of the Palestine problem, for example. And so much had happened, in which I have had some involvement – Quebec, for example, Kosovo, the breakup of Yugoslavia generally. I wanted to incorporate all that and bring it up to date. It just took quite a long time because I had other things to do. I should say, to be fair, I had a great deal of help from my senior associate, Tom Grant²³, a research student of mine who worked on “Statehood” and who played a great, very helpful role in that process, as is acknowledged in the book.

109. He is still at Cambridge.

Still at Cambridge, yes.

110. At the beginning of Chapter 2, page 38, “Criteria for statehood,” you cite both Brownlie and George Scelle²⁴ apropos the ILC 1948 attempt to define a state and the former said it would be difficult and highly controversial, and the latter that after 50 years he couldn't do it and didn't expect to find out what a state was before he died, which was in 1961. Do you think that 70 years later it is possible to say what a state is in a paragraph or two in contrast to an 800-page book?

Yes, it is. If we don't know what a state is, why would we use the term so often? Of course, we are not looking for a lexical definition, we're looking for something more serious than that, but we are looking for a general concept and there's a general concept in widespread use. There would be something wrong with a subject in which the most important concept was completely undefinable, unless it's astrophysics.

111. On this issue you say at page 45, the “best known formulation of the basic criteria for statehood is Article 1 of the Montevideo Convention.” You also say on page 47, “the convention's formula is hackneyed.” Does there exist another more fresh or modern formula?

No. Let's get rid of the Montevideo Convention, it's never been applied in a normal way. It's imperfect, partial, incomplete. I say all that in the book. We've got to give up the search for definitions as if definitions solve problems. We've got to clarify our concepts, and we have a concept of statehood in international law under which incontestably Israel is a state, New Zealand is a state, Western Samoa is a state and other entities are not and there are some entities, you know, in the shadow zone where you would have to ask serious questions – Kosovo, for example – and there are processes by which that happens. Somalia is a state despite the problems with its government. We shouldn't, at least, willingly accept the conclusion that the terms we use all the time don't have any meaning.

112. The reviews were very praising and I looked at four of them by Wood, now Sir Michael Wood²⁵, Jia²⁶, Michelle Burgis²⁷ and Robert McCorquodale²⁸. All were praising. “A tour de force,” “Stands alone in its field,” by Sir Michael. “An invaluable contribution,” “Vital resource,” “Perceptive,” by Burgis, and McCorquodale said it

²³ Tom Grant, Senior Research Fellow, Wolfson College; Fellow, Lauterpacht Centre for International Law.

²⁴ Georges Scelle (1878-1961). French international jurist, Professor of Law, University of Dijon, Member, International Law Commission.

²⁵ Sir Michael Charles Wood, KCMG (b. 1947-), QC, Member, International Law Commission, Principal Legal Adviser, Foreign and Commonwealth Office (1999-2006), barrister, Essex Street.

²⁶ Bing Bing Jia, D. Phil. (Oxon.); Professor of International Law, Law School, Tsinghua University (2004-).

²⁷ Michelle Burgis-Kasthala, Lecturer Public Int Law University Edinburgh (2013-), Previously Research Fellow ANU College of Asia and the Pacific.

²⁸ Robert McCorquodale, Professor of International Law and Human Rights University of Nottingham, Director of British Institute International Comparative Law (2008-)



was, “In command of his field,” “Highly recommended,” “High quality scholarship.” This must have been very satisfying, showing that your ideas had survived well for 30 years?

Well, you do something and you move on and so it’s for other people to appreciate what you’ve done, if they do appreciate it. Michael Wood’s remarks were gratifying and I think very well of him!

113. He raised the topical issue about the failed state. He deemed this, “a brilliant coda,” in your book. You look at this in your conclusion section, but some might argue that there has to be a possibility that a state can fail or perhaps every state that ever existed will still persist?

Well, there’s a distinction between the dissolution of a state or the termination of a state which is definitive and which has consequences in terms of territory or sovereignty and nationality and so on, and the failure of a system of government. People use the phrase “failed state” to refer quite misleadingly to failures of government. There are failures of government in, let’s say, South Sudan. I don’t want to pick on South Sudan but it comes to mind. It doesn’t mean that the people of South Sudan somehow revert to their status as nationals of (North) Sudan. I’m trying to rescue the people of the state, who are the ultimate beneficiaries, as I have taught, of international law, from the thrall of governments.

International law operates on the assumption that governments take control of peoples and determine their future, subject to limited constraints. That may be true but let’s work on the constraints, because in the long run I don’t want to have to agree with Philip Allott’s vision of international law as a conspiracy of governors; I think it’s more than that.

114. Robert McCorquodale took up your concept of sovereignty and he said that you avoided dealing with the concept of sovereignty by arguing that it applies as a legal right or presumption only to territories accepted as states, and he said that you were not taking cognisance of alternative views such as people’s sovereignty or shared sovereignty.

Well, shared sovereignty is certainly possible. You can have condominiums, although they are very unusual and you normally have to have a stipulation of shared sovereignty for it to exist. I’m suspicious of the idea of non-state entities as sovereign. We have enough problems with the concept of sovereignty in relation to states and states are subject to disciplines, legal and non-legal disciplines. Non-states are much less subject to them because the international system is built around the concept of statehood and to take one simple example, only states can be parties to contentious cases before the International Court of Justice. If you want to have an arbitration involving a non-state you’ve got to make special provision as, for example, in the Abyei Arbitration²⁹. So the concept of sovereignty applying to non-states seems to me inherently problematic and if that makes me old-fashioned, then I’m old-fashioned.

115. So overall do you see states as the entities that are necessary for International Law to even function?

In the present conception of International Law, yes, they are necessary and no-one seriously proposes to abandon them. Many people, an increasing number of people, because what are often ignored are the successes of the state system in the modern period, to a large

²⁹ Permanent Court of Arbitration, case 2008-7, The Government of Sudan / The Sudan People's Liberation Movement/Army (Abyei Arbitration), <https://www.pcacases.com/web/view/92>.



extent because of developments in India and China but for various reasons even in Africa, I might say... There's been a significant development of people moving out of dire poverty. There are too many people still in the situation of dire poverty but there's been real improvement and in the systems of government when we have problems, whether it's the extinction of the great whales or now the problem of plastic pollution, there's a system in place which can address them.

It involves intellectual property, it involves human dynamism, but it also involves governments because governments are the institutes and entities which have got the capacity to legislate and to coordinate their activities. International Law is a law of coordination addressed to human problems and the human problems we have can't be solved by individual assertions of sovereignty, that's absolutely clear. Global warming, the ozone layer, these can't be solved by the United States alone or by the Russian Federation alone or by China alone. They have to be solved by coordination; that means that the apparatus of coordination, which is part provided by international law, is really essential.

116. It is twelve years since the second edition appeared to high acclaim. Have there been any international developments that have advanced your thinking on this crucial topic?

Not in essence, I think. I think the basic conceptions, the basic arguments made are still valid but just may be a simple function of arteriosclerosis on my part with advancing age.

117. That brings us to your 2012 8th edition of *Brownlie's Principles of Public International Law*, published by OUP³⁰. The reviews were excellent, like Koskenniemi, Paparinskis³¹, Sender³² and Wood and Bjorge³³. This was the second of your two books that Professor Sands said were your best, the "minor miracle", and it appeared in this purple patch of five books in the latter years of your time at Cambridge. You must have done the work simultaneously with your second term as Director of the Lauterpacht Centre. Could you describe the circumstances? You have touched on it, but is there anything that you want to add?

I had a great deal of help from my students who I paid for doing that work and were paid at professional rates, were paid at research team rates. We checked every reference. We updated, I think, as much as we could. We corrected the out of date statements and we did some restructuring and all of that work is acknowledged in the Preface.

118. Koskenniemi said it was, "The most impressive English language textbook available," and Paparinskis said, "Very impressive," "Wide-ranging," "Nuanced," "Best English language text," "Exhaustive references," "Highly recommended." Sender and Wood described it as, "Excellent," "Highly recommended," "Pre-eminent in the field," and Bjorge from Bristol said it was, "A masterpiece," "Fruits of awesome labour," "Sombre and elegant prose." Were you happy with the final result and its reception?

Yes, I was obviously very happy at some of those remarks because, as you say, it was controversial because I had made so many changes and I have already tried to deal with that controversy and have nothing really to add [*see Q93- LD*].

³⁰ Eighth edition, 888pp.

³¹ Martins Paparinskis, Reader in Public International Law UCL (2013-), Hauser Research Scholar at the New York University (2009-10).

³² Omri Sender, Counsel at The World Bank, Advisor and Litigator in Public International Law.

³³ Eirik Bjorge, (MJur, DPhil) Norwegian lawyer, Senior Lecturer in Law, University Bristol.



119. I might just pick up on a few points from Martti Koskenniemi’s review which looked at the way you had written the book and he wondered before he read it whether you had retained Brownlie’s oddly appealing British idiosyncrasies, given that you were an Australian. But he suggests that by writing the chapters as systemic wholes, linking doctrines and practices which previously stood by themselves, you did not retain Brownlie’s idiosyncrasies. He said that you had indicated your intention to do this by adding an historical and doctrinal Introduction. So this was a conscious strategy to counter Brownlie’s eccentricity which, as Koskenniemi put it, “had driven students, including myself, mad, because it would demand one had to figure out the conclusions oneself”?

Well, of course, it is a great virtue of a book that it makes you think for yourself, and Brownlie did that. I tried not to lose that and I tried to keep the characteristic assertions of Brownlie. For example, he describes sovereignty as the “core constitutional principle of international law”, and I kept that statement and I kept that approach. I knew Ian very well and worked a lot with him and my attitude was not that far away from his, although it was different in some respects. Where I disagreed with what he’d said, that disagreement was reflected. In relation to nationality this was one area where he clearly had put a great deal of thought and work into the chapters on nationality, which were based on a *British Yearbook* article of his on nationality, and out of respect for that, even if I didn't entirely share it, I kept his approach to nationality under which *Nottebohm*³⁴ was rightly decided.

I think the modern consensus, which was reflected in the ILC’s work on Diplomatic Protection, is that *Nottebohm* was wrongly decided, and if I had to rewrite those chapters myself I might have reached a different conclusion. On the treatment of Human Rights, for example, there is a great deal of material added on human rights because so much has occurred, but the core structure of human rights treaties is as Brownlie said. Human rights are rights against the state protected by legal instruments, mostly in treaty form, which have been added to each other by a process of accretion and 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.

I'm not an unalloyed positivist, but there's no rule or theory or concept that the human right to property has to be the same in Europe as it is in South America. It depends on the formulations in the texts and 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.

120. Very interesting. So your difference in treatment led Koskenniemi to make a point which I found very interesting. He said that while this did make the book more readable and coherent, it no longer gave the impression created by Brownlie that international law topics or titles or principles had, “fallen from the sky and represented some past case that had emerged from the vicissitudes of history where international law was a wholly empirical phenomenon, topics and laws emerging out of practical

³⁴ *Nottebohm* (Liechtenstein v. Guatemala), ICJ case 18, 1951-1955, <http://www.icj-cij.org/files/case-related/18/018-19550406-JUD-01-00-EN.pdf>



needs.”

I’m not sure I agree with that. I mean, obviously, it didn’t fall from the sky, but that’s a metaphor. Particular international rules came into existence quite often by chance, as I say, in *Chance, Order, Change*, or in response to specific needs, which may change. You’ve got to acknowledge that international law is profoundly contingent in historical character. That makes me, I suppose, a constructivist. The cover image of *Chance, Order, Change* is a constructivist image by a British artist, an abstract work which was created partly by chance, deliberately; he set up a mechanism to do that.

The international law we have is different because certain people did things on certain days and you’ve got to acknowledge that, and it doesn’t amount to a metaphysics of international law except to the extent that in any field of human endeavour if you do something you are implying a certain version of human life. I come back to saying it’s contingent. Koskenniemi is the greatest theorist of international law of the 21st century and I am grateful to him for his praise. I don’t always agree with him, but we get on well.

121. Paparinskis raises an interesting point. He claims that, “Brownlie and Crawford are not necessarily known for holding the same legal views and may very well be invoked to support significantly different arguments,” yet he notes that you state there was a need for an overhaul with the preservation of the general spirit and tone of Brownlie’s work. How difficult was it to manage such differences and were there instances where you had to abandon this preservation in favour of accuracy or your strongly held opinion?

Well, I’ve given one instance, the part dealing with nationality which is respectful of Brownlie’s views on nationality and the effective link, but beyond that, no. It was broadly aligned with Brownlie’s views. Brownlie was a positivist, a left-liberal positivist in his earlier life. As many of us, he became more conservative as he aged, but his basic metaphysic didn’t change and I was fairly closely aligned to that. I was aware that there were tensions in what to change, what to include. One of the constraints was the publishers said it couldn’t get any longer and it was a little bit longer because of Chapter 1, but for everything that was put in something had to be left out and that was quite difficult. And that has been a difficulty with the ninth edition. The ninth edition is exactly the same length as the eighth edition.

Brownlie was very fond of a small number of writers of the 50s of which Fitzmaurice³⁵ was typical. Waldock³⁶ was his doctoral supervisor. They were very different characters and I maintained a lot of those references because they are historically important, though there are fewer of them in the ninth edition than there are in the eighth because of the length constraint.

122. In a review by Sender & Wood, they raise a fundamental point. Their review was of two books, yours and the seventh edition of *Brierly’s Law of Nations* by Andrew Clapham³⁷, and I wondered why both you and Professor Clapham still felt it “necessary in our day and time to stress that international law is law”?

Well, I think there is widespread doubt in the general community about whether

³⁵ Sir Gerald Gray Fitzmaurice, QC (1901-82), barrister and judge. UK Counsel to ICJ (1948-54), Senior Legal Advisor (1953-60), Judge ECHR, Strasbourg (1974-80).

³⁶ Sir (Claud) Humphrey Meredith Waldock (1904–1981), Chichele Professor of Public International Law at All Souls College (1947-72), International Law Commission (1961-72), judge European Court of Human Rights (1966-74), judge ICJ (1973-81), President (1979-81).

³⁷ Andrew Clapham, Representative of Amnesty International at UN (1991-97), Professor of Human Rights law and public international law Graduate Institute of International and Development Studies in Geneva.



international law is law, and you've got to acknowledge that, and there are reasons for the doubt and there's so many areas of disorder and so many cases of defiance of international law. The ordinary person, the ordinary intelligent onlooker would expect a legal system to have consequences and it's possible to say international law doesn't have consequences. It's not possible to do it if you look very carefully at the subject, but I still think that proposition has to be defended and it matters, particularly because the question, "what is the role of the international lawyer?": an international lawyer isn't the same as the governor of the world, but if someone comes to you, irrespective of whether they are a state or a non-state entity, and says, "What's the international law of X?" if you can't provide an answer, a credible answer, then you shouldn't be doing what you are doing, you should be doing something else, perhaps becoming governor of the world.

International Law is a discipline or a profession, I don't mind which you call it, in which a certain range of techniques going back to heuristic devices of interpretation and historical analysis of what happened produce certain outcomes. "Is ethnic cleansing genocide?" to take just one question. If you had been defining the term for the first time in the Genocide Convention you could have defined it to include ethnic cleansing. By "ethnic cleansing" I mean the clearing out of people from a certain territory without necessarily exterminating them, or exterminating only a very few of them. As a general matter you cannot equate ethnic cleansing and genocide as it has been defined. I mean, maybe we could have a better definition but we're not going to get a better definition. So one of the functions of an international lawyer is to be honest about the history of the subject and what the consequences of that history have been and to believe that there are consequences. The world looks like a free-for-all; it's not as much as a free-for-all as all of that.

123. Just a few of my own questions. Apropos the recent Eli Lauterpacht³⁸ symposium and Philippe Sands highlighting therein the Lemkin/Hersch Lauterpacht³⁹ differences of emphasis on human rights, I couldn't find in the index to "Brownlie" the terms "genocide" or "crimes against humanity" and I wondered if you would sum up in your opinion the issue of individual versus group rights before international tribunals such as Nuremberg.

Well, obviously, after *East-West Street*, the ninth edition will contain a reference to those things. There is some discussion on genocide in the criminal law chapter, for example. There are human groups which have rights under international law.

Self-determination... the people of East Timor have the right of self-determination. Arguably, the people of X-stan do not and the reasons for that are historical. It wasn't that the people of East Timor had an inherent right which the people of X-stan didn't have, it was that the principle of self-determination developed out of a reaction against western colonialism which largely defined the people to whom it applied. That's why Tibet is not a state and Timor-Leste is, and it may be a pity. I don't really have a view about whether it's a pity but it's the truth.

International Law is a way of telling the truth about the ought in international relations, or one of the oughts in international relations. I think it's a series of techniques, constrained, qualified, limited and no doubt defective that we have for doing that, and we

³⁸ Sir Elihu Lauterpacht, QC (1928-2017), Hon. Professor of International Law (1994-2017). Judge *ad hoc*, International Court of Justice (*Bosnia v Yugoslavia*) (1993-2002).

³⁹ Raphael Lemkin, (1900-1959). Polish human rights lawyer, at Nuremberg served as an assistant to the U.S. prosecutor, coined the term genocide, Adjunct Professor of International Law, Rutgers School of Law in Newark (1955-59) /Sir Hersch Lauterpacht (1897-1960), Judge at ICJ (1954-60). Whewell Professor of International Law (1938-55).



don't have all that many.

124. A propos of Nuremberg, Judge Crawford, I wondered what you feel about the general principle of retrospective laws applied to crimes, even of such an horrendous nature?

Well, retrospectivity was a problem when it came to Nuremberg, as I say, in the first sentence added to the chapter on criminal law in *Brownlie*. International criminal law began its modern career as a problem and a promise, in effect. The problem was the problem of retrospectivity. The promise was to correct that by applying those principles in future and when you've got a customary system, by definition there is an element of retrospectivity because of the first time you apply it: there must be a first time. There was a time when there wasn't a law against genocide, there was a time when there wasn't a law against slavery. So the first time you apply a law against slavery you can't say, "We make an exception for existing slaves," at least not in principle, though you may in practice make some sort of exception.

So some element of retrospectivity is inherent in the customary law system and what makes it law is the determination to apply the new rule, the new norm, the new principle in the right cases in future and that's the answer to the moral concern, which is a real one, about retrospectivity. We've got to stop this, we've got to take the genocide seriously. To take it seriously involves an element of retrospectivity but morally it's better to do that than the alternative, which was to allow Hitler to go free, notionally.

125. Your section on Use of Force is almost double in size from Brownlie's. The ineffectiveness of international law in maintaining world peace between states is stark and is this perhaps due to a lack of effective international sanctions?

Yes, although I wouldn't overstate the ineffectiveness of international law in relation to world peace. There's a great deal more peace around than we think and most states will never go to war with most other states. We are dominated by a few situations – you know which ones they are, Syria, North Korea – and there's a tendency to say that because there's active force going on in certain parts of the world, therefore, there's no constraints. There are constraints, but they're not as good as we would like and it's a very difficult thing to do, given that the history of humankind is a history largely of warfare. It's very difficult to create a peaceful system, but the virtues of a peaceful system outweigh the disadvantages of it.

126. That brings us to your next book, the 2012 *Cambridge Companion to International Law*⁴⁰, which was conceived while Professor Koskenniemi was the Goodhart incumbent 2008 to '09. Could you describe the circumstances and how you decided on the format and also from whom to invite contributions?

Well, as these things happen, Cambridge approached me and asked if I would be interested in editing a Cambridge Companion and Martti was coming. I was pleased to facilitate that and I wanted to work with him, so we agreed to do it together and we agreed on the people we respected, some people we respected. We couldn't choose everyone to write the chapters. We haven't done a second edition, largely because we have both had other priorities, but I thought it was a useful compilation and it sold well.

127. Your article or your chapter in that volume, "Sovereignty as a legal value", was

⁴⁰ *The Cambridge Companion to International Law*, Edit James Crawford & Martti Koskenniemi, CUP, 2012, 471pp.



written long before this became a prominent political issue in the UK within the context of its returning as a Brexit topic. You wrote on page 120 that, “Within the state, sovereignty involves a monopoly of governing authority.” So, having passed functions, for example, supremacy of parliament and judicial decisions, over to EU institutions, would you say that the UK is currently a sovereign state and when, if we leave the EU and this sovereignty comes back, where will it go?

Of course it’s a sovereign state. The functions that were transferred to the EU were transferred with the consent of the UK and, therefore, in accordance with the principle of sovereignty. The UK wasn’t coerced. The principle of sovereignty doesn’t require any particular form of government. It’s consistent with a variety of different forms of government including the sharing of governmental functions between state and supra-state entities, which is what happens with the EU.

Britain is no less or no more sovereign outside the EU than within. It may have more formal powers. It may have less authority, it may have less prestige, it may have less success as a community and the judgement of what balance to have of supranational and national or sub-national arrangements, forms of government, is a judgement that has to be made from time to time and sovereignty doesn’t dictate that judgement. I think it’s a serious mistake to think that it does.

There’s no doubt a perception, a consciousness of autonomy which was influential with some in the Brexit referendum, but in the end it comes down to what’s the best way of making these human arrangements work and sovereignty doesn’t answer that question, it simply tells you who has to make those decisions.

128. “In the modern era when the formal equality of states,” as Solomou⁴¹ puts it, “is recognised,” how can it be justified that certain states are more formally equal than others whilst retaining a veto in the Security Council?

Well, we know why the five states have a veto in the Security Council, because it was withdrawn from the others. There was a veto in the League of Nations Council, including a veto for parties to disputes, and it was found that didn’t work. The price of having the UN was that the key powers of the time, and prospectively for the future because China wasn’t a key power at the time, were granted that veto and that was done with the consent of the member states of United Nations, now 193 states. You can complain about the veto as a matter of policy, but you can’t complain about it as a matter of law, that’s what the Charter provides, and you are a member of the Charter and if you don’t like the veto you get out of the United Nations, which you are entitled to do.

129. Finally, re Article 38, I was particularly interested in Professor Charlesworth’s⁴² chapter 8, in view of Boyle and Chinkin’s⁴³ 2007, page 211, description of these as “dated and increasingly misleading”. Do you think that there needs to be a revision of the list of four categories that have been used?

Well, it would be nice if we had a revision although I am sceptical as to whether the revision we would get would be very much better. We’re used to the categories; we can use and we can apply them. We don’t treat them too seriously; we take it and pay attention to

⁴¹ Alexia Solomou, Cypriot lawyer, Associate Legal Officer at the International Court of Justice (2015-), Research and Publications Assistant to the Director of the Lauterpacht Centre for International Law. See 2016, *Int. Comparative Law Quat.* 65 (1), p.268.

⁴² Hilary Christiane Mary Charlesworth (b. 1955-), Melbourne Laureate Professor at Melbourne Law School (2016-), ARC Laureate Fellowship (2010-2015).

⁴³ Christine Mary Chinkin, CMG FBA (b. ?1949-), Emeritus Professor of International Law LSE.



other factors. For example, the work of the International Law Commission can't be fitted into "the Sources of International Law", Article 38 as it stands, and yet it's been extremely influential. So it's part of the history of the subject and let's not worry about it so much, would be my attitude.

130. That brings us to *State Responsibility: The General Part*⁴⁴, published in 2013, your last major text on a specific topic, published about the same time as you gave your Hague lectures. It was the penultimate text in your remarkable period at the end of your time at the Lauterpacht Centre and its preparation must have been undertaken while you were compiling your lectures and engaged in several ICJ cases. It must have been a very busy time for you, Judge Crawford?

Well, *State Responsibility* drew on work I had done over a long period of time so it didn't come *ab ovo*, so to speak, out of an egg. It was a compilation of material which I had produced over time and reflections on subsequent decisions and so on and, again, I had help with it, which is acknowledged in the Preface. But it was an attempt to systematise my thinking at work on responsibility and to justify the ILC Articles as a general matter.

131. Was the publication something that the ILC encouraged you to do?

No, they didn't have any view about it. The ILC is a rather curious body and it works on one thing, then it works on something else. It has a number of themes, so its work on State Responsibility is certainly one, but it doesn't have a standing authority to encourage or to sponsor, still less any resources.

132. Right. This was the second attempt to produce a draft; the first had taken 47 years. You undertook the second draft and you did it in three years.

Four years, from the date of appointment. Appointed in 1997 and finished in 2001, four sessions.

133. Four sessions. The second draft was annexed to the 2001 General Assembly resolution 56/83. What was the secret of your success in bringing it to fruition so rapidly?

Well, it was the thing that the Commission was working on which was most important and there was a broad consensus amongst the influential members of the Commission, including the US member, Rosenstock⁴⁵, the French member, Pellet⁴⁶, the Italian member, Gaja⁴⁷, and others, it should be given priority and it was a time... I wasn't expecting to be re-nominated to the ILC in 2001 so if I was going to do it, it had to be done in that period and it was helpful to say to people, "We've got to do it in four years."

I have always tried to make institutions which I have been party to more efficient; sometimes they needed it. I don't think it helped the Articles that they took so long to produce in the first reading, although the thoroughness of Ago's⁴⁸ work on Part One has to be acknowledged, it was very helpful, but they were over-refined, they needed to be simplified and completed and purged of some idiosyncrasies of which State crimes was the worst.

⁴⁴ *State Responsibility: The General Part*, CUP, 825pp.

⁴⁵ Robert Rosenstock, longtime legal adviser in the US Mission to the UN in New York.

⁴⁶ Alain Pellet, ILC Member (1990 – 2011), President (1997-98).

⁴⁷ Giorgio Gaja (b. 1939-). Professor of International Law, University of Florence (1974-2010), Member ILC (1999-2011), Judge ICJ (2012-)

⁴⁸ Roberto Ago (1907-95), Italian jurist, Professor of International Law, universities of Catania (1934–1935), Genoa (1935–1938), and Rome (1956–1982). Judge of ICJ (1979-95), served on ILC (1957–1978).



134. All the reviewers heaped praise on the volume. Creutz⁴⁹ said it was, “A massive undertaking, producing a coherent and comprehensive exploration of the general law of state responsibility.” Borge, “The book is so good it is impossible not to like it.” d'Aspremont⁵⁰, “An impressive work,” “Stands apart,” “The most authoritative and extensive treatise on the laws and practices pertaining to state responsibility. It will become a form of holy writ of state responsibility.” This praise was given by academics who you clearly impressed. Was it written primarily for such an audience?

It was written for the standard audience of international law books, which is the combination of government officials, scholars and students. I didn't have any particular reader in mind.

135. So some points raised by reviewers. d'Aspremont makes the point on page 984, “On the historical pedigree of ARSIWA⁵¹ that you see it synthesising a variety of heritages in contrast to a linear paternity, which is why you single out the work of various Americans; Wheaton⁵², Borchard⁵³, Eagleton⁵⁴, rather than Anzilotti⁵⁵. Is this a correct interpretation?

Yes, it is. I think the Americans were very important and the early American arbitrations, the Venezuela arbitrations⁵⁶ and so on, were very important. Ago was obviously very important, as was Anzilotti before him, so the Italian tradition was strong and Ago brought about the major reconceptualisation of responsibility in the direction of the set of principles concerning compliance with obligations, which I absolutely adhered to, but he was very fussy and a lot of Part One was excessively fussy and went beyond what was necessary in order to achieve the result, particularly in chapter 3 and I did quite a lot of simplification of chapter 3, but the basic structure was Ago's structure. So I tried to synthesise the Italian tradition and the American tradition with the practice of general international law.

136. Another point picked up by d'Aspremont is that the famous controversy of the non-injured states being able to take countermeasures in the general interest, he implies that you were, “unable to persuade the ILC to adopt this concept.” Have you come to terms with the impossibility of imposing this idea of countermeasures in the general interest?

Well, it was the one issue in which it was clear that we were not going to get a consensus and I thought the consensus on the text was essential. I pushed and it became clear

⁴⁹ Katja Creutz, Senior Research Fellow, Global Security Research Programme, Helsinki

⁵⁰ Jean D'Aspremont, Professor of Public International Law, University Manchester, Co-founder with Professor Iain Scobbie of Manchester International Law Centre (MILC). Previously Associate Professor of International Law University of Amsterdam, Assistant Professor of International Law University of Leiden.

⁵¹ Articles on the Responsibility of States for Internationally Wrongful Acts.

⁵² Henry Wheaton, (1785-1848), US lawyer, jurist and diplomat, minister to Denmark (1827-35), minister to Prussia (1835-46).

⁵³ Edwin Montefiore Borchard (1884-1951), Justus H. Hotchkiss Professor of Law Yale (1927-50), ardent US neutralist.

⁵⁴ Clyde Eagleton, (1891-1958), International lawyer, Law Faculty New York University (1923-56), US Department of State (1943-45), assistant secretary of the Dumbarton Oaks Conference, 1944. Rhodes Scholar 1917.

⁵⁵ Dionisio Anzilotti, (1867-1950), Italian jurist, taught international law at Florence, Palermo, Bologna and Rome (1892-1937), judge of the Permanent Court of International Justice (1921-46), President (1928-30).

⁵⁶ *Reports of International Arbitral Awards*, Award regarding the Boundary between the Colony of British Guiana and the United States of Venezuela. Washington, 3 October 1899, Vol. XXVIII pp. 331-340. http://legal.un.org/riaa/cases/vol_XXVIII/331-340.pdf



that a consensus couldn't be achieved but, much more important than that, because countermeasures is a rather specialised subject, is the principle that non-injured states have got the right to complain at violations of certain rules in international law, and that's reflected in Article 48 and is fundamental to my conception of international law. Otherwise, international law is fundamentally a set of bilateral deals with no supervening public interest and that's not my conception of international law.

If we have a problem which is a global problem, no state is injured by any emission of CFCs into the atmosphere, or perhaps every state is injured, but not injured to a perceptible degree. But every state must be able to say, "If we are going to protect the ozone layer, you can't do that," and that's now, I think, widely accepted. Australia complained of Japanese whaling, not because Australia was injured by Japanese whaling, but because the world had made a decision, rightly or wrongly, to protect the great whales – in my view, rightly. Therefore the scientific exception to the moratorium and the Whaling Convention was a matter in which Australia had a legal interest, like all other states party to the Convention. Obligations go beyond the bilateral, I should say, and that's, I believe, widely accepted, and has got nothing to do with countermeasures.

137. D'Aspremont says that in your concluding remarks (p.984) you confront criticism of the ARSIWA regime from governments and scholars, but he wondered why you didn't mention Philip Allott's famous argument that ARSIWA "confirm rather than constrain power" and are a "convenient veil" behind which a "morally responsible person can take shelter"?⁵⁷

Well, I don't want to engage in the general metaphysics of international law in terms of working on responsibility. Of course, responsibility confirms power. International law confirms power, confirms the responsible use of power, and you can take a nihilistic attitude and say, "I prefer to have a completely unconstrained system." I don't take that view and it's implicit in what I have said. I don't fully understand the attitude that we shouldn't make things better, because that's the enemy of perfection. Things will never be perfect, but they can be improved and if that makes me a reformist, well, *c'est la vie*.

138. Creutz, in her review, said that for a scholar dedicated to the topic and a propos your role as a Court of Justice judge, there is no better place than the World Court for you to clarify obscurities and inadequacies in law of State Responsibility. Do you also see your relatively new position on this Court in this light?

No. It's not the function of individual judges in the International Court to solve the problems of the world. Its function is to decide individual cases. I bring my attitudes to responsibility to the decisions of individual cases and so do the other judges in the Court, but the Court's process is a collective process. I have whatever influence on the Court I am entitled to have by virtue of the strength of the arguments in the cases in which I am entitled to sit. That's the beginning and end of it.

139. Your *State Responsibility* had been preceded by the even more voluminous OUP, *The Law of International Responsibility* in 2010. This was an edited compilation by yourself, Alain Pellet and Simon Olleson⁵⁸; 104 contributions from a wide spectrum and included three chapters by yourself. Can you tell us how this compilation came about?

⁵⁷ "State responsibility and the unmaking of International Law", 1988, *Harvard Int. Law J.*, 29, 1-26.

⁵⁸ Simon Olleson, BA (Hons)(Cantab); LL M (New York University); Intern on State Responsibility at the ILC. Barrister at Three Stone: investment protection disputes, international human rights law, issues of sovereign immunity, State succession and the law of the sea,



Well, Pellet was working on a series of volumes published in French with that format. He suggested that I be involved in it and I said, “I think it will have more of a circulation if it’s published in English.” He agreed to that so we had many of the chapters, about 70 chapters produced in French, many of them translated by my associates into English, it was a real factory. We commissioned a lot of the chapters and it came out as a collective work and this has a certain value, but *State Responsibility: The General Part* was my personal statement. It was different in that respect.

140. Your last book in 2014, *Chance, Order, Change*⁵⁹...

I’m just going to get it.

141. This book was your last published book to date, a dense exposition of your views and again I apologise for only being able to pick and choose seemingly random aspects. These lectures were published in 2014 but given in 2013. Could you summarise the circumstances under which you were invited to give the lectures and their planning?

Well, I was a member the Curatorium. There is a tradition that international lawyers in the Curatorium, if they want to, will give the General Course at some stage. I was asked to do it and it ended up being done in 2013. A tendency of the General Course is to produce rather superficial accounts of the 15 chosen subjects of international law. I didn't want to do that, I wanted to address some more fundamental problems and the lectures are given over three weeks, five lectures a week. So I thought, “That’s fine, three big questions: International Law as law, International Law as a system, International Law and its relationship to the idea of the rule of law.” They were the three general themes and I picked five problems or topics with each of those. That’s how it was organised.

142. According to one review, Jack Nelson⁶⁰, this work is described as, “Crawford defending his vocation from doctrinal attack.” Is that how you saw it?

Well, I think it’s a fair comment. I hope it doesn't come across as defensive but if it does then it’s fair comment on the part of the reader. I wanted to address questions which advanced students of international law, such as the auditors of the Hague Academy are, habitually ask and I think which they are entitled to have answered: “Is international law law”, “Is it a system?” “Does it conduce to the rule of law?” These are the three fundamental questions about our subject, and I thought a systematic address of those questions was a way of filling 15 lectures.

143. Right. You brought a review by Pierre Bodeau-Livinec⁶¹ to my attention and I can make a few points. Bodeau refers to the “Baxter Paradox” and its effect in relation to ARSIWA which you mention, paragraph 342-3, in the *Belgium v Senegal* Court of Justice case. You say, “The court applied customary international law by stealth,” paragraph 166, and I wonder if you can explain what you meant by this?

Well, it’s perhaps a rather over-dramatised way of saying it, but the key question in *Belgium v Senegal* was, “What was the legal interest of Belgium in respect of allegations of

⁵⁹ *Chance, Order, Change: The Course of International Law*, 2014, AIL Pocket, Hague Academy of International Law, 537pp.

⁶⁰ Jack Nelson, Covington & Burling, ex-Hong Kong King & Wood Mallesons.

⁶¹ Pierre Bodeau-Livinec (1971-) Professor Public International Law, Université de Paris Ouest Nanterre La Défense (2016-), Professeur des Universités –Université Paris 8 (Vincennes-Saint-Denis) (2010-16).



torture against the head of state of a third state” in proceedings in Senegal. Hissène Habré⁶², since convicted, and you might say that the legal interest of Belgium was because of their taking a specific procedural role under the Torture Convention in seeking trial or extradition. The Court didn't do that. The Court said that by virtue of the provisions of the Torture Convention the prohibition on torture is a collective interest, *erga omnes partes*, they used the phrase, and that's what Article 48 says.

Article 48 was an attempt to bring together strands of International Law in various cases. The concept of peremptory norms, the concept of obligations *erga omnes*, the concept of obligations *erga omnes partes*, in a systematic way, and if I had to identify the single most important contribution, which I have tried to make to international law it's Article 48 of the ILC Articles. I was very pleased that in *Belgium v Senegal* the Court, in effect, endorsed Article 48 without mentioning it, and that's what I meant by stealth.

144. Very interesting. Bodeau refers to your use of the “S - word”, which he says, “is an expression borrowed from Louis Henkin⁶³....

Yes.

145. ...and he cites your statement that, “who knows in what direction international law might develop if the notion of sovereignty was somehow abolished or superseded,” (that's paragraph 120), “it would probably come back in another guise.” He relates this to what he calls, “the experience of the EU,” and refers to your page 111, which is paragraph 124, and I wonder what you thought this other guise could be in the European context?

Well, sovereignty is, I've already said this, I don't think it's a useful term in trying to analyse the EU, but it's true that some of the proponents of the EU ideal are closet sovereigntists in relation to Europe and I personally don't agree with that. I don't think that the enterprise of making Europe into a single state is likely to succeed in our lifetimes or the lifetimes of my children. I don't think it would necessarily be a good thing if it did succeed.

The EU is a governing structure, a bureaucratic structure in a way. It's not a popular union of peoples. It's not particularly organic. It could become organic over time and, if it did, the concept of sovereignty might become more relevant, but I'm opposed to the use of what is after all a categorical concept to define something as subtle as the distribution of authority within Europe. That's what I meant, I think.

146. Right. Still on the review by Bodeau, re part three of the book. He said that your treatment of “international democracy,” and he refers to the structural deficiencies in the Charter of the UN, which you mention. You both compare this to the 1789 French revolutionary Constitution which you say, “Is a strong constitution,” that's paragraph 571. Could you envisage what you call, “The only current candidate for an international document,” that's paragraph 593, ever being improved to overcome the deficiencies to which you refer?

Well, the passage says the Charter is the only current candidate for an international constitutional document and that's a reference to the literature on international constitutionalism. I think it's a mistake to treat the Charter as a constitution except in a very

⁶² Hissène Habré (b. 1942-) President of Chad (1982-90), first former head of state to be convicted for human rights abuses in the court of another nation (Senegal, 2016). In 2012 the ICJ ordered Senegal to put him on trial or extradite him to face justice overseas.

⁶³ Louis Henkin (1917-2010), Professor, Columbia Law School (1981-2010), President of the American Society of International Law.



loose sense and there's no sign of the problems of the UN being resolved by constitutional means. It's a pity that the international system seems only able to make radical change after world wars and let's hope that it never has to make a radical change after another world war because God knows what another world war would be like. It means we're compelled to live with imperfect institutions trying to improve them by stages and they sometimes degenerate by stages as well and you see both tendencies in the UN. I don't currently envisage the Charter being changed into anything else but what it is.

147. Re the title, you explain that the “Course” of International Law refers to the fact that “we can only understand International Law as a historical process which combines an intellectual tradition with (at the same time) a form of practical problem solving”. This applies that International Law evolves as “practical problems” present themselves, and suggests that this evolutionary “process” of International Law is dependent on contingency. Would this be a fair conclusion?

Absolutely, it's precisely what I'm trying to say. Of course, the phrase, “The course of international law,” is also a joke because it concerns the course of international law. The General Course is a course of international law in the ordinary sense of a “course” of lectures.....

148. Yes, of course.

.....but it's about the course of international law in another sense. The courses of international law. But I don't write jokes...!

149. To what do the *Chance, Order, Change* in the title refer?

Well, as you will see from the cover photograph, it's a work by a British constructivist artist, Kenneth Martin⁶⁴, and it was one of a whole series of abstract pictures that he drew using a framework which created images of lines and colours from which the reader would extrapolate the pattern and then he could change it. They were called “Chance, Order, Change”. The cover photograph is “Chance, Order, Change, number 12, four colours”, but there are a whole lot of them. That reflects my image of international law as something which happens to some extent by chance, but creates order out of it, and it's then subject to change.

That's a continual process in that sense, of course.

150. So in the writing of these lectures for which you chose the topics, did this allow you to theorise more than usual in the writing of your books, and, if so, was this an opportunity that you relished?

Yes, I think is the answer to both of those questions.

151. With this freedom to write on any topic of your choice, did you clarify or learn anything about your chosen field during your rummaging in distant corners of

⁶⁴ Kenneth Laurence Martin (1905-1984), English painter and sculptor, leading figure in the revival of Constructivism in Britain and America in the 1940s. *Chance Order Change* is a painting from an extensive series of works that developed from an earlier series also titled 'Chance and Order'. The title refers to the combination of chance events and the artist's ordering procedures that made the painting. To create the network of lines, the artist first marked a drawing with points, moving clockwise round a rectangle. Lines were then generated by taking numbers, two at a time, at random out of a bag. Martin chose eight pairs of numbers for this work. He then instigated the Change of the title by turning the drawing through 90 degrees and repeating the process. This process was repeated twice more. The drawing was then transferred to canvas.



International Law that you might not normally have frequented?

Well, I had done work on many of these subjects, and many of the chapters respond to or are reflections of things that I had published in article form. For example, “Change in International Law” was a piece I had done with Tom Viles⁶⁵ on the Truman Proclamation⁶⁶, and so it consolidated work I’d done before and brought it together in, I hope, a fairly systematic way.

152. I found the example of the Melian Dialogue salutary (p. 27-28), and the fate that befell the Melians at the hands of a superpower Athens shocking. Are we to believe that anything has really changed in the way that strong treat the weak?

Well, obviously there are examples of the strong treating the weak in terrible ways but there is an attitude, especially amongst international relations writers, that the Melian event, the oppression and enslavement of the Melians, was really typical of how modern international relations is and ought to be conducted. In my view, it’s not typical of the way modern international relations is conducted even in its extreme form, though there are still occasions where it is true, nor is it how it ought to be conducted. So I took the case of Timor-Leste as the modern equivalent of the Melian Dialogue and showed that the outcome was different, in part because of international law. That’s controversial, but I firmly believe it, having seen at first hand some of the ramifications of that situation. And in part because of chance.

153. In the first part of this interview you did touch on the realism/idealism debate and in the first part of this book in discussing this debate you were tending to refute the realist challenge to International Law. You state (p. 31) that “if the antithesis of power is soft power, international law is often seen as the antithesis of law, the law you have when you are not having law”, and I wondered if you could elaborate on that?

Well, I think to some extent, as I said earlier, when discussions about international relations get cabined into categories such as realism and idealism, we’re in trouble. I wanted to come up with a vision of international law that is both realist and idealist. So that was the aim; whether it was successful is for others to judge. Realism is important to the extent it comes down to truth telling and if the reason we are not at war is happenstance, we had better know that, because we may be able to reinforce the happenings that go to make up that happenstance. But if the reasons we are not at war include certain systematic features of the world, we should know that as well, and it’s continuously a question which of those two views is right. They’re probably both right and both wrong at the same time.

154. You reject (p.32-33) Hersch Lauterpacht’s notion that international law is in a transitional stage and evolving towards something very different. The alternative is that law is already well-formed and will not evolve significantly. Do I understand you correctly?

I think law will evolve. It can't be stopped from evolving, that's the element of change. But I don't think we should concede that unless international law is moving towards a confederation, it's not law, because it may not be moving forward to confederation. If it's

⁶⁵ Thomas Viles, practices law in New York, written extensively on international law, criminal law, and antitrust. PhD student, Sidney Sussex College.

⁶⁶ Harry S Truman, 33rd President of USA 1945-53. 150 - Proclamation 2667 - Policy of the United States With Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf, September 28, 1945.

<http://www.presidency.ucsb.edu/ws/?pid=12332>

See Australian comment: <https://www.ruleoflaw.org.au/truman-proclamation-rule-law/>



moving forwards to confederation, perhaps, let's see, but it may not continue to move in that direction and its legal character shouldn't be dependent upon the remote future.

155. I was particularly interested in your concluding sections (p.466-7) where you introduce the concept of an “international constitution” based on a framework of secondary rules - peremptory norms of states cannot “contract out” and being enforced by the Security Council, and to some extent domestic courts. If such an international constitution ever comes about, how would you envisage it being implemented?

Well, it would be implemented by happening. It won't be implemented because someone holds a conference and says, “Let's agree on this.” It would be implemented because over a range of situations it's found to be the best way of addressing problems. It may be that what we have at stake in an orderly society in which people can deal with each other in trading relations, in human relations, in all sorts of relations in a peaceful way, requires more coordination than we have got now. That will happen as an evolutionary matter because we don't have any choice. The alternative to evolution is war and it doesn't seem to be a realistic solution now that we have nuclear weapons.

156. In the final sections, while admitting various shortcomings of international law, for example, the areas of human rights and the concept of a new international economic order, the common heritage of mankind, you still strike a positive note (e.g. p.506). As Koskenniemi said in his review of *Brownlie*, “it is a positive book. No doubt, this reflects the spirit of its author.” He goes on to say, however, “that optimism is out of sync with the widespread concerns over the state of the world it deals with.”

Judge Crawford, my question is, why are you so optimistic that international law will deliver for the world what you clearly desire?

My optimism is distinctly qualified, and qualified more sharply by developments since I wrote the book. To some extent it's a question of what one would like to believe. I have to be honest about that. But if you look at, for example, at the reduction in the number of people in absolute poverty, the improvement in understanding of environmental problems, patchy though it is, as witness the Paris Agreement controversy, you can't think that we are going to solve the problem of global warming by going back to coal without significant technological improvements in the handling of carbon emissions. And that's one of a hundred problems where we need coordination, and legal devices are a key method of coordination. Not the only method, of course, thank God, but a method. Let's not trash what we've got because what we've got creates problems, and when the problems would be worse if we didn't have it.

157. In my peripheral reading I came across the paper by your successor in the Whewell Chair, Professor Eyal Benvenisti⁶⁷, “The Conception of International Law as a Legal System” and it contains some comments on the role of judges in international courts. As a judge yourself, I wonder what your opinion of this is. He says that re the issue of viewing International Law “as a legal system rather than a mix of discrete treaties” this empowers, “courts to develop international law beyond the intention of governments,” which amounts to “evolutionary interpretation”, as he calls it. This allows judges to promote what “is legal” rather than what is “good and efficient”. Do you see your role on the International Court of Justice in this light?

⁶⁷ Eyal Benvenisti (b. 1959), Whewell Professor (2016-), Professor of Human Rights, Tel Aviv University (2002-16).



Probably not. The role of a judge in international law is to apply the applicable texts and I can tell you as an international lawyer which texts are applicable. I know what the rules are about who has entered into treaties and who has not and how those treaties have been interpreted. They're not necessarily right on all those questions but the questions are capable of an answer. The function of the court is not to produce a global synthesis of legal norms, it's to apply the applicable legal norms in an appropriate way and the secondary rules have the feature that as secondary rules of interpretation and so on, they assist in your doing so in a way that's appropriate having regard to the coexistence of other norms, but they don't give you a licence to go and improve things as you think fit.

158. Trying to sum up your scholarly work by me would be presumptuous, but looking back on your illustrious career, can you reminisce on what you would single out as your most significant contribution to the advancement of International Law?

I think the Articles on State Responsibility and Article 48 in particular, but underlying that the conception that it's possible to have both a professional approach to particular problems of clients and to persons interested in particular situations, and a view which is conducive to world order. It's combining those two which international law tries to do in my vision of it.

159. Well, thank you most sincerely for two mammoth and comprehensive interviews and for being so open about your life and your work. This is a major contribution to the archive and I can only reiterate my gratitude for your generosity and your time in what must be an extremely busy schedule. Thank you so much.

Lesley, thank you for the care you've taken with it.

160. Thanks.

