Editorial

1 INTRODUCTION

Welcome to the first issue of the eighth volume of the Cambridge International Law Journal (CILJ). This issue constitutes a continuation of a tradition that started from the journal's predecessor, Cambridge Journal of International and Comparative Law. CILJ provides an academic platform that brings outstanding research by young and senior academics to light and is committed to fostering international law scholarship by publishing high quality research on contemporary as well as diachronic international law topics. We believe that this issue provides a fascinating and insightful read that will stimulate critical academic thought and push the frontiers of academic literature. We are sincerely grateful to our publisher Edward Elgar Publishing, for assisting us throughout the publication process, and, in particular, to Ben Booth, Marina Bowgen, Katie Smith, Nick Wilson and the rest of the Edward Elgar team for their cooperation, professionalism and commitment. We are also indebted to the previous Editors-in-Chief, Richard Clements and Ya Lan Chang for their guidance and for ensuring a smooth transition to the new generation of the journal.

This issue is the product of collective work and effort. We would like to thank the journal's Managing Editors, Tim Clark, Catherine Drummond, Patrick Simon Perillo, Francisco Quintana and Faidon Varesis, as well as the General Editors, whose continuous dedication and diligence enabled the successful completion of the editorial process for this issue. We would also like to express our gratitude for the invaluable guidance and direction of CILJ's Honorary Editor-in-Chief, Professor Eyal Benvenisti, and our thankfulness for the strong relationship with the Lauterpacht Centre for International Law and the support of the Faculty of Law of the University of Cambridge. We are also extremely grateful for the academic advice provided by the members of our Academic Review Board.

2 OVERVIEW OF VOLUME 8(1)

Recent global developments not only show that international law is far from being 'at the vanishing point', but instead reveal a pressing need for a renewed focus on this area. In this issue, the work of eight authors is presented, touching upon topical subjects from various fields of international law, ranging from international human rights and international criminal law, to international dispute settlement and law of treaties.

With Brexit discussions in the United Kingdom reviving issues regarding the Irish border, the opening paper of the journal, authored by Louise Mallinder, serves as a unique reminder of the complications surrounding post-conflict societies. We are delighted that Mallinder's paper 'Metaconflict and International Human Rights Law in Dealing with Northern Ireland's Past' appears in this issue, a paper based on the Cambridge International Law Journal–Lauterpacht Centre for International Law Annual Lecture delivered in January 2019 in Cambridge. In this paper, Mallinder examines how metaconflicts shape political actors' engagement with or resistance to international legal obligations to investigate and prosecute past violations. Focusing on Northern Ireland, Mallinder analyses the approaches of the Unionist political parties

and aligned organisations to the United Kingdom's obligations under the European Convention of Human Rights. Mallinder identifies the strategies used by Unionists to resist approaches to dealing with the past that they view as contrary to their interests and argues that actors understand law as a means to construct and provide official recognition for communally resonant moral and social categories and norms. This according to Mallinder's argument leads to viewing legal principles such as equality of the law as secondary to political concerns. Mallinder concludes by highlighting the importance of political generosity and more substantive engagement with the principles of universality and equality underpinning international human rights law by all actors.

The second paper, 'Transformative Reparations: Changing the Game or More of the Same?' by Brianne McGonigle Leyh and Julie Fraser, also investigates issues pertaining to societies at post-dispute or post-conflict stage. McGonigle Leyh and Fraser examine the notion of 'transformative reparations', explore its origin, and question its suitability to achieve the desired aim of structurally transforming societies that have been harmed by serious crimes and human rights violations. The authors highlight that despite the fact that the concept of 'transformative reparations' has been endorsed by the United Nations (UN), the International Criminal Court (ICC) and regional and domestic jurisdictions, its content remains unclear. They explore the rationale behind this concept and critically assess the utility of the 'transformative' element. They conclude that there is greater potential for transformative reparations, but only when victims and affected communities play a central role in the decision-making, and when linked with other non-temporary, structural changes. The authors also emphasise that authorities should be careful not to create false expectations that reparations will be transformative.

The third paper, 'Mechanisms of Systemic Change in Regional Human Rights Courts: Swinging the Pendulum Between Legitimacy and Impact' by Lucas Lixinski, comparatively evaluates specific aspects of international human rights dispute settlement mechanisms. In particular, Lixinski discusses a novel mechanism by the Inter-American Court of Human Rights, namely the joint supervision of compliance with multiple judgments issued against the same State, which is a mechanism designed to promote systemic change in domestic jurisdictions. The author compares this mechanism to the European Court of Human Rights' pilot-judgments procedure, which is a more established mechanism with a longer history. Lixinski uses the criteria of legitimacy and impact to critically assess these Courts' mechanisms and concludes that the new Inter-American Court's mechanism has higher legitimacy costs in relation to the State, but lower vis-à-vis the international human rights community, and that this is despite the fact that ultimately both mechanisms' primary goal is addressing court backlogs, and only incidentally aim at promoting systemic change.

In the fourth paper, entitled 'Determining the Contours of the Rome Statute to Prosecute "Trafficking in Persons": Enslavement, Other Inhumane Acts, or Judicial Overreach?', Raghav Kohli adopts an innovative approach to discussing the issue of human trafficking in relation to the jurisdiction of the ICC. Due to the rising importance and the negative consequences of human trafficking globally, it is necessary to reassess whether human trafficking constitutes a crime within the jurisdiction of the Court, a question which, although it has been previously explored by commentators, remains very controversial. Kohli examines two specific issues that have been neglected by commentators; first, the Rome Statute's *travaux préparatoires* for enslavement, and second, the potential to prosecute trafficking otherwise than under the crime against humanity of enslavement. Kohli doctrinally assesses Article 7(2)(c) of the Statute and concludes

that an overly strict textual interpretation of the crime against humanity of enslavement would lead to the exclusion of modern forms of slavery from the scope of the provision, which would run counter to its purpose. Kohli argues that the Statute's *travaux préparatoires* support a broader understanding of enslavement, a reading that is more faithful to the drafter's intentions as provided for in the Vienna Convention on the Law of Treaties (VCLT). Alternatively, Kohli suggests that human trafficking may be prosecuted as an 'other inhumane act' under Article 7(1)(k) of the Statute. Thus, the Statute is providing more than one ground capable of establishing the Court's jurisdiction over the crime of human trafficking and is, hence, in a position to preserve the credibility of the ICC.

The fifth paper, 'International Human Rights Law Responsibilities of Non-Governmental Organizations: Respecting and Fulfilling the Right to Reparative Justice in Rwanda and Beyond' by Noam Schimmel, also examines transitional justice but this time from the perspective of non-governmental organisations (NGOs). Schimmel discusses the potential responsibilities of NGOs to respect, protect and fulfil international human rights law (IHRL), by focusing on NGOs pursuing development in a post-genocide/post-mass-atrocity transitional justice context acting in partnership with State governments, as proxies, and providing essential public goods as part of their development remit. Schimmel uses the Rwandan genocide as a case study to show how the failure of NGOs to adhere to IHRL hinders reparative justice, as defined in the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of IHRL and Serious Violations of International Humanitarian Law. Schimmel argues that many development NGOs in Rwanda, while having the capacity to do so, neither adequately incorporate reparative justice into their development and transitional justice scope of activities nor acknowledge/respond to the distinctive rights and vulnerabilities of genocide survivors, which results in neglecting the IHRL right to reparative justice. Schimmel also argues that current soft law demands that NGOs should never enter into a contract for provision of development aid with a State that knowingly entails – whether by commission or omission – a violation of IHRL. In conclusion, Schimmel argues that although States may ultimately be held legally responsible for the acts of NGOs, this should not prejudice their simultaneous social and moral responsibility, and suggests that new soft-law moral and social standards regulating NGO behaviour have the potential to become legal obligations by eventually achieving the status of customary international law.

Maria Xiouri's paper, 'Material Breach of a Treaty: Some Remarks on the Partial Award of 30 June 2016 in the Matter of an Arbitration Between Croatia and Slovenia', focuses on the law of treaties and international dispute settlement. Xiouri uses the Permanent Court of Arbitration's Partial Award of 30 June 2016 *In the Matter of an Arbitration Between Croatia and Slovenia* as her starting point and discusses broader issues pertaining to the termination of treaties on the ground of material breach by a party, as encapsulated in Article 60 VCLT. Xiouri argues that the Partial Award is particularly interesting as it made important clarifications on the issue of treaty termination based on its material breach. The author examines the Award thoroughly and focuses particularly on the issues of the jurisdiction of the Tribunal to examine the legality of the purported termination of the arbitration agreement, the possibility of terminating an arbitration agreement because of its material breach, the definition of a material breach (by examining the notions of repudiation of a treaty, violation of a provision essential to the accomplishment of the object and purpose of the treaty, and the gravity of the breach), as well as relevant procedural issues. After analysing

in detail the various elements of the Award and assessing the rationale of the Tribunal in the light of customary international law and general principles, Xiouri concludes that the Tribunal, by adopting a strict interpretation of the definition of a material breach according to Article 60(3)(b) VCLT, prioritised treaty stability and moved away from the text of the provision.

The final paper of this issue is authored by Ya Lan Chang: 'The Threnody of International Criminal Justice'. This short piece constitutes a review of the book *The UN Security Council and the International Criminal Court: The Referral Mechanism in Theory and Practice* (Edward Elgar Publishing 2018) by Gabriel M Lentner, a book about the UN Security Council referral mechanism to the ICC based on Article 13(b) of the Rome Statute. Chang analyses the book's various chapters and arguments with a critical eye and argues that Lentner's doctrinal and realist analysis is clear, objective and insightful, and that Lentner provides well-grounded reasons and critique of the ICC's ineffectiveness. Chang criticises several aspects of the book but concludes by siding with Lentner's view of the referral mechanism as being inherently defective, especially when combined with a political Security Council that is incapable of aiding the ICC in its aim of attaining universal justice.

Eirini Kikarea and Maayan Menashe
Editors-in-Chief