

FOREWORD: SMALL WORLD

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This issue of the *Duke Journal of Comparative & International Law* marks the completion of the first ten years of a periodical, which I helped to establish together with Professor Lawrence Baxter and a group of very enthusiastic and dedicated students. It is also the second issue in a non-symposium format. Like the previous issue, it represents a great variety of topics and perspectives on comparative and international law. At the same time, however, it appears to me that a common theme runs through most of the articles and notes. Given the non-symposium format of the issue, this is not the result of a design by the editors. On the other hand, in my view, it is not fortuitous either. I will return to this point at the end.

The first article in this issue by Dr. Alexander Bruns of Freiburg University, Germany, compares German and American defamation laws with a focus on access to a journalist's sources of information. Dr. Bruns first introduces the reader to the various remedies available to the plaintiff in defamation cases under German law, which, in contrast to American law, does not limit the injured party to money damages. While in this respect German practice is more attractive to plaintiffs, access to information from media sources that might support a plaintiff's case is, in terms of procedure, not so easily obtained. Pretrial discovery is not available. Dr. Bruns goes on to explain that certain functionally comparable procedural devices have limited application. He examines in detail the journalist's privilege not to reveal information under both laws with an emphasis on statutory shield laws in force in some thirty states of the United States. In the absence of such specific legislation, German courts rely entirely on constitutional rights to limit the obligation to disclose information. Dr. Bruns concludes his analysis with insightful observations on some remarkable similarities in American and German defamation proceedings. While confidential informants enjoy an absolute protection in Germany, quite unlike their precarious position in the United States, access to internal media

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information appears to be available to the same extent under both systems. This, Dr. Bruns believes, may reflect a common democratic concern with the control of media power.

The following article by Simon Chesterman of Oxford University, England, explores the elements of crimes against humanity as they emerge from the practice of the various international tribunals previously or currently in existence (with particular emphasis on the International Criminal Tribunal for Rwanda (ICTR)) and from the Statutes of these tribunals as well as the Rome Statute of the International Criminal Court of 1998. First, Mr. Chesterman discusses the definitions of crimes against humanity in these documents which are, unfortunately, not identical. All of the relevant instruments require that certain enumerated criminal acts are committed under defined circumstances, but these circumstances are not uniformly defined. It appears that an armed conflict, as a required element of the crime against humanity, though specified as such in the Nuremberg Charter and the Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY), has not become part of international customary law. Likewise, Mr. Chesterman points out, an attack on a civilian population can constitute a crime against humanity under customary international law and the Rome Statute, even in the absence of discriminatory grounds for the attack, as they are provided for in the Statute of the ICTR. Two core elements of a crime against humanity thus remain—that an attack is of widespread or systematic character and that it is directed against any civilian population. In the main part of his article, Mr. Chesterman analyzes these core elements and their application in the case law. He then proceeds to submit three offenses to a more specific examination: murder, extermination, and rape. Finally, Mr. Chesterman attempts to forecast the future role of the International Criminal Court in light of the uncertainties and inconsistencies he finds in the practice of the ad hoc tribunals.

In the next article, Mr. Alejandro Posadas, a Mexican lawyer who received his LL.M. from Duke five years ago, explores the recent efforts to combat corruption in an international setting. He makes it clear how short and dramatic the history of this development actually is. It dates back no further than thirty years, and began with the Watergate investigation which disclosed that multinational companies had not only made illegal campaign contributions in the United States, but had also channeled money to foreign governments and foreign political parties. Eventually, this discovery led to the

enactment of the Foreign Corrupt Practices Act (FCPA) in 1977. Mr. Posadas analyzes this act, as amended twice since its enactment. He then traces the ramifications, in a number of countries, of the American investigations and reactions to international bribery. Also, he discusses the early attempts at the international level to address the problem and the reasons for their failure. It was not before 1988 that the collapse of the communist bloc, the rise of market economies, and more open international trade in most parts of the world provided a new impulse for combating corruption in a coordinated international effort. A 1996 U.N. Declaration addressed the problem in a more balanced fashion, according to Mr. Posadas, than an earlier act of 1975. Serious work aimed at binding international agreements began in the framework of regional organizations after U.S. companies complained about competitors in other countries using bribes to influence foreign governments to their advantage, a practice that, when followed by Americans, would result in criminal liability. An OECD Convention on combating bribery was adopted in 1997 and went into force 1999. A similar Convention was concluded within the framework of the OAS and became effective in 1997. Like the FCPA, the two Conventions include provisions to criminalize bribery and improve corporate accounting practices. In a most illuminating fashion, Mr. Posadas compares the Conventions with respect to many important details. He then highlights anti-corruption efforts within the European Union, the World Bank group and other organizations. He concludes with a thoughtful evaluation of the accomplishments and possible setbacks in the realm of international cooperation combating corruption.

In his essay on certain aspects of the Pinochet case in England, Professor Michael Byers of Duke, formerly at Cambridge and Oxford, explores non-legal factors surrounding the British extradition proceedings of General Pinochet. He argues that these non-legal factors had a pronounced impact on the legal resolution of the case itself. After recounting the development of the Pinochet case prior to the appeal before the House of Lords, Professor Byers points out several factors distinguishing the situation in that forum from the circumstances that existed in the Divisional Court, the first court to hear the case. As Byers explains in detail, among the five Law Lords chosen to sit in the Pinochet case were four with a somewhat unusual background. In addition, counsel employed by the Crown and by human rights groups intervening in the proceedings were highly regarded specialists in international law who presented a full and

focused discussion of the immunity issue. Thus the hearings took much more time than in the lower court. Finally, greatly heightened media attention was devoted to the Pinochet proceedings in Britain's highest court which Professor Byers, having witnessed the events as a participant advising human rights organizations, describes most vividly. As he puts it succinctly: "There is no question that the Law Lords felt the eyes of the world upon them." After the first panel's groundbreaking decision (Pinochet I), refusing to grant immunity to a former head of state accused of crimes of torture, had to be overturned because of the appearance of bias on part of one of the judges (Pinochet II), a second panel of seven Law Lords was convened. This time the hearings lasted three weeks, a record for the House of Lords. Professor Byers offers his most valuable insights into the surrounding circumstances and the twists and turns the Pinochet drama took at this point. Although the second panel, like the first, denied full immunity in Pinochet III, the majority of its members took a more conservative approach and chose to rely primarily on treaty and statutory law rather than on customary international law. As a consequence, the denial of immunity was limited to the time after the British Torture Convention and Criminal Justice Act of 1988 went into effect. In his concluding remarks, Professor Byers comments on the non-legal factors, partly constraining, partly increasing the options available to the various actors in the case.

In her note on Ireland's corporation tax policy in the light of EU law, Julia R. Blue, who received her J.D. from Duke in 2000, first describes the discussion of the impact of direct taxes on the Common Market since the beginnings of European integration. It was, of course, realized early on that tax policies and laws could be used by member states so as to attract capital and business operations. However, various reports and initiatives designed to address the issue did not result in effective harmonization of corporate tax rates and structures. Ireland, which joined the European Communities in 1973, has clearly benefited from this situation. In an effort to overcome the country's economic distress, Ireland's policymakers decided to systematically reduce its rate of taxation on corporate profits to one of the lowest rates in Europe. As Ms. Blue explains in detail, this policy appears to have been extremely successful in terms of stimulating economic growth and dramatically lowering the unemployment rate. The low rate of corporation tax is commonly cited as at least one of the more important reasons for Ireland's

recent economic boom. Of course, not everyone is happy about this success story. France and Germany, in particular, maintain a 33.33 percent and a 45 percent corporate tax rate, respectively, and they complain that the low Irish tax rate is distorting competition. But the legal framework of the European Union, as Ms. Blue points out, provides for only limited Community powers in the area of direct taxes. Basically, the Commission can act only if certain tax rules produce results that amount to the granting of illegal state aid to businesses. After the Commission took action with respect to certain aspects of Ireland's corporate tax system under Article 92 of the EC Treaty on state aid, Ireland agreed to make changes in that system. Those changes were carried out in 1999. Ireland did not, however, abandon its general policy of stimulating growth through low corporate rates of taxation. Ms. Blue argues convincingly that the existing legal framework does not allow the EU to force Ireland into harmonization of its tax policies with high-tax member states. Article 100 of the EC Treaty, which provides the only conceivable basis for such harmonization, insulates each member state from an imposed change of its direct taxation policies by requiring unanimity in the Council where each member state has a vote. Thus each member has veto power in this area. Because of this power, the Celtic Tiger can continue to roar defiantly.

The note concluding this issue, authored by Mike Perry, a Canadian barrister and solicitor who received his LL.M. from Duke in 2000, discusses the desirability and feasibility of a Canadian-U.S. insolvency convention. Mr. Perry explains the difficulties presently encountered in cross-border insolvency proceedings, in the absence of international coordination of the proceedings by treaty, and the negative effects an anticipation of such difficulties may have on cross-border investment and lending. Mr. Perry reviews efforts made in the past to remedy this serious shortcoming and concludes that they have been mostly unsuccessful. Even within the EU where the EC Treaty has provided for harmonization of bankruptcy proceedings since 1957, various draft conventions have not been adopted. Mr. Perry argues, however, that the most recent EU Convention of 1995 (also not yet in force) can serve as a model for Canada and the United States. In fact, some of the European provisions may be considered codified principles of customary international insolvency law. Thus, in Mr. Perry's opinion, "Canadian and U.S. bankruptcy laws may be influenced or ultimately determined by rules that neither country drafted or approved." This should provide an additional stimulus for

both countries to adopt a bilateral convention on insolvency. In Mr. Perry's opinion, a uniquely Canadian-U.S. bankruptcy instrument would serve the mutual interests of both parties better than a multilateral treaty or customary rules. Mr. Perry points out the inherent likeness of Canadian and U.S. bankruptcy principles. Yet, notwithstanding these similarities, a 1979 bilateral agreement on cross-border insolvency remained unratified in both countries. Mr. Perry suggests that judges from the United States and Canada should participate in drafting a new convention. This, he thinks, would help to strike a fair balance between uniform, bilateral cooperation and the protection of local creditors. He also advocates use of the NAFTA dispute settlement mechanism for the resolution of disputes regarding the interpretation and implementation of the future convention. In the end, however, Mr. Perry raises an array of skeptical questions concerning the feasibility of a convention. Still, he believes the project must be pursued and he suggests the NAFTA framework can help it to succeed.

Looking back at these six contributions to scholarship in international and comparative law, one is bound to think: Small World! To be sure, we do not live in the One World that the political rhetoric of an earlier era proclaimed. A multiplicity of political and legal systems continues to exist. But how close together are they now?

Defamation laws can be fruitfully compared and can influence each other in our media dominated Western societies, as Dr. Bruns shows in his article. Transnational agreement and cooperation have become powerful instruments for the enforcement of international human rights through criminal law, even against once immune dictators and their followers, as is evident from Mr. Chesterman's article and Professor Byers' essay. Combating trans-border corruption, at first seemingly of concern only to one country (albeit a superpower), can become an international concern within a short period, as Mr. Posadas demonstrates. One country's tax policies (even a small country's) can have enormous impact in a common market on the other member states and their economies, as Ms. Blue discusses. And, as Mr. Perry points out, in the NAFTA group of countries, trans-border insolvencies must be addressed by lawmakers because both the impact of such insolvencies on their mutual

economic interests and, ironically, the influence of legal developments on the other side of the Atlantic necessitate a response.

The common theme running through the contributions to this issue of our Journal and many other contemporary publications of lawyers worldwide is the greatly intensified interdependence of political, economic, and legal systems from which there is no viable escape. Like it or not, globalization is upon us.