In Conversation with Judge James Crawford,

Judge of the International Court of Justice

Australian Bar Association Conference

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Will Alstergen QC: Ladies and gentlemen, now we're in session. I'm delighted that His Excellency of Justice, Judge Judge Crawford, is with us today. Thank you so much. I'm terribly sorry for the delay at Heathrow Air, but we are delighted to have you.

Can I introduce Dominique Hogan-Doran SC, who is the Australian Bar Association's representative on the Law Council of Australia and in itself, obviously a very successful and very well noted SC in Sydney to introduce our special guest.

Hogan-Doran SC: Thank you, Will. Well, we're more fortunate than we realise to have Judge Crawford with us today, given his travails coming through Oslo to Heathrow today and then through to Cambridge tomorrow, but we're very grateful to have you join with us today back with your fellow brethren and colleagues at the Bar.

Judge Crawford: Absolutely.

Hogan-Doran SC: Judge, you were elected as only the second Australian to the International Court of Justice in February 2015. Of course, other Australians have acted as ad hoc judges from time to time, including the Honourable Justice Ian Callinan, who is here, or was here earlier today.

Your predecessor, Sir Percy Spender, served as a judge of the Court from 1956 and was indeed president of the court between 1964 and 1967. There are some interesting contrasts and parallels between the two of you.

In terms of contrast, of course, he was a politician and a diplomat before his election, and you of course came from an academic and principally jurist background, but what does bind you is that you were both members of the New South Wales Bar. Given that this is the Australian Bar Association conference, I thought we would begin by discussing, notwithstanding you having been primarily an academic and a jurist by training, and perhaps by disposition, why did you pursue admission to the Bar in 1987 and then silk in 1997?

Crawford J: Well I grew up in Adelaide, enough said. I'm very fond of Adelaide, my brother says it's a good place to have come from. I didn't think that a career at the Bar in Adelaide was what I wanted to do. I was interested in

international law, and that certainly wasn't something I could do in Adelaide except as an academic. So, I came here to do a doctorate and went back to Adelaide to teach, went to Sydney to work for the Law Reform Commission, and was developing some practise in admiralty and constitutional law, but I always did want to combine academic and practical work from the beginning, even though it took a while for that to happen, and it's not something that happens automatically.

But I had the good luck to be elected to the Chair of International Law at Cambridge in 1992. There's a tradition of the professors there mixing the two, and that made, although I had some international practise before then. A couple of cases involving Australia, one for, on against, both which we won.

The English Bar proved to be a congenial place; I was one of the founding members of Matrix Chambers and was admitted to the Bar here. I had been admitted to the Bar in Australia, and became a Senior Counsel in Australia. Partly as a form of identification. I never took silk in England, because I wanted to be identified as Australian. I still am even though I don't sound very Australian, even though I've been here for a long time, I'm sole national Australian, that's where my heart is and where many of my cases were. It was a combination of desire to combine to two and affiliation with Australia.

Hogan-Doran SC: But you began as an academic in Adelaide, what drew you to the area of international law?

Crawford J: Partly it was a reaction against fitting myself in a rather small society at the time. Although [South Australian Premier] Don Dunstan was making it a bigger society at the time, that also helped. Partly it was the feeling that something was going to happen and it did, globalisation and its discontents, which we're seeing in spades right now, and the feeling that if we were going to try and solve at least some of the problems that the world collectively has, we were going to have to do it beyond national legal systems.

National legal systems have to be involved, but they can't do it alone, so international law was a natural area, one that I was very interested in. My interest goes back to 1962, the Cuban Missile Crisis and the feeling that there could've been thermonuclear war, which we know now to have been true, there could have been, and the feeling that we've got to do something to arrange these things more sensibly than we have done, so that was the real reason - and a lot of good luck.

Hogan-Doran SC: I know when I met with you in April [in the Hague] I asked you did you imagine when you were starting out as an academic in Adelaide, that you'd ever end up as we were in the Hague at the ICJ.

Crawford J: Well the Australian Government, for good and through, identified that the possibility of an election to the Court at a fairly early stage. They asked if I would be prepared to stand for the International Law Commission, which I did in 1991, while I was still based in Australia, and that was really as a

precursor to a possible nomination to the Court, so it was long term thinking. In electoral things like this, you do have to think in the long term. I was a member of the International Law Commission, the first Australian ever to be on that body and still would be the only Australian for 10 years. I did some work. I did a first draft of the statute of the International Criminal Court, and completed the work on safe responsibilities, so I had a productive ten years and after that the government started to prepare a campaign for the Court.

So, it was a long term thing and Australians can do it. My feeling, the feeling I might have had in Adelaide that Australians couldn't do it, is completely wrong. Many Australians have done it.

Take one example of the Jessup Moot Competition. Australian lawyers have won that competition more than any other country in the world - including the United States. I sent the first Australian team to the Jessup in 1976, and since Adelaide of course has never won it, we came second, but Sydney has won it numerous times, Melbourne has won it, ANU has won it, Queensland has won.

Hogan-Doran SC: That's five times and I think Sydney has won it the most [Hogan-Doran's university]!

Crawford J: Sydney is the top. Australian teams have been formidable in the Jessup. I judged the final of the Jessup this year with a wonderful Australian team from Sydney, if they hadn't have been wonderful they wouldn't have won, because they were again Jamaica, and for a Jamaican team to get that far was really something, but they were terrific.

That's an example and you've seen many other examples in the field of international arbitration. There are quite a few Australians working in that field, and generally in academic international law as well. Including, I'm pleased to say, without any support from me, my daughter, Emily, who teaches International Law at Sydney. I told her I didn't want her to be a lawyer. I told her I didn't I want her to be an academic. I told her I didn't want her to do international law. See how much attention she pays to me!

Hogan-Doran SC: Is it necessary though, for someone who wants to practise on the international stage, or in international law, or supra national law to be based in England, or at least in Europe?

Crawford J: It helps, but is not essential. You've got people like Michael Pryles, or Campbell McLachlan. Campbell, admittedly a New Zealander, not an Australian, but was based here for some time. Michael has never been based here, but has a substantial arbitration practise, and it can be developed.

People often ask me how you get to present cases before the international court of justices, and the answer is quite simple. You just have to have done it once before, and I, well, and then you get more often is what happens, so you've got to take the chances as they come, and with luck, they will come.

Hogan-Doran SC: You said earlier that you, you wanted to have and retain “SC” to distinguish yourself from, perhaps, English QC's. Was it important as part of your practise, I know you were in at least 100 international law cases either as counsel, or an expert, or an arbitrator before you were elected to the Court. Was it important to, and a distinguishing factor that helped you, build a practise by being Australian?

Crawford J: Yes it was. Matrix is a very cosmopolitan place. It has a specialisation in international law and arbitration and it was helpful to be Senior Counsel in that framework with other people from Matrix, and, and I appeared a few times in the High Court, as in the House of Lords, rather, with being a Senior Counsel, having been recognised for that purpose. So, it was helpful, but for me it was a mark of identification.

Hogan-Doran SC: Is there an aspect of independence or non-alignment that is somehow perceived in relation to Australians?

Crawford J: I'm not sure. I think it's based on individuals and Australians are regarded as pig-headed and independent, which is not the same thing as non-aligned, but might be a substitute for it.

I've worked a lot for Third World governments, but I've worked a lot for First World governments. For Australia, for Canada, for various European countries, and I think, in the end, they've got a lot of individuals who can help them.

Hogan-Doran SC: Does the cab-rank rule work? Does it operate at the international level?

Crawford J: Well, it only operates if you come from a jurisdiction which operates it. Many international lawyers don't and it operates with certain exceptions.

It was never a problem for me. It meant, in a way, I was more inclined to work for the claimant than the respondent in international cases because the claimant came first. The claimant knew they wanted to start a case. Occasionally governments would predict that they might be the subject of litigation and would ask you to help them in advance. But those are very good governments, very well organised. Whether or not the litigation actually occurs, at least you've got a chance to advise them and mould the way they behave.

There's nothing worse than having a respondent state, ring you up and say, "Such and such a disaster has just happened, what can you do about it?" Because at that stage there may not be very much you can do, so it's a question of judgement of individuals.

Hogan-Doran SC: Did you appear for a claimant against Australia first, or-

Crawford J: I appeared for the government of Nauru against Australia in a case concerning phosphate lands, which we won with $103 million in damages and costs. I then appeared for Australia against Timor, sorry, against Portugal.

Hogan-Doran SC: Portugal, mm-hmm (affirmative).

Crawford J: I later on appeared for Australia against Timor. First of all, it was Portugal in relation to the East Timor dispute, which Australia won on a technicality, and I do emphasise technicality.

Hogan-Doran SC: Do international counsel appearing before tribunals such as the International Court of Justice and perhaps other tribunals like the Permanent Court of Arbitration, which you also sit and hear cases on. Do they have the same kind of, or same degree of forensic manoeuvrability or judgement that they can exercise independently as counsel when they're retained by governments in such a forum?

Crawford J: It depends a bit on the government, but the short answer is no. Everything you do has to be done with approval and the approval sometimes doesn't come, or it takes a while to come.

I remember in a case where I wanted to argue maritime limitation. I wanted to argue in the alternative because our main case on maritime limitation was absolutely hopeless and if we stuck to it, we were going to lose 100%, so I wanted to argue a more tenable line, and it took about six months to persuade the government to ours, to do that, and we got a tenable line, I think. And so, you are subject to a process of instruction, which is more strenuous than you would get in international court on a standard commercial case, but you do have some room for manoeuvrability, because in the end you are arguing a case before the court, or before a tribunal, and you've got to come up with responses to what's been said, so there is, you're still acting as an advocate with all the challenges and pleasures and hardships that that involves.

Hogan-Doran SC: Does that mean that to some extent you're more bound or more, need to be more closely tethered to the written submissions that are filed, and that's lead to, perhaps, less development of the oral advocacy tradition, or is that more a consequence of say, the civil tradition in international law?

Crawford J: A bit of both. The civil law tradition and the styles in writing. International tribunals get the worst of both worlds. They get a lot of writing, a lot of oral argument as well. Of course, the common law is moving toward often very long skeleton arguments. The difference is less than it used to be. I'm still a great believer in oral argument.

When you get bad oral argument, and I'm surprised at some of, at how bad some of the oral argument one hears is, but an arbitrations on the floor of the court. It means that you've got to do the work for yourself as a judge, if you're going to be fair to the parties and you've got to be fair to both of them, including the one who's argued the case well, that presents many difficulties.

The merit of good oral argument is that it brings the case together in a way, which is important to the client. It accentuates the client's interest in the case and the people who you're working to generally move up a couple of

echelons in the hierarchy once you get to the oral stage instead of working to the deputy undersecretary, you're working with foreign minister, and that's a virtue in terms of making concessions. You sometimes have to, in effect, give an undertaking to the court about something as we did, for example, when East Timor sued us. Timor Leste sued us in respect of the seizure of government documents by someone who spoke to you this morning, the current Attorney General ordered the raid on the Canberra lawyer of Timor Leste, and we were, we were dragged before the court and we had to give an undertaking as to what use would be made or what use would not be made of these documents in the meantime, so quite a lot of effort went into making those submissions.

Hogan-Doran SC: You've had the experience now of both sides, of both being counsel and as a judge. One of the questions that was put to Baroness Hale in the earlier session this morning concerned judicial intervention and the amount of judicial intervention. She spoke of her court being quite activist in relation to engaging with counsel and asking questions.

My impression is that that tradition is not as strong, if at all, historically, on the international court, but is that still true, or was it never true, or does it depend on the makeup of the court, or the kind of questions?

Crawford J: Well, a bit of all of those things. There's far less questioning in the court than there is in arbitration. In arbitration, you often get quite intensive questioning.

I remember a case brought by Mauritius against United Kingdom in relation to Chagos Archipelago, an arbitration about the fishing zone around the Chagos Archipelago. I was subject, as counsel to, for Mauritius, to extraordinarily intense questioning. That doesn't happen in the court.

On the other hand, there are occasions when you get something to that effect. For example, in the Whaling Case brought by Australia against Japan, I was counsel for Australia, there were some, quite some questions from the bench and it was assisted by the fact that there was all evidence given by experts on the scientific value of the Japanese whaling programme, and that, I think, inspired the court to ask some of their own questions from the expert, which was very helpful. So, it's something that some of us on the court are trying to develop.

It's difficult with the court of 15, coming from different traditions, in which there's not a lot of prior discussion of the issues, and one of the surprises, having practised for the court for 20 years I was very surprised to become a member of it and find it wasn't at all like I expected.

One of the things that wasn't like I expected was that there's not much prior discussion of the issues. Most of the discussion occurs afterwards and then it's quite intense, but I think there should be more prior discussion and that's another thing we're trying to, some of us are trying to do.

Hogan-Doran SC: Is that a consequence of just the mix of traditions or there's an assumption that there ought to be the states and the claimants ought to be able to put their case first?

Crawford J: Entirely deference to the parties, which is a strong factor in the court, but it's true in arbitration as well. My experience is that there's not much in treaty arbitration and their sort. There's not much prior discussion by the tribunal who pleads, maybe a day. One of the reasons, from a Counsel's point of view, for interlocutory proceedings, which become much more common in international arbitration is that it helps the bench or encourages the bench to get to know the case. Provisional measures application or a contested application with discovery of documents is a way in which the bench familiarises themselves with the case, and that's a good thing.

Hogan-Doran SC: Jumping around some of the topics, and this is the mistake of giving you the posed questions beforehand, you've anticipated quite a number of them, one of the questions drawing together what you said was, what makes a good international advocate? Assuming you've seen enough and many.

Crawford J: Yeah, I've seen some very good ones. You've got to have good grounds for the general area, so you can put the case within its proper framework. You've got to have good technique. I was very fond of humour as a way of communicating with the bench.

My favourite example, well, I'll give you two examples. These are two favourite examples. In the Kosovo case where I was counsel for the United Kingdom, the question was whether the Declaration of Independence was unlawful under international law, and in the front of the court, I declared the independence of South Australia, and I said I was disgruntled South Australian, I hereby declared the independence of South Australia. I said, "I haven't done anything unlawful. I may have done something ineffective."

Hogan-Doran SC: There's a member of the South Australian Parliament here [Vicki Chapman MP], she may have some views on the declaration!

Crawford J: Nothing unlawful, the court, that's what the court said and I think that's probably enough of an example, so humour is good, but focusing on the real issues. Having the insight into what really matters, not going off into detail on peripheral issues, things like that, but that's true of all advocacy.

Hogan-Doran SC: You said it was important to place the argument in the context and one of the things that you did, going right back to the beginning, when you were, for example, Dean of that Sydney Law School was to make International Law a compulsory element of the curriculum. Is international law more or less relevant for practise and for practitioners today? Is globalisation changing the way in which we need to engage with international law and apply international law?

Crawford J: Well, I suppose it is, to some degree. The international law we made compulsory included Conflicts of Law, a course which was a hybrid, probably some public international, some part international law. I think the decline of

Conflicts of Law as a subject of education was something I regretted very much compared to when I studied.

Globalisation takes a lot of forms, and it's not always public international law, but it still goes beyond particular jurisdictions. I was talking to Paul Hayes before we started about sports law. Sports law didn't exist to any intent or any intent 30 years ago, it's now quite important, and it's, it's the governing law. If you have a question of disqualification or whatever drug taking, whatever it is the governing law is the international law of sport. It's directly enforceable under the New York Convention, and not everyone does it, but if you do it, you've got to understand how it fits into the framework.

The same is true of various trends of arbitration, so it's a bit patchy. Not everyone does public international law, but you need to know it's there, and maybe to recognise it when it happens, and there's, to understand the bits, what, how what you're doing fits into the overall framework.

Hogan-Doran SC: Globalisation may be a reality, but in political discourse it's increasingly, for some, an unhappy reality, and we've seen quite some reactions, both at national levels and more microcosm levels across states.

In your recent Chorley Lecture for the Modern Law Review, you spoke about the current political discourse concerning international law and some concern you expressed that on some occasions it is, indeed, invoked, but increasingly in an antagonistic way. In other times, it's transparently ignored. Is there a pattern to all this and how do we respond in that context?

Crawford J: Well, we're going through difficult times, there's no doubt about that. We have Trump and the law that involves. President Trump, I should say, who's still finding his feet if that's the right description, and is causing considerable problems to other governments. He may have, there may be points on which he's right, I'm always one to ignore a possibility, though I think on the Paris Convention, he's certainly wrong. And then there's the President of the Russian Federation, who's obviously got his own views about things.

International law has been through some really tough times. It almost broken down completely in the late 30's. I don't think it's in a stage of almost breaking down now. I'm more optimistic than that. I think it's going through a difficult period and it's testing our allegiance not to international law as such. There's almost no one in the world, who's not an international lawyer, who has primary affiliation or allegiance to international law. It's one of the curiosity.

We have a primary allegiance to international law by association. International law is there in a supplementary role. So it's going through difficult times, but it does reflect certain values. In my view, it reflects certain realities about what the world needs to be, needs to have, if we're going to survive this century given the acute problems, which can't be solved nationally. There are more of those these days, global warming, there

is only, slightly older than, so a real problem, conservation and the environment. These problems can't be solved by unilateral action and international law is one of the ways reflecting that.

Hogan-Doran SC: I mentioned to you earlier that there was discussion, the Attorney General of England spoke of his work, together with the Australian Attorney General, on the doctrine of imminence. I, of course, appreciate the limitations that you have, in terms of speaking on something that may ultimately, potentially, come to the Court for determination. But speaking more broadly, how good is international law at adapting doctrines that were developed in an earlier period to emerging and new circumstances? For example, non-state terrorism and cyber terrorism and those kinds of challenges that we have in the modern world?

Crawford J: Well, non-state terrorism is obviously a major issue and exacerbated by the situation in Syria particularly and the situation in Afghanistan.

My personal view is that quite a bit of it has been caused by the mishandling of Western policy in relation to Iraq and, at least more generally, in the last 15 years, and I think that's created a problem.

President Trump said that invading Iraq was like kicking a hornet's nest, and on that I entirely agree with him. And it's caused all sorts of flow on effects. It's really easy to be pessimistic about the present situation, but it's almost an existential situation. There's almost an existential reality that we have very little choice, but to collaborate, if we're going to do certain things, and the need to do them is pretty, pretty flaming obvious. So, I think international law will come through, but undoubtedly changed.

The doctrine of imminence is, perhaps, one example. I can not say that much about ... I don't think the disputes over the use of force in recent times have been primarily caused because of disagreements about imminence. They're disagreements being about other things.

Hogan-Doran SC: But anticipatory use of force.

Crawford J: Well yes, anticipatory what? Does it [inaudible 00:30:06] Iraq having weapons of mass destruction? That wasn't in there. This is wrong.

Hogan-Doran SC: I think we're coming to the end of our allotted time. Much of international law has come from a state or states bucking the trend and asserting a right that they did not objectively have or exist. Can international law still evolve by states breaking old rules and making new ones? I mean, the way international law develops is, and this also's an international law, different to those as they apply within state, on a state level. How important are states acting separately or unilaterally, separately or together in collaboration important for the development of the future of international law? Responding to these kinds of issues.

Crawford J: You know interaction is part of the picture, but it has to be carefully considered, and it fails much more often than it succeeds. Unilateral action

taken with consideration of the interests of other states can produce significant results. My favourite example is the Continental Shelf case, which is the unilateral doctrine of state option, but it was consulted, the United States consulted with allies before proclaiming it and it met a real need, which was security of off shore title, consistent with feel and allegation, so it was a very clever move, very carefully planned. Unilateral in a sense, but in another sense not unilateral. Not in the sense that the United States, somebody went ahead and did it without consultation, so there are different forms of unilateralism and there's room for a bit, there are lots of wishes, as well international law might be and, and then there's what it is, and what it is tends to be more persistent than people think.

Hogan-Doran SC: So you're just past 2 years into your term. How long is your term? It's nine?

Crawford J: Nine, nine years.

Hogan-Doran SC: Nine years. So, still seven to go.

Crawford J: Yeah.

Hogan-Doran SC: Is it too much to ask what you hope to achieve during that period, even if it is just to get all the judges talking to each other?

Crawford J: The judges talk to each other already, but they could talk to each other more. It's a very difficult court to change because it's made of 15 people who've had independent careers not interacting with each other very much, necessarily, and having their own ideas as to what should happen, but I'd like to think some procedural reforms can occur. The Court, at present, has 17 cases on its docket. It's never had 17 cases on its docket in its history. In the last three years, 30 states have been part of cases before the court, and quite a number of them more than once. That's 15% of the states in the world, so it's a significant case load and the court, I think, is facing a challenge of dealing with it efficiently, and I hope they can improve the way we're doing that.

Hogan-Doran SC: I didn't ask whether I was able to take questions? I can take questions. I didn't ask you either, so perhaps I'd better not. Do you want to take a question?

Crawford J: If people have questions ...

Hogan-Doran SC: If anyone has a question, of course I haven't primed you all to do so, so I haven't actually arranged it. Fiona McCleod [President, Law Council of Australia]?

Fiona McLeod SC: Judge, a question about the Articles of State Responsibility and as much as you can, to give a view about where the minefields are for Australia?

Crawford J: Wow. The Articles on State Responsibility, which are engraved on my heart, will be found there when I die, and were a 40 year project, which I finished off in four years, and they're relatively neutral as to content, because they

apply to the whole of international law. They're not substantive, they're secondary rules. I haven't yet come across a situation in which what might be thought to be Australian interests come across the ILC articles. They're fairly libertarian on countermeasures, fairly libertarian, and perhaps that, I think probably consistent with Australia's position. So, I can't think of anything glaringly obvious.

One of the issues, which is still unresolved, is the question of attribution of state owned enterprises, the conduct of state owned enterprises. Again, I think Australia probably has interests on both sides of that questions, so.

Hogan-Doran SC: Any other questions? Well I know that we're running quite a tight schedule here and we appreciate you having come from Oslo via the Hague, and then on to Cambridge today.

I neglected to properly introduce you, but I wanted to mention that you were awarded the Companion of the Order of Australia in 2013. Are we right to be hopeful that upon the conclusion of your term at the Hague, you will return to Australia, finally?

Crawford J: Yes, that’s certainly my plan, but who knows what happens next? Something I wanted to do, I'm Australian, born Australian, I will die Australian.

Hogan-Doran SC: Please join me in thanking his Honour. [Applause]