

KEYNOTE ADDRESS

The Assembly was convened at 4:45 p.m. on Thursday, April 5, 2018, and the Keynote Address was given by Sir Christopher Greenwood, Judge on the Iran-United States Claims Tribunal.

THE PRACTICE OF INTERNATIONAL LAW: THREATS, CHALLENGES, AND OPPORTUNITIES

*By Sir Christopher Greenwood, GBE, CMG, QC**

INTRODUCTION

It is a great pleasure for me, as a British member of the Society, to give the keynote address to this year's Annual Meeting. I have now been a member of the Society for forty years and one of the attributes of the Annual Meeting I have always enjoyed and appreciated is that the American Society goes out of its way to welcome its overseas members and to make them part of every aspect of the meeting. I am more than ever aware of that welcome this year, both because you have invited me to give this address and because, as the president has mentioned, I have just had the signal honor of becoming one of the three U.S.-appointed members of the Iran-United States Claims Tribunal. You will, however, understand that my pleasure at that appointment is balanced by the profound sense of loss which—like everyone here—I feel at the loss of David Caron. David was a brave and distinguished public servant and a very great friend whom I very much miss. Being asked to follow in his footsteps is both a great compliment and a very great challenge.

The theme of this year's meeting is the "Practice of International Law." It comes at a time when there is a spirit of pervading pessimism about international law. Had I followed the example of my friend Judge Donoghue in choosing a catchier title for my address, I might have selected "Tiptoeing Through the Minefield on Our Way to the Inevitable Abyss." A title like that might have caught the spirit of the moment but in my view, it would not have reflected the reality of our situation. There are certainly threats facing international law today—some of them very serious indeed—and that sense of "glad, confident morning" so apparent ten years ago has disappeared. Yet it would be quite wrong to imagine that all is doom and gloom. What is needed is a more realistic assessment of the strengths and weaknesses, the threats and opportunities of international law today.

A SENSE OF PROPORTION ABOUT INTERNATIONAL LAW

That assessment needs to begin with a sense of proportion both about the recent history of international law and its place in international society. So far as the first of these is concerned, it is easy to underestimate how far international law has come in recent years. Forty years ago, when I was studying international law at Cambridge, the International Court of Justice had one case on its

* Judge, Iran-United States Claims Tribunal; formerly Judge of the International Court of Justice (2009–2018).

books—a year later it decided that it lacked jurisdiction to decide that case.¹ I was reminded of those times when I became a judge at the International Court thirty years later. My office there boasted a bound set of the *ICJ Reports*. The volume for 1977 was four pages long—two in English and two in French. There was a rather sad note that “this volume contains neither an index nor a table of contents,” under which someone had written “nor anything else.”

The entire jurisprudence of the European Court of Human Rights could be fitted into a single volume and there were no other fully functioning human rights courts or tribunals. Moreover, in intergovernmental relations, protests about a state’s human rights record were still regularly met with the riposte that this was a purely domestic matter of no concern to outsiders. Arbitration was very rare. The only important interstate case for many years, *Beagle Channel*,² had nearly led to war, a threat which was averted only by papal mediation.³ The International Centre for Settlement of Investment Disputes (ICSID) Convention had been in force for a decade and had generated a large literature but no cases. The idea of an international criminal court was a dream seldom discussed even in universities. The UN Security Council’s powers under Chapter VII of the UN Charter were generally assumed to be unusable; they were certainly unused.

The contrast with today could not be starker. The International Court of Justice is busier than it has ever been at any time in its history. Moreover, increasingly those cases involve matters of great importance for the parties. In one recent case, the hearings were attended by the head of state of one party, while it was reported that the entire cabinet of the other party was watching the hearings on live television, despite a time difference which meant that they were doing so in the middle of the night.⁴ Despite suggestions that the emphasis on negotiation in the Law of the Sea Convention, together with its creation of the International Tribunal for the Law of the Sea and Annex VII arbitration, would render the Court redundant in relation to maritime boundary disputes, its jurisprudence on that subject has remained substantial and seminal and it has made major contributions to almost every area of international law during the last forty years.

Human rights law has been transformed, not only by the vastly increased jurisprudence of the European Court but by the increasingly important work of the UN Human Rights Committee, the Inter-American Court and Commission of Human Rights, the African Court of Human and Peoples’ Rights, and the specialist committees created under treaties like the Convention against Torture, 1984. Moreover, as the late Sir Geoffrey Howe, foreign secretary of the United Kingdom from 1983 to 1989, remarked, by the end of the 1980s very few states even attempted to take refuge in the notion that human rights were a matter of purely domestic concern.

Arbitration has taken off in a way that no one would have predicted forty years ago, with an explosion of investor-state arbitrations under bilateral investment treaties and a substantial increase in the numbers of interstate cases. The Iran-United States Claims Tribunal has dealt with hundreds of individual claims involving over 2.5 billion U.S. dollars and is now addressing several very large cases between the two states, while the UN Compensation Commission has offered a different model of mass claims settlement. International criminal law has become a reality, with the International Criminal Tribunals for the former Yugoslavia and Rwanda establishing a solid legacy for the International Criminal Court and tribunals like the Special Court for Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia offering new scope for a combination of national and international law and jurisdiction. The dispute settlement mechanism of the World

¹ Aegean Sea Continental Shelf Case (Greece v. Turk.), 1978 ICJ Rep. 3 (Dec. 19).

² Beagle Channel Arbitration (Arg./Chile), 52 ILR 93.

³ See 82 ILR 671.

⁴ The case was *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*. Judgment was given on October 1, 2018.

Trade Organization has played a far more important role than its predecessors and has established itself with a central role in international trade law.

Finally, the Gulf Conflict of 1990–1991 helped to breathe new life into the Security Council as a result of which Chapter VII of the UN Charter—even if it still does not play the seminal role envisaged in 1945—has taken on real importance for the first time since the Korean conflict.

In short, international law has come a long way toward the establishment of a rule of law in international society. Its achievements in the last forty years have been substantial and the problems that it faces today need to be seen in that light.

That said, we also need to have a sense of proportion about the place which—in spite of all those achievements—international law can occupy in international society. I would not have spent my entire adult life in international law had I not thought that international law matters. And if international law matters, so do international lawyers. But perhaps we do not matter quite as much as we think we do. Every legal system reflects the society which it serves and which created it. Only very rarely—and then only for short periods of time—is a legal system stronger and more cohesive than the society within which it operates. In the case of international law, it operates within a society that is in most ways markedly less cohesive and less strong than any national society. That is why it is parochial—and even fatuous—to criticize the International Court of Justice, or other international tribunals, because they do not behave like the Supreme Court of the United States or the highest courts in other countries. International society simply bears no resemblance to the societies within which those courts operate.

When we consider the daunting problems confronting us, we need to reflect that they may not be ours to solve. International law and international lawyers cannot possibly solve the problems of climate change, poverty, global injustice, or resolve the threats to world peace on their own. It is international society, not international law, which is failing here. What we, as international lawyers, can—and must—do is ensure that the rules and principles of our legal system, our working methods and, perhaps above all, our institutions inspire enough trust among states that they choose to make use of us in tackling those problems and that, if they so choose, we are able to respond effectively and in good time.

Against that background, I want briefly to consider three challenges (and opportunities) currently facing the practitioners of international law. That is not to say that there are not others but these are ones that have particularly preoccupied me and I apologize that time does not permit me to range further afield.

LEGITIMACY AND INSPIRING TRUST

The first—and the biggest—challenge is to inspire trust in the international legal system and its processes. That is an issue for any legal system. Legitimacy is as important an issue as simple legality. And it is particularly important with international law. Compliance with the rules of international law may not be voluntary but participation in most of its institutions, and in its treaties, is largely a matter of choice. A state does not have to accept the jurisdiction of the International Court of Justice or become party to the Statute of the International Criminal Court. The result is that those courts face a challenge which is largely unknown to national courts. Unlike their national counterparts, international courts are obliged in some sense to regard those appearing before them as “clients” who, if they are dissatisfied, can go elsewhere—either by seeking other methods of peaceful settlement or, which is of course the real problem, by economic and political coercion or even force.

That fact places a considerable strain upon how international courts behave. For while states are bound by customary international law and the treaties to which they have chosen to subscribe, in

general they may withdraw from those treaties. Moreover, the scope for a state to behave unlawfully and defy a rule of law or an adverse decision of an international court is in practice far greater than the scope to get away with lawbreaking which exists in most national societies. That uncomfortable fact reflects the nature of international society rather than any failing on the part of international law or international lawyers but it creates a challenge for international lawyers nevertheless. How should we respond to that challenge?

First, I suggest that it is imperative that international lawyers remain true to their calling but that we “get real” about what we are asked to do. It would be quite wrong for us not to do our job as lawyers properly and with integrity merely because states, however powerful, may not like the results. Yet we should take a long, hard look at some of the things that we are asked to do. The recent judgments of the International Court of Justice in the cases between the Marshall Islands, on the one hand, and India, Pakistan, and the United Kingdom, on the other,⁵ provide one example. In those cases, the Marshall Islands claimed that the respondent states had breached their obligations to negotiate in good faith to achieve nuclear disarmament. The Court held that it lacked jurisdiction because, prior to the filing of the Applications in the three cases, there had been no indication of a dispute between the Marshall Islands and the respondent states on this issue. But it is worth asking a more fundamental question: was the problem of the nuclear arms race one which could ever have been resolved by judgments of the International Court given in cases against three out of the nine states known to possess nuclear weapons?⁶ In other words, could judgments involving only those three respondent states have brought about a change in the attitude toward the possession of nuclear weapons by other states? If, as I suspect, the answer is clearly “no,” then we must also ask whether it would have been reasonable to expect the three respondent states to change their approach to the possession of nuclear weapons when the others did not. For international law to be effective, it has to retain the confidence of states.

Secondly, I think that we have to look again at the way in which international law deals with historical disputes between states and, in particular, with cases brought today which concern facts occurring long ago. It is fashionable to decry limitation periods as technical barriers to justice. But is that really right? Barriers to a state presenting old claims which could have been brought many years—or even decades—earlier may prevent a court doing justice in relation to the events of the past. Yet they also enable a state to decide upon action today (e.g. accepting the “compulsory” jurisdiction of the International Court) knowing that it will not face potentially unlimited liability for the acts of a previous generation. That has a value which we underestimate at our peril. International law has no statute of limitations as such. It is true that jurisdiction of a court or tribunal *ratione temporis* may be limited by the terms of the treaty it is called upon to apply, as is the case with the Statute of the International Criminal Court, or by the date of its entry into force for a particular state. In the case of the International Court of Justice, a limitation *ratione temporis* may also be derived from the terms of a state’s acceptance of the Optional Clause. Yet there is no general limit on the time within which a case must be brought beyond some rather vague pronouncements about the possible effect of delay.⁷

In my view, we need to develop the concept of unreasonable delay as a barrier to jurisdiction or admissibility and also to consider greater use of limitation periods. By doing so we can remove the

⁵ Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament, (Marsh. Is. v. India), 2016 ICJ Rep. 255 (Oct. 5); (Marsh. Is. v. Pak.), 2016 ICJ Rep. 552 (Oct. 5); (Marsh. Is. v. U.K.), 2016 ICJ Rep. 833 (Oct. 5).

⁶ The Marshall Islands had attempted to bring proceedings against all nine states but there was obviously no jurisdictional basis with regard to China, France, Israel, North Korea, the Russian Federation, or the United States of America and, in the absence of *forum prorogatum*, those cases did not proceed.

⁷ See, in particular, Phosphate Lands in Nauru (Nauru v. Austl.), 1992 ICJ Rep. 240, paras. 31–36 (June 26).

fear that accepting the jurisdiction of an international court will expose a state to litigation regarding the distant past. While I recognize that this is unlikely to be a popular view, especially with those who regard themselves as progressive international lawyers, it might be worth asking whether the prospect of a decision today reaching far into the past does not deter judges from being more adventurous—or shall we say creative—with regard to the development of the law. It is noticeable that some of the most important developments in European Union law have come about because of the ability of the Court of Justice of the European Union to limit the retroactive effect of some of its judgments. Limits on the capacity to bring historic claims may turn out to be a force for reviving the international legal system, rather than something which constrains it and prevents it from doing justice.

Thirdly, there is the need to confront the time taken, once a case has been brought, for an international tribunal to render a judgment or award. The fact that a case may take what seems like an unconscionable time is by no means always a reason for criticism. A case may proceed slowly because the parties have asked for extensions of time for their pleadings, perhaps in the hope of reaching a negotiated settlement. Given the primacy accorded to negotiation as a means of dispute settlement, it is entirely understandable that courts and tribunals try to facilitate such negotiations. Moreover, a leisurely pace in litigation may serve a broader purpose. The length of time taken by the tribunal in the *Taba* case between Egypt and Israel⁸ is just such an example, as the arbitration proceedings gave the two states a reason to keep talking to one another during a difficult period and a forum in which they could do so.

But there are all too many instances when the time taken to decide a case benefits no one and cannot be excused. All judges and arbitrators need to take a long hard look at this aspect of international adjudication and ask whether the procedures which we follow are well-suited to the timely delivery of justice. Is it, for example, necessary in this age of modern communication for the president of an international court to meet with the agents of the parties in The Hague or Hamburg at the start of every case? Could not the business of such a meeting be conducted more speedily and far more cheaply by videolink? Is a second round of written argument always necessary or even desirable? Are there other ways in which our procedures could be speeded up?

At the same time, ensuring that cases do not drag on is not just a matter for the court or tribunal; counsel also have a role. Is it necessary that every investment arbitration involve hundreds of authorities and even more exhibits, many of which receive barely a mention in the pleadings and are ignored completely at the hearing? Does every claim for unfair and inequitable treatment need to be accompanied by a claim for indirect expropriation? Must every application for annulment involve at least three of the grounds set forth in Article 52(1) of the ICSID Convention with numerous different permutations of each ground? Above all, is there a risk that extravagant claims—and again some of the indirect expropriation claims come very much to mind—not only make proceedings more protracted but also undermine confidence in the entire process?

That last consideration goes to the heart of my main point, which is the need to inspire trust in the international legal process. In her Grotius lecture, Judge Donoghue reminded us that a state contemplating accepting the jurisdiction of an international court looks at the matter through two different lenses: Will I be sued? Can I bring a claim? All too often it is the first of those lenses which seems to dominate. We need to persuade states that the ability to vindicate their own claims is worth the exposure to a risk of being claimed against; extravagant claims, claims extending back decades, and long and costly procedures all work against achieving that goal.

⁸ 80 ILR 224.

SPECIALIZATION AND THE DANGER OF FRAGMENTATION

The second challenge which I want to discuss concerns what is sometimes called the fragmentation of international law. I am not one of those who believe that the system of international law has been replaced by a number of self-contained, isolated specialist systems.⁹ I am a firm and passionate believer in the unity of a single system of international law. But there is no denying that that system has become far more complex and varied than it was at the time of the early Annual Meetings of this Society, when it was taken for granted that any member would be interested in, and knowledgeable about, all aspects of international law. Today, no one can be on top of every area of international law. That creates a danger that some parts of the subject are becoming so specialized that they are in danger of becoming islands, entire of themselves, increasingly detached from the international legal main.

That creates three dangers. First, it can too easily lead to some specialisms being marginalized with adverse effects on the system as a whole. “Women, peace and security,” the subject of a panel which I greatly regret having been unable to attend, is not an isolated topic but something which should be at the heart of all our discussions of peace and security issues. International environmental law may require a degree of specialization but it would be unbelievably damaging if it therefore came to be regarded as somehow divorced from the mainstream of international law, a subject which general international lawyers need not consider. If it is not possible for a generalist to be on top of all the developments and scholarship in each of the specialized fields, it is nevertheless important that they at least be aware of the overall contours of each specialization and how it impacts on international law as a whole.

Secondly, there is a fear that some of those steeped in a particular specialization would quite like to turn their backs upon the world of general international law, that they rather resent generalists putting their grubby fingers all over the nuances and complexities of the chosen specialization. That approach is surely a mistake. It contributes to the marginalization of the subject and can also lead to a fraying of the bonds that tie us all together. The challenge of finding the proper meaning of a treaty provision calls for the same toolkit of rules and principles enshrined in the Vienna Convention on the Law of Treaties no matter what the subject of that treaty. Moreover, just as every specialist field has something to contribute to international law as a whole, so each of those specializations benefits from exposure to general international law and to one another.

Lastly, there is a risk that rules developed within particular specialized parts of international law are increasingly adopted without reference to the other parts of international law which may also bear upon the same subject. The danger is that states are then treated as subject to conflicting obligations. One area in which it has sometimes been suggested that that is the case is the relationship between international human rights law and international humanitarian law, both of which may be applicable to a particular act in the context of an armed conflict. Each body of law has adherents who are sometimes too ready to assume that they should apply their own chosen branch of international law without concerning themselves if the result is a conflict with rules derived from the other branch. It was, therefore, encouraging to see a Grand Chamber of the European Court of Human Rights recently insist that Article 5 of the Convention, on deprivation of liberty, had to be read consistently with the relevant provisions of the Third and Fourth Geneva Conventions.¹⁰

The growth of new fields of international law has enriched our subject and marks the increasing importance and influence of international law. That makes it all the more important that we ensure that those new fields are not isolated or marginalized and that we defend the principle of a single

⁹ I have developed this theme in *Unity and Diversity in International Law*, in A FAREWELL TO FRAGMENTATION, at 37 (Mads Andenas & Eirik Bjorge eds., 2015).

¹⁰ *Hassan v. United Kingdom*, App. No. 29750/09, 161 ILR 524 (2014).

international legal system which embraces all such fields. That is why I greatly regret the number of universities which allow students to study Masters' courses in Human Rights Law, International Economic Law, or even International Legal Theory without ever requiring a grasp of the core principles of general international law. How can anyone be a serious student of, let alone work in, any area of international law without a command of such vital matters as the law of treaties or state responsibility?

SCHOLARSHIP AND PRACTICE

The last challenge I want to examine—and far more briefly—is the need to bring together international legal scholarship and the practice of international law. These Annual Meetings—with their rich mix of academics, students, private practitioners, and government lawyers—have always been a force for that kind of unity. One only has to look at the awards for books and other works of scholarship given earlier in this meeting to see how much is being published which would be of interest to both academic and practitioner.

Elsewhere, however, there are distressing signs of a rift between the study and the practice of international law. Writers on international law should never be the mere scribes of state practice but there are worrying indications of a trend in international legal scholarship that is both ignorant of and determinedly detached from the practice of international law. To take just one example, some years ago I attended a conference on aspects of humanitarian intervention. One of the topics under consideration was, if there was a right to intervene on humanitarian grounds, under what conditions did such a right come into play. One suggestion was that only the commission or threat of genocide was sufficient. I countered that such a requirement was very limiting, because the Genocide Convention was framed in such narrow terms. Over coffee, a professor told me that I should not worry about that, because “scholars working in the field have long since redefined the concept of genocide.” That is all well and good but the International Court of Justice, faced with cases like *Bosnia v. Serbia* or *Croatia v. Serbia* has to apply the definition contained in the Convention. The Court, like everyone involved in the practice of international law, does not have the luxury of “redefining” genocide or other treaty terms. If academics follow the lead of this professor in dismissing the existing law as intellectually irrelevant, part of the price that we all pay is that their writing becomes irrelevant to the world in which law has to be applied and ideals translated into reality.

The best writers in international law have not only been scholars of the first rank, they have also contributed the ideas and the inspiration that have driven the practice of international law and its development in state practice, through treaty and the judgments of international courts. If the scholars of international law write only for one another then we are all the poorer.

CONCLUSION

Reflecting in 2018 on the practice of international law, we should avoid what I described at the outset as the sense of pervading pessimism. International law—and international lawyers—has much of which to be proud. The achievements of the last forty years are real, significant, and wide-ranging. That is reason for celebration but not for complacency. The last few years have seen a number of different threats and challenges from very different directions. If we are to move forward, and even if we are to defend what has already been achieved, then there is much to be done. Yet those challenges are also opportunities—opportunities to improve the international legal system and its processes, to enhance trust in the legal system, to bind its different parts together and to avoid a divorce between the scholar and the practitioner which would render both less influential in the wider world of international affairs. Whether we have what it takes to meet those challenges and to seize those opportunities is the basis on which future generations will judge us.