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ELEVENTH ANNUAL CHARLES N. BROWER LECTURE: SIR CHRISTOPHER GREENWOOD

This lecture was convened on Thursday, March 30, 2023 at 10:30 a.m. The distinguished lecturer was Sir Christopher Greenwood of the Iran-U.S. Claims Tribunal.

Introductory Remarks by Greg Shaffer*

Welcome, everyone. I am Greg Shaffer, president of the Society, and it is my huge pleasure to introduce the Brower Lecture. Of course, this is thanks to our good friend, Judge Charles Brower and I am thrilled that we are able to offer the offer this opportunity every year to have such great lectures.

I wanted to let you all know that we have the special privilege this year, unlike any other year, of honoring Judge Brower with his new book, and at 3:30, there will be a book signing, *Judging Iran*. I have read this book and it is wonderful. It is a history of this amazing man's life, and so take a look, and at 3:30 you can go and get a signed copy.

In terms of the history of this lecture, this is the eleventh year of the lecture, and the lecture has been held with amazing speakers. You can see all of them online. This year, we have an incredible speaker in Sir Christopher Greenwood. I am so honored to introduce you, Sir Christopher. He is our honorary president. He has had a storied career in the field of international law, arbitration, and dispute resolution. He has served as Professor of International Law at the London School of Economics until his election as a judge of the International Court of Justice (ICJ) in 2009. He was called to the bar by Middle Temple in 1978 and appointed Queen's Counsel in 1999 and has been a member of Lamb Building Essex Court Chambers and 24 Lincoln's Inn Fields. During his time as a barrister, Sir Christopher regularly appeared as counsel before the International Court of Justice, the European Court of Human Rights, the English courts, arbitral and other tribunals. He has extensive experience as an arbitrator, both in interstate and investor-state cases, and currently sits as a member of the Iran and United States Claim Tribunal and is on the ICSID panel of arbitrators. Sir Christopher was appointed Companion of the Order of St. Michael and St. George in 2002 and knighted in 2009 for services to international law. In 2018, he was made Knight Grand Cross for services to international justice.

Sir Christopher, it is my honor to hear you. Thank you.

Remarks by Sir Christopher Greenwood**

Greg, thank you very much for that kind introduction. The organizers of today's conference have done a very dangerous thing. They have put me in a room where there is no clock. I will try not to overrun and to allow time for questions. A newly ordained clergyman once asked a very

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** Iran-U.S. Claims Tribunal.

experienced priest how he should know when a sermon should stop, and the older priest said, "Well, don't take any notice if they look at their watches. They always do that, but when they start taking them off and shaking them, then it's time to sit down."

It is a great honor and a pleasure to be asked to give the eleventh Brower Lecture here at the Society. I have known Charlie Brower for thirty years. I first met him when I was a relatively callow youngster in the *Lockerbie* case at the International Court of Justice. I was the very junior counsel for the United Kingdom, wisely not given a speaking part, and Charlie was one of those who was speaking on behalf of the United States. And as I sat in one of the back rows, I watched him and I thought that is the best-dressed man in international law.

Although I have to confess that the sartorial prize at that particular hearing was stolen from you by the Libyan agent who turned up in a white toga and a black silk skullcap. He was the one who got all the attention from the television cameras.

There is something else that many people in this room will know about Charlie, and that is that if he asks to have a conversation with you on the telephone, it is going to cost you. He is the President's secret weapon in raising money for the Society. Two of my predecessors referred to their bodies still bearing the scars. All I can say, Charlie, is you are an expensive person to know.

Now, looking back on the previous ten lectures, they cover some of the most interesting topics you could imagine in the field of international dispute settlement, starting with Johnny Veeder, whose premature death we all greatly mourn, talking about the *Alabama* case, and then going on David Caron's talk, again, somebody we have sadly lost far too early, on what arbitrators and adjudicators are really there to do, Daniel Bethlehem posing some very difficult questions about how international dispute settlement (IDS) might develop in the future, and Lucy Reed looking at how international dispute settlement can react to crises like the recent COVID pandemic.

This leaves me with a problem, how to say anything that has not been said already and said better. I thought I would take the theme of this year's annual meeting—the reach and limits of international law to solve today's challenges—and look at IDS in relation to it. That gives the opportunity for a stock taking on where we are and a chance to ask some hard questions which perhaps, as lawyers, we do not always ask sufficiently frequently. I am not going to talk about the criminal courts. They are a subject all their own. By dispute settlement, I mean, for these purposes, cases in which there is a dispute that turns on public international law between two parties—or more than two parties in some cases—who at least for the purposes of the litigation appear on the footing of equality.

And that will include, for example, national courts dealing with points of international law. One of my happy memories of the American Society is coming here for a conference and being told, as soon as I got back to England by my clerk that I was to appear in the *Pinochet* case in the House of Lords, then the equivalent of our Supreme Court today. And I said, "Oh great"—this was a Monday morning—"When?" "The day after tomorrow," he said. "Could you please come straight down to London?" So it gave me some experience of how to argue international law in a domestic court and how to do it with very little notice. The scars from that experience are even more marked than the scars from my last conversation with Charlie.

Now, if we look at the picture of international dispute settlement today, I think two features stand out. The first is its vitality; and the second, the variety of tribunals that are dealing with these matters today. Vitality? Look at the International Court of Justice, nineteen cases on its books at the moment. And look at the sort of cases it is dealing with today, and compare that with the 1970s, when it basically had nothing to do at all.

Interstate arbitration is more vital than it has ever been before. ITLOS, the World Trade Organization, the Iran-U.S. Claims Tribunal, the Ethiopia-Eritrea Claims Commission, now having finished its work, the UN Compensation Commission. The last thirty years have seen an

explosion of more cases, more important cases, and a wider variety of tribunals dealing with them. And that is at the interstate level.

Look also at what has been happening in cases between states and private parties, individuals, corporations. Again, the Iran-U.S. Tribunal, although now dealing with interstate work, spent most of its history dealing with cases brought by private claimants. In the human rights field, the European Court of Human Rights, whose jurisprudence, when I was a student, could be fitted into one volume, is now dealing with something like 40,000 cases a year and has been followed by the African Court on Human and Peoples' Rights, the Inter-American Court and Commission of Human Rights, the UN Human Rights Committee, and the specialist committees dealing with the various human rights treaties.

Investor-state dispute settlement, which was in its infancy when I was a student, has exploded with a number of cases and, indeed, a fair number of criticisms of that process. I will come back to that at a later stage.

And there has been an increased role for domestic courts as well. The first international case I was involved in, in Britain, was the *International Tin Council* litigation in the late 1980s. In one of those hearings, the judge said, "Ah yes, international law. I know about that. English law is law, foreign law is fact, international law is fiction." In the House of Lords it was worse with one judge suggesting that the banks and brokers who were the claimants should go to the International Court of Justice instead.

Within ten years, that had been completely transformed into an environment in which English courts at all levels were dealing with points of international law, and the same has been true in courts in a wide range of countries. On its face, international dispute settlement has never been in a better place, not to say it cannot be better still. But there is more of it, it is more important, it is more interesting.

That is the time to ask the difficult questions, and I want to ask three. First, are we expecting the wrong things from international dispute settlement. David Caron dealt with this in his Brower Lecture a few years ago, but I want to take it a little bit further. He rightly pointed out that the idealism of the very beginning of the twentieth century, which built on the *Alabama* arbitration, and saw arbitration and adjudication as the alternative to war, was always expecting too much. The history of the next fifty years vividly made that point. International courts are not peacemakers. International courts can contribute to peace and often do, but they are dealing with an individual isolated legal dispute. They cannot be expected to act as some kind of mediator on the broader political environment of that dispute.

International courts—quite rightly in my opinion—have taken the view that the fact that the dispute before them has a broader political environment is not a reason for not dealing with the legal issue. But they have held that the legal issue has to be isolated. It cannot be muddled up with political mediation. Now, in one sense, that is a great advantage of the international legal system. It levels the playing field between the parties by isolating a legal issue and dealing with the parties on a footing of equality. By contrast, once you get out into the wider political realm, the more powerful state is always in a much stronger position. Look for an example at the *Rainbow Warrior* litigation. The legal issue isolated and dealt with placed New Zealand and France on a footing of equality. The broader political issue, with France just dropping a hint about the New Zealand butter concession coming up for renewal in the European communities (as they were then known) was a very different matter indeed.

Nevertheless, that does mean that we often overestimate what can be achieved by an international court. Even in a relatively minor dispute, it is unlikely to bring peace just through a single judgment. Of course, it can do so; the *Alabama* is a striking example of that, because the years running up to the arbitration saw Britain and America come closer to war than they had been

since the British burned the White House. The effect of the award was to lance a boil that might have poisoned relations between them for a generation or more, and you only have to look at some of the longer running disputes, for example, in Latin America, to see how what, from the outside, can appear a relatively minor dispute can have a totally distorting effect in terms of relations between two governments.

But that depends on a willingness on the part of the two states to accept third-party adjudication and to live with the result of that adjudication. Britain paid up immediately in respect of the *Alabama* case. But had the case gone the way that some people in America had hoped, with the indirect damages claim, which in today's money is hard to compute, but something like 3 trillion U.S. dollars, there is no doubt the British would have walked away from the case. They could not have afforded to do anything else.

You have to see this in a reasonable perspective. That is particularly a problem in the International Court of Justice, because the nature of its jurisdiction means that very often it can only deal with a part of the legal dispute. If you look at the two Genocide Convention cases between Bosnia and Serbia and Croatia and Serbia, there is no question that either could have raised a serious legal dispute about breaches of the Geneva Conventions, breaches of the United Nations Charter, any number of other issues. But the court only had jurisdiction to rule on the genocide point.

That is something that I confess haunts me, because I sat in the *Croatia v. Serbia* case, and I can remember one of the witnesses saying at the end of her testimony, "Who gave them the right to walk peacefully into my village, to destroy my house, to kill my brother, to ruin my sister, to deprive me of half of my life and to kill so many of my villagers … I am asking who gave them that right ?"[1] And I thought, we are never going to be able to answer those questions, because our jurisdiction is confined to deciding whether or not what took place was genocide. That is a prime example of the difference between expectations and reality.

If you look at that list of cases currently before the International Court of Justice, most of them are very different from the cases where the legal issue sits on its own. There are some very high stakes, complicated political considerations behind at least half of the cases currently on the agenda of the court, and that inevitably means that expectations of what the Court will do will be very different from what it is actually able to do.

I also think an international court should not be seen as the way of righting a perceived wrong from long ago. If it behaves like a court, it will apply the law in force at the date the events in question happened, however distasteful that law might seem to us today. If it does not do that, it has no business calling itself a court at all. It is instead trying to rewrite history.

Nor, I think, should we expect an international court or tribunal to be the prime agent for change. Of course, every time a court or an arbitration tribunal gives a judgment or award, at least if it is public, it is refining and developing the law. It will make a difference to how we see the law hereafter.

But whereas American society can survive both *Roe v. Wade* and the reversal of *Roe v. Wade*, I am not so sure that international society could do so. I do not think it has the degree of cohesion to be able to cope with that kind of change being legislated, in effect, by a court of law. And while I think the decision of the General Assembly to seek an advisory opinion on climate change is very interesting and it may produce some very fruitful results, I strongly suspect that people will expect a great deal more from that advisory opinion than the Court is going to be able to deliver. There is a real danger in that, because if we expect too much, through litigation, it takes the attention away from other things that need to be done. Anyone who imagines that the request for an advisory

[1] Transcript, 2014/8, at 24.

opinion means we can all down our pencils as far as climate change is concerned and stop looking at other means of developing the reality, not just the law, is living in Cloud Cuckoo Land.

Now, let me turn from that to my second hard question: Does the variety of international dispute settlement mean it is actually a recipe for chaos? Do we really have an international legal system when it comes to dispute settlement? You have the International Court of Justice taking one view about state responsibility and being contradicted by the International Criminal Tribunal for the former Yugoslavia (ICTY), which, for reasons best known to itself, decided it needed to opine on a subject that did not actually arise in the case in front of it. You have the European Court of Justice in the *Achmea* and *Komstroy* cases taking views about, first of all, bilateral treaties and then the Energy Charter Treaty (to which more than a third of the parties are not EU member states anyway) and doing it on the basis of principles of EU constitutional law rather than general international law. You have the constant risk that a human rights tribunal is going to take the position that it must apply the text of the human rights treaty without regard to what the rest of international law might have to say. You could say the same, perhaps, about investor-state tribunals, ignoring environmental law, as we have just heard from the previous panel.

And you have the complete divergence of views about whether a most-favored nation (MFN) clause in a bilateral investment treaty (BIT) can alter the jurisdiction of a tribunal, a subject on which, in a lecture to honor Judge Brower, I am going to tread very carefully indeed.

Now, we all like the idea of law being a system, especially those of us who are or have been academics. We like the bits to fit together neatly. We like to complete the jigsaw. But I do not think we actually need to do that in international dispute settlement. I think the danger of chaos is greatly overrated. One of the reasons why the dispute between the ICJ and the ICTY about state responsibility gets trotted out in every article about fragmentation of international law is that it is the only clear example of its kind, and it has made almost no difference whatsoever in practice to the development and application of international law.

In the world of human rights, the International Court of Justice in the *Nuclear Weapons* case went a long way to reconciling international humanitarian law with the global human rights treaties. The European Court of Human Rights very bravely has done the same with a much more difficult treaty because of the difference in wording. Unlike the covenant, for example, which talks about arbitrary detention or arbitrary taking of life, the European Convention prohibits detention, prohibits taking of life, and then lists some very narrow exceptions to that general prohibition. But in the *Hassan* case, the European Court of Human Rights by a majority of six to one decided that provided that somebody who was taken prisoner as a prisoner of war was treated in accordance with the Prisoner of War Convention, there would not be a breach of Article 5 of the European Convention. And in *Jones v. United Kingdom*, it took a broadly similar view about state immunity and human rights.

I think it is not unreasonable to say that the risk here has been overstated. It is also worth asking, what could we actually do if it was not overstated? There were some suggestions about twenty-five years ago that the International Court of Justice could be a final court of appeal from every court or arbitration tribunal applying international law. The President of the International Court is not here today, but I imagine that her in-tray would look rather intimidating if that were to be the case. Or possibly the ICJ could be a court of reference, like the European Court of Justice, to which national courts could refer for a preliminary ruling on a point of international law. That strikes me as an even worse possibility, and neither strikes me as even remotely likely, since it would require an amendment of the statute and, thus, of the Charter of the United Nations.

But while we have to recognize, I think, that the risk is not as great as it has been suggested and that the way of dealing with it is pretty limited, let us not underestimate the difficulties. Twenty arbitration tribunals hearing cases against Argentina divided almost equally between those who

said MFN clauses did expand their jurisdiction and those who said they did not. In many cases, the difference between tribunals concerned the same BITs. That does no credit to any system of international law, however varied and diversified.

My third question is perhaps the hardest of them all. Is the growth of international dispute settlement necessarily a good thing? Now, even to ask that question, especially to ask it here, is surely an example of heresy, for which in an earlier age I would probably have been burned in front of the bookstalls outside. It is also a prime example of somebody who has made his living out of international adjudication, breaking his own rice bowl. So it will not surprise you to hear me say that on the whole, I think the increased use of international adjudication has benefited international society and not just international law and its lawyers.

But Oscar Schachter, in a later round of the *Lockerbie* case started his speech by saying, "There's an old saying: to a shoemaker, there is nothing like leather, to a lawyer, there is nothing like a court."[2] But the truth is that you can make shoes out of things other than leather, and if you ever tried fishing in a deep water river or wading through the puddles in Wellington Boots, you will know that leather is not always the best thing from which to make a pair of shoes. And a court is not always the best way to resolve a dispute, even if it has a legal content.

Let us look briefly at some of the possible dangers. First of all, I think there is a real risk in trying to strain jurisdictional provisions in treaties, to accommodate a case which is actually about something different. States, it seems to me, are entitled to know what it is they are signing up for when they sign up for it. They are entitled to do it, because not to do that is unfair, but also, if states feel that they are being cheated and that jurisdictional provisions are being given a distorted interpretation, there is something else they can do. They can just leave. And I think there is a danger that those of us trained in a domestic law environment, as we all are, where compulsory adjudication is taken for granted, we overlook the fact that states have other options.

Look at how many states have withdrawn their declarations under the Optional Clause after they have lost a case in the International Court of Justice. An interesting example, in which I sat as a Judge, is the *Temple of Preah Vihear*. After losing the first case, Thailand withdrew its acceptance of the Optional Clause. When, some fifty years later, Cambodia came back to the Court, it could do so only by way of a request for interpretation of the earlier judgment. That is, again, an example of the divergence between expectation and reality, because lots of people expected the court, essentially, to draw a workable boundary between the two states. But we did not have jurisdiction to do that. All we had jurisdiction to do was to work out what our predecessors had meant fifty years earlier.

I think there is a real danger also in playing fast and loose with temporal limitations on the jurisdiction of international tribunals. A state, or indeed any other party, ought to be able to know that in accepting a voluntary jurisdiction, it is not exposing itself to a vast and impossible array of litigation about the past. That is particularly important in international law because we do not have a statute of limitations. There may be individual provisions in particular treaties, particular statutes of courts, but there is no overall rule that you have got to bring your case within three years, six years, sixty years, or six hundred years, and frankly, we are not in a position to go back and rewrite history. Indeed, there is a danger that is not spotted by those who want to see a radical development of international law. It is much easier to do that if you are doing it for the future or for the very recent past. It is a great deal more difficult if you are untying the arrangements made at the end of World War II or World War I or the Crimean War, for that matter. Go back as far as you like. A limitation, whether it is in the acceptance of jurisdiction or some general rule of international law that you

[2] Transcript, 1997/19, at 31.

must bring your case within a reasonable period of time, is something which actually facilitates the development of international law, rather than hindering it.

The second area where I think we need to ask, is it really such a good thing, is the willingness on the part of some courts to confuse issues of jurisdiction with issues of merits. Anyone who has been a judge or, for that matter, a litigator has been there. If the merits of the case are overwhelmingly in favor of one party, it is a huge temptation to find that you have jurisdiction and not throw the case out on a preliminary ground. The European Court of Justice, very radical on some things, when it comes to judicial review of the institutions, the political institutions of the European Union, has too often allowed the merits to color its view of jurisdiction, even though its view of jurisdiction in such cases has generally been extremely constrained.

I think you see that, in particular, in the way in which *jus cogens* is trotted out as a concept, which can be used somehow to override a jurisdictional limitation. A particularly graphic example of that was the way in which many people were critical of the Court's judgment in the *Congo v. Rwanda* case, where one of the arguments by Congo—and I should declare an interest, I was counsel for Rwanda in this case—was that the reservation made by Rwanda to the Genocide Convention, whereby it did not accept the provision on international court jurisdiction, should somehow be overridden by reference to a concept of *jus cogens*. The Court rejected that argument, but it is worth looking at what a scandal it would have been if the Court had gone the other way, because only a few years earlier, it had automatically struck off cases against Spain and the United States brought by the Federal Republic of Yugoslavia, where precisely the same argument about *jus cogens* and the reservation to the Genocide Convention had been used. To uphold that reservation in a case against the United States and then to reject it in a case against Rwanda, a country that had itself suffered genocide, rather than just being one where the subject is written about, would surely have been inexcusable at any level.

You see it also in some of the arguments raised in the *Germany v. Italy* case about sovereign immunity, and in the *Jones v. Saudi Arabia* case in the United Kingdom. I do not think it is acceptable for courts to confuse questions of merits with questions of jurisdiction, and there are still too many, I fear, who are willing to listen to the siren song that we should do that. I have grave reservations about the United Kingdom Supreme Court's decision in the *Wong* case on diplomatic immunity and the trafficking of a domestic servant. To hold by a very narrow majority that bringing in a servant whom you are not properly paying is engaging in a commercial activity, whereas the ordinary employment of a servant would not be commercial, I find a little difficult to understand.

Lastly, one comment about the danger that might be there in the growing role of domestic courts in hearing cases on international law. There are many cases which national courts have to hear that involve international law. The Venezuelan gold dispute between the two claimants to be the Government of Venezuela could only have been heard in the United Kingdom, because that is where the gold is deposited. The *Pinochet* case, though it might look like an example of far-reaching extraterritorial jurisdiction, actually turns on whether we take seriously or not the jurisdiction provisions in the Convention Against Torture. General Pinochet's argument that he was entitled to immunity because what he had done, he had done in his official capacity is an argument that could be raised by any official of any government or any former official. And since the Convention Against Torture applies only to those acting in an official capacity, to accept that argument would be to negate the jurisdictional provisions of that Convention.

But is it sensible for national courts to set themselves up as a kind of court of claims for dealing with disputes that have nothing to do with that country whatsoever, especially since when they do that, they do not always get their international law right? I think if one looks at some of the alien tort claims cases, they leave you with a rather uncomfortable feeling that this was not actually international law that was being applied. Indeed, I gave an expert opinion, along with the late Professor

James Crawford, in one of those cases, and in the next round of pleading, the other party lambasted what we had said arguing that "the British professors have not cited a single instance of Second Circuit international law."[3] There is no such thing as Second Circuit international law. There is international law. If the Second Circuit cannot get it right, so much the worse for the Second Circuit.

The reach of international dispute settlement and its limits is a subject that we need to look at more carefully than we have tended to do in the past. It calls for a degree of idealism. To quote Robert Browning, "A man's reach should exceed his grasp, or what's a heaven for?" But it also calls for a degree of realism. We should not pretend that international courts and other methods of dispute settlement can do things that in fact they cannot. We should not put all our faith in dealing with a problem like climate change into the lap of an advisory opinion requested by the General Assembly. We should not pretend that every court that deals with a point of international law is going to get it right, and that is why I am so much in favor of the Judicial Outreach Program of the Society, because it is important that a judge who spends most of their time dealing with something completely different, confronted with a point of international law, is given the equipment, the material with which to resolve it.

Idealism on the one hand, realism on the other. International dispute settlement has come a long way in the time I have been a member of this Society. It will, I think, go very much further in the time that the younger people here in this audience will, I hope, still be members of the American Society.

But let us not go too far beyond its reach and its limits.

[3] I never dared to ask James Crawford, a proud Australian, how he felt about being thus described.