

EDITORIAL COMMENT

International law is so pervasive and extensive that at times it is hard to choose an area to concentrate on. The Australian Branch of the International Law Association reflects some of the areas in its various working committees: on Gender, Human Rights, Indigenous Rights, International Heritage, International Trade and Business Law, Law of the Sea, Military Law, Space Law and Transnational Crimes. In this issue, the general focus will be on international crime and commerce and their connection.

On 12 October 2002, just over a year from the events of September 11, the Bali bombings claimed 88 Australian lives. As a consequence, it is not surprising to find Australia somewhat preoccupied with counter terrorism nowadays. In 2002, Australia participated in many regional and international initiatives that highlighted the 'natural' link between terrorism and poverty including the efforts to combat them.

On 18-22 March 2002, leaders from 50 states and governments met in Monterrey, Mexico for the United Nations Conference on Financing and Development.¹ This was the first summit where governments, civil society, the business community and institutions engaged in a quadripartite exchange of views on world poverty. Over 800 participants met in twelve separate roundtables for global discussions and exchange of ideas and key delegates identified poverty as a driving force behind international terrorism.² Han Seung-Soo, President of the United Nations General Assembly, identified the world's poorest states as a breeding ground for violence and despair.³ Secretary-General Kofi Annan observed that it was in the interests of rich states to help poorer states.⁴ Michael Moore, Director General of the World Trade Organisation, stated that "[p]overty in all its forms is the single threat to peace, security, democracy, human rights and the environment."⁵

¹ For more information see "Poverty fuelling terrorism", BBC News, 22 March 2002 at <<http://news.bbc.co.uk/1/hi/world/1886617.stm>> (visited October 2003).

² International Conference on Financing and Development, Follow up Process to the International Conference, 2003 at <www.un.org/esa/ffd/> (visited October 2003).

³ "Poverty fuelling terrorism", BBC News, 22 March 2002 at <<http://news.bbc.co.uk/1/hi/world/1886617.stm>> (visited October 2003).

⁴ *Ibid.*

⁵ *Ibid.*

The summit adopted the Monterrey Consensus in which developed, developing and transition economy states agreed on important actions governing domestic, international and systemic policy issues on financing development.⁶ *Inter alia*, the Consensus addressed the concern over the dramatic shortfalls in resources to attain certain internationally agreed development goals to eradicate poverty, improve social conditions, raise living standards and protect the environment. Similar goals were found in the United Nations Millennium Declaration of 8 September 2000 in General Assembly resolution 55/2.⁷ The Consensus recognised that developed and developing states should work in partnership and commit to sound policies, good governance at every level and the rule of law.⁸ It acknowledged that the 11 September terrorist attacks had exacerbated the global economic slowdown reducing growth rates further.⁹

On 23-27 October 2002, Australia was one of 21 APEC economies that met in Mexico again, this time for the Los Cabos summit that became dominated by the two Ts, trade and terrorism. Speaking at this summit, Prime Minister John Howard announced that Australia would grant tariff and quota free access for 50 of the world's poorest states to signal its commitment to sharing the fruits of trade liberalisation and help least developed countries (LDCs) to trade their way out of poverty.¹⁰ On 17-18 December 2002 in Bali, Australia co-chaired with Indonesia

⁶ In December 2002, the General Assembly detailed a follow-up intergovernmental process to drive the policies: International Conference on Financing and Development, Follow up Process to the International Conference, 2003 at <www.un.org/esa/ffd/> (visited October 2003). For more information on the Draft Outcome of the Monterrey Consensus see United Nations, International Conference on Financing for Development, "Final Outcome of the International Conference on Financing for Development", Annex, A/CONF198/3, 1 March 2002 at <www.un.org/esa/ffd/0302finalMonterreyConsensus.pdf> (visited October 2003).

⁷ Ibid 2 para I(2). The resolution is available at <www.un.org/millennium/declaration/ares552e.htm> (visited October 2003).

⁸ See Draft Outcome of the Monterrey Consensus para I(4) Annex, United Nations, International Conference on Financing for Development, "Final Outcome of the International Conference on Financing for Development", A/CONF198/3, 1 March 2002 at <www.un.org/esa/ffd/0302finalMonterreyConsensus.pdf> (visited October 2003).

⁹ Ibid para I(5).

¹⁰ Prime Minister of Australia News Room, "Tariff-free access for the world's poorest countries" at <www.pm.gov.au/news/media_releases/2002/media_release1951.htm> (visited October 2003).

the Conference on Combating Money Laundering and Terrorist Financing issuing the following statement:¹¹

The world is undergoing dramatic historical change at a rapid pace. We have witnessed fundamental changes in the spread of information technology, in the nature of war, and in transnational crime, including money laundering and terrorism. This trend is introducing elements which present new threats to the international community in the twenty-first century. The growth of international trade, expansion of the global financial system, increased international travel, and the surge in the internationalisation of organised crime have combined to provide opportunities for converting illegal proceeds into what appear to be legitimate funds.

Earlier, addressing the General Assembly on 2 October 2002 the Australian delegate, Bruce Scott, referred to Security Council resolution 1373 (2002) as the “cornerstone of global action against terrorism”¹² adding that Australia was “strongly committed to working within the UN framework to combat terrorism and terrorist financing.”¹³ He said:¹⁴

Given the insidious and transboundary reach of today’s terrorist movements and tactics, Australia is convinced the problem needs to be tackled comprehensively by the international community – through a full complement of measures, multilateral, regional, bilateral and domestic.

The statement stresses that terrorism and its related crimes are so penetrating and so interlinked that every level of society, from domestic to international, is unsafe.

¹¹ Co-Chair’s Report, Conference on Combating Money Laundering and Terrorist Financing in the Asia Pacific region, Bali, 17-18 December 2002 at <www.dfat.gov.au/globalissues/reports/> (visited October 2002).

¹² Statement by Hon Bruce Scott MP, Parliamentary Adviser to the Australian Delegation, Sixth Committee, United Nations General Assembly, Item 160: Measures to Eliminate International Terrorism, 2 October 2002 at <www.australiaun.org/Statements/UNGA_57/021002_sgscottterrorism.htm> (visited October 2003).

¹³ *Ibid.*

¹⁴ *Ibid.*

Acknowledging that state debt is a major cause of world poverty, the International Monetary Fund has developed a proposal on sovereign debt restructuring, an attempt to give effect to the Millennium Declaration. The Fund recognises that an effective bankruptcy regime brings about many benefits to an economy, such as equity and systemic stability.¹⁵ At present, because there is no such framework the cost of default is escalating and the poorest states are accumulating unsustainable debt burdens.¹⁶ In a timely analysis, Professor Ross Buckley in his article provides the Australian perspective and explains why this subject is fundamental to Australia's security and regional interests.

As noted above, poverty has actual implications for peace, security, democracy, human rights and the environment. On this topic, Dr Laura Horn's article leads us through the 2002 World Summit on Sustainable Development where the imperative is articulated as "a life-or-death issue for millions upon millions of people, and potentially the whole human race." In another article, Michael Head advocates the cause of refugees within the Australian context, notes global inequality and proposes more open borders and global citizenship. He presents the role of the United Nations High Commissioner for Refugees, questions the 1951 United Nations Refugee Convention and raises the economic implications caused by the international displacement of persons.

It is undoubted that institutions have a role in the war against terrorism, be it direct or indirect. Judith Marychurch's article is staged in the European Union where she examines its corporate law, on the form of the *Societas Europaea* and the likely impact its introduction would have on the national law and legal culture of member states. Instead of harmonization, she concludes that this would likely contribute to corporate law's proliferation contrary to the original aim that such a structure would allow companies to be more efficient and cheaper to administer. The European Union membership itself suggests an economic and developmental discrepancy between the "old" and "new"

¹⁵ International Monetary Fund, "Proposal for a sovereign restructuring mechanism (SDRM): A factsheet", January 2003 at <www.imf.org/external/np/exr/facats/sdrm/htm> (visited October 2003).

¹⁶ International Monetary Fund, "IMF Board holds informal seminar on sovereign debt restructuring", Public Information Notice (PIN) No 02/38, 1 April 2002 at <www.imf.org/external/np/sec/pn/2002/pn0238.htm> (visited October 2003).

or ascending states, particularly from the eastern bloc,¹⁷ that warns of a potential potent mix. In this respect, Germany's difficult experience in economic integration is a useful reminder. The comparative analysis in this discussion has some relevance for Australian corporations law.

At the international level, Australia is twelfth largest contributor to the United Nations with a commitment to revitalising this institution so that it may better serve its member states.¹⁸ José A Paja has the same idea. To ensure that organisation's efficiency and effectiveness, he proposes a replacement regulatory framework in his article. Nevertheless, even though the United Nations is not perfect, it should be given due credit for its important initiatives in combating poverty and terrorism. When 2002 ended, there were 19 international or regional treaties on the prevention and suppression of international terrorism, 16 of them in force presently.¹⁹ Australia is party to eleven of twelve anti-terrorism conventions, acceding to the 1997 Convention on the Suppression of Terrorist Bombings on 9 August 2002²⁰ and ratifying the 1999 Terrorism Financing Convention on 26 September 2002.²¹

At the regional level, Australia's efforts in counter terrorism activities include its adoption of the ASEAN Regional Forum Declaration on Terrorist Financing on 31 July 2002.²² Further, the 2002 Conference on

¹⁷ The 15 old member states are Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Portugal, Spain, Sweden, Netherlands and United Kingdom. The ten new member states are Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia. There is a list of states waiting for admission, namely, Bulgaria, Romania and Turkey: Europa, "The EU at a glance" at <http://europa.eu.int/abc/governments/index_en.htm> (visited October 2003).

¹⁸ Permanent Mission of Australia to the United Nations, 20 May 2003 at <www.australian.org/> (visited October 2003).

¹⁹ For more details see "Extract from the Report of the Secretary-General on measures to eliminate international terrorism", Doc A/57/183 as updated on 10 December 2002 at <www.un.org/law/terrorism/terrorism_table_update_12-2002.pdf> (visited October 2003).

²⁰ The convention entered into force generally on 23 May 2001 and for Australia on 8 September 2002: [2002] Australian Treaty Series 17.

²¹ The Convention entered into force generally on 1 April 2002 and for Australia on 26 October 2002: *ibid* 23.

²² See Association of Southeast Asian Nations (ASEAN), Declaration on Terrorism by the 8th ASEAN Summit, 2002 at <www.aseansec.org/13154.htm> (visited October 2003).

Combating Money Laundering and Terrorist Financing referred to earlier was an Asia Pacific conference.²³ At the bilateral level are many Memorandums of Understanding on counter terrorism such as that signed with Thailand on 3 October 2002, the third of its kind with a regional partner following agreements with Malaysia and Indonesia.²⁴

Within Australia, the federal and state governments agreed on 20 initiatives to enhance the existing framework on terrorism and transnational crimes at the domestic level. So far, the key legislative proposals include controls over terrorist finances and extraterritorial application of laws. More specifically, the headings include entry and deportation of aliens (1958 Migration Act); intelligence services agencies (1979 Australian Security Intelligence Organisation Act, 2001 Intelligence Services Act); proscribed organisations (1914 Crimes Act, 1945 Charter of the United Nations Act); suspect transactions (1987 Proceeds of Crime Act, 1988 Financial Transaction Reports Act); investigation and enforcement (1979 Australian Federal Police Act, 1984 National Crime Authority Act); criminal procedure (1987 Mutual Assistance in Criminal Matters Act, 1988 Extradition Act); and specific offences (1976 Crimes [Biological Weapons] Act, 1976 Crimes [Internationally Protected Persons] Act, 1978 Crimes [Foreign Incursions and Recruitment] Act, 1989 Crimes [Hostages] Act).²⁵

On 21 March 2002, Australia passed a controversial anti-terrorism Bill. This is the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill [No 2].²⁶ Generally, the Bill's stated aim is to improve Australia's ability to combat terrorism by amending the

²³ Co-Chair's Report, Conference on Combating Money Laundering and Terrorist Financing, Bali, 17-18 December 2002 at <www.dfat.gov.au/globalissues/reports/> (visited October 2003).

²⁴ The Hon Alexander Downer MP, Minister for Foreign Affairs, Australia, Media Release, FA 143, 3 October 2002 at <www.foreignminister.gov.au/releases/2002/fa143_02.html> (visited October 2003).

²⁵ Parliament of Australia, Department of the Parliamentary Library, "Terrorism: Legislating for security", Research Note No 25, 2001-2002 at <www.apl.gov.au/library/pubs/rn/2001-02/02rn25.htm> (visited October 2003).

²⁶ Bill [No 1] was withdrawn because of a drafting error and was substituted by Bill [No 2]: Bills Digest No 133, 2002-03, "Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 [No 2]" at <www.apl.gov.au/library/pubs/bd/2002-03/03bd133.htm#Background> (visited October 2003). This Bill is commonly known as the ASIO Bill.

1979 Australian Security Intelligence Act. The Bill creates specific terrorist offences, enables ASIO to question non-suspects before a "prescribed authority", and allows state and federal police to arrest persons "to protect the public".²⁷ It provides for warrants to be issued to detain and question persons, including children over 14 years old.²⁸ It is presented as a package with five other components all introduced in 2002, namely, the Security Legislation Amendment (Terrorism) Act, Suppression of the Financing of Terrorism Act, Border Security Legislation Amendment Act, Criminal Code Amendment (Anti-hoax and Other Measures) Act, and Criminal Code Amendment (Suppression of Terrorist Bombings) Act.²⁹

Further, the Telecommunications Interception Legislation Amendment Act allows interception warrants for the investigation of acts of terrorism, while the Australian Crime Commission Establishment Act reconstitutes the National Crime Authority as the Australian Crime Commission with broader powers to gather criminal intelligence.

The next group of articles in this issue focuses on international criminal law. Melron Nicol-Wilson compares the criminal tribunals for the former Yugoslavia, Rwanda and Sierra Leone while Steven Freeland provides some reflections on the bombing of Kosovo and the *Milosevic* trial³⁰ before the Yugoslav tribunal. More insight into the individual's accountability for war crimes and crimes against humanity *inter alia* is presented in three case notes that showcase the three different stages of proceedings (trial, review and appeal) in this tribunal. The cases are

²⁷ Parliament of Australia, Department of the Parliamentary Library, "Terrorism: Legislating for security", Research Note No 25, 2001-2002 at <www.aph.gov.au/library/pubs/rn/2001-02/02rn25.htm> (visited October 2003).

²⁸ Originally, the age proposed was ten: *ibid*.

²⁹ Parliament of Australia, Department of the Parliamentary Library, "Terrorism: Legislating for security", Research Note No 25, 2001-2002 at <www.aph.gov.au/library/pubs/rn/2001-02/02rn25.htm> (visited October 2003).

³⁰ Bosnia – Prosecutor v Milosevic, Initial Indictment, 22 November 2001; Croatia – Prosecutor v Milosevic Initial Indictment, 8 October 2001; Kosovo – Prosecutor v Milosevic et al, Second Amended Indictment, 29 October 2001. The Appeals Chamber held that for the purposes of the appeal, the three indictments were to be deemed as one: Prosecutor v Milosevic, Case No IT-02-54-AR73 (Prosecutor v Milosevic) Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, 1 February 2002.

Krnojelac,³¹ *Tadic*³² and *Kunarac et al*³³ respectively. Human rights and their breach receive attention from Dr Jackson Nyamuya Maogoto who discusses the state's duty to punish perpetrators of disappearances and extra-judicial executions, whereas Professor Rafiqul Islam laments the United States' withdrawal from the 1998 Rome Statute of the International Criminal Court.

Unlike the United States, on 2 July 2002 Australia ratified that treaty which entered into effect on 1 September 2002. The acceptance of this permanent court with power to investigate and prosecute genocide, war crimes and crimes against humanity had long been its human rights and foreign policy objective.³⁴ In a joint media release the Minister for Foreign Affairs and the Attorney-General stated that the ratification was subject to a declaration affirming the primacy of Australia's criminal jurisdiction over crimes within the Court's jurisdiction. They added that it included: (1) a declaration affirming the primacy of Australia's criminal jurisdiction in relation to crimes within the Court's jurisdiction; (2) the conditions under which a person in Australian custody or control would be surrendered to the Court; and (3) clarification of Australia's interpretation of the crimes found in the Statute. The declaration, which was not a reservation, had full effect in Australia reinforcing the Statute's inbuilt safeguards that preserved Australian sovereignty over its criminal jurisdiction.

As usual, a number of book reviews and cases are presented. In 2002, two cases before the High Court of Australia, *John Pfeiffer*³⁵ and *Zhang*³⁶ dealt with private international law, more specifically, tort choice of law. Jacqueline Princi in her article discusses both decisions, which establish that the *lex loci delicti* rule is without a flexible exception.

³¹ Trial Chamber II, 15 March 2002, Case No: IT-97-25.

³² Appeals Chamber, 30 July 2002, Case No IT-94-1-R.

³³ Appeals Chamber, 12 June 2002, Case Nos IT-96-23 and 23/1-A.

³⁴ The Hon Alexander Downer MP, Joint Media Statement, "Australia ratifies International Criminal Court", 2 July 2002 at <www.foreignminister.gov.au/releases/2002/fa095b_02.html> (visited October 2003).

³⁵ [2000] High Court of Australia 36 (21 June 2000).

³⁶ [2002] High Court of Australia 10 (14 March 2002).

At the same time, the International Court of Justice continued to be more streamlined, efficient and productive. Several Orders were issued and disputes put to bed. The Court even managed to settle one of them in an unprecedented short 16 months. This judgment was delivered early, in February, in *Arrest Warrant of 11 April 2000 (Congo v Belgium)*.³⁷ The case concerns the legality of an international arrest warrant issued *in absentia* by a Belgian judge against a Congolese government minister. Applying customary international law, the Court held that Belgium had violated its legal obligations towards the Congo by issuing and circulating the arrest warrant internationally. In other words, Belgium's actions failed to respect the minister's immunity from criminal jurisdiction and inviolability under international law.

Another case dealt with the land and maritime boundary between Cameroon and Nigeria, with Equatorial Guinea appearing as a non-party intervener.³⁸ After delimiting the boundary, the Court rejected the parties' allegations on state responsibility because there was inadequate evidence to support those claims or their imputability to the other party.

In yet another proceeding, the Congo requested the Court to order provisional measures against Rwanda concerning armed activities on Congolese territory that resulted in an abundance of serious violations of human rights and international humanitarian law, and in the flagrant violation of the Congo's sovereignty and territorial integrity.³⁹ The Court rejected the application because it lacked a *prima facie* jurisdiction to make the order. Such lack of jurisdiction meant that it could not grant Rwanda's request to remove the case from the Court's List too. However, the Court held that this did not prejudice the admissibility of the Congo's application, the merits of the case or the merits themselves. It explained that a fundamental distinction existed between a state's acceptance of its jurisdiction and the compatibility of particular acts with international law. The former required consent

³⁷ The Court's judgment available at <www.icj-cij.org/icjwww/idocket/iCOBE/iCOBEframe.htm> (visited October 2003).

³⁸ See *Land and Maritime Boundary (Cameroon v Nigeria: Equatorial Guinea intervening)* at <www.icj-cij.org/icjwww/idocket/icn/icnframe.htm> (visited October 2003).

³⁹ See *Armed Activities on the Territory of the Congo (New Application: 2002) (Congo v Rwanda)* at <www.icj-cij.org/icjwww/ipresscom/ipress2002/ipresscom2002-19_crw_20020710.htm> (visited October 2003).

while the latter dealt with the merits after jurisdiction was established and it had heard both parties' full legal arguments. Therefore, the states continued to be responsible for violations of international law attributable to them irrespective of whether they had accepted the Court's jurisdiction since they were always required to fulfil their obligations under the United Nations Charter, Organisation of African Unity Charter⁴⁰ and 1949 Geneva Conventions.

The Court's final judgment for the year was delivered on 17 December 2002. The case involved a longstanding sovereignty dispute between Indonesia and Malaysia over two islands, Ligitan and Sipadan, in the Celebes Sea off Borneo's northeast coast. Faced with different bases under which the parties had claimed title (convention, succession and *effectivités*/effective administration), the Court eventually chose *effectivités*, accepting Malaysia's arguments that it exercised state functions in respect of the islands. The Court relied on *Legal Status of Eastern Greenland (Denmark v Norway)*⁴¹ to arrive at this conclusion.

There has been much sadness in recent times. On 19 June 2002, the president of our Branch, the Hon Dr Peter Nygh, AM passed away following illness. Many of our readers all over the world would have known Peter. Included in this issue is the eulogy presented by the Hon Justice Rodney Purvis who is another past president. It was decided that the eulogy would be published here for a more intimate insight into the person that Peter was.

Also, this past year has been my *annus horibilis*, fraught with personal tragedies, the reason for the lateness of this 2002 issue. As we go to print, we have begun work on the 2003 issue that should hopefully see us back on track regarding time-lines. As always, I would like to thank the International Court of Justice for allowing us to use its materials freely. I am also grateful to our contributors, editorial advisors, and colleagues and students on the Editorial Board, without whom there would be no journal. Finally, on a more personal level, thank you to all who showed me kindness, patience and understanding this past year.

Alexis Goh
Editor in Chief

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⁴⁰ The OAU Charter was signed in Addis Ababa, Ethiopia on 25 May 1963.

⁴¹ Permanent Court of International Justice [1933] Series A/B, No 53.