

FOREWORD

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Anniversaries invite reflection, offering us an opportunity to survey our footsteps and, perhaps more importantly, determine what lies ahead. On this *Journal's* anniversary, such a retrospective is particularly appropriate: in 1978 when this *Journal* was founded, few people could have foreseen the direction that international law would take over the next three decades. International law has since grown to become a dominant force in transnational commerce and in the domestic politics of nations around the world. In many ways, the history of this *Journal* is the history of that evolution.

From its inception as the *Journal of Comparative Business and Capital Market Law* in 1978, this *Journal* has sought to cover the current and forthcoming issues of law in the global context. In 1978, the world was focused on the Cold War; the collapse of the Bretton Woods System; and the rise of Japan to global market prominence. The political and economic clash between capitalism and communism captivated the world's attention. In that political climate, the prospect for an active system of public international law seemed distant indeed.

With the thawing of the Cold War the global environment began to change. Europe appeared to be on its way to forming a single market through the Single Europe Act; the Soviet Union increased its economic cooperation with the West through Glasnost; and the development of multi-national corporations signaled a shifting tide toward globalization. As the cooperation

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among nations became more robust in this commercial context, and the stale systems of the Cold War began to give way to more open economies, the *Journal* shifted focus to become the *Journal of International Business Law* in 1986.

But international law did not stop growing. The European Market became the European Community; financial crises like the Mexican Peso devaluation threatened to collapse the entire global economy; the United States, Canada, and Mexico formed the North American Free Trade Agreement; and the rise of China highlighted a constantly evolving and increasingly integrated global financial network. As economic integration rapidly soared, the need for international economic standards beyond the limited area of business contacts became apparent. The world was now beyond mere cross-national business relationships; it had entered an era of state-level economic integration. To meet this change, the *Journal* became the *Journal of International Economic Law*, in 1996. This change was perfectly matched to its era: the Asian Financial Crisis only highlighted how the world was now almost entirely economically integrated.

Economic integration brought with it a new willingness of states to collaborate in other respects as well. Public international law—in particular, international criminal law, international human rights law, and the law of the use of force—underwent tremendous development, emerging as a strong force to bind not only the behavior of states but, for the first time, the behavior of private parties. Seeking to broaden its scope in light of these changes, the *Journal* once again changed its name in 2007 to become simply the *Journal of International Law*.

In this new capacity, the *Journal* is able to explore all of the important issues pertaining to the law among nations, paying particular attention to the developments in public international law, as well as to the more traditional areas of comparative and international economic law. As the global financial system morphs to meet the challenges of the current economic crises; as the countries of the European Union continue to move towards a single integrated political and economic unit; and as the world continues to seek solutions to crises such as the killings in Darfur; this *Journal's* broad mission ensures that it will be at the forefront of future developments in the field for decades to come.

For this anniversary issue, the editors of this *Journal* have solicited an outstanding set of academics, scholars, and practitioners to guide us in an overview of some of the most

prominent topics of international law, and to reflect on the breadth, development, and remarkable growth of these topics over the last thirty years. Individually, each of these authors offers commentary on diverse topics that range from the importance of judicial non-interference in international arbitration procedures to the question of what ethical framework needs to be developed to govern the work of lawyers in international practice; from the role that international human rights law should play in protecting migrant laborers to the trial of Saddam Hussein for crimes against humanity. Collectively, the authors explore the rich history of international law – and speculate on its likely future.

The issue begins with a series of articles on international litigation and arbitration. In this age of globalization, the importance of this topic is hard to overstate. More and more companies around the world find that their business horizons extend beyond the domestic jurisdiction of their home nation. But as these companies find increasing opportunities in working with their counterparts abroad, they also expose themselves to enormous liabilities in unknown and unfamiliar jurisdictions. International arbitration is an effective way for parties to contract around this risk; by agreeing on the mechanisms by which disputes are resolved, the contracting parties ensure procedural neutrality and fairness. Moreover, international arbitration is often tailored to the needs of the parties involved and is designed to be much more efficient than traditional trial procedures. In their separate essays, David McLean and David Stewart trace the historical developments of international arbitration as it arose following the adoption of the New York Convention, and they consider the future implications of that movement. Meanwhile, developments in international arbitration in Latin America are discussed by Jonathan Hamilton in his essay *Three Decades of Latin American Commercial Arbitration*, which analyzes the explosion of commercial arbitration in the region following the adoption of the Panama Convention, and considers the efficacy of that Convention in light of other developments in the field.

As with any discipline, understanding international arbitration requires a firm grasp of its procedures. Gary Born takes up that topic in the first article of the issue, offering a perspicuous look at the principle of judicial non-interference in commercial arbitration. Focusing on the basic prerogative and autonomy of the parties to determine the procedural mechanics of arbitration as the background of this principle, Mr. Born argues that judicial non-

interference is the critical component of arbitration procedures, emphasizing that it has received little attention from other commentators. In his vision, the principle of non-interference lies at the very heart of commercial arbitrations. Mr. Born, an alumnus of this law school, is widely recognized as the foremost authority on international commercial arbitration and litigation.

Following up on the examination of procedural fairness in international disputes, Catherine Rogers' article, *Lawyers without Borders*, takes up the question of what ethical rules should govern attorneys appearing before international tribunals. Arguing that any promulgated rule needs to be carefully tailored in a conflict-of-laws analysis, Professor Rogers critiques the model rule put forth by the American Bar Association, suggesting that the rule is an anachronism of "assumptions about territoriality and the historical relationship between the jurisdiction of tribunals and the licensing of attorneys" that no longer hold true today in the international context. Ultimately, Professor Rogers suggests that tribunal-specific standards are necessary to insure that international processes continue to function fairly.

The rise of international litigation and arbitration has necessarily impacted the broader growth of private international law. In his essay, *Private International Law: A Dynamic and Developing Field*, Professor Stewart suggests that private international law—which was once confined to choice of law questions in private disputes—has grown to include the study of procedural mechanisms for overcoming divergent domestic rules and a focus on harmonization of substantive rules among states. This expansion reflects the attention that is being devoted to private-party disputes on a state level, and emphasizes the growing importance of private international law in the global marketplace.

Of course, the growth in international law over the past 30 years is hardly confined to globalization and economics. Some of the most important developments in international law have taken place in the fields of international human rights, international criminal law, and the use of force doctrine—areas that even in the last five years have undergone dramatic changes. International criminal law, in particular, has grown tremendously after a period of dormancy following the Nuremberg and Tokyo prosecutions in the 1940s, when the U.N. Security Council reinvigorated the principle of holding individuals accountable for serious international crimes by creating the International Criminal

Tribunals for the former Yugoslavia and Rwanda in the 1990s. As these ad hoc tribunals have begun winding up their affairs in recent years, international criminal law has continued to develop rapidly, with the birth of a permanent International Criminal Court and the development of new hybrid international-domestic courts such as the Special Court for Sierra Leone and the Extraordinary Chambers in the Court of Cambodia. These international courts and tribunals have contributed to a growing body of case law in the field and demonstrate that individual prosecutions for grave atrocities will likely continue for the foreseeable future.

This history of international criminal law enforcement and the development of the International Criminal Court are separately traced by David Tolbert and Jennifer Trahan in their respective essays. Both authors ponder the future of the Court and of international criminal law while analyzing the necessity of state participation. Other commentators consider the application of international criminal law in practice. Thus, while David Glazier laments what he sees as America's abdication over the past thirty years of its traditional leading role in developing the law of war, including prosecuting war crimes, Eric Blinderman draws on his personal experiences participating in the work of the Iraqi High Tribunal in trying Saddam Hussein and the members of his regime for crimes against humanity, offering a fascinating look at the charges against the Iraqi dictator and analyzing the legal theory behind his conviction for "other inhumane acts" as a subset of crimes against humanity.

Other commentators offer a broader perspective on human rights. In his essay, *The 60th Anniversary of the UDHR*, Juan Méndez traces the development of the human rights movement following the adoption of the Universal Declaration of Human Rights—a movement he describes as "a rich and diverse network" of public and private entities "that strive to promote, protect, defend, and fulfill human rights across the globe"—and contemplates the future directions in the evolution of human rights law. Meanwhile, Christina Cerna evaluates the unique framework of international human rights law in the Americas in light of the Inter-American Commission's practice of applying the American Declaration of the Rights and Duties of Man as binding law, and Sarah Paoletti summarizes the developments of international law in application to migrant workers and analyzes the challenges in implementing international legal rights in the context of migrant laborers.

The final topic for this issue is the use of force. Like international criminal law, international law concerning *jus ad bellum* and *jus ad bello* has developed dramatically over the past thirty years. Although both superpowers frequently disregarded U.N. Charter Article 2(4) banning illegal uses of force during the Cold War era, the Security Council authorized force to uphold Article 2(4) when it sanctioned force against Iraq in 1990. As interstate warfare has subsequently declined in the post-Cold War era, international humanitarian law has developed to prevent war crimes during armed conflicts. The International Criminal Tribunal for the former Yugoslavia's case law and the International Criminal Court's Rome Statute have helped in defining and prosecuting these crimes. With his co-authors, Dan Stigall gives an overview of this relationship between the law of armed conflict and international humanitarian law in his essay, *Human Rights and Military Decisions: Counterinsurgency and Trends in the Law of International Armed Conflict*.

As all commentators recognize, the terrorist attacks on 9/11 and United States' invasion of Iraq once again altered the legal landscape. These commentators alternatively critique the new world order as either an unsustainable aberration against the evolution of law, or praise it as a necessary concession to the altered reality of a post-Cold War era. In his article, *Power Through Clarity: How Clarifying the Old State-Based Laws Can Reveal the Strategic Power of Law*, Lieutenant Michael Bahar takes the first position, arguing that only by understanding war as a condition between two states and recognizing the limitations of that understanding, can the Constitutional order be preserved. By contrast, Amos Guiora offers a colorful narrative that edifies the reader on the need to calibrate the edicts of international law to the necessities of military operations.

These and many other arguments and observations play out in the pages of this issue as they have done throughout the development of the very law that the commentators describe. Unfortunately, it is beyond the modest scope of this Foreword to give anything more than a taste of the wealth that the subsequent pages harbor. I invite the reader who has the luxury of time to consider the entirety of the issue, and come to his or her own conclusions about the past, future, and meaning of international law.