A New Zealand Perspective on International Law

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E ngā iwi

E ngā mana

E ngā rangatira mā

Tēnā koutou, tēnā koutou, tēnā koutou, katoa

Thank you Sir Ken for that kind introduction.

I am delighted to be New Zealand's candidate for the International Law Commission. I come from a long tradition of New Zealand "lawyer-diplomats" and I am privileged to give this address in memory of one of my predecessors, Christopher Beeby. Chris has been a role model to me, and many other New Zealand international lawyers, and in whose path I have followed.

This presentation gives me an opportunity to talk today about the New Zealand perspective of international law. What is it that is distinctly Kiwi in terms of our take on international law? Are there any identifiable characteristics of New Zealand international lawyers? And why is a New Zealand approach valuable to international law? This matters because if I am elected, I will take a New Zealand perspective with me into the International Law Commission.

But first a bit about myself. When I first studied international law at Auckland Law School in the mid-1970s, there was little focus on examining international law from a New Zealand perspective. International law operated on the plane of States and rarely figured in domestic discourse. In New Zealand, international law functioned behind the scenes and outside the public gaze.

This has changed markedly. The internet is bringing the world ever closer, and we are seeing international legal issues discussed daily in our media.

Young lawyers now have a textbook edited by Alberto Costi on New Zealand Perspectives of International Law which is designed as a teaching resource relevant to New Zealand, with New Zealand case studies. And 2021 will see an additional text: International Law in Aotearoa edited by Anna Hood and An Hertogen; which will be a rich trove of material on how New Zealand and New Zealanders see international law.

These texts are a welcome addition to the teaching of international law in New Zealand. It is incredibly valuable for students and practitioners to have a New Zealand perspective of international law, so that they can see the relevance of international law for themselves and their country, as well as what New Zealand has contributed to international law.

Over my career, I have had a range of roles as an international lawyer. I have been fortunate to be present at some key moments for New Zealand in international law.

These roles have spanned:

- contributing to new developments of international law as **a negotiator**;
- applying international rules to practical real world challenges as **an adviser** to regional fisheries management organisations;
- challenging state conduct as **an advocate** before international tribunals; and
- interpreting international law as **an arbitrator**.

As **a negotiator**, in the late 1980's I was a key part of the New Zealand team working to institute a global ban on driftnet fishing - a destructive fishing method known as a "wall of death" which destroyed everything in its path. Driftnets tens of kilometres long were being deployed in international waters adjacent to New Zealand, impacting our and the Pacific marine environment. In response we developed a carefully orchestrated strategy at the national, regional and global levels. This ultimately lead to a regional convention, the South Pacific Driftnet Fishing Convention, and a UN General Assembly resolution led by New Zealand and the United States proclaiming a global moratorium on the practice. I am incredibly proud that New Zealand was able to champion this issue and bring others on board. I think this remains one of the best examples of the UN General Assembly successfully operating in a rule making capacity.

Later in my career I was involved in creating the regional architecture for the sustainable management of tuna, a vital resource for the Pacific region. I led the New Zealand delegation for the negotiation and adoption in 2000 of the Western and Central Pacific Fisheries Convention. This established a regional fisheries management organisation in the Pacific, known as the Tuna Commission, which manages the tuna stocks in the region. I am especially proud of the part I played in finding a mechanism to ensure that dependent Pacific territories, in contrast to the usual practice in international organisations, could have a seat at the table of Commission meetings. This gave them a direct say in the management of a resource which is vital to their interests.

In my current role I am **an adviser** to the Tuna Commission where we are tackling the question of how to respond to the COVID-19 pandemic, the resulting restrictions, and the health and safety of observers on board vessels – and how to do so in a manner consistent with Commission rules. In my view, regional fisheries management organisations are one of the best instances of international law in action; creating a system where States come together to jointly manage a shared resource governed by international rules. The establishment of the Tuna Commission was also an example where New Zealand showed creativity and resourcefulness to shape the legal framework to achieve an important outcome.

But the highlight for any international lawyer's career, as with mine, is appearing as **an advocate** before the International Court of Justice. I was the Agent in *Whaling in the Antarctic* and presented New Zealand's intervention on the interpretation of the Whaling Convention. We argued that the Convention replaced unilateral whaling with a system of collective regulation in which cooperation among members of the International Whaling Commission was key; and that this limited the extent to which "scientific

research" whaling could be pursued. The case was a step towards New Zealand's ultimate goal of ending whaling in the Southern Ocean.

I have been very fortunate that my career has extended from appearing before international judges to becoming **an adjudicator** myself. First as a panellist arbitrating trade disputes before the World Trade Organisation (WTO) and now as a member of the pool of arbitrators of the WTO Multi-Party Interim Appeal Arbitration Arrangement (MPIA). This is an interim appeal mechanism set up by a group of WTO Members in response to the absence of a functioning WTO Appellate Body. As an independent adjudicator, I also bring a New Zealand perspective to my role - a deep respect for binding dispute settlement and for interpreting rules in a coherent and consistent way. The MPIA, and how the pool of arbitrators conducts its business, will be important in rebuilding trust in the role of appellate review within the WTO.

What is this New Zealand perspective on international law?

So looking more broadly, **what is this New Zealand perspective on international law?**

Taking first a global view: according to its Charter, the United Nations is based on the principle of the sovereign equality of all its Members. States are bound by a common framework of the international rule of law.

As Sir Arthur Watts, a former UK International Legal Adviser has said:

> "the rule of law relates less to the substantive content of particular rules of law than to fundamental principles which are characteristic of a legally ordered community and which provide a … [long-term quasi-constitutional] framework within which particular rules of law operate."

The community at large benefits from a system where countries abide by negotiated rules. It benefits from States collaborating together in pursuit of the common aims of peace, prosperity and equality for all.

This does not mean, of course, that size or power are irrelevant. Indeed, they are highly pertinent to international debate and to the making and enforcement of international law.

But all States benefit from an international system that is rules-based. This is especially relevant for small, geographically isolated countries, such as New Zealand, which does not belong to any particular geo-political bloc and does not possess any natural power.

As New Zealand Prime Minister Norman Kirk wrote in 1973:

> "If small states are to have any sense of security from the use of force against them by more powerful states, it is essential that recourse to law, or some comparable form of impartial arbitration, should become the accepted method of peacefully settling international differences".

For this reason, New Zealand has long seen its foreign policy interests as being best supported by the international rule of law and multilateralism. This has been a deliberate foreign policy choice of successive New Zealand governments.

75 years ago at the San Francisco Conference New Zealand opposed the veto to the five permanent members of the UN Security Council and supported the compulsory jurisdiction of the International Court of Justice.

In the 1950s, 60s and 70s, New Zealand was actively involved in developing international legal treaties, including on space, Antarctica and the Law of the Sea. These continue to provide essential frameworks for their respective areas.

A common thread throughout the years has been New Zealand's commitment to the **integrity of the international legal system and the broader community of interests.** It was this broad community of interests which drove New Zealand's opposition to nuclear testing in the Pacific, and which led to the *Nuclear Tests cases* before the International Court of Justice. It was also behind New Zealand's push for rules on the prevention of transboundary harm caused to the environment by activities not contrary to international law.

The rule of law has provided New Zealand with a principled basis for our actions and decisions. It is this reliance on principle and community interests which I think is the hallmark of a New Zealand perspective of international law.

New Zealand's anti-nuclear policy, commitment to conservation of shared resources, and our approach to the Rwandan genocide during our term on the UN Security Council are all firmly grounded in principle. These are examples where New Zealand's size and geography has encouraged a more independent approach based on long-standing commitment to the rule of law and to compliance with the law.

There are other examples where size and geography has influenced New Zealand's approach. Because New Zealand is not powerful enough to drive the international agenda on our own, we must form coalitions with other countries and other peoples to pursue our interests. This has been and continues to be a characteristic of New Zealand diplomacy.

New Zealand would not have been able to pursue the Comprehensive Progressive Trans-Pacific Partnership without first entering into the Trans-Pacific Strategic Economic Partnership with Singapore, Chile and Brunei. I was Legal Counsel for this agreement and we sought to build a strategic coalition with like-minded countries which could provide a springboard for trade cooperation with a broader group of countries spanning Asia, Pacific and the Americas. This was a success for trade diplomacy.

Are there characteristics that set New Zealand international lawyers apart?

Turning to the questions: Are there particular characteristics drawn from New Zealand perspectives of the world that set New Zealand international lawyers apart?

New Zealanders are recognised for our strong commitment to protecting the environment and to preserving the earth for our *mokopuna*. A desire for equality and fairness are among New Zealand traits. We are known for our 'can do' attitude and never let size or lack of power define who we are or how we act.

International negotiations can offer a small principled country like New Zealand the opportunity for leadership and magnified influence. New Zealanders are creative and pragmatic problem-solvers who seek to understand the underlying interests of others, while promoting universal values.

New Zealanders have been extensively engaged in the development of international treaties, including the Law of the Sea Convention, the UN Disabilities Convention; the Arms Trade Treaty and the Nuclear Weapons Prohibition Treaty.

New Zealand international lawyers are coalition- and bridge-builders - building pragmatic alliances with States and interest groups which cross traditional boundaries. This was particularly notable during the Law of the Sea negotiations where New Zealand aligned with Pacific States supporting the idea that all islands, irrespective of size, have the right to an exclusive economic zone, and with the group of countries with extended continental shelves.

Many of these characteristics stem from our values, our principles, our history, and our land.

What is the value of a New Zealand perspective?

What is the value of a New Zealand perspective? To address this question, I want to consider some examples of **how New Zealand has influenced the development of international law through its involvement in international dispute settlement.**

Some cases have loomed large in the collective memory of the New Zealand international legal community. The *Nuclear Tests cases* in 1973 and the subsequent iteration in 1995, the Rainbow *Warrior* affair, the *Southern Bluefin Tuna case*, the *Whaling case*, in which New Zealand intervened, and the various trade disputes in which New Zealand has been involved.

In some instances, New Zealand's involvement in dispute settlement has influenced the resulting decisions of tribunals. I wish to touch on a few areas where I consider that New Zealand has made a difference to international law, and where this difference is the result of a pursuit of a New Zealand perspective.

New Zealand has undoubtedly contributed to the development of international environmental law through its determined pursuit of rules to protect the environment.

There is now an **international rule that a State must ensure that activities within its jurisdiction and control do not cause harm to the territory of another State or to areas beyond national jurisdiction.**

This rule of international law has come about in large part because of New Zealand values and especially *kaitiakitanga* – or guardianship and protection.

New Zealand initially sought to pursue such arguments before the International Court of Justice in the *Nuclear Tests cases*, and then turned to the International Law Commission and in particular the work of New Zealander Professor Robert Quentin-Baxter, who led the topic relating to transboundary harm.

With Quentin's untimely death, his vision was eventually encapsulated into the 2001 draft Articles on the Prevention of Transboundary Harm from Hazardous Activities, which continue to be frequently cited by

international courts and tribunals. The related draft principles on the allocation of loss were adopted in 2006 when New Zealand's Bill Mansfield was on the International Law Commission.

Before the Commission's work was completed, New Zealand had again the opportunity to raise the risk to the environment from France's continued underground nuclear testing before the International Court of Justice in the 1995 follow-up to the *Nuclear Tests case*, as well as in the *Advisory Opinion on the Legality of the Use of Nuclear Weapons*. The Court accepted the existence of a general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control and furthermore it stated that this "is now part of the corpus of international law relating to the environment".

The Court's dicta validated arguments that New Zealand had made for 20 years.

New Zealand has also had a role in furthering the **precautionary principle**. In its most common articulation, this expresses the idea that where there are threats of serious or irreversible damage, the lack of full scientific certainty shall be not used as a reason for postponing cost-effective measures to prevent environmental degradation. In the 1995 phase of the *Nuclear Tests case*, New Zealand argued before the ICJ that the precautionary principle was an operative principle of international law. Although the Court did not address this issue, the dissenting judgments, including of Judge Ad Hoc Geoffrey Palmer, gave support to the precautionary principle as a rule of customary international law.

Then New Zealand and Australia actively pursued the precautionary principle before the International Tribunal for the Law of the Sea in the *Southern Bluefin Tuna cases* and by New Zealand before the ICJ in the *Whaling case* as a check on the management of a shared resource. It is now accepted that the precautionary principle is part of international environmental law.

Another development which rests on New Zealand values is its **pursuit of the community of interests**. In other words, there are obligations which are owed to the community of nations, rather than just bilaterally to one State. This pursuit of community interests is consistent with the New Zealand perspective of the importance of multilateralism and community.

In the *Nuclear Tests cases* New Zealand (and to a lesser extent Australia) sought protection of rights *erga omnes* – in other words international obligations that are owed to the international community as a whole - in addition to rights owed specifically to New Zealand.

New Zealand argued that these rights included the rights of all members of the international community to be free from radioactive fall-out. These were rights held in common with every other member of the international community. Therefore, all States had a legal interest in their observance.

Although the Court did not address it, the argument that such fundamental obligations should *also* extend to obligations to protect the environment, including the marine environment, has been recognised by international legal scholars.

In my view the communitarian, as compared to the bilateralist, perspective will prevail in the future and it will apply in particular to the protection of the environment.

These are all examples of the value of a New Zealand perspective of international law to international legal discourse.

Future of international law for New Zealand

Having looked at the past, I now want to look to the **future of international law for New Zealand**.

In my view, there is a fundamental belief in New Zealand that our interests lie in having generally-applicable rules which guide State conduct. We have, and are, working hard to apply existing international law, to clarify international law through adjudication and the development of soft law instruments, and to develop new international law through negotiation.

It is here that the International Law Commission plays a significant role. It is tasked by the United Nations with the progressive development and codification of international law. It has made major contributions in the past to international law, such as the Vienna Convention on the Law of Treaties, the Vienna Convention on Diplomatic Relations, the Rome Statute of the International Criminal Court, and the Draft Articles on State Responsibility.

The International Law Commission is and remains the preeminent international body for the development of international law. It is demonstrating its continued relevance through addressing contemporary topics such as sea level rise. I am sure that it will continue to do so in future.

But we live in uncertain times and there are many challenges to international law and to compliance by States with their international obligations.

The nature of international law as a system of rules based on the consent of States is evolving. States may not always give or receive consent to rules that guide their conduct in the same manner over time. This tends to shift the balance between the international rule of law and cold hard politics.

It is challenging to ensure that the balance is weighted in favour of the international rule of law so that the values and interests of countries like New Zealand are protected and advanced.

I am convinced that New Zealand and New Zealand international lawyers will meet these challenges in the same way that they have met other past challenges: with intellect, creativity, courage, and tenacity.

This is the New Zealand perspective of international law. And this is the perspective that I would bring to the International Law Commission.

Thank you