EDITORIAL

On the eve of the millennium, international law is more significant than ever before. This is reflected in this issue of the Journal, the biggest issue by far.

This is also reflected in the following statement of the President of the International Court of Justice, Stephen M Schwebel in his 1998-1999 Report of the Court to the United Nations General Assembly on 26 October 1999:[1]

> The century which is about to close is a century of great achievement and profound loss, of extraordinary scientific and technological advance and of atavistic reversion to barbarism...[it] is as marked by its invention of the concentration camp and the refugee camp as it is by its invention of the airplane and of the exploration of space.

It was 40 years ago that the development of space law was given a permanent place on the United Nations agenda. The launch of Sputnik I in 1957 signalled the beginning of the space age. Then, the world feared that outer space would become the new theatre where the geopolitical tension between the two super powers would be played out. We have since moved on, away from the Cold War, with the United Nations contributing in a major way to the establishment of a legal regime for the peaceful uses of outer space.

The legal work of the United Nations on space law is the responsibility of the Legal Subcommittee of the Committee on the Peaceful Uses of Outer Space, first established in 1958 as an *ad hoc* committee, which later became permanent in 1959. In July 1999 the Committee held a conference in Vienna attended by the United Nations membership which stands at more than 180 states, innumerable non-government organisations or NGOs, and other persons and corporations interested in outer space, space science and technology. This was the Third United Nations Conference on the Exploration and Peaceful Uses of Outer Space.[2] More commonly

[1] For an edited version of the text of Schwebel P's address refer to http://www.icj-cij.org/.
[2] The Committee was also responsible for the two previous UNISPACE Conferences held in 1968 and 1982.

known as UNISPACE III, it should mark the beginning of a new era of co-existence and harmony with nature.

In fact UNISPACE III devised a blueprint to maximise the benefits of space science and technology for all people into the new millennium as well as one for cooperation in space activities in the 21st century. The most vivid statement to emanate from UNISPACE III is this:[3]

> [The United Nations] must strengthen its efforts to protect the global environment, as we do not inherit the planet from our ancestors, but we are just borrowing the planet from our children.

Instead of suspicion, fear and doom, now there is recognition that the real and potential use of outer space is more positive and hopeful. Words such as the environment, communication, progress, peace and prevention provided the theme of UNISPACE III. These words conjure up images of cooperation, coexistence and a collective willingness to ensure that the world fulfils its duty to the next generation. There was even a place for "commercialisation" during the Conference, entrenching further cyber-culture's pervasive influence on human society.

Mirroring developments in this area of international law, the Manfred Lachs Space Law International Mooting Competition has spread from Europe and North America to the Asia-Australasia region. In March 2000 the inaugural regional rounds will be held in the Faculty of Law, University of Western Sydney Macarthur. It is expected that at least eight universities will take part, including the University of Waikato and the National University of Singapore. It is hoped that the competition will engender more interest in this growing area of international law and pave the way for the next generation of space lawyers. The finals will be held in Rio de Janeiro in late September/early October 2000.

It is therefore fitting that this issue leads with a provocative article by Professor Bin Cheng on a neologism for space law. Professor Cheng, who needs no introduction because of his eminence in international, air and space law, demonstrates the comparatively new nature of space law and the need to fill lacunae as the law develops.

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[3] UNISPACE III, Vienna, 19-30 July 1999, Final Programme 2.

The next article is also devoted to space law. It discusses the legal controversies that surround the 1979 Moon Agreement. Australia is only one of a handful of states that have signed and ratified this agreement. Michael Davis and Ricky Lee argue that it could possibly be in Australia's interest to withdraw from the agreement.

As observed by Schwebel P, 1999 was a year of drama and tragedy, and it tested the role of international law in protecting human rights. It is appropriate that we publish articles that illustrate these matters. The first concerns the bombing of Yugoslavia by ten NATO member states that led to the recent cases in the International Court of Justice, the *Legality of Use of Force cases.* Here, Professor Jianming Shen presents the cases from the perspective of the applicant state, Yugoslavia. Yugoslavia had unsuccessfully sought the indication of provisional measures of protection from the Court by requesting the latter to intervene to halt the bombings. The question now before the Court is its jurisdiction to hear the cases. If the Court finds that it has jurisdiction, it can then rule on the merits of Yugoslavia's applications.

The second is about the crisis in East Timor where Australia continues to play a major role.[4] Dr Andre de Hoogh gives the reader an analysis of what has happened there. He explains the decision of the International Court of Justice in the *East Timor case* between Portugal and Australia, including the application of the doctrine of *erga omnes* in that case. This article will provide readers with a better insight on what happened in East Timor, especially for those who hold strong views on Australia's (and Indonesia's) role in that region. Indeed, some claim that Australia might have been complicit in Indonesia's wrongdoing, thereby making it just as guilty as Indonesia in breaching fundamental principles of international law, especially the right of East Timor to independence and self-government.

In a related development, President Abdurrahman Wahid recently made a statement on another resource-rich Indonesian province, Aceh. He said that Aceh should be permitted to vote on its own future in a referendum leading to either independence or autonomy within Indonesia. The suggested time frame for this is mid-2000. It is noteworthy that 30 years ago the United

[4] Australia recently recommended that it would transfer control of the peacekeeping force in East Timor to the United Nations in January 2000.

Nations had "given" Irian Jaya to Indonesia without the people's true consent.[5]

The security of the region was the topic of the ASEAN Regional Forum[6] held in Singapore on 25-26 July 1999. The Forum called for the continued process on the engagement of the major powers, provided an insight into the security perceptions of the member states and fostered a sense of regional community. The Forum expressed strong concern about North Korea's missile launch the year before and called upon all states to exercise restraint in the development, testing and export of missiles. On claims in relation to the South China Sea, the Forum asked claimants to exercise restraint and noted that ASEAN was working on a regional Code of Conduct in the South China Sea. The Forum also asked Pakistan and India to exercise restraint, including adherence to the 1996 Comprehensive Test Ban Treaty and reviving of the Lahore process.[7]

The next article is about children and their right to protection. Rita Shackel writes on the international responses to the commercial sexual exploitation of children. It is a sad and damning report on society's apparent acceptance of this practice and she urges that more urgent work be carried out to save our children.

In 1994 Australia legislated to address child sex tourism involving Australians abroad,[8] an internationally ground-breaking move. It appeared as the Crimes (Child Sex Tourism) Amendment Act, amending the 1914 Crimes Act (Cth). A new Part IIIA made it an offence to engage in child sex tourism overseas,[9] and "child" is defined as a person under 16 years of

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[5] Irian Jaya is the western half of New Guinea island. It has been suggested that the 1969 Act of Free Choice that led to the process by which the West Papuans opted for Indonesian integration unanimously was a farce: Polglaze, " Back on agenda, 30 years later" Sydney Morning Herald, 19 November 1999 at 12. Indonesia's annexation of East Timor may be contrasted with this.

[6] It was attended by 22 member states.

[7] Department of Foreign Affairs and Trade, "Sixth Meeting of ASEAN Regional Forum continues dialogue on regional security", October 1999 at 8.

[8] The Act extends to Australian citizens, residents and companies including non-Australian companies that carry on activities principally in Australia: section 50AD.

[9] The provisions are fairly wide and extend to various sexual acts, including acts of indecency that are "so unbecoming or offensive that it amounts to a grave breach of ordinary contemporary standards of decency and propriety in the Australian community": section 50AB(c).

age. As observed in Ms Shackel's article, the control and prosecution of child sex offences are difficult and few and far between around the world. In spite of the legislation, including the provision for video link evidence to be given by children overseas in proceedings in Australian courts,[10] there have been only a few prosecutions in Australia.

Sea piracy is becoming more widespread so John Kavanagh provides an overall perspective of this universal criminal act, including its genesis in the English common law. In the light of what is happening in the South China Sea and very recently to an Australian family sailing in the Middle East,[11] this is a relevant topic indeed. What is often left unreported and unsaid by victims of piracy in the South China Sea is the piratical targeting of boat people. They have to brave not only the elements but pirates as well in their search for safety and shelter in Australia. As shown in an article that appears later in the issue, this is not all they have to endure.

This is the shorter article written by Michael Head on Australia's current immigration policies and their effects on refugees and illegal immigrants. This article critically examines the granting of temporary "safe haven" visas in Australia to refugees for the period of conflict that exists in their homeland.

As a postscript to this article the Australia Government announced recently that it was preparing legislation to stem the tide of more than 10,000 boat people who have been reported as "packing up" for Australia.[12] Known as the Border Protection Bill, it will provide penalties of up to 20 years imprisonment and hefty fines for offences under this legislation.[13] If the necessary cross-party support for this is given in parliament, it is expected that the law will be in place before Christmas 1999.[14]

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[10] Section 50AE.

[11] The Tucker family was robbed and their yacht sprayed with bullets by five armed pirates in a fishing vessel near Yemen in November 1999. They were rescued by a Saudi oil taker and towed to the port of Aden. Five men are due to face a Yemeni court for piracy and robbery related offences: Rucker, "Children in shock after pirate raid" at http: //news. com.au/news_content/national_content/4263876.htm (visited 20 November 1999).

[12] Martin and anor, "Blitz on boat people – Rush to tighten laws as 10,000 head this way", The Sydney Morning Herald, 16 November 1999 at 1.

[13] Stensholt, "Boat people: 'No bypassing' rule", The Australian Financial Review, 22 November 1999 at 8.

[14] Refer note 12.

The proposed initiatives include Australia denying boat people refugee status if they pass another state where they may make a valid refugee claim before reaching Australia.[15] Australian authorities will be empowered to board suspect vessels in international waters as well and reject protective visas if similar applications had been lodged elsewhere.[16] Philip Ruddock, Minister for Immigration, gives the example of Iraqi asylum seekers who forum shop for the best visa conditions and who are registered in 77 states.[17]

Other reports suggest that the Australian authorities may resort to x-rays to determine the age of refugees by their bones. If found to be minors, the refugees will be processed under different but easier criteria. Generally speaking, this raises the issue of the right to privacy and questions the use of x-rays for non-medical purposes.

This intention leads to another issue on the reconciliation of competing positions. On the one hand, states have legal competence or sovereignty over national territory, a basic constitutional doctrine of international law. They have exclusive jurisdiction over their territory and have a right and a duty to protect their territory and people living there. As stated by Professor Bin Cheng:[18]

> [A]nyone with any acquaintance of international law and relations would recognize that the first and foremost problem on the minds of all States is the certainty, security and inviolability of their own frontiers...

On the other hand, states have international obligations under human rights law and humanitarian law. This therefore makes the issue of boat people and refugees a worldwide problem requiring, not only priority from the global community regarding longer term answers, but also urgent efforts in coordination in the immediate term.

Dr Konstantinos Magliveras takes us to another region of the world, to Africa. He examines four African international organisations and gives lessons learnt in hindsight from Africa that could benefit international

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[15] Refer note 13.
[16] Ibid.
[17] Refer note 12.
[18] Cheng B, Studies in International Space Law (1997, Clarendon Press, Oxford) 476. Also refer Book Review at 287 below.

organisations, such as the European Union. These essentially relate to making recalcitrant member states comply with the tenor and spirit of their organisation's purposes and aims.

The European Union is discussed in two other articles. Patrick Latham writes the first, from a fairly technical yet insightful angle. Mr Latham has in fact worked in this area in the European Commission and he shares with the reader his "insider" perspective. The second is a shorter article in which Professor Flint explains why the European Union has a special relationship with Australia.

Recently, the European Union called for a seat in the Security Council and has found allies in Germany, Italy and Japan, proponents of reform in this 15-member body charged with primary responsibility for international peace and security in the United Nations Charter. The Security Council has five permanent members, namely, the People's Republic of China, France, the Russian Federation, the United Kingdom and the United States. It has ten non-permanent members that serve for two year terms, currently Argentina, Bahrain, Brazil, Canada, Gabon, Gambia, Malaysia, Namibia, Netherlands and Slovenia.[19]

Professor David Ruzié appraises the position of locally recruited United Nations staff and notes the difference in attitude and practice towards such employees *vis-á-vis* internationally recruited staff. He says that the practice is discriminatory and proposes recommendations to improve the situation. The extreme danger that United Nations staff face sometimes was recently brought home with the deaths of Valentin Krumov of Bulgaria, Luis Zuniga of Chile and Saska von Meijenfeldt of the Netherlands. They were killed in Kosovo and Burundi in the line of duty.[20]

In hindsight, the Sandline affair should never have occurred in Papua New Guinea. The use of mercenaries is always controversial and in this incident the fallout included the toppling of a Prime Minister. Damien Sturzaker

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[19] The members with terms expiring on 31 December 1999 are Bahrain, Brazil, Gabon, Gambia and Slovenia. The other members' terms will expire at the end of 2000. The new members in 2000 will be Bangladesh, Tunisia, Mail, Jamaica and Ukraine. The Security Council's presidency rotates on a monthly basis amongst the members: see "General Assembly elects five non-permanent Security Council members", United Nations Press Release GA/9635, 14 October 1999.

[20] Ibid.

and Craig Cawood present this incident from the standpoint of an illegal international contract and international arbitration.

The Australian Aboriginal community continues to agitate for more rights. The spill over has included the allegation that Australia had committed genocide against the Aboriginal people. In a recent decision of the Federal Court of Australia, *Nulyarimma v Thompson,* the Court decided whether the crime of genocide exists in Australia. The Court arrived at a negative conclusion, prompting Sean Peters to show that the decision appears based on political expediency rather than on sound legal reasoning.

In addition, this decision seems to juxtapose with the current sentiments of the international community regarding accountability for international crimes. On 9 December 1998 Australia was one of 120 states that signed the Statute of the International Criminal Court,[21] having adopted it in a diplomatic conference in Rome on 17 July 1998. The Statute establishes the Court as a separate legal entity with international personality. It has jurisdiction over natural persons for international crimes such as genocide, crimes against humanity, war crimes and crimes of aggression. However, although the Court's jurisdiction is prospective only, the crimes are not subject to any statute of limitation.

As reminded by Schwebel P, the world is responsible for the invention of the concentration camp this century. It is hoped that the international community will move quickly to ratify the Statute so that it can enter into force. The goodwill for this already exists as shown by its overwhelming acceptance by states. In Australia, ratification and enabling legislation will be required for the Statute's implementation.

As in previous issues, the articles in this issue traverse a breadth of topics, some longer, some less so, and some more academic in approach than others. The selection is topical. Consequently it is hoped that the issue contains something of interest to every reader. A number of book reviews have been included and the section on the International Court of Justice is more comprehensive than in previous years, made possible by the launch of the Court's website. This is a commendable initiative and for those interested, the address is http://icj-cij.org/.

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[21] Over 80 states have signed the Convention but only a handful have ratified it so far. It requires 60 ratifications to enter into force.