Editorial

The *Australian International Law Journal* (AILJ) is entering a new phase of consolidation and development. As one of very few international law journals published by a national branch of the International Law Association (ILA), the AILJ has a distinctive role as a publication with a shared commitment to the objectives of the ILA: 'the study, clarification and development of international law, both public and private, and the furtherance of international understanding and respect for international law'. Like the ILA, the AILJ serves as an important focal point for legal practitioners, academics, government and NGO lawyers, judges and experts from related fields with a common interest in international law.

From this volume onwards, the AILJ will benefit from some important new initiatives. First, it has become a peer-reviewed journal, ensuring that the historically high standard of scholarship will continue to rise in quality and consistency. Peer review will help to attract contributions from leading international and Australian scholars, in a university environment where increasing emphasis is placed on research quality. It will also encourage wider citation of the AILJ and enhance its scholarly impact. While articles will be peer-reviewed, the new policy will not preclude the publication of relevant contributions with a more practitioner-oriented focus.

Secondly, from October 2007, the AILJ will be published by the ILA (Australian Branch) in association with the Sydney Centre for International Law at the Faculty of Law, The University of Sydney. By linking with a leading international law research centre at one of Australia's pre-eminent law schools, the AILJ will benefit from a firmer institutional foundation and closer ties with current legal scholarship. The AILJ will remain the journal of the ILA (Australian Branch), with an Editorial Board composed of international lawyers from a variety of different sources and places.

Thirdly, the AILJ has adopted a professional new design which will better convey its content to readers. While the AILJ began its life as a publication produced on typewriters, a cleaner, modern design will help to facilitate the transmission of the AILJ's content and make it a (greater) pleasure to read. Fourthly, back issues of the AILJ will be available through the online legal subscription database, Heinonline, which will amplify the reach of the AILJ and bring it to new readers worldwide. Finally, some future volumes of the AILJ will be symposium volumes, dedicated to particular themes or contemporary issues. The first symposium (in the 2007 volume) will address legal responses to climate change.

Regular articles on other topics will, of course, continue to be published in addition to symposium pieces in any volume. The AILJ welcomes submissions on public or private international law at any time and instructions for authors can be found on the inside back cover of this volume. The ILA (Australian Branch) and the Editorial Board particularly encourage contributions of private international law (conflict of laws) articles, given that that bulk of current international law scholarship tends to occupy the public field and there is relative inattention to private law issues. A focus on international law in Australia and the Asia-Pacific is welcome, but by no means essential, and the AILJ is open to international law scholarship of any kind.

This volume of the AILJ marks a transition from one editorial team to another. The new Editorial Board expresses its gratitude to Ricky Lee, the outgoing Editor in Chief, for his hard work and his assistance during the transition. The articles in this

volume were solicited and selected under Ricky Lee's stewardship, while their preparation for publication was largely undertaken by the new Editorial Board and the student editors at the Sydney Centre for International Law.

Due to various production difficulties in recent years, the AILJ finds itself behind schedule, with this 2004 volume appearing in late 2007. The editors and the ILA (Australian Branch) sincerely apologise to the AILJ's subscribers for the long delay in publication, and are grateful for their patience and forbearance. The Editorial Board is committed to rectifying the delay and ensuring that the AILJ, as an annual publication, is published near the end of the relevant calendar year. To that end, the 2006 volume will be published in early 2008, the 2007 volume (the climate change law symposium) in mid-2008, and the 2008 volume by the end of that year.

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It is hoped that readers will enjoy this volume of the AILJ. In the opening article, **John King Gamble and Kevin Belknap** consider whether a coherent Asia-Pacific 'region' has emerged through patterns of multilateral treaty-making over 500 years. They first demonstrate the utility of quantitative analysis of treaty-making data to elucidate the role of regionalism in international law. Employing a broad review of international law theorists, tested through statistical analysis of treaty implementation, they explore the definition of 'regionalism' (acknowledging its elusive quality) and argue that its significance is frequently overlooked. Through statistical analysis of over 5,000 treaties they conclude that regionalism is most clearly manifested in 'laterality' — namely, through the identity and quantity of parties involved. Gamble and Belknap use their data to conclude that global treaty making peaked in the 1970s and, since the 1950s, has been characterised by the preponderance of supplementary instruments (such as protocols and amendments) over original treaties. They conclude that this region represents an anomaly in global patterns of regionalism — namely, its level of regional treaty-making activity has increased throughout the 20th century and, significantly, shows no decline since 1980. They argue that Europe, throughout modern history, has represented an unparalleled example of regionalism and enjoys the most clearly defined identity of any region. On this basis, they find a relationship between treaty language and regional identity and conclude that the definition of Asia-Pacific regionalism is trending toward crystallisation, despite the comparative historical underdevelopment of multilateral institutions in the Asia-Pacific.

Moving from regionalism to multilateralism, **Sue Robertson** examines the emergence of the 'Responsibility to Protect' doctrine in the wake of the legal controversy and political disagreement about humanitarian intervention in the 1990s. Robertson outlines the development and scope of the doctrine — with its refiguring of State sovereignty from an entitlement to a responsibility — from its conceptual origins in the Report of the International Commission on State Sovereignty in 2001 to its endorsement by the United Nations World Summit in 2005. She then applies the critical lens of Third World Approaches to international law to the Responsibility to Protect doctrine, particularly concerns about the doctrine serving as a justification for military intervention by powerful States in developing States, and as a continuation of the colonial project of international law. While Robertson

acknowledges the important insights furnished by Third World Approaches, she distances herself from its more polemical or exaggerated critiques and accepts that there may be a legitimate role for the doctrine, as long as it is appropriately structured and there is sufficient transparency in Security Council decision-making. Ultimately she urges greater attention to the practicalities of applying and implementing the doctrine and cautions against celebrating norm creation as an end in itself.

Where military interventions occur, whether as a result of humanitarian intervention or collective security action under the Responsibility to Protect doctrine, a critical question arises concerning the legal accountability of multinational forces, particularly in preventing and remedying abuses of human rights by UN forces. **Chris Faris** addresses the difficulties in determining which legal frameworks govern United Nations missions in his article on the applicability of the laws of occupation and human rights to UN forces. Faris begins by outlining the changing role of UN forces over time. The increasing complexity of UN missions has seen multinational military forces engaged in a variety of activities, from traditional peacekeeping roles to law and order functions in post-conflict missions in transitional societies. With the rapid expansion of UN deployments throughout the 1990s, Faris observes that UN forces may operate under complex legal regimes, stemming from Security Council mandates, status of forces agreements, contributing nations agreements, human rights obligations, humanitarian law, international criminal law and national law. He focuses on the key questions of whether the laws of occupation apply to UN forces and in what circumstances, before considering the applicability of human rights law. Faris concludes by proposing a new legal framework governing UN forces, based on human rights standards, to clarify the present uncertainties surrounding the accountability of UN forces and the limitations in the laws of occupation.

Where humanitarian law does apply, either to UN or State forces, the principles of distinction and proportionality are at the heart of the law. In her article, **Kristen Dorman** puzzles over why civilian casualties in armed conflict have been increasing since the First World War, despite the codification and strengthening of the principles of distinction and proportionality in the *1949 Geneva Conventions* and the *1977 Additional Protocols*. By analysing the relevant jurisprudence of the International Criminal Tribunal for the former Yugoslavia, Dorman suggests that increasing civilian casualties may be at least partially attributable to ambiguities in both the content of the principles (which are imprecise and subjective) and their application by criminal tribunals (which has been inconsistent, underdeveloped, and thwarted by jurisdictional challenges or limitation, particularly in internal conflicts). Tribunals have been reluctant even to apply the relevant principles, relying instead on ex post facto statements of attacking forces. Like Faris, Dorman is essentially calling for legal clarity to enhance accountability for violations in conflict situations.

Whereas Faris discusses which legal frameworks apply to conflict, and Dorman examines the content of particular principles applicable in conflict, **Sarah Louise Steele** analyses how victim-witnesses are protected in international criminal trials after violations have occurred. Steele observes that legal processes dealing with gross human rights violations often cause further trauma to victim-witnesses who testify. Such secondary traumatisation may be exacerbated by the International Criminal Court's (ICC) use of a common law-based adversarial approach. She identifies recent reforms to the *1998 Rome Statute of the International Criminal Court* and the *Rules of*

Evidence and Procedure which have sought to address these problems of witness traumatisation, participation and security. Her review of these provisions is timely and she draws several themes from NGO, academic and other commentary to reach conclusions about their effectiveness.

The concerns Steele identifies relate primarily to omissions, namely the failure of the system to provide a comprehensive framework of support and security for the victim-witness. She notes the 'pervasive failure' of various judicial bodies and humanitarian agencies to adequately liaise about individual cases, leading to repetitive questioning of witnesses and miscommunication throughout the pre-trial process. This failure is also associated with a lack of consistency in the variety of professional personnel with whom the victim-witness contacts, from NGO officers to psychologists, legal counsel and court officials. This often undermines victim-witness confidence in the process and exacerbates trauma. Further concerns include waiting periods for trial, the location of the ICC in The Netherlands (which risks socio-cultural misunderstandings) and extensive reliance on translators (which inhibits trust and confidence between victim-witness and court professionals). These concerns underlie her call for greater use of field posts in evidence gathering and a broadening of admissible evidence in the ICC, for example to include videotaped interviews. Finally, Steele's case for increased protection of victim-witnesses extends to the need for established asylum policies to guarantee the testifying victim safety during and after their participation in the trial. Steele powerfully argues that in the absence of such protections, in-court protections are often redundant in alleviating the fears of victim-witnesses about their post-testimony safety.

The final article deals with international and Australian attempts to regulate the growing field of biotechnology, which has critical implications for public health and environmental protection. **Hossein Esmaeili** provides a powerful argument for the importance of biotechnology regulation and a comprehensive review of international and Australian biotechnology law, noting the intersections between environmental and trade law as the governing frameworks. He analyses the *1992 Convention on Biological Diversity* and the more comprehensive *2000 Biosafety Protocol* as the only two international instruments which specifically address biotechnology. He suggests that while current international regimes have not yet crystallised into accepted principles of law, the 'precautionary principle' is of central importance to biotechnology regulation and is the most appropriate legal response given scientific uncertainty about the safety of genetically modified organisms.

While the *Biosafety Protocol* attempts to reconcile trade policy with biotechnology regulation, its enabling of restrictions on biotechnology imports (such as genetically modified organisms) may conflict with the free trade principles of World Trade Organisation (WTO)/General Agreement on Tariffs and Trade (GATT) agreements. Australia has ratified the *Biodiversity Convention* but has not signed the *Biosafety Protocol* precisely because of concerns about its relationship with WTO obligations. Esmaeili contends that Australia's real objections to the *Biosafety Protocol* are founded in agricultural export dependence, and argues that Australia will inevitably be impacted by the Protocol if its trading partners choose to utilise Protocol provisions. He suggests that addressing the parallel operation of biotechnology regulation and free trade systems will be a key point of arbitration in coming years.

Like most of the articles in this volume, Esmaeili's article is another concrete manifestation of the growing diversification and interconnectedness of specialised legal regimes in international law. This volume is perhaps indicative of the ongoing need for international lawyers — whether practitioners, academics, arbitrators, judges or government lawyers — to grapple with the challenges of the deepening and widening of international law; its regionalism, its specialisation, and its points of conflict and tension. It is also suggestive of the need for international lawyers to think creatively about how to prevent disputes and reconcile conflicts arising under potentially competing (though often reinforcing) branches of law — and to attempt to discern or foster productive patterns of order amidst the seeming chaos of fragmentation. Since its founding in 1873, the International Law Association (and its national branches and committees) has provided one avenue for imaginatively working through such concerns — and hopefully reading (or even subscribing) to this Journal provides another small way forward.

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