EDITORIAL COMMENT

A long time ago I learnt that a *right* can be a difficult term of law to define. When influenced by the opinion of society it is deemed a moral right; when protected by sanction of state it is deemed a legal right. In this issue the concept of *right* rises to the fore and the articles reflect its implication and application. Rights are not only substantive; they also exist in the law of procedure. Way before the Universal Declaration of Human Rights in 1948 it was acknowledged that although the human race is divided into distinct groups with varying physical and moral characteristics, they all resemble each other and rules of conduct apply to them and govern their relations. Each group has its own system of laws and no one, not even the state as represented by the government, is permitted to breach the rule of law. This idea stems from Plato's *The Republic* (360 BCE) and is reflected in Albert Venn Dicey's *Law of the Constitution* (1895).

On 10 December 2003 the world observed the 55th anniversary of the Universal Declaration. To celebrate this Human Rights Day, Australia reflected on many of its human rights initiatives and achievements occurring during 2003.

In "Australia and the Rule of Law", the first article of this issue, the Hon Sir Gerard Brennan AC, KBE, Chief Justice of Australia from 1995-1998, looks critically at Australia within the context of the rule of law, human rights, a world gripped by terrorism, and boat people and refugees. Referring to Guantanamo Bay and the alleged violations of the human rights of those incarcerated there (including two Australians), he cites Lord Styen who had stated that "[t]oo often courts of law have denied the writ of the rule of law". Sir Gerard adds: "The problem is not with the law – for that can be amended – but with Australia's respect for the legal process." He adds that the "failure to condemn the breakdown of the rule of law, this 'monstrous failure of justice', as Lord Steyn calls it, [is a] notable example of Australia's ambivalence to the rule of law".

On Human Rights Day 2003 the Attorney-General of Australia referred to the National Committee on Human Rights Education as part of Australia's commitment to the United Nations Decade for Human

Rights Education. He stated that education is a "most lasting and effective way" to promote human rights. To minimise discrimination in our community, projects such as *Isma – Listen: National consultations on eliminating prejudice against Arab and Muslim Australians* have been initiated to engage the community.[1]

On 24 July 2003, the Hon Marcus Einfeld AO QC gave the keynote speech at the University of Western Sydney's Social Justice Colloquium and, like Sir Gerard, he issued Australia with a wake-up call. The speech appears as the next article. His Honour observed that "[d]eveloping awareness in the young of what the concept [of social justice] is should begin early, in education, and learning institutions such as universities should institute specific social justice programs as a matter of policy". He added: "In Australia and elsewhere, universities represent microcosms of entire societies comprised of colourful cultural, religious, ethnic and linguistic diversity. The needs and expectations of such differing backgrounds can never be wholly aligned, but it is possible to mix and match – in other words, to compromise".

That is so true, but where children's rights are concerned, there should never be any compromise. In "The UN Convention on the Rights of the Child – A review of its successes and future directions", Rita Shackel uses this 1989 Convention to present the whole range of rights (civil, political, economic, social) existing for children. She cautions that the greatest danger the Convention faces is the complacency of states towards it and the "tendency to view the [Convention] as an end in itself, when in fact it is merely a beginning".

On 10 April 2003 Mike Smith, Permanent Representative of Australia, addressed the Commission on Human Rights[2] referring to Australia's commitment and measures to promote and protect the human rights of children at the international, regional and national levels, including support for the two 2000 Optional Protocols[3] to the 1989 United

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[1] Isma is an initiative of the Human Rights and Equal Opportunity Commission: Australia, Attorney-General, News Release, R045/2003, 10 December 2003.

[2] Australian Government, Department of Foreign Affairs and Trade, Item 13 – Human Rights, 59th Session of the Commission on Human Rights, 10 April 2003 at <www.dfat.gov.au/hr/comm_hr/chr59_item13.html> (visited March 2004).

[3] Namely, the Optional Protocol on the sale of children, child prostitution and child pornography and the Optional Protocol on the involvement of children in armed

Nations Convention on the Rights of the Child. He reminds us that millions of children live in poverty and are subject "to the worst forms of child labour, sexual and other physical abuse and exploitation [including] their use and abuse in armed conflict".[4] To fulfill its obligations, in September 2003 Australia lodged with the United Nations its combined second and third report under the Convention and announced the proposed Commonwealth Action Plan to Eradicate Trafficking in Persons.[5]

Later the reader will discover that there is a link between Ms Shackel's article on children's rights and that by Mr A-Khavari on "Blind spots, rigid approaches and uncertainties – The external affairs power and Australian courts in 2003". Although the latter article does not deal with the issue of "best interests of the child", it refers to *B and B v Minister* where the Family Court gave effect to this fundamental right embedded in international legislation (see below).

A newly recognised fundamental human right is the right to water. Acknowledging water as essential to human life the General Assembly proclaimed 2003 as International Year of Freshwater.[6] In 2003 the United Nations Committee on Economic, Social and Cultural Rights reiterated in a General Comment that the recognition of this right is "a milestone in the history of human rights",[7] highlighting our obligation as individuals, communities, and states to ensure that our environment is sustainable and continues to develop at the global level.[8]

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conflicts. Both of them entered into force in 2002.

[4] Australian Government, Department of Foreign Affairs and Trade, Human Rights, 59th Session of the Commission on Human Rights, 10 April 2003 at <www.dfat.gov.au/hr/comm_hr/chr59_item13.html> (visited March 2004).

[5] Ibid.

[6] For more information see the International Year of Freshwater webpage at <www.wateryear.2003.org/en/> (visited March 2004).

[7] 2003 International Year of Freshwater, "Facts and Figures: Water as a Human Right" at <www.wateryear2003.org/en/ev/> (visited March 2004).

[8] See generally Australian Government, Department of the Environment and Heritage, "2003 International Year of Freshwater" at <www.freshwater2003.gov.au/index.html> (visited March 2004); Environment Australia, Factsheet: 2003 International Year of Freshwater" at <www.freshwater2003.gov.au/publications/factsheet.html> (visited March 2004).

Earlier, in November 2002 the Committee had noted in General Comment No 15 on the implementation of Articles 11-12 of the 1966 International Covenant on Economic, Social and Cultural Rights that "the human right to water is indispensable for leading a life in human dignity. It is a prerequisite for the realization of other human rights".[9] Although General Comments do not legally bind the 146 states parties to the International Covenant they have the influence and weight of "soft law".[10]

On 2 June 2003 Peter Cochrane, Head of the Australian Delegation, reported on Australia's support for an "effective, transparent, and regular inter-agency mechanism on ocean and coastal issues within the United Nations system"[11] including the improvement of ocean management and protection of coral reefs. Land-based sources of marine pollution are a major threat to the marine environment and states have been called upon to support the Global Action Program of the Marine Environment from Land-Based Activities. The contribution of Global Ocean Observing System and Census of Marine Life to marine environment management has been significant and Australia's Oceans Policy supports the introduction of a new mechanism within the United Nations system to improve international coordination and reporting.[12]

Environmental rights and the regulatory regime to control land-based sources of marine pollution are featured in Daud Hassan's article, "Land-based sources of marine pollution – A global framework". He discusses customary international law and treaty law and charts their inadequacy as a means for controlling and rectifying the problem. He recommends that any approach to solving the problem should be holistic and include the use of regional and global arrangements.

The International Year of Freshwater has particular importance for Australia since it owns vast ocean territory covering more than two

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[9] United Nations, International Year of Freshwater 2003, "The Right to Water" at <www.un.org/events/water/TheRighttoWater.pdf> (visited March 2004).
[10] Ibid.
[11] Opening Statement, 4th Meeting of the United Nations Open-ended Consultative Process on Oceans and the Law of the Sea, New York, 2 June 2003 at <www.australiaun.org/Statements/UNGA_57/030602_lawofthesea.htm> (visited March 2004).
[12] Ibid.

million square kilometres.[13] Land-based sources of marine pollution have grave implications for ocean resources (including the Great Barrier Reef)[14] and poor water and sediment quality are considered the most serious pollution issues affecting Australia's coastal and marine environment.[15] In fact land-based sources of marine pollution form 80% of all marine pollution.[16] On 18 July 2003 Australia's National Oceans Office[17] released the Draft of the First South-east Regional Marine Plan to tackle marine pollution at source.[18] On 5 December 2003 the Draft Plan was launched following the fourth and final stage of the Reef Water Quality Protection Plan.[19] This initiative is linked to "Oceans Policy: Principles and Processes", an important document also released in July 2003 aimed at the ongoing implementation of Australia's Oceans Policy.[20]

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[13] Australian Government, National Oceans Office, Draft of the First South-east Regional Marine Plan at <www.oceans.gov.au> (visited March 2004).

[14] Australia's Coastal Catchments Initiatives aim to decrease significantly the discharge of pollutants to agreed hotspots identified in agreements with relevant jurisdictions within Australia: Australian Government, Department of the Environment and Heritage, "The Coastal Catchment Initiative" at <www.deh.gov.au/coasts/pollution/cci/index.html> (visited March 2004).

[15] Australian Government, Department of Environment and Heritage, "Programs of the First Phase of the National Heritage Trust: Clean Seas Program" at <www.nht.gov.au/> (visited March 2004).

[16] Ibid.

[17] This Office was created in December 1999 as the main national body responsible for Australia's Oceans Policy including regional marine planning. For more information see the National Oceans Office webpage at <www.oceans.gov.au> (visited March 2004).

[18] Australian Government, National Oceans Office, Draft of the First South-east Regional Marine Plan at <www.oceans.gov.au> (visited March 2004). The Plan is an initiative under a Memorandum of Understanding between the Federal Government and the Government of Queensland on the national and international protection of the Reef from land-based sources of pollution: Australian Government, Department of Environment and Heritage, "Reef Water Quality Protection Plan" at <www.deh.gov.au/coasts/pollution/reef/index.html> (visited March 2004).

[19] Australian Government, Department of Environment and Heritage, "Reef Water Quality Protection Plan" at <www.deh.gov.au/coasts/pollution/reef/index.html> (visited March 2004).

[20] When the Policy was first announced in December 1998 it was widely acclaimed as setting an international benchmark: see generally MESA Marine Ed Forums, "Oceans Policy: Principles and Processes" at <www.mesa.ed.au/forums/topic.asp?TOPIC_ID=201> (visited March 2004).

In the next article, Chun Hung Lin writes on another regulatory framework, this time in Europe. In "Regionalisation or globalisation? Telecommunication cooperation in Europe" Mr Lin tries to unravel the current but confusing European telecommunication framework that relies on a surfeit of acronyms. He observes that this network seems to work reasonably well having had the opportunity to address the problems over the years, and proposes that regionalism should be the interim solution until the process of multilateral telecommunication cooperation is completed. He believes globalism is becoming both compulsory and urgent in modern commercial terms, and regionalism has a role in global telecommunication negotiation. However, to succeed the process should be non-discriminatory and inclusive, and compatible with the creation of world trade.

Although modern telecommunication has overwhelming advantages it also has a price. For example, spam has become an international problem having progressed from being a nuisance to being a costly and disruptive threat to information technology systems worldwide.[21] Spam usually refers to unsolicited bulk email for the marketing of products and a serious problem results when the products advertised are black market drugs, pornography, and other illegal goods or services, which is often the case. Further, billions of spam messages are increasingly clogging the Internet at great cost.[22] Consequently, states have begun to regulate spam and impose hefty penalties for violations.[23]

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[21] Barker, "Spam canned as new laws on email announced", The Age (Melbourne), 17 April 2003 at <www.theage.com.au/articles/2003/04/16/1050172650296.html> (visited March 2004).

[22] In Australia for example, Telstra carries more than eight million messages daily that has more than doubled in the last six months, half of them reputedly originating from overseas. Further, spam costs corporations almost AUD1,000 per employee per annum in lost time and productivity: ibid.

[23] For example, the European Union has focused greatly on this topic especially from the viewpoint of data protection that is mainly governed by two Directives, 95/46/EC and 97/66/EC. A study released in February 2002 shows the phenomenal cost of junk emails: Europa, European Commission, "Commission study: "Junk" email costs international users euro 10 billion a year worldwide" at <http://europa.eu.int/comm/internal_market/privacy/studies/spam_en.htm> (visited March 2004). In 2003 the United States' House of Representatives passed the national CAN-SPAM Bill that is expected to enter into force early 2004. This federal law modifies the strict state laws banning spam. However, although the practice may be legalised it will be subject to various conditions: Spamhaus, "United States heads towards the legalization of spam" at <www.spamhaus.org/news.lasso?article=150> (visited March 2004).

In 2003 Australia passed the Spam Act that is administered by the Australian Communications Authority. This Act is linked to the 1997 Telecommunications Act (Cth). The Spam Act gives jurisdiction to the Federal Court and Section 24 allows the Court to impose heavy civil penalties if the act is breached. Section 3 creates the scheme for regulating commercial email and other types of electronic messages. Section 5 refers to use of the Internet carriage service by spammers. However, nowhere in the act is there a reference to "bulk" in connection with the words "email" or "spam". Instead, "unsolicited" is used to describe the prohibition of marketing by email, which suggests that such marketing, irrespective of the number of recipients, would attract the operation of the act so long as it is "unsolicited". This is the better approach since "unsolicited" email is of greater concern to society than "bulk" email. Unsolicited emails are often "in the face" of the recipient or downright offensive in nature, and are often tainted by breaches of privacy or the unauthorised use of personal information. On the other hand, if bulk email is regulated properly it can be a legitimate method of commercial marketing.

Section 7 of the Spam Act requires an Australian link to be established before the Act may apply. This provision is drafted in disjunctive terms resulting in ambiguity and difficulty in interpretation. For example, does it mean that both the sender and recipient must be in Australia or otherwise have an Australian link before a commercial electronic message is deemed to have the necessary link? Or is it enough if just one of them has that link? If the former interpretation is accepted the act would not be very effective for two interconnected reasons. First, the act would not apply if one of the parties is not linked to Australia. Secondly, this would usually be the case in practice since the vast majority of the world's spam originates from overseas particularly the United States of America.[24]

As noted above, laws are either substantive or procedural. Moreover, their rules may be written or unwritten. Article 38 of the Statute of the International Court of Justice provides the law governing the Court. More specifically, Article 38(1) lists the sources as international

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[24] In fact 90% of all spam received in Europe originates from the United States: Spamhaus, "United States heads towards the legalization of spam" at <www.spamhaus.org/news.lasso?article=150> (visited March 2004).

conventions, international custom, general principles of law, judicial decisions and the teachings of the most highly qualified publicists. In "Customary international law – Not merely fiction or myth" Jeremy Pearce writes on the concept and application of international customary law in modern international law and observes that they are often controversial and surrounded by much debate.

On 6 November 2003 an Australian Department of Foreign Affairs and Trade Workshop heard that treaty law is overtaking customary international law as a source of law.[25] Since World War II, treaties (especially multilateral treaties) have become more prominent as the primary source of international law making.[26] As globalisation grows the pressure and demand to codify international law will grow in tandem. In this respect, codification will be the chosen method because it is a "relatively simple, clear and quick way of crystallizing existing international rules and developing new ones".[27]

However, treaty making is not always an exemplary process and this happens when negotiating states reject an international norm believing the proposal does not benefit them or believing it does not represent customary international law. When this occurs compromises or the so-called "constructive ambiguity" (unclear meaning in the settled text) will ensue. In any event, states parties usually prefer this option since ambiguity creates for them the opportunity to interpret the norm, and a "fuzzy treaty is better than none at all".[28]

Afshin A-Khavari extends the discussion on sources of international law to Australian courts in "Blind spots, rigid approaches and uncertainties – The external affairs power and Australian courts in 2003". He selects five cases for discussion, namely, *B and B v Minister* in the Family Court; *Toben v Jones* in the Full Court of the Federal Court; and three High Court cases (*Ex parte Lam, Oates v Attorney-General* and *Ex Parte Pacific Shipping).* The writer concludes that

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[25] Moraitis C, "Treaties in the global environment" at <www.dfat.gov.au/treaties/workshops/treaties_global/moraitis.html> (visited March 2004).

[26] Note for example the work of the International Law Commission on the codification and progressive development of international law.

[27] Moraitis C, "Treaties in the Global Environment" at <www.dfat.gov.au/treaties/workshops/treaties_global/moraitis.html> (visited March 2004).

[28] Ibid.

these cases (and others as well) have been haphazard in approach and reasoning in dealing with issues related to section 51(xxix) of the Australian Constitution (the external affairs power). The decisions have also tended to be more limited and formalistic in nature.

The 1989 United Nations Convention on the Rights of the Child requires states to recognise that "the best interests of the child" is a basic human right.[29] Generally, the judicial interpretation of the rights and freedoms of children in Australia has been fairly consistent because this right has been treated as a paramount benchmark. The Family Court gave effect to this right in *B and B v Minister* as "a primary consideration"[30] when determining the Court's jurisdiction even where the proceedings had been commenced in a foreign forum.

The next two articles deal with the protection of private rights when a conflict of laws situation arises.

The first is Murat Hakki's "Choice of law, contracts and the 1980 Rome Convention: A re-evaluation in the 21st century", where the writer presents the framework of the European Community's 1980 Convention on the Law Applicable to Contractual Obligations (Rome Convention) and its proposed conversion into a Community instrument. Australia has every reason to maintain and develop strong ties with the European Union and keep abreast of developments there.[31] In this respect, it would not be too early to consider any implications the draft Constitution for Europe, adopted by the European Convention by consensus on 13 June and 10 July 2003,[32] might hold for Australia.

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[29] Australia ratified the Convention in 1990. For more information see Lees and anor, Human Rights Brief No 1, "The Best Interests of the Child", Australian Human Rights and Equal Opportunity Commission at <www.hreoc.gov.au/human_rights/briefs/brief_1.html> (visited March 2004).

[30] Ibid.

[31] The European Union heads the list as Australia's foreign investor with an accumulated investment of AUD294 billion at the end of June 2002. This represents 35% of total foreign investment in Australia, compared to 29% for the United States and 6% for Japan: Delegation of the European Commission to Australia and New Zealand, "Statistic of the Week", News@eu, 26 November 2003. For more information on the European Union and its activities in Australia see the Delegation's webpage at <www.delaus.cec.eu.int/pressandinformation/EUnews.htm>.

[32] On 18 July 2003 the draft was submitted to the President of the European Council in Rome: The European Convention, Draft Treaty Establishing a Constitution for

The second is the article on "The 'place of action' defence: A model for cross-border Internet defamation". This topic breaks new ground and captures the earlier themes on human rights and information technology. Here, Dan Sventesson suggests a solution for the problem caused by the controversial and infamous Internet defamation case *Gutnick v Dow Jones* (2003). The courts in this Australian case had to balance two sets of rights in two different jurisdictions where the parties were located – the right of reputation of the plaintiff in Australia and the right to freedom of expression of the defendant in the United States. After the High Court ruled on appeal that the case could be heard in the Australian state of Victoria where the plaintiff resides, the defendant journalist filed a writ in the Human Rights Commission claiming that he had been denied the right of freedom of speech.[33]

Appearing next in this issue is the international law opinion provided by the Oxford Public Interest Lawyers, a group that includes staff and students affiliated with the Faculty of Law, University of Oxford. This group will evaluate the General Assembly's request to the International Court for an advisory opinion on *Legal Consequences of Israel's Construction of a Separation Wall in the Occupied Territories* within the context of the important legal and practical implications affecting the rights of persons living there.

In the history of the International Court so far there have been only three cases on the revision of the Court's earlier judgments under Article 61 of its Statute. The first was Tunisia's application in 1984 to revise the judgment of 24 February 1982 in *Case concerning the Continental Shelf (Tunisia v Libya).*[34] Regarding the second and third, in 2003 the Court delivered judgments in both of them, the former being Yugoslavia's application in 2001 to revise the judgment of 11 July 1996 in *Case concerning the Application of the Genocide Convention (Yugoslavia v Bosnia and Herzegovina)*[35] and the latter

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Europe (2003, Office for Official Publications of the European Communities, Luxembourg).

[33] Sydney Morning Herald, "Australian laws challenged at UN" at <www.smh.com.au/articles/2003/04/18/1050172745955.html> (visited March 2004).

[34] The judgment was delivered on 10 December 1984: [1985] International Court of Justice Reports 192.

[35] [2003] International Court of Justice Reports (to be published); for the Summary of the judgment delivered on 3 February 2003 see the court's webpage at <www.icj-cij.org/> (visited March 2004).

being El Salvador's application in 2002 to revise the judgment of 11 September 1992 in *Case concerning the Land, Island and Maritime Frontier Dispute (El Salvador v Honduras: Nicaragua intervening).*[36] The Court rejected all three applications suggesting its concern that states should not be allowed to use Article 61 for *de facto* appeals.

The former, namely, *Case concerning the Application of the Genocide Convention (Yugoslavia v Bosnia and Herzegovina)* appears as the first of two case notes presented in this issue. The second case note is on *United States – CRS Sunset Review (United States v Japan),* a dispute within the World Trade Organization (WTO).

In the first case note, Ricky Lee discusses the Court's judgment delivered on 3 February 2003. This case involved state succession, more particularly Yugoslavia's accession to rights in relation to the 1948 Genocide Convention following the break up of the former Yugoslavia. Although Mr Lee agrees with the Court's conclusion that there was no discovery of some "new" fact to warrant the revision of an earlier judgment under Article 61, he questions some of the Court's reasoning.

In the second case note Simon Kozlina analyses the last WTO Appellate Body Report for 2003. He describes the report in *United States – CRS Sunset Review (United States v Japan),* circulated on 15 December 2003, as "remarkable" for divergent reasons. On one hand, it is expected that the case will witness the "likely expansion of the scope of the WTO's review of internal administrative procedures of member states through a broad interpretation of the kinds of 'measures' that can be challenged under WTO covered agreements". On the other hand, Japan as complainant could not obtain a satisfactory result even though the Panel Report's analysis was flawed due to restrictions on the Appellate Body's role preventing rectification of the situation.

In 2003, Australia continued to be an active participant in the WTO dispute resolution process as complainant, respondent and third party.[37]

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[36] [2003] International Court of Justice Reports (to be published); for the summary of the judgment delivered on 18 December 2003 see the court's webpage at <www.icj-cij.org/> (visited March 2004).

[37] Australia, Foreign Affairs and Trade, Australia and WTO Dispute Settlement, Monthly Bulletin, December 2003.

By the end of that year Australia had appeared as complainant in three cases: (a) *European Communities: Export Subsidies on Sugar (WT/DS265);* (b) *United States: Continued Dumping and Subsidy Offset Act of 2000 (the Byrd Amendment) (WT/DS234);* and (c) *European Communities: Protection of Trade Marks and Geographical Indications for Agricultural Products and Foodstuffs (WT/DS290/1).* Further, Australia was the respondent in three other cases: (a) *Australia: Certain Measures Affecting the Importation of Fresh Fruit and Vegetables (WT/DS270);* (b) *Australia: Certain Measures Affecting the Importation of Fresh Pineapple Fruit (WT/DS271),* and (c) *Australia: Quarantine Regime for Imports (WT/DS287).* In addition, it was involved as third party in eight cases.[38]

Two book reviews follow, on (a) *The Law of Extradition and Mutual Assistance – International Criminal Law: Practice and Procedure* (2002) by Nicholls, Montgomery and Knowles; and (b) *Refugee Law in Australia* (2003) by Germov and Motta.

In (a), Professor Ivan Shearer welcomes this "compendious work on the law and practice of extradition and mutual assistance in criminal matters in the United Kingdom". Although written primarily for the United Kingdom market, there are many similarities between United Kingdom and Australian law thereby making the book relevant also to Australian practitioners and courts. Professor Shearer, current President of the International Law Association (Australian Branch) and known to many all over the world, retired in 2003 as Challis Professor of International Law, University of Sydney, a position he held since 1993. Here, his distinguished career and great contribution to international law are acknowledged especially in human rights law, the law of armed conflict, international criminal law (including extradition law), and the law of the sea.

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[38] Ibid. The cases are (a) EC: Measures Affecting the Approval and Marketing of Biotech Products (WT/DS291, 292 and 293); (b) Canada: Measures Relating to Exports of Wheat (WT/DS276); (c) US: Subsidies on Upland Cotton (WT/DS267); (d) Mexico: Measures Affecting Telecommunications Services (WT/DS204); (e) European Communities: Measures Affecting Meat and Meat Products (Hormones) (WT/DS26); (f) United States: Section 110(5) Copyright Act ("Homestyle" exemption) (WT/DS160); (g) United States: Tax Treatment for "Foreign Sales Corporations" (WT/DS108); (h) Japan: Measures Affecting the Importation of Apples (WT/DS245).

In (b), Kate Watson also welcomes the book that she reviews because it helps us understand [better] "a complex topic of evolving concepts" and fills "a huge void" in Australian legal literature on the subject of refugee law.

The International Court and its work in 2003 continue to appear as regular features in this issue. The Court's permission to use its materials for this purpose is gratefully acknowledged. In 2003 the Court delivered two judgments on the indication of provisional measures to ensure that rights yet to be determined on the merits are not unduly prejudiced but are preserved instead. They are *Case concerning Certain Criminal Proceedings in France (Congo v France)* and *Avena and other Mexican Nationals (Mexico v United States).* The Court denied the request in the first but granted part of the application in the second. However, the Court reiterated in *Avena* that under Article 75(1) and (3) of the Rules of Court it may at any time "examine *proprio motu*" the indication of provisional measures. The Court added that the rejection of a request does not stop the applicant from making another request based on new facts.

The Court has been consistent in its application and interpretation of the rules on provisional measures. The cases show that the Court's jurisprudence on this subject is quite settled and the fundamentals remain the same. Before the Court may entertain an application for provisional measures its jurisdiction must be established while urgency and irreparable damage are required as essential conditions. As the Court evolves it is presented with the chance to consider new aspects such as that in *Congo v France* on the historical application of Article 38(5) of the Rules of Court.

Besides the cases mentioned so far the Court in 2003 also concluded *Oil Platforms (Iran v United States),* which appears in this issue as well. Two other inter-related cases instituted on 3 March 1992 by Libya against the United Kingdom and United States respectively on *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie* were removed from the Court's list by Orders of Court on 10 September 2003 following joint requests from all parties.[39]

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[39] For details see International Court of Justice, Press Release 2003/29, 10 September

As more states turn to the Court seeking help, pending cases on the merits are slowly but surely piling up. In September 2003, the Court's list stood at 23 cases[40] and it does not appear that matters will improve in 2004. Moreover, the Court has been sidetracked by the General Assembly's urgent request in resolution A/RES/ES-10/14 of 8 December 2003 passed pursuant to Article 95 of the Court's Statute and Article 96 of the United Nations Charter on the legality of the wall in the occupied Palestinian territories. Accordingly, much heed should be paid to the Court's proper funding to allow it to continue with its work in a proper and impartial manner contributing to international peace and security. This would be an investment in a most worthwhile cause.

There have been changes to the Editorial Board and Editorial Advisory Board, and there will be more to come. On one hand, we bid farewell to Michael Brogan as Editorial Board member. Similarly, Nancy Haddad is no longer Business Manager but she will remain an Editorial Board member. It is contributions such as theirs that make the Journal possible and we are indeed grateful for their services.

Meanwhile, the Journal continues to receive great support. I would like to welcome Professor Gillian Triggs (University of Melbourne) and Professor Stuart Kaye (University of Wollongong) who have joined the Editorial Advisory Board. In the next issue, Dr Christopher Ward, Co-Vice President of the International Law Association (Australian Branch) will also join the Advisory Board and become Case Note Editor. Finally, Ricky J Lee (Flinders University), who joined the Editorial Board recently, was given the task of developing a new look for the Journal befitting this century. I hope you like it.

Alexis Goh
Editor in Chief ***March 2004***

2003 at <http://212.153.43.18/icjwww/ipresscom/ipress2003/ipresscom2003-29_luklus_20030910.htm> (visited March 2004).

[40] See speech by Shi J, President of the International Court to the United Nations General Assembly on 31 October 2003 available at the court's webpage at <www.icj-cij.org/> (visited December 2003).