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AFTER BAGHDAD: CONFLICT OR COHERENCE IN INTERNATIONAL LAW?

Campbell McLachlan*

This paper is the edited text of Professor McLachlan's Inaugural Lecture, delivered at the Victoria University of Wellington Law School on 2 July 2003. The lecture traversed some of the international legal dimensions of the recent conflict in Iraq against the development of international law generally. What are the implications of the Iraq crisis for international law? How can the increasing fragmentation of international law be avoided, and a new coherence be achieved in its place? What is the role for New Zealand, and its universities, in the development of international law?

I IRAQ AND THE CRISIS IN INTERNATIONAL LAW

On 20 March 2003, after they had failed to secure the support of the United Nations Security Council for a resolution explicitly authorising the use of force against Iraq, the United States and the United Kingdom launched a massive military offensive in Iraq.[1] In the space of a few short weeks, that campaign toppled Saddam Hussein's regime, and left the United States and United Kingdom in position as occupying powers.

The campaign represented a massive display of military might from the world's last superpower. It displayed an apparent disregard of respect for both the territorial sovereignty of another nation (however malign its government may have been) and for the authority of the Security Council as the central organ of multilateral security. In the face of this, many ordinary people have questioned the continuing relevance of international law in international relations. Is this, as one delegate to the American Society of International

* Professor of Law, Victoria University of Wellington. The author wishes to record his thanks to Rt Hon Justice Sir Kenneth Keith, Professor Vaughan Lowe, Duncan Currie, and Alberto Costi for helpful discussion in the preparation of this lecture, and to Andrew Townend for editorial assistance. Any errors are the responsibility of the author alone.

1 The campaign was also supported by a number of other states in a "Coalition of the Willing", of which Australia was a prominent member.

Law's 2003 Annual Meeting memorably put it, really the United States taking the Johnny Cochrane approach to international law: "If the rules don't fit then we must quit"?

Yet it is difficult to think of a crisis in modern times in which international law has been of such apparent concern to the states involved, and to the general public.

In the United Kingdom, the Government was forced to take the highly unusual step of releasing the opinion of the Attorney-General on the legality of the invasion of Iraq and a supporting paper from the Foreign Office, just two days before the commencement of hostilities.[2] The statement sought to justify the legality of the intervention in terms of existing United Nations Security Council resolutions. It was released against a background of public outcry against the war in Britain, and a public statement by many of the leading international law professors in the United Kingdom to the effect that the war would be illegal.[3] A senior Foreign Office legal adviser resigned shortly thereafter over the issue.[4]

The United States Government also placed reliance in its official communications with the United Nations on existing Security Council resolutions.[5] However, the debate on legality has taken on a more radical dimension in the United States. Following the events of 11 September 2001, the Administration has made an explicit attempt to shift the norms of international law, by claiming a new doctrine of "preventive war", which it seeks to derive from the pre-United Nations Charter notion of pre-emptive self-defence. Its *National Security Strategy* states:[6]

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2 Foreign and Commonwealth Office "Attorney General Clarifies Legal Basis for Use of Force against Iraq" (18 March 2003) <http:/ / www.fco.gov.uk/ servlet/ Front?pagename=OpenMarket/ Xcelerate/ ShowPage&c=Page&cid=1007029394383&a=KArticle&aid=1047661460790> (last accessed 25 September 2003).

3 "War Would Be Illegal" (7 March 2003) Guardian Unlimited <http:/ / www.guardian.co.uk/ letters/ story/ 0,3604,909275,00.html> (last accessed 25 September 2003).

4 Ewen MacAskill "Adviser Quits Foreign Office over Legality of War" (22 March 2003) Guardian Unlimited <http:/ / www.guardian.co.uk/ guardianpolitics/ story/ 0,3605,919611,00.html> (last accessed 25 September 2003).

5 UNSC "Letter from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council" (20 March 2003) UN Doc S/ 2003/ 351. A similar approach was taken by Australia: UNSC "Letter from the Permanent Representative of Australia to the United Nations addressed to the President of the Security Council" (20 March 2003) UN Doc S/ 2003/ 352.

6 White House *The National Security Strategy of the United States of America* (September 2002) 15. This document may be found at The White House <http:/ / www.whitehouse.gov/ nsc/ nss.pdf> (last accessed 25 September 2003).

> For centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack. …
>
> We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries. Rogue states and terrorists do not seek to attack us using conventional means. They know such attacks would fail. Instead, they rely on acts of terror and, potentially, the use of weapons of mass destruction—weapons that can be easy to conceal, delivered covertly, and used without warning.

The claim of both states to a legal basis for intervention in Iraq rested in turn on the accuracy of the factual allegation that Iraq continued to possess weapons of mass destruction.

Against this background, international law has entered into the common currency of public debate to an unprecedented extent. It is understandable in this context that the public has questioned the continuing role—even the very existence—of international law. The debate has exposed widely divergent views about how the future development of international law would proceed. Iraq has been perceived as a crisis, not merely in the sense of "a time of intense difficulty or danger", but also more fundamentally as a "turning point … when an important change takes place, indicating either recovery or death".[7]

This lecture will attempt to set these current burning issues against a broader canvas of the evolution in international law. It will examine first the pervasive impact of international law. Second, it will be necessary to look at the extent to which the very maturing of the system has also led to a degree of fragmentation and potential conflict between its constituent parts. Third, it will ask how international law may move towards a new coherence, and in particular what the implications may be of the current crisis in Iraq. The lecture will conclude with some observations about the role and potential future role for New Zealand, and especially for its universities, in the development of international law. It is indeed in New Zealand, at this very university, that this present journey of exploration into international law must start—on an evening much like this one on 1 August 1906.

II THE BURGEONING OF INTERNATIONAL LAW

It is well known that New Zealand's most famous jurist, Sir John Salmond, spent a year as Foundation Professor of Law at Victoria University College. It was perhaps less widely

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7 See the definition of "crisis" in Judy Pearsall (ed) *The New Oxford Dictionary of English* (Clarendon Press, Oxford, 1998) 435. I am indebted to Dr Caroline Foster of the University of Auckland on this point.

known, at least until Alex Frame's invaluable biography,[8] that, despite being principally known for his work in jurisprudence, tort, and constitutional law, Salmond was also an active and committed international lawyer. He appeared as counsel for New Zealand in a major international arbitration,[9] and as New Zealand representative on the British Empire delegation to the Washington Conference on the Limitation of Armaments.

Salmond chose to devote his Inaugural Lecture at Victoria on 1 August 1906 to international law. In it he stated:[10]

> The history of modern times showed that international law was not a dead letter. It was a living force that did in fact govern and control the actions of States and secured to a very large extent, the claims of justice, peace, humanity and honourable dealings; and no-one possessing faith in the future of humanity need doubt that the Law of Nations was destined to grow in strength and increase in stature until it dominated the whole society of nations just as the Law of the Land dominated the individuals of the community.

Salmond was speaking, of course, at a time of great optimism for international law following the Hague Peace Conference of 1899, an optimism which was to be dashed by the outbreak of World War I a mere eight years later. But, over the longer term, Salmond's words proved to be prophetic. At least after World War II, and in the course of the latter half of the 20th century, international law has grown exponentially to reach into almost every area of human affairs. It can no longer be said to be merely a set of rules of minimum conduct of states.

Four broad trends in the development of international law in the latter half of the 20th century may be identified: multilateralism, institutionalisation, judicialisation, and participation.[11]

A Multilateralism

There is nothing new in states' use of the treaty as a means of securing a binding contract between them, whether bilaterally or multilaterally. What is distinctive about the current scene is the unprecedented scale and range of treaties and the depth and

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8 Alex Frame *Salmond: Southern Jurist* (Victoria University Press, Wellington, 1995).

9 The *Webster* claim. See Frame, above, 133–153.

10 Professor John Salmond "If Germany Came to New Zealand", first published (1 August 1906) *New Zealand Mail* Wellington; reprinted (1999) 30 VUWLR 489.

11 Compare the typology adopted by Philippe Sands in his inaugural lecture "Turtles and Torturers: The Transformation of International Law" (2001) 33 Intl L & Pol 527, 537–543, identifying the four broad trends of globalisation, technological innovation, democratisation, and privatisation.

complexity of their coverage. New Zealand alone is or has been party to some 1,100 multilateral treaties and 1,450 bilateral treaties.[12]

Multilateral treaties reach into every area of human affairs. This now includes the private law arena, with such important instruments as the Vienna Convention on the International Sale of Goods 1980[13] and the many conventions concluded by the Hague Conference on Private International Law. Even the area of criminal law, traditionally resistant to internationalisation, has been the subject of substantial treaty-making efforts as states have sought to respond to the challenges of global drug trafficking, money laundering, and the international mobility of criminals.

Treaties such as those concluded in the human rights area have not only extended the impact of international law into ordinary people's lives. They have also provided a mechanism for individuals to participate directly in the international system through their ability to take complaints to bodies such as the United Nations Human Rights Committee.

Finally, modern multilateral treaties enshrine a regime in which the founding treaty operates as an umbrella agreement for a standing international institution or for a series of bodies, each of which has its own delegated legislation making power. Prominent current examples are the agreements establishing the World Trade Organisation (WTO) in 1994[14] and the United Nations Law of the Sea Convention 1982 (UNCLOS).[15]

B Institutionalisation

A second truism about the modern development of international law, closely allied to the first, has been its institutionalisation. This was of course part of the vision of the architects of the post-World War II settlement. There were to be three major standing institutions of international governance: the United Nations, the international financial institutions (especially the World Bank and the International Monetary Fund), and an International Trade Organisation. The latter of course took some 50 years longer to realise than its original proponents may have hoped. Nevertheless, the original vision of a triumvirate of major institutions has now been realised.

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12 Information provided by the Legal Division of the Ministry of Foreign Affairs and Trade (1 July 2003).

13 United Nations Convention on Contracts for the International Sale of Goods (11 April 1980) (1980) ILM 671. See also the Sale of Goods (United Nations Convention) Act 1994, s 4 of which gives the provisions of the Convention the force of law in New Zealand.

14 Agreement Establishing the Multilateral Trade Organization (15 December 1993) (1994) 33 ILM 13.

15 United Nations Convention on the Law of the Sea (10 December 1982) UN Doc A/ Conf.62/ 122; (1982) 21 ILM 1261.

Over and above these major systems of international governance, there are now a myriad of other international organisations dealing with particular areas of international concern or interaction. These include some very important regional organisations: the European Union, the Organisation of American States, and the African Union. They also include standing conferences of the states parties and secretariats on specific issues such as those devoted to the ozone layer[16] and climate change.[17]

C Judicialisation

The third trend identified is one of more recent hue. That is the blossoming of an international adjudicatory capacity. The objection traditionally raised by every undergraduate law student of international law was that its claim to be a legal system foundered on the absence of any comprehensive system of compulsory adjudication of disputes between states. It is increasingly possible today to provide a credible answer to this claim.

Of course the system of international adjudication remains partial in its coverage, both as to states' accepting such adjudication and as to the types of disputes which can be submitted. However, since the end of the Cold War, the International Court of Justice has seen an exponential rise in its general caseload. Other dispute settlement systems have experienced a like growth in work. For example, the International Centre for the Settlement of Investment Disputes (ICSID), established by the Washington Convention of 1965, had more cases pending or concluded in the 2002 fiscal year than in all 37 previous years of its existence.[18]

At least as significant as the rise in workload for existing tribunals has been the proliferation in recent years of specialist courts and tribunals. Sometimes these have been developed as an ad hoc response to a particular problem, such as for example the Iran/ United States Claims Tribunal or the United Nations Compensation Commission (dealing with compensation claims arising from Iraq's invasion of Kuwait). Others have been developed as standing tribunals integral to a new component of the multilateral system. Most significant amongst these has been the Dispute Settlement Understanding of

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16 See the 1985 Vienna Convention for the Protection of the Ozone Layer, arts 6, 7, establishing the Conference of the Parties and the Ozone Secretariat (1987) 26 ILM 1516; <http:/ / www.unep.ch/ ozone/ viennaconvention2002.pdf> (last accessed 25 September 2003).

17 See the 1992 United Nations Framework Convention on Climate Change, arts 7–11, establishing the Conference of the Parties and the Secretariat (1992) 31 ILM 849; <http:/ / unfccc.int/ resource/ docs/ convkp/ conveng.pdf> (last accessed 25 September 2003).

18 International Centre for the Settlement of Investment Disputes *2002 Annual Report* (2002) 4.

the WTO[19] and the International Tribunal for the Law of the Sea (ITLOS). Dispute settlement in the field of international trade law has significantly evolved from the informal mediation model of the old GATT panels to the sophisticated two-tier system of adjudication inaugurated after the Uruguay Round within the WTO. This example lends some weight to the proposition that a new "judicialisation" of international law is emerging.[20]

Consider the significance of this development in the field of international criminal law. Despite many determined efforts, the development of a genuinely international adjudicatory capacity to try international crimes had been essentially stymied by the Cold War since Nuremberg. In default of agreement on international adjudication, states had focussed their efforts in this area instead upon efforts to enhance the efficacy of national adjudication through treaties of cooperation.[21] Suddenly, in the 1990s, the dynamics of this area changed radically. First, the International Criminal Tribunal for the former Yugoslavia was established in 1993 as an explicit development of the power of the United Nations Security Council to issue enforcement measures under Chapter VII of the United Nations Charter.[22] What more visible demonstration of the growth and the power and capacity of international adjudication could there be but the sight of former President Milosevic in the dock before an international tribunal in the Hague? The establishment of the Yugoslav Tribunal was followed by a similar tribunal for Rwanda, in this case dealing with an internal armed conflict.

Finally, it was possible for states to agree on the creation of an international criminal court of a standing and plenary character. The Rome Statute for the International Criminal Court was adopted in 1998.[23] Even more surprisingly, it entered into force just four years later on 1 July 2002 on the ratification of the Statute by 60 states (including New Zealand

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19 See the Understanding on Rules and Procedures Governing the Settlement of Disputes (15 December 1993) (1994) 33 ILM 112.

20 For a recent study, see Andreas F Lowenfeld *International Economic Law* (Oxford University Press, Oxford, 2002) 135–196.

21 See Roger S Clark "Offenses of International Concern: Multilateral State Treaty Practice in the Forty Years since Nuremberg" [1988] Nordic J Intl L 49.

22 See the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, reproduced in Ian Brownlie *Basic Documents in International Law* (4 ed, Oxford University Press, Oxford, 1995) 456.

23 Rome Statute of the International Criminal Court (17 July 1998) (1998) 37 ILM 999. The text is reproduced, with an extensive commentary, in Antonio Cassese, Paola Gaeta, and John R W D Jones *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, Oxford, 2002).

and the United Kingdom). Judges for the new court were appointed in February 2003, including a graduate of this law school, Hon Neroni Slade of Samoa. The United States was an active participant in this process, and eventually signed the Rome Statute (although its support has now been notably withdrawn and reversed by the current Administration).

D Plurality in Participation

The fourth trend has been the increasing plurality in the participants in the international system.

It was the human rights movement which really broke the mould in this respect by introducing the notion of individuals as the subject of rights in international law. International human rights law then developed that notion in a practical context by providing for rights of individual petition to international human rights bodies, such as the European Court of Human Rights, the Inter-American Court of Human Rights, and the United Nations Human Rights Committee.

A further element in the increasing pluralism of international law has been the participation of non-governmental organisations in the development of international law, both through their formal recognition as observers in many international institutions, and also through the international adjudicatory process. The Appellate Body of the WTO[24] and arbitral tribunals under the North American Free Trade Association[25] have both accepted the possibility of receiving amicus curiae briefs from non-parties in disputes proceeding before them.

A third illustration of the plurality of actors in the international system may be found in the international law of foreign investment, where a hybrid form of adjudication has emerged in which states confer on corporations the right to pursue them directly for breach of international investment law.[26] New Zealand has, amongst other states, had

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24 WTO *United States: Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom—Report of the Appellate Body* (10 June 2000) WT/ DS138/ AB/ R WTO Online Database <http:/ / docsonline.wto.org> (last accessed 25 September 2003).

25 *Methanex Corporation v USA—Decision of the Tribunal on Petitions from Third Parties to Intervene as "Amici Curiae"* (15 January 2001); *United Parcel Service of America Inc v Canada—Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae* (17 October 2001). The texts of these decisions may be found at <http:/ / www.naftaclaims.com> (last accessed 25 September 2003). See also Dinah Shelton "The Participation of Nongovernmental Organizations in International Judicial Proceedings" (1994) 88 Am J Int'l L 611.

26 See Jon Paulsson "Arbitration without Privity" (1995) 10 ICSID Rev—FILJ 232; John Collier and Vaughan Lowe *The Settlement of Disputes in International Law* (Cambridge University Press, Cambridge, 1999) ch 4.

direct experience of this system in the *Mobil Oil Corporation v New Zealand* arbitration, which concerned a concession agreement for the production of synthetic gasoline from natural gas in New Zealand.[27]

III THE FRAGMENTATION OF INTERNATIONAL LAW

These trends represent a huge growth in the complexity of international law. They are symptomatic of a maturing and professionalisation of the legal system from one characterised by partial coverage, intermittent application, and a weak institutional and judicial base towards a system that is wider and deeper in its coverage. But the very complexity and range of modern international law has also spawned its own problems.

It is perhaps inevitable, given the growth in the volume and depth of international law, that it has been divided for convenience into a number of specialised sub-disciplines. Thus, for example, international environmental law and international human rights law have become subjects in their own right. But the elementary virtues of this development in scholarship, which reflects the increasing complexities of international law in reality, carry the seeds of potential vice. At the scholarly level, it may lead to a loss of coherence between international law's constituent parts. Perhaps more seriously, there is a risk at the operational level of inconsistency and conflict between legal rules enshrined in conventions or between decisions of international tribunals.

Brownlie pointed out these dangers in 1988:[28]

> A related problem is the tendency to fragmentation of the law which characterizes the enthusiastic legal literature. The assumption is made that there are discrete subjects, such as "international human rights law" or "international law and development". As a consequence the quality and coherence of international law as a whole are threatened. ...
>
> A further set of problems arises from the tendency to separate the law into compartments. Various programmes or principles are pursued without any attempt at co-ordination. After all, enthusiasts tend to be single-minded. Yet there may be serious conflicts and tensions between the various programmes or principles concerned.

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27 ICSID *Mobil Oil Corporation v New Zealand* (1997) 4 ICSID Rep 140. See also the earlier judgment of the New Zealand High Court: *Attorney-General v Mobil Oil NZ Ltd* [1989] 2 NZLR 649; (2001) 118 ILR 622.

28 Ian Brownlie "The Rights of Peoples in Modern International Law" in James Crawford (ed) *The Rights of Peoples* (Clarendon Press, Oxford, 1988) 1, 15.

This issue of fragmentation has become the subject of learned symposia.[29] It has also been taken up as a specific topic of research by the International Law Commission.[30]

This lecture will develop this point by reference to five current examples, where different elements of international law have—or have threatened to—come into conflict with each other. These areas are:

(1) Expropriation of foreign investments and state regulation;

(2) Protection of the environment and promotion of world trade;

(3) Conflicts between tribunals;

(4) Immunity for international crimes; and

(5) Terrorism and human rights.

A Expropriation and State Regulation

Foreign investment protection has been one of the areas into which the development of an international adjudicatory capacity has reached deep in recent years. The judgment of the International Court of Justice in *Barcelona Traction*[31] had highlighted the enormous difficulties involved in inter-state litigation for expropriation claims. In light of the failure thus far to achieve any solution to these difficulties by way of a multilateral investment protection regime, states have turned instead to bilateral investment treaties to protect investment from expropriation. Typically, these treaties confer on the foreign investor a direct right of arbitration against the host state. The growing use of this arbitral process has led to a renewed focus on the content of the treaty rights protected, and especially on the central concept of "expropriation".

This concept may have been well-enough understood in the context of the outright nationalisations of the Libyan oil industry of the 1970s.[32] It could also be applied robustly

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29 See for example the collection of papers of "The Proliferation of International Tribunals: Piecing Together the Puzzle", a symposium held at New York University in October 1998, published in (1999) 31 NYU J Int'l L & Pol 679–933.

30 See International Law Commission "Report of the International Law Commission on the Work of its 54th Session" (29 April–7 June and 22 July–16 August 2002) UN Doc A/ 57/ 10 ch IX.

31 *Barcelona Traction, Light and Power Co Case (Belgium v Spain)* [1970] ICJ Rep 3.

32 *BP Exploration Company (Libya) Limited v Government of the Libyan Arab Republic* 53 ILR 297; *Texas Overseas Petroleum Company and California Asiatic Oil Company v The Government of the Libyan Arab Republic* 53 ILR 389; *Award of the Arbitral Tribunal in the Dispute between Lybian American Oil Co (Liamco) and the Government of the Libyan Arab Republic relating to Petroleum Concessions 16, 17 and 20* 20 ILM 1.

(although a more sophisticated analysis was required) to deal with the disguised de facto nationalisations of foreign investments in Iran after the Iranian Revolution of 1979, which were the subject of many decisions by the Iran/ United States Claims Tribunal.[33] But the concept of expropriation is much more difficult to apply in the modern context of exercises of state regulation, especially where that regulation is exercised to protect other public goods such as the environment.

The tensions inherent in this relationship between foreign investment law and other public goods (which may themselves have some international currency) may be vividly seen in the differing views taken by three arbitral tribunals in the course of the year 2000. In *SD Myers Inc v Canada*, the Tribunal said:[34]

> Expropriations tend to involve the deprivation of ownership rights; regulations a lesser interference. The distinction between expropriation and regulation screens out most potential cases of complaints concerning economic intervention by a State and reduces the risk that governments will be subject to claims as they go about their business of managing public affairs.

The apparently emollient tone of that passage may be contrasted with the award of the Arbitral Tribunal in *Metalclad Corporation v United Mexican States*, in which the Tribunal observed:[35]

> Thus, expropriation under NAFTA includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favor of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State.

A Tribunal chaired by the same distinguished arbitrator, Sir Elihu Lauterpacht, had decided earlier that year in *Santa Elena v Costa Rica*[36] that the fact that land had been expropriated from a foreign investor in order to preserve it as a national park in no way served to reduce the level of compensation to which the foreign investor was entitled.

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33 Reported in the Iran–United States Claims Tribunal Reports.

34 *SD Myers Inc v Canada* 121 ILR 73, 122.

35 *Metalclad Corporation v United Mexican States* 119 ILR 615, 638.

36 ICSID *Compañia del Desarrollo de Santa Elena SA v Republic of Costa Rica* (2000) 15 ICSID Rev—FILJ 169; (2000) 39 ILM 317.

These differences are fundamental. They are not to be explained merely by differences in view between arbitrators, still less by the fact that one of the arbitrator's decisions is to be dismissed as simply wrong. They reflect a deep current division in the views of international adjudicators as to the line to be drawn between conflicting principles.[37] In a currently pending ICSID claim, *Aguas del Tunari v Bolivia*,[38] the foreign investor's claim has become a focus for arguments about the fundamental right of the citizens of Bolivia to access to clean water.

B Environment and Trade

The second example of current conflict between elements of international law is to be found in the case law being developed by the Appellate Body under the Disputes Settlement Understanding (DSU) of the WTO on the interaction between international trade law and the protection of the environment. It is not possible within the compass of this lecture to do more than give a snapshot of this complex debate.[39]

In *Tuna–Dolphin I*,[40] a GATT panel had held that a United States ban on imports of Mexican tuna, which had been imposed on the ground that the fishing method adopted did not sufficiently protect dolphins, was contrary to the General Agreement on Tariffs and Trade (GATT). It found that the United States could have adopted other measures for achieving its objectives short of an outright ban on Mexican tuna and thus the measure was not "necessary to protect human, animal or plant life or health".[41] That decision (although never formally adopted by the GATT Council) was subsequently substantially confirmed by a second GATT Panel.[42]

That case may be contrasted with a judgment of the WTO Appellate Body in 1999 in *Shrimp–Turtle*.[43] That was a case concerning a very similar issue—a United States ban on the importation of commercial seafood in order to protect against the incidental killing of

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37 See now also *Feldman v Mexico* (2003) 42 ILM 625.

38 ICSID *Aguas del Tunari SA v Bolivia* pending case ARB/ 02/ 3 ICSID Cases <http:/ / www.worldbank.org/ icsid/ cases/ pending.htm> (last accessed 25 September 2003).

39 A good recent summary is to be found in Andreas F Lowenfeld *International Economic Law* (Oxford University Press, Oxford, 2002) 314–339.

40 GATT *United States Restrictions on Imports of Tuna* (3 September 1991) GATT Doc DS21/ R; (1991) 30 ILM 1594.

41 General Agreement on Tariffs and Trade (GATT 1947) (30 October 1947) 55 UNTS 194, art XX(b).

42 GATT *United States Restrictions on Imports of Tuna—Report of the Dispute Settlement Panel* (16 January 1994) GATT Doc DS29/ R; (1994) 33 ILM 839.

43 WTO *United States: Import Prohibition of Certain Shrimp and Shrimp Products—Report of the Appellate Body* (12 October 1998) WT/ DS58/ AB/ R; (1999) 38 ILM 118.

another species. On this occasion, the imported product was shrimp, and the endangered species caught in the shrimp nets was sea turtles. In its decision the Appellate Body still found that the United States had infringed the GATT by failing to negotiate with complainant states on its ban, and thus proceeding with a unilateral measure which was in effect discriminatory. But the Appellate Body made extensive reference to international environmental law texts in its decision. It found that the words of article XX of the GATT had to be read in the light of contemporary concerns of the community of nations about protection and conservation of the environment.

That debate has developed a greater level of specificity through the issues surrounding the application of the Sanitary and Phyto-Sanitary Agreement (the SPS Agreement).[44] In a decision of 16 January 1998 on *Beef Hormones*,[45] the Appellate Body considered the impact of a European Union Directive banning the import of hormone-fed beef. The European Union had relied for the validity of the Directive upon the precautionary principle, which it contended had become a general rule of customary international law. However, articles 5.1 and 5.2 of the SPS Agreement specifically required a risk assessment conducted on the basis of scientific evidence. The Appellate Body found that the European Union had not conducted such an assessment and that its ban was therefore contrary to the SPS Agreement. It did, however, hold that:[46]

> [A] panel charged with determining, for instance, whether "sufficient scientific evidence" exists to warrant the maintenance by a Member of a particular SPS measure may, of course, and should, bear in mind that responsible, representative governments commonly act from perspectives of prudence and precaution where risks of irreversible, e.g. life-terminating, damage to human health are concerned.

These issues will be raised again by a United States challenge to a European Union moratorium on genetically modified bio-tech products notified under the DSU on 20 May 2003,[47] which New Zealand has requested to join.

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44 Agreement on the Application of Sanitary and Phyto-Sanitary Measures. For the text of the Agreement see WTO Legal Texts <http:/ / www.wto.org/ english/ docs_e/ legal_e/ 15-sps.pdf> (last accessed 25 September 2003).

45 WTO *EC Measures Concerning Meat and Meat Products (Hormones)—Report of the Appellate Body* (16 January 1998) WT/ DS26/ AB/ R.

46 WTO *EC Measures Concerning Meat and Meat Products (Hormones)—Report of the Appellate Body* (16 January 1998) WT/ DS26/ AB/ R para 124.

47 WTO *European Communities: Measures Affecting the Approval and Marketing of Biotech Products—Request for Consultations by the United States* (20 May 2003) WT/ DS291/ 1.

C Conflicts between Courts

A third example of the process of fragmentation has been a by-product of the proliferation of courts and tribunals. This has led to the modern reality that many international disputes develop a polycentric character—being litigated in more than one forum at the same time. A current example of this par excellence is the *Mox Plant* case, which is concerned with the potential environmental effect on Ireland of the operation of the nuclear reprocessing plant at Sellafield in the United Kingdom. Ireland first brought a request for provisional measures to the ITLOS.[48] It also submitted a dispute regarding access to information to an arbitral tribunal to be constituted under the 1992 Convention for the Protection of the Marine Environment of the North East Atlantic (the OSPAR Convention).[49] Ireland sought to have its substantive claims dealt with by an arbitral tribunal constituted under UNCLOS.[50] It also raised the prospect of claims under the European Union Treaty and the EURATOM Treaty.

In its decision on provisional measures of 3 December 2001, ITLOS held that all of these proceedings could potentially go ahead in parallel. It found that:[51]

> [T]he dispute settlement procedures under the OSPAR Convention, the EC Treaty and the Euratom Treaty deal with disputes concerning the interpretation or application of those agreements, and not with disputes arising under the [UNCLOS] Convention … .
>
> [E]ven if the OSPAR Convention, the EC Treaty and the Euratom Treaty contain rights or obligations similar to or identical with the rights or obligations set out in the [UNCLOS] Convention, the rights and obligations under those agreements have a separate existence from those under the Convention …

On one level, this dictum does no more than to state the obvious. Each multilateral treaty regime creates its own adjudicatory system. The jurisdiction of any such tribunal and the substantive rights protected flow from the treaty. By contrast with national legal

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48 ITLOS *The Mox Plant Case (Ireland v United Kingdom)—Request for Provisional Measures and Statement of Case of Ireland* (3 December 2001) International Tribunal for the Law of the Sea <http:/ / www.itlos.org/ start2_en.html> (last accessed 25 September 2003).

49 PCA *Dispute Concerning Access to Information under Article 9 of the OSPAR Convention: Ireland v United Kingdom—Final Award* (2 July 2003) Permanent Court of Arbitration <http:/ / www.pca-cpa.org/ PDF/ OSPAR%20Award.pdf> (last accessed 25 September 2003). The Convention is published at (1992) 32 ILM 1069.

50 PCA *The Mox Plant Case: Ireland v United Kingdom—Order no 3* (24 June 2003) Permanent Court of Arbitration <http:/ / www.pca-cpa.org/ PDF/ MOX%20Order%20no3.pdf> (last accessed 25 September 2003).

51 ITLOS *The Mox Plant Case (Ireland v United Kingdom)—Request for Provisional Measures—Order* (3 December 2001) paras 49–50.

systems, international law has no overarching judicial hierarchy which might provide a coherent order into which all of these tribunals might fit. But it also lacks any developed system of rules, of the kind commonly found in national legal systems and in private international law, to regulate conflicting proceedings and judgments.[52] Private international law has a developed system of rules of lis alibi pendens, which provide an order of precedence between courts hearing the same cause, and of res judicata, which govern the effect to be given to earlier judgments of the same cause or matter.[53]

The perils of this type of reductionist approach are vividly illustrated by the arbitral proceedings brought by the American entrepreneur Ron Lauder against the Czech Republic alleging expropriation of his investment in the Czech television channel, TV Nova. Mr Lauder brought two arbitration claims. The first was brought under the United States–Czech Bilateral Investment Treaty in his own name.[54] The second claim was brought under the Dutch–Czech Bilateral Investment Treaty in the name of a Dutch corporate vehicle for the investment, CME, in which he was the controlling (albeit minority) shareholder.[55] This led to the establishment of two arbitral panels pursuing identical claims on identical treaty language with identical evidence.

Nevertheless, despite this overlap, on 3 September 2001 the first arbitral tribunal handed down its award in London finding no expropriation, and no damage. It was all a private dispute between Mr Lauder and his local investment partner. A mere ten days later on 13 September 2001, the second arbitral tribunal delivered its award in Stockholm and found multiple expropriations, awarding damages based on a complete loss of the investment at its fair market value. The second tribunal saw nothing surprising in the difference of view between the two tribunals. It held:[56]

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52 For a recent study see Yuval Shany *The Competing Jurisdictions of International Courts and Tribunals* (Oxford University Press, Oxford, 2003).

53 See Campbell McLachlan "Declining and Referring Jurisdiction in International Litigation: Third Interim Report of the Committee on International Civil and Commercial Litigation" in International Law Association *Report of the Sixty-Ninth Conference* (London, 2000) 137; Peter Barnett *Res Judicata, Estoppel and Foreign Judgments* (Oxford University Press, Oxford, 2001).

54 *Lauder v Czech Republic—Final Award* (3 September 2001). For the text of the award see the Ministry of Finance of the Czech Republic <http:// www.mfcr.cz/ static/ Arbitraz/ en/ FinalAward.pdf> (last accessed 25 September 2003).

55 *CME Czech Republic BV (The Netherlands) v Czech Republic—Partial Award* (13 September 2001). For the text of the award see the Ministry of Finance of the Czech Republic <http:// www.mfcr.cz/ static/ Arbitraz/ en/ PartialAward.pdf> (last accessed 25 September 2003).

56 *CME Czech Republic BV (The Netherlands) v Czech Republic—Partial Award* (13 September 2001) para 412.

> There is also no abuse of the Treaty regime by Mr. Lauder in bringing virtually identical claims under two separate Treaties … . Should two different Treaties grant remedies to the respective claimants deriving from the same facts and circumstances, this does not deprive one of the claimants of jurisdiction, if jurisdiction is granted under the respective Treaty.

Yet it is submitted that the net result is contrary to a commonsense application of the principle of res judicata. Whether or not the two proceedings ought to have gone ahead in parallel, the award rendered first ought to have attracted some binding effect in the second arbitration given sufficient identity of cause of action and parties.

Each of these sagas of fragmentation in microcosm has now reached an outcome of sorts. In the *Lauder/ Czech Republic* debacle, a challenge to the validity of the second award in the Swedish Court of Appeal failed on the narrow ground of a lack of sufficient identity of parties between Mr Lauder and CME so as to preclude the application of res judicata.[57] In the *Mox Plant* case, the arbitral tribunal constituted under UNCLOS suspended its proceedings on 24 June 2003 until 1 December 2003.[58] It did so in order to enable the European Commission to institute proceedings before the European Court of Justice. Those proceedings would be designed to establish whether or not the European Court had exclusive competence in the matter of a dispute between two member states; and whether or not the competence of Ireland in the matter had been transferred to the European Commission. There was no present conflict of jurisdictions, but the risk of an exclusive jurisdiction over at least part of the claim justified a stay of proceedings until the matter had been clarified.

These outcomes seem to be precisely the reverse of where they should have been. In the field of foreign investment arbitration (as exemplified by the *Lauder/ Czech Republic* dispute) most bilateral investment treaties, and the ICSID Convention itself, establish a broad definition of "investment", which allows the piercing of the corporate veil so as to enable claims to be brought by the ultimate investor (in this case Mr Lauder) as well as by intermediate investment vehicles.[59] It is submitted that it is inconsistent and unfair to permit a broad approach at the jurisdictional stage, and then to impose a narrow rule of identity of parties for res judicata purposes at the recognition of award stage.

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57 *CME Czech Republic BV (The Netherlands) v Czech Republic* (15 May 2003) judgment of the Svea Court of Appeal. For the text of the judgment (translated from the Swedish) see the Ministry of Finance of the Czech Republic <http:/ / www.mfcr.cz/ static/ Arbitraz/ en/ Judgment_English.pdf> (last accessed 25 September 2003).

58 PCA *The Mox Plant Case: Ireland v United Kingdom—Order no 3* (24 June 2003) paras 20–28.

59 See for example ICSID *AMCO Asia Corporation v Republic of Indonesia—Decision on Jurisdiction* (25 September 1983) (1993) 1 ICSID Rep 389; (1984) 23 ILM 351.

In the *Mox Plant* litigation, one might have had concerns about the very reductionist approach to controlling plural legal processes adopted by ITLOS. But the result adopted by the UNCLOS Tribunal seems to go too far in the opposite direction. The Tribunal stayed its proceedings simply following a statement made by the European Commission to the European Parliament, after close of pleadings in the arbitral proceedings, to the effect that it was examining the question whether to institute proceedings to seek to establish the exclusive competence of the European Court of Justice under article 226 of the European Community Treaty.[60] Thus, from the point of view of the Arbitral Tribunal, there was no clearly established conflict, or even any concurrent proceedings which might have given rise to an argument of lis pendens. Although articles 281 and 282 of UNCLOS could potentially have operated so as to confer exclusive competence over the dispute on the European Court of Justice, it is unclear why this issue should not have been finally determined by the Arbitral Tribunal itself. The Tribunal seems to have been prepared to have acted pre-emptively on a mere apprehension of future possible conflict and to have deferred on this point to the European Court of Justice. In the meantime, the substantive complaint of Ireland, which is founded upon the provisions of UNCLOS, is no closer to resolution.

D Immunity for International Crimes

Perhaps the greatest clash between conflicting values in international law in recent times, however, has been on the issue of immunity for international crimes. The conflict has been between that body of law which protects states and heads of state from being sued in the courts of other states, and the equally important body of law (at least since Nuremburg) which imposes individual liability under international law for international crimes including war crimes and crimes against humanity.

As those who were involved in the *Pinochet* litigation[61] discovered, these two bodies of law had developed largely independently. Their potential incompatibility had not been resolved, despite the fact that many international conventions had been concluded during the latter half of the 20th century, which provided for national court jurisdiction over international crimes.[62]

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60 PCA *The Mox Plant Case: Ireland v United Kingdom—Order no 3* (24 June 2003).

61 *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 1)* [2000] 1 AC 61 (HL); *(No 3)* [2000] 1 AC 147 (HL). The author represented the Republic of Chile in *Pinochet (No 3)*.

62 See Roger S Clark "Offenses of International Concern: Multilateral State Treaty Practice in the Forty Years since Nuremberg" [1988] Nordic J Intl L 49.

The House of Lords in *Pinochet (No 3)* thought that it had found its philosopher's stone in implied state waiver by treaty. If, reasoned the majority, Chile was not to be taken to have waived immunity on ratification of the Torture Convention, "the whole elaborate structure of universal jurisdiction over torture committed by officials is rendered abortive".[63]

The great virtue of this approach was that it was seen to rest on state consent. The problem with it is that such consent is essentially a fiction. As Lord Goff pointed out in his dissent, "how extraordinary it would be, and indeed what a trap would be created for the unwary, if state immunity could be waived in a treaty sub silentio".[64]

If ever there were a principle of the international law of state immunity which was well established prior to *Pinochet*, it was that waiver of immunity by treaty had to be express.[65]

This route out of the impasse has now been decisively rejected by the International Court of Justice in its decision on the immunity of Congo's foreign minister in *Democratic Republic of the Congo v Belgium*.[66] The Court held:[67]

> [A]lthough various international conventions on the prevention and punishment of certain serious crimes imposed on States obligations of prosecution or extradition, thereby requiring them to extend their criminal jurisdiction, such extension of jurisdiction in no way affects immunities under customary international law, including those of Ministers for Foreign Affairs. These remain opposable before the courts of a foreign State, even where those courts exercise such a jurisdiction under these conventions.

If implied waiver by treaty will not do, the courts may have to look again at the notion of "official" acts. Judges Higgins, Kooijmans, and Buergenthal, in an important passage in their Joint Separate Opinion in *Congo v Belgium*, suggested that it may be that

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63 *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 3)* [2000] 1 AC 147, 205 (HL) Lord Browne-Wilkinson. This part of the text draws upon the author's note "Pinochet Revisited" (2002) 51 ICLQ 959.

64 *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 3)* [2000] 1 AC 147, 223 (HL) Lord Goff.

65 See Sir Robert Jennings and Sir Arthur Watts (eds) *Oppenheim's International Law* (9 ed, Longman, Harlow, 1992) vol I 351; *Argentine Republic v Amerada Hess Shipping Corporation* (1989) 109 S Ct 683.

66 *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (2002) 41 ILM 536.

67 *Democratic Republic of the Congo v Belgium*, above, 551.

"international crimes cannot be regarded as official acts because they are neither normal State functions nor functions that a State alone … can perform".[68]

Yet, however convenient such a solution may be as an apparent development from established legal categories, it surely falls into the very trap which the courts have sought to avoid in defining acts *jure imperii*. What is required is an examination of whether the act is by its nature (and not purpose) a governmental act. It will most often be the case that the carrying out of an international crime by a high state official—particularly where it has the character of a "widespread or systematic attack directed against any civilian population"[69]—will, of its nature, involve the exercise of the apparatus of the State. As Lord Millett observed in *Pinochet (No 3)*, an exception to state immunity for international crimes, so far from falling within the existing restrictive theory of state immunity, would be an "opposite development".[70]

One is driven, then, to conclude that it would be preferable, if international law were to admit an exception to state immunity for the prosecution of individuals for international crimes, that such an exception should develop as an independent head. The development of the exception for torts committed on the territory of another state provides a parallel precedent. As a matter of the internal logic of the law of state immunity, unbundling individual criminal liability from other forms of impleading the state may have little to commend it. But the issue here does not depend upon the internal logic of state immunity alone. Rather, it is how to reconcile that set of rules governing immunity with another equally important set of rules in modern international law.

E Terrorism and Human Rights

The final example of conflict between norms in international law comes back more closely to where this lecture started, with the issues which the international community has been confronting since 11 September 2001. It is concerned with the clash between the desire to combat the peril of international terrorism, which threatens to undermine the basic elements of civil society, and the need to preserve respect for fundamental human rights, including the rights of those suspected of perpetrating such crimes.

Unfortunately, the news from the sharp end of that debate, and specifically from Guantanamo Bay, is not good. For it is there, at the United States Naval Base, immortalised

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68 *Democratic Republic of the Congo v Belgium* , above, 591.

69 Rome Statute of the International Criminal Court (17 July 1998), art 7. The text of the Statute may be found at <http:/ / www.un.org/ law/ icc/ statute/ romefra.htm> (Last accessed 25 September 2003).

70 *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 3)* [2000] 1 AC 147, 268 (HL) Lord Millett.

in the song *Guantanamera*, that 650 people from 43 countries have been imprisoned without trial since late 2001.[71] Many of these are said to have been Taliban fighters and are not accused of being al Qaeda terrorists. The position taken by the United States Government is that they will not be accorded prisoner of war status. However, the Geneva Conventions specifically entitle persons claiming to be prisoners of war to a determination of their status by a competent tribunal.[72]

In *Al Odah v United States of America*,[73] Australian and Kuwaiti citizens imprisoned at Guantanamo Bay applied through next friends for habeas corpus. The United States Court of Appeals for the District of Columbia held that the writ of habeas corpus was not available because the protections of the United States Constitution would not be extended to aliens abroad.[74] It found that Guantanamo Bay was not part of the sovereign territory of the United States.[75]

So great was the concern at this approach in the United Kingdom, that the English Court of Appeal held in *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Abbasi*[76] that British detainees at Guantanamo Bay had a legitimate expectation that the Foreign and Commonwealth Office would consider their request to espouse diplomatic protection on their behalf, in order to ensure that the detainees were not left in a "legal black hole".[77]

IV TOWARDS A NEW COHERENCE

What are we to make of the effect of all of these pressure points in the international system on the shape of international law?

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71 It is planned to bring some of those people before military commissions—see United States Department of Defense "President Determines Enemy Combatants Subject to His Military Order" (3 July 2003) News Release No 485–03 <http:/ / www.defenselink.mil/ releases/ 2003/ nr20030703-0173.html> (last accessed 25 September 2003).

72 See the Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention) (12 August 1949) 75 UNTS 135, art 5 and the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (8 June 1977) 1125 UNTS 3, art 45(1), discussed in George H Aldrich *The Taliban, Al Qaeda, and the Determination of Illegal Combatants* (2002) 96 Am J Int'l L 891.

73 *Al Odah v United States of America* (2003) 321 F 3d 1134 (9th Cir); (2003) 42 ILM 408; petition for certiorari filed, no 03-343 (25 September 2003).

74 Following *Johnson v Eisentrager* (1950) 339 US 763.

75 Applying *Vermilya-Brown Co v Connell* (1948) 335 US 377.

76 *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Abbasi* [2002] EWCA Civ 1598; (2003) 42 ILM 358.

77 *Abbasi*, above, (2003) 42 ILM 358, 365 Lord Philips MR for the Court.

Mary Robinson recently observed, in giving the Grotius Lecture at the American Society of International Law Annual Meeting in April 2003, that "it has only been at times of profound transformation that we have seen self-conscious reflection on international law's underlying goals".[78]

Part of the answer to this may be found in exploring the implications of three central concepts which may help to explain international law as both a system and a dynamic process. Those concepts are: progressive development, accommodation, and coherence.

A Progressive Development

In 1934, the Privy Council, delivering an opinion on the definition of piracy at international law said this:[79]

> International law was not crystallized in the 17th century, but is a living and expanding code.

It continued, quoting Hall:[80]

> Progressively it has taken firmer hold, it has extended its sphere of operation, it has ceased to trouble itself about trivial formalities, it has more and more dared to grapple in detail with the fundamental facts in the relations of states. The area within which it reigns beyond dispute has in that time been infinitely enlarged …

It is submitted that whether or not that proposition were already true in 1934, it is certainly true now. We have entered a new area of the pervasive application of international law.

There are two other ideas encapsulated in the passage just cited which also bear further reflection. The first is that notion of Hall's that international law has "dared to grapple in detail with the fundamental facts in the relations of states". This encapsulates the idea that international law might be seen not as a substitute for a multitude of ways in which states and other actors interact with each other on the international plane, but rather as engaged in a continuous dialogue in which legal principle is both informed and shaped by state practice and in turn seeks to influence it. The second element of the approach adopted by the Privy Council is the notion that international law is a "living and expanding code". This

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78 Mary Robinson "Shaping Globalization: The Role of Human Rights" (2003 Grotius Lecture, Washington, 2 April 2003) American Society of International Law <http:/ / www.eginitiative.org/ documents/ grotius.html> (last accessed 25 September 2003).

79 *In re Piracy Jure Gentium* [1934] AC 586, 592 (PC).

80 *In re Piracy Jure Gentium* [1934] AC 586, 593 (PC). The quote is from the preface to the third edition of William Edward Hall's *A Treatise on International Law*, reprinted in A Pearce Higgins (ed) *A Treatise on International Law* (8 ed, Clarendon Press, Oxford, 1924) xxv.

means that any general theory of international law must both comprehend the process by which it is developed and changed, and embrace that potential for change within it.

B Accommodation

The second concept comes from the separate opinion of Judges Higgins, Kooijmans, and Buergenthal in *Democratic Republic of Congo v Belgium*. The judges, in commenting on the relationship between state immunity and the prosecution of individuals for international crimes, observed:[81]

> International law seeks the accommodation of this value [the preservation of unwarranted outside interference in the domestic affairs of States] with the fight against impunity, and not the triumph of one norm over the other.

This concept of accommodation is not a process of selecting general principles from a jumble of different international law materials. Some public lawyers (both judges and academic commentators) examining the new-found role of international law in domestic administrative law have tended to see international law merely as a source of values, which permit "the judicial updating of the catalogue of values to which the common law subjects the administrative state".[82] This public lawyers' approach to accommodation—even when applied at the domestic level—runs the risk of ignoring important differences between the quality of various sources of international law. It also risks glossing over the hard process of accommodation between competing values and interests of states hammered out in the course of international negotiations, and the subtle balance of the results achieved.

The same kind of process also informs the development of customary international law. As Brownlie observed:[83]

> The elements of the formation of rules of general international law—international custom—are not some esoteric invention; rather they provide criteria by which the actual expectations and commitments of States can be tested.

Anyone who has studied the process by which the International Law Commission's articles on state responsibility emerged over a 40-year period until finally adopted in 2001

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81 *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (2002) 41 ILM 536, 589.

82 David Dyzenhaus, Murray Hunt, and Michael Taggart "The Principle of Legality in Administrative Law: Internationalisation as Constitutionalisation" (2001) 1 OUCLJ 5, 34.

83 Ian Brownlie "The Rights of Peoples in Modern International Law" in James Crawford (ed) *The Rights of Peoples* (Clarendon Press, Oxford, 1988) 1, 15.

would understand how difficult it can be for a new consensus to develop on these grundnorms of the international system.[84]

However, it does not mean that the process is one of pure realpolitik. Here I find myself in respectful disagreement with Professor Brownlie who goes on to say that "[i]nternational law is about the real policies and commitments of governments, it is not about the incantations of secular or religious morality".[85]

Of course one cannot, by mere enthusiasm, turn propositions which are mere desiderata into hard international law. But, if it were not the case that, running alongside the impact of international politics were also a strong strain of international morality, few of the great milestones of the last 50 years in international law would have been achieved: in human rights, in humanitarian law, in international criminal law, and in international environmental protection.

As the late Professor Colin Aikman put it in his inaugural lecture at this university on 11 September 1956, countering the American realist school of his day, "to deny the application of moral principles in international affairs is to reject one of the foundations of human society".[86]

C Coherence

This is where the concept of coherence comes into play. As Lowe recently reminded us, we must test any claims for new developments in international law for their coherence with the fundamental principles underlying the international system as a whole.[87]

Lowe draws a distinction in this process between moral and political arguments:[88]

> The difference is crucial. Moral arguments can be universalised. Political arguments cannot. Rooting the development of international law in the soil of common morality is necessary in order to sustain its claim to legitimacy; the rooting of international law in the exigencies of

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84 See James Crawford *The International Law Commission's Articles on State Responsibility* (Cambridge University Press, Cambridge, 2002).

85 Ian Brownlie "The Rights of Peoples in Modern International Law" in James Crawford (ed) *The Rights of Peoples* (Clarendon Press, Oxford, 1988) 1, 15.

86 C C Aikman "Law in the World Community" (1999) 30 VUWLR 501, 517.

87 Vaughan Lowe "The Iraq Crisis: What Now?" (2003) 52(4) ICLQ (forthcoming; paper presented to the Spring Conference of the British Branch of the International Law Association, Reading University, 12 April 2003).

88 Lowe "The Iraq Crisis: What Now?", above.

> national political objectives, on the other hand, is one of the defining characteristics of imperialism.

Many of the conflicts currently being experienced within the operation of the international law system, which have been discussed above, may in fact be merely symptoms of the maturing of international law—the growing pains of an increasingly effective multilateral system. The solution to them may lie in a careful analysis of a particular issue and of the coherence of a proposed rule within the existing body of general principles of international law. One's suspicion is that issues such as the content of expropriation in relation to state regulation, the relationship between environment and trade, and the resolution of lis pendens issues between international tribunals may be worked out in this way.

This is not a process of seeking to achieve a triumph of one norm over the other. We value equally the enhancement of free trade and the protection of the environment. But we need to work out in detail how these two important values of international society are to be articulated and harmonised. This may require tough choices. In the process, new principles of international law may emerge. Some of the conflicts may turn out on closer examination to be more apparent than real. A recent study by the late Professor Charney found remarkably little substantive conflict in the application of international law by international tribunals.[89] This is in part because of an explicit effort by judges to locate their decisions within a broader framework of international law.

But bigger issues, which may be less easily resolved, continue to confront us in the core areas of the best means of maintaining international peace and security and the balance to be struck with the protection of human rights. In these areas, to borrow the late Professor Quentin-Baxter's memorable phrase, "[b]etween the conception of a world order and its actuality falls the shadow of state sovereignty".[90]

With these points on coherence in mind, it is now possible to make some observations on the present situation in Iraq.

D Reflections on the Iraq Crisis

The United Kingdom's position on the legality of armed intervention in Iraq was characterised by a conscious effort to locate its intervention within the existing structures of the United Nations Security Council. It invoked an entitlement to intervene in Iraq on

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89 Jonathan I Charney "Is International Law Threatened by Multiple International Tribunals" (1998) 271 Recueil des Cours de l'Académie de Droit International 101.

90 R Q Quentin-Baxter "The United Nations Human Rights Commission and the Search for Measures of Implementation" (1999) 30 VUWLR 567, 568.

the basis of Iraq's repeated non-compliance with Security Council resolutions and the standing authorisations to intervene to compel compliance which it contended had been granted by the Security Council. The United Kingdom thus made an appeal to coherence with the existing system.[91]

The difficulty that this approach causes is that Resolution 1441 does not on its face authorise the use of force. It could not have done so given the number of states which were opposed to the use of force against Iraq prior to the recent intervention. The best evidence against the proposition that Resolution 1441 itself gave a clear mandate is the fact that the United Kingdom itself made a sustained effort to obtain a further resolution which would have explicitly authorised the use of force and failed to do so.

Insofar as the United Kingdom sought to bolster its position by relying on earlier Security Council resolutions, there is no known doctrine of the revival of past Security Council resolutions.[92] Resolution 678, on which so much reliance was placed, has to be read in the context of all the Security Council resolutions at the time of Iraq's invasion of Kuwait in 1991. In particular, it is submitted that Resolution 686, when read together with Resolution 687, shows that the authorisation on states to use force was only given for a limited purpose, namely to repel the invasion of Kuwait. By Resolution 687, the Security Council terminated its authorisation of the use of force by member states once that invasion had been repelled and a formal ceasefire achieved.[93]

The position adopted in the United States took a rather different line. There was a formal reference to the legality of the actions within the context of existing United Nations resolutions. However, that needs to be seen in light of the development by the present Administration of a doctrine of "preventive war". This doctrine seeks to revert to a position prior to the adoption of the United Nations Charter, which outlawed the use of force by states by article 2(4), save for the very limited preservation of a right of actual self-defence

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91 Foreign and Commonwealth Office "Attorney General Clarifies Legal Basis for Use of Force against Iraq" (18 March 2003) <http:/ / www.fco.gov.uk/ servlet/ Front?pagename=OpenMarket/ Xcelerate/ ShowPage&c=Page&cid=1007029394383&a=KArticle&aid=1047661460790> (last accessed 25 September 2003).

92 A point made by Vaughan Lowe in "The Iraq Crisis: What Now?" (2003) 52(4) ICLQ (forthcoming).

93 See the careful analysis of the position, written before the current crisis, in Danesh Sarooshi *The United Nations and the Development of Collective Security* (Oxford University Press, Oxford, 1999) 170–186. Sarooshi concludes (at 182): "The better legal view is that … the delegation of Chapter VII powers to Member States was terminated by conclusion of the formal ceasefire between Iraq and the UN, the terms of which were specified in resolution 687."

in article 51.[94] The Australian Government, one of the United States' most prominent coalition partners, has expressly admitted that an amendment of the Charter would be required for this new doctrine to gain validity in international law.[95]

The essential problem with the doctrine of preventive war is that it provides no measurable way of evaluating any state's right to launch acts of aggression whenever it feels threatened. This is exactly what the United Nations system was designed to outlaw. As President Truman once famously put it, "You don't 'prevent' anything by war except peace".[96]

It has become fashionable in some quarters in Washington, and even among professors of international law, to suggest that the actions of the Coalition of the Willing may have been "illegal [but] nonetheless legitimate".[97] Worse still, it has been suggested that the grand experiment of the 20th century—the attempt to impose binding international law on the use of force—has failed and that therefore "the old moralist vocabulary should be cleared away so that the decision-makers can focus pragmatically on what is really at stake".[98]

In my opinion, these are dangerous and misguided heresies which, in seeking to reroot international law in the exigencies of national political objectives, will founder in the seas of international discord. Disobedience to the rules of international law—even by the world's most powerful states—is not an indication in itself that the legal system has failed.

It is perhaps worth reiterating that the value of a multilateral system is that it is there to protect strong nations as well as the weak. The stance taken by the current United States Administration over the legal status of detainees at Guantanamo Bay, namely that they have no right to have their prisoner of war status determined by a judicial tribunal, is diametrically opposed to the arguments originally espoused by the United States in

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94 See Michael Byers "Preemptive Self-Defense: Hegemony, Equality and Strategies of Legal Change" (2003) 11 Journal of Political Philosophy 171.

95 See Bryan Bender "International Response: Debate Over Pre-Emptive War Sharpens as Iraq Showdown Nears" Global Security Newswire (5 December 2002) <http:/ / www.nti.org/ d_newswire/ issues/ 2002/ 12/ 5/ 2s.html> (last accessed 25 September 2003).

96 Harry S Truman *Years of Trial and Hope 1946–1953* (Hodder and Staughton, London, 1956) 406.

97 Anne-Marie Slaughter "Good Reasons for Going Around the U.N." (18 March 2003) *New York Times* New York A33.

98 Michael J Glennon "Why the Security Council Failed" (2003) 82(3) Foreign Affairs 16, 32.

working to have such a requirement included in the Protocols to the Geneva Conventions. At that stage, as George Aldrich observes:[99]

> [T]he United States government was painfully aware of the experiences in Korea and Vietnam, where many American military personnel were mistreated by their captors and denied POW status by mere allegations that they were all criminals. Time evidently dulls memory.

There is a vivid, but nevertheless ironic, counterpoint from the hostilities in Iraq, in which the current United States Secretary for Defence, Donald Rumsfeld, was seen on television holding up a copy of the Geneva Conventions with a view to holding the Iraqis to their obligations.

It is, however, significant that in seeking to establish some legitimacy for their occupation of Iraq after the invasion, both the United States and United Kingdom Governments have found it necessary to confirm in terms to the Security Council that they will "strictly abide by their obligations under international law".[100] Now that the immediate impact of the military campaign has been followed by the uncertainties and difficulties of occupation, the auguries are that a return to multilateralism has become increasingly attractive to the occupying powers.

In the end, public opinion may be a more powerful judge of the actions of the states concerned than any court could be. The late Professor Colin Aikman gave his inaugural lecture at this university at the time of the Suez crisis. He spoke after Egypt's nationalisation of the Canal, but before Britain's ill-fated military expedition. He quoted Elihu Root, who observed:[101]

> [T]he nation which has with it the moral force of the world's approval is strong, and the nation which rests under the world's condemnation is weak, however great its material power.

Professor Aikman then went on to observe:[102]

> In my view, this statement has some relevance to the Suez crisis. I believe that the United Kingdom and France, were they to forsake the course of negotiation and compromise, including resort to United Nations procedures, and to seek to establish the international status

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99 George H Aldrich *The Taliban, Al Qaeda, and the Determination of Illegal Combatants* (2002) 96 Am J Int'l L 891, 898.

100 UNSC "Letter from the Permanent Representatives of the United Kingdom of Great Britain and Northern Ireland and the United States of America to the United Nations addressed to the President of the Security Council" (8 May 2003) UN Doc S/ 2003/ 538.

101 Elihu Root "The Sanction of International Law" (1908) 2 Am J Int'l L 451, 456, quoted in C C Aikman "Law in the World Community" (1999) 30 VUWLR 501, 518.

102 Aikman "Law in the World Community", above, 518.

> of the canal by force of arms, would lose more in terms of prestige and moral stature than could conceivably be gained by force.

Those words were prophetic when uttered in 1956, and have a continuing resonance today.

V A NEW ZEALAND ROLE

Where do New Zealand, and its universities, stand in all this?

It was of course the New Zealand Prime Minister, Peter Fraser (whose magnificent, energetic statue stands outside the entrance to this law school with the epitaph "Te kotuku rerenga tahi—Rare as the white heron on its solo flight") who had originally proposed to the San Francisco Conference in 1945 that states should undertake in turn to preserve, protect, and promote human rights in the United Nations Charter.[103] In the event, the furthest that states were prepared to go at that stage was the Universal Declaration of Human Rights of 1948. Fraser's far-sighted hopes were only fully realised two decades later through the United Nations Covenants of 1966.

This single example illustrates the fact that the role which New Zealand has played, despite its small size and distance from the centres of world power, has been not inconsiderable in the field of international law.

The inheritance of this university in the field is august. I have mentioned Salmond, Aikman, and Quentin-Baxter. Mention should also be made of Dr George Barton QC and Rt Hon Sir Kenneth Keith. All of these men have served as professors in this law school, and have had a significant impact on the development of international law.

The unique power of New Zealand is that it may speak as an independent voice in the global village. It often works quietly and practically behind the scenes. Yet it also carries the power of moral suasion across a whole range of international law issues: the law of the sea, Antarctica, world trade, human rights, the creation of the International Criminal Court, and peace and security.

In all of this, the university may potentially play a crucial role. First, as a collegiate forum for research and debate. Second, as a seed-bed for future generations. Third, and most importantly, in carrying out work—not just on the pressing issues of the day—but also in seeking to make its own contribution to the overall architecture of international law. In doing so, it should help to build a framework which is robust; which achieves an appropriate and fair accommodation between conflicting values and interests; and, above

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103 See Colin Aikman "New Zealand and the Origins of the Universal Declaration" (1999) 29 VUWLR 1.

all, which is coherent with our common sense of a just vision for international society in the 21st century.