

## Conversations with Professor Campbell McLachlan

by

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*This is the second interview with Professor McLachlan, who is the fifteenth Arthur Goodhart Visiting Professor of Legal Science to be interviewed for the Eminent Scholars Archive.*

*This interview was held at the Lauterpacht Centre for International Law in Cambridge.*

*Questions in the interviews are sequentially numbered for use in a database of citations to personalities mentioned across the Eminent Scholars Archive.*

Interviewer: John Magyar (JM). His questions are in **bold type**.

Professor McLachlan's answers are in normal type.

Comments added by JM, [*in italics*]. Footnotes added by JM.

**1. I'm here today with Professor Campbell McLaughlin for our second interview for the Eminent Scholars Archive. Let's just dive right in, shall we? Last time we closed with you discussing your time as the Goodhart scholar and then your appointment to the 1973 Professorship chair, but we left a gap. You had been a professor at Victoria University of Wellington, and where we left off, you had received a grant from the Law Foundation - New Zealand Law Foundation - that enabled you to do the background research that led to your work on foreign relations law. You were a fellow at All Souls at Oxford when that happened?**

Yes, that's right, and so those two things came together very nicely. I'd had the idea for quite a long time that I wanted to try and write a book about foreign relations law, and this connected with my prior experience when I was still in practice at Herbert Smith. A lot of the work that we did, or quite a bit of the work that we did, involved questions relating to the application of international law before English courts. At that stage, even right up until the early part of the previous decade, 2010, really, very little work had been done on that topic since FA Mann himself, as I mentioned I knew, who wrote a little book in the mid-eighties called *Foreign Affairs in English Courts*.<sup>3</sup>

I always thought it was a topic that was crying out for development, and shortly after I decided to leave full time practice and go into academic life, the wonderful Finola O'Sullivan, formerly the commissioning editor of law here at CUP,<sup>4</sup> encouraged me to take that as a theme and contracted me to do so. But then other projects intervened, and I never got to it.

I decided to apply for the New Zealand Law Foundation Distinguished Fellowship, which was a lovely scheme in the sense that it just gave you a fund which enabled you both to do some international travel, and also in my case, I used a decent chunk of it to hire a wonderful junior research fellow to help me on the project because I knew at that point that it was going to be a very big project. Kind of big intellectually, since so little work had been

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<sup>3</sup> F A Mann *Foreign Affairs in English Courts* (Oxford University Press 1986).

<sup>4</sup> Cambridge University Press.



done, really, trying to work out what the field was - it was a mess really, doctrinally - and since there hadn't been a book for so long, one really had to start again from first principle structurally. But secondly, because I got the money out of New Zealand, in particular, I decided that this book should not be limited to comparison between international law and English law, but had to include the cognate Commonwealth jurisdictions. Although it was a lot more work, it turned out to be very worthwhile because it made it a much richer project and it demonstrated that Commonwealth jurisdictions had a lot more in common in this field than one might have thought.

Because I had a sabbatical coming up - I'd applied on the encouragement of Vaughan Lowe,<sup>5</sup> a friend of mine who was then the Chichele Professor of International Law at Oxford - I'd applied to the college for a visiting fellowship there [at All Souls College], having no particular idea, apart from all the things that one knows, sort of apocryphal things about All Souls, what that experience would be like. It proved to be a brilliant combination. All Souls, after all - the College of Blackstone - you were kind of living and breathing the development of English law as well as international law there. But also, to their credit, they have this extraordinarily well-developed visiting fellowship programme. They're very, very well set up. At any given time there will be a dozen scholars, all working in different fields. In fact, in the time that I was there, almost all of the other scholars were working, rather intimidatingly to me, on a joint research project on the evolution of human cognition, which made foreign relations law seem really very small beer in comparison. But they were wonderful people to get to know.

It was a great place to be, and because it's an extraordinary place to be - a college which has so many eminent professors and no students - it's a college where the atmosphere really propels one to produce research. That was the sole justification of the place, really. That was a wonderful experience. I made a lot of progress on the book and took a little bit longer once I came back to New Zealand to complete it, but I did eventually complete it and publish it in 2014. It proved to be good timing although I couldn't have foreseen that. At the time that I did the work, this was regarded as a rather obscure area full of these bizarre and apparently anachronistic doctrines like the act of state doctrine, for example, but then, partly as a result of things like the UK's military interventions in Iraq and Afghanistan, and then even more so as a result of Brexit, the whole question of the relationship between international law and English law and the exercise of the foreign relations power became highly controversial in this country and was, of course, litigated right up to the Supreme Court on a number of occasions. I was able then, based on the research that I'd done, to intervene in the academic debate about that which, very kindly, the judges of the Supreme Court then cited in their in their judgements.

That was an example of where you do academic work, essentially greenfield work, not quite knowing what impact it's going to have - you can never predict that - but it did

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<sup>5</sup> Professor Alan Vaughan Lowe KC, British barrister. Chichele Professor of Public International Law in the University of Oxford, and a Fellow of All Souls College, Oxford 1999–2012; Emeritus Professor of International Law and Emeritus Fellow of All Souls College, University of Oxford since 2012; member of l'Institut de droit international.



prove, in fact, to be quite impactful because of circumstances which none of us could have foreseen, but which proved that this whole question was really a rather important one.

**2. Indeed. At the same time - the same year that was published 2014 - you were also a fellow in residence at the New York University's Centre for Transnational Litigation, Arbitration and Commercial Law.**

That was really picking up on a different strand of my work. For a long time, again, going back to my experience in practice at Herbert Smith, I had this great interest in the transformation of the field of private international law through the practical experience of international litigation or transnational litigation, if you like - in other words, litigating commercial disputes in cases that engage the interests of more than one state. As is apparent from my list of publications, even while I was at Smith, I wrote quite a lot of the articles about that on those sorts of themes, exploring in particular the way in which the courts sought to respond to the challenges of globalisation and trying to make their remedies more effective in a cross-border manner.

I've written quite a lot about that, and I also became very involved in trying to make constructive law reform proposals. We had a wonderful committee of the International Law Association on international civil and commercial litigation,<sup>6</sup> which did some very innovative work in the nineties under the chairmanship of the late great Professor Peter Nygh<sup>7</sup> of Australia. It had a wonderful group of scholars from around the world who participated in that. Through that side, the private and national law side, I'd got to know Linda Silberman<sup>8</sup> at NYU Law School very well, and through her also Franco Ferrari,<sup>9</sup> who coordinates the centre that you mentioned.

As well as knowing the public international lawyers there rather well - Jose Alvarez,<sup>10</sup> particularly as a close friend - I had this entrée in the private international law, so they'd written to me and asked me whether I could come and spend some time with them. Again, another fantastic experience, really. Quite a short experience, but a wonderful one at a law school which has created such a dynamic research community. The faculty seminars are so popular they practically have to sell tickets to them. So just to be able to dip into that was a

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<sup>6</sup> <https://www.ila-hq.org/en/committees/international-civil-and-commercial-litigation>

<sup>7</sup> (1933–2002). Professor of Law and founding head of Macquarie University Law School, 1973–1979. Judge of the Family Court of Australia as of 1979, then the Appeal Division in 1983. Rapporteur to the Convention on Recognition and Enforcement of Foreign Judgments.

<sup>8</sup> Clarence D Ashley Professor of Law at New York University School of Law and the Co-Director of the NYU Center on Transnational Litigation and Arbitration. Assistant Professor, New York University Law School 1971–74, Associate Professor 1974–77, Professor 1977–present. Adviser to the American Law Institute, Restatement (Fourth) of the Foreign Relations Law of the United States.

<sup>9</sup> Professor of Law and Director of the Center for Transnational Litigation, Arbitration and Commercial Law at New York University School of Law. Chaired Professor of Comparative Law, Tilburg University 1995–98; chaired Professor of Comparative Law, University of Bologna 1998–2002; chaired Professor, Verona University 2002–16.

<sup>10</sup> Herbert and Rose Rubin Professor of International Law, New York University School of Law. Formerly the Hamilton Fish Professor of International Law and Diplomacy and the executive director of the Center on Global Legal Problems at Columbia Law School; Professor of Law at the University of Michigan Law School; Associate Professor at the George Washington University National Law Center; and Adjunct Professor at Georgetown Law Center.



great privilege, and there were aspects of the foreign relations law book that were of interest more on the private law side. In particular, I gave some talks about the role of the foreign states in international civil and commercial litigation, which was one of the topics that I'd also gone into in the book, both as a claimant where the state sues for recovery of state assets in domestic courts, or trying to use domestic remedies for enforcement of security or environmental objectives, and of course, when it's sued as a defendant and in applying the restrictive doctrine of state immunity and the like.

**3. Right. You then spent some time as a research fellow at the - I won't try to pronounce it - they shortened it to the KFG<sup>11</sup> Law Centre in Berlin.**

So it's again, back on the public international side.

This is another wonderful experience in my life. I've really been... it's one of the great things about academic life, I think, is that it does present these opportunities for collaboration.

That was a group which had been put together by Gorge Nolte,<sup>12</sup> who was then professor of international law - public international law - at Humboldt, now a judge on the international Court, together with his colleagues, Professor Heike Krieger<sup>13</sup> at Freie Universität, which, of course, had been established in the post-war period in West Berlin and Professor Andreas Zimmermann<sup>14</sup> from Potsdam.

The German Science Council has this wonderful scheme Kolleg-Forschungsgruppe which just means a group of colleagues gathered together into ... for a scientific inquiry.

**4. Which is the FG portion of the short form.**

The nice thing about it, they're very hard to get because they are rather well funded. The hard thing is to convince the Science Council that your project is worthwhile, but once you've done that, provided you keep to their requirements in terms of the makeup of the group, which is broadly 50% German and 50% foreigners, and then a spread from junior research fellows up to more senior people, you can pretty much do what you like. To me, I think it's a wonderful model because it brought together a fascinating group of people under this theme *international rule of law: rise or decline*, which of course, one could interpret pretty much how one liked. The only formal requirement was to participate in two seminars every week, otherwise everyone was left to get on with their own research.

When we then collected up at the end of - I happened to be there at the end of the first five year period and the application for renewal - when we collected up everything that had

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<sup>11</sup> Kolleg-Forschungsgruppe.

<sup>12</sup> Fellow, Max Planck Institute for Comparative Public Law and International Law, Heidelberg 1987–1999; Professor of Public Law and International Law, University of Göttingen 1999–2004; Professor of Public Law and International Law, Ludwig Maximilian University of Munich 2004–08; Professor of Public Law and International Law, Humboldt University of Berlin 2008–21; Judge of the International Court of Justice 2021-present.

<sup>13</sup> Professor of International and Public Law, Institute for International Law, European Law and Comparative Public Law, Freie Universität.

<sup>14</sup> Professor of International and European Law at the University of Potsdam and Director of the Potsdam Centre of Human Rights. Ad hoc Judge in cases before the European Court of Human Rights, arbitrator under the annex to the Vienna Convention on the Law of Treaties.



been done that time it was really an extraordinary record of high quality research in public international law.

Of course, being in Germany, it was very thoroughly done. The people came very prepared, having read each other's papers to comment on them. That was where I began the work which I'm this week completing, which was my decision - to take another look at the principle of systemic integration in international law, which I'd been privileged to give a label to and articulate at the time of the work that I did at the request of the International Law Commission back at the time of the study group on fragmentation - to look at that 20 years later and see what had been done with it, not just by courts and tribunals, although that was an important part of it, but also by states in the way in which they had in framing new treaties, sought to better integrate, coordinate all these massive, different, potentially conflicting rules of international law into some kind of coherent system.

I think when I started that project in Berlin, I had something reasonably modest in mind. It's still modest in terms of, I don't make any grand claims for it, but it did turn out to be a very large, challenging research project because... for two reasons. Firstly, it became apparent that the principal exerted a much greater influence across a panoply of different international courts and different exercises of treaty making, which to say anything useful meant sucking in a huge amount of data - not to speak of the scholarly literature which was even more extensive - but also for another good reason, really, which was that my colleagues in the group encouraged me to be more ambitious. I guess my instinct, since we all kind of start from a background, is, and the common law as background tends to be what they what the Germans probably call inductive reasoning, you know, you start from looking at the cases and then work out what the principle is from the cases. They said, well, sure do all of that, but you can't really write something about this in a book level scale project without also trying to consider a bit more deductively or, dare I say it philosophically, what this means for our understanding of what the international legal system is and how it operates. And I never claimed to be a legal philosopher so, of course, I found it somewhat intimidating, but in the end, they were right. It was fine for the International Commission Study Group just to assert in a sentence 'International law is a legal system', but if you're writing an academic monograph which takes that as a premise you have to unpick and defend what it is you mean by that.

So in the end, I've actually very much enjoyed that side of the research as well. The great thing about this, or indeed any good piece of legal research, is I learned a whole bunch of stuff that I didn't know and that that's what one tries to keep doing all through one's life is learning new stuff. And rather important - again, a bit like the Foreign Relations Law Project, but in a different context - rather important stuff to be articulating right now in a very different way to what the context in which that debate took place in the early part of the millennium. Because at that stage, the concern was one of luxury, namely all these new tribunals had been established, all these new treaties concluded and everybody thought, oh my God, the system is just falling apart. It's all fragmenting into separate bits and people will go their own ways and stuff. That's still a concern, but the larger concern today is really will



the centre hold in the sense of the participation of... the widespread participation of states as a whole in operating the multilateral system. In that context, understanding the system that we have created, trying to articulate how it operates, the value of it, and its capacity both to stabilise - in terms of providing a framework within which the agreements and disagreements of states can take place - but also facilitating orderly change, it seems to me, is actually rather important. There are all sorts of different ways of doing that, but trying to do it in a rather focused way, actually looking at the evidence, which is what has made the project so painstaking, it seems to me, hopefully, will be found to be a solution. Anyway, it's the book - the manuscript - that will be delivered to the publishers at the end of September, and others will have to judge whether it's a useful contribution, but it's going to be there.

**5. Fair enough. Having discussed these various chairs that you're involved with, and more fascinatingly, the intellectual work that you did while occupying them, this takes us to the point where... did you retire from the University of the Victoria University of Wellington, or did you come here as a Goodhart fellow? Just to complete the story of your academic career.**

Sure. I guess I gave the best years of my life probably to Victoria, which is my alma mater, and I still feel very attached to it, and subject to their wishes I would hope to maintain connection. The Goodhart is simply a visiting position, so I took a leave of absence to take it but I'm still the professor at home. The new development of course is that while I was here as Goodhart Professor the Cambridge faculty decided to advertise, in fact, to re-advertise, because there had been a previous round which hadn't resulted in an appointment being concluded, one of the, I think, six or seven so-called statutory chairs in law in this great university - a chair that was established in 1973. The first holder was Kurt Lipstein,<sup>15</sup> a great private international lawyer. But it's never been ... it had never previously been limited to any particular area of law and the faculty has always deployed it in different ways. But they had decided - and a decision which of course in which of course I had no part but was very fortuitous for me - to specifically focus the advertisement this time round on private international law and/or international commercial arbitration. That was the way it was described. The reason for that - well, the faculty will know their own reasons - but one reason is that a very remarkable, talented and highly charismatic lecturer here, Professor Richard Fentiman,<sup>16</sup> who had taught a signature course on the LLM for many years in international commercial litigation, was retiring. Richard's a friend of mine. So there was a recognition that that was a gap that had to be filled. There are two other wonderful private international lawyers here on the faculty, both of which are friends of mine, Professor Pippa Rogerson,<sup>17</sup> now Master of Caius,<sup>18</sup> and Louise Merrett,<sup>19</sup> Vice-Master of Trinity College. So

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<sup>15</sup> Professor Kurt Lipstein (1909–2006). Professor of Comparative Law, University of Cambridge 1973–76. For a bio, see his entry in the Eminent Scholars Archive: <https://www.squire.law.cam.ac.uk/eminent-scholars-archive/professor-kurt-lipstein>

<sup>16</sup> KC, British barrister. Professor of Private International Law at the University of Cambridge, and Arthur Armitage Fellow in Law, Queens' College, retiring in 2023.

<sup>17</sup> Professor of Private International Law at the University of Cambridge; Master of Gonville and Caius College 2018–present.

<sup>18</sup> Gonville and Caius College.



immediately you can see it in my descriptions that they've got pretty heavy jobs elsewhere. So although they're still teaching, they weren't going to be able to devote at the present time all of their energies to that. So that was the focus. I was encouraged to and did decide to apply and fortunately the Board of Electors elected me.

A word about the focus, though, which may be of interest. The end or in the middle of that description was very interesting. It signals, I suppose, some degree of recognition on the part of the faculty that, in addition to what might be called classical private international law - an immensely important field in practice, and method of reasoning in the law which deals with all manner of transnational private law disputes, but which is traditionally focussed on the resolution of such disputes in national courts - that in parallel to that, we'd seen in the last few decades this huge rise in the use of arbitration as a means of resolving such disputes, in the commercial area in particular. The faculty had not perhaps devoted as much attention to arbitration as they had to the more well-known area of private international law, but plainly it had become very significant in practice. The students themselves had founded an arbitration club here and the like. So there's a question of what to do about that now. But in academic life we tend to work, or many people tend to work, in categories. The law operates by means of categories and probably we couldn't survive if we had to see everything whole time, but it had led to quite a sort of, as it were, division, often between categories. My proposition to the board, which one has to assume they accepted since they agreed to elect me, was that we should see that I was the guy for the ad, that we should see the whole field as being the field of international dispute resolution, and that we should conceive of that as including not just actually private international litigation and its actual commercial arbitration, but also litigation before public international courts and tribunals, the the common factor in all cases being not the substantive law that's applied, but the study of the procedure, study of the process. So, in a way, if you look at quite a lot of the work that I've done throughout my career - the early work that I talked about in the nineties, in particular, on procedural issues in international commercial litigation, which is very much continued in me academically because I've become responsible for the the procedural chapters, essentially, of *Dicey Morris and Collins on the Conflict of Laws*, the leading common law treatise;<sup>20</sup> then I've done a lot of work in arbitration, in particular at the institute,<sup>21</sup> being responsible for piloting through a report and resolution on the principle of the equality of the parties in international arbitration<sup>22</sup> - this was a kind of a way of connecting all of that up.

Of course, a tall order to try and do that in the course of a single course. One could teach a whole number of courses, and I won't be unsupported in this because the faculty is committed also to hiring an associate professor in the field, which I warmly welcome. But the starting point will be to try and look at the process of an international dispute in procedural

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<sup>19</sup> British barrister. Professor of International Law at the University of Cambridge. Vice-Master of Trinity College 2022–present.

<sup>20</sup> AV Dicey and JHC Morris, *Dicey, Morris and Collins on the Conflict of Laws* (Lawrence Collins and Jonathan Harris eds, 16th edition, Sweet & Maxwell 2022).

<sup>21</sup> Institut de Droit International.

<sup>22</sup> CA McLachlan 'Report on Equality of the Parties in International Arbitration' Rapporteur, 10 December 2018, 18<sup>th</sup> Commission.



terms, as it were, from institution of the claim through to judgement and execution or award of execution; and then, in a comparative way, at each stage as to how that works out depending upon your forum, whether you are in a national court or in arbitration or before an international court. So that's the plan. It will be up to me to deliver on that plan next year when I come back, and then the idea for that, on the research side, is to turn that into a book.

I don't know why I keep volunteering to write more books, but I have. I'm not volunteering to write it immediately. But in fact, there is a lineage for this, or a precedent for this, in this great university. There was another very popular course on the LLM which focused more on public international litigation before the international Court and so forth, which the late great James Crawford<sup>23</sup> and others had taught on. And in a previous era, Vaughn Lowe, whom I've already mentioned, when he was still at Cambridge together with John Collier,<sup>24</sup> a private international lawyer here, much loved in the college with which I've been attached here at Trinity Hall and more broadly, had written a book on the settlement of international disputes which tried to do this.

But personally, I think now in contemporary ... right now, there is really a gap because to the extent that there are books on international dispute resolution, they tend to be largely institutionally focussed. That is to say they describe what the International Chamber of Commerce looks like or the International Court of Justice or whatever, whereas what I have in mind is something which traces the procedure through. And one of the things that I think I've seen in my life and which I can hopefully make good on in teaching and research is a very much more considerable convergence between process - between the major courts of international commercial disputes, international arbitration and public national disputes, as we've come to understand that things like provisional measures, for example, or the problems created by competing in overlapping jurisdiction, the problem of lis pendens or evidence or whatever. Essentially the problems is the same even if the context is different. So we've seen a convergence around principle, and that's what I want to - plan to - explore. So that would all be kicking off in the academic year 2024–25.

In the meantime, I have to deliver the general course at the Hague Academy in January, so that's my next big challenge. And just going back to the general theme of, certainly today's discussion, I've given as my general theme for that the topic 'on the interface between public and private international law'. So in 15 lectures and 2 seminars, I will try and explore that with what is still the most globally international student body of any academic institution, I think.

**6. And of course, that Academy being very close to you, close to your heart, because of a very formative experience you had back in back in day.**

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<sup>23</sup> Judge James Crawford FBA (1948–2021). Australian barrister, Whewell Professor of International Law at the University of Cambridge and director of the Lauterpacht Centre for International Law. Judge of the International Court of Justice 2015–21. For a bio, see the entry in the Eminent Scholars Archive: <https://www.squire.law.cam.ac.uk/eminent-scholars-archive/judge-james-crawford>

<sup>24</sup> (1933–2016). British barrister, Lecturer in Law and Fellow at Trinity Hall, Cambridge. For a bio, see the entry in the Eminent Scholars Archive: <https://www.law.cam.ac.uk/press/news/2016/06/john-collier-1933-2016>





Back in the eighties as a student. That's right, and it's been with me all through my life. So it's nice to be asked to give a general course because that doesn't... because it can only be one in each session. So it tends to limit the number of people whom the academy curatorium can invite. And it's an opportunity to... I think there's a difference for myself. People interpret this brief in different ways. The special courses, one of which I've given back in 2008, are designed essentially to present cutting edge research on discrete topics. In my case, as might have been predicted, I took the doctrine of *lis pendens* in international designation and tried to do exactly what I'm proposing to do for the ... for this new course - look at how that worked out through commercial litigation, arbitration, investment arbitration and before public international courts and tribunals.

So people do wonderful topics, but the general course is something different because it's meant to be a survey course, and my feeling at least, is that it should be summative, which is to say, one should be trying to impart to the students - it's not a replacement for doing a, you know, your basic course on international law in your home institution, all the students already have law degrees - it's more about giving them the benefit, if it be a benefit, of your own perspective. So it should be a summative thing. And I think some of the best courses - I'm thinking, for example, of Dame Rosalyn Higgins' wonderful general course - do that. They really give, in the space of a relatively compact compass, her views on what international law is and how we use it, as she put it. So that's my hope, is to try and draw that together, but of course, there is a limit to what you can do in that space of time.

**7. If I look at the pattern of your publications and the way the development of ideas present themselves, just chronologically going through them, I do see how where you ended up had all of its roots and foundations in your focus on, for example, remedies earlier on, and I think you've laid that bare that with the two strengths - the public side and the private side, and I wonder how much your dissertation and your work on the acceptance of customary law fed into any of that.**

Well ... It's a funny thing. I picked that topic I think because at the most abstract possible level, I've always been interested in the way in which systems of law interact. And I know that sounds rather abstract. In reality, of course, it's not. It becomes rapidly, highly concrete.

**8. It's central to everything...**

... I've done since, yes, exactly. But this was a rather particular application for it, and I did have a slightly different ... at that point in New Zealand, New Zealand was just kind of waking up, as it has now done in spades, to the legal implications of its Maori heritage. But I was also conscious, and in part, inspired by my great teacher of private international law and comparative law, Tony Angelo,<sup>25</sup> that there had been a similar development in the rather different context of the emergence into independence of the Pacific Island states. So I picked that topic - the interaction between customary law of indigenous peoples and the entity state law system - really because of my fascination with what was then well, it's still now called

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<sup>25</sup> Tony Angelo KC, New Zealand barrister. Emeritus Professor, Victoria University of Wellington.



legal pluralism. The idea that the state doesn't have a monopoly on the rules by which social groups conduct themselves. So I wasn't trying to - wouldn't be so presumptuous to try to - understand the substantive rules themselves, and in any event, I rapidly came to the view that it's a mistake to think of indigenous legal systems in the same way that we would of a state legal system because of their nature.

**9. They are more or less incommensurable, are they not?**

That's right. But then they're driven into engagement with each other, and it was the processes of engagement that was what really fascinated me. And funnily enough, because maybe everything in life really is connected, at that time, even before he came to Cambridge, James Crawford was working as an Australian law reform commissioner and produced a groundbreaking study on the recognition of Aboriginal customary law in Australia. Because he was always so generous with his time, I remember sitting with him for a whole day here in Cambridge with two other New Zealand colleagues, both of whom went on to become great professors themselves in different cognate fields, discussing all this stuff.

So I did all of that work. I never published the PhD. I should have done, but I went straight into practice at the time and got distracted.

**10. There would be no time at a City solicitors' firm, would there.**

There wasn't. But it has always stayed with me because that early work about interaction, even though in a very different context, kind of fed into everything that I've subsequently done, both in private international law, which if you like, is kind of formalised legal pluralism because it's all about the interaction between, in its case, national legal systems, and in a way the work on foreign relations law as well, because that's also about interaction between legal systems. That's the best way to understand it, I think. So a very, very different context, but a similar preoccupation.

In the meantime, that debate has very much moved centre stage at home in New Zealand, as the country, including the Law Commission there, sought to grapple more comprehensively with how to integrate concepts derived from Maori customary law into the national legal system, which was otherwise originally inherited - the state system having been inherited from English law, although in turn, massively reshaped by the actions of a domestically competent legislature over a long period, but you've still got that process of interaction

**11. Something you bring up in your work, I suppose, it is what you refer to as systemic integration. The notion that as things change you need - there are no simple large categories that work - you need to cut everything up in almost a... if I understand it correctly, with the ends in mind of fair settlement. It needs to be a system.**

Yeah. Well, isn't this what we do as lawyers? It's all about ... so there's two things here. One is, the only way in which we can make sense of law, in my view, is by reasoning on the relationship between rule and principle. In other words, I mean, of course you don't need to do that all the time because legal system would break down if we had to go back to



first principles all the time, but in any hard case, even in one which is purely within a domestic legal system it will often boil down to an apparent conflict between rules in which, only by referring to the working out of what you think the underlying principle is and what that which underlies the rule and what that indicates about the way in which that conflict is to be resolved, can you can you get to an answer. So that's one side of it.

But then the other side of it, which I think is equally important, and that was a big part of my work on the Foreign Relations Law Project, and it just informs my approach because it's the same thing - the systemic integration thing. Let's just take foreign relations law first. There I actually felt that the invocation of these rather generalised doctrines like the act of state doctrine or the notion that the country must speak with one voice on foreign affairs or the idea of non-justiciability had actually become seriously unhelpful because they were essentially obscurantist. They were doctrines... they were excuses for non-law, I call them, in the book. And the only way to start solving issues on the interface between domestic and international law was by disaggregating - by breaking up, working out what the real problems were at the granular level - and then following that through.

And actually just going back to the debate that we just had about customary law, I learnt that in many ways but in one way, very formidably from James Crawford's approach in his Aboriginal customary law project, which had become run aground under previous law commissioners because they tried to conceive it at a very generalised level. And James just said very pragmatically and rightly in my view, well, let's go and see what real problems Aboriginal people are encountering as a result of the non-recognition of their Indigenous customary law practices and what solutions we can propose. So he went, in other words, highly inductively and pragmatically to do that.

And it's really been the same thing with the systemic integration thing. I didn't invent the underlying concept at all. It was already there in the Vienna Convention. And it's, in fact, there in many earlier authorities, but I gave it a label: the principle of systemic integration. What I discovered, sort of as it were, slightly to my horror, in the intervening period, is that it had become something of a slogan that was very frequently invoked as if it was self-explanatory. But of course, it's not. I mean, it does give expression to the idea that when we interpret any given rule in international law, one of the things the interpreter must do is to take account of the surrounding relevant rules within the total legal universe of international law. But it doesn't tell you when and how to do that. It can't do - the principal on its own can't do that. So part of the point of the book has been to sort of drill down to that and work out when you do that and how you do it and look at the different contexts in which it's been done and make an assessment of it.

I don't think there's anything so ... I mean, the fact that I've been trying to do this in the international context is perhaps distinctive, but I do think this is actually part of what just good legal reasoning is all about. A good lawyer, as I was taught by Lawrence Collins, must try to be both a great generalist and a great specialist. I may have said this in the last interview, but if I didn't I'll say it now ...



## 12. You didn't.

So his point being, with which I agree, that if you're a generalist without real specialism, you can, as it were, be a menace to humanity because you don't really know enough about any particular people to be that useful, but equally dangerous and much more common in the current environment given the highly specialised world in which we live is the narrow specialist who has no general perspective on what he or she is doing. And that's dangerous because then you can't see the wider significance of your own field or how it fits in.

And I actually think... people say, oh, well, you know, the law is so complex, you can't expect to get across all of it. And of course, that's true at the level of saying, you know what, you can't carry in your head all the details of all legislation of all countries, and you certainly can't do that in public international law either. But I don't think that that's what legal reasoning has ever been about, actually because the purpose of legal education is to instil good legal reasoning and a sufficient understanding of the structure within which that operates so that you can solve legal problems. It isn't just stuff you brain full of as much detailed rules as possible even though many law students may feel like that's what's happening while they're studying.

And that is all about an ability to problem solve in part through the process that I'm attempting perhaps poorly to describe, which is identifying your specific issue - that's the hardest thing always - and then solving that issue in part through using the standard techniques of argumentative reasoning, but in part also by working out how your particular legal rule fits within the larger framework. Because in the end, after all, what is law but the means by which human society chooses to regulate itself? It's not ... if it were unbearably complex, it could never survive. One has to be able to explain the doctrines of the law by reference to the broader principles which they're there to perform.

## 13. I've always understood the legal system as necessary because we can't hold everything in our heads, because we can't set everything up in advance. There's always going to be some new problem that crops up, perhaps that no one anticipated or perhaps someone anticipated but could not do anything about because there's no epistemological way to set it out. So you have a process and there's someone who actually gets to decide. I mean, how else could you do it?

Yeah, and of course, why public international law is challenging in that respect is that, I think, we're all of us educated first in our national legal system and the accounts of the system that we tend to get when we learn law in a national legal system domestically are institutional. In other words, and you can see them, you know, you can go and visit parliament, you can sit in the Supreme Court, you can see a hierarchy of courts all the way up from the lowliest magistrates court to the top.

You can see a similar hierarchical structure in the way in which legislation and delegated legislation and rulemaking is set up. And so we kind of imbibed this idea that what's important about a legal system is an institutional structure to solve problems as they arise. And I'm not denying that that aspect is important, but you can't explain public



international law on that basis because it has many things which look like an institutional structure and which then on further examination - a fairly basic examination - plainly aren't. They don't operate in the same way.

So how do we explain the systemic attributes of public international law? It seems to me and the view I've expressed and developed in a new book is we can only explain it as a system of discursive legal reasoning. In other words, it offers us the tools by which states can solve their problems by reference to law. So understanding the reasoning process is the key to understanding - in turn to understanding - the system. And that's why I think the principal state integration so important, because it's not the only tool that we have, but it is the only tool that we have that knits individual rules into a system.

In fact, as Martti Koskeniemi himself wrote in the fragmentation study group report,<sup>26</sup> that the rules themselves, they'd just be words written on a piece of paper if they weren't collectively imagined as part of an operating system. In other words, all law is about the way in which it's applied, actually. And I think also we tend perhaps to also neglect that dimension - people might say this is a rather common lawyer's view, but I don't think in fact, it is unique - I don't think it's unique to a common law perspective. We tend to imagine that we can understand and interpret rules, again, in a vacuum. International law abounds with detailed commentaries on how to interpret particular provisions of particular international treaties and the like, and that's very valuable work, but in reality, international law doesn't speak until we've got a problem to which we have to apply it. So in fact, the process of interpretation of rules always takes place against a background of the application of those rules to a particular fact pattern which has provoked an issue of interpretation or more than one or two interpretations that then has to be resolved. Everything takes place against the facts of life because that's why we have law.

#### **14. That does come across to me as rather common law lawyer-like.**

Maybe, but then at least in the International Court of Justice hasn't hesitated to say the same thing when it has been appropriate for it to do so in the resolution of international disputes. So I think, but it is striking to me - it was striking to me when writing the new book how, despite the enormous quantity of great secondary material on public international law, how little attention had been really paid to the claims process in terms of working out what that actually means for the application and interpretation of the law - very little written about that at all, surprisingly. Lots written, of course, about the procedural stages of a case or whatever, the great commentaries on the Statute of the International Court, etc. But that's not really what I mean. What I mean is how you go about identifying your legal issue, identifying the potential universe of international rules that are applicable in the relations between the parties, interpreting and then applying those rules to your fact pattern. And yet that's what we do every day.

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<sup>26</sup> ILC, 'Report of the Study Group of the International Law Commission, finalized' (13 April 2006) UN Doc A/CN.4/L.682.



**15. So I think we've covered it in fairly good detail, albeit in a rather circuitous fashion, you're intellectual... the pathways of your intellectual development. You wanted to discuss some of your thoughts on investment arbitration and the opportunities for the future.**

Well, let's guess the one - I can't remember whether we did this in the first interview - but the one piece in this jigsaw puzzle that we haven't perhaps fully fleshed out is the contribution that I've been privileged to make, both academically and then subsequently as arbitrator in the investment field. I can't remember whether we talked about this much in the first ...

**16. We talked about how you had to work as an arbitrator but we had not really gone into, in any great depth, what the significance of that was.**

It seems hard to imagine now, given the huge profile that investment arbitration seemingly has and the interest in it and the developments in the number of cases, but in the early and mid-2000s, the field was very much in its infancy. It had existed only on paper. So there was the great ICSID Convention framed up by the World Bank in 1965. Lots of states had signed it, but there had only ever been a handful of cases. There were some pivotal developments in the latter half of the previous century and early part of the present century, which unlocked its potential and, in particular, by marrying the jurisdictional requirements of the ICSID Convention with the mass of bilateral investment treaties that had been concluded by states, which often contain the promise of arbitration. The theory which was espoused in some very influential early awards was: that was a standing offer directly to the private person or corporation, which that person, if they met the other jurisdictional criteria, could accept by filing the claim. There came to be this great increase in claims.

I'd never done such a claim when I was in practice, although I had been involved in many disputes between states or SOEs and private parties, but they generally all had a contractual background. However, two former assistants of mine, now both very eminent practitioners in their own right, Matthew Weiniger<sup>27</sup> and Larry Shore,<sup>28</sup> proposed to me not long after I went back to into academic life, look, this field is beginning to become known but there's no book, no modern book on what these very broadly drawn provisions in these investment treaties - fair and equitable treatment, protection from expropriation, full protection, security - actually mean. So why don't we write one? We thought in all our innocence that this would be a good, worthy project.

For me, of course, it fitted very much with my interest precisely because it was at the interface between public and private international law. That's what the whole field is about. It's about the interface between private corporations and states governed by treaty, but then exercised through essentially a private mechanism: arbitration. So we wrote the book, really, as a greenfield exercise. Very hard to believe now, but when we published, when we were writing it - we published in 2007 - there was almost no contemporary secondary literature on

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<sup>27</sup> KC, Global Chair of International Arbitration, London, Linklaters.

<sup>28</sup> Laurence Shore, partner of BonelliErede, Milan; head of the International Arbitration Focus Team.



the topic, so we had to go back to first principles and then study the then relatively small number of cases that had been delivered and try and make sense of it all.

So we published that book with Oxford University Press. Again, the timing was right because there was sudden upswing in demand, considerable interest in the field, and fortunately the book was kindly received by both the academic and the practising and arbitral community, and became a standard reference work.

At that point Lord Cook of Thorndon passed away. Lord Cook was a remarkable common law jurist. He'd been both the president of our Court of Appeal at a time when we had no Supreme Court in New Zealand and there was only the right of appeal to the Privy Council. He was then appointed to the Judiciary Committee of the Privy Council in the House of Lords - rather extraordinary for a New Zealander. Anyway, he then in retirement, had been one of the four nominated New Zealanders, nominated to the list of arbitrators at the ICSID Centre in Washington. He'd been very kind to me when I came back to New Zealand, nominated me for the American Law Institute, etc., etc. Then he sadly passed away, but then we're all of us mortal, and so I plucked up my courage and went and asked Dame Sian Elias,<sup>29</sup> Chief Justice, whether she would be prepared to recommend me to replace him on the list. She said that she would, and she, at that point very much took a general overview of all judicial or quasi judicial appointments made by New Zealand.

The Centre accepted that. That could easily have just been something nice to put on your CV, but not a reality, but it coincided with a view in the ICSID Secretariat, strongly taken by the then acting Secretary-General, Nassib Ziadé,<sup>30</sup> a very remarkable Libyan, that he should - or the centre should - broaden the field of arbitrators and in particular for the sort of, what amounts to a second tier in the ICSID system - no general right of appeal, but there is a right of review on a closed list of grounds, essentially procedural grounds or excess of jurisdiction. He took a risk on me and I was appointed to various of these so-called annulment committees, and I learned a huge amount through that process by sitting with some very remarkable, experienced jurists, notably Steve Schwebel,<sup>31</sup> former American judge on the International Court, and then Peter Tomka,<sup>32</sup> who's still a sitting judge on the International Court, and others. Then I began to chair myself, and then I broke through what effectively was a glass floor for me in the sense of being appointed to tribunals hearing the underlying substantive cases rather than the second tier view, which of course, is a very limited kind of exercise.

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<sup>29</sup> Rt Hon Dame Sian Elias GNZM KC. Chief Justice of New Zealand, 1999–2019.

<sup>30</sup> Lebanese lawyer. Chief Executive Officer of the Bahrain Chamber for Dispute Resolution. Director of the Dubai International Arbitration Centre 2011–2013; Deputy Secretary-General of the International Centre for Settlement of Investment Disputes 2007–2011.

<sup>31</sup> Judge Stephen M. Schwebel. Judge of the International Court of Justice 1981–2000 and President of the Court 1997–2000. President of the Administrative Tribunal, International Monetary Fund 1994–2009. Judge of the World Bank Administrative Tribunal 2007–17. For a bio, see the entry in the Eminent Scholars Archive: <https://www.squire.law.cam.ac.uk/eminent-scholars-archive/judge-stephen-m-schwebel>

<sup>32</sup> Czechoslovakian lawyer. Slovakia's Ambassador to the United Nations 1994–97, 1998–2003. Judge of the International Court of Justice 1993–present, serving as President of the Court 2012–15.



That came to be a rather significant sort of second practical aspect of my work in international law. It fitted very well with the academic work because at least as arbitrator, you can control the timetable in a way that if you counsel can't. I was sitting with some fascinating people, many of whom themselves were academics, and for me, since I was very much based in New Zealand, then [with] a young family, it provides the opportunity to travel and sit in on these hearings. And of course, I was able to bring to them, I suppose, my dual expertise in public and private international law, and the fact that I'd had prior practical experience was valuable because I knew the process, I knew what counsel were going to be on about and the kind of issues that would arise in practice.

So that has continued and still continues today. I've always kept a very firm lid on the number of appointments that I accept because the day job is my top priority, and I don't, in any event, think that this is or should be a volume business. It's about trying to make a contribution where you can to the successful resolution of disputes, and where the opportunity arises to try to clarify the law along the way, but not trying to, you know ... just accept every appointment that's thrown at you. So one has to keep turning them down, but that's fine.

That then also led to me being asked to, when Meg Kinear<sup>33</sup> was brought in as the new secretary general of ICSID - a fantastic Canadian appointment - she and I together relaunched with Oxford University Press the *ICSID Review*.

## 17. The Journal?

The Journal. We just had a board meeting this morning and, we set out to try and make that, to use a common law analogy, the *Law Quarterly Review* of the investment field. Since we wanted very high-quality material from a broader range of contributors, irrespective of the views that expressed, subject only to the requirement that they survived double-blind peer review. And then we brought out a new edition of the treatise a decade after the first. So that's been another field ...

## 18. I'm sorry, which treatise?

This is the book I did with Matthew Wiener<sup>34</sup> and Larry Shore<sup>35</sup> - *International Investment Arbitration: Substantive Principles*<sup>36</sup> - which is the prescribed text in fact for the Cambridge Investment law course, but is seemingly still rather widely used in cases although I deprecate having it cited in front of me, but apparently it is widely used in other cases.

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<sup>33</sup> Canadian lawyer. Secretary-General of the International Centre for Settlement of Investment Disputes 2009–present. Counsel at the Civil Litigation Section of the Canadian Department of Justice 1984–96; Executive Assistant to the Deputy Minister of Justice of Canada 1996–99; Director General of the Trade Law Bureau of Canada 1999–2006, then Senior General Counsel 2006–09.

<sup>34</sup> KC. British solicitor advocate. Partner at Linklaters and global co-head of International Arbitration Practice.

<sup>35</sup> American lawyer. Partner at Herbert Smith LLP, London 1995–2008; Partner and Co-head of International Arbitration Practice at Gibson Dunn & Crutcher LLP, New York 2008–13; Partner and Head of Public International Law Practice at Herbert Smith Freehills 2013–17; Partner at BonelliErede 2017–20, then Of Counsel 2020–present.

<sup>36</sup> Campbell McLachlan, Laurence Shore and Matthew Weinger, *International Investment Arbitration: Substantive Principles* (2nd edition, Oxford University Press 2017).





So we've tried to make a contribution in that way and then it led, when I was elected to the Institute, to the invitation to serve as rapporteur of a commission of the Institute on the equality of the parties for international investment tribunals and to try to do a similar thing that we tried to do in the book on the substantive principles to looking at procedural principles basically. In particular, looking at the procedure through the lens of the meta-principle of equality of the parties which resulted in the adoption of a resolution of the Institute back in 2019 which fortunately - because the Institute is, as one would hope, full of highly experienced but also highly opinionated members - this resolution did garner the support of the vast majority and was adopted in plenary.

There again, what we tried to do in collaboration with the wonderful group that the commission who took a very active role in the process, was to again strike that balance between explaining the general principle of equality and what that might mean in this context, but then trying to do the granular thing of looking at every stage in the process and working out what the implications of that general principle might be at every stage, from the assumption of jurisdiction, hearing issues arising from third party participation, issues of evidence, taking evidence at this stage, as well as the private party timing issues, all the way through the process to execution of the award.

My interest in the field was really sparked by this interface between private and public. I've never wanted to be seen, and don't regard myself as being solely a specialist in that field. I don't think one should be. I think you have to see that field as being part of a larger system of dispute resolution which draws in its case upon both public and private international law. But it has been undeniably an important part of my life, both academically and, as the opportunities arisen, as arbitrator practice, and in particular in recent years I have very much focussed on the practical side, on accepting appointments just as presiding arbitrator, in part because it's all too easy, rightly or wrongly, often wrongly, to be typecast in that field as being disposed towards claimants or respondents, and to me, as I'm sure to many, it's terribly important to be seen as being completely impartial. The best way of doing that is to be appointed as the presiding arbitrator.

On the other hand, it comes with a great deal of work because the presiding arbitrator has the responsibility to guide the process, and also is normally called upon to prepare the first draft of awards and decisions, even though they then become a matter of deliberation and hopefully consensus. Not that one can achieve them in every case, but one should always try as hard as one can to achieve consensus of the tribunal as a whole.

**19. Right, and going forward, what do you believe are the future opportunities in these realms of arbitration and private and public international law.**

We talked a little bit about that in the specific level because I'm fortunate to have been given this great opportunity to develop and deliver this new programme here, and hopefully that will, in turn, provide students who come through the LLM degree course here in Cambridge themselves with an opportunity. So in the specific level I guess I'm focussed on that.



More generally, and I've also got the opportunity of trying to put all of this together as we've discussed in the general course of the academy, to try to explain what it really means to think about the interface between public and private international law. It's another one of those things that's kind of easy to say ... not always so easy to deliver on, but I think terribly important because I think the world as a social system is not divided neatly between states on the one hand, and private individuals and corporations on the other. The world we live in encompasses both and we have to understand how the interactions work and probably - well, I think certainly - the structural insights which each of public and private international law can offer, that each only offer half of the picture. So I think that's an important thing to do.

But more generally speaking, I'm not sure that lawyers are always so good at looking to the future and in particular, looking to the longer term future, and at the moment, particularly so because perhaps every generation of humanity feels like they're the generation that's facing some existential crisis, but certainly I feel like we are, and we tend to lurch from one short term crisis to another as a species, partly because we are, as I said, we're all mortal, we all only have a certain life span. We don't necessarily think much beyond that. It's not only lawyers, but I think lawyers have some kind of responsibility to think about the systems which they have designed against their ability to contribute, over the longer term, to humanity and the world in which we live. That means both working out what it is that we have achieved, something I tried to go into in my good knowledge of this this year, because I think it's all too easy to take for granted the system that we that we've got - but it's kind of a remarkable thing that we've created in covering international law in the space essentially of a single generation - and then to assess how fit it is for the challenges that we face and what we might do about that.

**20. Do I sense within this answer, a worry that the system we have set up is actually fragile?**

I think all systems are fragile because in the end they only work because people believe in them. We know this. We know this in long durée of the history of law. When I gave the Goodhart Lecture, I started with that great quote from Arnold Toynbee, which nobody really reads anymore, but who had many great insights where he says, you know, in general, the process of legal codification reaches its peak long after the great ideas are being generated and when the legislators of the day are in a hopeless... fighting a hopeless rearguard action against the forces of destruction. And the reason for that is that behind all law is a belief system that is valuable - that the best way of organising human society is through some form of legal regulation - and once that belief system goes, all the circumstances, to use the language of the UN Charter, the circumstances that permit the application of law, once that goes then what you're left with is the digest of Justinian high and dry and no actual application for it on the ground.

There's always the risk - that's certainly a risk with international law that a system that has been, not the only explanation for the way in which the world operates, but a very, very important and valued contribution to the way in which the world operates. If it's continuously undercut and eroded, it simply ceases to operate.



I actually don't think that's the prospect that we face. I think that's overblown. I think for every piece of evidence of disintegration we equally see plenty of evidence of integration. In fact, the current - although it's only an example - the resolution of the General Assembly to ask the International Court to deliver an advisory opinion on the implications of climate change is, in many ways, a touchstone example of that. It couldn't have come about without the vast majority of the world's states agreeing that they wanted this, and the essential question being asked is a question of systemic integration. States don't need to know what the words of the UN agency or the or the Law of the Sea Convention say, what they want to know is how, when you put this all together with the overarching general principles that animate the whole field, what that tells us about what states should actually be doing. It's all about systemic integration in the law in practice, actually.

So I don't think we need to be pessimistic but, nevertheless, we certainly need to be clearly articulating the function - the importance of the function - of law in the international community, to paraphrase the late Hersch Lauterpacht.<sup>37</sup>

**21. And I think that's probably not a bad place to park this.**

I agree, John. I think we can never do better than Hersch and that's a wrap.

**22. Well, thank you very much for your time, Professor.**

It's a pleasure.

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<sup>37</sup> Sir Hersch Lauterpacht QC. Austro-Hungarian born international lawyer. Whewell Professor of International Law at Cambridge 1937–55. Judge of the International Court of Justice 1954–60.

