Welcome to the 24th Annual Conference of the Australian and New Zealand Society of International Law, hosted by the Centre for International and Public Law, ANU College of Law, The Australian National University.
ANZSIL gratefully acknowledges the financial and other support for the 24th Annual Conference and the ANZSIL Postgraduate Workshop provided by:

- The Commonwealth Attorney-General’s Department
- The Australian Department of Foreign Affairs and Trade
- The New Zealand Ministry of Foreign Affairs and Trade
- ANU College of Law
- Springer
- Hart Publishing
- Edward Elgar

**About the conference**

This is the Society’s 24th Annual Conference, and its theme of ‘International Law of the Everyday: Fieldwork, Friction, and Fairness’ has been chosen to explore international law’s rich and variegated present.

Participants have been invited to reflect on what comprises the everyday of international law and how international law shapes the everyday. Is the former, for instance, made up of states’ reporting and meeting under multilateral treaties; the cyclical, ritualised work of international institutions; the rhythms of claim and counter-claim characteristic of dispute resolution; the routine advisory work of international lawyers embedded in corporate, public sector, military or advocacy environments; the mostly unseen work of consular servicing and diplomatic protection carried out by governments; the implementation and monitoring of sanctions regimes; popular mobilisation of international legal argument in the media and public debate; the operationalisation of international law by NGOs and others working in the field; the familiar dramas of the classroom or the conference room; or something else?

How does international legal normativity get enacted, affirmed or called into question in such mundane settings and how might we compare and contrast the versions of international law so produced? And how do these various activities register in daily lives commonly understood in national or local terms? Can we, indeed, conceive of an everyday or a present for, of or around international law at all, when the conditions under which people live across the globe are marked by such disparity? What is at stake in assembling a particular moment – a ‘now’ – in which international law might operate and what is the history of the present international law purports to inhabit?

Can international law speak meaningfully to quotidian concerns – the question of how to live any one day – and what guidance (if any) does it offer in that respect? What are, or should be, international lawyers’ most pressing tasks for the here and now? These are among the questions that conference participants have been invited to explore.

**Conference featured speakers**

- Sundhya Pahuja, University of Melbourne
- Anthea Roberts, Australian National University
- Marco Sassòli, University of Geneva
- Richard Wilson, University of Connecticut

**Kirby Annual Lecture speaker**

- Justin Gleeson SC, Solicitor-General of the Commonwealth of Australia
2016 ANZSIL CONFERENCE
ORGANISING COMMITTEE

> Fleur Johns, UNSW Law (co-chair)
> David Letts, ANU College of Law (co-chair)
> John Reid, ANZSIL Vice President, Attorney-General’s Department (co-chair)
> Tim Stephens, ANZSIL President, University of Sydney (co-chair)
> Madelaine Chiam, University of Melbourne
> Jamie Cooper, Department of Foreign Affairs and Trade
> Alberto Costi, ANZSIL Council, Victoria University of Wellington
> Treasa Dunworth, ANZSIL Council, University of Auckland
> Camille Goodman, ANZSIL Secretary, ANU College of Law
> Sarah Heathcote, ANU College of Law
> Anna Hood, University of Auckland
> Peter Lawrence, University of Tasmania
> David Leary, University of Technology Sydney
> Bridget Lewis, Queensland University of Technology
> Christopher Michaelsen, UNSW Law
> Andrew Mitchell, University of Melbourne
> Isaiah Okorie, Australian Maritime College
> Karen Scott, ANZSIL Vice-President, University of Canterbury, Christchurch
> James Stellios, ANZSIL Council, ANU College of Law

Postgraduate Workshop convenors
> Daniel Joyce, UNSW Australia
> Petra Butler, Victoria University of Wellington

ANZSIL membership
ANZSIL was established in 1992 with the aims of:
> Developing and promoting the discipline of international law
> Supporting the teaching of international law
> Providing a forum for academics, government lawyers, NGOs, students and practitioners of international law to discuss research and issues of practice in international law
> Increasing public awareness and understanding of international law
> Liaising with other bodies in promoting any of these objects

New members are always welcome. The annual membership fee for 2016/17 is $100 AUD, payable on a calendar year basis. To become a member, or renew your membership, please visit: anzsil.org.au/membership

The advantages of annual membership of ANZSIL include:
> A special subscription rate for the Australian Year Book of International Law
> Copies of the ANZSIL newsletter
> Concession price for registration to the ANZSIL annual conference
> Membership of ANZSIL’s Interest Groups
> Invitations to special ANZSIL seminars and events
GENERAL INFORMATION

Venue locations
Maps of the venue are included on page 5 of this program and will be available at the registration desk.

Registration desk
Conference registration will take place in the University House Common Room.
ANU College of Law staff will be present at the registration desk for the duration of the conference. If you have any questions or need any assistance, please feel free to ask them.

Wi-Fi access
Free Wi-Fi access will be available for the duration of the conference.
> Network: ANU Secure/ANU Access
> Login: unihouseguest
> Password: aThEns14

Catering
Morning and afternoon tea, and lunch (Thursday and Friday) are included in the registration fee and will be served in the Hall Foyer.

Conference dinner
The conference dinner will be held at The Lobby restaurant, in King George Terrace, Parkes (opposite the rose gardens of Old Parliament House), on Friday 1 July 2016. Please note that it is necessary to register and pay for the dinner in addition to paying the registration fee for the conference.

Carbon offset
Conference registrants have been offered a carbon offset option for the conference this year. Contributions of this kind will be remitted to Greening Australia to assist with restoring landscapes, sequestering carbon, and protecting biodiversity in Greening Australia’s many projects, including in the ACT.

Disability access and inclusion
Maps of the ANU campus showing recommended wheelchair routes (including ramp and lift access), wheelchair accessible toilets, disability parking, and hearing loops may be accessed via disability.anu.edu.au/campus-access/access-maps.
Please advise staff at the registration desk of any access or accommodation needs as soon as possible so that we may be of assistance.
### DAY 1: THURSDAY 30 JUNE 2016

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<tr>
<th>TIME</th>
<th>SESSION</th>
<th>LOCATION</th>
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<tbody>
<tr>
<td>9–9.10 am</td>
<td>Welcome to Country and Conference Opening</td>
<td>Main Hall</td>
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<tr>
<td>9.10–10.30 am</td>
<td>Plenary: Keynote Speakers Marco Sassòli and Richard Wilson</td>
<td>Main Hall</td>
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<tr>
<td>11 am–12.30 pm</td>
<td>Panel 1: INTERNATIONAL DISPUTE RESOLUTION: PAST, PRESENT, AND FUTURE</td>
<td>Main Hall</td>
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<td>11 am–12.30 pm</td>
<td>Panel 2: LAND, TERRITORY, JURISDICTION</td>
<td>Common Room</td>
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<td>11 am–12.30 pm</td>
<td>Panel 3: THE INTERNATIONAL CRIMINAL COURT</td>
<td>Scarth Room</td>
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<td>1.30–2 pm</td>
<td>Book launch: ROUTLEDGE HANDBOOK OF THE LAW OF ARMED CONFLICT</td>
<td>Common Room</td>
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<td>2–3.30 pm</td>
<td>Panel 4: THE EVERYDAY OF INTERNATIONAL ADJUDICATORY TECHNIQUE</td>
<td>Main Hall</td>
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<td>2–3.30 pm</td>
<td>Panel 5: CURRENT PRACTICE OF THE UN SECURITY COUNCIL</td>
<td>Common Room</td>
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<td>2–3.30 pm</td>
<td>Panel 6: INTERNATIONAL TRADE AND INVESTMENT LAW</td>
<td>Scarth Room</td>
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<tr>
<td>3.30–4 pm</td>
<td>Meetings of ANZSIL Interest Groups</td>
<td>Common Room/Main Hall/Scarth Room</td>
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<tr>
<td>4–5 pm</td>
<td>Plenary: Keynote Speaker Sundhya Pahuja</td>
<td>Common Room</td>
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<tr>
<td>6 pm</td>
<td>ANNUAL KIRBY LECTURE RECEPTION</td>
<td>Finkel Theatre</td>
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<tr>
<td>6.30–7.30 pm</td>
<td>ANNUAL KIRBY LECTURE ON INTERNATIONAL LAW</td>
<td>Finkel Theatre</td>
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### OVERVIEW OF SESSIONS

### DAY 2: FRIDAY 1 JULY 2016

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<th>TIME</th>
<th>SESSION</th>
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<tr>
<td>9.15–10.30 am</td>
<td>Plenary: Keynote Speaker Anthea Roberts</td>
<td>Main Hall</td>
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<tr>
<td>11–12.30 pm</td>
<td>Panel 7: THE EVERYDAY IN WAR AND ITS AFTERMATH</td>
<td>Main Hall</td>
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<td>11–12.30 pm</td>
<td>Panel 8: LAW AND POLICY-MAKING BEYOND THE STATE</td>
<td>Common Room</td>
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<td>11–12.30 pm</td>
<td>Panel 9: DISPUTES OVER THE SOUTH CHINA SEA</td>
<td>Scarth Room</td>
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<tr>
<td>12.30–1.30 pm</td>
<td>ANZSIL Annual General Meeting</td>
<td>Common Room</td>
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<tr>
<td>1.30–3 pm</td>
<td>Panel 10: TOBACCO PLAIN PACKAGING DISPUTE</td>
<td>Main Hall</td>
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<td>1.30–3 pm</td>
<td>Panel 11: LAW OF THE SEA AND FISHERIES</td>
<td>Common Room</td>
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<td>1.30–3 pm</td>
<td>Panel 12: IMMIGRATION AND REFUGEE LAW</td>
<td>Scarth Room</td>
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<tr>
<td>3.30–5 pm</td>
<td>Panel 13: COLD WAR INTERNATIONAL LAW</td>
<td>Main Hall</td>
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<td>3.30–5 pm</td>
<td>Panel 14: THE DAILY LIVES OF CIVILIANS IN WARFARE</td>
<td>Common Room</td>
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<td>3.30–5 pm</td>
<td>Panel 15: EXPRESSION, ETHICS, RIGHTS, AND THE RULE OF LAW</td>
<td>Scarth Room</td>
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<td>5.15–6.30 pm</td>
<td>Panel discussion: THE EVERYDAY LIVES OF ANTIPODEAN INTERNATIONAL LAWYERS</td>
<td>Common Room</td>
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<td>7.30 pm</td>
<td>CONFERENCE DINNER</td>
<td>The Lobby Restaurant</td>
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<tr>
<td>9.15 – 11 am</td>
<td>Panel 16: INTERNATIONAL LAW: CRITIQUE AND PROGNOSIS</td>
<td>Main Hall</td>
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<td>9.15 – 11 am</td>
<td>Panel 17: CORPORATE ACCOUNTABILITY AND FAIRNESS IN BUSINESS</td>
<td>Common Room</td>
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<td>9.15 – 11 am</td>
<td>Panel 18: LEGAL DESIGN FOR A CHANGING CLIMATE</td>
<td>Scarth Room</td>
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<tr>
<td>11.30 – 1 pm</td>
<td>Year in Review</td>
<td>Main Hall</td>
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<td>1 pm</td>
<td>Close</td>
<td>Main Hall</td>
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## THURSDAY 30 JUNE 2016

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<tr>
<td>8.30 am</td>
<td><strong>REGISTRATION</strong> (Common Room)</td>
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<td>9 am</td>
<td><strong>WELCOME TO COUNTRY</strong> (Hall Foyer)</td>
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<td>&gt; Agnes Shea OAM, Ngunnawal elder</td>
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<tr>
<td>9.10 am</td>
<td><strong>CONFERENCE OPENING</strong></td>
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<td>Location: Main Hall</td>
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<td></td>
<td>&gt; Tim Stephens, ANZSIL President, University of Sydney</td>
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<td>&gt; Stephen Bottomley, Dean, ANU College of Law</td>
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<td>9.10–10.30 am</td>
<td><strong>PLENARY – KEYNOTE SPEECHES</strong></td>
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<td>Chair: Fleur Johns</td>
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<td><strong>Keynote Speakers</strong></td>
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<tr>
<td></td>
<td>Marco Sassòli, Professor of International Law, University of Geneva</td>
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<td>&gt; International Law between Theory and Practice at its Vanishing Point:</td>
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<td></td>
<td>The Case of the Laws of War</td>
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<td>Richard Wilson, Gladstein Distinguished Chair of Human Rights and Professor of Law and Anthropology, University of Connecticut School of Law</td>
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<td>&gt; Prosecuting International Speech Crimes</td>
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<td>10.30–11 am</td>
<td><strong>MORNING TEA</strong> (Hall Foyer)</td>
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<td>11 am–12.30 pm</td>
<td><strong>PANEL 1</strong> <strong>INTERNATIONAL DISPUTE RESOLUTION: PAST, PRESENT, FUTURE</strong></td>
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<td>Location: Main Hall</td>
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<td>Chair: Caroline Foster</td>
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<td><strong>Douglas Guilfoyle</strong>, Monash University</td>
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<td>&gt; Making History: The Past and Present in Mauritius v UK</td>
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<td><strong>Kanstantsin Dzehtsiarou</strong>, University of Liverpool</td>
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<td>&gt; Can the European Court of Human Rights Prevent War? Interim Measures in Inter-State Cases</td>
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<td><strong>Ashique Rahman</strong>, Fietta</td>
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<td>&gt; Challenges to Arbitrators under the ICSID Convention: Everyday Practice or an Abuse of Rights?</td>
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<td>10.30–11 am</td>
<td><strong>PANEL 2</strong> <strong>LAND, TERRITORY, JURISDICTION</strong></td>
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<td>Location: Common Room</td>
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<td>Chair: Stephanie Ierino</td>
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<td><strong>Edwin Bikundo</strong>, Griffith University</td>
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<td>&gt; Artificial islands, Artificial Highways and Pirates: Competing Visions of the World from the South China Sea to the Somali Coast</td>
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<td><strong>Camille Goodman</strong>, Australian National University</td>
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<td></td>
<td>&gt; The Jurisdiction of the Everyday (or why Lotus was Right all Along)</td>
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<td><strong>An Hertogen</strong>, University of Auckland</td>
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<td>&gt; Alleviating Everyday Friction through Good Neighbourliness</td>
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</table>
11 am – 12.30 pm  PANEL 3
INTERNATIONAL HUMANITARIAN LAW, INTERNATIONAL CRIMINAL LAW AND THE ICC
Location: Scarth Room
Chair: Leonard Blazeby

Jadrana Petrovic, Monash University and Vasko Nastevski, Victorian State Government Department of Treasury and Finance
> South Africa’s Response to the ICC’s Warrant for the Arrest of President Al Bashir

Emma Palmer, UNSW Law and Hannah Woolaver, University of Capetown
> Strangulation or Support? The Assembly of States Parties and the Independence of the International Criminal Court

Joanne Lee, Department of Foreign Affairs and Trade, Australia
> The ‘Verti-zontal’ Authority of the International Criminal Court

Monique Cormier, University of Melbourne
> Head of State Immunity and ICC Jurisdiction over Nationals of Non-party States: An Analysis of the Situations in Afghanistan, Georgia and Palestine

12.30 – 1.30 pm  LUNCH

1.30 – 2 pm  BOOK LAUNCH
Location: Common Room
Launched by: Marco Sassòli, Professor of International Law, University of Geneva
> The Routledge Handbook of the Law of Armed Conflict
Edited by Rain Liivoja and Tim McCormack, University of Melbourne

2 – 3.30 pm  PANEL 4
THE EVERYDAY OF INTERNATIONAL ADJUDICATORY TECHNIQUE
Location: Main Hall
Chair: Bill Campbell QC PSM

Caroline Foster, University of Auckland
> A Study in ‘Everyday’ International Adjudicatory Technique

Caroline Henckels, Monash University
> Everyday Challenges Faced by International Arbitrators when Dealing with Uncertainty

Joshua Paine, University of Melbourne
> Balancing Stability and Change: An Everyday Challenge in International Adjudication

2-3.30 pm  PANEL 5
PANEL DISCUSSION: CURRENT PRACTICE OF THE UN SECURITY COUNCIL
Location: Common Room
Chair: Christopher Michaelsen

Michael Bliss, Department of Foreign Affairs and Trade
Jesse Clarke, Commonwealth Attorney-General’s Department
Jeremy Farrall, Australian National University
Jeni Whalan, University of Queensland
Juliet Hay, Ministry of Foreign Affairs and Trade, New Zealand
2–3.30pm  PANEL 6  INTERNATIONAL TRADE AND INVESTMENT LAW  

Location: Scarth Room  

Chair: Vivienne Bath  

Zheng Lingli, School of Law, Nanjing Normal University  
> Conflict and Coordination between International Carbon Trading and WTO Rules  

Tania Voon and Elizabeth Sheargold, University of Melbourne  
> Evolution of Australia’s Approach to Regulatory Autonomy in bilateral Investment Treaties and Preferential Trade Agreements  

Heng Wang, UNSW Law  
> The Future of China’s FTAs and its Implications for China’s Trade Pacts with Australia and New Zealand  

Ofilio Mayorga, Foley Hoag LLP  
> Occupants, Beware of BITs: Applicability of Investment Treaties to Occupied Territories  

3.30–4pm  AFTERNOON TEA  

Meetings of the ANZSIL Interest Groups  
> International Economic Law Interest Group (Location: Common Room)  
> International Peace and Security Interest Group (Location: Great Hall)  
> Oceans and International Environmental Law Interest Group (Location: Scarth Room)  

4–5pm  PLENARY – KEYNOTE SPEECH  

Location: Main Hall  

Chair: Fleur Johns  

Keynote Speaker  

Sundhya Pahuja, University of Melbourne  
> Letters from Bandung: Encounters with Another Inter-National Law  

6–6.30pm  ANNUAL KIRBY LECTURE RECEPTION  

Location: Finkel Theatre, John Curtin School of Medical Research (131), Garran Road, Australian National University  

6.30–7.30pm  ANNUAL KIRBY LECTURE ON INTERNATIONAL LAW  

Location: Finkel Theatre, John Curtin School of Medical Research (131), Garran Road, Australian National University  

Convenor: James Stellios, Director, Centre for International & Public Law, Australian National University  

Justin Gleeson SC, Solicitor-General of the Commonwealth of Australia  
> Australia’s Increasing Enmeshment in International Dispute Resolution
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<td>9 am</td>
<td><strong>REGISTRATION</strong> (Common Room)</td>
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<td><strong>WELCOME TEA/COFFEE</strong> (Hall Foyer)</td>
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| 9.15 – 10.30 am | **PLENARY – KEYNOTE SPEAKER**  
*Location: Main Hall*  
Chair: Tim Stephens  
*Anthea Roberts, Australian National University*  
> Is International Law International?  
**10.30 – 11 am**  
MORNING TEA (Hall Foyer)                                                                                                                                 |
| 11 am – 12.30 pm | **PANEL 7**  
*THE EVERYDAY IN WAR AND ITS AFTERMATH*  
*Location: Main Hall*  
Chair: Rob McLaughlin  
*Solon Solomon, King’s College London*  
> The Role of Incidental Enemy Civilian Fear in Operational Targeting  
*Rain Liivoja, University of Melbourne*  
> Go-Pills and the Protection of Medical Military Personnel  
*Cassandra Mudgway, University of Canterbury*  
> Sexual Exploitation by UN Peacekeepers: The ‘Survival Sex’ Gap in International Human Rights Law  
*Susan Harris Rimmer, Griffith University*  
> Ordinary versus Extraordinary Crimes in Transitional States: Feminist Dilemmas  
**PANEL 8**  
*LAW AND POLICY-MAKING BEYOND THE STATE*  
*Location: Common Room*  
Chair: Sue Robertson  
*Ben Saul, University of Sydney*  
> ‘Terrorists’ as Law-Makers, Regulators, Mediators, and Adjudicators: Everyday Life and Justice Under Non-State Rule  
*Peter Lawrence, University of Tasmania*  
> Representation of the Voiceless and the International Legal Order: Current Limitations and Future Possibilities  
*Fikrie Sintayehu, Debre Berhan University, Ethiopia*  
> Emergence and Evolution of International Norms: Lessons from Cross-Border Interactions of Pastoral Communities in Eastern Africa  
*John-Mark Iyi, University of Johannesburg*  
> Falling Through the Cracks: Boko Haram as a Non-State Armed Group and The Inadequate Reach of International Law  
**11 am – 12.30 pm** | **PANEL 9**  
*PANEL DISCUSSION: DISPUTES OVER THE SOUTH CHINA SEA*  
*Location: Scarth Room*  
Chair: Richard Rowe PSM  
*Donald R Rothwell, Australian National University*  
*Katrina Cooper, Department of Foreign Affairs and Trade*  
*Malcolm Jorgensen, University of Sydney*  
*Natalie Klein, Macquarie University*  
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<tr>
<td>12.30–1.30 pm</td>
<td>LUNCH (Hall Foyer) &amp; ANNUAL GENERAL MEETING OF ANZSIL (Location: Common Room)</td>
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<td>1.30–3 pm</td>
<td><strong>PANEL 10</strong>&lt;br&gt;TOBACCO PLAIN PACKAGING DISPUTE&lt;br&gt;Location: Main Hall&lt;br&gt;Chair: Mark Jennings&lt;br&gt;John Atwood, Commonwealth Attorney-General’s Department&lt;br&gt; &gt; The Tobacco Plain Packaging Dispute&lt;br&gt;Dilan Thampapillai, Australian National University&lt;br&gt; &gt; Why Australia should lose the Plain Packaging Debate in the WTO&lt;br&gt;Patricia Holmes, Department of Foreign Affairs and Trade&lt;br&gt; &gt; The last gasp – Australian government approach to the WTO tobacco plain packaging dispute</td>
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<td><strong>PANEL 11</strong>&lt;br&gt;LAW OF THE SEA AND FISHERIES&lt;br&gt;Location: Common Room&lt;br&gt;Chair: Camille Goodman&lt;br&gt;Rosemary Rayfuse, UNSW Law&lt;br&gt; &gt; Climate Change and International Fisheries&lt;br&gt;Zoe Scanlon, Commonwealth Attorney-General’s Department&lt;br&gt; &gt; Taking Action against Stateless Vessels: The Development of a New Norm of Customary International Law?&lt;br&gt;Phillip Ng, Commonwealth Attorney-General’s Department&lt;br&gt; &gt; Fisheries Enforcement in the Field: International Law and Technological Innovation&lt;br&gt;Ed Couzens, University of Sydney&lt;br&gt; &gt; Threshing About in International Conservation Law: Australia and Reservations to Shark Listings at the CMS and CITES</td>
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<td>1.30–3 pm</td>
<td><strong>PANEL 12</strong>&lt;br&gt;IMMIGRATION LAW, REFUGEE LAW AND DETENTION&lt;br&gt;Location: Scarth Room&lt;br&gt;Chair: Anna Hood&lt;br&gt;Chao Yi, Peking University&lt;br&gt; &gt; Internal Relocation/Protection Alternative in Refugee Status Determination: The Practices of Australia and New Zealand Compared&lt;br&gt;Madeline Gleeson, UNSW Law&lt;br&gt; &gt; Judging Responsibility: The Implications of Plaintiff M68 for International Law and the Future of Offshore Processing&lt;br&gt;Bal Kama, Australian National University&lt;br&gt; &gt; The Manus Island Decision: Adjudicating Australia’s Role in the Detention of Asylum Seekers in the Pacific</td>
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<td>3–3.30 pm</td>
<td><strong>AFTERNOON TEA</strong> (Hall Foyer)</td>
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3.30–5 pm  PANEL 13
COLD WAR INTERNATIONAL LAW
Location: Main Hall
Chair: Daniel Joyce

Madelaine Chiam, University of Melbourne
➤ Justifying Participation in the Vietnam War: The South East Asian Treaty Organization and International Law in Australian public Debate

Emily Crawford, University of Sydney
➤ Accounting for the 1976 ENMOD Convention: A Product of Cold War Paranoia or a Rare Instance of Forethought in International Humanitarian Law?

Anna Hood, University of Auckland
➤ International Law as the Weapon of Choice for Nuclear Matters During the Cold War

Richard Joyce, Monash University
➤ Cold War as Katechon (or, what’s our excuse now?)

3.30–5 pm  PANEL 14
THE DAILY LIVES OF CIVILIANS IN WARTIME: THE ROLE OF INTERNATIONAL LAW
Location: Common Room
Chair: Marco Sassoli

Kevin Riordan ONZM, Judge Advocate General of New Zealand and Chief Judge of the Court Martial
➤ Siege and the Law of Armed Conflict

Mary Crock, University of Sydney
➤ Making Every Life Count: Ensuring Equality and Protection for Persons with Disabilities in Armed Conflict

Phoebe Wynn-Pope, Australian Red Cross
➤ Legislating Against Humanitarian Principles

Alberto Alvarez-Jimenez, University of Waikato
➤ Letters to the Security Council by Two Prisoners of War, Israel and Palestine, and How to Interpret IHL in Protracted International Conflicts

This panel is the result of collaboration among the ICRC, Australian Red Cross, and New Zealand Red Cross.

3.30–5 pm  PANEL 15
EXPRESSION, ETHICS, RIGHTS, AND THE RULE OF LAW
Location: Scarth Room
Chair: John Reid

Catherine Renshaw, University of Western Sydney
➤ Adultery, Pornography, Sodomy. How Does International Law Deal with Everyday Moralties?

Jingyi Li, Macquarie University
➤ Australian Copyright Law Regarding Limitations and Exceptions for the Print Disabled: Achievements to date and required further reforms

Sherif Elgebeily, University of Hong Kong
➤ A Deafening Silence: the Absence of ICCPR Article 25(b) Protections and Hong Kong's Democracy, Free Speech, and Rule of Law

Chester Brown, University of Sydney and Robert Kirkness, Freshfields Bruckhaus Deringer
➤ The Status of the Doctrine of “Clean Hands” in Public International Law
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<tr>
<th>Time</th>
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<tr>
<td>5.15–6.30pm</td>
<td>PANEL DISCUSSION</td>
<td>THE EVERYDAY LIVES OF ANTIPODEAN INTERNATIONAL LAWYERS</td>
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<td></td>
<td>Location: Common Room</td>
<td>Chair: Madelaine Chiam</td>
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<td></td>
<td>Penny Cumming, Department of Defence, Australia</td>
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<td>Penelope Mathew, Griffith University</td>
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<td>Sue Robertson, Commonwealth Attorney-General's Department</td>
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<td>Ivan Shearer AM RFD, University of South Australia and University of Sydney</td>
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<td>7.30pm</td>
<td>CONFERENCE DINNER</td>
<td>(The Lobby Restaurant, King George Terrace, Parkes)</td>
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<td>Dinner Speaker: Angus Trumble, Director, National Portrait Gallery</td>
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## SATURDAY 2 JULY 2016

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<tr>
<th>TIME</th>
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<tr>
<td>9am</td>
<td>WELCOME TEA/COFFEE (Hall Foyer)</td>
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<td>9.15 – 11am</td>
<td>PANEL 16</td>
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<td>INTERNATIONAL LAW: CRITIQUE AND PROGNOSIS</td>
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<td>Location: Main Hall</td>
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<td>Chair: Fleur Johns</td>
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<td>Tamás Hoffmann, Karoli Gasper University, Budapest</td>
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<td></td>
<td>&gt; Will the Real International Lawyer Please Stand Up?</td>
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<td>Irene Baghoomians, University of Sydney</td>
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<td>&gt; Teaching Public International Law: Panacea or Part of the Problem?</td>
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<td>Toby Hanson, Commonwealth Attorney-General’s Department</td>
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<td>&gt; Multilateralism: A Eulogy?</td>
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<td>PANEL 17</td>
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<td>CORPORATE ACCOUNTABILITY AND FAIRNESS IN BUSINESS</td>
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<td>Jessica Viven-Wilksch, University of Adelaide</td>
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<td>&gt; Bringing Fairness in International Long-term Relationships: An Analysis of Amendments to the Unidroit Principles on Commercial Contracts</td>
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<td>Holly Cullen, University of Western Australia</td>
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<td>&gt; Known Unknowns? On the Need for Follow-up of Agreements between Transnational Business and Host Communities</td>
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<td>Kate Eastman SC, NSW Bar</td>
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<td>&gt; Business and International Human Rights</td>
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<td>9.15 – 11am</td>
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<td>LEGAL DESIGN FOR A CHANGING CLIMATE</td>
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<td>Location: Main Hall</td>
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<td>Chair: David Leary</td>
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<td>Susannah Leslie, Ministry of Foreign Affairs and Trade, New Zealand</td>
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<td>&gt; Linking Emissions Trading Schedules: A Legal Design Perspective</td>
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<td>Michelle Podmore, Ministry of Foreign Affairs and Trade, New Zealand</td>
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<td>&gt; The Paris Climate Change Agreement: Designing an Ambitious and Fair Global Agreement</td>
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<td>Jonathan Pickering, University of Canberra</td>
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<td>&gt; Hard Law, Soft Law and Reflexive Climate Governance: The Paris Agreement as Crème Brûlée</td>
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<td>Howard Bamsey, Australian National University</td>
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<td>&gt; Regime Change: From Kyoto to Paris, the Transformation of the Legal Dimension of the Global Response to Climate Change</td>
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<td>11 – 11.30am</td>
<td>MORNING TEA (Hall Foyer)</td>
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<td>11.30am – 1pm</td>
<td>YEAR IN REVIEW</td>
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<td>Chair: Andrew Byrnes</td>
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<td>&gt; Katrina Cooper, Department of Foreign Affairs and Trade</td>
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<td>&gt; John Reid, Commonwealth Attorney-General’s Department</td>
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<td>&gt; John Adank, Ministry of Foreign Affairs and Trade, New Zealand</td>
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<td>&gt; Alison Todd, Crown Law New Zealand</td>
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John Adank
Year in Review

John Adank was appointed as International Legal Adviser and Divisional Manager of the Legal Division of the New Zealand Ministry of Foreign Affairs and Trade (MFAT) in August 2015.

This role involves the provision of advice on all aspects of New Zealand’s international obligations. Immediately prior to this he served for 4 years as New Zealand’s Permanent Representative and Ambassador to the World Trade Organisation in Geneva. John’s earlier career in MFAT has included a range of roles as a Legal Adviser within the Legal Division. He has extensive experience as a panellist and Chair in a range of WTO disputes.

Alberto Alvarez-Jimenez
Letters to the Security Council by Two Prisoners of War, Israel and Palestine, and How to Interpret IHL in Protracted International Conflicts.

Israel and Palestine send letters to the UN Security Council almost on a weekly basis describing what their civilians are enduring. This paper has reviewed 100 letters forwarded by these two States from 2012–14. The chronicle depicts a human tragedy of immense scale. The communications have a common denominator: there has never been an expression of regret for the other’s civilian casualties. This is an astonishing situation for a conflict that has reached its 68th year.

The purposes of this paper are twofold. First, how NGOs and international courts could interpret international humanitarian law in a way that makes Palestinian and Israeli civilian suffering visible to the party inflicting it. The second purpose is to discuss whether or not, and in which circumstances, the interpretation of international humanitarian law should be carried out in a different way in protracted conflicts such as that in the Middle East. Or in other words, when and how to incorporate time in the interpretation of IHL.

Alberto Alvarez-Jimenez holds a Doctor of Laws degree from the University of Ottawa, and an LL.M from McGill University. Currently, he is a senior lecturer at the Faculty of Law of the University of Waikato and also an international consultant on international law.

Professor Alvarez-Jimenez’s research agenda concentrates on public international law, international trade law, and foreign investment law. He has published more than 25 articles in prominent peer-reviewed journals in the United States, the United Kingdom, Germany, Canada, the Netherlands and Switzerland. His most recent publication is entitled The Great Recession and the New Frontiers of International Investment Law: the Economics of Early Warning Models and the Law of Necessity. 17 Journal of International Economic Law 517 (2014).

Irene Baghoomians
Teaching Public International Law: Panacea or Part of the Problem?

I am interested in interrogating how the teaching of Public International Law (PIL) in the context of an introductory ‘survey’ course in Law schools can undermine and/or damage the emancipatory commitment inherent within some disciplines of PIL while simultaneously paying lip service to them in exultant terms. The need for continuing focus on and denunciation of the imperial roots of this paradigm is at the heart of a reimagined pedagogy which takes upon itself the reinvigoration of a critical approach. I intend to demonstrate this by focusing on the mechanics of teaching an introductory PIL unit of study and deconstructing how topics are introduced, emphasised or deemphasised, all together ignored or explained away having done no better than formalist teachers when introducing the role of ‘law’ in common law systems.

I intend to reflect on and attempt to deconstruct the somewhat demoralising version of one encountered reality, ie, that the teaching of PIL often further entrenches the dominant socio-political and/or economic narratives at the expense of the marginalised interests and voices. Instead of sparking or
fomenting counter-narratives, this mode of orthodox and staid teaching mindful of allocated times and short student attention spans further entrenches the utility of PIL as yet another arena for the mundane brutality of power and its wielders as opposed to an opportunity to educate and produce a more fertile generation of future international lawyers and NGO advocates who challenge the regressive hegemony of realpolitik and cynicism for normative and practical gains however small.

Using the prism of international human rights law to focus on the class room both in Australia and in Nepal, I aim to find pauses and spaces which allow me to reconfigure my teaching to further my commitment to the protection and realisation of human rights however incremental.

Irene Baghoomians is a senior lecturer at the Faculty of Law, University of Sydney. She has worked in the areas of public interest and human rights litigation, policy and research for nearly two decades. She has worked at the Australian Law Reform Commission, the Department of the Prime Minister and Cabinet, AHRC as well in the Center for Constitutional Rights as a staff attorney. Irene teaches Public International Law, International Human Rights Law as well as co-teaching the Himalayan Human Rights and Development Field School in Nepal.

Howard Bamsey

Regime Change: From Kyoto to Paris, the Transformation of the Legal Dimension of the Global Response to Climate Change

The Kyoto Protocol established specific mitigation commitments for developed countries only and set out a conventional treaty mechanism to promote compliance. For reasons of effectiveness, Australia was among the parties most dissatisfied with this regime and worked consistently for universality of obligation.

Beginning with the non-negotiating ‘Dialogue on long-term cooperation’ in 2006–07, followed by the Bali Action Plan, understanding of the need for universal participation in mitigation efforts increased. It was clear though that this could not occur in the basis of the top-down, mandatory Kyoto model. For developing countries concerned about their capacity to implement commitments and even more to monitor, report and verify their efforts, a compliance enforcement approach was anathema. Gradually a more bottom-up model reflecting individual country priorities emerged and a facilitative processes to support national commitments took shape. The Paris Agreement embodies both of these elements with minimal distinction made between developed and developing countries. Compliance and enforcement of country commitments will now be the responsibility of the countries concerned although the Paris Agreement also ensures international transparency.

Australia was instrumental in this transition. I was a co-facilitator of the Dialogue; Penny Wong as the newly appointed Climate Change Minister brokered most of the Bali Action Plan and several of the facilitative aspects of the Paris Agreement can be traced to Australian proposals from 2007–08. These were developed by an extraordinarily talented legal team from several departments but based in the Department of Climate Change. Their proposals that appear albeit in modified form in the Paris Agreement include peer review, and nationally developed ‘schedules’ for setting out commitments, the prototype for INDCs. In addition, the reference to a 1.5 degree cap for temperature rise that was essential to agreement in Paris was first brokered by Kevin Rudd in Copenhagen using the considerable standing and influence he had developed from his active engagement in the process for most of the preceding year.

Howard Bamsey is Honorary Professor in the School of Regulation and Global Governance at the Australian National University. He was Director General of the Global Green Growth Institute until early 2014. He has served as Special Adviser on Sustainable Development to the Australian Department of Foreign Affairs and Trade and Special Adviser on Green Growth to AusAID. Earlier he was Australia’s Special Envoy on Climate Change, a Deputy Secretary in the Australian Public Service and CEO of the Australian Greenhouse Office. He held several appointments at ambassadorial level during over twenty five years in the Australian foreign service.

Edwin Bikundo

Artificial islands, Artificial Highways and Pirates: Competing Visions of the World from the South China Sea to the Somali Coast

The links between building artificial islands in the South China Sea and international efforts to combat piracy off the Somali coast are not immediately apparent. Let alone those between the law of the sea and international criminal law. However this paper argues that these may all be fruitfully examined together by analysing the opposition between internationalism and globalism where internationalism is a state-centric conception of international law and globalism is in tension with the state sovereignty inherent in internationalism.

This has implications for Australia and beyond as it balances economic interests with long standing strategic commitments. While the United States seeks to uphold freedom of navigation in the South China Sea, China constructs artificial islands in the area to bolster its territorial claims. Both countries utilise their navies in a similar manner but for opposed reasons. This difference of approach with identical state practice argued
as having diametrically opposed legal consequences is a miniaturisation of a broader strategic antagonism with the United States being a global champion of keeping the sea open to global navigation and commerce while China is intent upon building a primarily land based so-called ‘New Silk Road’ to link China to critical markets and natural resources. This struggle between land and sea is consequently more than just a metaphor. It encompasses both the law of the sea and international criminal law in unexpected ways. Piracy is not just the threat of private and hence illegal violence in the high seas that challenges the state monopoly on legitimate violence but far more importantly it also threatens to disrupt global commerce. This is a right held in common by all states and therefore any state can exercise its jurisdiction. Indeed China and the United States are both involved in combating piracy off the Somali coast. The recent translation of Carl Schmitt’s Land and Sea provides the unique opportunity to evaluate whether it may clarify the issues at stake that Schmitt himself did not consider.

Chester Brown and Robert Kirkness

Panel Discussion: Current Practice of the UN Security Council

Edwin Bikundo is a Senior Lecturer at the Griffith University School of Law on the Gold Coast in Australia. He has teaching and research interests in International and Comparative Law and Legal Theory. His current research focuses on the German intellectual contribution to international criminal law. One forthcoming aspect of this project is: ‘Carl Schmitt as a Subject and Object of International Criminal Law: Ethical Judgment in Extremis’ (Forthcoming 2016) The International Criminal Law Review.

Before joining Griffith University he taught international law and international criminal law at the University of Sydney. Prior to that he studied at the University of Pune in India, Utrecht University in the Netherlands and at the Kenya School of Law. Edwin also practiced as an Advocate of the High Court of Kenya and taught at the Faculty of Law at the University of Nairobi and the Faculty of Arts at Egerton University in Kenya.

Michael Bliss

Panel Discussion: Current Practice of the UN Security Council

Michael Bliss is Legal Adviser (International) and Assistant Secretary, International Law Branch at the Australian Department of Foreign Affairs and Trade. He is concurrently a Visiting Fellow at the Australian National University’s Asia-Pacific College of Diplomacy.

Michael served as Political Coordinator for Australia’s Security Council team during Australia’s 2013–14 term on the Council. This was his second posting to New York; he previously served as Legal Adviser at the Australian Permanent Mission to the UN from 2001–04. Michael has served in a range of international law and multilateral roles in Canberra, and as Minister Counsellor in Jakarta from 2008–12, heading the Embassy’s Political and Economic Branch. He has a bachelor’s degree in law from UNSW and an LLM from Columbia University, which he attended as a Fulbright Scholar. He has also taught as an adjunct lecturer at Columbia University School of Law, and is admitted as a Legal Practitioner to the Supreme Court of NSW.

Chester Brown

The Status of the Doctrine of ‘Clean Hands’ in Public International Law

There is uncertainty concerning the status of the doctrine of ‘clean hands’ in public international law. It is assumed to be an element of the doctrine of good faith which underlies the duty on States to comply with their obligations (pacta sunt servanda), but precisely what this means is unclear.

The Permanent Court of International Justice and the International Court of Justice have not expressly rejected the doctrine, but they have generally failed to apply it. Related principles have however been adopted: e.g., exceptio non adimpleti contractus (a party can withhold its performance of contractual duties until the other party has performed its duties), and ex injuria ius non oritur (law does not arise from injustice). More recently, a number of decisions of investment tribunals have subjected the doctrine to renewed scrutiny with mixed results. First, the doctrine was rejected by the Tribunal hearing the triumvirate of claims brought by the shareholders in Yukos (Yukos Universal Ltd v Russian Federation, Hulley Enterprises Ltd v Russian Federation, and Veteran Petroleum Ltd v Russian Federation (Final Awards of 18 July 2014). But in another case, Hesham Al-Warraq v Indonesia (Award of 15 December 2014), the doctrine was applied by the Tribunal to deny the claimant’s claims.

This paper considers the clean hands doctrine, and argues that its status in public international law is doubtful. It goes on to suggest that the apparently related doctrines may be understood as having different spheres of application.

Chester Brown is Professor of International Law and International Arbitration at the Faculty of Law, University of Sydney; a Barrister at 7 Wentworth Selborne Chambers, Sydney, and an Overseas Associate of Essex Court Chambers, London, and Maxwell Chambers, Singapore. He teaches and researches in the fields of public international law, international dispute settlement, international arbitration, international investment law, and private international law. He also maintains a practice in these fields, and has been involved as counsel in proceedings before the International Court of Justice, the Iran–United States Claims Tribunal, inter-State and investor-State arbitral tribunals, as well as in international commercial arbitrations. He has been nominated by the Governments of Australia, Canada and
International Law of the Everyday: Fieldwork, Friction & Fairness

Robert Kirkness is a Senior Associate in Freshfields’ Public International Law and International Arbitration Groups, based in Singapore. He has appeared as counsel on behalf of States and investors in a number of investment treaty arbitrations. His recent investment treaty work includes representing a consortium of international investors in four parallel arbitrations against a Middle Eastern government and its state entities; representing a North American investor in a multi-billion dollar claim against a South American government; and representing two Asian States in investment treaty arbitrations involving complex issues of public international law. Prior to joining Freshfields, Robert appeared as counsel for the Attorney-General of New Zealand in a number of precedent setting cases before New Zealand Court of Appeal and the Supreme Court of New Zealand. Robert is a Registered Foreign Lawyer at the Singapore International Commercial Court.

Madelaine Chiam

Justifying participation in the Vietnam War: The South East Asian Treaty Organization and International Law in Australian public debate

In this paper, I examine the role of international law in public debates over Australia’s participation in the Vietnam War. In doing so, I interrogate two common assumptions about the place of international legal language in public debate. First, that the prominence of international legal language during the public debates over the 2003 Iraq War was new; and second, that the stalemate over international law during the Cold War left little or no place for international legal language in public debate of that period.

This paper uses the example of the 1965/66 parliamentary debates over Australia’s obligations under the South East Asian Treaty Organization (SEATO) to demonstrate the role that international legal language played in political arguments of that time. I argue that there are parallels between the technical debates over Australia’s SEATO obligations in 1965/66 with the debates that occurred over the meaning of Security Council resolutions in 2003. There are also important differences between those debates however. One difference arises from the role that expertise – in particular legal expertise – played in framing the status of international legal obligations during the debates. A second difference stems from the distinct ways in which international law was perceived by the users of that language in the two debates. In 1965 international law was one justification among many for a decision to go to war. International legality was not, as I argue it was in 2003, a criterion that was characterised, at least by some, as a ‘trump’ over other reasons for or against war. Both debates serve as a reminder of the limits of legal language, and of the inability of that language to encompass all that needs to be said in decisions about life and death.

Madelaine Chiam is a Senior Fellow and PhD Candidate at the Melbourne Law School. She holds undergraduate degrees in Arts and Law from the University of Melbourne and a Masters in Law from the University of Toronto. Madelaine’s research interests are in the histories of international law, human rights and the relationships between the global and the local. She has published predominantly on global-local interactions, particularly aspects of Australia’s engagement with the international system. Madelaine’s PhD examines the role of international law in public debates about war in 20th century Australia. Madelaine is faculty at the Harvard Law School Institute for Global Law and Policy Workshop (Doha 2014 & 2015, Madrid 2016) and was previously a Research Fellow and Lecturer at the Australian National University College of Law.

Jesse Clarke

Panel Discussion: Current Practice of the UN Security Council

Jesse Clarke is a Principal Legal Officer in the Office of International Law of the Attorney-General’s Department where he co-leads practice groups on international criminal law, law of the sea, and air and space law.

As a dual national, Mr Clarke worked as a legal adviser at the United Kingdom Foreign & Commonwealth Office from 2007-2015 where he advised on a broad range of matters arising under public international law, European law and public law. Between 2012–15, he served as First Secretary (Legal Affairs) at the UK Mission to the United Nations in New York, where he represented the UK in a variety of legal fora (including the Security Council and General Assembly) and advised on a wide range of international legal issues arising from the UK’s foreign policy priorities at the UN. In 2011–12, Mr Clarke spent a year as a Visiting Lecturer at Harvard Law School where he taught courses on Government Lawyering and International Law.

He has previously been a Senior Legal Officer in the Office of International Law at the Attorney-General’s Department, a Senior Associate at Freshfields’ Deringer LLP (London), an Associate at Curtis, Mallet-Prevost, Colt & Mosle LLP (New York), and as an Associate to the Hon. Justice Michael Kirby of the High Court of Australia. Mr Clarke holds an LL.M. (International Law) from the University of Cambridge and an LL.B. and B.A. (Hons. Government) from the University of Sydney.

New Zealand for election to the United Nations International Law Commission.

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As a dual national, Mr Clarke worked as a legal adviser at the United Kingdom Foreign & Commonwealth Office from 2007-2015 where he advised on a broad range of matters arising under public international law, European law and public law. Between 2012–15, he served as First Secretary (Legal Affairs) at the UK Mission to the United Nations in New York, where he represented the UK in a variety of legal fora (including the Security Council and General Assembly) and advised on a wide range of international legal issues arising from the UK’s foreign policy priorities at the UN. In 2011–12, Mr Clarke spent a year as a Visiting Lecturer at Harvard Law School where he taught courses on Government Lawyering and International Law.

He has previously been a Senior Legal Officer in the Office of International Law at the Attorney-General’s Department, a Senior Associate at Freshfields’ Deringer LLP (London), an Associate at Curtis, Mallet-Prevost, Colt & Mosle LLP (New York), and as an Associate to the Hon. Justice Michael Kirby of the High Court of Australia. Mr Clarke holds an LL.M. (International Law) from the University of Cambridge and an LL.B. and B.A. (Hons. Government) from the University of Sydney.

New Zealand for election to the United Nations International Law Commission.
Katrina Cooper
Panel Discussion: Disputes over the South China Sea
Year in Review

Katrina Cooper is the Senior Legal Advisor at the Department of Foreign Affairs and Trade, with oversight of international and domestic law issues. Katrina has had a varied career as a diplomat, including postings to Chile, Port Moresby and as Australia’s Ambassador to Mexico.

Monique Cormier
Head of State Immunity and ICC Jurisdiction Over Nationals of Non-Party States: An Analysis of the Situations in Afghanistan, Georgia and Palestine

There is a significant amount of scholarship dedicated to the issue of head of state immunity in international law. There is also a growing body of work that looks at the legal basis for the International Criminal Court’s (ICC) jurisdiction over nationals from states not party to the Rome Statute. A question that has received far less attention in the literature is whether there is a legal basis for the ICC to prosecute sitting heads of state from non-party states.

Under customary international law, heads of state and senior state officials are immune from prosecution in foreign domestic courts. Immunity ratione personae (personal immunity) is absolute and shields heads of state from prosecution for the duration of their term in office. There is, however, an exception to immunity ratione personae when the accused is being prosecuted by an international court. This is explicitly recognised in Article 27 of the Rome Statute which provides that official capacity cannot preclude an individual from criminal responsibility and that any immunity under national or international law will not prevent the ICC from exercising jurisdiction.

Despite this recognised exception to immunity ratione personae, a number of high profile international criminal law scholars have argued that the ICC cannot exercise jurisdiction over sitting heads of states not party to the Statute in circumstances other than a Security Council referral. Such a conclusion is largely predicated on delegation of territorial jurisdiction as the legal basis for the ICC’s jurisdiction over nationals of non-party states. If the territorial state cannot gain jurisdiction over an incumbent foreign head of state, how can it delegate to the ICC what it does not have?

My paper deconstructs this argument, and the assumptions on which it is based. It examines the theoretical foundations of jurisdiction over international crimes and takes a closer look at the concept of delegation and the effect of procedural immunities on delegable jurisdiction. Ultimately I argue that interpretive choices with respect to how one conceptualises jurisdiction can have important consequences for determining whether there is a legal basis for the ICC’s jurisdiction over heads of states from non-party states.

Monique Cormier is a PhD candidate and Fellow at Melbourne Law School, where her areas of research interest include jurisdiction, defences and immunities in international criminal law. Monique is also Co-Director of the non-profit public international law consulting partnership Lex Specialis which provides research and advice on contemporary issues of public international law.

Monique has a Bachelor of International Studies and a Bachelor of Laws (Hons I) from the University of Adelaide, and a Master of Laws from Columbia University.

Ed Couzens
Threshing About in International Conservation Law: Australia and Reservations to Shark Listings at the CMS and CITES

In November 2014 at the Eleventh Conference of the Parties to the Convention on Migratory Species proposals were made to list five species of shark (three thresher species and two hammerheads) on Appendix II, which lists species with an ‘unfavourable conservation status’ that would ‘significantly benefit’ from international cooperation. Although appearing initially reluctant, Australia did not block the proposals which were adopted by consensus.

An Appendix II listing does not in itself confer significant protection on species, but this listing created a potential difficulty for Australia as the national Environmental Protection and Biodiversity Act, 1999 provides for Appendix II listed species to be treated in Australia as though they were Appendix I species – for which the international obligation is to prohibit taking, except in certain limited circumstances.

The difficulty arose because recreational fishers apparently take the species within Australian waters and they would be in breach of the EPBC Act in doing so; even though Australia apparently believes that the species are not in fact endangered within its waters, and apparently believes that the protections which it provides are at least as strong in any case as those required by the CMS listing.

When a similar issue arose in 2008 (concerning mako and porbeagle sharks) the issue was dealt with by way of amendment to the EPBC Act. However, the solution which Australia adopted after CMS CoP11 was to lodge a
reservation to the Appendix II listing. This has been described as Australia’s ‘first ever reservation to a global conservation treaty’; and the potential is obvious for undermining the mounting global pressure for increased conservation measures to protect shark species, given that Australia is a country which would normally be expected to support such measures wholeheartedly. In that sense, lodging the reservation cannot have been a decision easily made – something apparent from dissent (albeit along party political lines) within the Parliamentary Joint Standing Committee on Treaties, which in February 2015 approved the decision.

What is most interesting for me at this point, as a researcher, is to speculate on what action/s Australia might take at the end of September and in the first week of October 2016, when the 17th Conference of the Parties to CITES meets, and what the future international repercussions of its decision/s might be. The three species of thresher shark that occasioned the difficulties described here are the subject of a proposed Appendix II listing, the proposal having been made by the European Union countries and eighteen other countries. Should the proposal be successful Australia will face a quandary similar to that which it faced with the CMS listing.

At CITES and in its wake, Australia will thus need to weigh up the importance of taking a consistent approach across conventions against the damage it might do to shark conservation efforts worldwide by continuing to lodge reservations, it being unlikely that the nuances of its domestic legal position will be understood globally.

Ed Couzens is an Associate Professor in the Sydney Law School, University of Sydney, where he teaches international law and environmental law; and where he is the current Director of the Australian Centre for Climate and Environmental Law (ACCEL). He joined the Sydney Law School in early 2015 from the University of KwaZulu-Natal in Durban, South Africa, where he had taught for 14 years.

He holds the degrees of LLB Hons LLM (Wits), LLM Environmental Law (Natal & Nottingham) and PhD (KZN). He is the author of Whales and Elephants in International Conservation Law and Politics (Earthscan/Routledge, 2014); co-author of Environmental Law: South Africa (Kluwer Law, 2013); and co-editor of International Environmental Law-making and Diplomacy: Insights and Overviews (Earthscan/Routledge, 2016).

His main research interest is in international wildlife law; and he has been a member of the South African delegation to four meetings of the International Whaling Commission.

Emily Crawford

Accounting for the 1976 ENMOD Convention: A Product of Cold War Paranoia or a Rare Instance of Forethought in International Humanitarian Law?

The Cold War was an era of remarkable growth and development in international humanitarian law (IHL). A number of significant treaties were adopted during this period, including landmark instruments like the 1977 Additional Protocols, the 1954 Hague Convention on Cultural Property, the Conventional Weapons Convention, and the 1972 Biological Weapons Treaty. Also adopted during this period was the ENMOD Convention – the Convention on the Prohibition of Military or Any Hostile Use of Environmental Modification Techniques. The Convention prohibits the Contracting Parties from engaging in ‘military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State Party’. While protecting the environment and prevention its manipulation as a means of warfare is a laudable goal, the environmental damage envisaged by the ENMOD Convention seems largely in the realm of science fiction. As one commentator noted at the time, the ENMOD ‘proscribes mainly non-existent or imaginary environmental modification techniques’.

With this background in mind, how do we account for ENMOD? Was it a product of Cold War paranoia, informed by misinformation and fear about Soviet and US capabilities and technologies? Or is it a rare instance of forward thinking in the notoriously reactive and often backward-looking field of IHL. This presentation will explore the ENMOD Convention, its drafting history, and its ultimate adoption, and attempt to account for why this treaty was adopted.

Emily Crawford is a senior lecturer and Co-Director of the Sydney Centre for International Law (SCL). Previously at the Law Faculty at the University of New South Wales, Emily completed her Arts and Law degrees before working as a researcher at the Australian Broadcasting Corporation, before returning to UNSW to undertake her PhD. Her doctoral thesis on the disparate treatment of participants in armed conflicts was published by Oxford University Press in 2010.

Emily has taught international law and international humanitarian law, and has delivered lectures both locally and overseas on international humanitarian law issues, including the training of military personnel on behalf of the Red Cross in Australia. A member of the International Law Association’s Committee on Non-State Actors, as well as the NSW Red Cross IHL Committee, Emily’s most recent research project examined major developments in the conduct of armed conflicts in the 21st century, such
as cyber warfare, targeted killings, and the increasing presence of civilians directly participating in armed conflicts. The research project was published in 2015 by Oxford University Press as Identifying the Enemy: Civilian Participation in Armed Conflict.

Mary Crock
Making Every Life Count: Ensuring Equality and Protection for Persons with Disabilities in Armed Conflicts

This paper considers the implications of article 11 of the Convention on the Rights of Persons with Disabilities (CRPD), which obliges states parties to take all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk, including situations of armed conflict, humanitarian emergencies and natural disasters. Unusually among human rights conventions, the CRPD explicitly invokes international humanitarian law as a source of states’ obligations. This paper focuses on one type of emergency situation, armed conflict. It argues that the CRPD reorients and transforms the protections offered through international humanitarian law by casting them in the language of ‘rights’, advancing a ‘social’ model of disability which conceptualises persons with disabilities as rights-bearing agents, rather than as subjects in need of medical attention, welfare and passive protection. The paper also contends that the CRPD approaches disability as a context-specific phenomenon that is the result of society and environment as much as the product of a personal condition. After analysing various rules of international humanitarian law — including specialised protections for the ‘disabled and infirm’, protections for the sick and wounded, fundamental guarantees of human treatment, restrictions on weapons during armed conflict, and the prohibition on discrimination — the paper concludes that article 11 makes a profoundly important and novel contribution to both IHL and international human rights law as these affect persons with disabilities.

This paper will draw on the article of the same title, published in the Monash University Law Review (Volume 40, Number 1).

Holly Cullen
Known Unknowns? On the Need for Follow-up of Agreements between Transnational Business and Host Communities

One area where international law can impact the everyday life of people is through mechanisms for implementing international norms, particularly in the areas of environment or human rights, in the relationship between transnational business and host communities. While there has been innovation in dispute resolution mechanisms involving business, we still lack methods of assessing the effectiveness of those mechanisms in the longer term. Recent work shows the immensity of the task of following up on undertakings by business in relation to ensuring the respect for international norms in their operations.

Under the Guidelines for Multinational Enterprises of the Organisation for Economic Cooperation and Development, disputes about whether or not a business is observing international law and policy project run in conjunction with Harvard University and the London School of Economics (and a range of other universities both in Australia and overseas). The second pursues her interest in refugee children and youth, while the third (funded by AusAid) involves a study of refugees with disability, conducted in collaboration with UNHCR and the Women’s Commission for Refugees.

Mary Crock came to academia in Sydney in 1995 from a background in practice after completing her doctorate on the relationship between the Courts and the Executive in controlling immigration. Her main field of research is migration, citizenship and refugee law. However, she has general interests in administrative law, constitutional law, public international law, international human rights and comparative law in these fields.

Her specific research interests range broadly from studies of the interaction between immigration and labour laws through the examination of vulnerabilities in particular categories of migrants - most particularly refugee children and youth and refugees with disabilities. Through her work with her husband, Emeritus Professor Ron McCallum AO, she has been involved in internal United Nations initiatives for the reform of the UN Human Rights treaty body system. She is known for her work on immigration detention, but has also written and lectured on many other aspects of immigration and refugee law and their interface with other areas of law and other disciplines. She is currently working on three large research projects. One is a comparative law and policy project run in conjunction with Harvard University and the London School of Economics (and a range of other universities both in Australia and overseas). The second pursues her interest in refugee children and youth, while the third (funded by AusAid) involves a study of refugees with disability, conducted in collaboration with UNHCR and the Women’s Commission for Refugees.
of an agreement made as resolution of a dispute under the Guidelines for Multinational Enterprises. Following numerous accusations that security guards for Barrick’s mine in Porgera, PNG had sexually assaulted women working at the mine and in the local community, a complaint was brought to the Canadian National Contact Point for the Guidelines for Multinational Enterprises. The procedure conducted by the National Contact Point led to an agreement by Barrick to remedy the problem of endemic sexual violence. The Harvard/ Columbia review looked at three years of the implementation of the agreement and found that while the agreement had several positive features, and offered an alternative to the situation of impunity that existed in PNG, Barrick did not act promptly to investigate and remedy allegations and the remedy mechanism was inadequate in several respects.

The report is significant not only for its contents but for the multi-disciplinary methodology that it used. It looked at purely legal questions such as the interaction of the informal remedy system with formal judicial remedies, and also at the adequacy of compensation and at the perception of victims of their treatment within the remedy process. The report also looked at the ‘big picture’ questions concerning the power imbalance between transnational business and host communities, including individuals within those communities.

This paper will conclude by considering the following questions: is this report a model for the future? If so what does it say about the need for an inter-disciplinary approach to international law? Does international law have the conceptual and material resources to provide this kind of follow-up on a more regular basis?

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Holly Cullen is Professor of Law and Associate Dean (Students) at the University of Western Australia, which she joined in 2010. Previously, she was Reader in Law at Durham University and Deputy Director of the Durham European Law Institute from 1998–2006, having also served as its Acting Director in 2003–04. She is the author of The Role of International Law in the Elimination of Child Labor (Brill, 2007) and numerous articles on international human rights law, international organizations and theory of international law. Her research on child labor and on legal reasoning in economic and social rights cases was funded by the United Kingdom Arts and Humanities Research Council. She is a member of the International Law Association’s research committee on Non-State Actors in International Law and was a member of the Advisory Group for Child Labor Research Initiative at the University of Iowa Human Rights Center. She is co-editor, with Joanna Harrington and Catherine Renshaw, of the conference proceedings of the 2014 Four Societies Conference, to be published by Cambridge University Press in 2016 as Experts, Networks and International Law.

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Penny Cumming

Panel Discussion: The Everyday Lives of Antipodean International Lawyers

Colonel Penny Cumming joined the Australian Regular Army in 1994 as a Legal Officer. She has served in a variety of legal appointments, primarily in the land, special forces and joint service environments and has undertaken operational deployments to Iraq, Afghanistan and Timor Leste.

She is currently posted as Director, Operations and Security Law within Defence Legal Division, the area responsible for the provision of legal advice to the Department on operational, international and national security matters relevant to the ADF. She also holds the appointment of Head of Corps for the Australian Army Legal Corps and in this role, is responsible for the oversight of all Army Legal Officers. Colonel Cumming was admitted to practice in the Supreme Court of Victoria and the High Court of Australia in 1991 and holds a Master of Laws degree from the University of Melbourne.

Kanstantsin Dzehtsiarou

Can the European Court of Human Rights prevent war? Interim Measures in Inter-State Cases

The Contracting Parties to the European Convention on Human Rights (ECHR or Convention) do not always peacefully collaborate for their mutual benefit. Their relations can deteriorate to the point of military confrontation. The drafters of the ECHR thought that the creation of the European Court of Human Rights (ECHR or Court) and the Contracting Parties’ adherence to human rights would be sufficient to prevent military conflicts in Europe. However, the mere fact that some states ratified the Convention has not stopped them from resorting to the use of force. This paper examines whether the ECHR is capable of preventing or deescalating armed conflicts between the Contracting Parties to the Convention and assesses what tools can assist in its attempts to do so. It is argued here that the Court’s involvement into ongoing armed conflicts by means of interim measures can threaten the Court’s legitimacy.

The impact of the ECHR on ongoing violations of human rights is limited. The Court sometimes can express its opinion in relation to a continuing violation. For instance, if the applicant has been arrested illegally and continues to be held when the ECHR judgment finding a violation of the Convention in this situation is delivered, the Court can suggest that release is the only way to remedy such a violation. Having said that, in the vast majority of cases judicial review is a predominantly post factum exercise dealing
with the consequences of violations of the Convention and offering some remedial redress to breaches that have already happened. The Court can impact the ongoing situation by issuing interim measures that would prevent the state from breaching the rights of the applicant.

The Convention itself does not empower the Court to adopt legally binding interim measures. It is not an accidental omission. Despite this lack of explicit legal basis for interim measures in the Convention, the European Commission of Human Rights began instructing the Contracting Parties to fulfil interim measures as early as the late 1950s. The Contracting Parties have routinely complied with these measures and the Commission formalised this procedure by including a relevant rule in its Rules of Procedure in 1974. The Court included a similar rule in its Rules of Court nine years later. Currently interim measures are regulated by Rule 39 of the Rules of Court.

The Commission and the Court have developed their case law related to interim measures in cases originating from individual applications. This paper considers whether the relative success of interim measures in such cases would translate into inter-state cases or whether the Court is risking its legitimacy by venturing into the uncharted waters of interim measures in inter-state complaints. The last statement requires qualification: the key issue is not that the measures are adopted in inter-state applications per se but the nature of these measures. This paper will focus on interim measures of general nature adopted in the context of inter-state litigation. It argues that interim measures in inter-state cases bring about a whole new set of challenges which are less known to the practice of the ECHR in individual applications. Therefore, the Court should reconsider its approach to interim measures in inter-state complaints as they are likely to undermine its legitimacy since compliance with such measures depends on various political considerations over which the ECHR has almost no control. This means that such measures are less likely to be complied with than in the case of specific interim measures in individual cases.

### Kanstantsin Dzehtsiarou

Kanstantsin Dzehtsiarou is a senior lecturer at the School of Law and Social Justice of the University of Liverpool.

He read for his undergraduate law degree in Belarus. Then he took a MA in European Studies from the University of Sussex. In 2007 Kanstantsin began working on his PhD project ‘European Consensus in the Case Law of the European Court of Human Rights’ (UCD Dublin, Ireland) which he successfully defended in 2011. Kanstantsin moved to the University of Liverpool in 2015 from the University of Surrey where he has been a lecturer and then a senior lecturer in law since January 2012. He is also a visiting professor at the European Humanities University (Lithuania), he cooperates with international inter-governmental and non-governmental organisations as an expert in international and European human rights law.

His research interests spread between interpretation of the European Convention of Human Rights, reform of the European Court of Human Rights, administration of international justice, comparative and constitutional law.

### Kate Eastman SC

#### Business and International Human Rights

Over the past 50 years, human rights law has focused on the relationship between the individual and the State. As traditional State functions are devolved to the private sector, it is appropriate to ask whether the private sector and business should also take on the responsibility to protect and respect international human rights? What about business that operate global operations – should the international nature of their businesses operate by reference to international law?

In 2011, the UN Human Rights Council endorsed Guiding Principles on Business and Human Rights for implementing the UN ‘Protect, Respect and Remedy’ Framework. The Guiding Principles explain why human rights are relevant to business. The Guiding Principles explain the State’s duty to protect individuals from human rights abuses by third parties, including business. The Guiding Principles encourage States to provide effective remedies to secure human rights.

In December 2015, when Australia was examined under the Universal Periodic Review Mechanism in the UN Human Rights Commission, one of the recommendations made by The Netherlands was for Australia to consider a National Action Plan (NAP). It should be noted that The Netherlands and Dutch companies have led the way in developing international human rights standards to business practice.

In Australia, business and the legal community have been slow to respond to the Guiding Principles. The NGO sector is leading the way with strong advocacy by Global Compact Network Australia, the Australian Centre for Corporate Social Responsibility and the Australian Human Rights Commission. Recently the Law Council of Australia established a Working Group on Business and Human Rights to explore how to raise awareness of business and human rights in the legal community and beyond.

This paper will:

- examine the impact of the Guiding Principles for Australian business and the opportunities for using international human rights law in business practice;
- examine the three pillars of the Guiding Principles;
- highlight recent overseas initiatives such as s 414C(7)(b) (iii) Companies Act 2006 (UK) and the Modern Slavery Act 2015 (UK)
> suggest Australia is well placed to develop a NAP that builds on its existing experience with Australian laws that incorporate international human rights standards.

Between 1991–95, Kate Eastman SC worked as a solicitor with Allen & Hemsley (as it then was) in the Commercial Litigation and Corporate groups. During her time at Allen, she acted for asylum seekers detained at the Port Hedland Detention Centre as part of the firm’s pro bono program and was seconded to Kingsford Legal Centre. Between 1995 –98, Kate was a Senior Legal Officer with the Human Rights and Equal Opportunity Commission (now AHRC). She worked on the Commission’s hearings, intervened in court proceedings involving human rights and advised on a range of discrimination and human rights issues. She acted as a mediator for employment and human rights disputes.

Since 1995, Kate has taught human rights and international law at an undergraduate and postgraduate level at various universities (UTS, The University of Sydney and Monash) and overseas. She is a Senior Fellow of the Faculty of Law, Monash University and a member of the Postgraduate Advisory Committee. In 2008, Kate received a Commendation on teaching excellence for Human Rights Advocacy, Monash University.

Kate is and has been actively involved in a number of human rights and international law organisations. She was a co-founder and for many years President of Australian Lawyers for Human Rights (ALHR). She is a member of the Law Council of Australia’s National Human Rights Committee and the Working Group on Business and Human Rights.

Her international work includes participating as a NGO Representative for ALHR to the Diplomatic Conference on the Drafting of the Statute for the International Criminal Court in Rome in 1998, AusAID Short Course Human Rights, Rights of the Child and Judicial training in Burma between 1999 –2003. In May 2003, she was a consultant to UNIFEM Australia for Human Rights and Women project in Afghanistan.

Sherif Elgebeily

A Deafening Silence: The Absence of ICCPR Article 25(b) Protections and Hong Kong’s Democracy, Free Speech, and Rule of Law.

Article 25(b) of the ICCPR – granting citizens the ‘to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage’ – has been subject to a reservation in the Hong Kong Special Administrative Region (HKSAR) since 1976, when it was under British administration and following which the People’s Republic of China (PRC) extended it. The decision in August 2014 adopted by the Standing Committee of the National People’s Congress (‘NPCSC’) – proposing universal suffrage from a pre-vetted list of candidates and imposing preventative measures to those wishing to stand for election – led to allegations of flawed democracy, discussions of a broken rule of law and ultimately 79 days of protests under Occupy Central. The most recent reform vote in the Hong Kong Legislative Council in June 2015 was rejected in a most ignominious fashion, with a botched walk-out by pro-Beijing legislators. These events are consequences of the absence of requisite protections for electoral freedom.

Although universal suffrage was cited as an ‘ultimate aim’ of the HKSAR government in its most recent, third periodic report to the Human Rights Committee (CCPR) of 2011, the CCPR expressed concerns in its response of 2013 about the lack of clarity in the path towards universal suffrage in the HKSAR, as well as the PRC’s continuing reservation to article 25(b). The CCPR ventured so far as to recommend that the PRC ‘consider steps leading to withdrawing the reservation to article 25(b).’ The PRC, in response, has steadfastly maintained its reservation to the article.

There is no international legal basis for free and fair elections in Hong Kong; in fact, universal suffrage is only vaguely alluded to as an ‘ultimate aim’ in Basic Law articles 45 and 68, relating to the Chief Executive and Legislative Council respectively. No timeframe is projected; no key milestones are outlined; no definition of the composition of ‘universal suffrage’ is given; and no legal or legislative framework is proposed. Accordingly, Hong Kong operates outside of international law with respect to comprehensive voter rights, free elections, and universal suffrage.

The impact that the absence of such international legal protections has on the daily lives of Hong Kong citizens is simple but crucial: without the possibility of Hong Kong citizens to vote in politically independent leadership, there is no incentive for the current government to abide by core components of the rule of law and good governance – there is no risk of removal. This has direct impact on the lives of citizens. The 2014 Occupy Movement and recent ‘Fishball revolution’ displayed the appetite of citizens for political change and their rejection of the PRC’s evermore encroaching influence. Incidents including the disappearances since late 2015 of ‘dissident’ Hong Kong booksellers; interference in academic freedoms and appointments at Hong Kong universities; and unprecedented declarations by the Chief Executive that he is “transcendent” to the separation of powers distinctly undermine the rule of law with an impunity that accompanies a lack of meaningful political opposition.

This paper uses the lens of electoral freedoms in Hong Kong to examine the voids that are created by states in their reservations to international treaties and the inevitable vulnerabilities associated with omissions of such protections. Hong Kong highlights the significance of international law
in the quotidian lives of citizens not through a positive, active implementation of law, but rather through its notable absences.

In this way, a juxtaposition with states where citizens have full enjoyment of electoral freedom underlines the ripple effect that such a simple right can have on the rule of law and democracy.

**Sherif Elgebeily** is Research Officer for the Centre for Comparative and Public Law, part-time Lecturer, and current convenor of the Clinical Legal Education programme (Refugee Stream) at the Faculty of Law, University of Hong Kong, as well as the 2016 International Rule of Law Visiting Fellow of the Bingham Centre for the Rule of Law, UK.

He is the author of *The Rule of Law in the UN Security Council. Turning the Focus Inwards* (Routledge, forthcoming 2016), writes frequently for both media and academic outlets, and has presented his research internationally at numerous conferences.

He is a founding member, former Editor-in-chief, and current Member of the Advisory Board of the Westminster Law Review, with experience co-drafting Human Rights and other reports for the Iraq Team of the United Nations Department of Political Affairs in New York, defending human rights with the Egyptian Initiative for Personal Rights in Egypt, drafting Space Policy for the Enterprise and Industry Directorate-General of the European Commission in Brussels, and researching media law at the Child Law Centre, University of Pretoria. His research interests include the rule of law, comparative constitutional law, the UN Security Council, and international human rights law.

**Jeremy Farrall**

Panel Discussion: Current Practice of the UN Security Council

**Jeremy Farrall** is Fellow and Convenor of Higher Degrees Research at the Asia-Pacific College of Diplomacy in the Coral Bell School of Asia Pacific Affairs at the Australian National University. He is also Adjunct Associate Professor at the University of Tasmania Faculty of Law. Jeremy’s research interests include UN diplomacy, UN sanctions, international mediation and negotiation, peacebuilding and the rule of law.

**Caroline Foster**

A Study in ‘Everyday’ International Adjudicatory Technique

International adjudicators are increasingly required to make decisions on matters that once were exclusively for national governments to determine. How are international courts and tribunals responding to this challenge, in terms of the adjudicatory techniques they employ?

This research focusses on cases involving the regulatory themes of environment and health in the World Trade Organisation with some reference also to investment treaty cases and decisions of the International Court of Justice. Adjudicators in these cases are employing a range of decision-making techniques that might at first glance seem quite ‘everyday’, with only incremental changes or trends. However, if we reflect on what we see, it seems that their work serves increasingly to delineate domestic and international spheres of legal authority, and the means chosen for doing so may be altering the character and structure of international legal relations.

The paper will specifically engage with the idea of ‘standard of review’ as seen in all of the adjudicatory fora mentioned above. The paper will begin with some comments on the adjudicatory techniques that are implied when we talk about ‘deference’, as some say that this can be equated with ‘standard of review’. The paper suggests that ‘standard of review’ is essentially a rhetorical term when used in this way. We are in fact envisaging the use of techniques including interpretive techniques and techniques relating to the operation of the burden of proof. The paper will then broaden out into a consideration of the concept of ‘review’ and why there is an interest in this concept in international adjudication, raising questions we may want to consider in contemplating the usefulness and implications of characterising international adjudication as ‘review’. Finally, the paper will briefly address the role of the principle of proportionality in adjudication and review.

**Caroline Foster** is an Associate Professor at the University of Auckland, currently researching the international judicial and arbitral function in the twenty-first century, supported by a grant from the Marsden Council of the Royal Society of New Zealand. She was previously employed by the New Zealand Ministry of Foreign Affairs and Trade (1991–99).

International Law of the Everyday: Fieldwork, Friction & Fairness

However the significant implications of this case for international law are yet to be fully explored. The Court was not asked, nor did it have jurisdiction, to make findings with regard to the lawfulness or propriety of the offshore processing regime by reference to Australia’s obligations under treaty and customary law. Nevertheless, over five separate judgments, the Court did make findings of fact and law with considerable international relevance. Through their explicit findings, choice of language, and respective approaches to the matters raised, the separate judgments demonstrated keen awareness of the underlying international law frameworks – ubiquitous though not specifically in issue – and the rapprochement between international and domestic law on the subject at hand.

With a focus on the international law of State responsibility, my paper will explore three critical issues of contention to which the findings of the Court in Plaintiff M68 are directly relevant: i) the scope of a State’s legal obligations under international law, where action and policy has an extraterritorial component; ii) attribution of conduct of non-state actors to the State, specifically the private companies contracted to provide services and operate the offshore processing centres on Nauru and on Manus Island in Papua New Guinea; and iii) the concept of joint state responsibility in the context of cooperative immigration control and refugee protection.

Through exploring these issues, my paper will ultimately consider what the broader implications of the Court’s judgment are for Australia as a global actor and international law generally, and what impact it might have on any future development of a regional cooperation framework on displacement in the Asia-Pacific region.

Justin Gleeson SC

Annual Kirby Lecture on International Law: Australia’s Increasing Enmeshment in International Dispute Resolution

Justin Gleeson SC is the Solicitor-General of the Commonwealth of Australia. He was formerly a barrister practising at the NSW Bar and founding head of Banco Chambers in Sydney. He is an Australian member of the Permanent Court of Arbitration (PCA) in The Hague. As Solicitor-General, he appears as counsel for the Commonwealth and related entities, and provides opinions on questions of law on referral from the Attorney-General.

Madeline Gleeson


On 3 February 2016, the High Court of Australia handed down its decision in the case of Plaintiff M68 v Minister for Immigration and Border Protection. The history and progression of the case to this point had been extraordinary in many respects, not least of which being the hasty introduction of legislation after proceedings began, giving retroactive legal coverage to the government’s conduct since 2012; the sudden end to detention on Nauru mere days before the hearing commenced; and the politicisation of the government’s voluntary undertaking not to remove the interested parties from Australia before judgement could be delivered.

Subsequent to this decision, the focus has centred on its most direct and immediate consequences, namely the outcome for the 267 asylum seekers involved in the case who are now liable to return to Nauru at the discretion of the Minister, and the effect of the Court’s findings on the viability of the offshore processing regime more generally.

However the significant implications of this case for international law are yet to be fully explored. The Court
offshore processing on Nauru and Manus Island, and the protection of children. She is currently the Director of the State Responsibility and Borders, Offshore Processing and Regional Cooperation and Protection projects at the Andrew & Renata Kaldor Centre for International Refugee Law.

Camille Goodman

The Jurisdiction of the Everyday (or Why Lotus Was Right All Along)

What could be more everyday than jurisdiction? It provides the basis to make, apply and enforce every law, affects every transnational activity, and is used by administrators, regulators, police officers, lawyers and judges all over the world on a daily basis. It underpins the peaceful co-existence of sovereign States and is vitally important to the international legal system. But there is no international treaty governing jurisdiction, and the only international jurisprudence directly on the issue – the infamous Lotus judgment of 1927 – has come to be ‘considered as obsolete, and even as never having been a precedent at all’. In which case, what is the international law governing this vital, everyday issue?

Lotus is commonly cited as authority for the presumption that States can do anything that is not prohibited (and then just as commonly derided as being wrong in any case). This paper will argue that this ‘received view’ of Lotus is fallacious, that the Lotus judgment was in fact correct, and that it continues to accurately reflect international law in relation to jurisdiction. The paper will show that Lotus really comes down to the proposition that extraterritorial prescriptive jurisdiction (and the territorial enforcement of such jurisdiction) is permissible ‘within the limits’ that international law places upon it. Far from being an ‘extreme positivist’ approach giving rise to unlimited State sovereignty, this proposition clearly envisages limits on the exercise of jurisdiction; the difficulty is that Lotus does not make clear what those limits are – and nor does anything else.

Against this backdrop (and setting aside the maritime law issues which are now governed by a specific jurisdictional regime in the law of the sea), this paper will ask: what would happen today if Australian citizens on an Australian-flagged ship were killed in a high seas collision with a foreign-flagged ship which subsequently came to port in Australia with both captains on board? As in Lotus, this would be a case of concurrent jurisdiction. And as in Lotus, Australia already has legislation that could theoretically apply in such a situation, including under the Criminal Code Act 1995 (Cth) and the Crimes At Sea Act 2000 (Cth). Neither piece of legislation specifies any particular ‘basis’ upon which jurisdiction is intended to be exercised. But both pieces of legislation provide a mechanism for Australia to take into account the concurrent jurisdiction of other States. Using this scenario the paper will undertake a contemporary examination of the practical issues associated with the territorial enforcement of extraterritorial laws, and formulate some conclusions about the modern application of the Lotus principle and the everyday law of jurisdiction.

Camille Goodman has worked at the Office of International Law in the Attorney-General’s Department since 2005, providing advice to the Australian Government on a wide range of public international law issues, with a particular focus on maritime law and international fisheries law.

She has provided advice on the development and implementation of a variety of international agreements, including as the legal adviser to the Australian delegation at a range of international negotiations and has also worked as an out-posted legal adviser in the International Fisheries team at the Department of Agriculture.

Most recently (from 2013–15), she was the Director of the East Timor Litigation Team, with responsibility for preparing Australia’s defence of litigation commenced by East Timor in the Permanent Court of Arbitration and before the International Court of Justice.

In February 2015, Camille commenced her PhD at the Australian National University College of Law, with the support of the Sir Roland Wilson Foundation. Camille’s doctoral research is in the law of the sea, and seeks to understand the nature and extent of coastal State jurisdiction over resources in the exclusive economic zone under contemporary international law.

Douglas Guilfoyle

Making history: The Past and Present in Mauritius v UK

Agatha Christie wrote part of Murder on the Orient Express in the Pera Palas hotel, Istanbul. It was also the home of Atatürk during the early days of the Turkish Republic. For two weeks in early 2014 the Pera Palas ballroom was the hearing room for the arbitration convened under the UN Convention on the Law of the Sea (UNCLOS) between Mauritius and the United Kingdom over the UK’s declaration of a marine protected area (MPA) in the exclusive economic zone surrounding the Chagos archipelago in the run-up to the 2010 UK general election.

At several levels the case was an attempt to refraiment politics by reference to the past. The case was embedded in a contest as to sovereignty over the Chagos archipelago. Mauritius maintains that the archipelago was illegally excised from its territory by the UK prior to it being granted independence. The excision occurred so that the UK could lease the archipelago as an airbase to the United States, and the base so established on Diego Garcia became notorious in the context of rendition flights. To make way for the base
the island was forcibly depopulated of the Chagossians who had lived there for some three generations. The excision occurred on the basis of certain undertakings made by the UK to pre-independence Mauritius in 1965. The question in the 2014 arbitration was the extent to which the UK’s unilateral declaration of the MPA had violated rights secured to Mauritius by those undertakings. Could litigation provide a mediating processing by which the present could be informed, and re-made, by the past? The questions included the legal status of undertakings given by a colonial power to a pre-independence non-self-governing territory. A further question was, if those undertakings were legal obligations, were they justiciable in an UNCLOS proceeding?

In terms of the daily rituals of litigation, this arbitration had both remarkable and unremarkable features. At one level, it followed the completely usual pattern of various rounds of written and oral argument in which claims were refined and points of argument sharpened. What, however, made the case remarkable was how deeply embedded in documentary history it was. In conventional maritime boundary disputes tribunals may consider patch historical evidence, old treaties and colonial maps. Here, however, a rich archive of UK government material had been discovered in the course of decision-making during the last days of the colonial era.

These documents provided insights into the course of daily decision-making during the last days of the colonial era. Also, however, a great volume of more contemporary UK government documents had been discovered in the course of recent litigation by Chagossian activists in UK courts. It came from two main sources. The first was the UK archive at Kew gardens, where much of the material relevant to the decolonisation of Mauritius was now in the public domain. These documents provided insights into the course of daily decision-making during the last days of the colonial era.

Also, however, a great volume of more contemporary UK government documents had been discovered in the course of the UNCLOS arbitration (2010–15). Through the rituals of litigation, international law was the mechanism by which the past was used to determine and re-shape the present. The tribunal concluded that the undertakings given pre-independence created legal rights for Mauritius and these had been arbitrarily affected by the UK’s MPA declaration. This was sufficient to find the MPA procedurally invalid. While this might seem a small legal victory, by far the greatest victory was the judgement that Mauritius had a set of presently enforceable legal rights in the archipelago and was more than the mere beneficiary of political promises to return the islands when no longer needed for defence purposes.

Douglas Guilfoyle is Associate Professor at the Faculty of Law, Monash University. He researches and teaches in the fields of public international law, international criminal law, and the law of the sea. He holds his LLM and PhD from the University of Cambridge where he was a Gates Scholar and a Chevening Scholar. His undergraduate study was at the ANU (BA (hons), LLB (hons)), which he represented in the world championship round of the Jessup Moot in 1998. Douglas joined Monash University in 2015 and is currently the Associate Dean (Research).

He was formerly a Reader in International Law at University College London. He is the author of Shipping Interdiction and the Law of the Sea (Cambridge University Press 2009) and numerous articles on maritime security, naval warfare and Somali piracy. He has consulted, inter alia, to the UN Office on Drugs and Crime, the Contact Group on Piracy off the Coast of Somalia and the Office of the UN Commissioner for Human Rights. He was a legal adviser to the Government of Mauritius in the Mauritius v UK UNCLOS arbitration (2010–15).

Toby Hanson

Multilateralism: A Eulogy?

The practice of international law has been punctuated by a steady stream of multilateral treaty negotiations, the bread and butter of the international law practitioner. Despite this history an emerging claim is that multilateral law making, particularly in the form of formal treaty negotiations, is in decline and is being superseded by the practice of States opting for the flexibility of non-binding arrangements to address issues of international concern. The purpose of this paper is to examine, in the Australian context, whether these claims prophesying the death of multilateralism are correct.

The paper will examine this issue by posing the questions when were the halcyon days of Australian participation in multilateral treaty negotiations? Has there been a decline in the conclusion of large multilateral conventions over recent decades? Are important multilateral issues instead being addressed by States through non-binding arrangements and patchworks of bilateral agreements? This paper will explore these questions by identifying Australian practice including through interviews with experienced Australian public international lawyers.

Finally, the paper aims to reconcile these findings against both academic commentary in this area including arguments by Joost Pauwelyn et al. that formal international law making is stagnating and observations from the everyday experience of a practitioner.

Toby Hanson is currently employed as a Senior Legal Officer in the Office of International Law at the Australian Attorney-General’s Department, where he works in Practice Groups covering IHL and Security Law, Environment Law, International Criminal Law and Air and Space Law. From 2012-2013 he worked on the Philip
Morris Asia–Australia investor–State arbitration defending Australia’s tobacco plain packaging laws.

Prior to joining the Office of International Law, he worked for two years as a legal advisor for the Coalition to the International Criminal Court in New York. He also participated in meetings of the Special Working Group on the Crime of Aggression between 2007 and 2010 and attended the Review Conference of the Rome Statute in Kampala where the crime of aggression amendments were adopted.

He also has experience working in private practice specialising in criminal and international law.

**Juliet Hay**

**Panel Discussion: Current Practice of the UN Security Council**

**Juliet Hay** is currently Lead Adviser, Legal Division, New Zealand Ministry of Foreign Affairs and Trade. Her present role is as part of New Zealand’s Wellington-based UN Security Council team. This involves helping to formulate positions on most issues on the UNSC agenda particularly those resulting in resolutions or involving the sanctions committees.

Since joining the MFAT in 1999 Juliet has alternated between time spent in Legal Division and postings first at the New Zealand Embassy in The Hague and more recently in the New Zealand Permanent Mission in New York where she spent four years. Most of the time spent in the Legal Division before her current role involved working on aspects of International Criminal Law and Terrorism, areas on which she had also worked while at the Ministry of Justice before joining MFAT. She participated in negotiations on the Rome Statute of the International Criminal Court. She then led the work to implement including the legislation and subsequently published some related articles.

**Caroline Henckels**

**Everyday Challenges Faced by International Arbitrators when Dealing with Uncertainty**

International courts and tribunals are frequently called upon to determine issues in circumstances of empirical or normative uncertainty. In some cases where such uncertainty arises, the characteristics of the governmental decision-maker relative to those of the court or tribunal suggests that the government’s decision should be accorded weight, through the doctrine of deference.

Deference is a concept that may arise as part of a court or tribunal’s determination of the appropriate standard of review to employ in a given dispute. ‘Standard of review’ refers to the degree of scrutiny the decision of a primary decision-maker by an adjudicator. Deference involves an adjudicator exercising restraint in relation to the evaluation of factual and legal issues where the adjudicator’s judgment is different from that of the primary decision-maker in circumstances where there is uncertainty as to what the right conclusion should be, or there is no objectively correct answer to an issue. Deference may be justified where there are particular reasons why the view of the primary decision-maker should be preferred to the view of the adjudicator in relation to the reliability of assessments of factual and value-based matters.

In the context of international adjudication, there are two key reasons why the views of national decision-makers may be more reliable than those of adjudicators in situations of normative or empirical uncertainty. These are the desirability of regulatory autonomy and decision-making by actors that are proximate to or embedded in the national polity, and the practical advantages of relying on the decisions of actors with greater institutional competence or expertise. These rationales for deference are relevant in situations of normative uncertainty and empirical uncertainty, respectively. We see distinct tendencies toward normative and empirical deference in the jurisprudence of the World Trade Organization Appellate Body, the European Court of Human Rights, and other international and supranational courts and tribunals. This paper discusses the circumstances in which deference will be appropriate and the benefits and limitations of the use of this technique.

**Caroline Henckels** (PhD Cambridge, LLM Melbourne, LLB Wellington) is a Senior Lecturer at Monash University and a Barrister and Solicitor of the Supreme Court of Victoria, Australia and of the High Court of New Zealand. Caroline researches at the intersection of international law and public law, with a focus on international investment law and trade law.


**An Hertogen**

**Alleviating Everyday Friction Through Good Neighbourliness**

This paper explores how the good neighbourliness principle can lessen friction between sovereign states. While friction is at its most visible when armed force is used, it can result from a variety of everyday governance decisions, for example: when...
a state approves industrial activities that cause pollution in another state; when a state’s monetary, trade, or fiscal policies improve its economy’s competitiveness at the expense of that of its trading partners; or when a state tolerates, or even actively promotes, practices that other states may find offensive.

Alleviating such friction between states is an important task for international law that is becoming ever more important in our increasingly interdependent world. Common response strategies are the conclusion of international agreements or the transfer of powers from states to international organisations. However, these are often painstakingly slow to achieve, if they even generate a successful result at all. In light of this, we need legal rules and principles that balance the sovereignty concerns and interests of both acting and affected states so as to avoid the friction caused by the everyday exercise of states’ sovereignty.

The proposed paper examines the potential of the good neighbourliness principle to achieve a fair outcome between all states involved, even in the absence of a formal agreement or an international organisation. The paper explores the meaning and origins of this principle, and reflects on its legal status. It establishes that many rules and principles in international environmental law already draw on the good neighbourliness principle, and examines how these rules and principles can in turn inspire the development of international law in other areas in which the interdependence of states manifests itself, particularly where the impacts are not of a physical nature.

An Hertogen is a lecturer at the University of Auckland Faculty of Law, where she completed her PhD in 2012. She also holds an undergraduate law degree from the KU Leuven in Belgium, and an LLM from Columbia University. After the completion of her doctoral thesis, she was a visiting researcher at the Georgetown University Law Center in Washington DC, a visiting fellow at the Global Trust Project at Tel Aviv University, and a participant in the 2013 Centre for Studies and Research at The Hague Academy for International Law. From 2012–15, she was an assistant editor of Opinio Juris.

An is currently working on a three year research project on ‘Good Neighbourliness in International Law’, funded by a Marsden Fund Fast-Start grant of the Royal Society of New Zealand. The research explores the potential of ‘good neighbourliness’ as a foundation for legal restrictions on states’ sovereign decisions that have a non-physical impact on other states.

Tamas Hoffmann
Will the Real International Lawyer Please Stand Up?

Schachter memorably spoke about the ‘invisible college of international lawyers’ that implies that international lawyers are an objectively definable group of people who have the authority to decide how international law is created and applied. After all, international law is basically ‘a group of people sharing professional tools and expertise, as well as a sensibility, viewpoint, and mission’ (David Kennedy), isn’t it?

However, international lawyers are obviously a diverse group whose members hail from different countries and intellectual traditions. Different scholars identify themselves with divergent theoretical approaches or ‘schools’ while practitioners might not bother with monikers but have radically differing approaches to the same conundrum. The growing specialization (or even fragmentation) of international law created specialists of international human rights law, international environmental law, international criminal law etc. who are working in a field that is generally accepted to constitute part and parcel of general international law but at the same time might not even self-identify as international lawyers. At the same time, domestic courts and tribunals increasingly adjudicate cases involving international legal issues without specialized international legal knowledge.

My presentation investigates the question of the membership of the community of international lawyers and its consequences on international law-making. Influenced by Bourdieu’s concept of habitus, I propose that international law is a legal culture that comprises of ‘a body of internal protocols and assumptions, characteristic behaviors and self-sustaining values.’ International lawyers can only be those persons who participate in that culture, in other words, accept the membership rules. This in turn begs the question how does the activity outside this community influence the development of international law.

Tamas Hoffmann is an Associate Professor at Károli Gáspár University, Budapest. And in 2011, he received his PhD from the International Law Department, Eötvös Loránd University of Sciences, Budapest.

Patricia Holmes
The Last Gasp – Australian Government Approach to the WTO Tobacco Plain Packaging Dispute

Australia’s tobacco plain packaging legislation has a high profile around the world. Since its introduction on 1 December 2012, a number of other countries have begun the process of adopting similar measures. A High Court constitutional case and an investor-State dispute settlement claim have been unsuccessful in challenging Australia’s tobacco
plain packaging legislation. However, the tobacco plain packaging measure remains the subject of dispute settlement proceedings in the World Trade Organization (WTO). Four WTO members, Honduras, Indonesia, the Dominican Republic and Cuba are challenging the consistency of Australia’s measure with its WTO obligations. Throughout 2014-2015, the Australian government has been defending its measure in a series of written and oral submissions to a WTO dispute settlement Panel. The Panel is expected to issue its report in the second half of this year. Patricia Holmes, Assistant Secretary of the Trade and Investment Law Branch in the Department of Foreign Affairs and Trade will summarise the WTO proceedings and claims, and speak about Australia’s approach to the dispute.

**Patricia Holmes** is a career Diplomat with the Australian Department of Foreign Affairs and Trade. She is currently Assistant Secretary, Trade and Investment Law Branch in the Office of Trade Negotiations, a position she has held since February 2015.

Ms Holmes was Australia’s Ambassador to Argentina, with concurrent non-resident accreditation to Paraguay and Uruguay, from November 2011 to December 2014. Prior to her appointment to Argentina, Ms Holmes was Assistant Secretary, FTA Legal Counsel Branch, a position she held since April 2010. Ms Holmes has served previously in Geneva WTO (Counsellor 2006–09), Papua New Guinea (First Secretary 1998–2000) and Vanuatu (Third, later Second, Secretary 1994–96). She also served as a WTO Panellist in the dispute EU – Measures Prohibiting the Importation and Marketing of Seal Products (WT/DS400, DS401).

Ms Holmes holds a Bachelor of Science with a Bachelor of Law (Hons) degree from Macquarie University; a Graduate Diploma in Legal Studies from the University of Technology, Sydney; a Masters of Arts in Foreign Affairs and Trade and a Masters of Laws in Environmental Law from the Australian National University. Ms Holmes was admitted to the Bar of New South Wales and the Australian Capital Territory in 1992.

**Anna Hood**

*International Law as the Weapon of Choice for Nuclear Matters During the Cold War*

Orthodox accounts of international law suggest that it was of little significance during the Cold War with power politics ruling the day. By contrast, in the Cold War’s aftermath, international law sprang back to life and over the last 25 years, the world has witnessed a deluge of international legal activity and the development of a wide range of new international legal principles, doctrines and institutions. The extent to which this narrative accurately reflects the development of any particular body of international law is highly questionable. With the law of nuclear weapons, however, there is simply no correlation between the narrative and the law’s trajectory. In fact with nuclear weapons, the account is inverted: during the Cold War international law played a central role in the nuclear weapons story but since the early 1990s (with the exception of the 1996 Nuclear Weapons Case in the International Court of Justice (‘ICJ’)) law has largely disappeared from the plot.

My paper aims to explore this inverted story and its significance. In Part I, it maps the role that international law played in the nuclear weapons story during the Cold War. It argues that international law was used by an array of actors to advance a wide range of nuclear agendas and in doing so helped both to shape Cold War relationships and influence the duration, parameters and trajectory of the conflict. The Great Powers sought to employ treaty law regularly to control, maintain and protect their nuclear stockpiles, consolidating their power and the contours of the Cold War in the process. They also channelled disputes they had with non-nuclear weapons states about nuclear weapons issues through legal avenues. For example, when New Zealand refused to let US nuclear ships into its waters, the US chose to invoke the ANZUS Treaty and conduct what could have remained a diplomatic dispute through a legal lens. Outside of the Great Powers, numerous other states also looked to international law as a mechanism to address nuclear weapons matters. In contrast to the approach of the US and USSR, however, they employed it to circumvent power politics, rein in the use of nuclear weapons and at times challenge the approach that nuclear weapons states took to nuclear weapons. For example, many states sought to establish nuclear weapon free zones through treaty law, and Australia and New Zealand worked to limit French nuclear testing in the Pacific by launching litigation in the ICJ.

Having established that international law was a tool used by many states to advance disparate nuclear agendas during the Cold War, Part II explores what the significance of this is. Why did so many states turn to law to advance their nuclear agendas? Does the nuclear weapons/international law story of the Cold War reinforce ideas about international law as a discipline of crisis or is it perhaps possible to understand the volume of international legal activity around nuclear weapons during the Cold War as part of the everyday of international legal life during that period? How do we account for international law largely disappearing from the nuclear weapons narrative after the fall of the Berlin Wall and the collapse of the USSR? What can we learn about international law from the way that it was invoked by many different actors in many different ways? Was it anything more than a political tool? What ends did it serve? And what was lost and what was gained from the rush to law at this time?

**Anna Hood** is a lecturer at the University of Auckland. Her academic research focuses on international law and
security issues, the law of international organisations and international law and disarmament. Anna has a BA/LLB from the University of Melbourne, an LLM (International Legal Studies) from NYU and a PhD from the University of Melbourne.

**John-Mark Iyi**

Falling Through the Cracks: Boko Haram as a Non-State Armed Group and The Inadequate Reach of International Law

Africa is facing new threats to peace and security. Most of the conflicts on the continent in the last century had their roots in the struggle against colonialism and Cold War geopolitics. International law was able to respond to these conflicts within the existing legal framework of the law of armed conflict and international human rights law. However, there is an increase in the activities of Non-State Armed Groups of different character on the continent and the nature of the threats they pose to African states presents legal problems requiring fresh thinking. Conflicts like those in Mali and Nigeria raise questions about the adequacy of contemporary international law to respond to these new threats. First, while separatist groups like the National Movement for the Liberation of Azawad in Mali have been described as rebel groups demanding a separate state, others like Ansadine in Mali and Boko Haram in Nigeria lack clear political objective save to impose certain form of social, religious and legal order on the state. They have resorted to terrorism as a tactic to achieve their objectives.

This gives rise to a number of legal issues—how do we classify the group Boko Haram and the conflict Boko Haram conflict? What are the legal implications of such classification? Given that the activities of the group eventually became transboundary when it expanded its operations throughout the Lake Chad Region by launching attacks in Chad, Niger, and Cameroon, does contemporary international law offer adequate legal framework for such classification? Does contemporary international law offer states the legal basis to respond in such cases? Some states in the region responded by use of force against Boko Haram’s cross-border attacks, and not infrequently, there were claims of violation of territorial integrity. Furthermore, while members of regular armed forces of the different states were criticised and investigated for violations of international humanitarian law during the conflict, there are legal issues about how and where to hold members of Boko Haram accountable for atrocities committed by them especially during cross-border attacks.

This paper argues that an examination of contemporary international law’s framework for addressing NSAGs like Boko Haram presents a rather complex kaleidoscope of legal possibilities. Since Boko Haram was classified as a terrorist organisation, a wide range of body of treaties relating to terrorism would be applicable to the situation. At the same time, the conflict was classified as a non-international armed conflict and thus principles of IHL would kick in. At the national level, Nigeria has sought to prosecute members of the group under its domestic anti-terrorism laws.

The paper argues that whereas there are cases where a particular legal regime may apply, there would be areas of interconnectedness where more than one legal regime would be applicable. Furthermore, there would also be cases of grey areas where the applicable law is less clear, perhaps requiring further development and clarity. The paper then concludes that given the nature of these new NSAGs and the regional dimension of the new threats they pose to peace and security especially in West Africa, appropriate legal response would require a regional approach and therefore the existing regional legal regime should be fully implemented and enhanced in order to provide a comprehensive legal framework.

**John-Mark Iyi** obtained his LLB (Hons) from the University of Benin in Nigeria in 1998 and the BL (Honours) from the Nigerian Law School in 2000. Between 2001–02, he taught at the Nigerian Police College Maiduguri. In 2003, he obtained a Certificate in Peace Research from the University of Oslo. He obtained his LLM from the University of Ibadan in 2007 where he emerged overall best graduating student. Dr Iyi received his PhD from the University of the Witwatersrand where he was a Research/Teaching Associate, a Webber Wentzel Scholar, and an Associate of the Wits Programme in Law Justice and Development in Africa.

Dr Iyi is currently a Post-Doctoral Research Fellow at the South African Research Chair in International Law, University of Johannesburg, South Africa and a Fellow of the Centre for Maritime Law and Security in Africa, (Accra Ghana).

He researches in public international law, international peace and security, and legal theory and jurisprudence from an African perspective. He is co-editor of *Boko Haram and International Law: Mapping the Legal Terrain for Accountability* (Springer 2016, forthcoming), and the author of *Humanitarian Intervention and the AU-ECOWAS Intervention Treaties under International Law: Towards a Theory of Regional Responsibility to Protect* (Springer 2016).

**Malcolm Jorgensen**

Panel Discussion: Disputes over the South China Sea

**Malcolm Jorgensen** is an associate of the Sydney Centre for International Law at the Sydney Law School, and has lectured in Public International Law at the University of Sydney and UNSW.
Malcolm was awarded his PhD in United States Foreign Policy and International Law in 2015 as the first resident doctoral candidate of the US Studies Centre at the University of Sydney, where he was also a research associate and lecturer in US politics and foreign policy. Malcolm’s PhD thesis was titled American Foreign Policy Ideology and The Rule of International Law: Contesting Power through the International Criminal Court, and explored the central role of foreign policy ideology in the conception and development of international legal rules and institutions.

He works as a researcher and is a regular broadcast and print media commentator on American international legal practice and American politics, with a particular focus on development of a rule-based order in the Asia-Pacific. Malcolm holds a Bachelor of Laws (Hons) and a Bachelor of Arts (Hons) with majors in Economics and International Relations, each from the University of Queensland. He has worked as a Judge’s Associate in the Supreme Court of Queensland and as a commercial litigation solicitor.

Richard Joyce

Cold War as Katechon (Or, What’s Our Excuse Now?)

In the epilogue to The Gentle Civiliser of Nations, Martii Koskenniemi, suggests that for some leading international law professionals after 1960, ‘the Cold War provided a convenient explanation for why a full realisation of the internationalist hopes was still impossible.’ This quote evokes a widespread (though not altogether accurate) idea of international law being in a period of hiatus during the Cold War, particularly in respect of the realisation of its institutions’ potential.

This paper will reflect and invite discussion on the idea of the Cold War as a restraining force inhibiting the realisation of international law’s potential. It will do so by drawing on a tradition of political theology in international law which can be traced to the work of Carl Schmitt. In so doing, international law’s potential will be considered in terms of its messianic dimensions, while the idea of constraint will be considered in terms of the katechon (the force or actor who restrains the coming of the Anti-Christ and in so doing delays the arrival of the Messiah). For Schmitt, the figure of the katechon enables a perspective on politics and history (and, we might add, law) which is an alternative to the dangerous bourgeois ‘faith in the unlimited potential for change and for happiness in the natural, this-worldly existence of man.’

In 1947, Schmitt wrote that ‘one must be able to name the katechon for every epoch of the past 1948 years…. The position has never gone unoccupied, otherwise we would no longer exist.’ If it can be argued that the Cold War functioned as a katechon and so prevented the realisation of international law’s potential (or, as Schmitt might have argued, dampened dangerous utopian faiths), what forms of potentiality in international law did the end of the Cold War unleash? Has the Cold War been replaced by other katechonic forces? And if not, what ‘convenient explanation’ do we have for the shortcomings of international law today?

Richard Joyce researches in the area of international law and legal theory, with a specific focus on the nature and limits of sovereignty. He is the author of Competing Sovereignties (Routledge 2010) and a number of articles and book chapters in this field.

He is currently a Senior Lecturer in the Monash Law Faculty and an Associate of the Castan Centre for Human Rights Law. He has a BA/LLB(Hons) from the University of Melbourne and a PhD from the University of London (Birkbeck College). He has held visiting research appointments at the Melbourne Law School and the Department of Political Science at San Francisco State University. Prior to joining Monash, he taught at Reading University, Birkbeck College, King’s College London and University College London.

Bal Kama

The Manus Island decision: Adjudicating Australia’s role in the detention of asylum seekers in the Pacific

In Namah v Pato (Manus decision), the PNG Supreme Court held that the ‘forceful transfer and continued detention (of asylum seekers)…by the PNG and Australian governments’ was ‘unconstitutional and illegal.’ Australia has sought Pacific Island nations as a solution to its problem of dealing with asylum seekers. In Plaintiff M68/2015, the High Court appeared to approve Australia’s ‘Pacific Solution.’ The majority judges argued that the arrangement allowed Australia to procure, fund and participate in the detention, but fell short of the actual detention of asylum seekers.

However, the Manus decision suggests that Australia’s actions in a processing country could be illegal according to domestic and international law. The Manus decision could have two likely implications for Australia. First, it casts doubt on the constitutional viability of the ‘Pacific Solution’ for Pacific Island countries. Second, it provides an opportunity to study closely the workings of PNG’s liberal constitution as an example of other liberal constitutions in the Pacific in order to better evaluate Australia’s responsibility in regional agreements. Contrary to the limitations identified in Plaintiff M68/2015, the Manus decision suggests that some form of extra-territorial scrutiny of the Executive’s actions is warranted.

Bal Kama is a PhD Candidate at the ANU College of Law. He has a Bachelor of Laws (Hons) and Bachelor of Arts (International Relations) from the University of Canberra.
Bal was a consultant to the United Nations Women in PNG prior to undertaking his PhD, and is the 2016 Commonwealth Pacific Young Person of the Year.

Natalie Klein
Panel Discussion: Disputes Over the South China Sea

Natalie Klein is Professor and Dean at Macquarie Law School and previously served as acting Head of the Department of Policing, Intelligence and Counter-Terrorism. At Macquarie, she teaches and researches in different areas of international law, with a focus on law of the sea and international dispute settlement.


She provides advice, undertakes consultancies, and interacts with the media on law of the sea issues. Prior to joining Macquarie, Professor Klein worked in the international litigation and arbitration practice of Debevoise & Plimpton LLP, served as counsel to the Government of Eritrea (1998–2002), and was a consultant in the Office of Legal Affairs at the United Nations. Her masters and doctorate in law were earned at Yale Law School. In 2013, she was invited to become a Fellow of the Australian Academy of Law.

Peter Lawrence
Representation of the Voiceless and the International Legal Order: Current Limitations and Future Possibilities

International lawmaking and dispute settlement traditionally focuses on the rights and voices of states. But decisions of international courts, tribunals and treaty bodies have significant impacts upon the everyday lives of current and future generations. Individuals negatively affected by such decision-making, both now and in the future, typically lack standing in international forums. As such, there are limited mechanisms in international law through which individuals can voice their concerns and challenge international decision-making that affects their everyday lives. They are ‘voiceless’.

This paper argues that representation has the potential to remedy this disconnect between individuals and international decision-making bodies. Addressing this disconnect is essential given: i) that the international legal order disproportionately represents the interests of the economically powerful, and ii) the acceptance by the international community of the value of democracy (e.g. in the Millenniumgoals) as being essential to ensure the maximisation of human rights and human dignity. Representation is the mechanism by which ordinary people potentially can have their interests expressed - and taken into account – in international lawmaking and dispute settlement processes.

For the purpose of the paper, ‘voiceless’ interests are taken to mean the interests of the global ecological system, stateless persons and refugees, future generations, the poor, many women, the old, the young the disabled, and the marginalised. The common feature of these entities/groups is that they have limited or no possibilities to express their interests and have their interest taken into account in the global legal order. Hannah Pitkin's concept of representation based on interests rather than agency provides a coherent basis for representation in this context.

A key focus of the paper is to analyse current mechanisms in the international legal order that give a voice to the ‘voiceless’. Which of these mechanisms are strong and which are weak and why? What are the limitations to such mechanisms? The paper provides a matrix capturing both the level and form of representation, including i) state to state diplomatic protection, ii) UN human rights mechanisms (individual complaints and special Rapporteur mechanisms), iii) global sustainable development mechanisms, iv) international litigation options. Structural limitations of these mechanisms include, limited standing provisions for international adjudication, the constraints of citizenship, and the lack of recognition of future generations and ecological systems in the global legal order.

Finally the paper sketches some options for reform, including the expansion of standing provisions for international tribunals based on the notion of atmospheric trust. The paper deepens our understanding of the importance and potential of notions of representation in the global legal order in order to give a voice to the voiceless.

Peter Lawrence is a Senior Lecturer at the University of Tasmania (UTAS) Law School where he teaches international law and supervises the University of Tasmania Law Review. Peter’s key area of research concerns the interface between ethics, justice, climate change and international law.

In 2014 Peter published Justice for Future Generations, Climate Change and International Law (Edward Elgar Press, 2014). Previously Peter worked for the Australian Department of Foreign Affairs and Trade (1989-2004) and was First Secretary for the Australian Permanent Mission to the United Nations in Geneva (1996-1999). In 2014, Peter gave public presentations at Kobe University, Japan and the University of Oxford and in 2015 at University of Sydney and Monash law Schools.

In 2016–17 Peter will be working on a joint project ‘Representation of future generations and international climate litigation’ under the Germany-Australia (DAAD)
The ‘Verti-zontal’ Authority of the International Criminal Court

The International Criminal Court (ICC) appears to be at a crossroads. After surprisingly high levels of support from across much of the globe during its infancy, and several years of modest achievements, some major, longstanding challenges remain unresolved, which threaten to undermine the legitimacy of the whole project. One of the key challenges for the ICC has been securing State Cooperation with the Court’s investigations and prosecutions, despite the clear obligation to cooperate stipulated in the Rome Statute of the ICC. Since all ICC trials must be held in the presence of the accused, with sufficient evidence before the Court to ascertain guilt beyond a reasonable doubt, and because the ICC does not have its own enforcement authorities, the Court is wholly dependent on State authorities to bring together most of the necessary elements for conducting fair and effective criminal trials.

Enforcement of International Criminal Law (ICL) has traditionally involved prosecution and/or extradition of persons accused of committing international or transnational crimes, and assistance with the collection and protection of evidence in relation to such crimes, and now encompasses State Cooperation with tribunals such as the ICC. Essentially there are two predominant models of ICL enforcement: one is described as ‘horizontal’ (inter-State) and one is described as ‘vertical’ (supra-State). This paper argues that the ICC State Cooperation regime reflects aspects of both these models, and therefore it is best described as ‘verti-zontal’.

This ‘verti-zontal’ authority creates a tension which leads to numerous ‘everyday’ interactions between the ICC and national authorities, as well as between the ICC, States, and the UN Security Council. For example the African Union – most of whose members are States Parties to the Rome Statute – regularly issues public declarations of non-Cooperation with the decision of the ICC Pre-Trial Chamber I in March 2009 to issue an arrest warrant for the incumbent President of Sudan for war crimes and crimes against humanity committed in Darfur. At the time of writing, President Al-Bashir of Sudan remains at large, despite having travelled to various African States since the arrest warrant was issued. The ICC has responded by formally reporting Chad and Kenya – both States Parties to the Rome Statute – to the United Nations Security Council, for failing to cooperate with the terms of the Security Council’s referral of the situation to the ICC. The ICC Assembly of States Parties also regularly considers ‘non-cooperation’ issues and how to address them. These deliberations highlight the ‘verti-zontal’ tensions inherent in the Rome Statute.

According to Harold Hongju Koh’s ‘transnational legal process theory’, these very ‘interactions’ and ‘interpretations’ are the bread and butter of gradual ICL norm internalisation. This paper will analyse the various ‘mundane settings’ in which these normative contests take place, as well as the more high profile challenges, in order to assess the trajectory that the ICC’s authority appears to be heading along.

Joanne Lee
The ‘Verti-zontal’ Authority of the International Criminal Court

Joanne Lee is a Legal Officer with the Department of Foreign Affairs and Trade and chairs the ACT IHL Committee of the Australian Red Cross. She was an Adjunct Lecturer, Tutor and PhD candidate at the ANU College of Law, Australian National University (2004–10).

From 1999–2004 she was a Research Associate for two Vancouver-based (UBC) research institutes, providing legal and policy advice on the International Criminal Court, in person and in numerous publications, to governments, civil society, and media on every major continent, with funding from the Canadian Government and international NGOs, as well as participating in ICC negotiations at UN Headquarters as part of the NGO Coalition for the ICC.


Linking Emissions Trading Schedules – A Legal Design Perspective

Susanna Leslie

Given the recognition in the Paris Agreement that carbon markets are needed to put countries on the right path to meet their emissions reductions targets, this presentation considers the potential for linking national and sub-national emission-trading schemes, in order to move towards an international carbon market. In this paper I consider how the legal design for any kind of linking framework could assist linking of different schemes. (Note, this presentation is based on a thesis completed as part of LLM from University of Toronto, and does not reflect the views of the Ministry of Foreign Affairs and Trade).

Susannah Leslie
(LLM (University of Toronto); LLB (Hons) BA (Politics) (University of Otago)) is a Crown Counsel in the New Zealand Crown Law Office with responsibility for advice and litigation involving public law. Prior to this role Susannah worked for over four years in New Zealand’s Ministry of Foreign Affairs and Trade, primarily as a legal advisor, as well as for New Zealand’s Permanent Mission to the World Trade Organisation in Geneva.
Susannah has advised the Government on a range of trade law and international law issues including in relation to the Trans-Pacific Partnership negotiations, market access and biosecurity issues, New Zealand’s accession to WTO agreements, United Nations sanctions enforcement; and United Nations organisations and practice. Before joining the Ministry Susannah was a solicitor in private practice at Bell Gully in Wellington.

Jingyi Li
Australian Copyright Law Regarding Limitations and Exceptions for the Print Disabled: Achievements to Date and Required Further Reforms

The Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, enacted in June 2013, aims to strengthen rights of access to knowledge and information embodied in published works for persons with print disabilities—those who are unable to read printed works due to blindness, visual impairment or a perceptual or reading disability.

The Treaty directs Member States to enact a limitation or exception in their national copyright law to permit designated authorized entities to reproduce published works in Braille, audiobooks and other accessible formats for persons with print disabilities without the authorization of the copyright holder, and then distribute them to its beneficiaries. Australia has actively supported the adoption and application of the Marrakesh Treaty, and became a signatory party on 14 June 2014. Copyright Act 1968 has established a mechanism to facilitate the visually disabled persons’ access to copyrighted works in Australia. Australia has not yet ratified the Marrakesh Treaty through its Federal Parliament to date because of differences existing between Australia copyright law and the Marrakesh Treaty. Australia’s present governance framework does not seem to be functioning effectively, as only 5% of all books currently produced in Australia are published in accessible formats such as large print, audio or Braille. The Australian government is now working on the ratification and full application of this treaty so to better benefit persons with print disabilities in this country.

The objective of the proposing paper is to evaluate the effectiveness of the current Australian copyright exception system for persons with a print disability. To this end, the paper provides an overview of copyright exceptions for the print disabled in Australia’s present governance framework. It then discusses the gap between the Marrakesh Treaty and copyright exceptions provided by the Copyright Act 1968, and examines proposals on copyright law reform aimed at filling the gap. Based on this analysis, the paper presents further recommendations on issues overlooked or remaining uncertain in previous law reform discussions.

Jingyi Li is currently a Cotutelle Ph.D. candidate in Macquarie University (Australia) and Shandong University (China). Jingyi Li has published a number of journal articles in constitutional law and intellectual property law area in China. She received the National Scholarship from the Minister Education of the P.R.C. She also holds the Certificate of the Legal Profession Qualification in P.R.C. She was admitted into a Ph.D. program in Law School of Shandong University directly after getting her Bachelor’s degree with Excellent Research Student Scholarship. In the year 2013, she was enrolled in the Ph.D. programme in Macquarie Law School with the Macquarie University Research Excellence Scholarship. Being a Cotutelle Student, she is conducting her research in intellectual property rights and human rights area with joint supervision.

Jingyi Li’s research interest is the relationship between intellectual property rights and human rights. Her present research focus is how the Marrakesh Treaty effectively balancing copyright and accessibility for the print disabled. Her recent publications on this topic including ‘Copyright Exemptions to Facilitate Access to Published Works for the Print Disabled: The Gap between National Laws and the Standard Required by the Marrakesh Treaty’ (IIC - International Review of Intellectual Property and Competition Law 45(7), 741-767) and ‘Reconciling the Enforcement of Copyright with the Upholding of Human Rights: A Consideration of the Marrakesh Treaty to Facilitate Access to Published Works for the Blind, Visually Impaired and Print Disabled’ (European Intellectual Property Review 38(10), 653-664. Co-authored with Selvadurai N.)

Rain Liivoja
Go-Pills and the Protection of Military Medical Personnel

Some of the best-established rules of the law of armed conflict (LOAC) relate to the special status of military medical services. Indeed, one of the foundational treaties of modern LOAC, the 1864 Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, was concerned with the protection of field hospitals, ambulances and their personnel. Currently, Geneva Conventions I and II, and their three Additional Protocols, along with relevant customary international law, establish a detailed legal regime for the protection of medical services in time of armed conflict.

The privileged position of medical services under LOAC rests on the exclusive assignment of certain personnel and facilities to medical functions. Special protection under the law is lost where military medical units are used to commit, outside their humanitarian duties, acts harmful to the enemy. The same rule applies, mutatis mutandis, to military medical personnel.
This paper considers the involvement of military medical personnel and facilities in programs that seek to enhance or ‘optimise’ the cognitive or physical performance of service members, as distinct from medical treatment and disease prevention. This not just a hypothetical problem. For example, US forces use central nervous system stimulants – often known as ‘go-pills’ – for ‘fatigue management’, allowing aviators and members of special forces to stay alert for longer periods of time and to undertake extended missions. This occurs under full medical supervision.

This paper argues that medical personnel and units carrying out interventions for performance enhancement forfeit their special protection under LOAC. This happens either because these are not medical functions for the purposes of LOAC, because these are acts harmful to the enemy, or both. This argument exemplifies, on a more general level, the lack of direct connection between medical ethics and the entitlement to protection under LOAC. That performance enhancement may be carried out in compliance with the prevailing principles of bioethics is immaterial for LOAC purposes.

Rain Liivoja is a Senior Lecturer and Society in Science – Branco Weiss Fellow at Melbourne Law School, where he co-directs the Program on the Regulation of Emerging Military Technologies (PREMT). He is also an Affiliated Research Fellow of the Erik Castrén Institute of International Law and Human Rights, University of Helsinki. Rain’s research interests include the law of armed conflict, international criminal law, the law of treaties and comparative military justice. He is the book review editor of the Finnish Yearbook of International Law, a member of the Board of Directors of the International Society for Military Law and the Law of War, and chair of the International Peace and Security Interest Group of ANZSIL. He has recently co-edited the Routledge Handbook of the Law of Armed Conflict (with Tim McCormack; Routledge, 2016). Rain holds a doctorate in international law from the University of Helsinki.

Wei-Chung Lin

Applying Multilateral Environmental Agreements to Private Enterprises through an Accountability Mechanism? Insights from the IFC/MIGA Compliance Advisor Ombudsman

Private sector operations sponsored by multilateral development banks can have significant impacts on the social and environmental dimensions of host countries. In order to address adverse consequences arising from such projects that are sponsored by the International Finance Corporation (IFC) or the Multilateral Investment Guarantee Agency (MIGA), the Office of the Compliance Advisor Ombudsman (CAO) was set up under the World Bank Group. The CAO receives private complaints about the IFC/MIGA-supported projects that are implemented by private sector clients. Different processes (such as dispute resolution and compliance functions) can thus be triggered to reach amicable solutions to the issues raised. The CAO constitutes a unique non-judicial, accountability mechanism. Its operation may reinforce oversight of the conduct of private enterprises in project finance activities.

According to the substantive rules applicable in the CAO’s investigation process (i.e. the IFC/MIGA Sustainability Policies and Performance Standards), numerous multilateral environmental agreements (MEAs) have been explicitly referred to in these rules. This contrasts with the World Bank’s Safeguard Policies, where MEAs are referred to only occasionally. However, little research has been conducted on the extent to which the CAO has really promoted the implementation of MEAs on private enterprises through its investigations. This paper seeks to examine how the CAO has utilised MEAs to address environmental impacts arising from IFC/MIGA-supported projects, thereby ensuring compliance with environmental treaty obligations by private enterprises.

Following the introduction, the second section explores the institutional aspect of the CAO, discussing the CAO’s different processes in handling complaints against projects carried out by private sector clients. The third section then introduces the substantive rules in determining complaints brought before the CAO. These rules mainly include the IFC/MIGA Sustainability Policies and Performance Standards. Meanwhile, as noted above, many MEAs have been referred to in the IFC/MIGA Sustainability Policies and Performance Standards. This section also considers the implications of these MEA rules for strengthening private enterprises’ accountability.

In the fourth section, cases are selected to evaluate how effective the CAO has been in holding private enterprises accountable for the manner they implement the projects that have negative environmental impacts in light of relevant MEAs.

Wei-Chung Lin is a lecturer at Macau University of Science and Technology Faculty of Law. Wei-Chung holds an LL.M. in Public International Law from the University of Nottingham, and LL.M. and LL.B. degrees from National Chung Cheng University, Taiwan.

Wei-Chung has successfully defended his Ph.D. thesis (which was conducted at the University of Nottingham and funded by the Taiwan Ministry of Education) in 2016, which examines the implications of civil society involvement in the settlement of environment-related disputes arising from international investment activities.

Wei-Chung has been active on the conference circuit, with submissions for participation being accepted by various universities and societies, including McGill University, the University of Strathclyde, University College Cork, King’s College London and Society of International Economic
International Law of the Everyday: Fieldwork, Friction & Fairness

Zheng Lingli
The Conflict and Coordination between the International Carbon Trading and WTO Rules

In recent years, climate change gave birth to the concept of the International Carbon Trading. Though the international carbon trading gives full play to market-based scheme in reducing emissions, it also bring some negative effects at the same time. Especially if a state is not only the party of the international carbon trading, but also a member of the WTO, state’s protection measures would incur conflict between the international carbon trading and WTO rules. Therefore, the conflict between the international carbon trading and WTO rules has become a major obstacle to the development of carbon trading in the future. This paper will focus on analysis of the intersection of international carbon trading and WTO, and further pay more attention to the GATT and GATS, to explore the potential areas of conflict and what we can do to promote the coordination of the two regimes.

There are four sections in this paper. Section One introduces some basic issues, such as the concept, legal basis and background of carbon trading. And then both Section Two and Section Three would address the potential conflicts between the international carbon trading and WTO rules. However, basing on the academic view of ‘carbon unit is a commodity’, Section Two points out that if a state takes protection measures in carbon trading, it would more likely lead to the violation of the rules of GATT, such as the Principle of MFN, NT and the rule of general elimination of quantitative restrictions. Alternatively, Section Three concludes that carbon trading itself and the relative service attached would likely have some overlaps with GATS if we treat the carbon trading as a kind of ‘service’. Therefore, it’s inevitable to address the possible violations of the rules of MFN, NT and market access of GATS. On the basis of the analysis of the conflict, Section Four would put forward the feasible approach to facilitate the compatibility of carbon trading and the WTO considering the differences of short-term and long-term interests, which is beneficial to achieve the organic coordination of the international carbon trading and WTO rules.

Zheng Lingli is associate professor of Law of Nanjing Normal University in China. She earned S.J.D degree in 2006 and since then teaches in Nanjing Normal University. Her expertise is WTO Law & International Economic Law.

Penelope Mathew
Panel Discussion: The Everyday Lives of Antipodean International Lawyers

Penelope Mathew is the Dean, Head of School and Professor of Law at Griffith Law School (Brisbane and Gold Coast, Australia). Prior to her appointment at Griffith Law School, she held the Freilich Foundation chair at The Australian National University.

From 2008–10, she was a visiting professor and interim Director of the Program in Refugee and Asylum Law at the University of Michigan Law School, where she convened the 5th Michigan Colloquium on Challenges in International Refugee Law. From 2006–08, she was a legal adviser to the ACT Human Rights Commission, where she conducted the human rights audit of the ACT’s Correctional Facilities.

Professor Mathew has also taught at the Australian National University College of Law and Melbourne Law School, and she is a past editor-in-chief of the Australian Yearbook of International Law. Her main area of expertise is refugee law. Her new book, co-authored with Tristan Harley, Refugees, Regionalism and Responsibility is to be published by Elgar this year.

Ofilio Mayorga
Occupants, Beware of Bits: Applicability of Investment Treaties to Occupied Territories

Foreign investors are exposed to economic losses in cases where, as a result of war, the territory they invested in has fallen under the control of a foreign army. Russia’s recent occupation and illegal annexation of Crimea illustrates the risks foreign investors face in occupied territories.

Indeed, several companies controlled by a Ukrainian national have already filed 5 investment treaty claims against Russia for the alleged seizure of their assets in Crimea. These companies
are invoking the Ukraine-Russia Bilateral Investment Treaty (BIT) of 1998. Because BITs do not apply extraterritorially, to hold Russia liable, the arbitral tribunals will necessarily have to conclude that the investments were made in Russian territory rather than the territory of Ukraine. As a result, there is a risk that the investment treaty system will be misused in these cases to validate Russia’s illegal land grab.

By exploring the intersection between the law of occupation and international investment law, this paper discusses how foreign investors can use ISDS to protect their economic interests in occupied territories without undermining the sovereignty of the ousted sovereign. The thesis of this paper is that, under article 43 of the Hague Regulations of 1907, occupants are bound by BITs signed by the ousted sovereign. Therefore, foreign investors may bring investment treaty claims against an occupant under BITs in force in the occupied territory prior to the occupation. An arbitral tribunal’s finding that the occupant violated the ousted sovereign’s BIT would reinforce the international legal principle that while an occupant does not assume sovereignty over occupied territory, it is still internationally responsible for its wrongful acts.

**Ofilio Mayorga** is an associate attorney in Foley Hoag’s International Litigation and Arbitration Practice in Washington, D.C. His practice focuses on State-State and investor-State disputes before the world’s principal dispute resolution bodies, including the International Court of Justice, ICSID and the Permanent Court of Arbitration. Ofilio also regularly advises sovereign clients on a wide range of public international law issues, such as compliance with obligations arising under International Humanitarian Law, International Human Rights, land and maritime boundary delimitation, and investment protection treaties.

Ofilio combines his experience in international arbitration with a solid background in Public International Law, which he acquired working at the United Nations’ Office of Legal Affairs in New York, and as a Legal Associate at Harvard University’s Program on Humanitarian Policy and Conflict Research. Before joining Foley Hoag, Ofilio led the Supreme Court Litigation practice of a major law firm in Nicaragua.

**Cassandra Mudgway**

Sexual Exploitation by UN Peacekeepers: The ‘Survival Sex’ Gap in International Human Rights Law

Allegations of sexual exploitation and abuse against UN peacekeepers over the past decade prompted a ‘zero-tolerance’ policy response from high-level UN officials. To facilitate this policy, the UN has initiated and implemented various preventative and responsive measures. Despite the raft of reforms, it is the troop-contributing countries which have exclusive criminal jurisdiction over their military contingent members and the current framework has been criticised for failing to ensure accountability of offenders.

In response to allegations of sexual abuse involving children by peacekeepers in the Central African Republic, an Independent Review Panel recommended in December 2015 that sexual exploitation and abuse should be reconceptualised as conflict related sexual violence. Moreover, the Panel recommended that sexual exploitation and abuse should be treated as human rights violations and therefore the response to allegations should be within the UN’s human rights framework. With a focus on sexual abuse involving children, the Panel did not comment on survival sex involving young women (one of the most common forms of sexual exploitation by peacekeepers).

This paper will explore the following issues; firstly, I will argue that state obligations to respond to survival sex, where sex is exchanged for assistance to which peacekeepers have access or which is already owed to the local population, do not exist in international human rights law. Secondly, this paper will explore whether survival sex should be considered violence against women under international human rights law. Thirdly, this paper will discuss whether human rights bodies, such as the Committee on the Elimination of Discrimination against Women, should consider filling the ‘survival sex’ gap in international human rights law.

NB: This paper is inspired by research I conducted for my PhD thesis and is the basis of a draft journal article on this topic.

**Cassandra Mudgway** is about to submit her PhD in international law at the University of Canterbury (UC), New Zealand. Her thesis topic explores sexual exploitation and abuse by United Nations peacekeepers, specifically how the UN can improve accountability of military contingent personnel.

Cassandra has research interests in international human rights, international criminal law and feminist legal theory. She has been the Student Editor of the New Zealand Yearbook of International Law and an administrator for the Australasian Law Teachers Association New Zealand. Outside of academia, she was a founding member of the University of Canterbury’s Feminist Society and organiser of the National Intersectional Feminist Day Conference held at UC in 2014–15.
Phillip Ng
Fisheries Enforcement in the Field: International Law and Technological Innovation

The scourge of illegal, unreported and unregulated (IUU) fishing has generated a plethora of operational, technological and legal responses across the world. In the Western and Central Pacific Ocean – home to over a third of the world’s tuna stock – combating IUU fishing is a matter of the very livelihood of many Pacific Island countries and territories.

Technological advances in monitoring, control and surveillance (MCS) measures to combat IUU fishing have been impressive – vessel monitoring systems and other satellite-based systems, traceability schemes, electronic monitoring and reporting and more recently, new forms of aerial surveillance including drones. Yet, these significant advances in MCS tools have often not been accompanied by similarly ambitious advances in the international legal framework which underpins such activity.

This paper will examine the application of these MCS technologies to the development of the contemporary legal regime governing maritime regulation and enforcement in the Western and Central Pacific Ocean.

In particular, the paper will focus on three issues: first, the impact of the new technologies on the ‘evolving’ interpretation of the right of hot pursuit and other enforcement rights under multilateral treaties, particularly in light of recent judicial decisions including the Artic Sunrise (Netherlands v Russia) arbitration. Second, the paper will examine how these new technologies have aided and encouraged legal innovation and cooperation between coastal States to combat IUU fishing. This includes new cooperative instruments such as the Agreement on Strengthening Implementation of the Niue Treaty on Cooperation in Fisheries Surveillance and Law Enforcement in the South Pacific Region (the Niue Treaty Subsidiary Agreement). Finally, the paper will consider what lessons can be applied from this fast-developing area of fisheries law and practice in respect of broader legal issues including marine environmental protection.

Phillip Ng is a Senior Legal Officer in the Office of International Law at the Australian Attorney-General’s Department, where he advises the Government across a range of fields including international environmental law, international trade and investment law and the law of the sea. He has also been involved in international litigation on behalf of the Government.

Phillip is currently engaged in a project funded by the Department of Foreign Affairs and Trade to combat illegal fishing in the Pacific, assisting Pacific Island countries and territories with ratification and implementation of the Niue Treaty Subsidiary Agreement, a cooperative fisheries surveillance and enforcement treaty. Prior to joining the Attorney-General’s Department in 2011, Phillip was an associate at a leading Australian commercial law firm. He holds a Master of International Law and Bachelor of Economics (Social Sciences)/Laws (Hons) degrees from the University of Sydney.

Sundhya Pahuja
Keynote Lecture: Letters from Bandung: Encounters with Another Inter-National Law

Sundhya Pahuja is the Director of Melbourne Law School’s Institute for International Law and the Humanities (IILAH). Her research focuses on the history, theory and practice of international law in both its political and economic dimensions. She has a particular interest in international law and the relationship between North and South, and the practice, and praxis, of development and international law. Sundhya has been awarded the American Society of International Law Certificate of Merit (2012), the Woodward Medal for Excellence in the Humanities and Social Sciences (2014) and a Fulbright Senior Scholar award at the Institute for Global Law and Policy at Harvard Law School (2016).

From 2012–15, Sundhya concurrently held a Research Chair in Law at SOAS, University of London, and in 2014, served as Director of Studies in Public International Law at the Hague Academy of International Law. She has held visiting appointments at the LSE, NYU and UBC, currently serves as core faculty at the Harvard Law School Institute for Global Law and Policy Workshop, as Affiliate Faculty of the European Collaborative Doctoral Programme in Globalisation and Legal Theory, and holds Visiting Chairs at Birkbeck and SOAS. In 2017, Sundhya will be a Fellow at the Stellenbosch Institute for Advanced Studies, in South Africa.

Joshua Paine
Balancing Stability and Change: An Everyday Challenge in International Adjudication

This paper argues that international adjudicators face, on an everyday basis, a challenge of striking an appropriate balance between stability and change, or ensuring legal certainty through their interpretations while allowing the law to evolve to respond to new demands. It further argues that this common challenge is responded to by adjudicators through a variety of familiar legal techniques which allow international law to appropriately balance stability and change even in the absence of new treaty law being agreed in many areas. Far from being new, the challenge of balancing stability and change has been noticed as a fundamental dilemma
by many who have reflected on the international judicial function. Lauterpacht devoted several chapters to the problem in his classic Function of Law and President Higgins also remarked on this feature of the ICJ’s work. Furthermore, as new challenges emerge which adjudicators must attempt to respond to, the everyday dilemma of balancing stability and change is likely to increase in importance. The paper draws on examples from WTO and UNCLOS dispute settlement, ICJ litigation and investment treaty arbitration.

The paper considers a range of legal techniques routinely deployed by adjudicators to manage the recurring challenge of balancing stability and change in applicable international legal norms. While all of the techniques respond to this underlying functional problem, they are relatively varied in terms of their doctrinal formulation and the circumstances in which they are utilised. For example, subsequent agreement and subsequent practice under the VCLT remain creatures of consent. Thus where the treaty parties are in agreement these techniques permit change (eg the NAFTA parties in investment arbitration), but often these techniques will favour stability and a treaty party who opposes change (eg the Whaling case). In contrast, the use of soft law standards and norms to interpret treaty obligations can enable adjudicators to permit a degree of change without the agreement of all treaty parties. Yet typically adjudicators moderate the change that such soft law standards can bring about in the absence of widespread support (consider US-Tuna II regarding international standards under the TBT Agreement).

In recent years, interpreting treaty terms as having an evolutionary meaning has been a celebrated technique for international adjudicators seeking to respond to the need for change while claiming to respect the treaty parties’ original intent and thus treaty stability (eg Navigational Rights, China-Audiovisuals). Interpreting a treaty term in light of developments in customary international law unsurprisingly often leads into argument over how custom has or has not evolved (see the ongoing debate among ICJ judges over the customary requirement to conduct an Environmental Impact Assessment in the recent Costa Rica/Nicaragua cases).

As well the various techniques used to balance stability and change in applicable legal norms, the paper considers examples of adjudicators responding to the frequent challenge of changes in relevant facts which affect the application of legal norms, such as changes in scientific knowledge or technical capacity. For example, both ICJ and ITLOS judges have observed that such factual developments can affect what a due diligence obligation requires at any particular time. Similarly, we see WTO adjudicators grappling with the issue of how factual developments affect what states’ SPS obligations require (see recently India – Agricultural Products and earlier US-Continued Suspension).

In short, the underlying functional challenge of striking an appropriate balance between stability and change is one faced on an everyday basis by international adjudicators. At this micro, everyday level, we see international law being adjusted to changed circumstances.

Joshua (Josh) Paine is a PhD Candidate at the Melbourne Law School. His doctoral thesis uses the category of environmental cases to consider selected aspects of the judicial function across four sites of international adjudication: dispute settlement in the World Trade Organization and the United Nations Convention on the Law of the Sea, International Court of Justice litigation, and investment treaty arbitration.

His research has been published in the Leiden Journal of International Law and Journal of International Dispute Settlement and selected for presentation at major conferences, including the European Society of International Law annual conference. In 2014 he was awarded a three month visiting fellowship at the Max Planck Institute for Comparative Public Law and International Law.

Josh is an associated scholar of the Refract Research Network on Fragmentation and Complexity in Global Governance, a five-year interdisciplinary project funded by Research Foundation Flanders (FWO). He holds an LLM in international law from Cambridge University and a BA/LLB (Hons 1) from the Australian National University.

Emma Palmer and Hannah Woolaver

Strangulation or Support? The Assembly of States Parties and the Independence of the International Criminal Court

Each year, representatives of states parties to the Rome Statute of the International Criminal Court (ICC), along with observer states and NGOs, meet in The Hague or New York to undertake ‘everyday’ administrative and other functions set out in the Rome Statute and the ICC’s Rules of Procedure and Evidence (Rules). In contrast, other international criminal tribunals have been either established and overseen by the United Nations – as for the International Criminal Tribunals for the former Yugoslavia and Rwanda – or have combined national and international supervision, as in the case of ‘internationalised’ tribunals.

At least two challenges to the ICC’s independence were raised during the fourteenth Assembly of States Parties (ASP) meeting, held in The Hague in 2015. The first involved a debate about including supplementary agenda items requested by Kenya and South Africa. Kenya’s requests concerned the intended application of Rule 68 – which the ASP had altered at the twelfth ASP – and monitoring the ICC Prosecutor’s witness identification and recruitment processes. South Africa sought a discussion on the ‘application and implementation Articles 97 and 98 of the Rome Statute’. Second, a number of states sought to place
severe restrictions upon the ICC’s budget. Many states and NGOs argued that these two matters called into question the relationship between the ASP’s ‘legislative’ and management roles and the judicial responsibilities of the Court.

Indeed, although it is a multilateral diplomatic forum, the ASP plays a significant role in relation to the ICC and, by extension, the operationalization of international criminal law. Yet the scope and content of the ASP’s relationship with the ICC and its potential to ‘threaten the independence of the judiciary’ has not been the subject of specific scholarly analysis. The ASP’s recent history suggests it is timely to review its impact on the ICC.

This paper examines the relationship between the ASP and the ICC’s prosecutorial and judicial independence. It draws on ICC and ASP documents, including NGO and state party statements, and is informed by informal discussions with NGO, judicial and State representatives and observations of the fourteenth ASP. The first section identifies the ASP’s main responsibilities as established by the Rome Statute framework. It then investigates the provisions in the Statute and the rules and procedures that govern ASP processes. The second section uses three examples to analyse the ASP’s potential to influence the ICC in practice: instances where the ASP has made changes to the ICC Rules, the ASP’s role in relation to non-cooperation of states with the ICC, and the budget approval process. The final section considers what these practices suggest about the ASP’s relationship to the ICC and the Court’s independence. This paper argues that as a body of diplomatic representatives, the ASP risks becoming a venue for translating essentially legal disputes into the arena of international diplomacy. This has important consequences for the independence and legitimacy of the ICC.

Emma Palmer is PhD candidate at UNSW studying international criminal law in Southeast Asia. Emma is currently a Research Assistant for two Australian Research Council (ARC) Discovery Projects within the Faculty of Law at UNSW Law. Emma completed a Masters in Law, specialising in international law, in 2011, having previously received Bachelor degrees in Law and Commerce. Emma has worked as a solicitor and was a senior investment analyst at Macquarie Bank between 2006–11. Emma is admitted as a Solicitor and Barrister in New South Wales and is a Director for Women’s Legal Services NSW.

Hannah Woolaver is a Senior Lecturer in the Faculty of Law, University of Cape Town. She teaches Public International Law and International Criminal Law at the LLB and LLM levels, and supervises postgraduate research in these areas. Hannah completed her PhD at the University of Cambridge, entitled ‘Recent Developments Related to the Principle of Equality of States in International Law: Equality and Non-Intervention’, supervised by Professor Christine Gray. Prior to this, Hannah graduated with Distinction from the BCL at the University of Oxford and the LLB from the University of Durham. Her research focuses on international criminal law, public international law (particularly the use of force and the principle of non-intervention), and the relationship between international and domestic law.

Jadranka Petrovic and Vasko Nastevski

South Africa’s Response to the ICC’s Warrant of Arrest for President Al Bashir

In 2009, Sudanese President Omar Hassan Ahmad Al Bashir (President Bashir) was indicted by the International Criminal Court (ICC) on charges of war crimes and crimes against humanity over the conflict in the western region of Darfur, Sudan. The following year the ICC charged President Bashir with genocide over events in Darfur, where allegedly more than 300,000 people have died and more than two million people have been displaced since 2003. Before the ICC can prosecute President Bashir, it has to obtain custody over him. As a judicial institution without power to arrest those it indicts, the Court relies on national authorities. States to which President Bashir has travelled since the warrants for his arrest have been issued have been reluctant to arrest and surrender President Bashir to the ICC justifying their refusal by the head of state immunity argument.

By focusing on the specific response of the South African Government to the ICC’s arrest warrant against President Bashir in June 2015, this paper considers the question of whether states must cooperate with the ICC in instances of an arrest warrant against a sitting head of state of a non-state party and observes the broader implications of state responses similar to the South African case.

The paper first briefly overviews the Bashir case and then considers South Africa’s response to the obligation to cooperate with the ICC and arrest President Bashir. After outlining the law concerning immunity of head of state, the paper examines pro et contra arguments relating to the specific June 2015 events in South Africa and then observes the broader consequences created by those events. The paper concludes that despite a legal basis for arrest of President Bashir, political nuances of the case have curtailed President Bashir’s arrest creating implications for future effectiveness of the ICC.

Jadranka Petrovic is a Melbourne Law School graduate. In addition to her degrees in law (doctoral, masters and bachelor), she has also completed a number of non-degree-based courses, both at postgraduate and undergraduate level, in law and in other disciplines at The University of Melbourne and other institutions.

She currently teaches and researches in International Law at Monash University. Her research interests include various areas of International Law, including International
Humanitarian Law, International Criminal Law, Art and Law and International Trade Law. She publishes and regularly presents papers at international conferences on such varied topics as cultural property, self-determination, use of force, individual criminal responsibility and international arms trade. Her professional membership includes Australian Law Teachers Association, Australian and New Zealand Society of International Law, and International Law Association. She also serves on the Editorial Board of the Journal of Philosophy of International Law.

Vasko Nastevski completed his PhD (2011) under the auspices of the Asia Pacific Centre for Military Law in the Melbourne Law School at the University of Melbourne. He also completed a Master of Public and International Law (2004) at the same institution.

Dr Nastevski has contributed to various individual research projects relating to international criminal law and international humanitarian law and has provided advice to different media outlets on these subjects. Dr Nastevski has also published chapters on international human rights law.

Jonathan Pickering

Hard Law, Soft Law and Reflexive Climate Governance: The Paris Agreement as Crème Brûlée

A critical question for international climate law is what kind of legal arrangements are best suited to encouraging actors involved in the global climate regime to reflect critically on its performance and to reform the regime in response. In particular, is reflexive climate governance more likely to be fostered by hard or soft law norms? The Paris Agreement under the United Nations Framework Convention on Climate Change represents what could be described a ‘crème brûlée’ approach to legal form: hard on the top, soft underneath.

In this talk (which draws on research co-authored with Jeff McGee and Sylvia Karlsson-Vinkhuyzen) I examine the mix of hard and soft law elements in the Paris Agreement and the implications of that mix for reflexive climate governance, with a focus on mechanisms for reviewing national and collective actions to reduce greenhouse gas emissions. I argue that the structure of the Agreement—whereby developed and developing countries’ responsibilities are articulated under a common legal framework—demonstrates a capacity for the UN framework to learn from, and partially overcome, the divisiveness and limited participation of previous agreements. Moreover, the structure achieves a balance between long-term procedural predictability on the one hand and flexibility to respond to changing economic and environmental circumstances on the other. At the same time, the Agreement’s ability to catalyse a more reflexive approach to climate governance is limited, not least because the non-binding nature of pledges shifts greater responsibility for the success of the Agreement onto domestic policy settings and informal accountability mechanisms.

Jonathan Pickering joined the Centre for Deliberative Democracy and Global Governance at the University of Canberra in 2015. He is a Postdoctoral Fellow working with Professor John Dryzek on his Australian Research Council Laureate Fellowship project, ‘Deliberative Worlds: Democracy, Justice and a Changing Earth System’.

He completed his PhD in philosophy at the Australian National University, based in the Centre for Moral, Social and Political Theory and graduating in 2014. His thesis explored opportunities for reaching a fair agreement between developing and developed countries in global climate change negotiations. Before joining the University of Canberra he taught climate and environmental policy at the Crawford School of Public Policy at ANU, and has been a Visiting Fellow at the Development Policy Centre at ANU since 2014.

Jonathan’s research interests include the ethical and political dimensions of global climate change policy, global environmental governance, development policy and ethics, and global justice.

He has a Masters’ degree in development studies from the London School of Economics and Political Science (LSE), and undergraduate degrees in arts and law from the University of Sydney. Previously he worked as a policy and program manager with the Australian Government’s international development assistance program (AusAID, 2003–09).

Michelle Podmore

The Paris Climate Change Agreement – Designing an Ambitious and Fair Global Agreement

Climate change is a significant global challenge, with local impacts, but requiring a global solution. In December 2015, the first truly global climate change agreement was adopted in Paris. One of the key challenges in reaching agreement was designing an effective agreement that would encourage all countries to participate and take meaningful climate change action, while providing sufficient flexibility to accommodate the great diversity of countries’ circumstances. This presentation will consider how this balance was struck, in particular, with respect to the legal design of the Paris Agreement.

Michelle Podmore is the Lead Adviser in the International and Resources Law Unit of the New Zealand Ministry of Foreign Affairs and Trade. She has focused on international environmental law and international security
and disarmament law. She was the Legal Adviser for the New Zealand delegation to the United Nations climate change negotiations from 2012–15. Prior to that, Michelle was posted to the New Zealand Embassy in Chile and worked in other policy roles at the Ministry of Foreign Affairs and Trade. She holds an LLM in international law from the University of Auckland.

Ashique Rahman

Challenges to Arbitrators Under the ICSID Convention: Everyday Practice or an Abuse of Rights?

Parties to arbitration under the ICSID framework have the right to propose the disqualification of an arbitrator pursuant to Article 57 of the ICSID Convention. If a party decides to exercise its rights under Article 57, pursuant to Rule 9 of the ICSID Rules of Procedure for Arbitration Proceedings, the ‘proceeding shall be suspended until a decision has been taken on the proposal.’

This paper will highlight how the rules contained in Article 57 and Rule 9 shape everyday practice in investment treaty arbitration. The paper will analyse recent challenges to arbitrators under the ICSID Convention and will question whether challenges to arbitrators are becoming (or have already become) part of everyday litigation practice.

For example a recalcitrant party that intends to thwart the progress of an arbitration may, as a litigation tactic, exercise its “right” under Article 57 and Rule 9 of the ICSID Convention to trigger an automatic suspension of the arbitration, derail the procedural timetable for the arbitration and potentially delay an award in the arbitration by many months, if not years. This is a lacuna in the ICSID Convention and the Rules and arguably it is exploited by parties in investment treaty arbitration.

Although this is everyday practice in international dispute resolution, this gap in the Convention and the Rules results in inefficiencies, increases the cost of the arbitration and delays the rendering of a final award.

Against this backdrop of the reality of everyday practice, the paper will consider whether principles of international law, including the prohibition of abuse of rights in international law, can be used to fill the gap in the ICSID Convention that potentially allows abusive practice. Finally, the paper will also consider whether there is a risk that using international law to fill gaps in the ICSID Convention and to ‘shape the everyday’ of litigation practice could have unintended consequences (e.g., by exposing the award to the risk of annulment).

Ashique Rahman is a senior associate at the public international law firm Fietta, based in London. Ashique has extensive experience representing States and private parties in international disputes, including proceedings brought under international investment agreements. He has acted as counsel in a number of complex, high-value arbitrations under the ICSID, ICC, LCIA and UNCITRAL Rules, several of which have related to claims over $500 million in value.

Ashique also advises States, international organisations and multinational companies on a broad range of public international law topics, including the law of the sea, the law treaties and jurisdictional immunities. He has delivered training in public international law to State officials and has taught courses in international investment law and international arbitration at University College London and at Newcastle Law School (UK). Prior to joining Fietta, Ashique was an associate at another leading public international law firm in London.

Rosemary Rayfuse

Sea Level Rise and the Protection of Biodiversity

In 2012 the ILA Committee on International Law and Sea Level Rise was established with a mandate to study the impacts of sea level rise and its implications under international law. While the focus of the Committee is predominately on the law of the sea and migration issues, clearly other areas of international law are implicated, including regimes relating to the protection of marine and terrestrial biodiversity in affected coastal areas.

Assessments of the existing fragmented international legal framework suggest that it is singularly ill-equipped to respond to the challenges of spatial shifts and changes in phenology, species abundance and species interactions that will be caused by climate change. Both their managerial competence and the institutional resilience of these regimes face major challenges, including that of separating sea level rise impacts from existing stressors and in incorporating sea level rise (and other climate change) considerations into their management efforts.

This paper explores how international regimes for the protection of biodiversity, in particular — but not limited to — the Biodiversity Convention, the Ramsar Convention and the World Heritage Convention are attempting to manage under the increased conditions of uncertainty posed by climate change.

Rosemary Rayfuse (LLB Queens, LLM Cambridge, PhD Utrecht, LLD h.c., Lund) is a Professor of International Law at UNSW Australia, a Conjoint Professor at Lund University and a Visiting Professor at the University of Gothenburg.

She researches and teaches in the area of Public International Law in general, and more specifically in the Law of the Sea and International Environmental Law focusing on high seas fisheries, oceans governance, protection of the marine environment in areas beyond national jurisdiction, climate engineering and the normative effects of climate change on international law.
Recent publications include the Research Handbook on International Marine Environmental Law (Edward Elgar, 2015) and International Law in the Era of Climate Change (with S. Scott) (Edward Elgar, 2012) as well as numerous journal articles, book chapters, conference and seminar papers in these and other areas of international law.

She is on the editorial or advisory boards of a number of international law journals, Chair’s nominee on the IUCN’s Committee on Sea Level Rise and International Law, and is a member of the IUCN Commission on Environmental Law and Co-Chair of its Sub-Working Group on High Seas Governance.

John Reid

Year in Review

John Reid currently leads the Office of International Law in the Commonwealth Attorney-General’s Department. He has been a legal adviser on international law to the Government for over a decade, working across a range of portfolios. John is responsible for advice to the Government on all areas of international law, including international human rights and refugee law, international security, international humanitarian law, environment law, law of the sea, air law and international trade and investment law.

In his current role, John is appointed Australia’s Agent in international litigation involving Australia, including disputes before the International Court of Justice and those conducted under the auspices of the Permanent Court of Arbitration.

Previously, John has worked as counsel in the Office of General Counsel and as an in-house legal adviser for the Australian Customs and Border Protection Service.

Catherine Renshaw

Adultery, Pornography, Sodomy: How Does International Law Deal with Everyday Moralities?

In 1963, in what was to become a famous exchange between Professor H.L.A. Hart and Lord Devlin on the subject of public morality and the criminalisation of homosexuality, prostitution, and pornography, Lord Devlin argued that a degree of moral conformity was essential to society, and that every society has a right to preserve its existence by insisting on some such conformity. Professor Hart’s response was that society is not as fragile as Lord Devlin imagined it to be, and that Lord Devlin offered no evidence to support his claim that tolerating individual practices which ran against the moral grain of society jeopardized society’s survival. Why (argued Professor Hart) should the moral status quo have the right to preserve its existence by force?

This debate is still played out in courtrooms across the world. Major international human rights instruments, and many state Constitutions, permit governments to discourage or prohibit conduct which they view as detrimental to the moral health of the community. Governments themselves, it is thought, are generally best placed to identify precisely what the moral values of the community are, and what measures are necessary in particular cases to ensure their maintenance.

The decisions of international tribunals and courts relating to the public morality limitation are unsatisfactory in three respects. First, there is little clarity about how the risk to society should be assessed. How do we know when the danger presented by a particular practice is sufficiently clear and present to justify prohibition? Should public condemnation, in and of itself, be enough to justify making an act a crime? If public condemnation is not sufficient, what more might be needed? Ronald Dworkin, applying these questions to Lord Devlin’s argument that society’s abhorrence of homosexuality justified its prohibition, noted that Lord Devlin offered no evidence that homosexuality presents any danger at all to society’s existence, beyond the naked claim that all deviations from a society’s shared morality are capable of threatening the existence of society.

Second, one part of the test for determining whether a particular restriction is legitimate on the grounds of public morality involves asking whether the measure burdens the individual excessively, compared with the benefits it aims to secure. This test assumes that intensity and degree of suffering can be measured with some form of common metric in an objective, neutral, precise process. But the reality of litigation specifically excludes the subjective pathos of isolation, guilt, grief, fear of exposure and humiliation that accompanies being characterised as a deviant and a criminal. Is it possible for a judge or decision-maker to understand this kind of suffering, and balance it against a public good?

Third, the scope of the state’s right to restrict individual liberty is usually constrained by the fact that the restriction must be ‘necessary in a democratic society.’ The European Court of Human Rights has defined a democratic society as one that is tolerant, broadminded and pluralist. But how does the restriction operate in states and regions where ‘democratic society’ is less clearly defined? In Southeast Asia, for example, public morality is used to justify restrictions as diverse as the Indonesian Ministry of Information and Communication banning same-sex emoticons from messaging apps (February 2016) and the decision of Malaysia’s Kelantan state legislature to pass laws providing for death by stoning for adultery (2014). How does the public morality limitation apply in states that are not liberal democracies, and where the conditions for deliberative democracy do not exist?

Catherine Renshaw (PhD(Syd); LLM(Syd); LLB(UNSW); BA Hons (Syd)), is Associate Professor and Deputy Head of the Thomas More School of Law at the Australian

She sits on the board of editors of the Journal of South Asian Law. She is an associate of the Australia Myanmar Constitutional Democracy Project, based at the University of New South Wales, and with funding from the Community of Democracies, Warsaw, she runs regular workshops in Myanmar on the subject of transitional justice and constitutional reform.

Susan Harris Rimmer

Ordinary versus Extraordinary Crimes in Transitional States: Feminist Dilemmas

International lawyers focus on extraordinary crimes, crimes that shock the ‘conscience of humanity’. To a certain extent, the field of transitional justice has followed suit, concentrating on ‘extraordinary’ moments of regime change or the period from conflict to peace. Ruti Teitel has defined transitional justice as: ‘the conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes.’ At the centre of the inquiry is the state. What if the unit of inquiry was a demographic group excluded by the state?

Some feminist scholars criticise notions of justice restricted to ‘extraordinary’ events in the life of a state. Christine Bell and Catherine O’Rourke argue that the emphasis of democratic transition in transitional justice prioritises ‘male-defined political violence’ and privileges violations of civil and political rights.

This paper applies these insights to two case studies from transitioning states, Afghanistan and Myanmar. The first study investigates the tragic case of the lynching of Farkhunda Malikzada in Kabul on 19 March 2015, based on a false allegation that she was American and had burnt the Koran. Now famous footage shows a large mob outside the Shah-e Du Shamshira shrine striking Farkhunda down. She is kicked, beaten with sticks, and run over with a car that drags her down a street, and then set alight, as police observe the scene. The second revolves around the unnamed Buddhist woman paid to make an allegation she was raped by her employers, the owners of a Muslim teashop in Mandalay on 2 July 2014. An ultra-nationalist monk broadcast the allegation on Facebook. During the four days of riots, there were many injuries and two deaths.

The justice processes for these ‘ordinary’ crimes were the basis for many citizens to make ‘justice judgments’ about the transition of their society. Legislation prohibiting violence against women is stalled in both countries, while personal status laws are rushed through before elections. This paper advocates that these ‘ordinary’ crimes deserve attention from international lawyers.

This paper is part of a larger project, focused on how transition is experienced ‘from below’ when diplomatic elites make deals. The aim is to assess ideas and discourse about the ‘tradeability’ of women’s rights in states experiencing a transition using examples from Afghanistan; and define what ‘tradeability’ means by identifying examples of where diplomatic representatives of a new State seek to ‘trade’ up or down the rights of women, who benefits from these negotiations in the new State, and what the international community says and does in such situations.

Kevin Riordan ONZM

Siege and the Law of Armed Conflict

Since time immemorial forces at war have tried to encircle their enemies and deprive them of food and supplies in order to starve them into submission. The ensuing sieges of towns and cities have historically been conducted with little regard for the suffering of civilian inhabitants. Indeed, it was often they who were the first to die. It might have been thought that this
technique was a relic of the Middle Ages, but events in Syria, where over thirty towns are besieged by one side or the other, demonstrates that this is not the case. This paper examines the techniques and tactics of siege and measure them against the principles of the modern law of armed conflict. It examines what the both attackers and defenders must do to comply with international law and the rules which must be enforce to mitigate, as much as possible, the plight of the populations who are affected.

Kevin Riordan ONZM has over thirty years’ experience in legal practice, including as head of the legal team of the New Zealand Defence Force for over a decade, before moving to the independent bar. Kevin has provided advice on international law, the law of armed conflict and the law relating to counter-terrorism. He has served in the Middle East, Bosnia, Afghanistan, the Pacific and South East Asia, and has provided advice on all major peacekeeping deployments involving NZDF. Kevin was part of the New Zealand delegation to the Rome Conference of the International Criminal Court and the subsequent preparatory conferences on the elements of crimes, as well as the 2010 ICC Review Conference in Kampala. Kevin has written number of manuals and other publications on operational law, the law of armed conflict and war crimes.

Anthea Roberts

Keynote Lecture: Is International Law International?

Anthea Roberts is Associate Professor at the Centre for International Governance and Justice (CIGJ) at the RegNet School of Regulation and Global Governance at the Australian National University. Anthea is a specialist in public international law, investment treaty law and arbitration and comparative international law.

Prior to joining the ANU, Anthea was an Associate Professor at the London School of Economics (2008–15), a Visiting Professor and Professor at Columbia Law School (2012–15) and a Visiting Professor at Harvard Law School (2011–12). She is also a Visiting Professor on the Masters of International Dispute Settlement at the Graduate Institute/University of Geneva.

Anthea has published on a wide range of international law topics in the American Journal of International Law, the European Journal of International Law, the International & Comparative Law Quarterly, the Harvard International Law Journal and the Yale Journal of International Law. She now serves as an editor for the American Journal of International Law, the European Journal of International Law, the Journal of World Trade and Investment and the ICSID Review. She is currently working on a book called Is International Law ‘International’? (OUP) and an edited collection called Comparative International Law (OUP).

Anthea has twice been awarded the Francis Deák Prize by the American Society of International Law for the best article published in AJIL by a scholar under 40 years of age for ‘Traditional and Modern Approaches to Customary International Law’ 95 AJIL 757 (2001) and ‘Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States’ 104 AJIL 179 (2010). In 2012, she was awarded a UK Leverhulme Prize (£70,000), which is awarded across all disciplines and is designed to ‘recognise the achievement of outstanding researchers whose work has already attracted international recognition and whose future career is exceptionally promising.’

Sue Robertson

Panel Discussion: The Everyday Lives of Antipodean International Lawyers

Sue Robertson is an Assistant Secretary in the Office of International Law in the Commonwealth Attorney-General’s Department. She currently leads advising on law of the sea, trade and investment, environmental law and international criminal law. Previously Sue spent five years at the Department of Foreign Affairs and Trade advising on international security law and then serving as the international legal adviser at the Australian Permanent Mission to the United Nations in New York. She has held various international legal policy positions in the United Nations, including in the High Commissioner for Refugees in Egypt, the UN Development Program in Bhutan and the Department of Peacekeeping Operations in Sudan.

She has a LLB (Hons) and BA (Hons) from Melbourne University and an LLM (International Law) (Dean’s Prize) from Australian National University.

Donald R Rothwell

Panel Discussion: Disputes over the South China Sea

Donald R Rothwell is Professor of International Law, and Deputy Dean at the ANU College of Law, Australian National University where he has taught since July 2006. His research has a specific focus on law of the sea, law of the polar regions, and implementation of international law within Australia as reflected in over 200 articles, book chapters and notes in international and Australian publications.

Rothwell has authored, co-authored or edited 20 books including most recently Rothwell, Oude Elferink, Scott and Stephens (eds), The Oxford Handbook of the Law

Major career works include The International Law of the Sea (Hart, 2010) with Tim Stephens, and The Polar Regions and the Development of International Law (CUP, 1998). Rothwell is also Co-Editor of the Australian Year Book of International Law. Since 2012 he has been Rapporteur of the International Law Association (ILA) Committee on ‘Baselines under the International Law of the Sea’.

He has taught a range of courses including Law of the Sea, International Dispute Resolution, International Law and Use of Armed Force, International Humanitarian Law, Military Operations Law, and Public International Law.

Rothwell was previously Challis Professor of International Law and Director of the Sydney Centre for International and Global Law, University of Sydney (2004–06), where he had taught since 1988. He has acted as a consultant or been a member of expert groups for UNEP, UNDP, IUCN, the Australian Government, and acted as advisor to the International Fund for Animal Welfare (IFAW).

Marco Sassòli

Keynote Lecture: International Law between Theory and Practice at its Vanishing Point: The Case of the Laws of War

Marco Sassòli is Professor of International Law and Director of the Department of International Law and International Organization at the University of Geneva. He is Commissioner of the International Commission of Jurists’ (ICJ). From 2001–03, he taught at the Université du Québec à Montreal, Canada, where he remains Associate Professor.

From 1985–97 he worked for the International Committee of the Red Cross (ICRC) at the headquarters, inter alia as deputy head of its legal division, and in the field, inter alia as head of the ICRC delegations in Jordan and Syria and as Protection Coordinator for the former Yugoslavia. During a sabbatical leave in 2011, he joined again the ICRC, as Legal Adviser to its delegation in Islamabad. He also served as Executive Secretary of the ICJ, as Registrar at the Swiss Supreme Court, and from 2004–013 as Chair of the board of Geneva Call, an NGO engaging non-State armed actors to respect humanitarian rules.

Ben Saul

Terrorists’ as Law-Makers, Regulators, Mediators and Adjudicators: Everyday Life and Justice under Non-State Rule

What do ‘terrorists’ think of, and do with, law and justice? This paper explores these questions based on field interviews with so-called ‘terrorist’ groups from Asia to the Middle East, including communist insurgents, rebels in civil war, national liberation fighters, and religious extremists. These questions are often ignored because after 9/11 the world simply outlawed terrorists. Terrorists are typically seen as enjoying no legal agency because they are outside formal legality: being both against domestic law and excluded from the sovereign authority to rule people and territory conferred on states by international law.

Reality is not so simple. Millions of people live under the effective authority of non-state armed groups, ‘terrorist’ or otherwise. Everyday life goes on, despite the prevailing fictions about the lawlessness of ‘ungoverned spaces’, ‘failed states’, and terrorist regimes like the Islamic State. People still get married and divorced, are born and die, buy and sell or inherit property, steal chickens, beat each other up, pay tax and so on. Crime, civil disputes and public regulation often continue in various guises under non-state authorities. The disintegration of state law in times of conflict is sometimes accompanied by the rise of some kind of non-state ‘rule of law’ – even if the countervailing law of the jungle, predictable in war, also stalks social life.

The paper explores the attitudes and practices of groups labelled as ‘terrorist’ towards law, including international and national law. It examines how these groups produce and enforce their own ‘laws’ and ‘legal’ institutions, from military rules about war fighting and the treatment of civilians, to ‘administrative’ regulations about taxation and governance, to ‘civil’ laws about personal and property disputes, to institutional ideas about dispute settlement, remedies, and punishment. It shows how our jurisprudential blindness to non-state ‘law’ leads us to neglect how social life is partly organized in such situations, and discourages meaningful discussions about rights, fairness and justice in those contexts.

A better understanding of what terrorists think of law, and how they use it, can also improve civilian protection and counter-terrorism. Why do some groups violate humanitarian norms more than others? What factors pull terrorist groups closer towards respecting human rights, and or push them away? Can the international community constructively engage with some groups to socialize them into behaving better? What are the limits of engagement? Are some groups, such as the ‘Islamic State’, so beyond the pale that all we can do is kill them?
A number of legal instruments addressing this issue have been also developed, including the FAO International Plan of Action to prevent, deter and eliminate IUU fishing, which recommends that States take measures consistent with international law against vessels without nationality. Similarly, at the 2015 negotiations on the UNGA resolution on sustainable fisheries, a proposal was considered encouraging States to amend their legislation to provide for legal action against vessels without nationality who are IUU fishing.

Further, at the 2015 CCAMLR Commission and 2016 SPRFMO Commission meetings, consistent with similar measures in other RFMOs, instruments were adopted declaring that vessels without nationality fishing in the respective Convention areas are IUU fishing and encouraging action to be taken against such vessels. Australia led the development of those two instruments.

As we increasingly witness the proliferation of such instruments, fuelled by the collective resolve of the international community, are we watching international law develop day by day?

This paper will examine the underlying lack of clarity in the international legal framework, reflect on recent legal developments addressing this issue and will consider whether it could be said that a new norm of customary international law is developing in this area.

**Zoe Scanlon**

**Taking Action Against Stateless Vessels: The Development of a New Norm of Customary International Law?**

In recent years, the number of stateless fishing vessels operating on the high seas has increased, causing great concern to the international community. These vessels operate without complying with relevant international legal regulation; undermining international regimes established to ensure that fish stocks are managed sustainably and that the ecosystems in which they occur are protected.

International law in this area is not yet fully developed and some uncertainty exists around the application of international law in respect of stateless vessels operating on the high seas. While the international legal framework establishes an extensive regulatory regime for flagged vessels, very little guidance is provided as to how stateless vessels are to be regulated and what actions may be taken against them.

In response, the international community has recently witnessed a number of developments in this area, particularly in recent years.

Some States have adopted domestic legislation allowing for various measures to be taken against vessels without nationality that are IUU fishing on the high seas.

**Ben Saul** is the Challis Professor of International Law and an Australian Research Council Future Fellow at the University of Sydney. He is an Associate Fellow of Chatham House in London and the Whitlam and Fraser Chair of Australian Studies at Harvard University in 2017–18.

Ben has published 13 books and 90 scholarly articles. Notable works include *Defining Terrorism in International Law* (2006) and the *Oxford Commentary on the International Covenant on Economic, Social and Cultural Rights* (2014) (awarded a Certificate of Merit by the American Society of International Law). Ben has taught law at Oxford, The Hague Academy of International Law and in China, India, Nepal, Cambodia and Italy. Ben practices in international and national courts (including the ICTY, STL, ECCC and IACHR) and was counsel in five successful national security cases before the UN Human Rights Committee (*Hicks* (2016), *FJ* (2016), *Leghaei* (2015), *FKAG* (2013) and *MMM* (2013)).

He has worked with the UN (including UNODC, UNESCO, UNHCR and OHCHR), governments and NGOs, delivered aid projects, and often appears in the media, including writing opinion in the *New York Times*. He has a doctorate in law from Oxford and honours degrees in Arts and Law, and two University Medals, from Sydney.

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**Ivan Shearer AM RFD**

**Panel Discussion: The Everyday Lives of Antipodean International Lawyers**

**Ivan Shearer AM RFD** is Emeritus Professor of Law at the University of Sydney, having retired from the Challis Chair of International Law of that University in 2003. Professor Shearer is an Adjunct Professor in the School
The Evolution of Australia’s Approach to ‘Regulatory Autonomy’ in Bilateral Investment Treaties and Preferential Trade Agreements

 Concern about the impact of international investment law on the domestic regulatory autonomy of states has created significant backlash in recent years, leading many states — both developed and developing — to re-evaluate their approach to negotiating these agreements. José E. Alvarez has termed this phenomenon the ‘return of the state’, linking it to a broader shift in international economic law away from the ‘Washington Consensus’ and the dominance of neoliberalism. In tracing this shift in international investment law, Alvarez and others have focussed on changes in the approach of the United States (US) and European Union (EU), both of which were traditionally major exporters of capital and proponents of strong investment protection norms. Unsurprisingly, concern about regulatory autonomy in the US and EU member states emerged (at least in part) as a reaction to their status as more frequent respondents in investor-state dispute settlement (ISDS) cases.

 At first glance, the story of Australia’s approach to investment law appears to have followed a similar trajectory to that of the US and EU, with initial enthusiasm for investor protections being tempered in recent years, following Philip Morris’ use of ISDS rules to challenge tobacco plain-packaging laws (the first ISDS case against Australia). Yet, this paper suggests that the evolution of Australia’s approach to regulatory autonomy in international economic agreements has not been as straightforward or linear as this description suggests. While the Philip Morris arbitration has had a notable impact on Australia’s subsequent negotiation of investment treaties, concerns regarding regulatory autonomy have ebbed and flowed over Australia’s 30-year history of participating in bilateral and regional economic agreements.

 Exploring the evolution of both international investment law and international trade law in Australia, the paper identifies three distinct generations of Australian bilateral investment treaties (BITs) and preferential trade agreements (PTAs), which reflect varied political and economic contexts. The first generation began in 1983 with the Australia – New Zealand Closer Economic Relations and Trade Agreement (ANZCERTA), and continued throughout the 1990s with the conclusion of 19 BITs. The second generation began in 2003, with the negotiation of the Singapore – Australia Free Trade Agreement, Australia’s first ‘modern’ PTA. During this period, Australia began to embrace bilateral and regional pathways to trade liberalisation. With the exception of two traditional BITs, the investment obligations negotiated in this period were contained in PTAs. This linking of trade and investment, as well as the experience of Canada and the US under the North American Free Trade Agreement, gave rise to serious concerns about regulatory autonomy, with significant impacts on the outcome of treaties (most notably, through the exclusion of ISDS provisions in some Australian PTAs – an exceptional approach for a developed country to take at that time).

 The third generation of agreements are those negotiated after the release of the Productivity Commission’s 2010 report, which called into question the potential benefits of PTAs and BITs – and in particular ISDS – for Australia. While concerns about regulatory autonomy have increased within the Australian community in recent years, domestic political shifts have had a significant impact on the country’s negotiation of these agreements. Strategies for protecting Australia’s regulatory autonomy in recent PTAs have varied, particularly in relation to ISDS, reflecting the absence of a principled approach to balancing the interests of investors against state sovereignty.

Elizabeth Sheargold is a research fellow and PhD candidate with the Global Economic Law Network at Melbourne Law School (University of Melbourne). Her research considers the relationship between international trade and investment agreements and domestic regulation for public purposes, such as the protection of human health or the environment.

Previously, she worked in the Melbourne office of law firm Allens Arthur Robinson (now Allens Linklaters) and as Associate Director of the Center for Climate Change Law at Columbia University in New York. She completed her BA/LLB (Hons) at the University of Melbourne, and her LLM at Columbia University.

Tania Voon is Professor at Melbourne Law School and was Associate Dean {Research) from 2012- 2014. She is a former Legal Officer of the WTO Appellate Body Secretariat and has previously practised law with King & Wood Mallesons and the Australian Government Solicitor and taught law at Georgetown University, the University of Western Ontario, the University of British Columbia, and several Australian universities. Tania undertook her LLM at Harvard Law School and her PhD at the University of Cambridge.

She is the author of Cultural Products and the World Trade Organization (Cambridge University Press, 2007), editor
Fikrie Sintayehu
Emergence and Evolution of International Norms: Lessons from Cross-Border Interactions of Pastoral Communities in Eastern Africa

Due to the contested nature of most of Africa’s borders, cross-border conflicts are extremely common across Africa. In addition, most borderlands are inhabited by clans and communities that mutually depend on common resources and ecological systems that straddle the border of two or more countries. Demographic explosions, recurrent droughts and environmental degradation resulting from climate change are increasingly forcing these communities to adopt a more pragmatic approach over static notions of identity and ownership of resources such as graze lands and trans-boundary Rivers.

The Turkana region along the Ethio-Kenya-South Sudanese borderland is home to many predominantly pastoral ethnic groups primarily composed of Ethiopia’s Dasanach (Merille) and Nyangatom, Kenya’s Turkana people and Uganda’s Karamoja tribes whose life for millennia depended on resources straddling along borders of two or more states. These pastoral communities are becoming the focus of international law and policy because they provide particularly interesting case on how local communities through day to day cross-border interaction developed mechanisms of international conflict resolution that are beyond the reaches of respective states concerned thereby expanding the frontiers and depth of international law.

Communities in the area developed peaceful mechanisms composed of community elders in settling conflicts and sharing resources even at times global institutions and bilateral relations informing governance of resources are contrasting than symmetrical. We undertake field research based on primary data through interviews to assess how local institutions evolved in reference to international progress and contributed in the negotiation and renegotiation of traditional principles long existed in the post-Westphalia state system.

More recently, the introduction of democracy, free market and relatively competitive politics are positively influencing those communities by increasing the role of women who were relatively marginalised.

Furthermore, communities of East African borderlands exhibit features of de facto ‘simultaneity’- changing the traditional notions of belonging and citizenship. That means, through increased trade and social interaction, cross-border communities continuously renegotiate their identities increasingly belonging with countries that provided them better economic and political opportunities. From the extensive surveys and analysis of qualitative data, daily lives in those communities are shaping and reshaping national legal processes and international norms in countries that enhanced political freedoms while the effect is limited in countries where national political processes are closed.

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ensure that their decisions take into account the effect these decisions have on others, even if these ‘others’ are not state nationals.

In urban warfare and counter-insurgency operations, interaction with enemy civilians is seen as a general framework of relations that should be developed and which ultimately better serves the army’s military goals. Thus for example, in situations of counter-insurgency, the COIN Manual stipulates that troops ‘feel the pulse of the local populace, understand their motivations, and care about what they want and need. Genuine compassion and empathy for the populace provide an effective weapon against insurgents.’

Yet, these new forms of warfare equally dictate the normative and not only policy-oriented arrangement of the feelings incurred to enemy civilians as a result of targeting decisions, in particular the feelings of fear that may be incidentally incurred.

While scholars, soft law documents and judgments have underlined the importance of incidentally caused fear, contrary to intentional fear which forms part of the jus in bello positivist structure, not much has been said about how incidental fear can enter the already existent legal structure. In that sense, the paper focuses on enemy civilian incidental fear considerations at the actual timing, the ‘now’ of targeting decisions.

In isolated incidents, incidental fear is seen as part of the proportionality principle and the balance test on military advantage and civilian injury. Such a test can never grasp the ‘now’. It is always doomed to remain either to the ‘before’, hidden in the ex-ante reasonableness of the commander’s decision or the ‘after’, when facts on the ground demonstrate whether the commander’s balance has been vindicated or not. What is needed though is a possibility for the commander to catch the ‘pulse’ of the enemy civilian population, the moment targeting decisions are taken.

While difficult for this to be achieved in isolated incidents, this is not the case for attack patterns. Taking as a starting point the ICTY’s utterance in Kupreskic that attack patterns may also negate the principle of humanity and the fact that the Tribunal wished to inaugurate a new approach to the laws of war based on the ‘humanization of armed conflict’, the paper will proceed to examine the incurring of incidental fear in operations involving attack patterns as an independent factor in a targeting decision’s legality, tied to the principle of humanity and the right to dignity, beyond the proportionality principle and any cost-benefit analysis considerations.

Dilan Thampappillai

Intellectual Property Rights in Agriculture: disrupting the everyday practices of rural communities in the developing world

There is now an increasing recognition that the rules of international trade law pertaining to investment and intellectual property rights may adversely impact upon the food security of rural small holders and their local communities.

There are a number of largely agrarian societies in South-East Asia, such as Myanmar and Vietnam, that are presently bringing their domestic laws into line with a number of international trade law agreements. This process is an essential part of membership of the World Trade Organisation. Yet, where food security is concerned, the rules of international trade law can be a double-edged sword. Whilst clear trade rules facilitate investment and development, the same investments can displace local communities. For example, the emergence of intellectual property rights in seeds, via patents or plant breeders rights, can quite significantly disrupt traditional farming practices which for centuries have been based upon sharing and reuse.

Further, the existence of intellectual property rights in agricultural inputs will likely orient food production towards cash crops and away from subsistence farming as farmers seek to recoup the higher costs of those inputs. Moreover, pressures around protecting intellectual property rights in agriculture, combined with those generated by export orientation, are likely to spur foreign investment in agricultural land itself with the consequence that rural land tenure in Myanmar will become somewhat imperilled. With large agri-businesses increasingly buying up rural land for food production, the food security of local communities becomes endangered because these businesses orient domestic food production towards export markets and away from local consumption.

Furthermore, rural smallholders are often forcibly removed from the land with little respect for human rights. In effect international trade law promotes a property-based regime that disrupts longstanding traditions in the Global South. At the same time the right to food, a well-recognised right under public international law, is increasingly imperilled by those structural changes in the economy that flow from intellectual property and trade. This paper, examines the disruptive impact of intellectual property and investment practices on food security in South East Asia and argues that our trade agreements need safeguards to protect food security.

Currently at King’s College London Dickson Poon School of Law, Solon Solomon is former member of the Knesset (Israeli Parliament) Legal Department in charge of international and constitutional issues. Recipient of the George Weber Award from the Hebrew University of Jerusalem, Faculty of Law, he is the author or editor of two books and a number of academic articles on the laws of war as well as international courts and tribunals together with a media presence on legal issues in outlets such as the Times of London, der Tagesspiegel, Haaretz and Hurriyet.

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Dilan Thampapillai is a Lecturer with the ANU College of Law. He has previously been a Lecturer and a Senior Lecturer at Deakin University. Dilan has also worked as an academic at Victoria University and the Queensland university of Technology. Prior to becoming an academic, Dilan worked at the Attorney-General’s Department and the Australian Government Solicitor.

Dilan teaches Contract Law and Intellectual Property. Dilan’s research interests include copyright law, food security and free speech. Dilan has written a book on Contract Law with Oxford University Press. His recent publications have included articles and chapters on food security, intellectual property in trade agreements, fair use and asylum seekers and security.

Alison Todd
Crown Law

Alison Todd is a Crown Counsel at Crown Law’s Auckland office, specialising in international, constitutional and human rights law. She has worked at Crown Law since August 2013, having returned to New Zealand from the United Kingdom after nearly 10 years. Alison spent most of her time at the UK Ministry of Defence, practising mainly in international humanitarian law and also advising on command, discipline and constitutional law issues.

Angus Trumble
Conference Dinner Speaker

Angus Trumble is the Director of the National Portrait Gallery of Australia. Born and raised in Melbourne, Angus studied Fine Arts and History at the University of Melbourne, graduating in 1986. In summer of 1987, he was an intern at the Peggy Guggenheim Collection in Venice. He studied for a year at the Bibliotheca Hertziana in Rome, graduating MA (University of Melbourne) in 1993. From 1987–91 he served as aide to Dr J. Davis McCaughey, AC, Governor of Victoria. In 1994 Angus won a Fulbright Scholarship for further study at the Institute of Fine Arts at New York University.

In January 1996 Angus was appointed Associate Curator of European Art at the Art Gallery of South Australia in Adelaide, and was promoted Curator in 1998. He curated and wrote the catalogue of a number of exhibitions, including Bohemian London: Camden Town and Bloomsbury Paintings in Adelaide and Love & Death: Art in the Age of Queen Victoria, which toured to Sydney, Brisbane, and Auckland, New Zealand, in 2002.

Angus was appointed Curator of Paintings and Sculpture at the Yale Center for British Art in May 2003, and served in that capacity until January 2014 (and from 2008 as Senior Curator). He is the author of A Brief History of the Smile (2003), and The Finger: A Handbook (2010). His latest book (co-edited with Professor Andrea Wolk Rager of Case Western Reserve University, Cleveland, Ohio), Edwardian Opulence: British Art at the Dawn of the Twentieth Century, was shortlisted for the 2013 Spears Book Awards in London. He is a regular contributor to The Times Literary Supplement, The Burlington Magazine, the Paris Review, Esopus Magazine, and the Australian Book Review.

Jessica Viven-Wilksch

Bringing Fairness in International Long-Term Relationships: An Analysis of Amendments to the Unidroit Principles on Commercial Contracts

Today, the Unidroit Principles on International commercial contracts (PICC) are considered a great achievement in the development of and are part of the international commercial body of legal rules. They provide a uniform set of principles that parties can choose as their law applicable to the contract that regulate their relationship. Furthermore, they go further than international instruments such as the Vienna Convention on the International Sale of Goods since these principles can be applied to contracts other than the commercial sale of goods. This characteristic can be shown as a strength and a weakness. Indeed, while the PICC are covering most important topics of general contract law, there are still questions in relation to specific contractual situations faced by parties in international dealings. This presentation focuses on long term contracts in international commercial dealings.

The concern of providing better guidance to parties in long term international commercial contracts is not new. Indeed, it had been brought to the attention of the working group in charge of revising the PICC in 2010. However, for lack of time, the provisions were not analysed and were not integrated in the revised principles. This situation highlights the challenges for international law to meaningfully address quotidian issues faced by parties in international long terms ventures. The question is therefore how these concerns could be better addressed by international law.

Currently, the PICC only refer incidentally to long term contracts. This was highlighted in a Unidroit Secretariat Memorandum in 2013 to the Governing Council. The following year, and acting upon the request from Governing Council, the Secretariat prepared a new memorandum relating to more specific issues faced by parties in long term contracts. This second memorandum highlighted the need for the PICC to provide more fairness to parties in long term contracts. This would ensure the establishment and success of new international commercial ventures. A working group was
created to address these concerns and provide amendments to the PICC. These amendments will be submitted to the Governing Council for adoption on 18–20 May 2016. This presentation will provide a critical analysis of the proposed provisions and their fate. It will explain the rationale behind the principles and show how fairness has always been a part of the principles and is a core characteristic of the amended provisions. This presentation will determine whether the amendments bring more fairness in long term relationships in an effective manner. The presentation will first discuss the issues relating to long term contracts and their definition. The presentation will provide three examples of situations in which parties in international long term contracts can face: the express agreement to negotiate in good faith; cooperation between the parties in long term contracts; and the termination of irreparable breakdown of mutual trust. These examples will be used as to determine whether the amended principles add more fairness. Currently, while the first two situations are currently mentioned in the PICC, even though only incidentally the third example is not yet tackled within the principles. Through the example of the revision of the PICC, this presentation aims at providing a critique of the legitimacy for transnational instruments to regulate cross border commercial relationships. It will demonstrate the need for such instruments to use principles to stay contemporary to the issues faced by parties in long term transactions, may they be present or future. Such discussion is timely as international instruments are updated and provide food for thought on the opportunity for jurisdictions to use these changes to reopen the discussion on addressing long term contract specificities at the domestic level.

Jessica Viven-Wilksch is a lecturer at Adelaide Law School. Her research focuses on contract law, international commercial law and comparative law. Her PhD used comparative methodology to examine how the concept of good faith has developed in contract law in Australia and the EU and what future – if any – there is for the notion in consumer contracts and long term contractual relationships. She published an article on this issue in the Alternative law Journal titled ‘The adventures of good faith’– Can legal history and international developments provide guidelines for Australia?’ (2015). She is currently working on book proposal for her PhD.

Her research interest in international aspects of law are reflected in her qualifications since she studied in France, Ireland, Germany and Australia. Before joining Adelaide Law School, Jessica also taught for the University of Toulouse Capitole in France, Flinders University of South Australia and the francophone Agency in Vanuatu. Her teaching reflects her research and she aims to provide an interactive and informative presentation.

Heng Wang

The Future of China’s FTAs and Its Implications for China’s Trade Pacts with Australia and New Zealand

In the context of burgeoning free trade agreements (FTAs), China has increased the speed of concluding and updating FTAs, including China-Korea FTA and China-Australia FTA (ChAFTA) that became effective in 2015. It is worth noting that bilateral investment treaties and ‘deep’ FTAs will have a profound effect on the development of China’s FTAs. China is actively negotiating investment treaties with the US and EU. The conclusion of the Trans-Pacific Partnership was a major landmark, along with more mega or larger ‘deep’ FTAs being concluded (CETA, EU-Singapore FTA) or negotiated (TTIP, RCEP, TiSA, etc.). As the most recent and the first FTA that China concluded with developed countries respectively, the ChAFTA and China-New Zealand FTA (CNZFTA) are among the high-level FTAs of China, although they are not comparable with mega FTAs. Both of them envisage subsequent negotiations and provide an amazing case study for the future development of China’s FTAs. The paper will analyze two key questions: What is the trend of China’s FTAs in the context of deep FTAs? Will there be a paradigm shift? The paper tentatively argues that several trends exist for China’s FTAs, notably for services and investment rules. Trends include, inter alia, expanded coverage and rules tailored for trade in the digital age. Some of them deserve attention. Foremost, services and investment rules are highlighted and further integrated, including the negative list approach and pre-establishment national treatment on services and investment that will be adopted for future negotiations. A substantial part, if not most, of substantial development in the ChAFTA occurs in services and investment. Second, regulatory improvements are made, particularly regarding greater transparency (e.g., a stand-alone transparency chapter, more concrete transparency requirements). In the ChAFTA, transparency requirements extend to new areas such as regulatory transparency in services trade, and transparency in the investor-state dispute settlement (ISDS). Third, the right of state to regulate for non-trade concerns is ensured (e.g. environment measures covered in general exceptions in ChAFTA investment chapter, public welfare notice that excludes certain claims related to public interests from the ISDS, expert reports for environmental, health, and safety issues in the ISDS). The FTAs endeavor to strike a balance between the protection of investment and public interests. Last but not least, the dispute settlement systems particularly the ISDS are strengthened through new rules (e.g. consolidation and expert reports, stricter code of conduct for arbitrators).

The paper also argues that China’s FTAs start to undergo a paradigm shift. First, they may shift to more rule-based FTAs
focusing on good governance norms and equipped with stronger dispute settlement systems with carve-outs. The driving force is the need to develop high-level FTAs that may compete with mega FTAs in the long term. Second, in spite of Chinese FTAs’ malleability, the paradigm shift may lead to a convergence towards mega FTAs, but difference may remain in areas such as SOEs. Third, uncertainty and serious challenges exist. They include the decision regarding the TPP accession, the attitude towards stringent requirements and divergences within mega FTAs, FTA utility rate, and the lack of a ‘systemic’ response to the relationship among FTA chapters, domestic law, and international law. As a case study, the future of the ChAFTA and CNZFTA will be discussed, particularly the following issues: What are the major developments that may happen? How might ‘new issues’ (e.g., e-commerce, data flows, environment, competition, labor, SOEs, regulatory coherence) be addressed? What is the gap between these FTAs with mega FTAs? Are they likely to be closed or not? Is the trend one of consolidation or one of fragmentation especially on new issues? What are its implications for the implementation and subsequent negotiations of the ChAFTA and CNZFTA (including from the perspective of smaller businesses)?

Research Associate of the Global Economic Governance Programme at the University of Oxford. Her research aims to promote solutions to intractable public policy problems. She has particular expertise in peacekeeping, the United Nations, policy evaluation, peace negotiations, and global security governance. She serves on the Board of the Centre for Policy Development, an independent Australian policy think tank, and is a Deputy Editor of the journal International Peacekeeping. Jeni is an Australian Research Council DECRA Fellow (2016–19). Her project ‘Taking sides: Assessing the partiality of international peacekeeping’ investigates whether UN peacekeepers should take sides between conflict parties or remain impartial peace brokers helping combatants to reach their own settlement.

Richard Wilson
Keynote Lecture: Prosecuting International Speech Crimes

Richard Wilson is the Gladstein Distinguished Chair of Human Rights and Professor of Law and Anthropology at the University of Connecticut Law School, and founding director of the Human Rights Institute at UConn.

Wilson studies international human rights, and in particular post-conflict justice institutions such as truth and reconciliation commissions and international criminal tribunals. His research on truth commissions focused on how successor governments seek to write history and to forestall retributive justice.

His most recent book, Writing History in International Criminal Trials, selected by Choice in 2012 as an ‘Outstanding Academic Title’ in the law category, analyzed the ways in which international prosecutors and defense attorneys marshal historical evidence to advance their case. His current project, Propaganda On Trial: the law and social science of international speech crimes, combines law and empirical approaches, including psychology and qualitative interviews, to understand recent efforts by international courts to prosecute political leaders for inciting genocide and instigating war crimes and crimes against humanity.

Phoebe Wynn Pope
Legislating Against Humanitarian Principles

The humanitarian principles – humanity, neutrality, impartiality, and independence – have come to characterize effective humanitarian action, particularly in situations of armed conflict, and have provided a framework for the broader humanitarian system. Modern counter-terrorism responses, including Australia’s own, are posing significant challenges to
these principles and the feasibility of conducting principled humanitarian assistance and protection activities. This article explores the origins of the principles, the history behind their development, and their contemporary contribution to humanitarian action.

This paper draws on the recently published article in the International Review of the Red Cross double issue on Principles Guiding Humanitarian Action (Issue 897/898), titled ‘Legislat ing against humanitarian principles: A case study on the humanitarian implications of Australian counter-terrorism legislation’ by Dr Phoebe Wynn Pope, Yvette Zegenhagen and Fauve Kurnadi, of Australian Red Cross.

Phoebe Wynn-Pope is Director, International Humanitarian Law and Movement Relations, at the Australian Red Cross. Phoebe has over 25 years experience in the humanitarian sector and has worked in complex humanitarian emergencies and conflict zones throughout Africa, the Middle East and Europe. This field work included working in Iran responding to the humanitarian impacts of the first Gulf War, and leading a humanitarian response to the Somali famine.

Phoebe also established programs in Bosnia Herzegovina during the armed conflict and worked in the Great Lakes region as part of the humanitarian response to the Rwandan genocide. Following this experience Phoebe returned to Australia to undertake a PhD in international law focussing on the role of the international community when confronting war crimes, crimes against humanity and genocide.

Previously Phoebe was a Principal Executive of Fundraising and Communications and from 1996–2002 Phoebe was the Commonwealth representative on the National Council for the Centenary of Federation. In this role she was Convenor of the Communications Committee and chaired the organising Committee of the Yeperenye Festival, the largest gathering of Aboriginal peoples since Federation.

Most recently, Phoebe was a founding Director of the Humanitarian Advisory group where her work focussed on the protection of civilians in armed conflict, the use of information technology for the prevention of mass atrocity crimes, as well as researching policy development for businesses operating in fragile and conflict affected states.

Inspired by the principle of humanity, Phoebe is committed to bringing her experience to the world’s largest humanitarian organisation, and to working closely with Red Cross Red Crescent colleagues from around the world to address the increasing complexities and needs of the world’s most vulnerable people.

Chao Yi
Internal Relocation/Protection Alternative in Refugee Status Determination: The Practices of Australia and New Zealand Compared.

Emerging from international practices of the past few decades, internal relocation/protection/flight alternative (IRA/IPA/IFA) refers to the principle that refugee status may not be granted to the asylum seeker who can find genuine protection against the well-founded fear of persecution in an alternative area within her country of origin. Although not explicitly spelled out in the Convention and Protocol relating to the Status of Refugees, IRA/IPA/IFA has been firmly established in international refugee law with the acceptance of refugee status determination in most State parties to the Refugee Convention and Protocol.

The lack of clear textual reference in the Convention and Protocol, together with considerable inconsistency in international practices, however, has brought ongoing debates and controversies around the interpretation and application of IRA/IPA/IFA principle. This paper seeks to clarify some of those puzzles by an in-depth and comparative study of Australian and New Zealand’s practices of internal relocation/protection principle.

Australia and New Zealand are chosen because they present legal practice of two main analytical framework of IRA/IPA/IFA in international refugee law and discourse – the ‘Relevance/Reasonableness’ framework by Australia and the ‘Internal Protection’ framework by New Zealand, while both countries have similar structured procedure of refugee status determination and face asylum seekers from similar countries of origins. This paper aims to answer to the question of ‘whether the practices of Australia and New Zealand concerning IRA/IPA are substantially similar and likely to yield similar results in refugee status determination, or the adoption of different analytical framework actually results in different approach in practice’ by a comparative study of Australian and New Zealand’s practices of internal relocation/protection principle.

Chao Yi is currently an LLM student of international law in Peking University Law School and holds an LLB degree of law from the same institute. He is Executive Editor-in-Chief of Peking University International and Comparative Law Review and has worked in Peking University International Law Institute and Peking University Ocean Strategy Research Center as research assistant.

His research interests include international refugee law, law of treaties, and human rights. He has published several articles in leading Chinese journals including Chinese Yearbook of International Law and Chinese Review of International Law.
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Through a focus on local, national and global contexts, the ANU College of Law provides students with a unique understanding of current law and policy, and a critical perspective on how they might be reformed to better meet the needs of a rapidly changing society.

Across undergraduate, postgraduate and research degrees, the ANU College of Law equips students with the insight and knowledge demanded by the world’s leading employers. At home and abroad, our graduates work not only as lawyers, but as architects for social change, public policy and global diplomacy.

With a 50-year legacy, and many academic staff recognised as leaders in their fields, the ANU College of Law has built an enviable research profile. We seek to shape and influence public policy, with particular expertise in constitutional and administrative law, international law and environmental law, and an emphasis on the values of law reform and social justice.

Located in Australia’s capital city, Canberra, the ANU College of Law has strong links with the nation’s law-making and legislative bodies, including the Australian Parliament, the High Court and government agencies such as the Attorney-General’s Department, Treasury, Prime Minister and Cabinet and the Department of Foreign Affairs and Trade.

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About the Centre for International and Public Law (CIPL)

For almost 25 years, the ANU College of Law’s Centre for International and Public Law has been advancing the understanding of international and public law. CIPL members are leading experts in their fields of international and public law, and their research has had a considerable impact on public policy at the local, national and international levels.

Through an active visitor program, CIPL hosts international and domestic scholars, judges and government lawyers. Along with its regular and diverse seminar and conference program, CIPL provides opportunities for the enrichment of legal research and engagement with government and the wider community.

CIPL is the home of the leading scholarly journal in Australia on international law, the Australian Year Book of International Law; two premier annual conferences, the ANZSIL conference and the Public Law Weekend; and two annual lecture series, the Kirby Lecture in international law and the Sawer Lecture in public law.

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Thursday 30 June – Saturday 2 July 2016