EDITORIAL COMMENT

There has been a great deal of preoccupation with the United Nations' role in the maintenance of international peace and security as reflected in the several articles on this topic that the Journal received for publication this year. Indeed, the world could do with less brutality and violence and with more peace and harmony as problems on the African continent are fast becoming entrenched. Humanitarian breaches and aggression still occur in the Balkans and the Yugoslav military expands progressively near the United Nations-patrolled boundary with Kosovo. The Middle East awaits eruption following the crucial setbacks in the recent November peace talks over Palestine, and both Israel and Lebanon have complained about the other's aggression in Southern Lebanon. The simultaneous withdrawal of Egyptian diplomatic representation from Israel has watershed significance as Egypt has been Israel's oldest Arab ally to date. Closer to Australia, the tragedy of East Timor continues to unfold and West Papua (formerly Irian Jaya) has begun agitating for self-rule.

It is well known that billions of dollars have been spent to maintain United Nations peacekeeping missions including US$3 billion this year alone. In these efforts, an uneasy shift has occurred in the use of third world troops with funds from first world States. As Lakhdar Brahimi has been reported widely as saying, we cannot have a situation where some contribute blood while others contribute money. In Sierra Leone, the 21 recent fatalities have involved peacekeepers from developing States.[1] In contrast, during the first decade of peacekeeping, 41 of 54 fatalities were from Canadian and European troops.[2] Although there were more than 3,300 American peacekeepers in 1993, there are none today.[3] These statistics are alarming.

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[1] They were Ghana, Guinea, India, Jordan, Kenya, Nigeria and Zambia.

[2] In June 2000, the European Union announced that it would have a new army of 60,000 troops by 2003. This would enhance the European Union's capability regarding crisis situations and reduce its dependence on the United States and NATO.

[3] In 1990-2000, the Australian Defence Force was involved in the following multinational peace operations: (1) Lebanon/Syria/Israel 1956-date; (2) Sinai 1993-date; (3) Iran/Iraq 1988-1990; (4) Namibia 1989-1990; (5) Red Sea/Gulf 1990-date; (6) Kuwait 1990-date; (7) Western Sahara 1991-1994; (8) Cambodia 1991-1993; (9) Somalia 1992-1994; (10) Rwanda 1994-1995; (11) Bouganville 1994; (12) Bouganville 1997-date; (13) East Timor 1999-date; and (14) Solomon Islands 2000-

When Kofi Annan became Secretary-General of the United Nations in 1997, his faith in United Nations peacekeeping operations was steadfast. He stated that the first operation was "an attempt to confront and defeat the worst in man with the best in man: to counter violence with tolerance, might with moderation, and war with peace".[4] He continued, "[s]ince then, day after day, year after year, UN peacekeepers have been meeting the threat of conflict, without losing faith, without giving in, without giving up".[5] At present, the organisation has 15 missions around the world involving 15,000 blue helmeted troops.[6]

Yet, in spite of this, the world continues to be besieged by horror and killings, from the Balkans and the Middle East to several African States and beyond.

In 1999, Kofi Annan commissioned a Panel on United Nations Peace Operations to assess the shortcomings of the present system and make frank and realistic recommendations for change. He appointed Lakhdar Brahimi as Chair and the Panel[7] published its Report in August 2000 (the Brahimi Report).[8] The opening lines recall the United Nations' primary objective as found in the Preamble of its Charter, which refer expressly to the saving of "succeeding generations from the scourge of war", the most important function of the United Nations. But, as the Brahimi Report observes in a pessimistic vein, over the past ten years

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date. In the same period, the following were humanitarian relief efforts, including the evacuation of civilians: (1) Afghanistan/Pakistan 1983-1993; (2) Camboida 1992-1999; (3) Mozambique 1992-date; (4) Papua New Guinea 1997-1998; (5) Irian Jaya 1998; (6) Cambodia 1997; (7) Solomon Islands 2000; and (8) South Pacific - periodic disaster relief and other assistance: Lague, "Shaped by heavy doses of reality", Sydney Morning Herald, 7 December 2000 at 8. See also Australia, Defence 2000: Release of the Defence White Paper at <http://202.59.33.56> (accessed December 2000).

[4] Refer www.un.org/depts/dpko/dpko/home_bottom.htm (accessed November 2000).

[5] Ibid.

[6] Compare the deployment of 65,000 peacekeepers under NATO's command at the height of the recent conflict in Kosovo and Bosnia.

[7] The Panel was established in March 2000 and has ten Members. Besides Lakhdar Brahimi from Algeria, the other Panel Members are from Germany, Japan, New Zealand, Russian Federation, Switzerland, Trinidad and Tobago, United Kingdom, United States and Zimbabwe.

[8] See Report of the Panel on United Nations Peace Operations at <www.un.org/peace/reports/peace_operations/docs> (accessed November 2000).

the organisation did not meet this challenge and neither does it fare any better today.[9] This is seen vividly in the Congo where this State is being wrenched apart from within and without. Meanwhile, the United Nations has adopted a wait and see attitude before deciding on what action to take (see cases below).

The Brahimi Report contains 20 Recommendations on peace building strategies, operational needs and adequate levels of funding, *inter alia.* The Report observes that support for peacekeeping should be a "core activity" of the United Nations and once it decides to deploy peace-keeping forces to uphold the peace, its Member States should confront the conflict quickly and be focussed on defeating the problem. The problems, manifested mainly as breaches of international law, include violations of human rights and humanitarian law.

An inevitable result of aggression and violence is the refugee. It is therefore apt that this millennium issue starts with an article on the 1951 United Nations Refugees Convention by Dr Peter Nygh. This Convention, which began in the shadow of the Cold War, has been amended once only, in 1967. Since then, somewhat different issues and considerations have appeared such as the emergence of the internally displaced person and the economic refugee. The question that therefore arises is what is the future of this 50-year old Convention and whether it continues to be adequate in a changing world. If not, should it be reviewed?

Dr Keith Suter writes the next article that takes the reader back to the genesis of human rights law. Dr Suter discusses how human rights law is caught in a global revolution by starting his journey in Australia and eventually ending his journey in Australia.[10] It is undoubted that an appropriate starting point for international human rights practice is United Nations peace operations as seen in the commissioning of the

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[9] Ibid at 1.

[10] There has been recent debate concerning euthanasia as a human right. Some argue that human rights have been pushed further along by the controversial new law permitting euthanasia in The Netherlands promulgated in November 2000. However, there are others who believe that no one has the right to take life away under any circumstances. A number of States, including China, allow euthanasia in prescribed circumstances. Although United States federal law does not permit this, it is permitted in a number of its states.

Brahimi Report. The Report is meant to address the United Nations' failure to prevent the killing of 800,000 people in Rwanda in 1994 and its failure to protect the inhabitants of Srebrenica (Bosnia and Herzegovina) the following year. As a strategy, the Report, in Recommendation 19, refers to a "substantially" enhanced role for the Office of the United Nations High Commissioner for Human Rights in field mission planning and preparation. The Report also refers to field missions being guided by "fair geographic and gender distribution" in Recommendation 11.

Thomas Feerick's article on the existence of the crime of genocide in Australia follows next. The article explores the reception of customary international law as part of the common law in Australia and provides an exegesis of the cases led by *Buvot v Barbuit* and Lord Talbot's rule. He advocates the *realistic* approach to the relationship between municipal law and international law as an alternative to the monistic and dualistic approaches. The Brahimi Report adopts the same approach and advocates a doctrinal shift, stating that such a shift is required before peacekeeping efforts can produce positive outcomes. In doing so, the Report emphasises the importance of recognising *realistic* and achievable peacekeeping mandates.

Professor Walter J Kendall III writes next on the killing of non-combatants in war and critiques the justifications and excuses when innocent people become victims of international conflict. He makes suggestions on how to reduce the killing of such innocent victims and concludes that prevention should be the goal. Kendall's thoughts accord with the recommendations of Kofi Annan on conflict prevention as outlined in Annan's Millennium Report and speech during the Security Council's second open meeting on conflict prevention in July 2000.[11] This position reflects Recommendation 1 of the Brahimi Report that calls upon the United Nations to increase the use of fact-finding missions in problem areas as a preventive measure. In addition, Members of the organisation are urged to give "every assistance" to such efforts pursuant to their obligations under Article 2(5) of the Charter.

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[11] Refer United Nations Doc A/54/2000. In September 2000, world leaders in New York for the United Nations Millennium Summit were presented with the Report for consideration.

Jackson Maogoto has the same concerns and more, writing on the need to put people before nations. In this context, he devises a new role for the United Nations and shows how this may be achieved. He opens his article with East Timor and analyses the United Nations' role in the emerging norm of humanitarian intervention and as the custodian of human rights. He refers to the organisation's involvement in national elections within the context of national sovereignty, poll monitoring and technical, financial and security assistance. Generally, this accords with the tenor of Recommendation 6 of the Brahimi Report on transitional civil administrations that includes the evaluation of the feasibility and utility of an interim criminal code pending the re-establishment of local rule of law and local law enforcement capacity.

Further, Recommendation 2 refers to "the use of civilian police, other rule of law elements and human rights experts...to reflect an increased focus on strengthening rule of law institutions and improving respect for human rights in post-conflict environments." This is expanded in Recommendation 10 on civilian police personnel, which refers to arrangements for judicial, penal, human rights and other relevant specialists who together with specialist civilian police would make up collegial "rule of law teams".

In his article, Hugh Watson discusses the mechanics of the regulation of humanitarian intervention in armed conflict situations and the role played by international standard rules of engagement and suggests a framework for an international convention on such rules. In doing so, he reiterates Recommendation 3 of the Brahimi Report, which states that potential troop contributors to United Nations forces should have the requisite training prior to deployment, including the ability to defend themselves "with robust rules of engagement". In fact, the Report considers that this is strategically necessary against those who renege on commitments or undermine peace initiatives with violence.

Ricky Lee has the last say in this discussion on the United Nations. His article examines peacekeeping successes and peace enforcement failures. He argues that the demarcation between the two should not be forgotten and concludes with optimism that at the very least, the organisation has acted as a forum for dialogue amongst its Member States. In this sense, the Brahimi Report recognises the importance of links and good communication at every operational level and

encourages modern practices, seen especially in Recommendation 20 on the conduct of peace operations in the "information age".[12]

At first glance, the next article, on the Antarctic, appears to be at a right angle to the articles above. However, a closer examination shows that it is based on a similar theme, conflict resolution. In this piece, Martin Lee avoids conflict in the Antarctic region by advocating the use of Article IV of the 1959 Antarctic Treaty to freeze all territorial claims in the region. In addition, he argues that the same provision provides for bifocalism, which should be used to protect the interests of claimant States, potential claimant States and non-claimants States.

The Right Honourable The Lord Slynn of Hadley, Chairman of the Executive Council of the International Law Association, writes the last article in this issue that is both a timely reminder and a lesson. Lord Slynn reminds the reader that nothing is static as he discusses the numerous constitutional changes occurring in the United Kingdom, and not even the House of Lords is spared. He shows that as Europe grows as a bloc, the United Kingdom shrinks accordingly. The global trend is increased partnering at the expense of sovereignty and States can no longer rely too much on their borders to protect themselves. At the same time, States are becoming more aware of collective accountability as a matter of principle.

As an example, Lord Slynn discusses the impact of the 1950 European Convention on Human Rights in the United Kingdom and informs that the Convention relocates the court of last instance from the House of Lords in London to the European Court of Human Rights in Strasbourg in matters concerning human rights.[13]

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[12] The Report uses technological jargon such as intranet, extranet and web sites.

[13] In a most recent development, the European Court has delivered the judgment in the *Öcalan Case*[13] involving Turkey, another Member State of the European Union. On 14 December 2000, the Court declared Öcalan's appeal admissible with the exception of two complaints under Article 5 of the 1950 European Convention on Human Rights. The two exceptions related to Öcalan's right to be informed of the reasons for his arrest and the charges against him, and the right to compensation for breach of Article 5: see European Court of Human Rights, Press Release issued by the Registrar, "Case of Ocalan v Turkey - Application declared partly admissible" at <www.dhcour.coe.fr/eng/Press/2000/Dec/Ocalanadmissibilityepress.htm> (accessed December 2000).

In the second half of this issue, two case notes and three book reviews present the commercial aspects of international law.

The two case notes concern the recent "fishy" cases, on salmon and tuna respectively. Both cases involved Australia as a Party and both had two stages. In *Case Concerning Measures Affecting Importation of Salmon,* the two stages were held in the Dispute Settlement Body of the World Trade Organisation, namely, the Panel proceedings and the Appellate Body proceedings. In *Southern Bluefin Tuna Case,* the two stages were the proceedings before the International Tribunal for the Law of the Sea and the proceedings before an *ad hoc* Tribunal established under the 1982 United Nations Law of the Sea Convention.

In the *Salmon Case,* Canada complained about Australia's quarantine restrictions that prevented the commercial importation of Canadian salmon into Australia. On appeal, the European Union, India, Norway and the United States joined as Third Participants. The Appellate Body's recommendation was not favourable to Australia.

The *Tuna Case* dealt with Japan's experimental fishing of Southern bluefin tuna in the southern oceans beyond pre-existing quotas. It was concern for the depletion of the Earth's resources that motivated Australia and New Zealand to complain about Japan's actions. While the *ad hoc* Tribunal was delivering its decision in Hamburg on 4 August 2000, stating that it had no jurisdiction to deal with the merits of the case, the world was preparing for negotiations on the future of the Earth in The Hague. Once again, the Tribunal's decision was not what Australia wanted to hear.

In November 2000, the United Nations sponsored these negotiations for a climate treaty aimed at a workable formula for reducing greenhouse gas emissions to retard global warming. This was to be the basis for the rules to implement the 1997 Kyoto Protocol aimed at reducing greenhouse emissions to 5% lower than 1990 levels in 2012. Unhappily, the negotiations failed following two weeks of intense meetings. High energy producing States such as Australia, Canada, Japan and the United States decided to reject the emission quotas presented and instead proposed the establishment of "carbon sinks" to offset the higher quotas sought. On the other hand, environmental hardliners such as Germany rejected this on the ground that the

Protocol would be compromised badly if the higher targets were accepted. Generally speaking, when States decide to adopt a position, an undeniable conclusion is that all of them are motivated by self-interest and none are pure. Despite the failure of these talks, the collective responsibility of all States to find acceptable and workable solutions must continue with renewed vigour in their role as Trustee of the Earth for future generations.

The book reviews are presented next. The first book is *Regulating Enterprise: Law and Business Organisation in the UK* edited by David Milman. This book provides a useful comparative perspective for the Australian reader on companies and other business entities. The second book is *Private International Law* written by Reid Mortensen. It is meant for students as a companion to a more substantive text. The third book is the second edition of John Mo's comprehensive *International Commercial Law.*

The final section in this issue surveys the International Court of Justice as usual. This issue presents every case on the Court's docket in 2000, pending or otherwise. The reader will discover that the Court has been busier than ever this year and there have been changes on the Bench.

The Court decided two cases, *Kasikili/Sedudu Island (Botswana v Namibia)* and *The Aerial Incident of 10 August 1999 (Pakistan v India)* and heard a number of Applications for provisional measures. The Court made Orders in *Armed Activities on the Territory of the Congo (Congo v Uganda)* and *Arrest Warrant of 11 April 2000 (Congo v Belgium).* In fact, *Arrest Warrant* is the newest case, being added to the Court's docket on 17 October 2000.

In *Arrest Warrant,* the Congo alleged that Belgium breached the 1961 Vienna Convention on Diplomatic Relations by issuing a warrant for the detention and subsequent extradition to Belgium of the Congolese Acting Foreign Minister for alleged grave violations of international humanitarian law. This case calls to mind the article on genocide written by Thomas Feerick, which includes reference to the extradition proceedings in the United Kingdom concerning General Pinochet of Chile.[1]

[1] See R v Bow Street Magistrate; Ex parte Pinochet [1998] 4 All England Reports 897; R v Bow Street Magistrate; Ex parte Pinochet (No 3) [1999] 2 All England Reports 97.

In the Congo, more than 16 million Congolese, a third of the State's population, have had their lives shattered by displacement, disease and hunger in a protracted civil war. Internally, the economy is in tatters after decades of neglect and mismanagement. Externally, military and diplomatic efforts to end "Africa's first world war" have been futile resulting in another humanitarian tragedy in terms of both intensity and magnitude. Further, readers will observe that the Congo has the most cases before the International Court of Justice. This is caused partly by rival rebel groups allegedly helped by Rwanda and Uganda against the government of President Laurent Kabila who is aided by Angola, Namibia and Zimbabwe. Meanwhile, the United Nations is waiting for fighting to subside before sending in a peacekeeping force of military observers. Is this enough? And has the Brahimi Report failed its first test?

A string of other cases are still pending in the Court including *Qatar v Bahrain* that dates back to 1991. This is the longest case in the Court's history and is one of two cases currently at the deliberation (final) stage in accordance with the Court's internal judicial practice. The other is *LaGrand (Germany v United States),* a sad tale of two German brothers who were executed separately in the United States as part of due process that went terribly awry. It is such experiences that sustain the case against capital punishment.

In conclusion, the support of the Editorial Advisory Board and Professor Jane Marceau, in particular, is acknowledged here. Recently, Ms Amanda Halpin was appointed Associate Editor, to assist while Ms Rita Shackel is on maternity leave. Mother and daughter are doing well.

Alexis Goh, Editor in Chief
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