
AN INTERNATIONAL REGIME FOR ENVIRONMENTAL PROTECTION

*SPEECH BY
RT HON PROFESSOR SIR GEOFFREY PALMER**

Tena Koutou, Tena Koutou, Tena Koutou, Katoa.

I have greeted you in Maori, the language of the indigenous people of New Zealand. This will indicate to you that I come from a different background than the one you and Dean D.D. Ellis come from. Dean Ellis and I taught together at the University of Iowa. It is a very great pleasure for me, sir, to be here at this wonderful law school and have the honor of addressing you and the students here.

I cannot help thinking that the introduction you gave me was designed to indicate that we in the South Sea Island Nations think utopian thoughts and design utopian schemes — for it is true.¹ And I shall engage in another part of such activity this afternoon with the proposals that I want to put before you about how we ought to develop a new international law for the environment.

There are two parts to the address which I want to give to you. The first relates to the general character of international law as it now comes to us and the second relates to the threats to the environment —

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1. See, e.g., GEOFFREY PALMER, *COMPENSATION FOR INCAPACITY: A STUDY OF LAW AND SOCIAL CHANGE IN NEW ZEALAND AND AUSTRALIA* (1979); GEOFFREY PALMER, *ENVIRONMENTAL POLITICS: A GREENPRINT FOR NEW ZEALAND* (1990). See also the Resource Management Act 1991, [1991] 1 N.Z. STAT. 69 - The Act is 382 pages long and sets up a system of sustainable management of natural and physical resources in New Zealand.

the two problems are dynamically interrelated. On these questions I am an optimist. I think that it is possible to reach the levels of international cooperation which are necessary for the world to conquer the problems that we face relating to the environment. The biosphere is as thin as the dew on an apple and our welfare on this planet depends on the dew being kept in good order and condition.² The threats to our environment are man made. The solutions lie in our own hands.

We do, however, have a heritage which comes down to us, of international law. International law has had a bad press by and large. Many quite respectable countries sometimes do not obey it, but most countries obey most of the norms most of the time.³ It is significant that President Bush in relation to the events in the Middle East justified the actions that the United States took in terms both of international law and of United Nation's Charter.⁴ Such has not always been the case in relation to actions which the United States takes, but it was heartening to see that for this international commitment, international law was offered as the justification for the actions taken. I think we can look forward to a more prominent part being played by international law as a determinant of the foreign policy of the United States in the future. That is a very good thing.

International law suffers from a number of deficiencies. Some jurisprudential writers have said that international law is not law.⁵ Many writers in the field of jurisprudence have problems analyzing international law.⁶ These views of international law are often reflected in the opinion of ordinary people. My own experience is that sometimes politicians involved in international affairs talk and think this way. They will accept that there are norms. They will accept that they should be

2. See THE WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, OUR COMMON FUTURE (1987).

3. LOUIS HENKIN, HOW NATIONS BEHAVE - LAW AND FOREIGN POLICY 10 (2d ed. 1979); THOMAS M. FRANCK, POWER OF LEGITIMACY AMONG NATIONS (1990).

4. Thomas M. Franck & Faiza Patel, *UN Police Action in Lieu of War: "The Old Order Changeth,"* 85 AM. J. INT'L L. 63 (1991); *United States: Authorization for the Use of Military Force Against Iraq Resolution* - U.S. PUBLIC LAW 102-1, 102d Cong. Jan. 14, 1991, 30 I.L.M. 296 (1991), U.N.S.C.R. 1560 (1990), together with Resolutions 674 (1990) of Oct. 29, and 677 (1990) of Nov. 28. Nine earlier resolutions adopted between Aug. 2 and Sept. 25, 1990, appear in 29 I.L.M. 1323 (1990).

5. JOHN AUSTIN, LECTURES ON JURISPRUDENCE 176-77 (R. Campbell ed. 2 vol. 1875); H.L.A. HART, THE CONCEPT OF LAW 209 (1961).

6. JOHN W. SALMOND, SALMOND ON JURISPRUDENCE 54 (P.J. Fitzgerald 12th ed. 1966); REGINALD W. DIAS, JURISPRUDENCE 217-19 (5th ed. 1985).

followed. But they doubt the ability of anyone to effectively enforce the rules if they are not followed.

John Austin and the analytical positivists argued that international law is not law properly so called because it lacks both a legislature and sanctions.⁷ H.L.A. Hart argues that international law is not a system but a set of rules.⁸ It is not law because it lacks any basic rules of recognition. The classical answer to the charge is that there are a body of rules in the community of nations which are followed and can be enforced.⁹ It is not so easy, however, to develop a coherent theory as to why those rules are binding. It may be sufficient to agree with J.L. Brierly "[t]he best evidence for the existence of international law is that every state recognizes that it does exist and that it is itself under obligations to observe it."¹⁰ While the statement is valid, it does not tell us anything about the significance of the differences between international law and municipal law. Those differences matter when confronting the problems with the state of the biosphere.

The controversy as to how to characterize international law is essentially barren.¹¹ The nature of the rules is not altered by the manner in

7. AUSTIN, *supra* note 5, at 176-77. Austin says, "[b]ut the greatest logical error of all that is committed by many continental jurists, who include in public law, not only the law of political conditions, of crimes, and of civil and criminal procedure, but also international law: which is not positive law at all, but a branch of positive morality." *Id.* at 177.

8. Hart, *supra* note 5, at 209. Professor Hart argues as follows:

For, though it is consistent with the usage of the last 150 years to use the expression "law" here, the absence of an international legislature, courts with compulsory jurisdiction, and centrally organized sanctions have inspired misgivings, at any rate in the breasts of legal theorists. The absence of these institutions means that the rules for states resemble that simple form of social structure, consisting only of primary rules of obligation, which, when we find it among societies of individuals, we are accustomed to contrast with a developed legal system. It is indeed arguable, as we shall show, that international law not only lacks the secondary rules of change and adjudication which provide for legislature and courts, but also a unifying rule of recognition specifying "sources" of law and providing general criteria for the identification of its rules. These differences are indeed striking and the question "Is international law really law?" can hardly be put aside.

Id. at 209.

9. JAMES L. BRIERLY, *THE LAW OF NATIONS* 71 (6th ed. 1963).

10. JAMES L. BRIERLY, *THE OUTLOOK FOR INTERNATIONAL LAW* 5 (1944).

11. See generally FRANCK, *supra* note 3; Thomas M. Franck, *Legitimacy in the International System*, 82 AM. J. INT'L LAW 705 (1988); HART, *supra* note 5, at 208-32; HENKIN, *supra* note 3, at 4-5; LASSA F. OPPENHEIM, *INTERNATIONAL LAW* 7-15 (8th ed. 1955); JOSEPH G. STARKE, *INTRODUCTION TO INTERNATIONAL LAW* 16-29 (10th ed. 1989).

which they are described. But there can be little doubt that international law does lack some of the conspicuous features of domestic legal systems and is for that reason different. International law lacks institutions which can legislate. Certainly treaties can be made and they are to a large extent followed but treaties, however many and however comprehensive, differ in respects which are basic from legislation. The most fundamental difference is in the capacity of legislation to provide a basic norm which is binding even on those nations which may disagree.

International law for the most part lacks institutionalized methods of law enforcement. There is, to put it at its crudest level, no police person. In some cases breaches of the norms will come to the notice of other nations, who may or may not decide to do something about them by diplomatic means. And those decisions will revolve around the political interests involved, the capacities and power relationships of the nations concerned. The decision to do anything about breaches of international law will not usually depend on the fact of the breach.

A key problem in any attempt to deal with the jurisprudential basis of obligation in international law lies in the concept of sovereignty.¹² If there are more than 170 co-equal sovereign states in the international community it is hard to see how it is possible to arrive at a system which includes legislation, enforcement, and third party adjudication unless all the nations agree. In its strongest form, arguments about sovereignty are used unhesitatingly by political decision makers to tell decision makers of other nations to keep out of matters which are not their business. What Brierly called the "incubus" of sovereignty still sits heavily upon the body of international law. And as Brierly said, it stands "for something in the relations of states which is both true and very formidable."¹³ But sovereignty does not stand for everything. It is not an absolute. It does not and cannot mean a state of international lawlessness.

Sovereignty casts a long shadow. Consider Professor Ian Brownlie's formulation in the latest edition of his treatise: "[t]he sovereignty and equality of states represent the basic constitutional doctrine of the law of nations, which governs a community consisting primarily of states having a uniform legal personality."¹⁴ From the principle Brownlie

12. BRIERLY, *supra* note 9, at 47.

13. *Id.*

14. IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 287 (4th ed. 1990).

deduces a number of consequences, the most important of which for present purposes concerns consent. He points out "the jurisdiction of international tribunals depends on the consent of the parties; membership in international organizations is not obligatory; and the powers of the organs of such organizations to determine their own competence, to take decisions by majority vote, and to enforce decisions, depend on the consent of member states."¹⁵ These are the features which pose an obstacle to the development of an international law to deal effectively with the problems of biosphere. They have to be overcome by means of acceptance of an international set of rules for this particular purpose which can be applied universally.

Political decision makers dwell little on theory and even less on jurisprudence. They want something practical that works. If they can be convinced that a broadly acceptable regime can be worked out that will offer the prospect of solving the problems of the biosphere, for example, they will not quibble at the surrender of some sovereignty. The greater challenge is to design the regime, it is a formidable undertaking from both a technical and a political point of view.

The ordering of the affairs of nations in their relationships with one another has steadily eroded the power of nations to please themselves. The complexity of the modern world and the plethora of intricate treaties sometimes on highly specialized subjects which provide the basis of most international obligations today have whittled away sovereignty. Political decision makers most assuredly do not think of themselves as inhabiting a world where they can take any actions they choose regardless of the consequences to other nations and people. They may choose to articulate defenses to their actions on the basis of sovereignty but they understand increasingly their mutual interdependence. So much international business between nations is transacted on the telephone, facsimile transmission machine, or by personal visits and international meetings that this reality is inescapable. These realities greatly affect the context in which the instruments of international law function. The formal rules tend to lag behind the contemporary reality.

I noticed, as an international and national politician, that there is a difference between domestic law and international law. Political decision makers take legal advice when they make decisions. Cabinet papers that come up are accompanied by a legal opinion or a summary of legal advice, if that is pertinent, to the paper. The purpose is to advise

15. *Id.* at 287-88.

ministers what the law is and whether there might be court actions as a result of the government's decision to decide to do A or B.

In my experience, ministers would sometimes debate, in the privacy of the Cabinet room if a law case were taken, whether the government would succeed. It turned out that in domestic questions the provision of legal advice to ministers was a significant, sometimes controlling variable in their decision making. They were deterred from making and taking decisions which would not be upheld in the courts. I am talking about a legal system which knows nothing of *Marbury v. Madison*¹⁶ and remains innocent of any doctrine of judicial review holding statutes passed by the Parliament unconstitutional. Parliament in New Zealand is sovereign.¹⁷ It can make whatever law it likes. The courts cannot interfere. Nonetheless, government decisions and ministerial actions can be reviewed by the courts under the common law principles of administrative law.

On international problems, the government received legal advice. But I found that ministers' attitudes to international legal advice tended to be more distant. That is to say they did not regard it as such a controlling variable in their decision making as domestic legal advice tended to be. In the international sphere, ministers frequently regarded the advice as to what the current state of law was on a subject as less important than the political aspects of the dispute and what it would do to our relations with the other nations involved. And so the political aspects would be more prominent than the legal.

The truth is that the ministers would feel that there was a set of international norms that should be followed by New Zealand, but there did not seem to be a legal system which was as clear and direct in its impact as the domestic legal system. The reasons for that attitude are really the reasons that the analytical positivists regarded international law as not being law properly so called.

The weaknesses of international law have long been accepted, and to some extent disregarded by scholars of international law. International jurists know there are an increasing body of customary rules of international law which are followed and which are binding on states. They know also that there is an increasing body of conventional law made up of treaties and multi-lateral conventions which are negotiated with increasing frequency.

16. 5 U.S. 137 (1 Cranch) (1803).

17. For an explanation of New Zealand's system of government, see GEOFFREY PALMER, *UNBRIDLED POWER* (2d ed. 1987).

The result is, I suppose, that conventional international law acts as something of a substitute for legislation, but it is not the same and the reason that it is not the same is important. The rules of treaty law are based on a primary principle of consent.¹⁸ The general rule is that nations cannot be bound by a treaty if they do not become parties to it and thereby consent to it. Now that rule has long been an obstacle to the development of what I might call international legislation. It has been an obstacle to the development of a set of laws on any extensive basis that is binding on states when they explicitly do not consent to it. The difficulty is very significant in relation to the subject matter of this address. It means, in relation to both the ozone layer and climate change, that there is no legislature. There can only be treaties. There is no obligation on any nation state to become a party to a particular treaty. That is the first difficulty.

The second difficulty of international law which becomes obvious when we are dealing with global environmental issues relates to adjudication. The International Court of Justice, in Article 36, has a compulsory jurisdiction clause but the compulsory jurisdiction clause is, in fact, optional.¹⁹ States can accept the compulsory jurisdiction of the court or not as they see fit. There is at the moment only one permanent member of the Security Council of the United Nations which accepts the compulsory jurisdiction of the International Court of Justice.²⁰ That nation is Great Britain.

The United States formally accepted the jurisdiction of the International Court of Justice until Nicaragua saw fit to take the United States to the International Court of Justice whereupon the United States picked up its bat and ball and went home in high dudgeon.²¹ For a nation based on the rule of law, and a nation which wishes to uphold

18. Vienna Convention on the Law of Treaties, May 23, 1969, U.N. Doc. A/CONF 39/27 (1969), 1155 U.N.T.S. 331, *reprinted* in 8 I.L.M. 679 (1969).

19. Statute of the International Court of Justice, 59 STAT. 1031, 75 No. 993, 3 Bevan 1153, 1976 Y.B.U.N. 1052.

20. BROWNLIE, *supra* note 14, at 726.

21. See Anthony D'Amato, Comment, *Modifying US Acceptance of the Compulsory Jurisdiction of the World Court*, 79 AM. J. INT'L L. 385 (1985); Patrick M. Norton, *The Nicaragua Case: Political Questions Before the International Court of Justice*, 27 VA. J. INT'L L. 459 (1987); W. Michael Reisman, Comment, *Has the International Court Exceeded its Jurisdiction?*, 80 AM. J. INT'L L. 128 (1986). See also U.S. Decision to Withdraw from the International Court of Justice: Hearing Before the Subcommittee on Human Rights and International Organization of the House of Commons on Foreign Affairs, 99th Congress, 1st Sess. (1985) (especially statements by Abraham D. Sofaer, Legal Advisor, Department of State; Professor Richard N. Gardner, Columbia Univer-

the rule of law in the international community that was, I suggest, a disgraceful action. But it was no worse than the action which France, another permanent member of the Security Council, took when Australia and New Zealand brought proceedings against France in the International Court of Justice in the Nuclear Tests case in 1974.²² France refused to appear, and revoked its acceptance of the compulsory jurisdiction of the International Court of Justice. Less than a third of the nation states in our world accept that compulsory jurisdiction, and that is a matter of grave concern.

The third institutional characteristic to which I wish to draw your attention in international law is the state of the United Nations Charter which contains no reference to the environment, save a fleeting reference to "good neighborliness."²³ There is in the United Nations a Security Council, a Trusteeship Council, an Economic and Social Council, but there is no environmental organ. There is no chapter of the United Nations Charter dealing with the environment. Undoubtedly, if that Charter were being drawn up today such an omission could not and would not be tolerated. What we have instead is the United Nations Environment Program headquartered in Nairobi.²⁴ That program, of course, is funded voluntarily by members of the United Nations. It has no institutional teeth. It has no real power except to act as a sort of clearing house and a general catalyst for encouragement and coordination. Given the constitutional weakness, the United Nations Environment Program has performed with remarkable skill and deftness, particularly in relation to the ozone layer. Its work is a tribute to its most able Executive Director, Dr. Mostafa Tolba.

It is to the ozone layer that I now come. The depletion of the ozone layer would lead to some very serious problems. We who live in the South Seas became greatly disconcerted when the evidence about the

sity School of Law; and Professor Burns H. Weston, Independent Commission on Respect for International Law and University of Iowa College of Law).

22. Nuclear Test cases (Austl. v. Fr; N.Z. v. Fr.), Interim Protection, 1973 ICJ Rep. 99 and 135 (orders of June 22), 1974 ICJ Rep. 253 and 257 (judgments of Dec. 20).

23. U.N. CHARTER art. 74.

24. See Institutional and Financial Arrangement for International Co-operation, G. A. Res. 2997 (XXVII) (Dec. 15, 1972). For full text of the resolution establishing UNEP, see LOUIS R. SOHN, INTERNATIONAL ORGANIZATION AND INTEGRATION 460 (1986). For a detailed account of the formation of UNEP, see generally, LYNTON K. CALDWELL, INTERNATIONAL ENVIRONMENTAL POLICY: EMERGENCE AND DIMENSIONS 193-94 (1983). For a complete collection of official documents relating to UNEP, see UNEP, COMPENDIUM OF LEGISLATIVE AUTHORITY (1978).

hole in the ozone layer opening up over Antarctica became clearer and clearer. We live not so very far away from Antarctica and we have, indeed, on our television screens all summer advertisements of the burn time. It tells you, for example, that the burn time in a particular town on a particular day will be seventeen minutes. This is to indicate to people that they cannot stay outside for longer than seventeen minutes without the prospect of sunburn, and they should take preventative measures. The risks of skin cancer are high in New Zealand. We, with the state of Queensland, have the highest rates of skin cancer in the world.

The ozone layer does the great service of blocking out ultraviolet light. Ultraviolet rays when they come through the atmosphere can cause increased rates of skin cancer. They can cause cataracts of the eyes. They can interrupt the ecology of the food chain in the seas.

Depletion of the ozone layer is a relatively new problem. It is the result of chlorofluorocarbons invented by General Motor's scientists in 1929. They did not come into general use until a bit later than that. Chlorofluorocarbons, or CFCs for short, have the great advantage of being very effective refrigerants for use in refrigerators and air-conditioning equipment, also as propellants in aerosols, for cleaning electrical equipment and computers. Halons, a related chemical, are very effective at putting out fires, particularly in tanks and aircraft.

So when the nations of the world gathered in Vienna in 1984 to negotiate the provisions of the Vienna Convention on substances depleting the ozone layer, there was quite a lot of resistance from the industry who produced CFCs, big multinational chemical companies, who said not to act precipitately.²⁵ Do not do anything too quickly because we do not know that this problem is really as serious as some scientists say. And whatever you do, remember, they said, the great advantages of these chemicals and remember the cost to the economy if they can no longer be used.

And so, at the time of the negotiation of the Vienna Convention it was possible to negotiate a framework convention only.²⁶ It was a significant convention, however, because it asked for international cooperation in the exchange of information. It set up a secretariat as well as a

25. John W. Kindt & Samuel P. Minifee, *The Vexing Problem of Ozone Depletion in International Environmental Law and Policy*, 24 TEX. INT'L L.J. 261, 262 (1989).

26. See Vienna Convention for the Protection of the Ozone Layer, Mar. 22, 1985 entered into force Sept. 22, 1988, U.N. Doc. UNEP/19.53/Rev.1, S. Treaty Doc. No. 9, 99th Cong., 1st Sess. (1985), reprinted in 26 I.L.M. 1529.

dispute settlement mechanism. It was a great achievement. But it did not commit any nation to cease emitting anything. There was no rule about reduction.

It did not take long for the state of scientific evidence to change. When that scientific evidence changed what we found was that things were very bad indeed. So nations gathered again together at Montreal and there they negotiated the Montreal Protocol to the Vienna Convention on substances depleting the ozone layer.²⁷ This time there was a set of rules which required a reduction in emissions of ozone depleting substances by fifty percent by the end of the century, with an allowance for developing countries.²⁸

Hardly was the ink dry on the Montreal Protocol before more holes in the ozone layer were discovered. There was even one in the Arctic. That made the Northern Hemisphere people think more carefully than they had been thinking prior to that; at least that is what we thought in the Southern Hemisphere. The result was that a new set of international meetings had to be held. In 1989, a meeting was held in Helsinki, in which a declaration was made that the Montreal Protocol needed to be revised.²⁹

The Helsinki declaration was an example of soft law. Soft law has great utility in the environmental area. Declarations are made, political commitments are given — they are not legally enforceable, they are not capable of being adjudicated by third parties, but they create a political atmosphere in which progress can be made. Do not denigrate soft law in the international environmental area — it has its uses. The Helsinki soft law instrument of 1989 was converted successfully into the amendments to the Montreal Protocol made in London in 1990 which, in fact, said all ozone depleting substances must be phased out by the year 2000 — all of them.³⁰ Even that may not be quick enough, we now learn.

Tucked away in the Montreal Protocol where hardly anyone noticed

27. Protocol on Substances that Deplete the Ozone Layer, with Annex A, Done at Montreal, Sept. 19, 1987, entered into force Jan. 1, 1989, *reprinted in* 26 I.L.M. 1550 (1987) [hereinafter Montreal Protocol].

28. Montreal Protocol, *supra* note 27.

29. The Helsinki Declaration for the Protection of the Ozone Layer, May 2, 1989, *reprinted in* 28 I.L.M. 1335 (1989). See Conference Report U.N. Doc. UNEP Ox.L.Conv. 1/5, Apr. 27, 1989.

30. Adjustments to the Montreal Protocol on Substances that Deplete the Ozone Layer done at London, June 29, 1990, *reprinted in* RICHARD E. BENEDICT, OZONE DIPLOMACY - NEW DIRECTIONS IN SAFEGUARDING THE PLANET 242 (1991).

it was a very novel provision. Remember that one of the defects of international law was that there was no legislative process. Pay attention to this. It relates to revisions to the Montreal Protocol. Article 9(c)(2) provides:

In taking such decisions, the Parties shall make every effort to reach agreement by consensus. If all efforts of consensus have been exhausted, and no agreement reached, such decisions shall, as a last resort, be adopted by a two-thirds majority vote of the Parties present and voting representing at least fifty percent of the total consumption of the controlled substances of the parties.

The measure was further refined in the 1990 London Amendments to Montreal Protocol so that the final sixteen words of the provision were deleted and the following words substituted: "a majority of the parties operating under paragraph 1 of Article 5 present and voting and a majority of the parties not so operating present and voting." The effect of the new provision is to give both developing and developed countries an effective veto; because a two-thirds majority is required for change, it must include a simple majority from each group. The provision is a manifest and important departure from the rule of unanimous consent. It is done by a proleptic means. You set up a rule of procedure in advance as to how you are going to arrive at a rule that will be binding. Then you arrive at the rule itself later. It is the beginning of a legislative process. It is the beginning of a means of developing binding rules on nations even when not all nations agree. There are some precedents for this in international organizations, technical rules in the field of International Civil Aviation Organization and a number of organizations of that type. The International Labor Organization also has an elaborate institutional way of settling the content of conventions.

The problem with climate change is that the social and economic impact of the policy decisions are much wider than for the ozone layer. Ozone is a relatively simple problem. The cause of it is world known and the cures are obvious. The causes of it are manmade chemicals and the cure is to stop using the chemicals. The technology is now becoming available to allow that to occur.

Climate change is a horse of a very different color. Climate change is caused by the balance of greenhouse gases getting out of kilter.³¹ The greenhouse gases and the ozone problem are related, in that one of the most potent greenhouse gases is, in fact, CFCs. But there are

31. GLOBAL WARMING: THE GREENHOUSE EFFECT (J. Leggett ed. 1990).

others and they are more important; carbon dioxide is the biggest. Carbon dioxide is being produced in unprecedented quantities and it is being released into the atmosphere. The consequence will be, according to the Intergovernmental Panel on Climate Change, that the world is going to heat up.³² When the world heats up and how far it heats up is a matter still of some scientific controversy. The truth of the matter is that the greenhouse gases, which are nitrous oxide, carbon dioxide, and methane (a substance which we have noticed in New Zealand is also produced by flatulent sheep of which we have many millions), are all substances which heat up the atmosphere.

Now we need greenhouse gases. Without greenhouse gases we will all freeze to death. The greenhouse gases provide the means of keeping the heat from the sun on the earth in ways that sustain life. If you do not believe that, take a trip to Venus and Mars and it will be demonstrated very clearly to you. But the difficulty is you can have too much of a good thing.

Ever since the industrial revolution we have been burning increasing amounts of coal and we have been chopping down increasing numbers of trees, which are carbon sinks. And we have taken to riding about in motor cars, which use fossil fuels. Indeed, the United States produces 21 percent of the greenhouse gas emissions for 4.5 percent of the population of this earth.³³ There are also a number of developing countries who produce a lot because methane is produced by rice paddies. Chopping down tropical forests is a big contributor to the greenhouse effect.

Now, what do you make of all of this? What I make of it is very clear. There needs to be action in June of 1992, at the biggest environ-

32. See IPCC (WMO/UNEP), First Assessment Report, Vol. 1: Overview, Working Group I Policymakers Summary; Working Group II Policy Makers Summary; Working Group III Policymakers Summary; Policymakers Summary of the Special Committee on the Participation of Developing Countries (Aug. 1990); IPCC (WMO/UNEP), First Assessment Report Overview (Aug. 1990); IPCC (WMO/UNEP), Policymakers Summary of the Scientific Assessment of Climate Change, report prepared for IPCC by Working Group I (Jun. 1990); IPCC (WMO/UNEP), Policymakers Summary of the Formulation of Response Strategies, report prepared for the IPCC by Working Group III (Jun. 1990); IPCC (WMO/UNEP), Scientific Assessment of Climate Change, report prepared for IPCC by Working Group I (Jun. 1990); IPCC (WMO/UNEP), Climate Change: The IPCC Impact Assessment, report prepared by IPCC Working Group II (Jun. 1990) (Tegart, Sheldon, Griffiths eds.); and IPCC (WMO/UNEP), Formulation of Response Strategies, report prepared by Working Group III (Jun. 1990).

33. CONGRESS OF THE UNITED STATES (OFFICE OF TECHNOLOGY ASSESSMENT), CHANGING BY DEGREES - STEPS TO REDUCE GREENHOUSE CASES (1991).

mental meeting that has ever been held on this planet, sponsored by the United Nations in Brazil.³⁴ There, among other things, a Framework Convention for climate change is to be signed. There must be within that convention some new elements of international law to deal with the problem.

First, there must be a legislative process which is capable of making binding rules which states must follow, even when they do not agree. Second, there must be some means of having compulsory adjudication of disputes, if not to the International Court of Justice, then perhaps to a special tribunal which is set up or capable of being set up under the Convention which is negotiated. Finally, there needs to be a new institution. There needs to be an institutional authority capable of monitoring what the nation states are doing, blowing the whistle on them when necessary, and acting as an effective coordinator of what action needs to be taken.

In conclusion, all I would like to do is to repeat the substance of what I said at the General Assembly of the United Nations in general debate in 1989.³⁵

In New Zealand's judgment, the traditional response of international law, developing international legal standards in small incremental steps, each of which must be subsequently ratified by all countries, is no longer appropriate to deal with 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 would 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 institution with this status will command the necessary respect and authority to achieve what is required.

Perhaps the most effective way to achieve this would be the inclusion in the United Nations Charter of a new chapter dealing with the environment.

That proposal did not suggest that we should do away with the

34. United Nations Conference on Environment and Development, U.N. Doc. A/RES/44/228, U.N., GAOR 44 Supp. No. 49 (Dec. 22, 1989).

35. *Provisional Verbatim Record of the 15th Meeting*, [1989] G.A., 44th Sess. at 61-79 U.N. Doc. A/44/PV.15 (1989).

United Nations Environment Program. Instead, I argued that we should strengthen it, but as I went on to say, the missing institutional link is the equivalent of a legislature.

I would envisage the new Environmental Protection Council becoming the point in the United Nations system which links the streams of economic and environmental advice. It would perform a function that currently falls between the cracks in the mandates of all existing organizations and it would have responsibility for taking coordinated decisions on sustainable policies for global development.

I do not pretend that the politics of global warming is at all easy. Any politician who starts suggesting to advanced countries that people will not be able to drive their cars with the frequency to which they are accustomed, or that the burning of coal will have to somehow be controlled or curtailed, or that conservation policies for energy will need to be adopted with some rigor — will not find great popularity. The public is quite unprepared for such policies because they haven't been told about the threat. A massive program of education is required about all these issues if the state of public opinion is to be produced that will allow these changes to be made. But whatever your view of the scientific data, it is beyond doubt in my judgment that we face a potential catastrophe.

I think we can all find that we have sufficient common values; that we want our species to survive; that we don't want to have a wholesale catastrophe. In some scenarios a number of the nations of the world will be inundated and cease to exist because of rising sea levels. In some areas which are now desert there will be rainfall, but other areas which are now quite habitable will become desert. A wholesale change in the world's patterns of weather, an inability to grow things where they are now grown, widespread inundation, even in those countries which are big enough to survive having their coastlines inundated, will be serious.³⁶

A number of nations in my part of the world - Tuvalu, Kiribaiti, and the Tokelau Islands (for which New Zealand has special responsibility) may cease to exist. I do not see why those nations should cease to exist in order that Americans may expend more fossil fuels than anyone else does. It is necessary to arrive at an international agreement which will

36. See IPCC (WMO/UNEP), Working Group I Policymakers Summary; Working Group II Policymakers Summary; Working Group III Policymakers Summary.

remove the peril of climate change. Climate change is only one of the serious problems facing the global environment. To meet the challenges, new methods of making international law are needed.

