

FORWARD

The Right Honourable Malcolm Fraser, AC CH
Prime Minister of Australia (1975 – 1983)

The Journal Jurisprudence has a high reputation as an effective and authoritative law journal. I am delighted to see the effort being made to bridge the gap between academic study of legal philosophy and the actual practice of the law. This edition focuses on the challenges and opportunities in international law after the Second World War, out of which we can draw valuable lessons for the problems of international governance in our own time.

These essays are important because they cover philosophy and the practical application. There are many people who say they believe in the Rule of Law and in due process but many who do so are not prepared to carry that commitment forward with vigour and effect.

The establishment of the International Criminal Court was a momentous change, in some ways, as important as the foundation of the United Nations itself. In theory, it meant that those nations who acceded to the Treaty were prepared to accept the obligations under the ICC. Obligations to fulfil the law and to abide by it. In his article Dr Juan Carlos Sainz-Borgo skilfully documents this challenge with international drug trafficking and draws our attention to the structural issues in international law faced by the ICC. Unfortunately, in many situations, the law is honoured in the breach. The Iraq War itself was illegal, just as many conflicts in the past have been. Professor Thomas Boudreau's analysis of the aftermath of World War II and the genesis of the Law of Nations reminds us of values which should have been heeded by world leaders before the Iraq War. Then as now, the great and the powerful accept the law when it coincides with their perception of their national interests, but when it does not, they do what they want to do anyway.

The law is not always applied impartially. Very often friends or allies are allowed to do things which will incur strong opposition if undertaken by another country. Professor Mihiri Kanade's article elucidates this trend in the tensions between human rights and international trade. Likewise, Iran's pursuit of nuclear missiles is a case in point. Under the terms of the Non-

proliferation Treaty, she is allowed to pursue enrichment, but not allowed to create a bomb. The West does not want Iran to pursue enrichment because they fear that Iran wants to produce a bomb and thus diplomatic efforts by the West have been vigorous and sometimes harsh in seeking to coerce Iran to give up plans for enrichment.

In stark contrast, Israel has a nuclear arsenal about the same size as China's, but she is not subject to international supervision, not subject to any treaties or controls, because she is a friend of the United States, she is allowed to do as she wishes. The proliferation of nuclear weapons in all states is the antithesis of a secure and prosperous world. There have been positive lessons in multilateral interventions and the responsibility to protect, particularly in Libya as documented in Professor Bernard Ntahiraja's article. Extending this passion for resolving regional conflicts to ending global nuclear proliferation will be a particular challenge for today's young people as they assume global leadership.

The West needs to learn that if there is to be a peaceful and lawful world, the Rule of Law must apply to all people and to all nations. Assistant Professor Tara Helfman insightfully documents this virtue, particularly as it was embodied by the Nuremberg prosecutor Francis Biddle. Living up to Biddle's example and strengthening the rule of law is a great challenge ahead of us.

In addition, we need a much better understanding that if the Rule of Law is to be applied equally within a country, governments must follow due process in relation to their own actions and also in relation to the law. Without due process, governments will make foolish decisions. They will try to sidestep the law. Without due process there is no justice.

It is a sobering thought that in recent times, freedoms hard won through centuries of struggle, in the United Kingdom and elsewhere have been whittled away. In Australia alone we have laws that allow the secret detention of the innocent. We have had a vast expansion of the power of intelligence agencies. In many cases the onus of proof has been reversed and the justice that once prevailed as been gravely diminished. This is underlined by a decision of the High Court which has effectively said the Federal Parliament has the power to overturn any Common Law right which our fathers most certainly took for granted and which our ancestors struggled to establish through the ages. It is a sobering thought that this is the position we have reached in the year 2012, even after the struggles of

the past six decades. As Professor Helfman shows, even with the desire of retribution at Nuremberg, the values of fairness, justice and the rule of law still prevailed.

I congratulate the Journal Jurisprudence in its efforts to improve and uphold the law throughout the world. This current issue of the Journal is an important contribution in this ongoing struggle, as the first author Thomas Boudreau states, between “the lawless leviathan and the rule of law.”