The Creation of States as a Cardinal Point: James Crawford's Contribution to International Legal Scholarship

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1 Introduction

The text that became *The Creation of States in International Law* ('*The Creation of States*') began life as a graduate thesis, for which James Crawford was granted his Doctorate by the University of Oxford in 1977. The second edition was published 29 years later and almost doubled the length of the original text.[1] For this reason, *The Creation of States* offers perhaps the clearest window into the evolving thought of Crawford as an international legal scholar, and to his overall approach to the identification of *de lege lata* within a complex and controversial area. This paper will examine that text in some detail, arguing it to be not only paradigmatic of Crawford's methodological approach, but also a 'cardinal point' within legal scholarship on statehood, taken as a whole. In that sense, *The Creation of States* offers an apt metaphor for Crawford's broader intellectual and professional impact. Whether one agreed with him or not, his was a position that one had no option but to consider: a powerful ally and an adversary never to be underestimated.

In the course of exploring that legacy, this paper shall examine three themes within *The Creation of States*. These centre less upon Crawford's substantive commitments—his characterisation of 'statehood as effectiveness', his understanding of self-determination, his view on the legal status of particular entities, and so on—and more upon what the text has to say about his method for identifying international law as it then existed. The first theme is that of cautious optimism about the determinacy of international law, encapsulated by Crawford's belief that the 'identification of new subjects may be achieved in accordance with general rules or principles rather than on an hoc, discretionary basis'.[2] The second is his appreciation for the importance

1 James Crawford, *The Creation of States in International Law* (Oxford University Press, 2nd ed, 2006). Unless otherwise stated, all citations are to this edition of the text.

2 Ibid 5.

of nuance, which can be located in the emphasis Crawford placed upon historical peculiarity and political context. The third theme is 'humanity', which I use to denote some of Crawford's general evaluative commitments, and can be seen in his rare but insightful detours into critical normativity. Taken together, these themes present a distinct and impressive picture of Crawford, which this paper seeks to elucidate: a scholar bold enough to search for order, humble enough to embrace complexity, and compassionate enough to understand that, at bottom, all law is about people.

Proceeding in this manner has value beyond pure exegesis. Crawford's method for identifying *de lege lata* marks a particular mode of humane and contextually rich legal reasoning. In this respect, his method contrasts markedly with, for example, austere legal formalism or more critical scholarship.[3] This contrast is all the more important given the point noted above: that Crawford's views on statehood (and many other doctrinal issues) represent a cardinal point within the field. In the same way that substantive work on state creation cannot but reference *The Creation of States*, even in disagreement, so too must theoretical scholarship remain cognisant of the legal method upon which it rests. Legal philosophy that fails to engage with methods like those employed within *The Creation of States* risks divorcing itself from the practical reality of doctrinal argument. Concurrently, by observing that a text as central as *The Creation of States* is perhaps not as positivist as its author might have elsewhere declaimed,[4] we invite ourselves, as doctrinal international lawyers, to examine our own methodological assumptions.

My engagement with Crawford's work shall proceed as follows. I begin, in Section 2, by detailing the interpretive perspective I adopt when examining *The Creation of States*. In particular, I emphasise the value of unearthing the methodological assumptions made by such detailed doctrinal work, which may then stand as examples of *theory in practice*. Section 3 builds upon this by drawing out the three themes mentioned above—cautious optimism, nuance, and humanity—which I articulate as core methodological commitments,

3 Formalism of the sort I have in mind is exemplified by: Jean d'Aspremont, *Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules* (Oxford University Press, 2011). For contrast, an outstanding and contemporary offering within the critical tradition is: Ntina Tzouvala, *Capitalism as Civilisation: A History of International Law* (Cambridge University Press, 2020). A classic example of the latter is, of course: Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press, 2005).

4 James Crawford, *Chance, Order, Change: The Course of International Law* (Brill, 2014) 21–23 ('*Chance, Order, Change*').

broadly representative of Crawford's doctrinal scholarship. Finally, Section 4 takes these commitments and applies them to a contemporary issue facing the law of statehood: the question of sea-level rise and the concomitantly endangered continuity of Small Island States. In this manner, I aim to show that *The Creation of States* provides valuable guidance, not just insofar as it offers a detailed substantive account of the law on state creation, but also insofar as it discloses a distinct and uplifting mode of engagement with international legal reasoning.

2 Establishing a Cardinal Point

Ronald Dworkin once argued that '[t]he work of philosophical icons is rich enough to allow for appropriation through interpretation. Each of us has his or her own Immanuel Kant, and from now on we will struggle, each of us, for the benediction of John Rawls'.[5] If that is true for Kant and Rawls, it certainly holds also in relation to great legal scholars. We students of international law each have 'our own' Hans Kelsen or Hersch Lauterpacht, and so too, I suspect, will many of us now 'struggle for the benediction' of James Crawford. What interests me is where this heuristic struggle might lead. In what follows, I explore just one path forward: the *excavation*, as it were, of Crawford's general method for identifying *de lege lata* and of his concomitant intellectual commitments.

The Creation of States contains many valuable doctrinal insights. Amongst these are: the role of political independence as what I elsewhere call an 'antecedent' of legal statehood;[6] the importance of supplementary 'international law' conditions upon the creation of states, beyond those necessary for 'effectiveness';[7] and the insight that sovereignty, as a legal concept, has limited analytical purchase, at least within the law on state creation.[8] Several of these insights are controversial. Some scholars criticise Crawford for continuing to rely upon the criterion of effectiveness,[9] whilst others object to his more

5 Ronald Dworkin, *Justice in Robes* (Belknap Press, 2006) 261.

6 Crawford, *The Creation of States* (n 1) 62–89; Alex Green, *Statehood as Political Community: International Law and the Emergence of New States* (Cambridge University Press, forthcoming) ch 3.

7 Crawford, *The Creation of States* (n 1) 96–173.

8 Ibid 32–3, 89.

9 Jure Vidmar, *Democratic Statehood in International Law: The Emergence of New States in Post-Cold War Practice* (Hart Publishing, 2013) 39–42, 48–50, 239–41.

concrete conclusions about the status of particular entities, such as the State of Palestine.[10]

Interesting though such points are, *The Creation of States* offers international lawyers more than doctrinal propositions alone. It encapsulates, or so I shall claim, a distinct *mode of identifying* international law, which merits its attention in its own right. This method centres around what I take to be Crawford's three primary methodological commitments—cautious optimism, nuance, and humanity—and is discussed within the next section.

Since *The Creation of States* represents not only Crawford's earliest attempt at long-form scholarly analysis but also, in its second edition, the reconsideration of that earlier study at a more mature intellectual stage, it offers the clearest window into these more foundational elements of his doctrinal approach. Attention towards applied texts of this kind is also apposite because Crawford famously resisted forays into what he considered 'grand theory' and largely avoided adopting general theoretical positions, even in his more abstract work.[11] In heuristic terms, although such agnosticism enabled him to elaborate more freely upon international law as a practical means for the resolution of disputes, it requires us to delve into his more concrete contributions if we wish to unearth where he truly stood, methodologically speaking, insofar as the identification of *de lege lata* is concerned. This is crucial, as I canvass above, not only for exegesis's sake but also because, as one of international law's most prolific contemporary writers and practitioners, the truth of Crawford's influential approach is something with which legal scholarship must engage, if it hopes to analyse international law *as it is actually practised*.[12]

One notable exception to his silence on methodological matters is Crawford's contribution to the Hague Academy's *General Course on International Law*. In those lectures, he adopted a seemingly positivist position, with a strong commitment to the social facticity of international law and the separability of such facts from normative evaluation.[13] Nonetheless, some elements of his language are puzzling. For instance, he writes as follows:

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10 John Quigley, *The Statehood of Palestine: International Law in the Middle Eastern Conflict* (Cambridge University Press, 2010).

11 See, eg, Christine Chinkin and Freya Baetens (eds), *Sovereignty, Statehood and State Responsibility: Essays in Honour of James Crawford* (Cambridge University Press, 2015) xi; Alain Pellet, '*Adieu*, James Crawford' (2021) 20 *The Law & Practice of International Courts and Tribunals* 465, 468.

12 Crawford was, as the various contributions to this special issue so aptly demonstrate, not only an influential writer but also an advocate, educator, judge, and law reformer. His influence, therefore, has been as close to pervasive within international law as one individual might hope to achieve.

13 Crawford, *Chance, Order, Change* (n 4) 21–3 (emphasis in original).

> Here and more generally I have asserted the existence of law, legal system and rule of law on the international plane as a matter of social fact … [Nonetheless,] I view the process of international law through the optics of my values and I cannot avoid offering evaluations or making arguments *for* specific ideals or ends. But that is as it should be. In doing so, I seek to show both the open texture of international law and its reasonably well-defined core. I can make normative arguments, but the reader should not be fooled into mistaking them for arguments of social fact.[14]

Although it is perplexing, I propose to leave unchallenged whether the Rule of Law, being a normative value,[15] could ever truly be shown to exist through what Crawford calls 'arguments of social fact'.[16] What interests me more is the suggestion that one 'cannot avoid offering [normative] evaluations', even when identifying the 'reasonably well-defined core' of international law. This seems manifestly at odds with most versions of legal positivism espoused within general jurisprudence,[17] although I think it quite accurately reflects how Crawford's doctrinal arguments proceed, both within *The Creation of States* and elsewhere.

In this paper, I shall 'struggle for benediction' by (tentatively) claiming that Crawford endorsed, in practice if not explicitly and in so many words, some version of 'non-positivism', which sees the identification of *de lega lata* as necessitating either outright normative argumentation or at least some underlying normative commitments (as opposed to an exclusive reliance upon social fact).[18] In so doing, this paper examines *The Creation of States* as both a normatively informed account of the law of statehood as it is and as evidence of Crawford's own normative horizons. At bottom, I contend that if Crawford *was* a positivist, at least in some respects or upon some occasions, then his positivism was tempered throughout with a distinct moral awareness that both contoured and underwrote his doctrinal legal arguments. It is that moral awareness, I contend, which truly establishes *The Creation of States* as

14 Ibid 22–3.

15 Dworkin (n 5) 168–78; Alex Green and Jennifer Hendry, '*Ad Hominem* Criminalisation and the Rule of Law: The Egalitarian Case against Knife Crime Prevention Orders' (2022) 42 *Oxford Journal of Legal Studies* 634.

16 This would be a naturalistic fallacy: see David Hume in (ed) LA Selby Bridge, *A Treatise of Human Nature* (Clarendon Press, 1967) 524.

17 See generally John Gardener, 'Legal Positivism: 5 ½ Myths' (2001) 46(1) *American Journal of Jurisprudence* 199.

18 For an outline of this view, and my reasons for adopting it: see Alex Green, 'The Precarious Rationality of International Law: Critiquing the International Rule of Recognition' (2021) 22(8) *German Law Journal* 1613.

a 'cardinal point' for future scholarship. In the next section, I provide my own account of this legacy, by articulating its central commitments.

3 Three Methodological Commitments

The methodological commitments to which this section is dedicated take the form of three overarching themes within *The Creation of States*, which comprise not so much Crawford's substantive arguments, as the ethos and premises of his text. Taken collectively, these themes denote a *mode of doing* international legal reasoning, with which legal theory must engage and about which doctrinal lawyers should be clear, when relying upon Crawford for information about *de lege lata*. The themes in question, which comprise cautious optimism about the determinacy of international law, an appreciation for nuance and the importance of context, and an underlying concern for humanity, are all normatively laden (and so non-positivist), or so I seek to demonstrate below. Moreover, they each shape the substantive arguments within *The Creation of States* in discrete ways, contributing in concrete and observable terms towards making that text a cardinal point within contemporary legal scholarship.

3.1 *Cautious Optimism*

The Creation of States opens with a discussion of the declaratory and constitutive theories of recognition.[19] Crawford quickly dismisses traditional accounts of both, arguing against Oppenheim's (seemingly declaratory) assertion that 'The formation of a new State is … a matter of fact, and not of law'[20] in the following terms:

> A State is not a fact in the sense that a chair is a fact; it is a fact in the sense in which it may be said a treaty is a fact: that is, a legal status attaching to a certain state of affairs by virtue of certain rules or practices.[21]

Nonetheless, he is equally swift to reject the same author's more archetypally constitutive mantra that 'a State is, and becomes, an International Person through recognition only and exclusively' on the basis that this:[22]

19 Crawford, *The Creation of States* (n 1) 4–36.

20 Lassa Oppenheim, *International Law: A Treatise* (Longmans, Green and Co, 1st ed, 1905) vol 1, 264.

21 Crawford, *The Creation of States* (n 1) 5.

22 Oppenheim (n 20) 109.

> [I]ncorrectly identifies [the need for identification and] … cognition [of statehood] with diplomatic recognition, and fails to consider the possibility that identification of new subjects may be achieved in accordance with general rules or principles rather than on an ad hoc, discretionary basis.[23]

These remarks indicate a commitment to the idea that international law contains at least some determinate legal content, capable of providing concrete guidance. This commitment pervades *The Creation of States* and mirrors, in this respect, Crawford's claim in his Hague Academy lectures, that '[t]he system, for all its exacerbated linguistic indeterminacy, works, and decision-makers clearly conceive of it as possessing meaning and relevance'.[24]

This confidence, reflected in Crawford's judgment that at least some legal propositions are 'obviously right',[25] rests upon the following philosophical distinction:

> [There is a] difference between *arguing* and *justifying* an international law position. Perhaps an argument may be made for almost any legal position; but that argument may fail, certainly in relation to a predictable opposing counter-argument. International legal language is not so open-ended or mutable as to justify just anything: there comes a point at which a particular argument or interpretation becomes untenable.[26]

It is unclear precisely what Crawford believed to make arguments 'untenable' and his use of 'justificatory' language is tantalisingly opaque, particularly to those of us who believe that proper legal justification must always be normative. What is clear, however, is that he was *optimistic* about the determinacy of international law, notwithstanding his admission that all language (including legal language) admits some indeterminacy. Whilst acknowledging 'that many cases are incompletely determined by the relevant rules',[27] Crawford nonetheless insisted that 'this does not reduce the efficacy of international law as a system'.[28] This optimism was enabled, as we shall see, by Crawford's reliance upon nuance, in the form of socio-political context, and humanity, as an overriding normative principle. For Crawford, the relative indeterminacy of legal language was, in effect, 'offset' by these things.

23 Crawford, *The Creation of States* (n 1) 5.
24 Crawford, *Chance, Order, Change* (n 4) 155.
25 Ibid 156.
26 Ibid 172 (emphasis in original).
27 Ibid 149.
28 Ibid 178.

Such methodological optimism manifests in his concrete legal judgements. *The Creation of States* pronounces upon the legal status of over 200 entities,[29] including such controversial cases as Palestine,[30] the Republic of China (Taiwan),[31] and the Turkish Republic of Northern Cyprus.[32] This is not to imply my agreement with all of Crawford's conclusions, nor even to suggest that his arguments are all made with the same degree of confidence. (Crawford never claimed for himself the kind of 'one-right-answer' thesis espoused by non-positivists such as Dworkin).[33] But this is as it should be: one gets a sense from *The Creation of States* that it is not so much awareness of legal indeterminacy that tempers Crawford's claims as it is his justifiable *caution*. The law of statehood is notoriously complex and politically charged. Fine judgments must be made when pursuing any concrete conclusion, given the historical peculiarity of each territorial unit, and the unique constitutional and socio-legal features that attend every nascent state.[34] Crawford's legal optimism, therefore, should be understood as cautious not necessarily (or at least not always) due to the spectre of indeterminacy, but by virtue of his appreciation for the importance of context.

3.2 *Nuance*

Towards the end of *The Creation of States*, Crawford makes a couple of claims that help considerably when divining his legal method. First, he notes that 'although the criteria for statehood provide a general, applicable standard, the application of that standard to particular situations where there are conflicting or controversial claims is often difficult'.[35] It is recognition of such difficulties, or so I argued in the previous subsection, that makes his 'optimism' about the determinacy of international legal reasoning 'cautious'. Second, Crawford avers that 'statehood is a legal concept with a determinate, though flexible, content'.[36] Here we see an appreciation for the 'openness' of legal rules, a theme which has featured prominently in his work elsewhere.[37] This

29 Crawford, *The Creation of States* (n 1) 727–40.

30 Ibid 421–48.

31 Ibid 198–221.

32 Ibid 144–7.

33 Dworkin (n 5) 32, 279.

34 Elsewhere, I emphasise the need for a holistic 'evaluative judgment' when attributing statehood to a nascent entity: see Green (n 6) ch 3. To this extent, I would claim Crawford's benediction, even though he never put the matter in precisely those terms.

35 Crawford, *The Creation of States* (n 1) 718.

36 Ibid.

37 James Crawford, *International Law as an Open System: Selected Essays* (Cameron May, 2002) 17, 37–8.

flexibility consists not just in the applicable principles *permitting* a range of contextual matters to become legally germane but rather in *requiring* them to be so. For Crawford, or so I suggest, the capacity for international law to provide determinate outcomes turns upon its complexity: a fact that requires lawyers to make *nuanced* arguments, rather than to rest upon their laurels once general principle has been declared.[38]

This appreciation for nuance is evident throughout *The Creation of States*, as well as within Crawford's other work on statehood.[39] It is there, for example, in the differentiations he makes between the law on state creation and that of continuity, identity, and extinction (an important point to which I shall return later).[40] It exists also in his more particular legal judgements and is most evident where legal ambiguity meets political (and so, normative) controversy. To take just one example, when characterising the emergence of the People's Republic of Bangladesh as consistent with the general prohibition on the use of force,[41] Crawford draws some characteristically fine distinctions when

38 This is supported by the Preface to the Second Edition, in which Crawford avers:

> A fellow Australian, Hedley Bull (who I regret never meeting) commented in his *Time Literary Supplement* review of the first edition that it was infuriatingly indecisive. I agree, and I have tried to come off some of the fences on which the young scholar rather awkwardly sat. But some might now complain that even longer discussions of past problems are unnecessary … Here I disagree … The past was experienced—and experienced as present—not in swathes but in particulars, and a careful account of the particulars still carries useful lessons even if we believe our circumstances to be new ones.

Crawford, *The Creation of States* (n 1) vi.

39 For an example of the latter, see 'State Practice in Relation to Secession' in Crawford, *International Law as an Open System: Selected Essays* (n 37) 199–242.

40 Crawford, *The Creation of States* (n 1) 59, 667–717.

41 For readers not aware of the legal and historical context, Crawford's argument was that '[w]here the local unit is a self-determination unit, the presumption against independence in the case of foreign military intervention may be displaced or dispelled. There is no prohibition against recognition of a new State which has emerged in such a situation. The normal criteria for statehood—based on effectiveness—apply': Crawford, *The Creation of States* (n 1) 148. Factually, Crawford accepted that 'Indian intervention was decisive in effecting the emergence of Bangladesh': at 141. It therefore mattered, on his analysis, whether East Pakistan was a self-determination unit, which raised the anterior matter of whether it could be classified as a non-self-governing territory under the *Charter of the United Nations* Chapter XI: at 112–16. If East Pakistan had *not* been a self-determination unit at the material time, the broad recognition it received would have counted against Crawford's general position that 'the presumption is against independence where … its creation is attended by serious illegalities [including the unlawful use of force], or where, in the case of territory under belligerent occupation, a new regime is created by or under the auspices of the occupying power': at 89.

examining the status of what was then East Pakistan.[42] Noting that it was at no stage '*formally* a non-self-governing territory'[43] after 1947, he nonetheless argued:

> However, its status, at least in 1971, was not so clear, for several reasons. In the first place, East Bengal qualified as a Chapter XI territory in 1971, if one applies the principles accepted by the General Assembly in 1960 as relevant in determining the matter. According to Principle IV of resolution 1541 (XV), a territory is prima facie non-self-governing if it is both geographically separate and ethnically distinct from the 'country administering it'. East Pakistan was both geographically separate and ethnically distinct from West Pakistan: moreover by 1971 the relation between West and East Pakistan, both economically and administratively, could fairly be described as one which 'arbitrarily place[d] the latter in a position or status of subordination'. It is scarcely surprising then that the Indian representative described East Bengal as, in reality, a non-self-governing territory. In any case, and this point is perhaps cogent, it is hard to conceive of any non-colonial situation more apt for the description '*carence de souveraineté*' than East Bengal after 25 March 1971. Genocide is the clearest abuse of sovereignty, and this factor, together with the territorial and political coherence of East Bengal in 1971, qualified East Bengal as a self-determination unit …[44]

This passage is worth reproducing because it demonstrates not only Crawford's nuanced approach to legal argument, but also his close attention to social and political reality. As regards the former, a footnote (omitted above) observes that both India and Pakistan voted in favour of resolution 1541 (XV),[45] which served to bolster his argument against strict consensualists, who may have otherwise objected that reliance upon such a text was unmotivated within the context of an allegedly bilateral matter.[46]

Turning to the latter, not only did Crawford apply the criteria of geographical separability and ethnic distinctiveness but he also placed considerable emphasis upon the '*carence de souveraineté*' engendered by the genocidal actions of government in Islamabad. Such emphasis upon context over formal

42 Crawford, *The Creation of States* (n 1) 140–2, 180–1.

43 Ibid 142 (emphasis added).

44 Ibid 142 (citations omitted).

45 Ibid 142.

46 See generally Olufemi Elias and Chin Lim, *The Paradox of Consensualism in International Law* (Kluwer Law International, 1998).

characterisation pervades *The Creation of States* and evinces the dialectic relationship between principle and reality in Crawford's legal thought. It is also telling that, in this passage, the *contextual* judgement that 'Genocide is the clearest abuse of sovereignty' also has striking normative overtones.[47] Indeed, one gets the impression from this passage that, for Crawford, what counts as relevant context will turn, at least sometimes and in part, upon the *normative salience* of the 'background' facts in question. This leads, rather neatly, to my final theme.

3.3 *Humanity*

In Section 2, I quoted Crawford's averment that he 'cannot avoid offering evaluations or making arguments *for* specific ideals or ends'.[48] Admissions of this sort may well provoke disquiet from more committed legal positivists, who consider themselves, perhaps, to be more 'doctrinally pure'.[49] Nonetheless, I consider this to be Crawford's most important methodological commitment: the hallmark, as it were, of his approach to identifying the content of contemporary international law.

When concluding *The Creation of States*, Crawford briefly considers the once popular classification 'failed State'.[50] He spares it no derision, in a critique worth reproducing in full:

> The perils of the expression go back to a conceptual confusion at its core. The situations described by some writers as 'failed States' are, evidently, crises of government or, if the vaguer term be preferred, governance. None of the situations so described—Somalia, the Congo, Liberia, etc—has involved the extinction of the State in question, and it is difficult to see what possible basis there could be for supposing otherwise. No doubt in many cases the *regime* has failed—either in the narrow sense of the group of thugs and cronies controlling the Presidential palace or in the broader sense of the governmental system, civil service, army,

47 My own assessment of Bangladesh, which is more explicitly normative, goes further, arguing that East Pakistan had, in effect, a right to unilateral and remedial secession, see: Green (n 6) ch 4.

48 Crawford, *Chance, Order, Change* (n 4) 23.

49 For such a view, see generally Hans Kelsen, 'The Pure Theory of Law and Analytical Jurisprudence' (1941) 55(1) *Harvard Law Review* 44; Jörg Kammerhofer, 'Hans Kelsen in Today's International Legal Scholarship' in Jörg Kammerhofer and Jean d'Aspremont (eds), *International Legal Positivism in a Post-Modern World* (Cambridge University Press, 2014) 81.

50 Crawford, *The Creation of States* (n 1) 720–3.

> opposition and all. But although there are many poor, often desperately poor, States, one must ask what they might all otherwise be or have been—satellites of a neighbour, for example, or equally poor or even poorer colonies? No doubt most Somalis, whose self-determination and security the governmental system of Somalia has conspicuously failed to protect, would prefer it were otherwise. But there is no indication that they wish to be, for example, Ethiopians. To talk of States as 'failed' sounds suspiciously like blaming the victims.[51]

This is an extraordinary passage, not because it so starkly divorces statehood from government, nor due to its explicit reliance upon socio-political context. Both are in keeping with Crawford's general method and with the substance of his doctrinal views.[52] What is striking, however, is the naked reliance it places upon normative considerations: the comparatively deleterious consequences of espousing the 'failed State' category; and the expressive harm risked by tarring an entire people with the same brush as the 'thugs and cronies controlling the Presidential palace'.

This reliance upon normative considerations should not be misunderstood as a merely rhetorical response or an interesting aside. Crawford is careful to point out that the category 'failed State' has been used, particularly by the United States of America,[53] to mount alleged justifications for international intervention, including the *prima facie* unlawful use of force and the suspension of individual rights.[54] '[W]hat is needed' he insists, 'is not a more intrusive intervention *doctrine*, but more effective *measures* … [t]o this real debate about development and governance the language of State failure has added little but confusion'.[55] We see here, perhaps, the clearest expression of what motivates Crawford within *The Creation of States*. The academic endorsement of a legal category as *de lege lata*, it seems, is not exclusively a matter of fidelity to practice but also one of *humanity*, seen through the dual lens of consequentialist reasoning and respect for persons. The category 'failed State' is not just rejected because it sits awkwardly with, say, the doctrinal distinction between state and government. It is also rejected because it: 1) performatively

51 Ibid 721–22 (citations omitted).

52 Ibid 33–5, 55–61.

53 Deputy Assistant Attorney General, US Department of Justice, Office of Legal Counsel, *Memorandum re: Application of Treaties and Laws to al Qaeda and Taliban Detainees* (9 January 2002) 2 (reprinted in Karen Greenberg and Joshua Dratel, *The Torture Papers: The Road to Abu Ghraib* (Cambridge University Press, 2005) 38–9).

54 Crawford, *Creation of States* (n 1) 721.

55 Ibid 723.

disrespects the victims of tyrannical governments; and 2) risks doubling down upon their subjugation by calling into question their legally protected existence as the population of a juridical state.

If we dig a little deeper, we can find similar normative motivations elsewhere within *The Creation of States*. Take, for instance, Crawford's endorsement of collective self-determination as a negative check upon the emergence of new states.[56] Although his general discussion of self-determination within international law is quite detailed,[57] the passages that consider whether 'the principle of self-determination is capable of preventing an effective territorial unit, the creation of which was a violation of self-determination, from becoming a State' discuss only one example and are limited to just over two pages of text.[58] The example in question is Southern Rhodesia, which Crawford asserts 'was not a State because the minority government's declaration of independence was and remained internationally a nullity, as a violation of the principle of self-determination'.[59]

Notably, Crawford draws upon no state practice that cites self-determination as a motivating factor for the collective non-recognition of Southern Rhodesia. Moreover, those United Nations texts to which he does refer mention only the 'racist' and 'illegal' nature of the nascent regime, and not self-determination as such.[60] The social facts, in other words, so dramatically underdetermine any assertion that self-determination was in play, that it is difficult to see how 'Crawford the legal positivist' could have endorsed such a conclusion on that basis.[61] This is not to suggest that I take Crawford to be mistaken, either in his explanation of Southern Rhodesia or in his broader assertion that self-determination acts as a negative check upon the state creation. In fact, I endorse a closely connected argument in other work.[62]

I believe that it is Crawford's underlying normative commitment to considerations of humanity, not his self-avowed legal positivism, which is doing the real intellectual work here. The explanatory potency of self-determination in relation to Southern Rhodesia is eminently explicable if we

56 Ibid 107–31.

57 Ibid 107–28.

58 Ibid 128–31.

59 Ibid 130.

60 GA Res 2024 (XX), UN Doc A/RES/2024 (XX) (11 November 1965); SC Res 216, UN Doc S/RES/216 (12 November 1965); SC Res 217, UN Doc S/RES/217 (20 November 1965).

61 As I argue elsewhere, without resort to something beyond such social facts, the international response could as plausibly be explained via 'an *ad hoc* aversion to racism or support for an alternative criterion of representative government with universal suffrage': see Green (n 6) ch 5.

62 Ibid Ch 4.

take Crawford to be attempting something more akin to what Dworkin calls 'creative interpretation',[63] or (perhaps more modestly) what Neil MacCormick describes as 'coherence-based' legal reasoning.[64] These normatively evaluative approaches are manifestly not something Crawford endorsed in his more theoretical work, however they are presently apposite. There are compelling reasons to believe that treating the collective non-recognition of Southern Rhodesia as an instance of 'negative self-determination' (my phrase) would promote respect for persons and also lead to beneficial consequences at the institutional level.[65] Taking these considerations into account when choosing between various possible interpretations of that non-recognition enables greater determinacy. The 'pull' that self-determination exerts *in normative terms* renders it a plausible explanation notwithstanding the relative indeterminacy of the relevant social facts.[66] Such arguments are, naturally, non-positivist in nature.[67] However, given the descriptive indeterminacy Crawford faced, I can think of no other plausible explanation for his chosen course within this passage.[68]

The forgoing discussion suggests that Crawford's self-professed positivism was somewhat sporadic and equivocal in nature and perhaps even a mischaracterisation, on his own part, of some of his most paradigmatic doctrinal work. In any event, his identification of *de lege lata* was demonstrably tempered (much to his credit) with underlying humanitarian concerns, which can be cashed out in terms of a basic respect for persons and an appreciation for broader consequentialist reasoning. This commitment to humanity—to the conviction that international law, at bottom, is all about *people*—does much to inform my arguments in what follows.

63 Ronald Dworkin, *Law's Empire* (Hart Publishing, 1986) 46–53, 225–58.

64 Neil MacCormick, *Rhetoric and the Rule of Law: A Theory of Legal Reasoning* (Oxford University Press, 2005) 132–7, 196–205.

65 Green (n 6) ch 4.

66 John Tasioulas, 'In Defence of Relative Normativity: Communitarian Values and the Nicaragua Case' (1996) 16(1) *Oxford Journal of Legal Studies* 85, 114–5.

67 Başak Çali, 'On Interpretivism and International Law' (2009) 20(3) *European Journal of International Law* 805, 807–9.

68 For a convincing rebuttal of the obvious objection—that resort to normative considerations invites a loss of legal stability: see Nahuel Maisley, 'Better to See International Law this Other Way: The Case Against International Normative Positivism' (2021) 12(2) *Jurisprudence* 154, 171–2.

4 A Cardinal Point in Changing Times

Small Island States are uniquely threatened by the prospect of rising sea levels. Like all states apt to lose territory in that manner, they face a concomitant shrinking of their maritime borders, with all the cultural, economic, and social loss this implies.[69] However, unlike larger communities, several Small Island States may well suffer *complete* territorial loss. According to one understanding of international law, this would constitute a legal (that is, in addition to a human and environmental) catastrophe. Continuing statehood, on that interpretation, supervenes upon the survival of territorial units in relation to which statehood can be asserted. If this is correct, sea level rise presents Small Island States with not only a practical but also an *existential* problem: that they might become extinguished legally, should their territory vanish beneath the rising waves.[70]

I call this unattractive possibility 'the austere view' and shall contrast it with an alternative, which I believe to be particularly attractive when one internalises the three commitments discussed above. My contention is that if we take Crawford's three methodological commitments seriously, the austere view becomes less plausible and we are left with the possibility that Small Island States might survive in law, notwithstanding the submergence of the islands upon which they currently exist. This eventuality has received some contemporary support,[71] although it remains controversial.

69 Pacific Islands Forum, 'Declaration on Preserving Maritime Zones in the Face of Climate Change-related Sea-Level Rise' (6 August 2021) <https://www.forumsec.org/2021/08/11/declaration-on-preserving-maritime-zones-in-the-face-of-climate-change-related-sea-level-rise/>.

70 Other important issues will naturally arise before complete submergence (and the possibility of extinction), such as practical inhabitability and mass migration, see: Derek Wong, 'Sovereignty Sunk? The Position of "Sinking States" at International Law' (2013) 14 *Melbourne Journal of International Law* 346, 359; Jane McAdam, '"Disappearing States", Statelessness and the Boundaries of International Law' in Jane McAdam (ed), *Climate Change and Displacement: Multidisciplinary Perspectives* (Bloomsbury, 2010) 105. However, the territorial and existential implications of submergence loom large on the current international agenda, as evidenced by their prominence within: International Law Commission, *Second Issues Paper on Sea-level Rise in Relation to International Law*, UN Doc A/CN.4/752 (18 April–3 June and 4 July–5 August 2022) 21–56.

71 Statement on behalf of Latvia at the Sixth Committee on Agenda item 82, *Report of the International Law Commission of its seventy-second session* (1 November 2021), Cluster II, ch VI, IX.

The Creation of States has chapters on both state continuity and state extinction, although it does not contemplate the Small Island State problem in direct terms.[72] Its direct doctrinal contribution, to that extent, is indeterminate, however its broader contribution, on my reading at least, remains important. The International Law Commission (ILC) released a second Issues Paper on sea level rise in the spring of 2022,[73] with the subsequent reactions of states due (at the time of writing) to be delivered in autumn of the same year within the General Assembly's Sixth Committee. The final report of the ILC is currently timetabled for release no earlier than 2023,[74] which makes this issue uniquely timely, as well as morally pressing. In what follows, I briefly summarise the austere view, before discussing its antithesis.

4.1 *The Austere View*

The austere view, in a nutshell, is that states cannot exist without territory, such that the total extinction of a state's territory necessitates the concomitant extinction of that state. It trades, amongst other things, upon an insistence that states are territorial entities and points to items of international legal practice, such as Article 1 of the 1933 *Montevideo Convention on the Rights and Duties of States*,[75] which indicate the same. Crawford himself seemed to support this view, holding 'that statehood implies exclusive control over *some* territory, small or large'.[76] Similar remarks were made, for example, by Philip Jessup, who averred 'that one cannot contemplate a State as a kind of disembodied spirit'.[77] The austere view is, in the mouths of such authors, both absolutist and a matter of conceptual necessity.[78]

The circumstances now threatening many Small Island States represent a genuinely novel problem for international law. As such, logically speaking, the austere view maintains its plausibility notwithstanding *every* previous situation in which statehood endured despite substantial territorial loss. Hitherto, all instances of territorial change have been geopolitical, rather than physical,

72 Crawford, *Creation of States* (n 1) 667–717.

73 International Law Commission (n 70).

74 *Report of the International Law Commission*, 72nd sess, Supp No 10, UN Doc A/76/10 (26 April–4 June and 5 July–6 August 2021) 177 [296].

75 *Montevideo Convention on Rights and Duties of States*, opened for signature 26 December 1933, 165 LNTS 19 (entered into force 26 December 1934).

76 Crawford, *Creation of States* (n 1) 48; see also at 671.

77 UN SCOR, 383rd mtg, UN Doc S/PV.383 (2 December 1948) 11.

78 The austere view has also been recently adopted by the International Relations and Defence Committee of the United Kingdom's House of Lords, see: International Relations and Defence Committee, *UNCLOS: the law of the sea in the 21st century* (House of Lords Paper No 159, 2nd Report of Session 2021–2022) 34 [117]–[126].

encompassing accession,[79] devolution,[80] and secession,[81] as well as unlawful annexation[82] and belligerent occupation.[83] Consequently, *no* prior examples of state continuity can determine the instant issue on their own, even where the state in question survived a total alteration or loss of its territory, whether *de jure* or *de facto*, for an extended period of time.[84] The threat of sea level rise is quite different, concerning, as it does, whether juridical survival extends to circumstances where the *land* in question is, for all practical purposes, physically gone.[85] To this the austere view provides a clear, though daunting, answer.

4.2 *An Alternative: Crawford's Commitments Applied*

The austere view has deeply unattractive consequences. However, at least according to most positivist understandings of international law, this fact alone provides no reason to dismiss its legal plausibility. Crawford, however, possessed, or so I have argued, an unusually humane and contextually rich approach to legal reasoning, which sits on the outermost borders of positivism (or, perhaps, beyond them). In what follows, I apply this approach to the existential problem detailed above, arguing that international law, properly interpreted, makes space for the possibility that Small Island States can survive the complete loss of their territory. My argument is self-consciously incomplete: solving the issue definitively is well beyond my scope here. Instead, I will articulate, with specific focus upon the three methodological commitments outlined above, what kinds of consideration may lead one to reject the austere view *as a matter of contemporary international law*.

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79 Crawford, *Creation of States* (n 1) 479–92, 673–6, 705–6.

80 Ibid 329–73.

81 Ibid 374–448.

82 Ibid 688–9.

83 Ibid 689–90.

84 Even in cases of the most extreme change, such as between Poland pre-1939 and post-1945, no substantial changes in territory, population, or government have ever involved anything like the total uninhabitability of the relevant land (Ibid 692–95). During that period of transition, Alfred Jarry's famous reference to that same nation (in 1896) as 'Poland—that is to say, nowhere' may have seemed apt: Alfred Jarry, *Ubu Roi*, tr Gershon Legman (Dover Publications, 2003) vi. However, there was still very much a sense in which Poland, for all its territorial and governmental ephemerality, was 'still there' throughout the 20th century. The same cannot necessarily be said in circumstances, akin to Plato's fictional Atlantis, where the oceans rise up to claim an island that was. The plausibility of this intuition perhaps follows from our attachment, as a species, to notions of 'place' and of 'home': see, eg, Avery Kolers, *Land, Conflict, and Justice: A Political Theory of Territory* (Cambridge University Press, 2009) 66–70; Margret Moore, *A Political Theory of Territory* (Oxford University Press, 2015) 35–6.

85 Cf Kate Purcell, *Geographical Change and the Law of the Sea* (Oxford University Press, 2019) 5–6.

4.2.1 Cautious Optimism

In one sense, this remains agnostic. The 'second order' question of whether or not international law yields determinate answers *underdetermines* the 'first order' issue of whether Small Island States can survive the complete loss of their territory. Nonetheless, in a different and more subtle manner, it does provide the beginnings of an interpretive 'nudge'. Any view about the general (in)determinacy of international law must be, to some extent, an article of faith. As Dworkin argues, we cannot *know* that a normative order is determinate or otherwise without actually attempting to reach determinate answers.[86] Moreover, since indeterminacy requires as much positive proof as determinacy, logically speaking, we can afford to assume neither.[87] Crawford's cautious optimism therefore seems methodologically unmotivated. There is, however, at least one reason to adopt a general attitude of optimism in relation to the determinacy of international law: unless we do, its capacity to offer guidance and resolve disputes would be, as it were, over before we got started. As Dworkin suggests, it is normatively good for us to believe in normative determinism, at least until the inverse is demonstrated.[88]

This assumes, as I take Crawford to assume, that part of the value of international law consists in its *solving* practical problems, including problems of cooperation and coordination.[89] The difficulty with the austere view is that it exacerbates matters, rather than ameliorating them. By necessitating the extinction of Small Island States, that view also entails the consequent statelessness of their populations. Beyond its deleterious humanitarian implications, this would create additional coordinative difficulties *vis-à-vis* multiple groups of stateless persons, each needing to be addressed *ad hoc*, without the mediating influence of their erstwhile state institutions. If the austere view is pursued, these coordinative burdens would be of international law's own making, which seems contrary to the spirit of the coordinative motivations underpinning cautious optimism. This argument alone is admittedly insufficient to reject the austere view, however it is sufficient, I think, to give us pause.

4.2.2 Nuance

In a similar vein, it seems as though this theme *must* be neutral as between the austere view and our hopeful alternative. Logically speaking, the complete novelty of territorial loss through sea level rise renders the existential threat

86 Ronald Dworkin, *Justice for Hedgehogs* (Belknap Press, 2011) 91–6.
87 Ibid.
88 Ibid 89–96, 150–1, 177–180.
89 Crawford, *Chance, Order, Change* (n 4) 40–55, 173–4.

it poses incomparable to, for example, loss via illegal annexation or belligerent occupation. A commitment to nuance, if anything, reinforces this point, underlining the difficulty with drawing argumentative analogies from past situations, whether of state extinction or of continuity. Nonetheless, closer reflection upon this methodological commitment does suggest at least one further interpretive nudge.

The relevant nuance exists at the level of legal principle. Although the law of statehood encompasses various existential questions, there is a schism within that law between creation and commencement, on the one hand, and continuity and extinction, on the other. *The Creation of States* emphasises at several points the strong doctrinal presumptions in favour of both continuity and identity, which render the traditional criteria for statehood less austere in that context than in situations of creation or emergence.[90] This point—that statehood can persist, for instance, notwithstanding substantial territorial change, or the loss of effective governmental control—is used by Crawford to explain the continuity of various entities, such as the Democratic Republic of Congo.[91] Indeed, what seems to matter, on his analysis, is whether 'all or nearly all manifestations of the … [relevant] States disappeared',[92] as well as what the position *vis-à-vis* international recognition seems to imply, evidentially speaking, about the former.[93]

This being so, I suggest that a commitment to nuance entails, for both practical and legal reasons, that much will turn upon the manner in which the international community responds to any complete losses of territory suffered by Small Island States. Should the factual continuity, say, of their *governments* be reinforced by sustained diplomatic relations and the recognition of their international rights and obligations, then the case for the continuity of those states will be stronger, notwithstanding their concomitant territorial losses. Admittedly, this argument does little more than emphasise the possibility of continuity. However, it nonetheless presents that prospect in more hopeful light than the austere view, which holds continuity to be just *logically* possible.[94]

90 Crawford, *Creation of States* (n 1) 59.

91 Ibid 56–8, 701.

92 Ibid 689.

93 Ibid 692.

94 The austere view, it will be remembered, adds the rider that, whilst logically possible *vis-à-vis* past practice, this outcome must be disavowed as a matter of principle: states, on that account, *just are* territorial entities.

4.2.3 Humanity

The humanitarian implications of Small Island State extinction are considerable and weigh significantly against the austere view in normative terms. In the first place, the statelessness threatening any affected populations would deny them important legal protections, including, most obviously, the diplomatic protection that would have been available via their erstwhile nationality.[95] Moreover, when given the international community's poor record with regards to the protection of stateless individuals,[96] and the social and economic deprivations that attend statelessness for many displaced persons,[97] the likely negative consequences of being rendered stateless are considerable. The juridical survival of Small Island States could not itself prevent the displacement of their populations in the event of significant territorial loss. Nonetheless, such survival would enable their extant legal protections and accommodations to endure. Acceptance of the austere view would abrogate those protections, creating statelessness through operation of law.

In addition to these more material considerations, the austere view would inflict an expressive loss upon the political communities that Small Island States represent. As I have argued at some length elsewhere, state institutions constitute the focuses, forums, and artifacts of domestic politics for their populations.[98] Treating these institutions as valuable achievements of collective political action communicates respect towards the populations involved, and the recognition of continuing statehood is one clear way in which the international community can express such an attitude. Conversely, by responding to territorial loss with the automatic extinction of statehood, the austere view risks treating those affected populations as mere externalities, rather than as collections of intrinsically valuable individual actors engaged in the *ongoing* project of their political communities. Such expressive harm compounds the material dangers of statelessness, adding, as it were, insult to injury.

In sum, both respect for persons and the balance of likely material consequences weigh heavily against accepting the austere view. There is, as such, a strong case in terms of humanity for holding Small Island States to survive, in juridical terms, any loss of territory they might suffer as a result of rising sea levels. This entails that even though the doctrinal position within *The Creation*

95 See, eg, International Law Commission, *2006 Draft Articles on Diplomatic Protection*, UN Doc A/RES/61/35 (18 December 2006).

96 William Conklin, *Statelessness: The Enigma of the International Community* (Hart Publishing, 2014) 113–7.

97 Ibid 126–134.

98 Green (n 6) ch 2. This is a point I am developing further as part of my work towards developing a political theory of State equality.

of States appears to support the austere view, Crawford's three primary methodological commitments apparently stand against it, at least as I have sought to represent them here. Humanity in particular exerts a strong normative 'pull' upon the ambivalence of past practice in this area, suggesting that the resilience of Small Island States should be preferred to their extinction. Admittedly, this argument leads us away from the legal positivism that Crawford himself professed. Nonetheless, or so I contend, it better represents the *spirit* of his approach.

5 Conclusion

This paper has argued *The Creation of States* to represent a 'cardinal point' within international legal scholarship, not just because it constitutes a doctrinal *tour de force*, but also because it exemplifies a discrete way of identifying *de lege lata*. Crawford's three methodological commitments—cautious optimism, nuance, and humanity—provide even the most committed legal positivist with a compelling example of how to work *with* international law by thinking *beyond* it. As I have argued here, this method provides a valuable perspective upon contemporary legal problems, such as the existential threat faced by Small Island States in light of rising sea levels. In this way, *The Creation of States* can continue to lead us forward, with the intellectual legacy it represents charting a course long after its doctrinal prescriptions have either run out or been called into question. It is, in this sense, a cardinal point in at least two ways. First, the sheer substantive and methodological importance of the text within the contemporary scholarship on statehood means that we must all, to some extent, chart our course in relation to its content. Second, however, and more importantly, the moral commitments it exemplifies *should* guide us, even when we disagree with its more particular content.

I met James Crawford only once: in London, at the June 2014 Oxford, Cambridge, and UCL Public International Law Conference. At that stage, I was less than two years into my PhD programme and was presenting an idea tentatively entitled 'Statehood as Political Community'. He listened in silence, nodding at points, and raising an eyebrow quizzically, but never unkindly, at others. He asked me no questions, although I was offered a series of (mainly positivist) objections by others. When the session had concluded, and my cold perspiration had subsided, Crawford approached me and remarked, 'So, for you, statehood is really a *scalar* property'. I can't remember precisely how I replied but I do recall realising—in a moment of some panic—that he was quite correct. The remainder of my PhD was, in many respects, an attempt to

square that circle: to preserve my view that the statehood of an entity depends upon its instantiating and promoting particular ethical principles, whilst maintaining statehood itself as a more or less determinate legal category.

Whether or not I have succeeded in that task remains unclear to me. The encounter nonetheless sticks in my mind for two reasons. First, as the expert in the room, it would have been all too easy for Crawford to put me on the spot and yet he refrained. Second, he listened so carefully, and so deftly diagnosed the crux of my theoretical difficulties, that he had, though I perhaps did not fully appreciate it then, provided perhaps *the* question that my ongoing research seeks to answer. In a manner of speaking, I suppose, his appreciation for nuance and his humanity were evident, even within that brief encounter. I can only hope that his optimism, whether cautious or otherwise, was also engaged.

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