Editorial

1 INTRODUCTION

It is our great pleasure to introduce Volume 9(2) of the Cambridge International Law Journal (CILJ). As is customary for the CILJ, this second issue is thematic and based on the CILJ Annual Conference for 2020. This year, the Ninth Annual Cambridge International Law Conference was held from 30 April to 2 May 2020 on the theme: ‘International Law and Global Risks: Current Challenges in Theory and Practice’. Under the exceptional stewardship of the Conference Convenors, Thea Chesterfield and Lora Izvorova, the Conference provided a platform for cutting-edge scholarship on international law and its response to some of the most pressing and complex issues facing humanity, from the vast and multiple impacts of climate change, to the responses to the COVID-19 pandemic, to the threat of nuclear proliferation, to the regulation of risk in cyberspace, outer space and in maritime areas beyond national jurisdiction. Thirteen cross-topic panels examined the concept of risk and its place in the theory and practice of international law, and explored what international law can do to help manage regional and global risks. The present issue consists of the keynote remarks and a selection of the finest papers presented at the Conference, as well as two additional excellent contributions on the theme.

The importance of the theme of this issue and the Conference has a special resonance due to the ongoing global COVID-19 pandemic and is particularly interesting to us for two specific reasons. The first is that the general Conference topic of global risks was chosen many months before the global COVID-19 pandemic had made itself known. This highlighted to us that the unsettled questions about the role of international law in responding to and managing global risks were already being raised and engaged with in a variety of different ways across varying subject areas, and the COVID-19 pandemic provided a fascinating and real-time case study of how some of that thinking could be applied in the specific context of global health risks. The second reason is that the Conference theme, a focus of which was on risk mitigation and adaption strategies, found concretisation for the CILJ when the COVID-19 pandemic emerged and our inimitable Conference Convenors, Thea and Lora, performed a small miracle to transform an already fully organised physical conference into a multi-day online event. The significance of adapting a conference on global risks into a new format in the face of a real-life global risk was not lost on our team!

This year thus marked the first time for the CILJ that the Annual Conference has been hosted completely online. We were particularly proud of the Conference Convenors for designing and implementing this feat at a time when many other organisations and institutions were simply (and understandably) cancelling or rescheduling conferences. While completely online events are now more and more common in COVID-19 times, the CILJ’s Ninth Annual Cambridge International Law Conference was, to our knowledge, one of the first (if not *the* first) full-scale international law conferences to be conducted completely online since the COVID-19 pandemic hit. It was also extremely well received, with presenters and participants lauding the smooth organisation and execution of the webinars, as well as the decision to make the conference free and therefore accessible to many more participants around the world than may otherwise have been able to attend in person. Across the three-day online conference there

were 13 webinars and 46 panel presentations attended by 2,465 viewers. On average, each webinar attracted around 190 viewers. The most popular webinar was the panel on ‘Climate Change and Public International Law – Overcoming Challenges in Governance, Cooperation and Implementation’, which attracted 238 viewers. Audience engagement was facilitated through the submissions of questions through a chat function, which was moderated in a Q&A format by the panel moderators. A number of the presentations remain available online through the Conference Playlist.¹ The success of the Conference stands the CILJ in very good stead for continuing to provide online conferences should that be necessary in the years to come.

We are incredibly grateful to the Conference Convenors, Thea Chesterfield and Lora Izvorova, for their vision and commitment to bringing the online Conference to fruition, as we are to their team of Conference Assistants: Maxime Cuypers, Emma Ffrench-Mullen, Mariana Gómez Vallin, Florian Held, Niamh McLoughlin and Jonathan Renaux. We also express our gratitude to Professor Anne Peters who graciously agreed to continue on as the Conference’s Keynote Speaker in spite of the sudden shift to an online platform. We must also thank Edward Elgar Publishing, the Cambridge Law Faculty (in particular Daniel Bates), the Lauterpacht Centre of International Law, our Treasurer Tony Zhou, and the presenters, moderators and attendees for their support and cooperation in making the Conference into the successful endeavour that it was.

Our gratitude also extends to the great many people without whom this Volume 9(2) 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 also thank our Managing Editors (Ibrahim Alturki, Tom Boeckstein, Oliver Hailes, So Yeon Kim, Darren Peterson and Jessie Smith) and our General Editors who with ease and accuracy managed the review and copy-editing process from start to finish, including doing so from various parts of the globe when separated from Cambridge by the COVID-19 situation. 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, who make 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 Jorge E Viñuales and Dr Kate Miles for their advice and direction.

Finally, before introducing the content of this issue, and as we come to the end of our term as Editors-in-Chief, we would like to thank the entire CILJ extended family for their commitment to and support of the journal, which we leave in the capable hands of our successors, Tom Boeckstein and So Yeon Kim. We wish every success for the tenth anniversary year of the journal and the production of Volume 10.

2 OVERVIEW OF VOLUME 9(2)

We are extremely pleased to open Volume 9(2) with the publication of the keynote remarks presented at the Conference by Professor Anne Peters. Professor Peters’ remarks were based on work conducted in collaboration with Professor Heike

1. ‘CILJ 9th Annual Cambridge International Law Conference: “International Law and Global Risks: Current Challenges in Theory and Practice”’ (YouTube, 14 July 2020) <<https://www.youtube.com/playlist?list=PLy4oXRK6xgzGY15XU6s0YoUAhltUuqpI>> accessed 2 September 2020.

Krieger and Leonhard Kreuzer, who join Professor Peters as authors of the contribution to this issue. This opening article presents the concept of due diligence as a 'risky risk management tool in international law' – an often positively perceived risk management tool that itself comes with potentially negative consequences. The authors begin by discussing the origins of due diligence, the role that it plays in various fields of law, and its increasing prevalence in international legal discourse today. They explore the role due diligence serves in managing risk, in compensating States for intrusions into their sovereign sphere and in expanding the scope for States to be held accountable for specific, often procedural, conduct. Yet the authors also warn that due diligence could run the risk of watering down substantive standards owing to its often vague and broad characterisation, which could ultimately weaken the international rule of law. The article concludes that while due diligence may not be able to offer a definite solution to a specific problem, the proceduralisation of due diligence requirements contributes to the potential of stabilising the international order. Overall, its rise in various fields of international law makes it an important indicator of structural change in the international legal order and reflects the 'deeply antagonist legal trends of our time'.²

Due diligence was also the core of the contribution by Professor Fulvia Staiano, considered in the particular context of transnational wildlife trafficking. Professor Staiano examines the Security Council's characterisation in Resolutions 2134 (2014) and 2136 (2014) of wildlife trafficking by organised criminal groups as a threat to the peace under Chapter VII of the UN Charter. She explores the effectiveness of such an approach and how it has or could complement the already existing international legal framework on wildlife trafficking. She also examines whether existing frameworks, such as that codified in the UN Convention against Transnational Organized Crime (UNTOC) vis-à-vis the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), are already sufficient to address the global threats posed by transnational wildlife trafficking. Professor Staiano argues that the framework afforded by UNTOC side by side with CITES is the most appropriate and effective tool in combating transnational wildlife trafficking, and that the Security Council's characterisation is a 'flawed perspective'³ that lacks the needed impact and which could further compromise situations of instability and violence.

Dr Tamar Meshel's contribution also examines a problem area of international environmental law having a transnational character. She brings to the fore the issue of dam-induced migration and the cross-border impacts of individuals and communities that are displaced as a result of dam construction. She observes that as dams are often constructed in transboundary watercourses, the principles of international water law can play a significant role in guiding responses to the problem of dam-induced migration. In particular, the article explains how international water law could foster inter-State cooperation and accountability, facilitate the resolution of disputes, and prevent or alleviate negative cross-border impacts of dam construction.

Godwin Tan and Andrea Chong examine the capacity for environmental risks to be addressed through the investor-State arbitration framework, specifically through the increasing recourse by States to environmental counterclaims against investors in International Centre for Settlement of Investment Disputes (ICSID) arbitration.

2. Anne Peters, Heike Krieger and Leonhard Kreuzer, 'Due Diligence: The Risky Risk Management Tool in International Law' (2020) 9(2) Cambridge International Law Journal 121, 122.

3. Fulvia Staiano, 'Wildlife Trafficking Under the Lens of International Law: A Threat to the Peace or a Serious Transnational Crime?' (2020) 9(2) Cambridge International Law Journal 137, 152.

They examine in detail two recent cases involving environmental counterclaims (*Burlington v Ecuador* and *Perenco v Ecuador*), track the rise of new generation treaties that directly impose environmental obligations on investors, and conclude that international investment law is evolving in a way such that environmental counterclaims may play a greater role in supporting global environmental protection in the future.

Christopher P Evans's contribution analyses whether the United States' initiative, 'Creating an Environment for Nuclear Disarmament' (CEND), is an 'effective measure' under Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons (NPT). Article VI of the NPT obliges States Parties to 'pursue negotiations in good faith on effective measures' relating to nuclear disarmament. CEND, in seeming contrast, acknowledges that the current global security environment is not conducive to nuclear disarmament and seeks to engage States in dialogue about ways to improve the security environment such that nuclear disarmament is again necessary. Having considered the purpose, origins and actions of the United States, Evans suggests that while CEND has encouraged discourse on nuclear disarmament and thus could be an effective measure towards non-proliferation, he remains sceptical about whether the same has been pursued and adopted in good faith pursuant to and in compliance with Article VI of the NPT.

Joseph Crampin's contribution comments on the increasing prevalence of unilateral treaty withdrawal and assesses how international law can best regulate such conduct in a manner that preserves and balances both the integrity and authority of treaty obligations. He emphasises the role of good faith in the interpretation and application of withdrawal provisions as a means of framing withdrawal discourse and better regulating the conduct of recalcitrant States.

The two additional contributions that were not presented at the Annual Conference but which were excellent papers on the theme and merited inclusion in this issue are those by Gerry Liston and Andrew T Bulovsky. Gerry Liston examines the 'fair share question' that inevitably arises in climate change litigation: what constitutes a State's fair share of the global burden of mitigating climate change? Liston explores how this question, combined with judicial restraint in the assessment of government policy, undermines litigation aimed at forcing governments to adopt the far-reaching mitigation efforts urgently needed to combat climate change. He assesses how general principles of law applicable in situations involving causal uncertainty and multiple wrongdoers may be invoked to address the difficulties created by the fair share question, with a particular focus on positive international human rights obligations under the European Convention on Human Rights.

The contribution by Andrew T Bulovsky on the over- and under-enforcement of anti-corruption law in investment disputes and international development rounds out Volume 9(2). Bulovsky examines the entanglement of anti-corruption enforcement and investment, a topic hitherto unexamined from a systemic perspective. He explains that under-enforcement of anti-corruption law occurs when local courts and arbitral tribunals refuse to hear cases involving corruption, while over-enforcement occurs when State authorities from multiple jurisdictions subject companies to duplicative enforcement actions and penalties for the same conduct. Bulovsky explores how this paradox undermines anti-corruption law itself and hinders international development objectives, and posits practical means by which each could be overcome.

We hope that you will find the contributions to this issue relevant, thought-provoking and insightful.

Catherine Drummond and Patrick Simon Perillo
Editors-in-Chief