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# SPECIAL CONFERENCE ISSUE: 20TH ANNUAL ANZSIL CONFERENCE INTERNATIONAL LAW IN THE NEXT TWO DECADES: FORM OR SUBSTANCE?

SPECIAL ISSUE EDITORS: PETRA BUTLER AND ALBERTO COSTI

THIS ISSUE INCLUDES CONTRIBUTIONS BY:

Andrew Byrnes
Martin Fentiman
Jan Klabbers
Jadranka Petrovic
Ivan Shearer
Teresa Thorp
Jure Vidmar

TE WHARE WĀNANGA O TE ŪPOKO O TE IKA A MĀUI
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The Student Editor
New Zealand Journal of Public and International Law
Faculty of Law
Victoria University of Wellington
PO Box 600
Wellington
New Zealand
e-mail nzjpil-editor@vuw.ac.nz
fax +64 4 463 6365


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# FOREWORD

***Andrew Byrnes****

This special issue of the *New Zealand Journal of Public and International Law* includes selected papers from the 20th Annual Conference of the Australian and New Zealand Society of International Law (ANZSIL), which was hosted by the New Zealand Centre for Public Law in the Faculty of Law, Victoria University of Wellington, from 5 to 7 July 2012. The conference organising committee considered it an appropriate occasion to reflect on the last 20 years of international law and to ponder on the coming 20 years of the development of the practice and teaching of international law. It accordingly chose as the conference theme "International Law in the Next Two Decades: Form or Substance?".

The papers presented at the conference ranged across all fields of international law. Those included in this issue comprise the keynote addresses by three of four featured speakers (Ivan Shearer, Jan Klabbers and Richard Fentiman), as well as other papers which address the issues of democracy, regime change and international law in the post-Cold War era (Jure Vidmar), the responsibility to protect and endangered cultural treasures (Jadranka Petrovic) and international climate law and natural disasters (Teresa Thorp).

Professor Ivan Shearer, one of Australasia's pre-eminent international lawyers, provides a fascinating retrospective on his career as an international lawyer, which began at the University of Adelaide in 1956.[1] A position as research assistant with Daniel P O'Connell, on a project examining state practice in relation to state succession to treaties in the post-colonial period, was the first of a number of wonderful opportunities presented to, and taken up by, Shearer to meet and work with leading international lawyers of the time (in addition to O'Connell, Hermann Mosler, Charles Rousseau, Ignaz Seidl-Hohenfeldern were among others whom he met and interacted with), and to range across the world, visiting research institutes and doing research in the field on a range of topics. Subsequent assignments, taken during breaks in his teaching career which started at the University of Adelaide, took him to Lesotho in the 1970s to advise the government on treaty

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* Professor, Faculty of Law, University of New South Wales, Australia. Former President of ANZSIL (2010-2013).

1 Ivan Shearer "An International Lawyer's Odyssey: From Natural Law to Empiricism" (2013) 11 NZJPIL 297.

succession issues, which led in turn to participating in the Caracas session of the Third United Nations Conference on the Law of the Sea.

Shearer sketches his and others' response to the changes in approaches to international law over this period and the evolution of new theoretical approaches, such as that developed by the New Haven School and critical approaches to (international) law. He traces his own journey from an understanding of international law as essentially based in natural law through a view of international law as "a discipline and body of law necessarily to be applied to the resolution of actual problems in inter-state relations",[2] to a position which he describes as "empiricism". He illustrates his perspective with examples from his own practice as an international lawyer, including in his roles as an expert on the law of the sea and as a two-term member of the United Nations Human Rights Committee. He concludes with the recognition that while theorists will always be important for the discipline of international law and its need to reflect on its concepts, practice and meaning, there is a pressing need for international lawyers to become ever more involved in the expanding number of judicial and quasi-judicial processes of dispute resolution, for which task international lawyers "need to be steeped in traditional legal doctrine and methodology and [to] keep our feet firmly on the ground."[3]

Professor Jan Klabbers, a leading international law theorist from the University of Helsinki, who has written with great insight in relation to international organisations (among other topics), sets out a different perspective on the steps that need to be taken to address problems of global governance, taking up where Ivan Shearer leaves off.[4] Klabbers' starting-point is that positive international law has not been very effective in dealing with the challenges of global governance, despite the "tendency over the last century, and in particular the last decade or two … to strengthen the dispute settlement mechanisms of international law."[5] He argues that the vocabulary of evaluation of international law and the operation of its institutions fall short of what we need in today's world. He draws on John Austin's notion of international law as "positive morality" – so that it may be seen as "a vocabulary for voicing approval and disapproval of acts of public power" – to argue that an approach based on "virtue ethics" may be a useful way to proceed.[6]

Klabbers argues that international law has difficulty in coping with many of the issues that global governance presents; many are problems that "cannot always be met by creating more rules or creating more tribunals".[7] The international law approach to seeking to hold the exercise of

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2 At 302.

3 At 308.

4 Jan Klabbers "Law, Ethics and Global Governance: Accountability in Perspective" (2013) 11 NZJPIL 309.

5 At 311.

6 At 311.

7 At 314.

public power accountable largely takes the form of responsibility regimes (the law relating to the responsibility of states and of international organisations, and the criminal liability of individuals). These are limited in scope (they have limited applicability to non-state actors, for example) and have many conceptual problems and problems of application. He argues for the deployment of a broader understanding of accountability beyond the classical framework of international law, and draws on the literature of public administration to seek guidance as to the variety of approaches that may be adopted.

Klabbers develops the argument that there is room to "complement the existing vocabulary of international law by appealing to the character traits of those in the position to exercise public power."[8] Thus, the exercise of global governance may derive legitimacy from the virtues of the decision-makers. He sets out a three-stage process for achieving this: identification of the relevant professional roles in global governance (ranging from leadership of international organisations or of civil society groups, experts, the international judiciary, among others); identification of the relevant virtues (whether honesty, temperance, humility, courage, charity, empathy and justice); and the attachment of the relevant professional duties to the corresponding professional roles.

While recognising that at this stage such a proposal "may sound eccentric and hopelessly romantic",[9] Klabbers points out that such bold ideas have prevailed before, and there are already indications that we already see adherence to virtue as an important component of individual professional roles – the judicial oath represents a commitment to certain virtues that may be peculiar to the role of the international adjudicator, with different virtues appropriate in the case of the different roles of a special rapporteur or a political leader. He concludes with the view that global governance is not just the responsibility of the global governors, but that all of us have a responsibility to "take care of our common world" (quoting Arendt),[10] and that holding those who exercise power against a standard of civic virtue is an appropriate way to respond to the limitations of international law in relation to the challenges of global governance.

Professor Richard Fentiman, professor of private international law at the University of Cambridge, led off a series of sessions at the conference on private international law. He also takes up the challenges that a globalised world and the actions of transnational non-state actors pose to systems of regulation based on the nation-state. He examines these by exploring the international principles that should bear on the exercise of powers by national courts to restrain the conduct of persons involved in litigation before the courts of other countries.[11] In a piece analysing recent case law from the English courts relating to the grant of transnational injunctions, he explores the

8 At 318.

9 At 319.

10 At 321.

11 Richard Fentiman "The Scope of Transnational Injunctions" (2013) 11 NZJPIL 323.

principles that do (or should) underpin the exercise of jurisdiction by courts in relation to the conduct of foreign litigation (or potential foreign litigation). He examines the importance of connection as a basis for the exercise of discretionary powers of a court in relation to foreign proceedings, and the importance of the principle of comity, arguing that too often it has been assumed that because a court has a power to intervene and the defendant's conduct is unconscionable, it should exercise the power, without proper regard to the principle of comity.

Fentiman argues that much of the uncertainty in the area is the result of two conceptual confusions. The first is the failure to appreciate the distinction between issues of obligation and of regulation, between the court's power to determine the rights and obligations of the parties and its power to regulate its process by granting injunctions. The second is the difference between issues of substance and jurisdiction, that is, between "whether a ground exists in equity for granting relief and whether such relief is a proper exercise of the court's power."[12] He concludes by arguing that the trend of recent decisions has been to adopt a more internationalist stance by restructuring the inquiry that courts need to undertake when considering whether to grant a transnational injunction, so that they take greater account of the requirements of appropriate connection to the jurisdiction, and of comity.

Jure Vidmar, of the University of Oxford, reflects on the scholarly debate that followed the end of the Cold War in relation to whether international law should be read with a democratic basis.[13] He explores the emergence of democracy into international law through the lens of human rights law, and examines the implications under contemporary international law of a government's democratic credentials. He critically analyses recent literature and state practice to test arguments that a democratic system of government has become a requirement for the legitimacy of a state under international law. He concludes that this view does not find much support in positive international law, though he suggests that there may be an emerging rule that while an extra-constitutional regime change in international law is generally tolerated, this may not be the case where the government overthrown is democratically elected. He concludes that the post-Cold War period has not codified democracy as a human right or reinterpreted international human rights law with a pro-democratic bias, but that some "international practice is nevertheless emerging which promotes democratic governments at least as a policy preference" that "often finds its way into legally binding documents" such as Chapter VII Security Council resolutions.[14]

Jadranka Petrovic, of Monash University, engages with the still relatively new concept of the responsibility to protect (R2P), exploring the potential relevance of R2P to the protection of

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12 At 325.

13 Jure Vidmar "Democracy and Regime Change in the Post-Cold War International Law" (2013) 11 NZJPIL 349.

14 At 380.

endangered cultural property.[15] Petrovic takes as her starting point the destruction of sacred mausoleums and centuries old mosques in Timbuktu, Mali, by Islamic militants, following their occupation of the city during an armed conflict in 2012; the destruction took place some six months after UNESCO had listed the city on its "World Heritage in Danger" list. While Petrovic recognises that the R2P concept was articulated and has been developed as an available response to gross and systematic violations of human rights such as genocide and crimes against humanity, she argues that a more expansive reading might be adopted to include the protection of such cultural property. She maintains that this would reflect both the international and shared character of cultural property and that cultural property is closely connected to people's dignity and humanity, and the destruction of such property often precedes human tragedy.[16] She concludes by exploring how R2P might be applied to situations in which there are threats to cultural property.

Finally, Teresa Thorp, of the Netherlands Institute of the Law of the Sea, Utrecht University, takes up an issue which has assumed increasing relevance in recent decades and seems destined to become inevitably much more prominent in everyday life and in the world of international law.[17] Thorp argues that there is a pressing need for the international community to develop a coherent and co-ordinated international legal regime to respond to disasters with transnational dimensions. She proposes that this should involve not just a unified normative framework, but also the possibility of an international civil protection force, something which she maintains may be attractive to decision-makers who are now more aware of the impact of climate change. Thorp proposes a "constitutionalism" of a "law of the global commons" based on a "first principles" approach that could lead to "an effective way to govern prevention, preparation, protection and recovery in the area of climate-related disasters".[18]

All of these papers provide thought-provoking reflections on the developments of the last 20 years or the challenges that lie ahead, and propose a range of different approaches that we might consider adopting, as international lawyers, as citizens and as inhabitants of our common world.

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15 Jadranka Petrovic "What Next for Endangered Cultural Treasures? The Timbuktu Crisis and the Responsibility to Protect" (2013) 11 NZJPIL 381.

16 At 384.

17 Teresa Thorp "International Climate Law and the Protection of Persons in the Event of Disasters" (2013) 11 NZJPIL 427.

18 At 482.