Australian and New Zealand Society of International Law

ANZSIL International Peace & Security Interest Group

VIRTUAL SEMINAR SERIES 2020

Zoom Link

FRIDAY 22 MAY, 1pm - 2pm (AEST)

Simon McKenzie (University of Queensland)

The problem of persistent surveillance: the use of un-crewed maritime vehicles for surveillance in the EEZ

FRIDAY 29 MAY, 1pm - 2pm (AEST)

Susan Harris-Rimmer (Griffith University)

Should We War Against War? The Women's Peace Army and the Promise of International Law to Achieve a Feminist Peace

FRIDAY 12 JUNE, 1pm - 2pm (AEST)

Shiri Krebs (Deakin University)

Fact and Fiction in Technology-Driven Military Decision-Making: Evidence from the US, Australia, and Israel

FRIDAY 19 JUNE, 1pm - 2pm (AEST)

Rebecca Barber (University of Queensland)

How Necessary is Security Council Authorisation for Humanitarian Assistance, in the Absence of Consent by the Host State?

FRIDAY 26 JUNE, 1pm - 2pm (AEST)

Anna-Marie Brennan (Waikato University)

The Dispensable Lives of Military-Working Dogs on the Battlefield: The Quagmire of their Legal Status under International Humanitarian Law

FRIDAY 17 JULY, 1pm – 2pm (AEST)

Ntina Tzouvala (University of Melbourne)

The 'Unwilling or Unable' Doctrine and the Persisting Inequalities of International Legal Argumentation

Draft papers may be circulated in advance of some seminars.

Any questions about the seminar series should be directed to Monique Cormier (mcormier@une.edu.au)

Friday 22 May 1pm AEST

The problem of persistent surveillance: the use of un-crewed maritime vehicles for surveillance in the EEZ

States are increasingly investing in un-crewed maritime vehicles (UMVs) to carry out a range of tasks, including assisting maritime surveillance. While the use of these devices by a state within their own territorial waters or on the high seas is relatively uncontroversial, whether such a device can be used in the exclusive economic zone (EEZ) of another state is more contested. Most prominently, the US and China have been involved in a long-running dispute about American devices in the South China Sea. The proliferation of UMVs capable of persistent surveillance have the potential to alter the strategic balance struck in UNCLOS. But how will their use effect the legal regime?

This paper will explore whether there are new legal questions raised by the operation of UMVs in the EEZ. It will consider both the legal regulation of surveillance in the EEZ zone, and the operation of the due regard obligations. It will consider what a coastal State could do if it discovered an array of UMVs carry out surveillance in EEZ, with a particular focus on whether the standard rules of sovereign immunity might be different for un-crewed devices. The paper provides an opportunity to reflect on how advances in technology may impact on the interpretation of UNCLOS and the conceptions of the different jurisdictional zones of the ocean.

Dr Simon McKenzie is a research fellow in the Law and the Future of War research group at the University of Queensland School of Law. He holds a PhD from the University of Melbourne in international criminal law. He has also worked as a policy officer for the Victorian Department of Justice and Community Safety, a researcher at the International Criminal Court and the Supreme Court of Victoria, and as a lawyer.

Friday 29 May 1pm AEST

Should We War Against War? The Women's Peace Army and the Promise of International Law to Achieve a Feminist Peace

The Women's Peace Army formed in the Australian cities of Melbourne, Sydney and Brisbane in 1915, to fight the introduction of conscription in the First World War. Their motto was, "Women's Peace Army – we war against war". The Women's Peace Army attempted to mobilise the women and men in Australia who opposed all war, regardless of political party membership. They were socialist and militaristic in their tactics, aiming to destroy militarism "with the same spirit of self-sacrifice that soldiers showed on the battlefield". Every new member took a pledge containing the credo that: "I believe that war is a degradation of motherhood, an economic futility, and a crime against civilisation and humanity".

The Women's Peace Army had serious ambitions and success in blocking two conscription bills. The Army financed the sending of three women leaders to Zurich to try and stop the war, and authored a manifesto that is still relevant today, calling for an international court, nationalisation of the Australian armaments industry, a compulsory citizen's referendum on decisions to go to war, plus a strong economic rights agenda, notably the price of food. They did not seek to institutionalise themselves and dissolved the Army in December 1919. The Women's Peace Army occupied and use the language and tactics of militarism but were focused on structural law reform, and the promise of international law as a language and driver of peace.

I argue that the globalised manifesto of the Women's Peace Army and their victory over compulsory conscription at a hyper-militaristic point of history still resonates 100 years later. Does the women's movement have to occupy and subvert the tropes of militarism to achieve this type of impact? Was this faith in international law justified? This article uses the Women's Peace Army as a case study to examine the possibility of international law agendas which could support feminist peace, as suggested by feminist legal scholars Di Otto, Gina Heathcote, Kim Rubenstein and Christine Chinkin around military service, disarmament, and crimes of aggression.

Note: This paper has been accepted for the European Journal of Politics and Gender Special Issue, 2021 - "Toward a Feminist Peace" with guest editors: Prof. Jacqui True and Dr. Jenna Sapiano from Monash Gender, Peace and Security Centre. The intention of the special issue is to explore and analyse the concept of 'feminist peace' and its relationship to the Women, Peace and Security agenda. To that end, the papers in the special issues will ask: What does 'feminist peace' look like and how is it distinguished from international peace and security as commonly (re)stated in intergovernmental forums? What processes and actors can bring about 'feminist peace' in various conflict and post-conflict settings? And how can we study and evaluate the progress toward 'feminist peace' and women's participation in peacebuilding? The aim of the special issue is to provide a first analysis of the concept of 'feminist peace', which can be further developed by other scholars and practitioners working on gender, peace and security. The concept is foundational to finding more equal and sustainable peace and state building processes and outcomes.

Susan Harris Rimmer is an Associate Professor at Griffith University Law School, Brisbane Australia, and is a former Australian Research Council Future Fellow. She is co-editor of the R*esearch Handbook on Feminist Engagement with International Law* (Edward Elgar 2019), author of *Gender and Transitional Justice* (Routledge 2010) and over 40 refereed works on women's rights and international law.

Susan was Australia's representative to the UN Commission on the Status of Women in 2014, and the W20 (gender equity advice to the G20) in Turkey 2014, China 2016, and Germany 2017. She is a National Board member of the International Women's Development Agency.

Sue was named in the Apolitical list of Top 100 Global Experts in Gender Policy in May 2018.

Friday 12 June 1pm AEST

Fact and Fiction in Technology-Driven Military Decision-Making: Evidence from the US, Australia, and Israel

Military decision-making processes, including legal evaluation of military operations, have been increasingly relying on technology-generated information and technology-assisted processes. Drone imaging, automated algorithms, and big data analytics are some of these new data gathering techniques and decision-making aids. While incorporating valuable information into the legal analysis and decision-making process, these methods also entail several inherent weaknesses, which lead to erroneous, irreversible, decisions. Findings from several military investigations conducted by US, Israeli, and Australian armed forces demonstrate that technology-assisted decision-making processes place further challenges on the decision-makers, and skew their risk assessments.

This article focuses on the role played by technology in the legal evaluation of military operations, the challenges of these human-machine interactions, and the dangers associated with humans' reliance on technology in this context. To provide fresh insight into these processes and interactions, the article employs interdisciplinary theories of risk assessment, organizational decision-making, and international law, and analyses findings from military investigations conducted by US, Australian, and Israeli armed forces. To test the effects of technology on the legal evaluation of military operations, a series of vignette experiment studies will be fielded in the US, Australia, and Israel. The experiments directly measure the effect of technology on military decision-makers (with legal or field experience), as well as on lay people. The experiments will be fielded with both professional and national samples, and funding for these experiments has already been secured by a generous research grant from Deakin University.

The experimental design includes two vignettes: One simulating ex ante decision-making (all samples), and the second simulating ex post evaluation of decisions made (national samples only). In the *ex ante decision-making study*, participants will be given descriptions of a high-risk, planned military operation and will be asked to make legal determinations as *ex ante* evaluators of the proportionality, reasonableness, and legality of the operation. In short, participants will be randomly assigned to one of four treatment groups (2x2 between-subjects design): one of two *intelligence assessments* of the likelihood and extent of collateral damage: one produced by an automated algorithm, and another produced by a human expert; and to one of two *intelligence inputs* (the data-generation method): one generated by drone imaging and the other generated by a human observer (both containing the same information). Participants will then be asked to make a decision to approve, cancel, or postpone the operation until more data is available. They will also be asked to rate their confidence in the decision they made, to evaluate various aspects of the legality of the planned operation (including its consistency with international law), and to evaluate the quality, sufficiency, and credibility of the intelligence. Some demographic data will also be collected, as well as

information about participants' political and technical knowledge, and their general attitudes about various domestic and international institutions, rule of law principles, and human rights. Due to the anticipated small size of the professional samples, and to increase utility to professional participants, only this ex ante design will be applied to the professional participants, simulating actual decision-making processes. *In the ex post study* (national samples only), participants will be randomly assigned to either the ex ante design or to an ex post design (creating a 2x2x2 between-subjects design). Participants in the ex post condition will be given a description of the same military operation described in the ex ante study, with one difference: Participants will now be asked to make legal determinations as *ex post* evaluators of the reasonableness and legality of the decision to approve this operation. They will be provided with the intelligence that was available to decision-makers in real time (which, again, will be produced by either technology-systems or humans), and will be asked to evaluate the quality, sufficiency, and credibility of the intelligence, and to make a recommendation as to whether further accountability measures should be taken.

The findings from this research will advance theoretical and empirical knowledge of vital legal decision-making process, at a time when legal decision-making processes are increasingly relying on complex – yet underexplored – human-machine interaction. The data on automation and technology-assisted legal decision-making processes will further inform practices and policies in additional areas, such as refugee protection, which also rely on technology-assisted decision-making processes. The mounting reliance on technology in various legal contexts makes this inquiry into human-machine interaction particularly important and urgent.

Shiri Krebs is a Senior Lecturer and HDR Director at Deakin Law School, as well as an affiliate researcher at the Stanford Center for International Security and cooperation (CISAC). Her research focuses on legal fact-finding processes and their impact on attitudes and beliefs about wartime events, at the intersection of law, psychology, and political science. To explore these issues, Dr. Krebs utilizes empirical research methods, including survey experiments and interviews. Her scholarship has been published at top international law and general law journals, including the Harvard National Security Law Journal. She has taught in a number of law schools, including Stanford University and the Hebrew University of Jerusalem, where she won the Dean's award recognizing exceptional junior faculty members. From 2005 to 2010 Dr. Krebs served as legal advisor to the Chief-Justice of the Israeli High Court. Following this role, she led research projects on national security and human rights at the Israeli Democracy Institute. In 2016 Dr. Krebs was selected by the American Society of International Law for the 'New Voices' Panel at the Society's Annual Meeting. Her publications granted her several awards, including the Vice-Chancellor's Early Career Researcher Award for Career Excellence (Deakin University, 2019), the Lucinda Jordan Research Award (2017), the Franklin Award in International Law (2015), the Goldsmith Award in Dispute Resolution (2012), and the Steven Block Civil Liberties Award (2011). Krebs earned her Doctorate and Master degrees from Stanford Law School, as well as LL.B., B.A. and M.A., all magna cum laude, from the Hebrew University of Jerusalem.

Friday 19 June 1pm AEST

How Necessary is Security Council Authorisation for Humanitarian Assistance, in the Absence of Consent by the Host State?

In December 2019, Russia and China vetoed a draft Security Council resolution that would have renewed the Council's authorisation for humanitarian assistance to be provided in Syria from neighbouring countries, via four designated border crossing points. The authorisation had been in place since 2014, and had been (and still is) seen by the UN and its partners as necessary in order for them to provide humanitarian assistance in areas not controlled by the Syrian Government, because the Syrian Government does not itself authorise the provision of assistance in those areas. Between 2014 and 2019, more than four million Syrians were reached with cross-border humanitarian assistance.

In January 2020 the Security Council passed a watered-down resolution (Resolution 2504), reauthorising the use of just two border crossings, allowing access from Turkey to northwest Syria for six months. The situation highlights the precariousness of reliance upon the Security Council to make decisions about humanitarian crises, and begs the question: is there any legal alternative to Security Council authorisation, in cases where there is overwhelming humanitarian need and the host state will not consent to the provision of humanitarian assistance?

This paper uses the humanitarian crisis in Syria as a case study through which to revisit the legal issues regarding the provision of humanitarian assistance without the consent of the host state, and to consider whether there is any way *not* involving the Security Council that such conduct can be justified in international law. It begins by examining the requirement of consent and the prohibition of arbitrarily withholding it; then considers the legality of humanitarian assistance provided in situations where consent is unlawfully withheld. It challenges the conventional view that humanitarian assistance provided without host state consent is a violation of the host state's territorial integrity; then proceeds to consider whether, if such assistance *is* a violation of territorial integrity, there are other legal arguments that may render such assistance justifiable in international law. Particular attention is paid to the legal doctrine of 'necessity', which – it is argued – may encompass situations in which there are humanitarian needs that cannot be met in any way other than the unauthorised provision of humanitarian assistance. Finally, the paper considers whether the UN General Assembly could step up and play a role in facilitating cross-border humanitarian access in Syria, specifically by passing a resolution recommending and authorising the provision of humanitarian assistance, or alternatively making a legal determination regarding the state of necessity; and it considers what such a resolution could mean for states and international organisations wishing to provide assistance in circumstances such as those in Syria.

Rebecca Barber is a PhD candidate at the University of Queensland. Her research focuses on the role of the UN General Assembly in the maintenance of international peace and security. She has spent most of her career with international humanitarian NGOs, including long-term roles in Afghanistan, Pakistan, Sudan and Indonesia (Aceh) and shorter-term assignments in South-East Asia and the Pacific. Her field roles included managing protection, human rights

and legal assistance programs, as well as multi-sector humanitarian response programs, and she has also served as a humanitarian advocacy advisor with Oxfam and Save the Children and has lectured with the Centre for Humanitarian Leadership at Deakin University. Her writing on human rights, humanitarian assistance, international humanitarian law and international peace and security law has been published in academic journals, books, foreign policy forums and mainstream media. She is a qualified lawyer and holds masters degrees in international development and international law.

The Dispensable Lives of Military-Working Dogs on the Battlefield: The Quagmire of their Legal Status under International Humanitarian Law

They were the only four-foots who could be trusted to do a piece of work strictly 'on their own'. Each one knew his job and did it, not because he was made to, but because of the love which is the impelling motive for everything a free dog does for a man.

- Ernest Harold Baynes, Animal Heroes of the Great War

Since ancient times, animals have played a pivotal role in military operations but international humanitarian law has thus far side-stepped any precise delineation of their precise legal protections on the battlefield. Dogs in particular have proven themselves indispensable during warfare. From acting as guards, bomb detectors, messengers, load bearers carrying weapons to directly attacking enemy troops on command military dogs are highly valuable and cooperative during warfare. While the contribution dogs have made to military operations is gaining wider recognition in society it is unclear what protections are afforded to them under international humanitarian law. Military-working dogs can be injured and killed not only when they are actively participating in hostilities but also as a secondary consequence of attacks on other objectives. Yet, international humanitarian law is mostly silent on the matter of their protection and focuses for the most part on the protection of humans. This paper considers the legal status of military animals under international humanitarian law. It will find that the current classification of military-working dogs as equipment is inherently problematic since it limits the extent of armed forces' obligations towards them before, during and after hostilities. This paper will thus propose a re-imagining of the combatant/civilian distinction to include a new category of 'animal members of armed forces'.

Dr Anna Marie Brennan is a Senior Lecturer in Law at the University of Waikato. She previously worked on the defence team of Karadzic at the ICTY and worked for Judge Sylvia Steiner on the Jean Pierre Bemba Gombo case at the ICC.

Friday 17 July 1pm AEST

The 'Unwilling or Unable' Doctrine and the Persisting Inequalities of International Legal Argumentation

This paper focuses on the 'unwilling or unable' doctrine, which argues for the lawfulness of extraterritorial self-defence against non-state actors whose acts are not attributable to the territorial state, when the latter is 'unwilling or unable' to put an end to armed attacks. My argument has two parts. First, I analyse the methodology of some of the most influential supporters of the doctrine, including Ashley Deeks' pathbreaking article, and contributions that link the doctrine to ideas of 'sovereignty as responsibility'. I show that when arguing for the validity of the doctrine, its proponents perpetuate inequalities of law-making power between Western and non-Western states, as well as between other groups of states that exist in ongoing relationships of domination and subjugation, which cannot be reduced to historic patterns of imperialism. They do so by overemphasising the practice and *opinio juris* of a handful of states and the writings of a narrow circuit academics. More importantly, they by-pass the legal imprint of decolonisation struggles on *jus ad bellum* and draw their arguments and precedents from the pre-Charter era, often from colonial warfare. Secondly, I turn my attention to the substance of the doctrine. I situate it within the political economy of the 'war of terror' as a process of transferring public resources to particular factions of global capital, especially US capital linked to security and surveillance technologies. I contend that 'unwilling or unable' mobilises the threat or use of force as a means of 2 pressuring states into the adoption of the preferred counter-terrorism policies of the US or the UK but also of the language, aesthetics and political economy of the neoliberal security state. In so doing, it enlists them in a global process that transfers resources from the periphery to the centre. Read this way, the doctrine re-authorises inequalities amongst and within states not only by confining 'unwilling or unable' states into a lower scale of 'sovereignty' but also by entrenching a profoundly asymmetrical form of political economy on an international scale.

Ntina Tzouvala is an ARC Postdoctoral Fellow in International Law at Melbourne Law School. Before joining MLS Ntina was a Lecturer in Law at Durham Law School (UK), and she obtained her PhD from the same institution. Her research focuses on the history and theory of international law, with a particular interest in international law and the global political economy. Her first monograph, *Capitalism as Civilisation: A History of International Law*, will be published by Cambridge University Press in 2020.