Australian and New Zealand
Society of International Law

# ANZSIL Postgraduate Workshop

# Wednesday, 28 June 2017

# ANZSIL Postgraduate Workshop 2017 Agenda

**Location – the Moot Court at the ANU College of Law, 5 Fellows Rd, Acton.**

| **Time** | **Opening Session** | |
|---|---|---|
| 9am | Registration, Welcome and Introductions<br>Allocation of Rapporteur Roles in Main Conference | |
| **9.30am** | **Session 1** | |
| | EEZ pickings? Examining coastal State jurisdiction over living resources in the exclusive economic zone | Camille Goodman<br>*ANU* |
| | Fishing with Grotius in the Pacific Ocean | Zsofia Korosy<br>*UNSW* |
| **10.30 am** | **Morning Tea** | |
| **11am** | **Session 2** | |
| | Aliens versus Rebels: Intervention, Arbitration and State Responsibility 1839-1930 (and beyond!) | Kathryn Greenman<br>*Melbourne* |
| | Free, prior and informed consent: In-forming the performativity of Indigenous people subjectivities | Stephen M. Young<br>*UNSW* |
| | Self-Determination in Climate Change-Induced Relocation | Nathan Jon Ross<br>*Victoria University of Wellington* |
| **12.30pm** | **Lunch** | |
| **1.30pm** | **Session 3** | |
| | Considering Foreign Fighters through the Prism of Mercenarism | Marnie Lloydd<br>*Melbourne* |
| | Grappling with the principle of the past: understanding the ICC principle of complementarity in international criminal law: a stable concept or a matter of representation? and its colonial dimensions | Souheir Edelbi<br>*UNSW* |
| | The international rule of law – translating domestic theory to an international context | Sam Hartridge<br>*UNSW* |
| **3pm** | **Afternoon tea** | |
| **3.30** | **Session 4** | |
| | Human and Organ trafficking in Bangladesh: Is the government's response consistent with international law? | Mst Kanij Fatima<br>*La Trobe* |
| | Justiciability of the Basic Necessity of Housing: Applying the 'Violations Approach' in Enforcing State-induced Forced Slum Evictions in Bangladesh | S M Atia Naznin<br>*Macquarie* |
| **4.30pm** | **Final Reflections** | |
| **5pm** | **Close** | |

# SESSION 1 9.30 – 10.30 am

**Camille Goodman**
*ANU*

***EEZ pickings? Examining coastal State jurisdiction over living resources in the exclusive economic zone***

While the coastal State's sovereign rights to explore and exploit, conserve and manage the living resources of the 200 nautical mile exclusive economic zone are firmly established in the 1982 *United Nations Convention on the Law of the Sea* ('LOSC'), the scope of actors and activities that may be regulated by the coastal State on the basis of these rights has never been fully explored or understood. Although the LOSC includes detailed and extensive provisions regarding the coastal State's jurisdiction over living resources, and refers in several places to 'fishing' and 'fishing vessels', it does not provide any definitions for these terms, or refer to the many other activities which are an integral part of modern industrial fishing, such as transshipment, transport, processing, bunkering and other forms of support and supply to fishing vessels at sea.

This gives rise to two important questions. First, do such 'fishing-related' activities fall to be regulated by the coastal State on the basis of its sovereign rights over living resources in the exclusive economic zone, or do they constitute an exercise of the freedom of navigation? And second, if the regulation of such activities *does* come within the jurisdiction of the coastal State, what is the scope of this jurisdiction? Does it only enable the coastal State to regulate fishing-related activities in support of vessels that are *actively engaged in fishing* in its own exclusive economic zone, or does it extend to the regulation of fishing-related activities involving fishing vessels that are merely in *transit* through the coastal State's exclusive economic zone on the way to or from fishing grounds elsewhere? And does it allow the regulation of all vessels that are *equipped to engage* in fishing related activities, or only the regulation of the activities themselves?

This paper will examine the material scope of coastal State jurisdiction over foreign fishing vessels in the exclusive economic zone, in order to clarify *what activities* and *which vessels* come within this regulatory power. This is an important part of my broader doctoral research regarding the nature and extent of coastal State jurisdiction over living resources in the exclusive economic zone (or 'what *can* States do?'), which ultimately seeks to establish how coastal States can maximize the effectiveness of their jurisdiction in a manner consistent with the law of the sea and the broader rules-based framework of international law.

**Zsofia Korosy**

*UNSW*

### *Fishing with Grotius in the Pacific Ocean*

In 1609, at the behest of the Dutch East India Company, Hugo Grotius advanced in *Mare Liberum* a defence of freedom of the seas that would influence the European articulation and practice of maritime trade, fishing and navigation for the next four centuries. This paper traces the translation of those ideas from their European origins to a new geographical context, the Pacific Ocean, in order to uncover the beginnings of international law's regulation of fisheries practices in that ocean. It pays particular attention to the frictions and tensions buried in those beginnings.

The paper has two parts. In Part I, I examine the arguments of Grotius and his critics, together referred to as 'the battle of the books'. This examination focuses on the geopolitical context conditioning the interests of the participants in this debate. A crucial aspect of this context concerned the competition between the Dutch, on the one hand, and England and Scotland, on the other, over the economically vital North Sea herring fishery that abutted the coast of Great Britain. Grotius, acting in Dutch interests, maintained that access should be free to all, while English and Scottish scholars such as John Selden and William Welwood advanced their own national interest in arguing for sovereign rights to control territorial seas and their resources. Part I outlines the principal arguments advanced in this debate. It examines the development of these arguments from responses to particular, geographically-situated economic imperatives into abstracted and universalisable concepts that not only shaped the nascent Law of Nations, but continue to be relevant today.[1]

Part II examines how such universalised principles were applied to a new, and unknown geographical zone, the Pacific Ocean, through the process of (principally British) colonisation. I am particularly interested in the interactions between these transferred legal concepts and the space itself. How, if at all, did the materialities of the Pacific Ocean influence the nature of the legal forms applied to it? How did these legal forms serve to construct the possibilities of the ocean in the British imperial imagination? What was erased, in terms of the distinctiveness of the Pacific Ocean itself, and of its peoples, in the adaptation of European legal doctrines to the governance of its fisheries resources? What, if any, were the possibilities for the Law of Nations to evolve differently through the influence of uniquely Pacific understandings of the nature of the sea? In addressing these questions, I draw on the insights of legal geography scholarship. In particular, I consider Nicole Graham's work on the translation of English property law to the Australian context, in which she makes explicit the geographic conditionality of abstract legal forms.[2] I also look to the Pacific Ocean as a tangible space, and consider how it came to be compiled as a single geographic entity, the role of Europe in that process of compilation, and how this affects the interaction between the law and the ocean's material geography.

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[1] See e.g. Francisco Orrego Vicuña, *The Changing International Law of High Seas Fisheries* (Cambridge University Press, 1999) 4–5; Donald R Rothwell and Tim Stephens, *The International Law of the Sea* (Hart Publishing, 2nd ed, 2016) 3; FV Garcia Amador, *The Exploitation and Conservation of the Resources of the Sea* (A.W. Sythoff, 1963) 2.

[2] Nicole Graham, *Lawscape* (Routledge, 2011).

# SESSION 2 11 am – 12.30 pm

**Kathryn Greenman**

*Melbourne*

***Aliens versus Rebels: Intervention, Arbitration and State Responsibility 1839-1930 (and beyond!)***

During the 19th century, the responsibility of the state for injuries done by rebels to foreign nationals, or 'aliens', in its territory became an important question for international law. Initially, it was common for disputes regarding such responsibility to be resolved through diplomacy, backed up, not infrequently, by the threat and even the use of force. Later it became a matter which also led increasingly to arbitration. In this paper I explore the development of the doctrine of state responsibility for rebels in the context of the decolonisation of Latin America and contemporaneous capitalist expansion in the region. I argue that the doctrine emerged from and was used to manage this post-colonial encounter between the new Latin American republics and Western powers as part of the attempts by the capital-exporting states to protect their trade with and investments in the capital-importing states of Latin America. Latin American international lawyers sought from the beginning to resist intervention on the basis of enforcing state responsibility for injuries to aliens by rebels. It was this resistance – together and in interaction with the efforts of Western international lawyers to rationalise a doctrine of state responsibility for rebels from the arbitral practice – that generated the international jurisprudence here. Framing this history as a debate about international versus national jurisdiction, and their relative authority to determine standards, judge if they have been met and enforce them, I argue that it can help us to reflect on how internationalisation through law is never necessarily an immanently progressive move but always a historically contingent one and thus to redescribe international law's contemporary engagement with rebels.

**Stephen M. Young**

*UNSW*

***Free, prior and informed consent: In-forming the performativity of Indigenous people subjectivities***

Since the endorsement of the *United Nations Declaration on the Rights of Indigenous Peoples*, Indigenous peoples have begun claiming free, prior and informed consent (FPIC) to slow-down and halt development projects. Some states, like Australia, Canada and the US, continue to enforce their municipal legal standards for Tribal participation rather than international standards like FPIC. As a result, one might believe that all Aboriginal and Torres Strait Islander, First Nation, and Native American peoples may claim FPIC. However, that belief rests upon an assumption that all Aboriginal and Torres Strait Islander, First Nation, and American Indian peoples are *ipso facto* Indigenous peoples. If we look at how peoples claim FPIC a different picture emerges. Those who lay claim to FPIC are not simply claiming it. They are also

involved in a process of performatively enacting an internationally recognizable subjectivity, that which is commonly identifiable as Indigenous peoples.

The assumption that all Aboriginal and Torres Strait Islander, First Nation and Native American peoples are Indigenous peoples is due to the salience of the Indigenous peoples and international law narrative. Those who construct this narrative claim something like Indigenous peoples have been here since time immemorial. It is beyond contention that those who are identifiable as Aboriginal and Torres Strait Islander, First Nation or Native American peoples have had a form of life that pre-exists contact with European societies. But the signifier 'Indigenous peoples' emerged from international legal structures, particularly as a result of the draft Declaration negotiations in the mid-1980s and early 1990s. The Indigenous caucuses and advocates involved in the UN negotiations purposefully left 'Indigenous peoples' undefined to avoid giving legal form to those multifarious forms of life that pre-exist contact with European society. However, in enacting those powers the caucuses were performatively enacting a new form of life, that of 'Indigenous peoples'. A consequence is that only those who are able to performatively enact a subjectivity that fits the form of Indigenous peoples can claim FPIC. This paper begins to analyze how peoples perform that subjectivity, and some consequences of those performances.

**Nathan Jon Ross**
*Victoria University of Wellington*

***Self-Determination in Climate Change-Induced Relocation***

Because of rising sea-levels and other adverse effects of climate change, it is almost certain that the entire populations of Tuvalu, Kiribati, the Marshall Islands and the Maldives will be forced to relocate to the territory of other States in coming decades. If this relocation occurs in an ad hoc way, or in a way that fragments these populations, critical aspects of nationhood will be assimilated into the dominant cultures of these new countries. In other words, climate change adaptation measures, such as migration policies, could in fact exacerbate the problems caused by inadequate climate change mitigation measures.

This presentation will introduce the research questions of this PhD, which relate to the domestic challenges for these low-lying States in terms of democratic representation, and to the central issues at international law. These questions relate to whether statehood, the right of self-determination, and human rights can be secured and enjoyed in the territory of another State.

The focus of the presentation will be the central research question of the dissertation, regarding the possible existence of duties on third party States or international organisations to cooperate with or assist the low-lying States in their relocation enterprises. There is a general principle of cooperation in a number of central instruments of international law, but can this principle translate into binding duties when interpreted harmoniously with the obligations agreed to in the *Paris Agreement* to assist with adaptation?

# SESSION 3 1.30- 3 pm

**Marnie Lloydd**
*Melbourne*

***Considering Foreign Fighters through the Prism of Mercenarism***

The term 'foreign fighter' is not defined in international law, but current scholarship and practice commonly refers to jihadist fighters. This attention to terrorism overshadows the fact that throughout history, civil war – including one small part of the 'war on terror' today – has also been fought by 'other' foreign fighters: international volunteers who voluntarily travel abroad to fight with an armed group, without necessarily being involved in terrorism-related offences. Contemporary examples include the Westerners joining Kurdish or Christian armed groups in Syria and Iraq to fight against the Islamic State group. My thesis considers international law in relation to this phenomenon, and the fundamental and confronting questions that arise with the private taking up of arms across borders. Indeed, one striking aspect of the debates surrounding foreign fighters is the lack of consensus about whether states need to control *all* such private volunteering, and if regulation is required, how to define the problematic cases and the scope of the duty.

By taking a critical historical approach to key legal moments related to foreign volunteering in the American Civil War (1860s), Spanish Civil War (1930s), wars of decolonisation (1960s & 70s), and foreign fighters in contemporary settings, the aim of my thesis is to suggest how examining the legal debate, responses and institutional history relevant to the issue of foreign fighters can help us to understand the interplay of international law and relations between sovereign states during civil war.

At the ANZSIL Postgraduate Workshop, I will discuss one aspect of this ongoing work, namely the debates that arose with the attempted prohibition of mercenarism in the 1960s-1980s. To do this, I examine the three decades of work of the Commission on Human Right's *Special Rapporteur on Mercenaries*, and its successor, the *Working Group on Mercenaries* of the Human Rights Council. I explore what happens to our ideas about foreign fighters when we view them through the prism of the legally-defined category of 'mercenary'. Rather than the definition of 'mercenary' providing a litmus test for comparison, I argue that the categorisation of mercenaries remains highly contested, as does, therefore, the identification within international law of the problematic cases of the use of private force by individual volunteers more generally.

**Souheir Edelbi**

*UNSW*

***Grappling with the principle of the past: understanding the ICC principle of complementarity in international criminal law: a stable concept or a matter of representation? and its colonial dimensions***

The principle of complementarity is widely seen as a 'cornerstone' of the International Criminal Court (ICC). This principle provides that national jurisdictions have the primary responsibility to investigate and prosecute crimes that fall within the jurisdiction of the Court with the ICC stepping in only as a last resort to address the shortcomings of states. It is thought that without this principle the creation of a permanent international criminal jurisdiction may not have succeeded. Yet for a cornerstone principle, the principle of complementarity has been one of the most highly contested principles of the ICC. Far from being settled, the principle is underpinned by multiple and varied scholarly projects and approaches that can and do often diverge. Yet the particular approach that has had the most influence on the ICC prosecutor in determining which situations to investigate has been that of 'positive complementarity'. Proponents of this approach argue that complementarity allows the prosecutor to use her legal and political powers to pressure, coerce and prod states to carry out international criminal law investigations. In contrast, opponents argue that this broad approach represents a clear departure from the principle as envisaged in the drafting negotiations, thereby inviting the question of whether a stable or 'pure' concept of complementarity exists. Drawing on this debate, my presentation explores some influential ways by which the principle has been constituted in academic debate and how, as a question of effect, this debate might inscribe or reproduce power relations in the postcolonial context by reference to the African Union's critique of the Court.

**Sam Hartridge**

*UNSW*

***The international rule of law – translating domestic theory to an international context***

The rule of law is a concept that is widely used in political discourse, and its content is somewhat contested. This paper will survey some of the main approaches to the rule of law as it applies in a domestic setting and then explain how, and to what extent these approaches apply to international law. I argue that while there are many fundamental differences between the rule of law, as it applies in domestic or municipal settings, and international law, the idea can be applied to the later system. The first part of this paper will summarise four important approaches to the rule of law. The second part will then survey the various ways that international law has engaged with the rule of law. The final part will detail the important points of difference, as well as proposing how and why we should want to apply the rule of law in the law that regulate the interaction between states.

# SESSION 4 3.30 - 4.30 pm

**Mst Kanij Fatima**

*La Trobe*

***Human and Organ trafficking in Bangladesh: Is the government's response consistent with international law?***

Human trafficking is one of the most heinous crimes, with its flagrant disregard for the dignity of human beings. Vulnerable groups such as women and children are most at risk, as traffickers seek out and profit from their susceptibility. Usually traffickers target countries whose economic and social conditions are worse and whose geographical situations make trafficking easier. Bangladesh is one such country, and has become both a source and transit area for human trafficking. It has also become a source for local and international patients who buy organs from the poor.

Despite not having signed the Trafficking Protocol to the Convention against Transnational Organised Crime, as a member of the international community Bangladesh is obliged to adopt a range of measures to deal with human trafficking, especially trafficking in women and children. Bangladesh does have some domestic laws addressing trafficking, but these laws are often ineffective.

Scholarly research into the issue of human trafficking mainly focuses on different causes and forms of human trafficking. Only a handful of researchers have pointed out the responsibility of government, and existing research has not scrutinized whether official activities are effective or compliant with international law applicable to human trafficking. Moreover, past research has not given importance to the issue of child trafficking and special measures to rehabilitate child victims. This research project will analyse the position of Bangladesh by addressing the following questions: a) To what degree is Bangladeshi Law compliant with applicable international law regarding human and organ trafficking? and b) Why are current government measures ineffective?

**S M Atia Naznin**

*Macquarie*

***Justiciability of the Basic Necessity of Housing: Applying the 'Violations Approach' in Enforcing State-induced Forced Slum Evictions in Bangladesh***

Systematic state-led forced slum evictions remain a persistent challenge in Bangladesh. The primary reason behind this is that housing is not a right, rather a basic necessity under the constitution of Bangladesh. Moreover, it is categorised as a fundamental principle of state policy and expressly termed as non-justiciable. Such a context is inconsistent with the state's international human rights obligation that guarantees the right to housing and prohibits forced evictions. However, since the late '90s, the Bangladesh Supreme Court has been liberally adjudicating forced slum evictions. Present paper argues that amidst others, such as the constitutional commitment to social justice or the rise of social rights

litigations, principally, the welcoming judicial attitude to apply the growing consensus in international law in conceptualising states' obligations from a 'violations approach' has been the catalyst behind the progress. Accordingly, first, it investigates the scope of this approach which unlike the 'progressive realisation' approach invokes negative and immediate obligations for any act which is retrogressive, discriminatory, and violates the minimum core content of the right to housing. Second, it examines the Court's capacity to adopt this development of international law into the dualist legal system of Bangladesh. Last, by analysing relevant judgments, this paper reveals the judicial craftsmanship that acknowledges the justiciability of the violation of the basic necessity of housing due to forced slum evictions by interpreting the later as the manifestation of retrogression and discrimination to violate the former that constitutes an integral component of the right to life.