Australian and New Zealand Society of International Law

ANZSIL International Peace & Security Interest Group

VIRTUAL SEMINAR SERIES 2020

Zoom Link

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The Treatment of Immunity Ratione Materiae *in Recent Work of the International Law Commission*

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The Principle of Legality, New Technology and the Rome Statute: The Case of Cyber Operations against Civilian Data

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Threshold for the Application of the Law of Armed Conflict at Sea

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

Friday 6 November 1pm AEDT

The Treatment of Immunity *Ratione Materiae* in Recent Work of the International Law Commission

Few principles of international law evoke such strong reactions, both within and outside the international law community, as the immunity of State officials. From Pinochet to Al-Bashir, domestic and international courts have struggled with the issue as *lex lata* and *lex ferenda*. The issue has also been taken up in a substantive way in two work streams of the International Law Commission ('ILC'). There is a seeming inconsistency within the recent work of the ILC as to whether immunity *ratione materiae* ('functional immunity') constitutes a procedural bar to foreign criminal jurisdiction or a substantive defence to criminal responsibility. The positions taken by the ILC in *Prevention and Punishment of Crimes Against Humanity* and *Immunity of State Officials from Foreign Criminal Jurisdiction* respectively, appear to be at odds with each other. This paper will illustrate the seemingly competing approaches taken by the ILC and identify pitfalls associated with the different approaches.

Draft Article 6(5) of *Prevention and Punishment of Crimes against Humanity*,[1] overseen by Special Rapporteur Sean Murphy, states that holding an official position is not a ground for excluding criminal responsibility. The effect of Draft Article 6(5) is that an alleged perpetrator cannot raise the fact of his or her official position as a substantive defence so as to negate criminal responsibility.[2] The commentaries further note that Draft Article 6(5) 'has no effect on any *procedural immunity* that a foreign State official may enjoy before a national criminal jurisdiction, which continues to be governed by conventional and customary international law'.[3] Furthermore, Draft Article 6(5) is without prejudice to the ILC's work on the topic *Immunity of State Officials from Foreign Criminal Jurisdiction*.

This raises a question about the proper characterisation of functional immunity. One argument put forward is that functional immunity is a substantive defence to criminal responsibility.[4] This argument proceeds on the basis that the individual official should not be

[1] International Law Commission, *Report of the Work of the Seventy-First Session*, 71st sess, UN Doc A/74/10 (29 April – 7 June, 8 July – 9 August 2019) 10 [39].
[2] International Law Commission, *Draft Articles on Prevention and Punishment of Crimes Against Humanity, with Commentaries*, 71st sess, UN Doc A/74/10, 77 [31] (emphasis added).
[3] Ibid.
[4] See, e.g., Claus Kreβ and Sévane Garibian, 'Laying the Foundations for a Convention on Crimes Against Humanity: Concluding Observations' (2018) 16(4) *Journal of International Criminal Justice* 909, 941-2; Micaela Frulli, 'The Draft Articles on Crimes Against Humanity and Immunities of State Officials' (2018) 16(4) *Journal of International Criminal Justice* 775, 783-4; Antonio Cassese, 'When May Senior State Officials be tried for International Crimes? Some Comments on the *Congo v. Belgium* Case' (2002) 13(4) *European Journal of International Law* 853, 863.

held responsible for acts which are, in effect, those of the official's State. Another argument is that functional immunity gives rise to both a substantive defence and a jurisdictional bar.[5]

However, Sean Murphy was one of eight ILC members who voted against the adoption of Draft Article 7 of *Immunity of State Officials from Foreign Criminal Jurisdiction*.[6] Draft Article 7 identifies six crimes under international law in respect of which 'immunity *ratione materiae* from the exercise of foreign criminal jurisdiction shall not apply', including crimes against humanity. Member Murphy noted a lack of state practice, let alone widespread and consistent state practice, to support denying functional immunity for those crimes listed in Draft Article 7.[7] This would seem at odds with the denial of 'official position' as a substantive defence in Draft Article 6(5) of Crimes against Humanity.

Angad Keith is a Legal Officer in the Office of International Law, Australian Attorney-General's Department, advising the Australian Government on issues of public international law including jurisdiction and immunities, among other matters. Prior to joining the Office of International Law, Angad worked as an Associate in the Associate Judges Chambers in the Supreme Court of Victoria. Angad holds a Master of Laws focusing on public international law from the University of Melbourne, and a Bachelor of Laws and a Bachelor of Engineering from the University of Technology, Sydney. Angad is admitted to practice as a Legal Practitioner to the Supreme Court of New South Wales.

[5] See, e.g., Dapo Akande and Sangeeta Shah, 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts' (2010) 21(4) *European Journal of International Law* 815, 826-7; Philippa Webb, *International Judicial Integration and Fragmentation* (2013, Oxford University Press) 86.

[6] International Law Commission, *Report of the Work of the Sixty-Ninth Session*, 69th sess, UN Doc A/72/10 (1 May – 2 June, 3 July – 4 August 2017) 164-5 [74].

[7] Sean D Murphy, 'Immunity *Ratione Materiae* of State Officials from Foreign Criminal Jurisdiction: Where is the State Practice in Support of Exceptions?' (2018) 112 *American Journal of International Law Unbound* 4, 4.

Friday 13 November 1pm AEDT

The Principle of Legality, New Technology and the Rome Statute: The Case of Cyber Operations against Civilian Data

Cyber operations are becoming an increasing part of armed conflict. These operations pose new questions about how to interpret the Rome Statute, and more specifically, how much the principle of legality as enshrined in the Statute should limit the development of international criminal law. This paper will explore this issue through an assessment whether cyber operations against data during an armed conflict could amount to a war crime. It unpacks the plausibility of data being included in the categories of 'object' and 'property' in the Rome Statute, showing that the better approach is to conclude that data should be included in both. Considering this question forces us to reflect on the proper interpretation of international criminal law, and if and how the Statute will be able to 'keep up' with new forms of warfare. If the ICC was to accept the incorporation of data into these two categories, it would be an example of an acceptable clarification of the law that is consistent with the principle of legality. In this case, technological change justifies a more expansive interpretation of the Statute.

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 27 November 1pm AEDT

Confronting misconduct head on:
Peacekeepers behaving badly gives offence to the UN itself

Over the last three decades, since the passing of the Cold War and its infamous impasses in the UN Security Council, the Council has found inventive style in the means and mechanisms deployed to address international peace and security. In addition to continuing evolution of peacekeeping missions per se, there have been special courts, tribunals, an ombudsperson or so, not to mention all manner of creative exhortations in various outcome documents by which the Council purports to instruct other actors on their obligations or shortcomings.

The Council has, however, shown rather less imagination in its attention to a litany of misconduct by peacekeepers, most especially matters of sexual exploitation and abuse. To the outside observer, the institutional response by the UN remains mostly 'too little, too late', via means and mechanisms that are cumbersome, inefficient, inaccessible, and - not least - seemingly interminable.

Of course, it is not novel to suggest that more is needed from the Council than a resolution that is largely unenforceable, approval of missions that cause serious harm to people they are intended to help, or otherwise allowing an inadequate response to further sully the name of the UN. However, greater urgency attaches to this issue as contemporary questions of institutional abuse of children - such as arise from an inadequate response by organisations to allegations of individual misconduct - have been unfolding in institutions otherwise held to be venerable and laudable (infamously, a range of mainstream churches, but, more recently, seen also in the Chapter 11 bankruptcy of the Boy Scouts of America, for example).

There is no longer doubt that bad apples sooner or later turn up in every conduct barrel in the world, and the Council can hardly expect to obviate all misconduct. However, it can (better) deploy the powers that it has - so as to pay due heed to the ubiquitous *possibility* of misconduct incidents, and then the deleterious impacts of actual incidents upon both the authority of the Council and, more generally, the UN's standing in the world community.

Accordingly, this paper argues that the time has well and truly come for the Council to tackle this issue head on, beginning by recasting the problem. To date, the essential approach has been that such misconduct can be taken as a discipline question (for the particular national armed force or police), or as a matter of ordinary criminality (to be pursued in the host state or the home state), or as a diplomatic issue between sovereign nations. Instead, or in addition, the Council could take direct action on the basis that misconduct gives offence to the United Nations itself, by casting it as being, for example, 'conduct unbecoming of representing the United Nations'. Instead of waiting for another scandal, and then reacting on the run, this

would provide a basis on which to respond more directly, and, one hopes, more effectively, to any future report.

Carolyn M. Evans CSC PhD (2019) MLS (2010) MBA (1988) Grad Dip OR (1987) BBus (Dist) (1982) was previously a senior decision-maker in commercial and nonprofit enterprise, after an early career in the Royal Australian Air Force which culminated in the award of the Conspicuous Service Cross. She is presently a researcher and teaching fellow at the University of New South Wales, Sydney, with current interests in international law - particularly in relation to her forthcoming book, *Towards a more accountable United Nations Security Council* (Brill | Nijhoff, December 2020).

In parallel to her doctoral research, on which the book is based, Carolyn has had the opportunity to make contributions to projects on 'The partiality of international peacekeeping', 'Scenario-Based Training for Senior Leadership in Peace Operations - Sexual Exploitation and Abuse', 'Dealing with Disgrace: Addressing Sexual Exploitation and Abuse in UN Peacekeeping', and 'Leveraging power and influence on the United Nations Security Council'. She has also addressed topics as diverse as forced marriage in Australia and competition in Australian retail banking, and, more recently, is supporting a project investigating constitutional populism as it relates to constitutional democracy.

Friday 11 December 1pm AEDT

The Threshold for the Application of the Law of Armed Conflict at Sea

There has been an increase in incidents in recent years involving warships mainly, but not only, involving the United States, China, Russia and Iran. While the law alone cannot prevent these incidents developing into more serious conflict, a lack of clarity as to the law may start one. When the use of force goes beyond self defence and crosses the threshold into armed conflict, the potential exists for much more destructive and widespread use of force.

The limitations on the use of force are much reduced in an armed conflict. Under the *jus in bello*, it is possible to target enemy warships, military aircraft and naval auxiliaries at sea, and military targets and personnel ashore offensively, that is to say, without waiting for a threat or use of force from those targets. The limitations of self defence do not apply. Crossing from the defensive use of force in peace time into the offensive use of force in an armed conflict is therefore the crossing of a major threshold.

In the *Corfu Channel Case,* the *Nicaragua Case,* the *Oil Platforms Case,* the *South China Sea Arbitration*, and the *Kerch Strait Case*, particular incidents have been localised to a warship or military aircraft or a small group of them. In contrast to the position of the ICRC and major naval manuals in English, this strongly suggests that the use of force in navigational incidents should be limited by the *jus ad bellum* as much as possible. Setting a high threshold for the application of the *jus in bello* may help to prevent a major escalation of hostilities.

Associate Professor Cameron Moore is the Deputy Head of the School of Law at the University of New England. He is also an Honorary Principal Research Fellow at the Australian National Centre for Ocean Resources and Security (ANCORS) at the University of Wollongong and a visiting Associate Professor with the Centre for Military and Security Law and the Centre for Public and International Law at the Australian National University. His publications include the books *Crown and Sword: Executive Power and the Use of Force by the Australian Defence Force* (2017) and *ADF on the Beat: A Legal Analysis of Offshore Enforcement by the ADF* (2004), and other articles and chapters on the Australian Defence Force and maritime security. Between 1996 and 2003, Cameron was a legal officer in the Royal Australian Navy and is still an active reservist.