New Zealand Centre for Global Studies
Te Pokapū Akoranga Aorere o Aotearoa

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Global Society and the Challenges of Governance

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Structure of the lecture

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1 What are the issues?

It is important to understand the angle of narration of anyone who is giving a lecture of this type. The most important ingredient determining the views expressed flows from the experience of the lecturer, and the forces that shaped his or her outlook. I speak as a lawyer who has had some political experience.[1] The meshing together of politics and law is at the heart of the problems of governance that afflict global society.

We have entered an era where it is not easy to have confidence in the future. But keeping hope alive is an essential ingredient of a healthy society. We have had a digital revolution the implications of which are as yet only dimly discerned, especially for future patterns of employment. The internet, metadata and instant global communication have the capacity to change our lives further than they already have. The effects upon our social life are likely to be profound over time. Other technological changes will also challenge us, such as nanotechnology and 3D printing.

The future of education is not secure and we may be trapped in a time warp, where there is a widening gap between real world experience and what is taught in the system.[2] We have had global financial meltdowns the causes of which have yet to be cured. Governments struggle still with economic policy that will produce adequate employment and social cohersion. Globalisation has had profound consequences and is controversial. We have not tamed capitalism yet in ways that are socially beneficial and optimal. Poverty remains a big issue in many parts of the world. Disparities in wealth is a contemporary issue afflicting western countries with increasing contrasts between the most and the least wealthy. We have climate change, a matter that challenges every institution both national and international, and which remains a great distance from being adequately addressed as yet. We have vast migrations of humans fleeing conflicts, raising issues that the global community does not seem to be able to address effectively. We have terrorism, explosions and people dying in many places. Too many states in the international community are failed states and lack the capacity to overcome their problems and provide an adequate life for the people who live in them. Pressures are coming upon liberal democratic states to adopt repressive policies to cope with the fears of people. We have unparalleled and increasing surveillance of people, the consequences of which may be far reaching. Large numbers of

[1] For my own account of my experience see Geoffrey Palmer *Reform-A Memoir* (Victoria University Press, Wellington 2013). There are about 100 pieces of my scholarly writing over the years accessible on the Social Science Research Network (SSRN) for anyone interested: http://papers.ssrn.com/sol3/results.cfm

[2] Garry Jacobs "Overcoming the Educational Time Warp: Anticipating a Different Future" (2015) 2 Cadmus, Vol 2, Issue 5,1.

people in the world have little or nothing with which to sustain themselves and they are not happy about it.

The problems posed by nuclear weapons remain with us. Yet public opinion wrongly seems to be less concerned with the issue than it was thirty years ago. We have an increasingly unstable geopolitical situation in the world with the Ukraine, the Middle East, North Korea and trouble spots in Africa. The Security Council of the United Nations is too often paralysed and ineffective.

2 Why I think what I think

The most telling experience in shaping my early attitudes was my education, taking degrees in politics and law at the Victoria University of Wellington. I learnt something about both international politics and international law in those courses of instruction. But, at the University of Chicago I was permitted in the law school to take two courses from across the Midway, taught by Professor Hans J Morgenthau, then a renowned political scientist and analysist of foreign policy in the United States. He was an opponent of the Vietnam war at its height when I studied with him.[3] We studied his book *Politics Among Nations – the Struggle for Power and Peace*.[4] Morgenthau was a realist, an arch realist. This approach to international affairs required analysis based on "*the concept of interest defined in terms of power*". The international law course I took at Chicago in the Law School did not square completely with the approach of Professor Morgenthau. It was taught by a renowned American law professor. But she took a very different view of what international law comprised than that I had been taught in the British tradition as expounded by my Wellington teacher, Professor George Barton.

Morgenthau's view of international law was not that it didn't exist; he was clear that it did. But he didn't think it was effective, not nearly as effective as national legal systems. It could not really regulate and restrain the struggle for power on the international scene. It was primitive. It was de-centralised.

His conclusion was:[5]

[3] Hans J Morgenthau *Vietnam and the United States* (Public Affairs Press, Washington D.C., 1965)
[4] Hans J Morgenthau *Politics Among Nations-The Struggle for Power and Peace* (4th ed.,Alfred A Knopf, New York,1966).
[5] *Politics Among Nations*, above 265.

"International law is deficient in all three fundamentals of an efficient judicial system: compulsory jurisdiction, hierarchy of judicial decisions, and the application of the rule *stare decisis* at least to the decisions of the highest courts."

Next, I was an intern at the United Nations in New York. I had been full of idealistic fervour about the purposes of the UN until I had exposure to the bureaucracy. Nevertheless, it was an experience I found very valuable when in 2010 I found myself chairing the Secretary-General's inquiry into the Gaza flotilla incident.

Teaching international law in the United States I have always found a challenging experience. The American students are not easily detached from the principle that might is right.

Later as a politician and then a New Zealand Minister, I secured some interesting exposure to international issues and I was involved in some pretty heavy disputes:

- The issue of nuclear testing in French Polynesia that went to the International Court of Justice twice – on the second occasion I was New Zealand's ad hoc Judge;[6]
- The dispute with the United States over New Zealand's anti-nuclear policy;
- New Zealand's dispute with France over the *Rainbow Warrior* affair;
- Efforts to reach diplomatic rapprochement at the International Whaling Commission, where I was New Zealand's Commissioner for eight years;
- Chairing the United Nations Inquiry into the Gaza Flotilla incident of 31 May 2010;[7]
- A scholarly interest in international environmental law and climate change which I have taught extensively both in the United States and in New Zealand;[8] and

[6] Request for an Examination of the situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v France) http://www.icj-cij.org/docket/index.php?sum=502&code=nzfr&p1=3&p2=3&case=97&k=cd&p3=5

[7] Report of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident (September 2011) http://www.un.org/News/dh/infocus/middle_east/Gaza_Flotilla_Panel_Report.pdf

[8] Jonathan Carlson, Geoffrey Palmer, Burns H Weston *International Environmental Law and World Order* (3rd ed., West, St Paul, 2012).

- Being the Deputy Prime Minister and Prime Minister were also experiences that required some extensive exposure to international political issues and I have spoken on behalf of New Zealand twice to the General Assembly.

In essence, my views are shaped by all those experiences. The loose bi-polar system of the Cold War promoted some stability. What we have now is something dangerously akin to anarchy. We lack the

machinery and the will it to solve the geo-political problems that afflict the world. Indeed, a number of them may well be insoluble.

I am remineded of the conclusion reached by Philip Allott in his book *The Health of Nations – Society and Law Beyond the State*:[9]

> "The necessary revolution is a world revolution. The world revolution is a revolution not in the streets, but in our minds."

Allott paints a picture for the future of a consciousness that extends throughout the world. It passes freely across frontiers. It is based on humanity, and our moral and social responsibility extends to the whole of humanity and to the whole of the physical world which we transform by our actions.

I am attracted to his vision. I see great difficulties in achieving it. As any lawyer knows, the key to resolving any dispute is to be able to isolate the issues effectively.

I cannot sensibly talk about all of the issues mentioned in this introduction, so I will confine myself to those that I know most about. These are:

.Environrmental governance

.Climate Change

.The Nuclear Threat

.The Institutions, particularly the United Nations.

[9] Philip Allott *The Health of Nations-Society and Law beyond the State* (Cambridge University Press, Cambridge, 2002).

When it comes to analysing global society and the challenges of goverance many of the issues have revolved around international peace and security. I suggest many but not all of them still do. The issues are more complicated than they used to be because nation states are not the only players. Asymmetrical warfare, terrorism and urban guerrillas have completely changed the nature of conflicts. While we still have conventional wars we also now have something that is in some ways more dangerous and more upsetting to the general population.

Then there is the question of what we are doing to the planet. The problems of international environmental governance are extremely serious, and little understood. While climate change is the most serious and pressing problem, there are many other international environmental problems that have yet to seep into the public consciousness and secure the necessary political attention.

Many years ago, New Zealanders were enthusiastic about New Zealand becoming nuclear free and political battles of a substantial type were fought over those issues. The reasons that impelled the 4th Labour government to take such a strong line on anti-nuclear matters remain. They have not been solved at the global level. Those problems are worse now than they were in those days, and the prospects of solving them seem to be receding fast.

On the institutional front the prime responsibility for international peace and security as conceived by the United Nations Charter was to outlaw the use of force on the part of nation states. The Charter bestowed a monopoly of force, except in self-defence, upon the Security Council. That system has failed. Syria is the most obvious contemporary example. Unless the veto in the Security Council can be reformed the present state of affairs seems bound to continue.

The failures no doubt lie in the deficiencies of human nature such as hubris, greed, ambition and the pursuit of power. But humans also have other qualities. Empathy, compassion and altruism. How can we harness the positive features of people and retard negative qualities? Interests, often economic interests, tend to dominate the actions of people and the untrammeled pursuit of interest leads in the end to disaster. International society lacks the means of restraint that exist in domestic legal systems. We lack both the international institutions and the necessary levels of agreement to do anything effective about restraining these interests. Hans Morgenthau was a good prophet, sad to say.

3 Environmental Governance

One of the most educational experiences I ever had was to be Minister for the Environment for New Zealand for three years. It was so interesting because it was fresh compared with other legal issues with which I dealt throughout my period as a Minister. International environmental law is an intensely practical subject. It deals with formidable problems of uncertainty and science that lie at the root of so many of the environmental problems that afflict the planet. It involves just about every academic discipline that exists. It also involves political leaders, diplomats, public servants, business leaders and non-governmental organisations in civil society. These people find themselves enmeshed in international environmental issues for significant portions of their working lives. Indeed, I tell my students in my "Climate Change and the Law" course at Victoria University that they will have jobs for life!

The environment affects us all and the influence of human activities that take place here on earth. The uncomfortable fact is that human activities seem to constitute the root cause of most of the international environmental problems we face. To some degree humans are unravelling their own future. Even that of their own species. Clearly natural disasters like earthquakes and volcanic eruptions are beyond human intervention, yet human activities in combination with natural disasters can also be devastating. Think earthquake, tsunami and Japanese nuclear power plants. The global community seems to lack the political will and determination to tackle many of these environmental problems. While there are episodes of substantial commitment and activity. These recede when there is an economic downturn.

The United Nations conference on "Environment Development" in 1992 was an occasion of great hope.[10] But, the prospects for the health of our global environment have dimmed since then. Economic adversity shifted the political spotlight onto more immediate and serious economic problems flowing from financial meltdowns. And these problems are not yet over. Their causes have not been addressed.

One effective thing we may have done is to improve the condition of the hole in the Ozone layer.[11] But we won't know for many years yet whether it is certain that we have succeeded. It takes a long time for the atmosphere to recover. But in terms of acceptance and ratification of international treaties the Vienna Convention and the Montreal Protocol were highly successful. Just about all nations have signed on

[10] The United Nations Conference on Environment and Development produced the Rio Declaration and many other instruments: The Rio Declaration on Environment and Development 14 June 1992 UNCED Doc. A/Conf.151.5 Rev 1, 31 ILM 874(1992).

[11] Vienna Convention for the Protection of the Ozone Layer concluded at Vienna, 22 March 1985, 1513 UNTS 293;26 ILM 1529 (1987); Montreal Protocol on Substances that Deplete the Ozone Layer Adopted 16 September 1987 1522 UNTS 3; 26 ILM 1550(1987).

and they seem to have converted those obligations into effective domestic law. We have had a pretty constant stream of treaties and declarations that have added to the thick wad of international environmental instruments that now cover something like 2,000 pages. But hard questions have to be asked. Have they actually made a difference or a sufficient difference? I tend to think not.

I use here an analogy to the domestic environmental situation. I was involved in the fashioning and design of the Resource Management Act 1991. That was implemented in 1992, and in the years since then the many features of the New Zealand domestic environment have become steadily worse, especially water quality. This despite the environmental bottom lines that the Resource Management

Act imposes. The same is true of the international environmental problems. Many treaties, little improvement.

The international legal order is not fit for purpose when it comes to dealing with the global environmental challenge. The incubus of out-dated ideas about state sovereignty too often prevents progressive and necessary outcomes. A new global legal regime bringing the virtues of the rule of law to protect the international environment seems as remote now as it was when I first examined this situation more than thirty years ago. While human kind can discern and analyse the needs, we lack the means to devise and implement measures to address those needs.

The litany of problems that we face is long enough:[12]

- Desertification;
- The strains resulting from increased world population and the depletion of natural resources;
- The absence of clean water in many parts of the world;
- Air pollution;
- Dangers from toxic substances and chemical pollution;
- Loss of biodiversity;

[12] For more on all of this see Geoffrey Palmer *Environment-the International Challenge* (Victoria University Press, 1995).

- Unsustainable methods of land use;
- Acidification of the oceans;
- Destruction of ecosystems;
- Depleting the fisheries resources at an unsustainable rate; and
- Deforestation especially of tropical rain forests at an unsustainable rate

When I was a Minister I worried about these issues and I do so still. The most cited article I have ever written was about a cure for this problem of international environmental global governance.[13] It was based upon a speech I gave to the General Assembly. The speech was influenced by the Hague Declaration of 1989 in which I had participated in the negotiation on behalf of New Zealand.

The Hague Declaration calls for the "development of new principles of international law including new and more effective decision making and enforcement mechanisms."[14] Since environmental problems are planet-wide, solutions can be devised only at the global level. In designing the solutions, different levels of national development must be taken into account. The Declaration reiterates that most of the emissions affecting the atmosphere originate in industrialised countries. Therefore, special obligations will have to be undertaken to assist developing nations. These countries cannot afford to pay the high economic costs of limiting industrial production, which uses harmful available technology, without financial assistance from developed nations. In concrete terms, the nations that signed the Declaration acknowledged a number of general principles and undertook to promote them. What they undertook to do by a soft law method was to promote a new species of hard law. The first casualty was the rule of unanimous consent, for the Declaration proposes:[15]

> The principle of developing, within the framework of the United Nations, new institutional authority, either by strengthening existing institutions or by creating a new institution, which, in the context of the preservation of the earth's atmosphere, shall be responsible for combating any

[13] Geoffrey Palmer "New Ways to Make International Environmental Law" (1992) 86 Am J In't L 259.
[14] Declaration of the Hague.Concluded at the Hague 11 March 1989. UN DocA/44/340-E/1989/120; 28 ILM 1308 at 1309.The Langkawi Declaration on Environment. Adopted by the Commonwealth Heads of Government at Langkawi 21 Octgober 1989 is another soft law instrument with which I was involved contained important aspirations.
[15] Hague Declaration, Above.

> further global warming of the atmosphere and shall involve such decision-making procedures as may be effective even if, on occasion, unanimous agreement has not been achieved.

This is a very radical departure from traditional international law; it is the embryo of a legislative system for international environmental issues. Nations that do not agree with a rule, and will not consent to the rule in a treaty, nevertheless may be obliged to follow the rule. Such a principle opens up the opportunity for the creation of new organisations that will have the ability to create norms by special majorities.

The statement above begs many questions. When will it be judged that effective decision-making procedures require the suspension of the rule of unanimous consent? What procedures must be followed to reach such a conclusion? What sort of majority is sufficient to make a rule binding on a

State that refuses to accept the rule? There is also a troublesome first principles question of how to get there from here; if the existing rule is unanimous consent and there is not unanimous consent to change the rule, how can it be changed? These issues have yet to be addressed.

I spoke to the United Nations General Assembly General Debate in October 1989 about New Zealand's anti-nuclear policy, the Rainbow Warrior, climate change and drift net fishing. It was a heavily environmental speech and basing my proposal on the Hague Declaration, our experience with the ozone layer and the challenges of climate change led me to suggest a new way of handling the problems. I pointed out that the missing institutional link for protecting the health of the planet is the equivalent of a legislature:[16]

> In New Zealand's judgment, the traditional response of international law, developing international legal standards in small incremental steps each of which of which must be subsequently ratified by all countries, is no longer appropriate to deal with the highly complex environmental problems of the future.
>
> The time has come for something more innovative for a conceptual leap forward in institutional terms. And we see the need for the establishment of a new organ in the United Nations system – perhaps it could be called the "Environmental Protection Council"… I have no doubt that if the Charter were being drawn up today, there would be widespread support for including among the organs of the United Nations a body empowered to take binding decisions on global environmental issues. … In our view nothing less than an

[16] Geoffrey Palmer, General Debate Statement of New Zealand Government UN Doc. A/44/PV.15 at 61-76.(October 1989).

institution of this status will command the necessary respect and authority to achieve what is required.

When in 1992 I developed these ideas further in the article previously referred to that appeared in the American Journal of International Law, designed to influence the 1992 Rio de Janeiro Conference on Environment and Developments, it opened this way:

> The purpose of this article is to suggest new ways to make international law for the environment. The existing methods are slow, cumbersome, expensive, un-coordinated and uncertain. Something better must be found if the environmental challenges the world faces are to be dealt with successfully. Nearly twenty years after the Stockholm Declaration, we still lack the
>
> institutional and legal mechanisms to deal effectively with transboundary and biospheric degradation. The 1992 United Nations Conference on Environment and Development presents an opportunity to make progress.' Unfortunately, my reading of the situation in late 1991 suggested that there is no political will to take decisions that will give us the tools to do the job.
>
> As matters stand today, we lack many of the necessary rules and the means for devising them; we lack institutions capable of ensuring that the rules we have are effective. I do not wish to sound apocalyptic. In fact, the proposals put forward here build on existing international law and institutions. But it will take political courage to take the necessary decisions. Unless we devise a better way to make international law for the environment, future progress is likely to be piecemeal, fitful, unsystematic and even random. If the appropriate steps are not taken now, the manifestly unsatisfactory situation we have will limp along toward crisis. Assuredly, action will be necessary in the end; it will be easier if we start soon.
>
> The justification for taking bold steps now rests on an analysis of three factors: the formidable nature of the environmental issues that must be dealt with; the condition of international organization relating to the environment, particularly the United Nations;and the methods currently used to make international environmental law.

I see no reason to change any of those 1992 judgments in light of subsequent events. I attended the Rio meeting in 1992. By this time I was teaching international environmental law in the United States. So I examined what was accomplished at Rio closely. The Rio Declaration was a short statement of principles revolving around sustainability. Agenda 21 was an enormous action plan of forty chapters

comprising recommendations to governments but binding obligations were not created. There was a Declaration on Forests which had been intended as a hard law convention. But agreement on that could not be reached. A Convention of Biodiversity was agreed upon although it does not appear to have been very successful at this distance. Species loss is continuing apace. The Framework Convention on Climate Change was concluded. And there was an agreement to establish a Sustainability Development Commission.

After Rio I wrote a law review article in the Washington Law Quarterly in the United States.[17] The conclusion I reached was bleak and sadly the pessimism has been proved to be correct by subsequent developments. Here is the conclusion:

> Twenty years after Stockholm [the first big international environment conference], we are deeper in the mire and no closer to getting out. The biggest diplomatic gathering in the history of the world, which more world leaders attended than any international conference before, did not summon up the collective political resolve necessary to deal with the global environmental challenge. Progress was, simply, insufficient, due to a general failure of political will.
>
> Rio produced too little, too late. Certainly, Rio had the effect of raising peoples' awareness of the global environmental issues in a way about which we should be optimistic and hopeful. Changing attitudes and education are vitally important in this field. We have had plenty of rhetoric –the time for rhetoric is past. The time for binding international instruments that actually produce change has arrived…. There were insufficient accomplishments at Rio to make us confident about the future of the global environment.

The deficiencies in international governance for the environment remain and little progress has been made since I wrote those words. In no field are the defects more obvious than in climate change to which I now turn.

[17] Geoffrey Palmer "The Earth Summit: What went wrong at Rio?" (1992) 70 Washington Law Quarterly 1005.

4 Climate Change

Climate change was central to the United Nations Conference on Environment and Development at Rio de Janeiro in 1992. The first report of the Intergovernmental Panel on Climate Change was published in 1990. I made a number of speeches about the importance of climate change in 1989 and 1990 but no-one seemed to be listening. In May 1989 I gave a speech entitled "The Role of the Pacific in Global Environmental Issues" at the University of Papua New Guinea at Port Moresby.[18] I outlined the serious consequences of climate change to the peoples of the Pacific and the ways it could adversely affect them, especially those who lived in atolls with changes in sea levels. Some of them are now doomed by increased sea level rises that the most recent research shows is more serious than previous estimates.

Climate change is undoubtedly the most serious problem the world faces. The threat has been evident for long enough, and far too little has been done about it. These are failures of governance on a grand scale. Great hope was expressed concerning the outcomes of the Paris climate change negotiations at the end of 2015 in Paris. It is possible that future negotiations will find a way through and actually produce some mitigation of climate change which is undoubtedly occurring and is going to continue to occur. The science is relatively simple, and it is amazing that the sceptics have been able to prevail in public discussion to the degree that they have for so long. But their voices are to a large degree now silenced. It is remarkable that a risk that is so well documented in scientific terms and the consequences if it occurs so dystopian, that so little has occurred.

The analysis goes like this:[19]

1. What is the probability that the atmosphere will heat up beyond 2 degrees Celsius as a result of anthropogenic climate change?

2. How grave will the injuries and consequences be if that eventuality occurs?

3. What is the cost and burden of taking adequate precautions to ensure that the warming does not occur?

If the burden and costs of mitigation are less than the probability of the climate change occurring multiplied by the consequences if it does then we should take steps to stop it. It would be much cheaper

[18] Geoffrey Palmer *Environmental Politics* (John McIndoe, Dunedin,1990) at 69-73.
[19] Geoffrey Palmer "Climate Change and New Zealand-is it doom or can we hope?" (2015) 11 Policy Quarterly 15. See also Geoffrey Palmer "New Zealand's Defective Law on Climate Change" (2015) 13 NZJPIL 115.

to do so in the long run. This would appear to be a self evident truth. But all political systems seem to have trouble dealing with long-term problems that seem more distant than the next election cycle.

This logic has not been sufficient to convince the world in the years since 1990 when the first report of the inter-governmental panel on climate change became available to take the necessary action. Climate change is going to produce a lot of bad things. They include:

- Damage to ecosystems and loss to biodiversity and species;
- Damage to agriculture and forestry production through drought, forest fires and changes in precipitation and increases in temperatures that will change land use;
- Increases of sickness and disease through heat related illnesses and death and the spread of infectious diseases;
- Increased acidification of the oceans;
- Damage to human welfare through emergency caused by greater extreme weather events;
- Life in a number of small island nations and some more populous ones is likely to be seriously disrupted and large numbers of people displaced.

Increases in sea levels are likely to reach a metre by the end of the century. And this now seems to be a serious under-estimate according to the latest research.[20] Warming above two degrees Celsius so the science tells us spells catastrophe or at least that is what we used to think. Now it appears that anything over 1.5 degrees spells disaster.

The precautionary principle, a quite well-established principle of international environmental law would lead to the exact same conclusion. Act now.

The political achievement at Paris was substantial. It was a tribute to skilful French diplomacy. Momentum was achieved. The legal achievement of Paris on the other hand, in terms of hard law obligations was more muted. The Paris Agreement is long on aspiration and short on obligation.

[20] Editorial Board, New York Times, "The Danger of a Runaway Antarctica" 31 March 2016.

The negotiating strategy devised for Paris called for nations to make Intended Nationally Determined Contributions (INDCs). These were not intended to be and are not legally binding. As expected, the cumulative offers received at Paris fell well short of what will be required to keep the temperature below 2°C by the end of the century, let alone 1.5 degrees.

Since the objective of the 1992 United Nations Framework Convention on Climate Change is stabilisation of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system, we obviously have a long way to go. We are not there yet or anywhere near. So in those terms Paris is not a success. The absence of binding targets on nations means there can be no effective enforceability of the INDC commitments, inadequate though they are.

This approach was deliberate on the part of negotiators, trying to avoid some of the traps that the Kyoto Protocol fell into. They tried to keep the developing countries in the tent and to accommodate the United States, where the prospect of securing Senate consent for binding targets looked hopeless, largely due to Republican party attitudes concerning climate change denial.

Thus, the issue is whether the Paris Agreement will after further iterations ripen into a success and achieve mitigation to the level required within the time available. That in turn will depend upon how far the political momentum generated at Paris will continue in order to ultimately produce sufficient binding obligations. The calculation was that an agreement with everyone on board was better than one where they were not, even if the price paid was to lower the level of ambition. The Paris Agreement can best be understood as a global political commitment to a future continuing process to address climate change issues. That represents welcome progress.

Given the difficulties facing the negotiators and the failures of the past, the legal architecture of the Paris Agreement has some impressive and interesting elements. Clearly the strategic aim was to pull all nations into the agreement by being very inclusive and avoiding division and confrontation. The strategy reminds me of the old nursery rhyme “Come into my parlour said the spider to the fly”. Once caught in the web , the threads of the agreement will tighten later and it may be very difficult for nations to remove themselves because they would be likely to lose a lot of face. Shaming in its various forms remains one of the most potential international sanctions.

It is difficult to assess how all of this will work or whether it will produce the desired outcome in time. It all depends upon continuing political will. And there are many geo-political problems that could knock the process all off-course. But it has to be said it is a positive start, if a long delayed one. The hallmark of all the previous 20 Conferences of the Parties has been procrastination; putting off hard decisions until later. That has occurred again here and time is rapidly running out. An earlier start would have made the problems of adjustment much easier. But it is a start. The mechanism for ratcheting up the INDCs over time may prove to be a successful strategy. But it must be understood the rate of decarbonising the economies of the world must be very rapid and there is nothing in the Agreement that directly addresses fossil fuels and their use, only the emissions that result from that use.

The Agreement has potential. Whether the potential will be realised is a question of speculation. The Agreement does not assure us that temperatures will not rise by more than 2°C, let alone be restricted to 1.5°C. It is more a political agreement to keep trying than a legal set of binding obligations that will produce the necessary result. But the Agreement does contain sufficient binding obligations that could

in time after more negotiations make a difference and ripen into a an enforceable set of obligations. When the detail has been developed we will know more.I am not prepared to judge at this juncture whether the approach taken in Paris will succeed. I hope it does. But it seems virtually certain that it will not succeed in holding the warming to 1.5°C by 2050. The next test will be the climate summit in Morocco in November 2016. Then in 2020 the emission cutting plans of nations must be submitted. Paris could succeed or it could fail as Kyoto did. For me it is a case of one hand clapping. Whether the Paris Agreement will succeed in combatting climate change is a question with no answer at this juncture.

5 The Nuclear Threat

My friend Gareth Evans, former Australian Foreign Minister, has been very active on the nuclear weapons front. He has made a singular contribution to a number of international dispute settlement methods.[21] At his invitation I joined the Asia Pacific Leadership Network for Nuclear Non-Proliferation and Disarmament. That is affiliated with the Nuclear Threat Initiative (NTI) in the United States. I have been to four significant meetings of this group over the last few years, and become even more profoundly depressed about the state of nuclear disarmament, than I was previously.

[21] Gareth Evans *The Responsibility to Protect* (Brookings Institution Press, Washington 2008,2009).

The difficulties in the Ukraine and in North Korea have made the geo-political situation more difficult than it was before and have raised the spectre of nuclear weapons being used to a greater degree of probability than we have experienced for some years. In August 2015, I was present at a meeting of the APLN in Hiroshima. It was the 70th anniversary of the indescribable horror of the world's first use of atomic weapons. There was a lot of disappointment at that meeting that the ninth Non-Proliferation Treaty review conference held in April-May in New York was a failure.

Sixteen thousand remaining nuclear weapons were strongly concentrated in the Asia Pacific region with the United States and Russia having 90% of the stockpile. (There were nearly 18,000 in 2012). China, India and Pakistan all have significant and growing arsenals. The situation promoted by North Korea's policy is producing real concern in that region. The out-dated doctrine of deterrence seems to be still dominating the policies of the nuclear powers and essentially efforts at nuclear disarmament are at a halt. The recent Nuclear Security Summit held in Washington at the beginning of April 2016 may have improved the methods for controlling and safeguarding highly enriched uranium and plutonium. The agreement with Iran is a positive sign.

There is another hopeful sign. The Nuclear Weapons Open-Ended Working Group had its first meeting in Geneva in February 2016. Although the nuclear arms states did not participate, a large number of countries relying on nuclear weapons did. These included Japan, South Korea and Australia. There is worrying evidence that significant funds are currently being expended in updating nuclear weapons. China, India and Pakistan all have significant and growing arsenals. And very big money indeed is earmarked for updating nuclear weaponry. The growing numbers of tactical nuclear weapons pose real problems.

When the humanitarian initiative on the nuclear issue was backed by 155 United Nations members of the general assembly in October 2014 hopes sprang. And in December 2014, the Vienna conference on Humanitarian Impact of Nuclear Weapons swelled further the support for that approach. But all has gone quiet since then. Furthermore, the 1996 advisory opinion of the International Court of Justice declared that it is in the interests of the very survival of humanity that nuclear weapons are never used again under any circumstances. But the Court on that occasion stopped short of saying that their use would be illegal in all circumstances.

The unfortunate paralysis that dogs efforts to halt the spread of nuclear weapons and outlaw their use needs to be urgently addressed. I have looked into this on recent occasions to see whether it would be useful to advocate some new approach to the stifled and paralysed efforts that are going on in this area. But unless New Zealand Government takes a stronger lead on these issues I cannot see how it would be possible to effectively advocate for progress from New Zealand.

Civil society internationally seems quite divided on how to proceed in this area. The negotiation and adoption of a comprehensive and universal nuclear weapons convention backed by effective verification enforcement mechanisms that absolutely prohibit not only the use of nuclear weapons but their possession, manufacture or acquisition by any other means by state or non-state actors is greatly needed. And there needs to be a commitment to the principle of no first use by all nations who have nuclear weapons. Unless the international decision makers can be influenced by the people who live in their countries, I do not see that much progress is going to be made on this, and I do not share the view that these risks are remote.

In January 2016, the annual doomsday clock press conference was held in Washington DC, and the members of the Science and Security Board of the Bulletin of Atomic Scientists decided to keep the doomsday clock at three minutes to midnight despite the success of the Iran talks.[22] That clock has been in use since 1947 as a symbol of the closeness or otherwise of civilisation to self-destruction. It has been at three minutes to midnight only during the most terrifying parts of the Cold War, notably in 1983. Bill Perry the former United States Security for Defence stated his view at that meeting that the current situation is actually more dangerous than it was in 1983.

World leaders have failed to act with the speed or on the scale necessary to protect people from the dangers posed by nuclear war. The best analysis in this part of the world is that produced by the Centre for Nuclear Non-Proliferation and Disarmament at the Australian National University led by Gareth

[22] http://thebulletin.org/press-release/doomsday-clock-hands-remain-unchanged-despite-iran-deal-and-paris-talks9122

Evans. Nuclear Weapons State of Play published in 2015 records that some progress has been made.[23] But that nuclear arms states pay at best lip-service to the ultimate elimination of nuclear weapons and none have committed to any "minimisation objective" nor any specific timetable for their major reduction – let alone abolition.[24]

On the evidence the size of their weapons arsenals, fissile material stocks, forced modernisation plans, stated doctrine and known deployment practices all nine nuclear-armed states foresee indefinite retention of nuclear weapons and the continuing role for them in their security policies.

This is a very complicated field but given the number of weapons that exist, the chances of human error and accident, the prospect of terrorists gaining use or access to some of these weapons it seems likely that nuclear explosions will occur in the long-term. Neither can it be convincingly argued that tactical nuclear weapons at least will not be used, given extreme situations that could develop. Surely we should not have to wait for a further nuclear explosion to address the issues. And the destructive power of modern nuclear weapons is much greater than those that destroyed Hiroshima and Ngasaki.

6 The Institutions

The Charter of the United Nations has as one of its central purposes the requirement set out in Article 2(3) that all members are to settle their international disputes by peaceful means in such a manner that

international peace and security, and justice, are not in danger. Specific settlement of dispute provisions appear in Chapter VI.[25] Article 33(1) imposes a specific legal principle on member states. It provides:

> "The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice."

The hierarchy of methods by which to arrive at a resolution of a dispute is extensive from negotiation to adjudication and every modern method of dispute settlement in between. Each enumerated method has

[23] Gareth Evans, Tanya Ogilvie-White, Ramesh Thakur *Nuclear Weapons: The State of Play (*2015 Australian National University,Canberra, 2015).
[24] The State of Play, above, at 4.
[25] On this subject generally see J G Merrills *International Dispute Settlement* (5th ed., Cambridge University Press, Cambridge, 2011). I have examined disputes with which I have been involved in Geoffrey Palmer "Perspectives on International Dispute Settlement from a Participant" (2012) 43 VUWLR 39.

its own features, its own literature and its own practice. Negotiations are the standard fare of diplomacy and they are usually the first step. Negotiations cover different categories of dispute. New law is made in treaties that are negotiated. Disputes both bilateral and multi-lateral are also settled by negotiation. States like negotiations because they remain in the driver's seat in the manner that they do not in third party adjudication. But to negotiate does not mean that agreement will be reached, even though that is the aim. Negotiations can be endless. Not resolving a dispute now in political terms is often better than a final result that will have adverse internal political consequences. But negotiations can be quick if there is a will and as a dispute settlement method negotiation is certainly flexible. At the apex of the dispute pyramid sits the International Court of Justice.

Bear in mind that about 70 states including New Zealand do now accept compulsory jurisdiction of the Court of Justice under the so called optional clause of the statue of the International Court. Nevertheless, the jurisdiction of the Court is essentially consensual. States are not obliged to accept the compulsory jurisdiction of the Court. Most do not.

Japan recently and conspicuously has withdrawn its acceptance of jurisdiction in relation marine living resources. This was as a result of the decision rendered by the International Court of Justice decision in which Australia sued Japan and New Zealand intervened. The court held that Japan's whaling operations in the Southern Ocean were in breach of Article 8 of the International Convention for the Regulation of Whaling. After eight years as New Zealand's Commissioner I just want to add that while Australia won the case they have lost the war. The negotiations that were held before Australia filed its proceedings would have produced a better result. Now there is no effective international control over

Japan's whaling operations. And for a nation with Japan's reputation to repudiate the court in this way is lamentable.

It is well-known that New Zealand and Australia argued strongly at the time of the foundation of the United Nations that the Court should have compulsory jurisdiction in respect to all member states, but that was defeated by the great powers. Russia and China have never accepted the jurisdiction of the Court either under the optional clause or by special agreement. The United States terminated its acceptance of the compulsory jurisdiction effective in 1986, in the aftermath of the decision of the Court in the case Nicaragua brought against the United States for military and paramilitary activities, particularly the laying of mines in Nicaraguan ports. At the time the United States noted that only 47 countries accepted the compulsory jurisdiction. France of course terminated its acceptance of the compulsory jurisdiction in the wake of the nuclear test case of 1974. The United Kingdom is the only

permanent member of the Security Council that accepts the compulsory jurisdiction of the Court. And of course there are many legal intricacies about the optional clause. One may reflect upon what sort of an example the P5 on the Security Council set for other nations.

The United Nations is essentially a diplomatic organisation. It's methods are the methods of diplomacy. The United Nations is a key institution in the endeavour to avoid, contain and resolve disputes. The Charter offers many dispute settlement menus that can be used with creativity where there is a desire to settle the dispute. The increasing use of the United Nations panels to find facts is itself a fresh contribution to the techniques of dispute settlement as I found in chairing the Gaza Flotilla panel. And there are many other disputes dealt with outside the ambit of the United Nations.

But if there are going to be international inquiries designed to find out what really happened and what should be done about it, quite a few changes are needed based on my experience with the Gaza Flotilla inquiry. Despite the accelerating use of the United Nations inquiries they suffer from inherent weaknesses.[26] These weaknesses cannot be all overcome, but steps can be taken to improve their processes. Such action will enhance the credibility of UN inquiries and give their findings more weight.

The UN is a complex set of structures inhabited by a massive bureaucracy and is difficult to manage.[27] Helen Clark has the range of skills required to sort this out. And I hope she gets to try. Elements of the UN sometimes find themselves in competition or at least at odds with one another. In such circumstances, rigorous attention must be given to high quality independent appointments and fair systematic means of working. There is a need to increase the credibility of inquiries and therefore advance the purposes for which they are established. There should also be greater co-ordination between various elements of the UN so they don't work at odds with one another. In addition to a generally applicable set of procedures, each part of the UN which conducts inquiries should develop a publicly available manual that sets out the inquiry-specific requirements concerning the qualifications of

[26] Geoffrey Palmer "Reform of UN Inquiries" in Suzannah Linton, Gerry Simpson and William A Schabas *For the Sake of Present and Future Generations-Essays on International Law,Crime and Justice in Honour of Roger S Clark* (Brill Nihjhoff, Leide,2015) at 597.
[27] Anthony Banbury "I love the U.N., but it is Failing" New York Times, Sunday Review, 18 March 2016. International New York Times http://nyti.ms/1Vj35sn.

appointees, the framing of the terms of reference, the fair methods and procedures that should be employed, and the level of support available.

All attempts should be made to ensure consistency, where possible, between these various inquiry-specific manuals. This should not impair the flexibility that is a valuable feature of such inquiries, but it will prevent the waste of time and resources involved in reinventing the wheel on each occasion that inquiries are established. In situations where an inquiry will receive no co-operation and is doomed in its prospects at arriving at the truth, it may be better not to establish it. The coin of inquiry must not be debased if it is to fulfil its function of promoting accountability in exposing the activities of international malefactors. Such machinery as is available to the UN to conduct inquiries needs to be carefully calibrated, prudently managed and conducted upon the basis of a process that is transparent and clear to everyone. UN inquiries are proxy for Courts in important ways. Courts depend upon independence, procedural fairness, efficiency and public confidence for their place within municipal government. Those are the qualities that UN inquiries need to exhibit. There are too many gaps as matters stand.

But improving UN inquiries in the manner that I have suggested is no substitute for the benefits that would flow from the rule of law at the international level that could be achieved if the jurisdiction of the International Court of Justice was compulsory, as Australia and New Zealand argued for in 1945. And if the range of the International Criminal Court's jurisdiction was extended so guilty leaders could not hide from the the consequences of breaches of international humantarian law that would be a great improvement.

Conclusions

It is not too late to solve all the problems of international governance that I have outlined. Establishing a new international organisation that has authority and weight with legislative capacity to deal with international environmental problems that are not within the capacity of a individual states to solve is not impossible. Solving climate change to a substantial degree is possible by building upon the approach of the Paris agreement. Time is running out and determined action is necessary. The nuclear weapons issue is stalemated, but surely we do not have to wait until a nuclear weapon is used before action is taken. Reforming the United Nations is not impossible either. I cannot help thinking that my generation has failed the future when it comes to bglobal governance and people ought to be angry about it.

Rational analaysis, however, is no substitute for political will. In all the areas upon which I have touched it is the voice of the people that needs to be heard from and their voice these days seems muffled. That is the instrsuments by which political will must be galvanised. Organisations like the Interparliamentary Union need to weigh into these issues. The IPU works closely with the United Nations and other multi-lateral bodies to ensure there is a parliamentary dimension to international cooperation, global governance as well as in the resolution of major international issues. I suggest these efforts need to be redoubled. Elected members of Parliament are not sufficiently heard from. They need to stand up and be counted. Executive governments have effective means of avoiding accountability to their publics on many of these issues. Civil society seems today to be weaker than in times past.

I end with Philip Allott whom I quoted earlier:[28]

> For 250 years, a perverted, anti-social,anti-human worldview has allowed the holders of public power to treat social injustice and human suffering on a global scale as if it were beyond human responsibility and beyond the judgement of our most fundamental values and ideals, and the holders of public power have imagined an international legal system which enacts and enforces such a world view. And the people and the peoples of the world have simply had to acquiesce in and to live with the consequences of this disgraceful perversion of theory and practice.

He calls for the need to find a way to communicate to the holders of public power the moral outrage at the present state of the human world that people feel.

[28] Philip Allott, above note 9 at 399.