NZCPL OCCASIONAL PAPERS

1. Workways of the United States Supreme Court
   Justice Ruth Bader Ginsburg

2. The Role of the New Zealand Law Commission
   Justice David Baragwanath

   Hon Doug Kidd

4. The Māori Land Court – A Separate Legal System?
   Chief Judge Joe Williams

5. The Role of the Secretary of the Cabinet – The View from the Beehive
   Marie Shroff

6. The Role of the Governor-General
   Dame Silvia Cartwright

7. Final Appeal Courts: Some Comparisons
   Lord Cooke of Thorndon

   Anthony Lester QC

   Anthony Lester QC

10. 2002: A Justice Odyssey
    Kim Economides

11. Tradition and Innovation in a Law Reform Agency
    Hon J Bruce Robertson

12. Democracy Through Law
    Lord Steyn

13. Hong Kong’s Legal System: The Court of Final Appeal
    Hon Mr Justice Bokhary PJ

14. Establishing the Ground Rules of International Law: Where To from Here?
    Bill Mansfield

15. The Case that Stopped a Coup? The Rule of Law in Fiji
    George Williams

17. The Official Information Act 1982: A Window on Government or Curtains Drawn?
    Steven Price

18. Law Reform & the Law Commission in New Zealand after 20 Years – We Need to Try a Little Harder
    Rt Hon Sir Geoffrey Palmer

19. Interpreting Treaties, Statutes and Contracts
    Rt Hon Judge Sir Kenneth Keith

20. Regulations and Other Subordinate Legislative Instruments: Drafting, Publication, Interpretation and Disallowance
    Ross Carter

Available from the New Zealand Centre for Public Law
Faculty of Law, Victoria University of Wellington, PO Box 600, Wellington, New Zealand
Email: nzcpl@vuw.ac.nz, Fax +64 4 463 6365
NEW ZEALAND JOURNAL OF PUBLIC AND INTERNATIONAL LAW
CONTENTS

Introduction
Petra Butler and Alberto Costi ................................................................. 289

Foreword
Andrew Byrnes ........................................................................................ 291

An International Lawyer's Odyssey: From Natural Law to Empiricism
Ivan Shearer .............................................................................................. 297

Law, Ethics and Global Governance: Accountability in Perspective
Jan Klabbers ............................................................................................. 309

The Scope of Transnational Injunctions
Richard Fentiman .................................................................................. 323

Democracy and Regime Change in the Post-Cold War International Law
Jure Vidmar .............................................................................................. 349

What Next for Endangered Cultural Treasures? The Timbuktu Crisis and the Responsibility to Protect
Jadranka Petrovic ..................................................................................... 381

International Climate Law and the Protection of Persons in the Event of Disasters
Teresa Thorp ............................................................................................. 427
The New Zealand Journal of Public and International Law is a fully refereed journal published by the New Zealand Centre for Public Law at the Faculty of Law, Victoria University of Wellington. The Journal was established in 2003 as a forum for public and international legal scholarship. It is available in hard copy by subscription and is also available on the HeinOnline, Westlaw and Informit electronic databases.

NZJPIL welcomes the submission of articles, short essays and comments on current issues, and book reviews. Manuscripts and books for review should be sent to the address below. Manuscripts must be typed and accompanied by an electronic version in Microsoft Word or rich text format, and should include an abstract and a short statement of the author’s current affiliations and any other relevant personal details. Manuscripts should generally not exceed 12,000 words. Shorter notes and comments are also welcome. Authors should see earlier issues of NZJPIL for indications as to style; for specific guidance, see the New Zealand Law Style Guide (2 ed, 2011). Submissions whose content has been or will be published elsewhere will not be considered for publication. The Journal cannot return manuscripts.

Regular submissions are subject to a double-blind peer review process. In addition, the Journal occasionally publishes addresses and essays by significant public office holders. These are subject to a less formal review process.

Contributions to NZJPIL express the views of their authors and not the views of the Editorial Committee or the New Zealand Centre for Public Law. All enquiries concerning reproduction of the Journal or its contents should be sent to the Student Editor.

Annual subscription rates are NZ$100 (New Zealand) and NZ$130 (overseas). Back issues are available on request. To order in North America contact:

Gaunt Inc
Gaunt Building
3011 Gulf Drive
Holmes Beach
Florida 34217-2199
United States of America
e-mail info@gaunt.com
ph +1 941 778 5211
fax +1 941 778 5252

Address for all other communications:

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
Advisory Board

Professor Hilary Charlesworth  
*Australian National University*

Professor Scott Davidson  
*University of Lincoln*

Professor Andrew Geddis  
*University of Otago*

Judge Sir Christopher Greenwood  
*International Court of Justice*

Emeritus Professor Peter Hogg QC  
*Blake, Cassels and Graydon LLP*

Professor Philip Joseph  
*University of Canterbury*

Rt Hon Judge Sir Kenneth Keith  
*International Court of Justice*

Professor Jerry Mashaw  
*Yale Law School*

Hon Justice Sir John McGrath  
*Supreme Court of New Zealand*

Editorial Committee

Professor Claudia Geiringer (Editor-in-Chief)  

Dr Joel Colón-Ríos  

Dr Mark Bennett (Editor-in-Chief)  

Associate Professor Alberto Costi  

Amy Dixon (Student Editor)  

Dean Knight  

Professor Tony Angelo  

Meredith Kolsky Lewis  

Professor Richard Boast  

Joanna Mossop  

Associate Professor Petra Butler  

Professor ATH (Tony) Smith  

Assistant Student Editors

Hilary Beattie  

Johanna McDavitt  

Nathalie Harrington  

Mark Shaw  

Daniel Hunt
The New Zealand Centre for Public Law was established in 1996 by the Victoria University of Wellington Council with the funding assistance of the VUW Foundation. Its aims are to stimulate awareness of and interest in public law issues, to provide a forum for discussion of these issues and to foster and promote research in public law. To these ends, the Centre organises a year-round programme of conferences, public seminars and lectures, workshops, distinguished visitors and research projects. It also publishes a series of occasional papers.

**Officers**

- **Director**: Professor Claudia Geiringer
- **Associate Director**: Associate Professor Petra Butler
- **Associate Director**: Dr Carwyn Jones
- **Associate Director**: Dean Knight
- **Associate Director**: Dr Rayner Thwaites
- **Centre and Events Administrator**: Anna Burnett

For further information on the Centre and its activities visit www.victoria.ac.nz/nzcpl or contact the Centre and Events Administrator at nzcpl@vuw.ac.nz, ph +64 4 463 6327, fax +64 4 463 6365.
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

---

* 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", 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

---

2 At 302.
3 At 308.
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." 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", 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), 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. 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."\(^\text{12}\) 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.\(^\text{13}\) 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.\(^\text{14}\)

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

\(^\text{12}\) At 325.

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

\(^\text{14}\) At 380.
endangered cultural property. 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. 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. 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”.

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.

16 At 384.
18 At 482.