

DIPLOMATIC FORUM

The Newsletter of the New Zealand Institute of International Affairs Auckland Branch

Issue no. 5, August 2003

UPCOMING EVENTS

Friday, August 15, 4:45 – 6:30 pm

*Co-hosted with the Branches of the
United Nations Association of NZ*

Mark Malloch Brown

Administrator, UN Development Programme

“The Future of the UN?”

*The UN’s relevance, the Millennium Development Goals,
and their achievability today*

and

Rhyl, Lady Jansen

International President of the World Federation of UN Associations

“The Federation, and how the World Federation of
UN Associations can support UN goals”

**The Tasman Ballroom #2, The Carlton Hotel,
Cnr Mayoral Dr and Vincent St,
Auckland Central.**

Please RSVP (See below)

Tuesday, August 19, 6 - 7:30 pm
Lecture Theatre 215, Arts1 Building
(See Below for Map)

Dr Kennedy Graham

Senior Fellow, United Nations University

“The US and the UN: Lessons from the Iraq Crisis”

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A NOTE FROM THE EDITOR

Dear Members,

August is set to be another busy month for the Auckland Branch. On Friday, August 15, the Branch is to co-host with the Branches of the UN Associations of NZ Mr Malloch Brown and Lady Jansen at the Carlton Hotel. Malloch Brown will offer his perspective on the future of the UN in a time of profound change and Lady Jansen will talk about the role of the World Federation of UN Associations with regard to UN goals (see *This Month's Speakers*)

Continuing with the UN theme, the second event of the month is a seminar by Dr Kennedy Graham, "The US and the UN: Lessons of the Iraq Crisis." A brief biography of Dr Graham and abstract of this seminar is available below.

The month of June was an eventful month with the Branch hosting three seminars. On June 18 the Branch hosted Sir Kenneth Keith, President of the NZIIA and a Justice of the NZ Court of Appeal (see Katy Donnelly's review below), on June 23 we were honoured by the visit of His Excellency Jacky Musnier, the French Ambassador to New Zealand (review available in September) and on June 30 by Professor Michael Smith of the University of Virginia (see Chris Green's review below).

Be sure to visit the Branch website (www.nziiia.auckland.ac.nz) for the latest events, past reviews and information on the NZIIA's activities. If you have any comments, enquiries, or a viewpoint you wish to see published, contact us. We look forward to your attendance at our meetings and welcome your feedback,

Adrian Sandberg (Newsletter Editor)

INTRODUCING THIS MONTH'S SPEAKERS: On Friday, August 15 Mr Malloch Brown

Mr. Malloch Brown is the Administrator of the United Nations Development Programme (UNDP) and the U.N.'s Global Development Network. He is also the Chair of the United Nations Development Group, a committee consisting of the heads of all UN funds, programmes and departments working on development issues as well as being a member of the cabinet of UN Secretary-General Kofi Annan. Mr.Malloch Brown is also leading the UN system in developing a strategy to help support the achievement of the Millennium Development goals. His seminar will draw on his experience from his many roles within the UN to discuss the relevance of the organisation in today's world and the achievability of the agenda set down in the Millennium Development Goals.

Rhyl, Lady Jansen

Lady Jansen is the International President of the World Federation of United Nations Associations and will give some background to the Federation and address the topic of how the Federation and how the World Federation of United Nations Associations can support UN goals.

Note - **R.S.V.P.** to Vivienne on Ph: 09 827 8830, leave message if not available or fax 09 827 5830 or email Monju: xplorer@world-net.co.nz. Your koha / donation is gratefully appreciated.

On Friday, August 15

Dr Kennedy Graham

Dr. Kennedy Graham is Senior Fellow at the United Nations University (Peace & Governance Division).

Dr. Graham took a Ph.D. in political science from Victoria University after graduating MA from the Fletcher School of Law & Diplomacy in Boston, Massachusetts. In 1995 he was a Quatercentenary Fellow at Emmanuel College, University of Cambridge, where he studied in the Global Security Programme.

Dr. Graham served in the NZ foreign service for 16 years and has taught international relations part-time. He has also worked in New York and Stockholm, and was Director of the UNU Leadership Academy in Amman, Jordan, from 1999 to 2002.

He has written many articles on the subject of global security and a number of books, his last one being 'The Planetary Interest', published by UCL Press in London and Rutgers University Press in New Jersey. He is currently researching issues of regional and global governance in light of the Iraq crisis.

'The Future of the UN'

The Iraq crisis, following fast from the events of 9/11, is shaking the foundations of the contemporary international system. Multilateralism, as it is traditionally known, is under challenge and apparent mutation. The crisis has left much of the world wondering how fundamental the apparent changes to the international order will prove to be.

Will the United States abide by international law and operate within the UN framework in the future? Will it be ‘business-as-usual’ with a continued flouting of the ‘rules of the game’ by various major powers? Are there ways of improving the Security Council’s functioning to make it better able to handle crises of this kind in the future? Might the UN be able to change and adapt within the current Charter system with a view to surviving the long-term implications of the crisis? What risk is there of another major terrorist attack – and even the collapse of the UN system itself?

Dr. Kennedy Graham, a New Zealand national and Senior Fellow in the Peace & Governance Division of the United Nations University, will address the implications of the Iraq crisis for the international order – exploring what underlying causes produced the crisis, and what the long-term impact it may have on multilateralism and the United Nations.

Dr. Graham’s address will cover three related issues –

Multilateralism 1919-2003 and the *mirage* of collective security;

Five fault-lines responsible for the current pressure on the UN system;

Four possible futures for the UN and its relationship to the United States.

You are invited to attend this talk and open discussion on the **dilemmas of multilateralism in a hegemonic age**.

REVIEW:

Sir Kenneth Keith: “When the cannons roar does the law fall silent? International Law and the use of armed force at the beginning of the 21st century”

According to Sir Kenneth, judges who state their decisions before they traverse their reasons are often accused of predetermining a trial’s outcome. However, the same criticism could not be made of Sir Kenneth for beginning his lecture with the simple answer, ‘no’. With well-researched sources ranging from Shakespeare’s historical plays to up-to-the-minute US Supreme Court decisions, Sir Kenneth enlightened a large audience on the connections found between law and war in the areas of international humanitarian law, terrorism, and the use of force.

For clarity, Sir Kenneth outlined the two very different categories of law that relate to the concept of war: *jus ad bello* - the rules that determine when a war may be justifiably fought; and *jus in bello* - the rules that decide how a war may be fought. The rules of war, which generally attempt to civilise or at least maintain some semblance of civilisation during conflict, are clear, accessible and acknowledged by most authorities. The modern rules emerged during the American Civil War when President Lincoln commissioned Francis Lieber to draft a code for the Union forces. Lieber had an incentive beyond his international law background to draft rational and appropriate rules: he had sons fighting on both sides of the conflict. Rule-making was not

the prerogative solely of the Great Powers: similar rules were announced to govern the battle of Gate Pa in the New Zealand wars.

International consensus over the importance of having rules of armed conflict is evidenced by the existence of the 1949 Geneva Conventions, to which there are 191 state parties. These Conventions govern conduct on the battlefield and at sea and the treatment of both prisoners of war and civilians. Sir Kenneth drew attention to recent breaches of the Convention requirements that POWs be protected at all times from acts of violence or intimidation, insults and public curiosity: parading prisoners before television cameras is a clear infringement of these obligations. Recent international attention has also been focussed on the fourth Convention which governs the duties of occupying powers due to the Security Council's classification of the United States and Great Britain as occupiers of Iraq. As a result Bush and Blair have obligations in Iraq that they do not generally have in respect of their own populations: for example, to the fullest extent of the means available an occupying power has the duty to ensure that food and medical supplies, public services and the rule of law are provided and applied to the citizens of the occupied state. Such rules provide a clear rejection of the concept of 'total war' and help ensure that the important distinction between combatants and civilians is recognised and respected.

The Geneva Conventions were updated in 1977 by two protocols dealing with international and internal armed conflict. All of the world's major states have accepted these protocols except for the United States. The first article of each protocol contains a statement that the high contracting parties not only undertake to respect, but also to ensure respect for the obligations enshrined therein in all circumstances. It has been widely accepted that the responsibility to ensure respect is a responsibility that is not just on the conflicting parties but on all state parties to the protocols. The International Committee of the Red Cross has consistently advocated that the international community should take this commitment more seriously as a means to reduce the 'dreadful gap' that frequently exists between the rules and reality of war.

Departing from the law of armed conflict, Sir Keith also addressed some of the legal issues associated with terrorism. He reminded the audience that although international terrorist attacks account for the deaths of ten people every week, the 1990s saw 4000 people die every week through war, three-quarters of whom lived in Africa. Even now, 3000 people die from malaria each week. Sir Keith noted however, that following September 11, Bali, Kenya and Casa Blanca terrorism was frequently at the forefront of the public agenda. Two issues discussed in depth at the seminar were the use of torture and the incidences of unconstitutional detentions in societies threatened by terrorism. Sir Keith made his own position on the first issue very clear: he criticised as 'terrifying' the suggestion by Alan Dershowitz that not only is it legitimate to use torture when a bomb is about to explode, but that judges should have the power to issue warrants to authorise torture in that sort of situation.

Sir Keith revealed the broad spectrum of attitudes towards this topic by contrasting the approaches of two judiciaries: the Israeli Supreme Court and the Supreme Court of the United States. In an article addressing what courts should do during a conflict, Aharon Barak, the President of the Israeli Supreme Court, stated that the struggle against terrorism is not conducted outside the law but within it, using the tools that the law makes available to a democratic state. For Barak, the power of a society to stand up to its enemies is based on a recognition that it has values worthy of protection: the rule of law is one of these values. As he presides over cases in one of the most volatile areas of the world, Barak is acutely aware of both the delicate balance that must be achieved between freedom and security, and the importance of resolving this balance by legal measures. In a recent case where he denied the legality of torture in the face of imminent terrorist attack, he provided a valuable description of the obligations of Judges:

We are part of Israeli society. Its problems are known to us and we live its history. We are not isolated in an ivory tower, we live the life of this country. We are aware of the harsh reality of terrorism in which we are at times immersed. Our apprehension is that this decision will hamper the ability to properly deal with terrorists and terrorism. That disturbs us. We are however judges. Our brethren require us to act according to the law. This is equally the standard that we set for ourselves. When we sit at trial we stand on trial. When we sit to judge we are being judged. Therefore we must act according to our purest conscience.

As Sir Kenneth acknowledged, such an attitude will certainly help ensure that even when the cannon 'speaks', law will prevail.

In contrast, the US Supreme Court approach appears less well-balanced, with many decisions clearly deferring to the Executive with respect to both who falls within a suspect class of persons and what qualifies as justifiable grounds for detention. Although American legal history clearly presents habeas corpus as a bulwark against unconstitutional detention, recent cases have held that it is not the function of the Judiciary to entertain private litigation which challenges the wisdom, propriety or legality of the Commander-in-Chief's decision to either send forces abroad or designate individuals as enemy combatants. The Supreme Court has thus negated the power of habeas corpus by refusing to engage in evidential or factual inquiries concerning grounds for imprisonment, even when the suspects are American citizens. Surely, the continued power of the rule of law during times of conflict is less secure when the Courts adopt such a trusting and deferential attitude towards the Executive.

Finally, Sir Kenneth addressed some of the legal conditions which determine the circumstances in which force can lawfully be used. Following the invasion of Iraq by American and British troops the justifications of self-defence, Security Council authorisation, and the responsibility to protect (humanitarian intervention) have come under close scrutiny. Article 51 of the United Nations Charter requires there to be an armed attack before self-defence can be employed by a state. Although presented as a possible legal basis for America's invasion of Iraq, the concept of anticipatory self-defence – the ability to use force in a pre-emptive strike even in the absence of an imminent attack – is not contemplated by the Charter. Drawing on the advice of Henry Kissinger, Sir Kenneth suggested that anticipatory self-defence is not only unlawful as a justification for the use of force, it is also inadvisable on policy grounds: a right to peremptory attack would also be available to Iraq, North Korea, Israel, India and Pakistan.

Dismissing as unpersuasive the argument that the Iraq mission was impliedly authorised by previous Security Council Resolutions, Sir Kenneth also questioned the validity of the humanitarian intervention argument. He argued that although academics and policy makers alike devoted a great deal of energy to the concept of 'responsibility to protect' in the aftermath of NATO's involvement in Kosovo, the moral imperative to intervene has yet to evolve into a definite legal rule. Sir Kenneth considered this unwillingness to codify such an amorphous and relative concept to be understandable as the precise delimitation of the obligations and responsibilities invoked by it would undoubtedly be problematic. Sir Kenneth also registered his disagreement with the President of the American Society of International Law, Anne-Marie Slaughter, who has recently suggested that critics should distinguish between lawfulness and legitimacy. Slaughter's attempt to favourably render the actions of America and Great Britain as legitimate despite their illegality is, in the words of Sir Kenneth, 'a bit hard to work out!'

The greatest strength of Sir Kenneth Keith's presentation was its diversity. Covering the history of the rules of armed conflict, the dangers of unconstitutional actions occurring in the shadow of terrorist threats, and the validity of justifications for war, its content was drawn from historical documents and plays, recent judicial decisions, statements of policy advice and academic discussion. The audience was accordingly able to gain an appreciation of both the variety of issues involved in determining whether the law falls silent when the cannons roar, and the importance of resolving the question in the negative.

Reviewed by Katy Donnelly. Katy is 4th year LLB (Hons)/BA (Hons) at the University of Auckland.

REVIEW:

Professor Michael Smith: “Ethics and Foreign Policy”

On 30 June the NZIIA had in conjunction with the Department of Political Studies the pleasure of hosting a seminar by Professor Michael Smith from the University of Virginia. The seminar looked at whether 'ethics and foreign policy' is a contradiction in terms, or whether ethical concerns play an important role in international relations today.

Professor Smith first sought to refute the Realist assertion that there is no room for ethical choice in foreign policy-making, citing the imminent deployment New Zealand troops to the Solomon Islands as evidence that moral considerations play a part in some major foreign policy decisions. Peacekeeping operations in general, and the notion of humanitarian intervention, lend further support to this argument. Many important foreign policy issues 'reflect and deeply involve moral choices'.

An interesting observation made in the seminar was that we enjoy increased 'ethical manoeuvrability' in the unipolar world of today. During the Cold War, it was arguably justifiable for the West to sponsor tyrannical regimes in the name of containing and ultimately defeating a greater evil. Excessive optimism in the early 1990s about an enlightened new world order was subdued by events in Somalia, Rwanda and the former Yugoslavia. Nevertheless, the relatively benign international environment of the present provides us with greater 'moral opportunity'.

Smith went on to warn of the dangers of allowing policy formulators to justify less moral actions with claims that these are in 'the national interest' or necessary for 'national security'. Typically employed to trump other concerns, these terms have been exploited to justify unpalatable policies in the past such as the WWII internment of Japanese American citizens. National security paranoia is still prominent today, as events at Guantanamo Bay illustrate, and serious open debate about the role of values in determining the national interest should not be avoided.

While ethical concerns cannot be completely dismissed, implementing them in foreign policy is no easy task. The theologian Niebohr was quoted describing the 'tentative and uneasy compromises' reached in politics, a place 'where conscience and power meet'. Professor Smith was quick to point out that it is inadequate to simply decide one's values in advance and expect everything else to follow. Having thrown his support behind the ideal of self-determination by the time he visited Paris in 1918, President Woodrow Wilson found himself besieged by Slovenians, Bosnians and other nationalities he had never heard of all wanting their own state. Exasperated, he finally turned to one of his advisers and said 'Just tell me what's right and I'll do it!' Assuming that the means will take care of themselves just because the goals are 'good' is naïve.

The policy of any single country cannot be assumed automatically to express universal ethical values because we live in a world of many cultural, religious and philosophical value systems. Given this complexity, Smith identified the human rights regime as a system of values that is genuinely universal. It is important to accept that the world has many value systems, but also important to discuss and critique those systems, an approach described as 'moral pluralism'. This requires 'rigorous self-examination and a willingness to apply standards to oneself as well as others'. Attention was drawn to the perils of 'relativism', which argues that others are

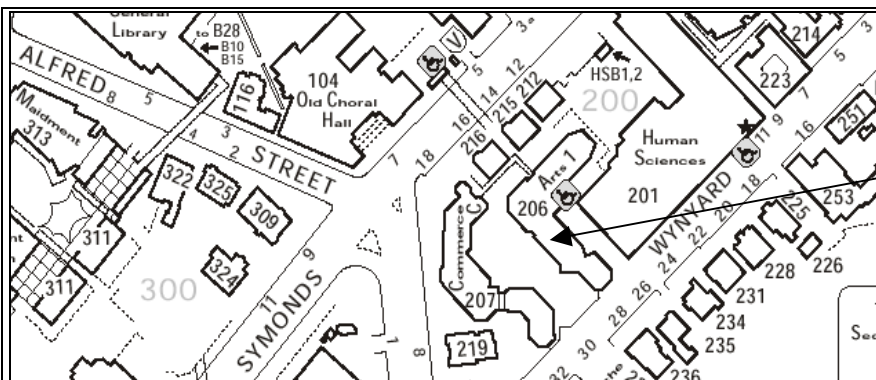
'strange', have different value systems, and that we have no rights to judge each other; this approach would logically result in unquestioning acceptance of slavery if one could travel back in time to Virginia of 1840. According to Smith, any ethical system should have some claim to universality. The human rights system addresses the 'moral pluralism' of the world, being neither culturally nor religiously exclusive. It asserts that we all have rights and responsibilities due to our common humanity.

The role of international law in 'operationalising' human rights has been significant, and 'is beginning to set precedents'. In Professor Smith's opinion, it is no longer possible to make the traditional sovereignty claim that 'whatever happens within the border of one state is opaque to outside scrutiny'.

Human rights can therefore be a useful standard for measuring the 'morality' of foreign policy proposals. It becomes necessary to debate whether policies are assisting, maintaining or undermining the achievement of human rights in both a domestic and international sense. Holding up the European Union as a model, Smith concluded that – idealistic as much of the seminar may have seemed – there is hope that we can work to protect and strengthen human rights at home and abroad.

Professor Smith's seminar was both interesting and entertaining. He prudently acknowledged the realities of contemporary international relations, and the result was a lecture that is likely to stimulate further discussion on this highly contested topic.

Reviewed by Chris Green. Chris is 2nd year BA/LLB at the University of Auckland.



Lecture Theatre 215
Arts 1 Building
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Parking on Wynyard St.

Do you have an opinion on a matter of international concern or wish to comment on issues raised in this newsletter or at NZIIA seminars? Email the editor at adrian_sandberg@hotmail.com to have your perspective published in our “Points of View” section. We welcome readers’ comments as a constructive way of approaching issues and stimulating discussion on a range of topics in international relations.

- Editor

Quotes of the Month

“If you wish to avoid foreign collision, you had better abandon the ocean.”

- Henry Clay, US Politician, 1777-1852, speech in the House of Representatives, 22 January 1812

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