Editorial

1 INTRODUCTION

Welcome to Volume 9(1) of the Cambridge International Law Journal (CILJ). This issue continues the CILJ's strong tradition of publishing high-quality research from contributors ranging from senior academics to young scholars. The CILJ holds a special distinction among academic journals of being both peer-reviewed and student-run. As such, the CILJ has the pleasure each year of engaging with esteemed academics involved in our review and advisory processes, while training the next generation of scholars who will join them.

The CILJ has always sought to build meaningful relationships that further the academic network of those involved in contributing to and creating the CILJ. This year has been no exception. In continuing the strong connection between the CILJ and the Lauterpacht Centre for International Law (LCIL) at the University of Cambridge, in November 2019 we co-hosted the Joint CILJ–LCIL Annual Lecture. We were extremely honoured and delighted to have Professor Pierre-Marie Dupuy present the Annual Lecture. Professor Dupuy spoke on the unity of the international order to an overflowing (standing-room only) audience ranging from students to senior academics, all eager to hear from one of the most esteemed and influential international lawyers of the last 50 years. Professor Dupuy's remarks appear in this Volume 9(1).

As per all Editors-in-Chief, our gratitude extends to a great many people without which this Volume 9(1) would not have been possible. We are sincerely grateful to our publisher, Edward Elgar Publishing, for their cooperation and assistance in the publication process and, in particular, to Ben Booth, Marina Bowgen, Phillip Thompson and Nick Wilson. We are particularly appreciative of the tireless commitment and fastidious attention to detail of our Managing Editors (Ibrahim A Alturki, Tom Boeckstein, Oliver Hailes, So Yeon Kim and Jessie Smith) and our General Editors who with ease and accuracy managed the review and copy-editing process from start to finish. We are also grateful to the members of our Academic Review Board and ad hoc reviewers for their time and expertise in peer-reviewing submissions which provides an important contribution to ensuring the publication of manuscripts of the highest quality. Our thanks also extend to our Honorary Editor-in-Chief, Professor Eyal Benvenisti, and to the members of our Faculty Advisory Board, Professor Catherine Barnard, Professor John Bell (part-year), Professor Jorge E Viñuales (part-year) and Dr Kate Miles for their advice and direction.

This year we bid farewell to long-standing Senior Treasurer and member of our Faculty Advisory Board, Professor John Bell, for whose ever-present support and guidance we, and our predecessors, are immensely appreciative. We welcomed in his stead as member of our Faculty Advisory Board, Professor Jorge E Viñuales, Harold Samuel Chair of Law and Environmental Policy at the University of Cambridge, and as Senior Treasurer, Dr Andrew Sanger, one of the inaugural Editors-in-Chief of the CILJ (then known as the Cambridge Journal of International and Comparative Law) and now Lecturer in International Law at the University of Cambridge. We also welcomed Tony Zhou as Junior Treasurer, taking the place of Ivan Lee, who capably guided the CILJ in all financial matters for the past three academic years and for whose commitment and diligence we are extremely grateful.

Finally, we are fortunate to have had the benefit of the guidance of the outgoing Editors-in-Chief, Eirini Kikarea and Maayan Menashe, whose advice over the past year has been invaluable.

2 OVERVIEW OF VOLUME 9(1)

For this issue, we are pleased to publish our Annual Lecture and five articles carefully selected through a rigorous double-blind, peer-review process from a pool of over 100 submissions. The first contribution to Volume 9(1) is the Joint CILJ–LCIL Annual Lecture presented by Professor Pierre-Marie Dupuy. In 2000, Professor Dupuy delivered the General Course of International Law at the Hague Academy of International Law, titled ‘The Unity of the International Legal Order’, in which he developed a theory on the tension existing between what he saw as the two grounds of unity in the international legal order: the formal unity (based on the procedures by which primary norms are created, interpreted and their breach adjudicated) and the material unity (based on the content of norms, including in particular peremptory norms of international law). The theory was posited in the face of and as a response to assertions that international law was becoming increasingly fragmented and thereby losing its coherence and its legitimacy. Twenty years after the delivery of the General Course, Professor Dupuy revisits his theory to determine the extent to which it remains a valid framework for analysing international law today, both in principle and in practice, and particularly in light of the rise of populist leaders that have sought to dismantle multilateral international law. He concludes that the unity of international law is, despite some side-steps along the way, at its core unfailingly maintained and that it ought to be championed by international lawyers seeking to uphold the rule of law, which, he ventures, is itself part of the common heritage of mankind.

Professor Dupuy’s unity of international law, and particularly the role of peremptory norms in uniting different branches of international law, finds concrete expression in the case study that is the focus of the second article in this issue. Dr Stephen Allen delves into the European Union’s (EU) participation in the exploitation of marine resources in Western Sahara through the EU/Morocco fisheries agreements. He examines how the Court of Justice of the European Union (CJEU) in the *Western Sahara Campaign* case used Western Sahara’s status as a non-self-governing territory with the right to self-determination to support its finding that the 2006 EU/Morocco Fisheries Partnership Agreement and its 2013 Protocol do not apply to the said territory’s coastal waters without the consent of the people of Western Sahara. In his analysis, Allen discusses how the existence of this third-party consent requirement, and the absence of guidance on how such consent must be obtained, left open the possibility that the relevant fisheries agreements could be revised and extended to Western Sahara’s coastal waters in a manner that further exploits the territory’s natural resources and calls into question the EU’s position that it does not recognise Morocco’s sovereignty claim to Western Sahara. The author posits that this occurred with the adoption of the EU/Morocco Sustainable Fisheries Partnership Agreement (SFPA) in 2019. Allen argues that the conclusion of the SFPA, which occurred with limited genuine consultation with the people concerned and which defines the relevant fishing zone as including coastal waters adjacent to Western Sahara, has the effect of sustaining Morocco’s unlawful control of a non-self-governing territory, thereby violating the duty of non-recognition and the right of the people of Western Sahara to self-determination. The SFPA also reflects the EU’s view that Morocco is the only entity with which

the EU could enter into an international agreement involving the exploitation of resources within the coastal waters adjacent to Western Sahara, as such territory is ‘administered principally’ by Morocco. Allen suggests that this violates the CJEU’s ruling in *Western Sahara Campaign*, which held that ‘Morocco does not exercise sovereignty or jurisdiction over the waters off Western Sahara’. This is in addition to the earlier decision by the General Court in *Polisario v Council*, which held that the EU contributed to human rights violations ‘by encouraging and profiting’ from exploiting Western Sahara. According to Allen, there is thus a compelling argument that the EU has implicitly recognised Morocco’s sovereignty over Western Sahara, notwithstanding its assertion that the SFPA has resulted in the protection of the subject marine area from over-exploitation. Allen advances the view that, absent an engaged administering power and a feasible dispute settlement process, third States and international organisations must refrain from entering into international agreements with Morocco that allow them to exploit the resources in Western Sahara and which lend Morocco’s control over the territory some legitimacy.

Like Allen’s, the contribution by Tomohiro Mikanagi and Dr Kubo Mačák also examines the application of the law of international responsibility to complex factual situations. Their work explores the application of the international law rules of attribution in the context of cyber operations. They observe that, despite agreement on the bases for attributing conduct to States under international law, States have varying approaches to the application of such rules in cases of hostile cyber operations. Mikanagi and Mačák themselves test the application of such rules by reference to the recent *Park Jin Hyok* case, in which Mr Park faced US criminal charges for conspiring in relation to a number of cyber incidents, including the 2014 operation against Sony Pictures Entertainment, the 2016 operation against the Bangladesh Bank, and the 2017 WannaCry incident (all cyber attacks for which the US government considers North Korea to be responsible). In revisiting the modes of attribution in international law, the authors examine whether the conduct of individual employees, such as Mr Park, and/or the company for which he worked, Chosun Expo, could be attributed to North Korea. They conclude that, although advances have been made in the capacity to trace cyber activities so as to attribute the relevant conduct to particular individuals, such as Mr Park (what the authors refer to as ‘technical attribution’), the same progress has not been made with ‘legal attribution’ to States. Mikanagi and Mačák consider that the evidence adduced in the *Park* case is insufficient to attribute the conduct of Mr Park or his employer to North Korea under any of the established bases for attribution, and that the exercise of attempting to do so demonstrates how the ‘international law of attribution, as reflected in the Articles on State Responsibility, appears too stringent for the attribution of cyber operations to States’.¹ The necessity of obtaining sufficient evidence to establish attribution prompts the authors to consider the treatment of evidence under the procedural rules of one forum that is well-placed to decide such disputes: the International Court of Justice (ICJ). Mikanagi and Mačák survey ICJ cases relevant to attribution and observe a ‘graded’ approach to the standard of proof employed, where the standard varies depending on the gravity of the alleged violation. They consider that hostile cyber operations would require a standard that is somewhere in between ‘clear and convincing evidence’ and a ‘preponderance of evidence’, both of which present their own difficulties. The authors conclude with some views on how to

1. Tomohiro Mikanagi and Kubo Mačák, ‘Attribution of Cyber Operations: An International Law Perspective on the *Park Jin Hyok* Case’ (2020) 9(1) Cambridge International Law Journal 51, 74.

strengthen State responsibility in the area of cyberspace, including by advocating for an independent third-party body that could collect and objectively analyse evidence and providing examples of how they envisage this mechanism could be set up. They also examine the principle of due diligence as an ‘alternative pathway to international responsibility’. In this sense, the existence of a duty on a State not to allow its territory or cyber infrastructure to be used for cyber operations against other States provides a means by which States are made responsible in respect of conduct even where it cannot be directly attributed to them.

From responsibility of States, José-Miguel Bello y Villarino takes us to a discussion of citizenships-for-sale, or, more commonly, ‘golden passports’, in which he examines how the seminal *Nottebohm* case can inform our understanding of this phenomenon. In that case, the ICJ held that there needed to be a ‘genuine link’ between a State and a person who is its national in order for that State to espouse a diplomatic protection claim against a third State on the national’s behalf. Bello argues that academics and practitioners often misunderstand the value of, and misstate the reasoning of the majority opinion in, the *Nottebohm* case by claiming that it established that principle (albeit much subject to criticism itself) that a ‘genuine link’ is necessary in order for States to grant nationality to an individual. Rather, he argues that the real value of *Nottebohm* lies in the distinction drawn between the *granting* of a nationality and the *effect* that is derived from that new nationality vis-à-vis third States. Viewed in this way, *Nottebohm* was not concerned with the *grant* of Liechtenstein nationality to Mr Nottebohm, but rather with the *effects* of that nationality on the international plane, and particularly whether Guatemala was obliged under international law to recognise that nationality in the context of a diplomatic protection claim. This position preserves the legal domain of States to grant or withdraw nationality on the basis of their choosing, but also provides the space for public international law to limit the effects of such decisions where such a limitation justified it (including, for instance, the prohibition on naturalisation of persons of an occupied territory or treaty-based obligations not to render persons Stateless). ‘Golden passports’ (which Bello also refers to as *ius pecuniae* naturalisations) can therefore create tension in the relations between States insofar as the decision by one State to permit its citizenship to be purchased may not be recognised by other States, a case in point being the EU, which has denounced citizenship-for-sale schemes adopted by some of its Member States. In order to increase predictability in the treatment of ‘golden passports’, Bello proposes that States make an ‘effects declaration’, clarifying their position on ‘golden passports’. He submits that this could be done either through an international agreement or a unilateral declaration that sets out whether they will recognise the effects of a ‘golden passport’ at all and, if so, whether that recognition would be subject to certain restrictions. He also explores the effects of *ius pecuniae* naturalisations under EU law, which pose further challenges, and measures designed at improving predictability in this context that could be developed within the EU’s legal framework. The particularity of domestic law and its relationship to international law, with which Bello is concerned, is also a matter addressed by Giorgio Risso and Anna Chiara Amato, whose contribution rounds out Volume 9(1).

Risso and Amato’s article focuses on legality clauses in international investment treaties. Legality clauses operate to limit the treaty’s protection only to investments made ‘in accordance with’ the domestic law of the host State. Such clauses are often the subject of jurisdictional challenges before investment arbitration tribunals by respondent States arguing that the claimant’s investment was not made ‘in accordance with’ its law and, as such, the State has not consented to arbitrate a dispute

in respect of it. While previous commentators have canvassed general issues relating to the use or consequences of such legality clauses, Risso and Amato make a unique contribution to the literature by examining how arbitral tribunals have interpreted and applied the relevant domestic law and what that tells us about approaches to the invocation of legality clauses more generally. In particular, they find that tribunals have devised a number of ways to limit their engagement with domestic law. The main three such devices are that: (1) only breaches of the fundamental principles of the host State's law can deprive an arbitral tribunal of jurisdiction; (2) mistakes of law made in good faith by an investor can cure illegality for jurisdictional purposes; and (3) decisions issued by domestic bodies have no relevance in assessing pleas of illegality. These devices signify the adoption of what Risso and Amato call an 'international' approach that seeks to detach the applicable law from its domestic context. Furthermore, even when using these devices, Risso and Amato observe that tribunals have found additional ways to avoid interpreting or applying – or sometimes even referring to – the domestic law that seemingly is the applicable law by means of the *renvoi* in the legality clause. Lamenting this failure to properly engage with domestic law, Risso and Amato advocate a return to first principles that would see tribunals interpret and apply domestic law directly in determining whether or not an investment was made 'in accordance with' the host State's law and thus whether a tribunal properly has jurisdiction over a dispute.

We hope that you will find the contributions to this issue stimulating and insightful.

Catherine Drummond and Patrick Simon Perillo
Editors-in-Chief