Editorial

In 1964, when Dr Wolfgang Friedmann was Professor of International Law and Director of International Legal Research at Columbia University, he published a book entitled *The Changing Nature of International Law*.[1] In the Preface, he stated the book "was an attempt to analyse in their respective importance and interdependence, the many profound changes that [had] affected contemporary international law to such an extent that it [was] something very different from what it was a generation ago." He added that the process of evolution was a continuing one and because those changes were sufficiently profound it was possible for him to make a preliminary assessment of them.

The articles presented in this issue of the Journal will show that Professor Friedmann's comments still hold true today. The nexus between international alliances, politics and law has continued, producing a formidable cocktail which has applied intense pressure on the rule of law and its development. The substance of "contemporary international law" looks different and the challenging headline news on land mines, the tragic conflicts on the African continent, the environment, computerisation and technology, and to a lesser degree, peace and security in the Middle East,[2] were either considered inconsequential or unheard of more than thirty years ago. On the African continent, the Hutus and Tutsis are engaging in conflict and terrorist bomb attacks continue to blast away dreams of a peaceful settlement in the Middle East and in Northern Ireland.

As expected, when Kofi Annan of Ghana was elected United Nations Secretary-General he was handed a most arduous task. Following his unanimous confirmation by the General Assembly on 13 December 1997 and Security Council on 16 December 1997, he announced that when he begins his term of office on 1 January 1998, he will have three priorities. The first will be the financial contribution of the United State to the United Nations, more than US$1 billion in arrears. The second will be the "opening up" of the United Nations, not only within the Secretariat, but by the empowerment of external groups such as non-governmental

---

1 1964, Columbia University Press, New York.

2 It is arguable that the nature of the conflict in the Middle East today is different to that which existed in the sixties.

organisations, to enable them to play a more significant role in United Nations governance. The third will be the quick and effective implementation of United Nations reforms.[3] This last task is seen by many as crucial if the organisation is to be a force in the future, with a mandate to continue effectively in the new millenium.

At present, one of the areas of immediate concern is the Middle East where long lasting peace and security have been elusive, although Israel and the Palestine Liberation Organisation continue to work towards that common objective. Iraq remains defiant in relation to United Nations inspections of its nuclear installations and activities regarding non-conventional weapons.[4] Iran is also causing some concern and western observers are edgy because of its uninhibited development of weapons of mass destruction. The same applies to Libya. This may be contrasted with the experience in the United Kingdom in July 1997 where chemical and biological defence facilities were successfully inspected by international teams of inspectors from the Organisation for the Prohibition of Chemical Weapons under the terms of the Chemical Weapons Convention.[5]

Mr Annan will bring to the United Nations a new era. He comes to the world's foremost chief executive position from his position as United Nations Under Secretary-General for Peacekeeping. His appointment marks the first time a United Nations Secretary-General has been drawn from the bureaucracy of the organisation as his predecessors were either from the diplomatic service or political parties in their own countries. In Bosnia, Mr Annan was responsible for the transition of the United Nations peacekeeping mission to a NATO-led international force and he is seen by many as possessing "the right credentials and mix of skills that should bring the United Nations into the 21st century".[6]

The contribution of individuals to the development of international law is increasingly becoming more important and obvious. The role to be played by Mr Annan as Secretary-General, and played by others before him, is but

---

3 Archer, "Kofi Annan: a new kind of Secretary-General", available at internet site: http://unac.flora.ottawa.on.ca/enews/liaison1/newkind/html (visited November 1997).

4 Ambassador Richard Butler, Permanent Representative of Australia to the United Nations, is the Executive Chairman of the Special Commission on Iraqi Disarmament.

5 "Chemical weapons inspection" (August 1997) 27:8 Survey of Current Affairs 314.

6 Crossette, "Ghanian chosen to head the UN, ending standoff" New York Times, 14 December 1996.

one example. The role of statesmen and Nobel Peace Prize winners is also worthy of mention. In 1997, the prize was awarded to two recipients, the International Campaign to Ban Landmines[7] and its Co-ordinator, Jody Williams. Their vital contribution to the banning and clearing of anti-personnel mines has been viewed as historic and pivotal in the formulation of the international convention, aimed at eradicating the world of those insidious weapons. The convention was signed in Ottawa, Canada in December 1997. The roles played by individuals such as Mr Annan and Ms Williams at the international level appear to be exactly what Professor Friedmann was referring to more than three decades ago. These examples testify to the "widening scope of international law in terms of its active participants, [when] assessing the role of public international organisations, private corporations and individuals in contemporary international law".[8]

International peace and security may be attained in a number of ways. The part played by individuals has already been seen. The other methods include the United Nations' peacekeeping mandate and the signing of international treaties for express purposes. In 1997, there were concerted efforts to ensure that developments in international humanitarian law saw reductions in the world's arsenal of nuclear weapons. Discussions were held as early as March in Helsinki to consider proposals for radical cuts in the long-range nuclear weapons arsenals held by the United States and Russia. The proposals actually went beyond the round of cuts under the 1993 Start 2 Treaty and were ratified by the United States Senate in 1997, but they still await ratification by the Russian parliament.

Perhaps an exception to what has been discussed thus far is the "old" topic on accountability and responsibility for Nazi atrocities committed during World War 2, and which continues to this day. This old topic has been chosen for comment because of interesting developments which have come its way. One example is the trial in November 1997 of Ernst Hering, a former member of a Nazi paramilitary unit. At the trial, which was held in Cologne, Germany, Hering was charged as an accessory to murder and accused of standing guard while colleagues shot down 65 Jews in a

---

7 Over 1,000 bodies are affiliated to the International Campaign, making up a network that is committed to an effective policy for peace: Statement by the Norwegian Nobel Institute available at internet site: http://www.nobel.no/97eng.html (visited November 1997).

8 Friedmann W, The Changing Nature of International Law (1964, Columbia University Press, New York) Preface.

Ukrainian village. The second concerns the so-called *Monetary Gold case*[9] which also has its genesis in World War 2. On 2-4 December 1997, the London Conference on Nazi Gold was held to address international concerns on the origins and disposal of Nazi gold and continue the work of the Tripartite Commission for the Restitution of Monetary Gold established under the 1946 Paris Agreement on Repatriations involving France, the United Kingdom and United States ("Tripartite Gold Commission").[10]

Thirty years ago, the environment as a matter of international concern was still in gestation. In December 1997, the future of the world and the environment was discussed at the climate change summit by the leaders of 160 countries in Kyoto, Japan.[11] Australia made the headlines when it advocated a hardline pro-industry greenhouse stance.[12] An environmental disaster in 1997 which caused grave concern were the forest fires in Indonesia. The fires had devastating effects, both domestically and transboundary. The fallout from the fires was extensively felt in the region, even as far as the Philippines. Near neighbours like Malaysia and Singapore have suffered more immediate injury. Like the case of Nazi Germany, here the question of state responsibility is surely an issue.

The events referred to above illustrate the significant impact they have had on the development, nature and scope of international law. An historic event which has not yet been mentioned is the return of Hong Kong by the United Kingdom to the People's Republic of China on 1 July 1997, pursuant to the terms of the Sino-British agreement signed on 19 December 1994. This act divested the United Kingdom of its last major colonial

---

9 Case of the Monetary Gold Removed from Rome in 1943 (Preliminary Objection) [1954] International Court of Justice Reports 19.

10 The Tripartite Gold Commission's mandate is to facilitate the distribution of monetary gold back to former occupied territory whose central reserves had been wrongly appropriated by the Nazis. Most of the gold had been distributed to the ten claimant countries following the findings of the Tripartite Gold Commission and a panel of experts. However, another 2% of the gold is yet undistributed, its current value being £40 million: "London Conference on Nazi Gold"(August 1997) 27:8 Survey of Current Affairs 315, 316.

11 In September 1997, Australia successfully defeated the push by the South Pacific Forum to commit the 16 member states of the Forum to legally binding targets on greenhouse gas emissions. Instead, different targets were set for different states: Short, "Pacific win a boost for PM's gas push" The Australian, 22 September 1997 at 2.

12 McKenzie and anor, "China warms to our greenhouse stance" The Australian, 16 September 1997 at 2.

possession. Other significant events are those which are sometimes deemed domestic in nature but which have international law implications. This is particularly reflected in the area of human rights, and a number of articles is devoted to the topic. Sir Anthony Mason AC, KBE argues that the values of judges, including their definition of rights and freedom, help to shape Australia's institutions [pages 1-16]. Dr Johannes Knorz approaches the interpretation of human rights from a theoretical perspective [pages 34-55] and the articles by Craig Durham [pages 56-85] and Kate Eastman [pages 86-96] illustrate the ever expanding relationship between international human rights norms and domestic law. An event which straddled the domestic and international arenas is the recent referendum in Canada on the independence of Quebec. This move raises interesting international law questions, and one of them, on new international borders following secession, is dispassionately analysed by Peter Radan in his article on the principle of *uti possidetis juris* [pages 200-214].

One of the by-products of international relationships is international trade and commerce (or is the international relationship the by-product of international trade and commerce?). The recent collapse of a number of Asian economies highlights the interdependence of nations, and more so at the regional level. The mood was subdued when leaders of the Asia Pacific Economic Cooperation Forum, more commonly known as APEC, met in Vancouver in November 1997. High on the agenda was the economic upheavals in and the bailout packages for members adversely affected. The domino effect of the collapse of the Thai baht had extended as far north as South Korea, the world's eleventh largest economy. The other Humpty Dumpties were Indonesia, Taiwan and Malaysia, and to a lesser extent the Philippines and Singapore. Some commentators have predicted that China and Japan, or Australia for that matter, may not be immune. This scenario is a far cry from that which existed in 1989 when APEC was established with the objective of free trade by the year 2020 in accordance with a progressive formula.

International commercial activity and its regulation have been much facilitated by efforts aimed at the smooth passage of transactions. A beneficiary of international consensus is the European Union. In October 1997, the central banks of five European Union countries followed the German Bundesbank in raising interest rates, thus acting collectively as one. This was a huge gain for the European Monetary Union which officially begins in a year's time, in January 1999. In practice, a number of

European Union members will convert to the euro as early as May 1998. Since the smooth operation of international commercial and other activities requires regulation, the formulation of rules and procedures continues to be an ongoing exercise. The Hon Dr Peter Nygh argues the case for a global judgments convention and analyses the proposed Hague Convention on the Recognition and Enforcement of Judgments in Civil and Commercial Matters [pages 96-111]. As Co-rapporteur (Common Law), he presents an insight that only an insider can provide. The article by Lisa Sarzin presents the existing framework for international commercial law in the context of its history. She traces the beginnings of the *lex mercatoria* and discusses the UNIDROIT Principles and their contribution to transnational trade law [pages 112-144].

Advances in technology and intellectual property have also created imperatives for the international commercial community. For example, the conduct of international business by electronic means is no longer the exception and this has raised the question of control and attendant issues. Dr Olujoké Longe-Akindemowo takes a critical look at copyright in the context of digitisation and the need to balance various rights and interests when considering the scope of protection [pages 170-199]. Such regulation is necessary, at domestic and international levels.

On the international trade front, Australia is embroiled in trade disputes. Emeritus Professor Gillian White discusses two cases against Australia, both involving alleged trade breaches. The cases flow from the implementation of agreements reached during the Uruguay Rounds of multilateral trade negotiations which were concluded in December 1993 [pages 145-169]. The cases, which are on-going, make use of World Trade Organisation processes for the resolution of trade disputes and it is expected that the cases will be heard in the first half of 1998.

In this issue of the Journal, two cases are reported. In the first case, between Iran and the United States (Preliminary Objection), Iran has claimed that the destruction of Iranian oil platforms by the United States has resulted in adverse effects on its oil export trade. This, Iran claims, is in breach of the Treaty of Amity, Economic Relations and Consular Rights signed by the two states in 1955, and which had entered into force in 1957 [pages 244-260]. In the second case, between Hungary and Slovakia, the dispute concerns the construction and operation of the Gabcikovo-Nagymaros System of Locks, originally envisaged by the parties as a "joint

investment [to] utilise the natural resources of the Bratislava-Budapest section of the Danube River for the development of water resources, energy, transport, agriculture and other sectors of their natural economy" [pages 261-280]. In both cases, the disputants had chosen a formal judicial procedure, namely, the International Court of Justice, to settle their dispute.

On the other hand, the Hon Justice Michael Kirby AC, CMG believes in the old adage that prevention is better than cure. In other words, states should engage in activities which would facilitate and cement their friendship and cooperation with one another, thereby reducing the risk of misunderstanding and friction. In his article, Justice Kirby argues the preventative perspective by focusing on the development of areas of agreement and commonality rather than on areas of disagreement and divergence. The example he chooses to underlie his proposition is the transnational relationship between Australia and India. He enumerates the benefits which may be obtained from the development of that particular relationship and provides a plan of action to show how links may be achieved [pages 17-33].

Readers will notice in this issue that the Journal has found a new home at the Faculty of Law, University of Western Sydney, Macarthur where I relocated at the beginning of this year. Other changes, hopefully improvements, include the establishment of an Editorial Advisory Committee, and I warmly welcome the members. It is an aim that membership of this committee will eventually reflect geographical representation even more. I am now assisted by a larger Editorial Board whose input has been most welcome and very much appreciated. Additionally, I am extremely grateful to Professor David Flint AM for agreeing to continue as Consulting Editor in spite of his varied and various commitments.

Finally, special thanks are extended to Mrs Noemi Lemaire who over the years was mainly responsible for the secretarial administration of the Journal, a task which she undertook in a most competent and reliable manner.