International law in the foreign policy of a small state

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The following article is the edited text of a lecture delivered by the Right Honourable Geoffrey Palmer M.P. to the Columbia University Law School on 26 September 1985. In the light of such developments as New Zealand's policy of refusing the entry into its ports of ships with nuclear weapons and the bombing of the Greenpeace boat 'Rainbow Warrior" in Auckland harbour, the Deputy Prime Minister is concerned that the principles of international law and the United Nations be upheld. He argues that the world's democracies have a special responsibility to support international law making and to be scrupulous to act within the confines of that law.

Just a short while ago the people of the United States of America celebrated a marvellous anniversary — 200 years of freedom and equality under the rule of law. That freedom did not come easily and those of us in the world who share that freedom owe an enormous debt of gratitude to the American colonists who dared to proclaim that all men are created equal and are endowed with certain inalienable rights.

I make this point because in a few weeks on First Avenue another very important anniversary will be celebrated — forty years of freedom and equality of nations under the rule of law established in the Charter of the United Nations. The adoption of the Charter at San Francisco on 26 June 1945 was a turning point in world history of epic proportions. I believe that it will be recognised in the future as a turning point equal in importance to the Declaration penned by Thomas Jefferson and proclaimed at Philadelphia on the 4 July 1776.

I have chosen to talk to you about international law and what it means to a small state. I have done so because I believe that the freedoms and prosperity which we all cherish in our domestic legal systems — and indeed the survival of civilised society as a whole — are threatened unless states, large and small, are willing to act in accordance with international law.

The second major theme that I would like to elaborate is the special responsibility of the world's democracies to support the process of international law making and to conduct their affairs within the framework of the rule of law.

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I should note at the outset that there is a tendency in New Zealand, and I believe it is more marked in the United States, to adopt a somewhat quizzical — if not downright cynical — attitude to the United Nations and international law. The man in the street, the newspaper editor, the judge and legislator are not easily persuaded that national laws or policy should be subordinated to any external reality. People ask, "What is international law?" and "Is it really law at all?" I am bound to say that this scepticism is not new and that there is some support for the sceptics in the writing of the early legal theorists. The great English positivist, John Austin, the "father of English jurisprudence", in his eagerness to provide a coherent intellectual framework for domestic law, totally dismissed international law, putting it in the same analytical class as the dictates of fashion. "The so called law of nations" he wrote "consists of opinions or sentiments current among nations generally. It therefore is not law properly so called."[1] A generation later, another great legal philosopher Kelsen unwittingly further undermined the standing of international law by postulating the international legal system as the "grundnorm" for all other legal orders. "The international legal order by means of the principle of effectiveness determines not only the sphere of validity but also the reason of validity in the national legal orders."[2] It is clearly the fact that the relative absence of effective machinery for ascertaining and enforcing international law in the years before the establishment of the United Nations system led many legal theorists, concerned primarily with municipal law, to conclude that because international law was different, it did not have the character of real law. Kelsen's somewhat forced attempt to justify the place of international law in his Monist theory was widely criticised by lawyers and philosophers. But is it not possible that in throwing out the "grundnorm" bathwater many commentators have also thrown away too readily the struggling infant of international law? A whole generation of students and professors of law have criticised the application of Kelsen's theory to international law. But it is easy to look back and criticise what international law was. It is much more difficult to look fairly at the system of international law which we now have and appreciate what is at risk if we do not nurture and support the rule of law in relations between states.

I think this is an important time for all of you who are lawyers — following in the traditions of Jefferson and Adams — indeed everyone who values our democratic tradition — to stop for a moment and reflect on the hopes and aspirations of all mankind that were reflected in the U.N. Charter.

Prior to 1945 the law of nations lacked any real sense of cohesion or universality. So long as there was no consensus on the illegality of the use of force in international relations; on the sovereign equality of states; on the rights of peoples to self-determination and basic human rights; international law was indeed a struggling infant. As Professor Schwarzenberger pointed out in his *Manual of International Law*, classical international law was "ultimately limited by power,

1 John Austin *Lectures in Jurisprudence: The Philosophy of Positive Law* ed. R. Campbell (5 ed., John Murray, London, 1885) 184.

2 Hans Kelsen *General Theory of Law and State*. Trans. A. Wedberg (Harvard University Press. Cambridge, Mass., 1946) 367.

politics and the rule of force".[3] He went on to point out that by contrast for the vast majority of the international community, international law under the Charter of the United Nations presents a very different picture from classical international law. But Professor Schwarzenberger had a deep and abiding pessimism. He saw the existence of nuclear weapons and the appalling concentration of destructive power in the arsenals of the two super powers as undermining not only the sovereign equality of states, but more fundamentally, the rule of international law itself. I share his concern. I think it is true that the technology of modern warfare be it nuclear, chemical, bacteriological or conventional has grave implications not only for our survival but also for the fabric of current international society. I do not, however, share his unduly pessimistic conclusion that international law itself is fatally flawed as a result.

We in New Zealand — and indeed all small states — continue to put our faith in the Charter principles. The principles are sound. The problem is that they are not being applied.

To take an example from the American constitutional experience, I believe that the international community is in a situation, with respect to the rule of law, which compares with the situation in the United States in the 1850s. Notwithstanding Jefferson's fine words in the Declaration of Independence and the provisions of the Bill of Rights, the full impact of the statement "that all men are created equal" meant little or nothing for those in slavery. We can now see the *Dred Scott*[4] decision for what it was. It did not mean that the Bill of Rights was unsound. But the failure to follow the principles of the Declaration of Independence surely plunged the United States in the cataclysm of the Civil War and I fear that at the international level we now face a similar threshold.

Let me return for a moment to the cynics who mock the existence of international law and point out that states pay less respect to international law than individuals pay to municipal law; that fear and self-interest are the principal reasons for complying with it and this is due to the lack of effective machinery to carry out sanctions. I do not accept the suggestion that, because all of the subjects of the law do not obey the law of the time, the existence of law itself is in question. I can tell you as Attorney-General, that we in New Zealand, and I know the same is true here, have not yet established a crime-free society. Yet we do have law. I can also tell you as Minister of Justice responsible for our prison service that sanctions and fear of punishment do not explain by themselves the reasons why most citizens obey the law most of the time. Professor Hart, in his famous work *The Concept of Law*[5] shows us that law does not depend on coercion but that there is a deeper "internal aspect" of law — an inner commitment on the part of citizens to the system as a whole. I believe the same is true on the international plane — that deterrence is only occasionally an explanation for state behaviour. For the fact is, that today the majority of the states in the world

3 Georg Schwarzenberger and E. D. Brown *A Manual of International Law* (6 ed., Professional Books Ltd., London, 1976).
4 *Dred Scott* v. *Sandford* 60 U.S. (19 How.) 393 (1856).
5 H. L. A. Hart *The Concept of Law* (Oxford University Press, Oxford, 1961).

are not big players like those who populated the international stage before World War 2. Most of the members of the international community are small states and, just like the citizen in the municipal legal system, small states look to international law as a framework for their existence, for their continued survival and for their economic prosperity. These things are reason enough to accept, respect and comply with law.

For most of the countries of the world then the Charter of the United Nations represented a major turning point. It stands on firm ground establishing clear, dispositive rules of law. Let me quote some of them.

— Article 2(1) "the organisation is based on the principle of sovereign equality of all its members"
— Article 2(3) "members shall settle their disputes by peaceful means"
— Article 2(4) "members shall refrain from the use or threat of force in their international relations"
— Article 25 "members agree to accept and carry out the decisions of the Security Council"
— Article 94 "each member undertakes to comply with the decisions of the International Court of Justice in any case to which it is a party".

These are fundamental rules of law. They are based on principles set out in the Preamble to the Charter. They have a ring which will be familiar to all Americans.

"We the peoples of the United Nations determined
— to save succeeding generations from the scourge of war . . .
— to reaffirm faith in fundamental human rights in the dignity and worth of the human person, in the equal rights of men and women and all nations large and small
— to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained
— to promote social progress and better standards of life and larger freedom".

I think it is clear from what I have said that there has been since the advent of the United Nations a cohesive international legal system. The Charter, a universal rule, is the constitutive instrument. Like the United States Constitution, it establishes the primary rules of political behaviour. It also establishes the secondary rules by which law may be formulated, ascertained and applied: an executive organ (the Security Council), a legislative organ (the General Assembly) and a judicial organ (the International Court of Justice). Since 1945 the United Nations system has produced law that expands to the entire range of human activity. From the grave matters of peace and disarmament, to health, education, transport and communications. The following is a quick summary:

— The declaration of principles of international law concerning friendly relations and cooperation among states in accordance with the Charter of the United Nations
— The definition of aggression
— The declaration on the granting of independence to colonial countries and peoples

— The Universal Declaration of Human Rights
— The Covenant on Civil and Political Rights
— The Covenant on Economic, Social and Cultural Rights
— The Genocide Convention
— The Convention on the Elimination of all forms of Racial Discrimination
— The Convention on the Elimination of Discrimination Against Women
— 5 conventions dealing with the legal status and rights of refugees and stateless persons
— 18 conventions dealing with cooperation in the suppression of narcotic drugs and psychotropic substances
— 18 conventions dealing with international trade and development
— 27 conventions dealing with commodity trade
— 75 conventions dealing with maritime transport and the law of the sea, including in particular the comprehensive Convention on the Law of the Sea concluded in 1982
— 29 conventions dealing with land transport
— 51 conventions dealing with telecommunications and postal matters
— 24 conventions dealing with civil aviation
— 14 agreements relating to world health.

A patchwork of law has been steadily built up and the rate of growth has been almost exponential. I suggested to you earlier that the survival of civilised society was dependent on international law. You can see how true this is at the practical level. The telephone system, the postal network, air travel, shipping, the environment, clean air, the rights of minorities and of women, health care systems, international broadcasting and many others are all dependent in large measure on international law — a system of law that works and it works at least as well as similar legal rules in municipal law. If the system can be faulted, it is that it works less well at the margins where the law is still being formed or where new law has not yet been fully accepted.

But our dependence on international law is not limited to the practical sphere. As I have indicated, due to technology we now live in a highly interdependent world, none the more so than in matters of war and peace. The technology of warfare has expanded in the past forty years at a horrifying rate. The nuclear holocaust could so easily become a reality. But as if that were not enough the weapons of so called conventional warfare now permit death and destruction at a level that strategic planners in 1945 could only have dreamt about.

There is, therefore, in my view, grave concern that states can contemplate, apparently so lightly, putting aside the fundamental precepts of the Charter
— the obligation to settle disputes peacefully;
— the prohibition on the use of force; and
— the obligation to comply with decisions of the International Court.

It seems to me that perhaps the older and larger states remember only too well the freewheeling days before the Charter when there was no universal prohibition on the use of force. There is, I fear, a disposition — and it is growing insidiously — to flaunt the precepts of the Charter and slip back to the maxim of "might is right".

Forty years is not a long time for the rule of law to become deeply rooted. There is a growing proliferation of situations where the rule of law is being ignored and I am afraid the Western democracies must share some of the blame for this situation.

I know there is a continuing desire amongst the people of the United States to move back from the nuclear precipice, to negotiate in good faith real and substantial reductions in weaponry. But I put it to you that respect for existing norms of international law is a critical element if this process is to succeed. Who knows when resort to force, covert or otherwise, to resolve some small dispute or advance some regional policy will be the fuse that triggers a global disaster?

There is also the fact that arms control and disarmament agreements are part of the fabric of international law. Negotiators speak of the need for verification provisions and strict rules to ensure compliance. But is it possible on the one hand to look to international law to provide essential security guarantees, while on the other hand, in other areas, the right is quietly being reserved to undermine, ignore and indeed walk away from the rule of law in international affairs?

While it is true that some of the gravest violations of international law are perpetrated by the totalitarian countries, these actions are in the long run exposed, and the perpetrators reap the political consequences. The sad history of Poland, Czechoslovakia, Hungary and Afghanistan is deeply etched into the political and legal consciousness of the international community. But what is more worrying to the small countries is the growing double standard between those who profess freedom and equality before the law at home but who refuse to deal within the law in their international relations.

I think George Ball put it rather well in his book *The Discipline of Power*:[6]

> We have been guilty, throughout the whole postwar period, of talking one way and acting another. We have used the vocabulary and syntax of Wilsonian universalism, while actively practicing the politics of alliances and spheres of influence and balance of power; and it is now time that we stopped confusing ourselves with our political hyperbole and frankly faced the hard realities of the postwar world.

It is an unfortunate fact of international life that the use of violence in support of political objectives, often by covert means, but nevertheless in clear violation of international law and the United Nations Charter, has become all too common. We have recently had first hand experience of this sort of thing in New Zealand with the sinking of the Greenpeace ship *Rainbow Warrior*. Throughout this matter the New Zealand Government, while reserving its rights in international law, has had to give proper attention to the rights of the two accused in custody in New Zealand. We have up till now and will in the future be scrupulously careful to ensure that the due process of law is not interfered with and that the rights of the accused to a fair trial are not prejudiced in any way. France has now acknowledged its international responsibility. This is a welcome step. France and New Zealand have agreed that our officials should sit down to examine the problems arising from the *Rainbow Warrior* incident.

6 G. W. Ball *The Discipline of Power* (Little Brown & Co., Boston, 1968) 300-301.

It is a fact, however, that in the world at large such acts are not unique. Third countries and innocent people are put at risk and lives are lost. The greatest loss, however, is the steady undermining of the rule of law by those who profess to believe in it and live by it. In this regard I would like to say something about the International Court of Justice. At present only 47 states accept the compulsory jurisdiction of the Court. Many of these have severely limited the terms of their acceptance or reserve the right to determine for themselves in each individual case whether a dispute is a matter within their domestic jurisdiction. It is of grave concern that, in this most important area of international law, some who strongly support the rule of law domestically have chosen to put themselves above the law of nations and to ignore the jurisdiction and decisions of the Court. These acts do not go unnoticed. The double standard is eroding the claim by the Western democracies to moral leadership in the international community. I cannot put the case any better than did Professor Lauterpacht in his 8th Edition of Oppenheim:[7]

> . . . progress in International Law, the maintenance of international peace and, with it, of independent national States, are in the long run conditioned by a partial surrender of their sovereignty so as to render possible . . . the securing of the rule of law as ascertained by international tribunals endowed with obligatory jurisdiction.

To look further afield at one of the gravest violations of international law, the situation in South Africa. In 1936, the League of Nations sat back and quibbled about taking decisive action on Abyssinia. The signal was not lost on Hitler and I think it is fair to say that the signal has not been lost on South Africa over the past 20 years while the international community has sat back and quibbled about taking decisive action to remedy a truly enormous injustice.

I do not accept that the international legal system is impotent so far as the problem of South Africa is concerned. One possible option would be to think seriously about the General Assembly seeking from the International Court of Justice an advisory opinion that the apartheid laws and policies of South Africa constitute a violation of that state's obligations under international law. Such an action would have very useful consequences in both the legal and political spheres. It would certainly heighten the political pressure on South Africa at this time. Secondly, it would dispose, once and for all, of the spurious legal argument that South Africa's apartheid laws are matters exclusively within its domestic jurisdiction.

Although an advisory opinion as such would not be binding on South Africa, it would open the way for decisive action under the United Nations Charter by the Security Council. An advisory opinion of this sort would define precisely South Africa's obligations under international law. A failure to adapt its policies would create a situation in which a legal dispute existed between South Africa and other members of the international community with respect to these obligations. At that time Chapters VI and VII of the Charter could be brought into play. The Security Council could move on a basis that would command extremely wide support in all corners of the world. It could move on the basis of the rule of law rather than

7 L. Oppenheim *International Law: A Treatise* ed. H. Lauterpacht (8 ed., Longmans, Green & Co. Ltd., London, 1955) Vol. 1, 123.

a purely political basis which has underpinned previous action against South Africa in that forum.

Clearly this is not a course of action which one state alone should promote. It would need from the outset to be recognised as a positive move by a large and representative group of countries. In this regard timing would be particularly important. It should certainly not be allowed to cut across any other effective action being taken in the U.N. system. My point is not that this legal move should be made but rather that it could be made.

I could not avoid, in the context of a speech on matters of international law before such a distinguished audience, some comments on the question of United States ship visits to New Zealand.

As many of you will know, I have spent several days in Washington seeking to negotiate a solution to this problem. We did not reach an accommodation but, in the spirit of close friendship which exists in the alliance relationship between us, we are going to continue talking. This issue is primarily a political one, but it has some legal elements. The negotiations have been conducted in a straightforward and frank manner. They have been tough but New Zealand and the United States both came to the table with respect for each other and respect for international law. Ironically, for both sides, our respective commitments to law have made the process of an accommodation more difficult. Neither country finds it possible to say one thing and do another. The fact of the matter is that New Zealand and the United States are allies under the ANZUS Treaty of 1951. New Zealand has always believed in collective security. Our history of pulling our weight in defence of our friends and Western values is unequalled. My Government has not lessened our resolve in this area. Indeed we have expanded our defence capabilities significantly since we came into office.

We want to cooperate to the fullest of our abilities with our allies in exercises in New Zealand and elsewhere. But as you will have gained from my earlier comments New Zealanders have an almost universal hatred of nuclear weapons. There is not much that a small country like New Zealand can do to help halt the arms race. One thing that we have done, however, is to make a stand about the presence of nuclear weapons in New Zealand. We therefore reserve the right to decline requests for visits by ships which in our judgement are likely to be carrying nuclear weapons. We do not see this policy as contrary to our obligations under the ANZUS Treaty.

The principal obligation on the allies apart from the responsibilities in the event of aggression in the South Pacific region is to work together in the defence field. We have made it abundantly clear that we are prepared to do that. Our proposals were designed to reopen New Zealand ports to United States vessels. Our sole restriction was to reserve the right to say no to vessels which we judged to be likely to be carrying nuclear weapons.

I should stress in passing that as far as general international law is concerned there is no disagreement between New Zealand and the United States. We both

accept that, under the Law of the Sea, the coastal state has a sovereign right to determine what foreign warships, if any, may enter its internal waters and on what conditions. We both accept that foreign warships, whether nuclear armed or not, have a right of innocent passage through the territorial sea. We agree that it is appropriate for a coastal state to make exceptions regarding entry into internal waters by ships in distress.

I should like to conclude by returning to my theme of the special responsibility of the world's democracies to support the process of international law making and to be scrupulous always to act within the confines of that law. We have seen in recent times all too great a readiness to adopt the "might is right" approach even on issues which are of concern not just to one or a few countries but to the wider international community, e.g. the legal status of the deep seabed. What is particularly worrying is not just that this approach is accepted in a particular instance but that there is little evidence that the long term consequences for the rule of law have featured either in the decision-making process or in public discussion of the decision.

To sum up my concerns I would like to quote Peter Fraser, who was Prime Minister of New Zealand in 1945 and leader of the New Zealand delegation to the conference in San Francisco at which the Charter was adopted:[8]

> I do not know if there has ever been in the history of mankind a more important document than the Charter of the United Nations . . . . it marks a great opportunity, and perhaps, the last opportunity, that the nations of the earth will have of forming an organization to maintain peace, to prevent aggression . . .

At the San Francisco conference itself he said:[9]

> The maintenance of peace is the paramount problem that confronts us. This is a moral problem and not merely a mechanical one. The failure of the League of Nations — one of the noblest conceptions in the history of mankind — was a moral failure on the part of individual members and was not due to any fundamental defect of the machinery of the League. It failed because its members would not perform what they undertook to perform. It failed because of the recession that took place in public morality. It failed because the rule of expediency replaced that of moral principles. I would therefore stress that unless in the future we have the moral rectitude and determination to stand by our engagements and principles then this new organisation will avail us nothing: the suffering and sacrifices our people have endured will avail us nothing and the countless lives of those who have died in the struggle for security and freedom will have been sacrified in vain.

8 N.Z. Parliamentary Debates Vol. 268, 1945: 575.
9 U.N. Conference on International Organization, San Francisco, Plenary Session, 3 May, 1945.