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SPECIAL CONFERENCE ISSUE  
14th ANNUAL ANZSIL CONFERENCE:  
PACIFIC PERSPECTIVES ON INTERNATIONAL LAW

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THIS ISSUE INCLUDES CONTRIBUTIONS BY:

Campbell McLachlan

Rt Hon Helen Clark

José E Alvarez

Transform Aqorau

Andrew T F Lang

Shirley V Scott

Andrew Townend

Stephen Tully

Steven Freeland

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VICTORIA UNIVERSITY OF WELLINGTON

*Te Whare Wānanga o te Ūpoko o te Ika a Māui*



FACULTY OF LAW  
*Te Kauhanganui Tatai Ture*

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# PACIFIC PERSPECTIVES ON INTERNATIONAL LAW

*Campbell McLachlan\**

This Special Conference Issue of the New Zealand Journal of Public and International Law presents a set of papers developed from addresses given at the 14<sup>th</sup> Annual Conference of the Australian and New Zealand Society of International Law (ANZSIL) held in Wellington from 28 June – 1 July 2006 on the theme of "Pacific Perspectives on International Law".

The Conference represented an important initiative on the part of ANZSIL. It came in the wake of some years of close focus on the troubled fate of multilateralism in the northern hemisphere as international lawyers concerned themselves with the impact of resurgent American unilateralism, and with the difficulties in achieving consensus on the reform of the United Nations and the expansion of the world trade system. Might it be the case that fresh perspectives could be offered, and solutions found, in discussions amongst scholars and practitioners of international law in the Pacific region? In that way, ANZSIL could contribute tangibly to the international debate, confounding the notion that international law is made only in New York, Geneva and The Hague.

At the same time, the Pacific region itself continues to present many of its own challenges for international law. It has, in recent years, experienced a series of major internal armed conflicts, and human rights abuses. As a region, it is marked by relatively weak participation in international institutions and a relative absence of well-developed regional institutions. The region's myriad small island states are increasingly seen as prey to the forces of globalisation — unable to reap the benefits of the world trade system; at risk from global warming and the degradation of the oceans, as well as from the geo-political designs of major powers bordering the region.

Thus, Pacific international lawyers have a large agenda of issues on their doorstep, and it was hoped that ANZSIL could make a contribution by stimulating research and informed debate about those issues: from regional security to climate change, oceans governance, trade and development, and human rights.

The Conference offered a unique vehicle to explore these issues. It brought together scholars and practitioners from Australasia and from the Pacific Island states (the participation of the latter

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generously supported by a grant from NZAID). From the very first moment, when the Prime Minister of New Zealand, the Rt Hon Helen Clark delivered her keynote opening address mapping the challenges and opportunities facing regional cooperation, the Conference set out to shed new light on international law in the Pacific.

It also offered an opportunity for direct engagement between scholars of the region, and leading international lawyers from North America and Japan. A ground-breaking collaboration between ANZSIL and the American, Canadian and Japanese societies of international law to foster a scholarly network on the subject of "International Law and Democratic Theory"<sup>1</sup> brought some two dozen scholars from outside the region to Wellington, including the presidents of the sponsoring societies. Their engagement with members of ANZSIL in the Annual Conference offered an opportunity to debate the position of Pacific region within the international community. Thus, Jose Alvarez, President of the American Society of International Law, set out to challenge some popular misconceptions about the Asia-Pacific region, and its participation in regional and international institutions in his lecture, "Institutionalised Legalisation and the Asia-Pacific 'Region'".

What themes of more general significance might be drawn from the research presented at the Conference, and the discussions which it provoked? My own list emphasised five points: international law as an integrated legal system; the power of the idea of international law; the special responsibilities of democracies; embracing pluralism; and the central concept of the common interest of humanity. The papers presented in this volume, which can be no more than a snap-shot of the totality of the Conference proceedings, explore, and in some cases challenge, aspects of these ideas.

My first proposition was simply the notion that international law represents an integrated legal system. However disparate and apparently self-contained its various sub-systems may be, they are all parts of a whole. While states can of course make choices about treaty participation, the very fact of statehood contemplates engagement with other states in accordance with the basic architecture of international law. This central organising idea underlies both customary international law and the United Nations Charter. It has recently been eloquently reaffirmed in the 2006 "Report of the Study Group of the International Law Commission" on the fragmentation of international law.<sup>2</sup>

In his important and original paper, Andrew Lang analyses the role of the human rights movement in trade policy. He challenges the value of the "coherence model", which views the function of international law as being to resolve conflicts between bodies of law such as human rights and trade law. Lang argues that this model has the unintended effect of limiting the impact of

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1 Edited papers from which will be published in (2007) 38 VUWLR.

2 International Law Commission "Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law " (13 April 2006) A/CN.4/L.682; (18 July 2006) A/CN.4/L.702.

human rights upon trade, by creating a "trade-off" of choices between the two. Instead Lang argues that human rights can actually act as an important trigger for the development of rational and desirable trade policy. Of course, the same might be said of environmental and other social and public goods. These are not antithetical to trade. On the contrary, the goal of an international rule-based trading regime is not the pursuit of a liberal trading agenda for its own sake, but rather the enhancement of humanity which it may bring.

My second proposition was the power of the very idea of international law itself. I suggested that international law was not to be reduced to a purely facilitative role — as a technocratic means of achieving other social or policy objectives. Nor is it to be written off, as has again become fashionable amongst some recent theorists, as an irrelevancy in the Hobbesian power-play of the selfish pursuit of state interests. On the contrary, central to the international law project at least since Grotius has been the idea of regulating the commerce of states within a legal process — not for its own sake, but for the benefit of humanity. Peter Fraser, the Prime Minister of New Zealand who played such a pivotal role at the San Francisco Conference for the establishment of the United Nations, well understood in a practical context the "soft power" of that idea, and its potential in particular for smaller and less powerful nations. So, too, did Australia, New Zealand and the many Pacific nations who took a principled stand on three occasions in the International Court of Justice regarding nuclear testing and nuclear weapons.

In her thought-provoking paper on "The Political Interpretation of Multilateral Treaties", Shirley Scott challenges some elements of this notion. She explores the reasons why states continue to negotiate, and sign in such numbers, multilateral treaties giving effect to idealistic policies. She addresses the enigma created by that phenomenon in view of the twin facts that states continue to be predominantly motivated by security and economic objectives, and that multilateral treaties seem rarely to deliver fully on their objectives. While arguing that the multilateral treaty phenomenon is not to be dismissed as an important element in international relations, she argues for a realist analysis of both the reasons for their conclusion, and of their likely impact.

My third proposition was that the moral high-ground held by states which advocated adherence to the rule of law in international affairs carried with it risks and responsibilities as well as benefits — responsibilities borne in particular by democracies. Often, as in the case of international peace-keeping, it means making practical contributions which carry with them very real risks and costs. Sometimes it may mean advocating a position which one knows to be right, even if it may be inconvenient in terms of foreign relations. That much was certainly true of the anti-nuclear stance adopted by the independent states of the Pacific. But the soft power to be derived from taking the moral high-ground can easily be squandered by short-term or opportunistic stances taken by states in international fora. Participation in the international community also entails having the maturity to accept the occasional criticism from international bodies as the price for maintenance of the overall value of the system. It means that states cannot responsibly free-ride on efforts to find common solutions to common problems.

In very different contexts, both the papers of Stephen Tully and Transform Aqorau explore these challenges. Stephen Tully examines the potential impact of climate change, in particular on the small island states of the Pacific from a human rights perspective. He argues that neighbouring states should consider affected individuals in terms of their entitlements to protection, rather than their status. Transform Aqorau addresses the challenges facing the effective management of tuna fish stocks in the Western and Central Pacific. He identifies the gaps in the region's tuna fisheries protection, exposing a litany of non-compliance by member states, fishing by non-members and illegal, unreported and unregulated fishing; all free-riders on the system of international regulation which is so gravely needed to ensure preservation of the fishery.

The fourth theme which I had suggested was the idea of embracing pluralism. International law was not to be seen as a uniform blueprint for the structure of the world's societies, still less a straight-jacket imposing alien norms upon indigenous societies. Rather, it was to be seen as a system which facilitated the search of societies for their own forms of governance and expression, even if those forms are fundamentally different. In James Crawford's atmospheric phrase: "The struggle of civilizations ... is contained within international law; it is not set against it..."<sup>3</sup> International law's fundamental norm of self-determination indeed embodies this idea of the progressive working out of the distinct and autochthonous destiny of peoples, within the framework of international law. This is not a process to be fitted within any predetermined outcome. It is therefore refreshing to have the benefit of Andrew Townend's detailed account of the 2006 referendum on self-government undertaken by the people of Tokelau. Tokelau is surely one of the world's smallest and remotest communities — just 1500 people on four coral atolls in the middle of the Pacific. Yet, it has carefully, over time, charted its own destiny, opting at this stage for a continuing partnership with New Zealand.

My fifth and final theme was, to some extent, the balancing idea to pluralism. It was the concept that international law is fundamentally about more than the mere drawing of boundaries between states. Rather, it is inherently concerned with the identification and pursuit of the common interest of humanity. As the great Australasian international lawyer Dan O'Connell observed:<sup>4</sup>

The widespread challenge of our time to order, stability and human dignity has impelled the conviction in many parts of the world that these are indispensable attributes of human co-existence, and the law is the formal structure which sustains them. Humanitarian considerations are the inspirational basis of the rules of international law.

It was one such humanitarian impulse which led to the creation of the International Criminal Court. In his paper, Steven Freeland cogently argues the case for active participation in the activities

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3 James Crawford "International Law and the Rule of Law" (2003) 24 *Adel LR* 3, 6.

4 Daniel P O'Connell *International Law* (vol 1, 2 ed, Stevens & Sons, London, 1970) 3-4.



of the Court by the countries of the Asia-Pacific region as the best way to ensure an ultimate protection against impunity for crimes against humanity.

However, this does not mean that, as international lawyers, we can rest content with the existing structures which we have inherited, and which are now in place. On the contrary, we need to continuously re-evaluate international institutions in order to ensure that they are serving the underlying values of the international legal system as it evolves. This is so whether the institution is focused on narrow issues, such as the International Whaling Commission, or carries a more general mandate for international governance, such as the World Trade Organization or the United Nations itself. This, the progressive development of international law, is a project on which the independent states of the Pacific can, and should, continue to engage every bit as actively as the larger states of the northern hemisphere.

