Australian and New Zealand
Society of International Law

anzsil newsletter

Welcome to the April edition of the ANZSIL newsletter.

In this edition

News in brief

Make sure you register for the ANZSIL conference!

From the Editors

ANZSIL Members are reminded to register soon for the upcoming annual conference to be held in Wellington from 5-7 July 2012. We look forward to seeing you in New Zealand, for what is sure to be a lively and productive conference.

This Newsletter contains the regular updates on practice in public international law from the Australian and New Zealand governments. Thank you as always to the Attorney-General's Department, the Department of Foreign Affairs and Trade, and the Ministry of Foreign and Affairs and Trade for supplying these.

There have been a range of achievements by Australian and New Zealand international lawyers to report in this Newsletter.

We extend our particular congratulations to two ANZSIL members for major awards they received at the recent meeting of the American Society of International Law in Washington D.C.

At the ASIL meeting James Crawford was the recipient of the Manley O. Hudson Medal, and Sundhya Pahuja was the recipient of the Certificate of Merit in a Specialized Area of International Law, for her recent book *Decolonising International Law: Development, Economic Growth and the Politics of Universality*.

We are also delighted to report on the success of Australian and New Zealand teams in the Jessup International Law Moot Court Competition. This year was very much one for trans-Tasman success with the University of Auckland reaching the Semi Final Rounds, and the University of Melbourne reaching the Quarter Final Rounds.

Sarah McCosker and **Tim Stephens**

From the President

As you will see from the many activities described in this edition of the Newsletter, it has already been a busy year for Australian and New Zealand international lawyers, with much more to come on the ANZSIL program and in other fora. Of particular note have been the recognition of the achievements and contributions of James Crawford and Sundhya Pahuja by the American Society of International Law at its annual meeting earlier this year. In accepting the award of the Manley O Hudson medal, James Crawford delivered a wide-ranging address which was a learned, hard-hitting and passionate apologia for the importance and distinctiveness of the discipline of international law that will provide stimulating reading when it appears in published form (summary here). Congratulations also to all those teams who participated in the Australian and international rounds of the Jessup Moot Competition, especially to those who made it to the advanced stages of the competition (to whom ANZSIL provides some modest financial support) – as well as thanks to the organisers.

Since the last Newsletter, the ANZSIL International Law Economic Law Interest Group and the Sydney Centre for International Law at the Faculty of Law, University of Sydney held the second research symposium jointed organized by SCIL and ANZSIL (under the leadership of Dr Brett Williams). Once again, the event attracted a committed group of scholars and students working in the field. Also in February, while not an ANZSIL event (though with the involvement of ANZSIL members), a major conference on the first ten years of the International Criminal Court was organized at the University of New South Wales by the Australian Human Rights Centre and the Faculties of Law and Arts at Social Sciences at UNSW. The conference featured the ICC President, Judge Sang-Hyun Song, ICC Registrar Silvana Arbia, ICC Deputy Prosecutor Fatou Bensouda, Christian Wenaweser former President, ASP, and a number of renowned academic, government and civil society experts on the Court. Papers from the conference will appear in a number of leading journals over the next 18 months.

ANZSIL Annual Conference: As mentioned elsewhere in this Newsletter, the ANZSIL annual conference is drawing near (5-7 July 2012) and I would urge you to register for it as soon as possible (and to renew your membership on the way through if yo have not already done this). In addition to the subjects dealt with by papers already on the program, there will also be opportunities to discuss the many recent developments at the international level, including the *Lubanga* judgment of the ICC, the *Taylor* judgment of the SCSL, recent judgments of the ICJ and decisions of the UN human rights treaty bodies, and international trade law developments, to mention just a few.

Joint ANZSIL-AsianSIL conference: I am also pleased to confirm the holding of the inaugural *Joint Conference of ANZSIL and the Asian Society of International Law* to be held in Sydney on 25 and 26 October 2012. The call for papers has been issued and closes on 30 May 2012; the conference website is being developed and registration details will be available soon. I would encourage you all to participate in this event.

ANZSIL and the electronic age: At the recent ASIL meeting I was particularly taken by the institution of ASIL Cables, a blog from the conference reporting on various sessions and other events. One of the topics I would like to put before the ANZSIL AGM in July is how we might make better use of the media of publicise our activities and to provide a better service to members (or greater opportunities for them to participate). I would welcome your thoughts on what we might do and how we might do it.

I look forward to seeing you in Wellington in July and Sydney in October.

Andrew Byrnes

American Society of International Law Awards

We are delighted to acknowledge the achievements of two ANZSIL members for awards they received at the recent meeting of the American Society of International Law in Washington D.C.

James Crawford was the recipient of the Manley O. Hudson Medal.

The American Society of International Law bestows from time to time, without regard to nationality, a medal to commemorate the life work of Manley O. Hudson, a distinguished American international lawyer who was, among other things, a judge on the Permanent

Court of International Justice, and was a member of the International Law Commission. The Manely O. Hudson Awards is made for scholarship and achievement in international law. James Crawford's most recent book is *The Cambridge Companion to International Law* (Cambridge University Press, 2012), co-edited with Martti Koskenniemi.

Sundhya Pahuja was the recipient of the Certificate of Merit in a Specialized Area of International Law, for her book *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (Cambridge University Press, 2011).

The book jacket describes the work as follows:

The universal promise of contemporary international law has long inspired countries of the Global South to use it as an important field of contestation over global inequality. Taking three central examples, Sundhya Pahuja argues that this promise has been subsumed within a universal claim for a particular way of life by the idea of 'development'. As the horizon of the promised transformation and concomitant equality has receded ever further, international law has legitimised an ever-increasing sphere of intervention in the Third World. The post-war wave of decolonisation ended in the creation of the developmental nation-state, the claim to permanent sovereignty over natural resources in the 1950s and 1960s was transformed into the protection of foreign investors, and the promotion of the rule of international law in the early 1990s has brought about the rise of the rule of law as a development strategy in the present day.

2012 Annual Conference

The Twentieth Annual Conference of the Australian and New Zealand Society of International Law (ANZSIL) will be held from 5-7 July, 2012 in Wellington, New Zealand.

Registration is now open for the conference which will be hosted by the New Zealand Centre for Public Law at Victoria University of Wellington.

There are reduced registration rates for ANZSIL members. If you have not renewed your membership for 2012 and would like to register please follow this link.

The 2012 Conference Registration form is available here.

The Provisional program is available here.

The conference website (with suggestions for accommodation) can be accessed here.

Distinguished speakers at the conference include:

- **Professor Jan Klabbers**, Professor of International Organisations Law and Director of the Centre of Excellence in Global Governance Research, University of Helsinki
- **Ms Valerie Hughes**, Director, Legal Affairs Division, World Trade Organization
- **Professor Richard Fentiman**, Professor of Private International Law, University of Cambridge
- **Professor Ivan Shearer**, Emeritus Professor of Law, University of Sydney (formerly Challis Chair of International Law), Adjunct Professor, School of Law, University of South Australia

Recent Australian Practice in International Law

International tobacco plain packaging litigation

The Australian Government is currently defending legal challenges to its recently introduced tobacco plain packaging measures in three fora: Constitutional challenges before the High Court of Australia, investor-state arbitration and dispute settlement in the World Trade Organization (WTO). The plain packaging measures, which will require tobacco product retail packaging to be of a standard shape and colour and prohibit the use of tobacco industry logos, brand imagery, colours and promotional text, are part of a comprehensive suite of measures that will contribute to efforts to reduce smoking rates in Australia (hyperlink: http://www.yourhealth.gov.au/internet/yourhealth/publishing.nsf/Content/tobacco-label-passedleg).

British American Tobacco, Philip Morris Limited, Imperial Tobacco (and a related company Van Nelle) and Japan Tobacco International have each filed writs in the High Court of Australia challenging the constitutional validity of the plain packaging measure. Imperial Tobacco is also challenging Australia's system of graphic health warnings. The British American Tobacco matter was heard on 17 19 April on an agreed set of facts and questions reserved; the JTI matter also proceeded on those dates, on the basis of a demurrer. Philip Morris and Van Nelle are intervening in the British American Tobacco matter. The parties' written submissions in these proceedings are available to the public on the High Court's website (hyperlink: http://www.hcourt.gov.au/cases/current-cases-submissions), and the hearings will also be open to the public.

Philip Morris is also challenging the measures under the Australia-Hong Kong bilateral investment treaty dispute settlement provisions, with Philip Morris Asia submitting a formal notice of arbitration to the Australian Government on 21 November 2011. In responding to the notice the Government rejected Phillip Morris Asia's claims and the matter is proceeding to arbitration under the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules 2010. Three arbitrators will hear the case with Professor Don McRae of the University of Ottawa appointed by Australia and Professor Gabrielle Kaufmann-Kohler appointed by Phillip Morris Asia. The third arbitrator, and chair of the arbitration, will be appointed by the Secretary-General of the Permanent Court of Arbitration. Information on the proceedings, including documents, is available on the Attorney-General's website (hyperlink: http://www.ag.gov.au/Internationallaw/Pages/Investor-State-Arbitration---Tobacco-Plain-Packaging.aspx).

WTO Members Ukraine and Honduras have requested consultations with Australia, the first step in the formal WTO dispute settlement process, claiming that the plain packaging measures are inconsistent with Australia's WTO obligations. Ukraine and Australia held consultations on 12 April in Geneva with WTO Members New Zealand, Norway, Canada, Brazil, Uruguay, EU, Guatemala and Nicaragua joining as third parties. A date for consultations with Honduras has yet to be agreed. Australia has consistently engaged with WTO members with regard to the plain-packaging measures, and will participate in consultations in a constructive manner and vigorously defend any disputes that follow. Information on these disputes will be available on the Department of Foreign Affairs and Trade's website (hyperlink: http://www.dfat.gov.au/trade/negotiations/disputes/index.html).

Anti-Counterfeiting Trade Agreement

Thirty-seven countries concluded negotiations for the Anti-Counterfeiting Trade Agreement (ACTA) during November 2010. The ACTA seeks to establish a new standard of intellectual property enforcement to combat the high levels of commercial-scale trade in counterfeit and pirated goods worldwide, by:

• improving international cooperation;
• establishing enforcement best practice; and
• enhancing the enforcement legal framework worldwide.

On 1 October 2011 the Hon Dr Craig Emerson MP, Minister for Trade, signed ACTA on behalf of Australia at a ceremony in Tokyo, Japan. Seven other ACTA negotiating parties (Canada, Japan, the Republic of Korea, Morocco, New Zealand, Singapore and the

United States) also signed.

Australia is now undertaking the domestic processes necessary to ratify the ACTA. The ACTA text was tabled in Parliament on 21 November 2011 along with a National Interest Analysis and Consultation document. Importantly, the National Interest Analysis states that the implementation of ACTA in Australia will not require any changes to existing Australian laws. The Joint Standing Committee on Treaties (JSCOT) is currently conducting an inquiry into ACTA. Twenty-one written submissions have been provided, and JSCOT held two public hearings during March 2012. JSCOT will report to the Government within twenty Parliamentary sitting days as to whether Australia should ratify the ACTA.

Participation as a Third Party in the WTO Appellate Body hearing of United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (DS 381)

On 15 September 2011 the Panel circulated its report in the dispute brought by Mexico against the United States (US) regarding measures concerning the importation, marketing and sale of tuna and tuna products. The Panel rejected Mexico's claims that the US had breached Articles 2.1 and 2.4 of the WTO Agreement on Technical Barriers to Trade ("TBT Agreement"). However, the Panel found in favour of Mexico in relation to Article 2.2 of the TBT Agreement, finding that Mexico had demonstrated that US dolphin safe labelling provisions were more trade-restrictive than necessary to fulfil legitimate objectives. The Panel did not rule on Mexico's claims of breach of the General Agreement on Tariffs and Trade ("GATT") Articles I:1 and III:4.

On 20 January 2012, the US appealed certain issues of law and legal interpretation. On Appeal, the US argued that the dolphin safe labelling provisions did not constitute technical regulations, as defined by the TBT Agreement. On 25 January 2012 Mexico also lodged an appeal on certain issues of law and legal interpretation, arguing that the Panel erred in the interpretation and application of the phrase "treatment no less favourable" under Article 2.1 of the TBT Agreement and erred in excising judicial economy by failing to decide on Mexico's claims under the GATT.

Australia participated as a third party to the proceedings before the Appellate Body. Given the size and complexity of the Appeal, the Appellate Body requested an extension to the 90 day timeframe. It is expected that the Appellate Body's report will be circulated to WTO members by no later than 16 May 2012.

The Optional Protocol to the Convention Against Torture – Government tabling of a National Interest Analysis

"On 28 February 2012 the Australian Government tabled a National Interest Analysis (NIA) with its national Parliament proposing that Australia ratify the Optional Protocol to the Convention Against Torture and Other Cruel, inhuman or Degrading Treatment or Punishment (OPCAT). The OPCAT aims to support prevention of torture and other cruel, inhuman or degrading treatment or punishment through a regime of both international and domestic monitoring of places of detention. Australia signed the OPCAT on 19 May 2009. The NIA states that it is proposed to ratify the OPCAT after the introduction and passage of legislation in all Australian jurisdictions (the Commonwealth and each State and Territory) to provide for monitoring of Australia by the UN Subcommittee on the Prevention of Torture. The NIA also states the intention that domestic monitoring would be undertaken by a range of bodies at the national and state and territory level with these arrangements to be determined and implemented post-ratification. This is proposed to be pursuant to the extended period of three years provided for under Article 24 of the OPCAT. The NIA will be considered by the Joint Standing Committee on Treaties which will report later this year. The OPCAT currently has 63 States Parties including the UK, France, Germany, Sweden and New Zealand.

The adoption of a general framework conservation measure to establish CCAMLR marine protected areas

In November 2011, after two weeks of negotiations in Hobart, Members of the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) adopted a conservation measure setting out a general framework for the establishment of CCAMLR marine protected areas. This followed CCAMLR's decision in 2009 to establish a representative system of marine protected areas in the CCAMLR Area. That same year, CCAMLR established the world's first entirely high seas marine protected area, south of the South Orkney Islands near the Antarctic Peninsula.

The adoption of the general framework conservation measure is a significant step forward in establishing a representative system of marine protected areas in the Southern Ocean. The general measure will guide countries in the preparation of individual marine protected area proposals to be considered by the Commission in 2012 and beyond.

Consideration of the Third Optional Protocol to the Convention on the Rights of the Child

The Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (the Third Optional Protocol) was adopted by the United Nations General Assembly on 19 December 2011 and opened for signature on 28 February 2012.

The Third Optional Protocol will allow communications to be made to the Committee on the Rights of the Child in relation to breaches of the Convention on the Rights of the Child or its existing Protocols. The Third Optional Protocol permits communications to be made by individuals or groups of individuals in respect to a State party that has ratified the Third Optional Protocol. States parties shall have a 6 month period in which to make submissions in relation to a communication. Following the issuance of views by the Committee on the Rights of the Child, States Parties will have an opportunity to respond. The Committee's views are not binding.

The Australian Government is considering whether to sign the Third Optional. Submissions were sought from the public via the Departmental website and closed on 10 April. Submissions will be posted on the Departmental website shortly. Consultations within the Commonwealth and with the States and Territories are continuing.

Recent New Zealand Practice in International Law

First ever bilateral investment treaty arbitration held in New Zealand

In February 2012, the first bilateral investment treaty arbitration hearing to be held in New Zealand took place in the Sky City Convention centre in Auckland, between a United Kingdom investor and the Republic of Indonesia (see Rafat Ali Rizvi v. Republic of Indonesia (ICSID Case No. ARB/11/13)). The hearing – before an arbitral tribunal consisting of Dr Gavan Griffith QC, ICJ Judge Joan Donoghue and Professor Muthucumaraswamy Sonorajah – concerned an application by Indonesia to summarily dismiss Mr Rizvi's claim. It was only the fifth case to date to consider the 2006 powers under the ICSID Arbitration Rules for investment treaty tribunals to dismiss claims which are "manifestly without legal merit" prior to a full evidential hearing (Rule 41(5)).

At the Auckland hearing, Mr Rizvi was represented by Salans LLP (counsel on record) and by Chapman Tripp, with partner Daniel Kalderimis presenting legal argument on the correct test to be applied under Rule 41(5).

A decision was notified on 4 April 2012, in which Mr Rizvi's submissions were accepted and the Republic of Indonesia's summary dismissal application was rejected.

South Pacific Regional Fisheries Management Organisation

New Zealand is the depositary for the Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean, which will establish the South Pacific Regional Fisheries Management Organisation (SPRFMO). Once established, the SPRFMO will govern the non-highly migratory high seas fisheries of the South Pacific Ocean.

As at 28 March 2012, seven countries have ratified, acceded or approved the Convention (New Zealand, Australia, Belize, Cook

Islands, Denmark in respect of the Faroe Islands, the European Union and Cuba). The Convention requires eight ratifications to enter into force, however that number must include at least three coastal States (including at least one each from the western and eastern sides of the Pacific Ocean), and three fishing States. Given these entry into force conditions, the Convention requires ratification from a coastal State in the eastern Pacific to enter into force. New Zealand is hopeful that the Convention will enter into force during 2012.

Chile hosted the third and final session of the Preparatory Conference on 30 January to 3 February 2012. The session agreed new interim measures for jack mackerel including a 2012 catch limit. If the Convention has entered into force, the first Commission meeting would be held in late January 2013 in Auckland, New Zealand.

WTO Disputes Settlement Cases

The first half of 2012 will see the conclusion of three WTO disputes settlement cases that litigate alleged inconsistencies under the WTO Agreement on Technical Barriers to Trade (TBT Agreement). Panel Reports for US – COOL (concerning the US' mandatory labelling regime for beef and pork), US – Clove Cigarettes (concerning the US measure to ban clove flavoured cigarettes which aimed to discourage youth from smoking) and US –Tuna II (concerning the US' legislation setting out "dolphin safe" labelling requirements for tuna products) have already been circulated with the Appellate Body phase already underway. All three cases consider the legal tests applicable to particularly Article 2.1 (national treatment) and Article 2.2 (technical regulations shall not be more trade restrictive than necessary to fulfil a legitimate objective) of the TBT Agreement and the analysis by the Appellate Body will shed significant light on their interpretation. For example, both the US-COOL and the US – Tuna II Panel Reports have confirmed that "consumer information" is a legitimate objective under Article 2.2 of the TBT Agreement and that the Article 2.2 list of legitimate objectives is a non-exhaustive one.

Trans Tasman Jessup Success

Caroline Foster reports on the success of the University of Auckland Jessup team:

The University of Auckland Jessup moot team competed successfully in the Philip C. Jessup International Law Moot Competition from 25-31 March 2012. The team comprised Benedict Tompkins, Mark Tushingham, Matt Beattie and Namita Singh. I was the team's international law adviser, and the co-coach was Isaac Hikaka of Lee Salmon Long.

The Auckland team were in the top four teams internationally, alongside Columbia, Peking and Moscow State University. The team won the prize for the best applicant memorials in the competition and won the runner-up award for combined memorials (the applicant and respondent memorials). The Auckland team was proud to represent New Zealand and made many new friends among the participants and judges attending from countries and universities all over the world. To name a few, Auckland competed against Oxford, Melbourne, the Baltics, Slovenia and Uganda as well as Columbia and Peking. Again, we are very grateful for the support and assistance from ANZSIL. Particular thanks to the team's primary funder, the New Zealand Law Foundation for their support.

Tania Voon reports on the success of the University of Melbourne Jessup team:

The University of Melbourne Jessup team reached the Quarter-Finals in Washington DC and received four awards. The team comprised Joshua Anderson, Alexander Maschmedt, Ben Murphy, Katherine Yang, Suzanne Zhou, and were coached by Timothy Lau.

L-R: Professor James Crawford, Suzanne Zhou, Alexander Maschmedt, Timothy Lau (coach/LLB graduate), Katherine Yang, Ben Murphy, Joshua Anderson.

In the preliminary rounds, the University of Melbourne won its four moots against the University of Ottawa, Kathmandu School of Law (Nepal), Centro Universitario Ritter dos Reis (Brazil), and the Russian-Armenian Slavonic University (Armenia). Melbourne proceeded to the run-off rounds ranked 1st out of the top 32 teams. The team went on to defeat the Honourable Society of King's Inns (Ireland) in the Run-off Rounds and the University of Heidelberg in the Octo-Finals. The team then lost to the University of Auckland in a close Quarter-Final. So Australia and New Zealand were well represented in the last rounds!

The team's dedication and advocacy skills were recognised at the awards ceremony on Saturday night with the award of:

- Best Overall Respondent Argument (taking account of both written and oral pleadings);
- Best Oralist in the Preliminary Rounds (Joshua Anderson);
- Fourth Best Oralist in the Preliminary Rounds (Alexander Maschmedt); and
- Seventh Best Oralist in the Preliminary Rounds (Katherine Yang).

The team and I would like to thank ANZSIL very much again for its generous support. The team was very grateful for ANZSIL's contribution and was delighted to have the opportunity to participate in the international rounds. The team and Melbourne Law School were also of course very pleased with the overall results.

Anthony Cassimatis reports on the success of the University of Queensland Jessup team:

The UQ Team (who were Australian champions) had a tough draw in the preliminary rounds in Washington coming up against the Moscow State University (the eventual winners of the Jessup World Championship, defeating Columbia University in the final) and the Norman Manley Law School (Jamaica).

The Jamaican team went on to defeat King's College London in the first knock-out round before bowing out of the competition. Notwithstanding their best efforts, two defeats for the UQ Team in the preliminary rounds meant that they did not progress to the knock-out stages of the competition.

The UQ team comprised Annabel Baker, Courtney Coyne, Thomas Galloway, Whitny Kapa and Jules Moxon, and were coached by Catherine Drummond.

The UQ Jessup team extends its thanks to all its supporters, particularly ANZSIL.

Upcoming Events

Law and Culture: Pacific Law and New Zealand/Aotearoa
29 – 31 August 2012, University of Auckland, New Zealand

There is little in the way of legal knowledge about how the New Zealand legal system operates in relation to Pacific peoples living here in New Zealand as well as how the New Zealand legal system interacts with its Pacific neighbours. There are studies on how New Zealand law impacts on Pacific peoples, but less attention has been paid to how Pacific peoples engage with, rather than simply passively experience the law. Even less attention is paid to the potential for discussion of the dynamic developments in Pacific law to enrich our own discussions here in New Zealand.

The aim of the Conference is to speak to those silences and to explore the New Zealand – Pacific relationship from a legal perspective. This will include examining the ways in which New Zealand law and lawyers are relevant to, and impact on, Pacific nations and Pacific peoples, including on New Zealanders of Pacific identity. It will also include discussion of current legal challenges that extend across all Pacific nations including New Zealand and Australia, such as land and natural resources; the relationship between custom and law; and the relationship between law and identity.

Further information about the conference, including the programme and registration details will be available at: www.law.auckland.ac.nz

International Law Year in Review Conference
22 February 2013, Faculty of Law, University of Sydney

The Sydney Centre for International Law is delighted to present the inaugural International Law Year in Review Conference.

The Conference will give participants insight into the latest developments in international law over the preceding year, especially those most salient for Australia. Speakers at the conference will include leading academics, practitioners and government lawyers, and willprovide an in-depth and critical analysis of contemporary developments in international law on topical themes, including Australia's participation in international cases in the International Court of Justice and the World Trade Organization. Participation will enable lawyers and non-lawyers alike to remain abreast of important trends in international affairs.

Further information concerning the conference will be made available here.

New Zealand Yearbook of International Law

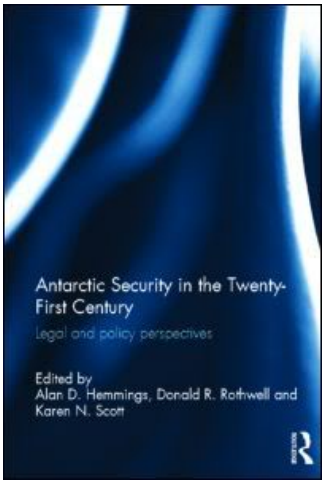
The New Zealand Yearbook of International Law is currently seeking submissions for volume 9, due to be published in October 2012.

The Yearbook is an annual, internationally refereed publication intended to stand as a reference point for legal materials and critical commentary on issues of public international law with particular reference to developments of relevance to New Zealand, Australia, the Pacific and Antarctica.

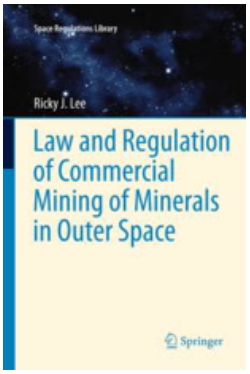
Please send your submissions to the Editor, Karen Scott.

Recent Publications by ANZSIL Members

Alan D. Hemmings, Donald R. Rothwell and Karen N. Scott (eds), *Antarctic Security in the Twenty-first Century: Legal and Policy Perspectives* (Routledge, 2012).



Ricky Lee, *Law and Regulation of Commercial Mining of Minerals in Outer Space* (Springer, 2012).



Ben Saul, Steven Sherwood, Jane McAdam, Tim Stephens and James Selzak, *Climate Change and Australia: Warming to the Global Challenge* (Federation Press, 2012).

Internship Reports

Under its internship support program, ANZSIL provides financial support for unpaid internships with International Organizations and NGOs.

Robert Clarke

From August 2011 to February 2012, I undertook an internship with the Office of the Co-Prosecutors (OCP) in the Extraordinary Chambers in the Courts of Cambodia (ECCC), with the assistance of an internship support grant from ANZSIL. The ECCC is a Cambodian court of mixed national and international composition created to try seniour leaders of Democratic Kampuchea (DK) and persons most responsible for crimes committed under the DK regime (17 April 1975 – 7 January 1979). Its subject matter jurisdiction includes both crimes against international law (genocide, grave breaches of the Geneva Conventions of 1949, and crimes against humanity) and certain offences under the Penal Code 1956 (Cambodia) (homicide, torture and religious persecution).

Like the Chambers themselves the OCP has both national Cambodian and multinational UN components, which made for a most interesting work environment. During the first half of my internship, my work was focused chiefly upon Case 004, which concerns two massive purges carried out in the Central and Northwest Zones of DK during the regime's bloody heyday. Along with Case 003, which concerns security centres and worksites reportedly connected to the Revolutionary Army of Kampuchea, Case 004 has been the subject of much controversy. During my internship, International Co-Investigating Judge Siegfried Blunk resigned, citing perceptions of political interference. After his successor Laurent Kasper-Ansermet arrived, the Cambodian Supreme Council of Magistracy declined to recognise his authority, notwithstanding its obligations under an agreement with the United Nations. Helping to push this case forward was often equal parts engaging and frustrating.

However, as my internship progressed, preparation for the commencement of trial in Case 002 inevitably consumed more and more of my time. This case originally concerned four seniour leaders of DK and their participation in a joint criminal enterprise encompassing all the criminal policies of the regime. However, shortly before the start of the trial, the Trial Chamber decided instead to hold a series of sub-trials, of which the first will deal only with a series of forced population movements carried out early in 1975 and 1976.

At roughly the same time, one of the accused, DK Minister for Social Affairs Ieng Thirith alias Phea, was found to be unfit to stand trial and severed from the case, to be tried individually if and when her condition improves. Preparing for this hearing involved a great deal of challenging legal research since analogous fact situations were difficult to locate – information on the health of accused persons is invariably redacted from publicly available decisions. Notwithstanding that we were not ultimately successful (and I had to sacrifice my weekend – the first of many), it was rewarding to work with a great team of lawyers and interns on this matter.

As the filings that flowed from pre-trial hearings petered out and the OCP begun its final preparation for the presentation of testimonial and documentary evidence, legal research and drafting receded into the background and evidence analysis came to the fore. Thus begun in earnest my capricious relationship with CaseMap, sometimes saviour and other times tormentor of the intern. However, I learned early on that although such software tools (properly used) can be of great assistance, there is no substitute for having an intimate knowledge of the facts. Although I could draw somewhat on experience in historical research and a basic knowledge of Khmer writing, in six months one could only hope to become familiar with small portions of the case. Nonetheless, it was pleasing to parlay that familiarity into work and then see firsthand that work being put to use in court after the trial commenced.

Unlike the ICTY and ICTR, the ECCC is based in the country where the crimes were committed, in the capital, Phnom Penh, and during the trial hearings the courtroom has often been a broad spectrum of Cambodian society. Victims of the Khmer Rouge such as Buddhist monks and Muslim Cham sit alongside former Khmer Rouge cadres; in many cases cadres were themselves victims of purges. I found the Court to be an interesting encapsulation of a society still grappling with the DK period, hopefully it can assist in the process despite the criticism which has been levelled at it.

Phnom Penh itself is, of course, quite unlike Australia or New Zealand, although one would not know from the number of Australians and New Zealanders who live there - which was also true of the OCP. Concerns that morale in the Office could plummet after the Rugby World Cup final proved be unfounded after the All Blacks won a hard fought victory – one of many great days with colleagues who were as sociable as they were professional. Thus it was with a heavy heart that I ended my internship, in a last week which could not have been more bittersweet.

On the one hand, I was lucky enough to design and deliver a legal training workshop for OCP staff on joint criminal enterprise doctrine. On the other, it was reported in the press that a number of national staff members would be leaving as their wages had gone unpaid for several months – a reminder that although funding disputes between diplomats and politicians are often described in terms of abstractions they have a real human cost. I was fortunate enough to receive a grant of support from ANZSIL, which was

indispensable to financing my internship at the ECCC. Looking back, I can only hope that the community of states will likewise continue to support the Court on the rocky road to justice.

Matthew Kalyk

From January to August 2011, I was fortunate to be given the opportunity to intern at the United Nations International Criminal Tribunal for the Former Yugoslavia (ICTY), situated in the Hague in the Netherlands.

Background

The ICTY is the first international criminal tribunal to be established since the Nuremberg trials. It has heard criminal prosecutions under international law in respect the worst crimes committed on European soil since WW2. Its mandate is to try those responsible for crimes committed on the territory of the former Yugoslavia since 1991. This mandate covers both the Balkan war of 1991-1995 and the Kosovo War of 1998-1999. In these wars, together, around 110,000 people were killed and more than 2.2 million displaced. The tribunal has prosecuted over 160 defendants involved in the conflict, including Serbs, Croatians, Bosnians and Kosovars.
In a nutshell, as Yugoslavia began to collapse, each of the major territories within it (Serbia, Croatia, Bosnia & Hercegovina, Montenegro, Macedonia and Slovenia) looked towards independence. While the dynamics and politics of the war were extremely complex, of central importance was that Bosnia, a poor country sandwiched between Serbia and Croatia, had a large number of ethnic Serb and Croat minorities. In such circumstances, the Bosnian Serbs, believing that they would therefore be isolated as a national minority in an independent Bosnia, contested Bosnia's becoming independent. They pursued a political and military strategy to create a greater Serbia through ethnic cleansing – that is, forcibly clearing out people of Bosnian muslim ethnicity from strategic territories. Similar steps were taken by neighbouring Croatia in relation to Bosnian Croatians, although not to the same extent.

The case against Radovan Karadžić

My time at the tribunal was exciting. I was working for the Office of the Prosecutor (OTP) and was assigned to the biggest case at the ICTY – the case against Radovan Karadžić. During the Balkan war, Karadžić was the president of the Bosnian Serbs (known as Republika Srpska). Not only does this mean that he oversaw the political aspects of the pursuit of the Bosnian Serbs to secure key territories and create a greater Serbia, but as he acted as the Supreme Commander of the military, he also oversaw the military pursuit of those objectives.

One key element of the case, for instance, is that he implemented a directive known as Variant A/B, an order for local Serb authorities to create 'Crisis Staffs' within key municipalities were Bosnian Serbs were present. These Crisis Staffs then proceeded to take control of the areas, detain the men, expel the women and children and commit numerous atrocities in the process.

The Tribunal has jurisdiction over war crimes, crimes against humanity and genocide. Karadzić is charged with all three. Factually, the case is divided into four parts.

The first concerns the siege of Sarajevo, where Bosnian Serbs shelled and sniped the Bosnian Muslim areas of Sarajevo from strongholds in the hills. While there were a small number of military targets within the city, the sniping and shelling was frequently directed into heavily civilian areas and had the effect and intention of killing, maiming and terrorising the local muslim population. Sarajevo was a highly desirable city and its taking was one of the strategic goals of the Republika Srpska leadership. To force its muslim population out of the city would have been a significant gain for the Bosnian Serbs.

The second concerns the taking of UN hostages. As word of atrocities and aggression reached the international community, the UN sent in a number of ground troops as impartial peacekeepers (called the UN Protection Force, or UNPROFOR) and NATO initiated a number of strikes. In an attempt to ward off NATO bombing, a number of UN personnel were captured and used as human shields at locations thought to be targeted by NATO.

The third, known as the 'municipalities' component, concerns the forced takeovers by Bosnian Serb forces of strategic municipalities of mixed ethnicity and the horrific crimes that were committed in the process. Crimes such as persecution, forced expulsion, killings, torture and rape were committed as the non-Serb women and children were deported and the non-Serb men imprisoned. This followed the implementation of Variant A/B, discussed above.

The fourth component concerns the tragic events at Srebrenica. After declaring Srebrenica a UN safe zone, Bosnian Serb pressure forced the UN troops to withdraw. In the days afterwards, 8,000 men trying to escape from the enclave were rounded up and, over the space of about 5 days, summarily executed.

My internship experience

Despite the horrific nature of the charges, working to hold the perpetrators of these crimes responsible was an exciting and rewarding experience, as it seemed to be for all those at the tribunal. Further, it was an exiting time to be at the ICTY as there were many successes. During my time, for instance, the final two fugitives were apprehended and brought to the dock to stand trial. Most notable was Ratko Mladić, the general of the Bosnian Serb army. As the head of the military, Mladić was responsible for a wide range of atrocities, most notoriously, the massacre of Srebrenica.

Many of the tasks that I undertook were exactly the kind of work a paralegal would expect to do: drafting interlocutory motions, legal research, organisation of evidence, disclosure (that is, disclosing material that may suggest the innocence of the accused in any respect), and assisting with witness proofing. But I can say that, perhaps disclosure aside, none of it was boring.

I was asked to research a particular legal issue concerning whether or not the ICTY, as an ad-hoc organ of the UN Security Council, could issue a subpoena binding on the UN for production of documents contained within the UN's own archives – archives usually inviolable under the UN Immunity Convention. This issue arose when the Karadžić defence team sought to subpoeana the Security Council discussions of Diego Arria, the Venezuelan ambassador to the UN from 1991 to 1993. Arria chaired the Security Council at the time of the first 'Srebrenica crisis' in 1993 when the resolution was passed to announce Srebrenica and other areas to be 'protected zones'. The OTP had planned to call Arria to testify that, even in 1993 (nearly two years before the massacre), a genocide was well underway.

This issue involved a huge number of fascinating legal and policy issues that I was lucky enough to be involved in sorting through. The organization of the workflow and work teams within the Tribunal was fantastic for interns. The trial teams are quite small and the budget is surprisingly tight, so the interns are given more responsibility than I would have expected. There is no secretarial staff assigned to trial teams. However, this did not mean that secretarial work had just cheekily been rebadged as 'interns work'. In fact, all the lawyers seemed to have an attitude that everyone was to do their own administrative work. The fact that all the lawyers were acutely aware that we interns were not being paid may have been a factor in this attitude. Whatever the reason, the lawyers for whom I worked seemed to go out of their way to keep work interesting. On top of all this, the majority of lawyers at the tribunal that I met are fantastic people – extremely talented, motivated and hard-working lawyers as well as modest, good-humoured people. Mostly, I think, because they were energized by their belief in value the work that they were doing.

One atypical task, and by far the largest task that I completed at the Tribunal, was assisting with the drafting the final trial brief for the OTP. This task required me to draft the prosecution argument for number of the shelling incidents that occurred during the siege of Sarajevo. The two most significant were the "Markale" shellings – instances where Bosnian Serb forces fired mortar shells into the centre of the open marketplace in Sarajevo. The first, on 4 February 1994, killed over 60 people and injured 140. The second, on 28 August 1995, killed over 40 people and injured over 80. These shellings were tainted with a degree of controversy as the Serb forces denied firing the shells, claiming instead that Bosnian Muslim forces had fired on their own people to attract international sympathy and prompt NATO air strikes. My task was to sort through the evidence that had been tendered in respect of the shellings (both orally and via documentation), analyse the material for weaknesses, and prepare the argument for why the case was established. The volume of material and the technical complexity of many of the issues made the task extremely challenging. It also made completing the task extremely rewarding.

Reflections on the experience

At the end of the internship, though, while the legal aspects of the work were certainly rewarding, I found that the most valuable aspect of the experience was what occurred on a much more personal level. I felt that the insight I had into the war was incredibly significant for me as a person.

On the one hand, I was exposed to some of the worst crimes that a human being can commit. Some of the unfathomable cruelties that I read about in documents, heard directly from witnesses, and watched captured on hand-held video cameras were profoundly shocking. The sheer creativity in which people conjure up new ways to cause others pain is very sad. One witness, for instance, described a game that the guards would play with them when they wanted to defecate. The guards would take them to a small curtained-off area beside the river. While one detainee attempted to defecate, another detainee was forced to beat that person through the curtain so that the person couldn't properly finish. After a while, the detainees would simply defecate in their own clothes to avoid this procedure.

On the other hand, I learned that it would be entirely unhelpful to characterize these crimes as being committed by evil monsters in a land far, far away. The crimes were horrific, but the saddest part about them was that they were committed by apparently ordinary people in a society where empathy and the rule of law had ceased to exist.

The question that remains for me was how could people commit these crimes? While there were a multitude of complex factors that led to the war, the one that stuck with me was a lack of empathy for other groups of people. As humans, if we are able to truly empathise with another human, we find it very difficult to harm them and we also have more difficulty in accepting their harm by others. My experiences have led me to conclude that one of the most effective ways to sever empathy with a group of people is to group them into the one category – whether that be a more traditional category like ethnicity, race and sexuality or new categories like 'boat people', 'suit' or 'westie'. Categorisation concentrates our focus on aspects of the category rather than focusing on the person; on the differences of the categories to us rather than the similarities of the individual. Many victims of the war were not seen as Dragan X or Nadja Y – they were seen as, for instance, "Bosnian Muslims". It is a conclusion which I find stays with me in my thoughts of all societies – including our Australian society.

In summary, my experience reminded me of the importance of movements like those concerning human rights. The basic ideology behind human rights law is that all people are inherently valuable. They are not valuable because they are a particular type of person, but simply because they are persons. And every person deserves to be treated with basic dignity. And every society, whether that be a war-torn country or a developed country, must enact laws to ensure that every person is treated with dignity.
Part of the reason I was able to stay so long at the Tribunal, and in turn, get so much out of the experience was the generous grant given to me by ANZSIL for which I am extremely grateful. And I thank ANZSIL for that assistance and opportunity.

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