Australian and New Zealand Society of International Law

Postgraduate Workshop

2nd December 2020

The 2020 ANZSIL Postgraduate Workshop will take place via zoom on 2nd December 2020. Each student has 10 minutes to present their paper and the allocated commentator will have 5 minutes to respond. This will then be followed by 10 minutes of discussion. At the end of the day, we will have 'zoom drinks' and conclude with an informal social session giving you an opportunity to get to know one another and swap tips on surviving your thesis! The workshop will be chaired by ANZSIL President, Professor Karen Scott.

8am – 9.35 AEDT 10am – 11.35am NZ Introductions and Session One	Speaker	Title of Presentation	Commentator
	Millicent McCreath	The development of community interests in the protection of the marine environment	Ethan Beringen
	Osvaldo Urrutia	Unregulated fishing on the high seas and the formation of customary international law	Frances Anggadi
	Ethan Beringen	The contested meaning of 'not undermining' in practice at the negotiations of an instrument for high seas conservation	Millicent McCreath
Break			
10am – 11.30am AEDT 12noon – 1.30pm NZ Session Two			
	Frances Anggadi	Exploring the relative stability of maritime zones in the law of the sea: a first-pass survey of state practice	Osvaldo Urrutia
	Hui Helen Pang	Global commons in international investment law: the rights and responsibilities of states and investors in renewable energy investments	Juliette McIntyre
	Juliette Mc Intyre	What values or interests do the rules of procedure of the international court of justice promote or obscure?	Hui Helen Pang

Lunch			
12.30pm – 2pm AEDT 2.30pm – 4pm NZ Session Three			
	Yvonne Breitwieser-Faria	The prevention of atrocity crimes: legal obligations and state responsibility	Silvina Sáchez Mera Tarisa Yasin
	Silvina Sánchez Mera	Child soldiers: children or soldiers in international criminal law?	Yvonne Breitwieser-Faria Tarisa Yasin
	Tarisa Yasin	Appropriate levels of human control necessary for autonomous weapon systems to comply with international humanitarian law	Yvonne Breitwieser-Faria Silvina Sánchez Mera
2pm – 3pm AEDT 4pm – 5pm NZ *Afternoon Tea/ Drinks/ Informal Social Event – Tips on surviving your thesis!*			

Zoom Details

If you would like to attend this workshop please contact me directly for zoom log in details: Karen.Scott@canterbury.ac.nz.

Exploring the relative stability of maritime zones in the law of the sea: a first-pass survey of State practice

Frances Anggadi

In considering the legal implications of sea-level rise on maritime zone, the prevailing understanding of the normal baseline in international law is that it has an ambulatory character (that is, that a legal baseline will automatically move when the coastline moves). This paper will present preliminary findings which aim to test whether this understanding of the current law is supported by State practice. The paper will present the results of a first-pass survey of all national maritime zones legislation currently hosted at the UN Division of Ocean Affairs and the Law of the Sea. Taking an inductive approach to group and classify the different methods by which coastal States implement maritime zones, the paper will offer some observations on (1) the variety of implementation methods observed (2) the degree of spatial stability offered by the different methods by reference to geodetic principles, and (3) the potential legal significance of these observations for the law on the normal baseline and current debates on sea-level rise.

Prior to commencing her research at ANU, Frances was a Principal Legal Officer in the Office of International Law, Attorney-General's Department, advising across the breadth of public international law, including international law of the sea, international human rights and refugee law, the use of force and international humanitarian law. Frances has also served as legal adviser to the Pacific Maritime Boundaries Project (2017-2019), working with Pacific countries to settle their maritime zones through the negotiation of maritime boundary treaties and in their national laws. Frances' MPhil research concerns themes of stability and change in maritime zones, and is supervised by Professor Donald Rothwell.

The Contested Meaning of "Not Undermining" in Practice at the Negotiations of an Instrument for High Seas Conservation

Ethan Beringen

The United Nations General Assembly Resolution 69/292 has been the subject of extensive discussions within the literature and amongst the state delegates at the negotiations for a new legally binding instrument for the conservation and sustainable use of biodiversity beyond national jurisdiction (BBNJ). This resolution, which formally established the negotiations on the new treaty instrument, contained a principle that stated that the completed BBNJ instrument "should not undermine" existing bodies and treaties at international law. It is argued in this paper that while the true legal interpretation is a matter of debate between scholars and state delegates alike, it is rather *how* this principle is utilised that is most relevant for the analysis of these negotiations. Specifically, it is contended that the way that each state interprets this principle aligns squarely with their goals for the instrument. This is particularly evident when it comes to the discussion of the implementation of area-based management tools (ABMTs), which focuses largely on the relationship between existing measures and the new instrument. As such, delegations deploy their interpretation of the principle at the negotiations as a strategic tool to both block unwanted measures as well as reinforce their own proposals. This tactic aims to build consensus on their interpretation of the principle and hence their policy. Australia will be used as a case study to highlight how these strategies are utilised to further its argument for a hybrid approach to ABMTs governance which preserves the role of the regional bodies in which Australia has a stake.

Ethan Beringen, is a master's student at the University of Adelaide, although he will be moving to Macquarie University next year to pursue a PhD. His research is focused on international environmental law and law of the sea. Specifically, Ethan is concentrating on the negotiations for a new instrument for conserving marine biodiversity beyond national jurisdiction. Of particular interest is the intersection between political science and international law making as well as Australia's role within the negotiation paradigm.

The Prevention of Atrocity Crimes: Legal Obligations and State Responsibility

Yvonne Breitwieser-Faria

Amidst the frequent reports of serious human rights and international humanitarian law violations, genocide, crimes against humanity, war crimes and ethnic cleansing (combined also referred to as atrocity crimes) have gained increasing political momentum as a global issue. The response to such crimes, let alone their prevention, however, remains highly politicised, raising the question of whether states incur a legal obligation to prevent atrocity crimes. States generally appear to accept that they incur some form of obligation, legal or otherwise, to this end.

Foreign involvement to prevent or react to atrocities was traditionally considered to conflict with the principle of non-intervention in a sovereign state. This, however, does not reflect the conceptualisation of sovereignty to also encompass responsibilities towards states' populations nor modern efforts to reframe the principle to one of non-difference.

This thesis seeks to address conceptual challenges of atrocity prevention through the identification of legal obligations states incur to prevent atrocity crimes, their scope and practical conceptualisation, and explores states' international responsibility arising from a breach of their obligation. It examines a practical legal approach to the application of atrocity prevention by exploring the parameters under which legal obligations of states to prevent atrocity crimes exists.

Yvonne is a PhD Candidate at the T.C. Beirne School of Law in affiliation with the Asia-Pacific Centre for the Responsibility to Protect, The University of Queensland, where she is also a casual academic in the area of Public International Law. She is a research scholar at the School's Centre for Public, International and Comparative Law. Her primary research interests are in the areas of general international law, atrocity law, and international human rights law. She holds a Law Degree and LL.M. from the University of Vienna and has previously worked as a research consultant in several international projects.

What values or interests do the rules of procedure of the International Court of Justice promote or obscure?

Juliette McIntyre

This paper is the first of four case studies from my PhD, which aims to answer the following research question: *What values or interests do the rules of procedure of the International Court of Justice promote or obscure?* My objective is to scrutinise the Court's rules of procedure in order to identify the values that are used to justify the Court's procedural rules; the interests advantaged by a particular approach; or the values and/or interests that may be obscured by the Court's application of its rules of procedure.

To that end, this paper considers the Court's revision procedure under Article 61 of the Court's Statute, and the competing procedural objectives of finality in judicial proceedings and the goal of substantive justice for the parties. Revision adversely affects the *res judicata* and can be perceived as damaging to the stability of legal relations. However, in doing so, the procedure can be said to promote the achievement of justice, in the sense of accurate fact-finding. The balance of these values informs the approach to be taken to practical matters of procedure, such as whether the Court should permit the revision of decisions on preliminary objections.

Juliette McIntyre is a Lecturer in Law at the University of South Australia. Her teaching and research focuses primarily on public international law, particularly international courts and tribunals.

Ms McIntyre holds a first class LL.M. in International Law from the University of Cambridge, and a BA and LLB/LP with Honours. She is presently undertaking her PhD at the University of Melbourne. She is a recipient of the Law Foundation of South Australia Fellowship, and has extensive litigation experience in public international law, including before the International Court of Justice.

The development of community interests in the protection of the marine environment

Millicent McCreath

Since the origin of the prohibition on transboundary environmental harm in the first half of the twentieth century, there has now emerged a strengthening consensus that states have an interest not only in the protection of their own territory, but also in the protection of the global commons, including the high seas and deep seabed. With states clearly empowered to take action to protect their own maritime zones from harm caused by other states, and with the International Tribunal for the Law of the Sea stating that the obligations in the Law of the Sea Convention relating to the preservation of the environment of the high seas and the Area are obligations *erga omnes*,[1] the final piece of the puzzle is the recognition of the interest of third states in the protection of the marine environment under the jurisdiction of other states.

International law has traditionally been of an essentially bilateral nature, meaning that obligations are owed reciprocally between pairs of states, and only the state to which the obligation is owed has an interest in its performance. However, since the mid-twentieth century the international legal system has been evolving to accommodate interests that do not fit the bilateral mould but rather belong to the international community in whole or in part. This has resulted in an increased recognition of 'the notion of obligations owed to an international community of states – and ultimately of all humankind', or, 'community interests'.

Despite the increasing evidence that the ocean is an interconnected system, as well as the growth in global environmental consciousness and concern, states continue to show little willingness to interfere in the 'domestic concerns' of other states. As a result, so long as any environmental harm is contained within their maritime zones, coastal states are able to exercise their sovereignty with something approaching impunity.

This paper traces the development of community interests in the protection of the marine environment from their transboundary origin to the protection of the global commons and explores whether the law has developed such that the international community has an interest in the protection of the marine environment as a whole – including within the national jurisdiction of other states. This investigation includes a detailed examination of the concept of 'community interests', including the process of identifying such interests and the 'community' to whom they belong, as well as their normative value and the enforcement mechanisms available to members of the 'community' to enforce them. The broader context of this paper is the question of how state sovereignty interacts with global environmental threats and how sovereignty affects the protection of community interests in the marine environmental context.

Millicent McCreath is a Scientia PhD Scholar at UNSW Law and a Global Associate at the National University of Singapore Centre for International Law (CIL). From 2017 to 2019 Millicent was a Research Associate with the Ocean Law and Policy Programme at CIL. Her doctoral research is focussed on the protection of the marine environment, state responsibility, community interests and dispute settlement. She has an LLB and BA from UNSW, an LLM in International Law of the Sea from UiT The Arctic University of Norway and is admitted as a solicitor of the Supreme Court of New South Wales.

[1] *Responsibilities and Obligations of States with Respect to Activities in the Area, Advisory Opinion* [2011] ITLOS Reports 10 [180].

Global Commons in International Investment Law: The Rights and Responsibilities of States and Investors in Renewable Energy Investments

Hui Helen Pang

The rise of green investment demonstrates a welcoming synergy between international economic law and international environmental law, as clashes often emerge between the two. However, it is dubious whether the investor-state dispute settlement mechanism ('ISDS') is ready to deal with cases that touch upon global public interests, as investment treaties often remain 'silent' on climate change mitigation, transnational environmental protection, and international human rights. On the one hand, the ISDS may not be able to render adequate protection to renewable energy investments. On the other hand, allowing investors to challenge regulatory change could generate negative spillovers, as many domestic interests need strong state powers to guard off irresponsible investors. The main question of this paper is: could the need to protect a domestic public interest, such as tariff stability or affordable electricity, serve as a sufficient defence for the non-compliance of green investment protection? In other words, when climate change mitigation investments clash with a domestic public interest in investment treaty arbitrations, which shall prevail and why? This question also has significance for the post-COVID world, as economic recession could lead to adjustments in investment policies and affected investors might initiate arbitration against the state. How to clarify the boundaries between non-compensable state action and breach of investment protection obligation is growing to be more imperative for the development of investment law. To answer these questions and ultimately address whether international investment law can contribute to clean energy transition, this paper will place renewable energy investment cases within the global public good and global commons framework, and explore the theories of global constitutionalism and global administrative law.

Hui is a Scientia PhD Scholar at UNSW Law, and she currently focuses on renewable energy investor-state dispute settlement. Her thesis looks into the rights and responsibilities of the investors and the state in renewable energy investment cases, with particular regards to international environmental obligations. Before joining UNSW, Hui was a Fox Fellow at Yale University for a year and researched sustainable development in international investment law from the developing countries perspective. Prior to her PhD, she worked in private practice on mergers and acquisitions and international securities.

Child Soldiers: children or soldiers in international criminal law?

Silvina Sánchez Mera

The paper is part of a PhD thesis that endeavours to examine the International Criminal Court's ('ICC') practice regarding crimes committed against children associated with armed forces by their own armed members. Thus, the thesis strives to uncover the manner in which prosecutions at the ICC are conducted and the underlying assumptions that shape them and lead to narrow approaches, which in turn results on a lack of accountability and lack of acknowledgement of victims, because it leaves part of their story unrecognised. To do so, the research combines a doctrinal analysis with feminist methodologies.

The reality of children associated with armed forces ('child soldiers') usually goes beyond mere recruitment and involves a range of other crimes they are subjected to by their own armed members. In recent years, the question of whether international crimes, other than recruitment, could be committed against child soldiers by their own armed forces emerged at international criminal tribunals, in particular at the ICC. This is mainly because it is not clear if, and to what extent, International Humanitarian Law protects child soldiers from the dangers posed by their own military force or whether these children constitute a civilian population for both war crimes and crimes against humanity ('CAH') purposes under the Rome Statute.

The traditional view understands a 'civilian' as someone that does not belong to armed forces. Therefore, whether children associated with armed forces are understood as soldiers or as children has serious implications for their protection under international criminal law, in the applicable law in general and in international prosecutions in particular.

The article seeks to address this tension and discuss the child soldier status in international criminal law. It will be argued that the crime of child recruitment is a crime against children in their capacity as civilians. Therefore, suggesting that they lose their status as civilian with respect to their own armed members would be placing them in a more adverse position and provide place for an impunity gap. As other international crimes committed against them beyond child recruitment, would not fall within the definition of other international crimes.

Silvina is a PhD candidate and tutor at La Trobe University, her research field lies within international criminal law and engages with feminist theories. She holds a Masters in international law. Before coming to La Trobe, she was working as a Lecturer in Public International Law and Human Rights Law in Argentina. Her professional experience also includes working as legal officer at a State Juvenile Court, as a researcher for Defence Counsel at the ICTY and interned at the ECCC. She is a Chevening alumni, member of the Argentinean Association of International Law, and Endeavour Scholar.

Unregulated fishing on the high seas and the formation of customary international law

Osvaldo Urrutia

Conventional understanding often suggests that treaties are at the core of change in international law and the main – if not the only – mechanism to solve pressing global problems. The case of unregulated fishing on the high seas (fishing by vessels flagged to non-party states to the relevant regional fisheries management organisation, or RFMO) shows a different picture, one that also encourages a broader assessment of how customary international law (CIL) evolves and how the two fundamental sources of international law interact. This PhD thesis examines how states, acting through RFMOs, have progressively demanded from non-member states a standard of cooperation based on the 1995 UN Fish Stocks Agreement, notwithstanding participation in this treaty. As these actions cannot be justified in treaty law, the thesis asks *whether* and *how* such practice is emerging as a CIL rule. It also addresses the lessons that the case against unregulated fishing offers for the understanding of the formation of CIL.

Osvaldo Urrutia is in his final year as PhD candidate at Victoria University of Wellington, New Zealand. He is also a lecturer at the Faculty of Law of P. Universidad Católica de Valparaiso (PUCV, Chile).

Appropriate Levels of Human Control Necessary for Autonomous Weapon Systems to Comply with International Humanitarian Law

Tarisa Yasin

The use of autonomous weapon systems potentially conflicts with the legal obligations of States to comply with the fundamental principles of international humanitarian law and other general principles of international law.[2] This is because of the qualitative assessments and judgements required when military commanders apply the rules of international humanitarian law.[3] Furthermore, weapon systems are not currently programmed to implement those rules.[4] Therefore, human discretion and judgement are still relevant, and one of the main concerns is ensuring that humans maintain control over the use of lethal force.[5]

This research will build upon the discussions related to the implications of autonomous weapon systems, considering both international humanitarian law principles and other rules and principles of international law, such as state responsibility, due diligence and international criminal liability, that may be affected by the use of autonomous weapon systems. It will attempt to clarify the legal limits of autonomy in weapon systems by examining the concept of human control over weapon systems and what retaining appropriate levels of human control would entail. This thesis aims to fill the gap in the literature regarding the ambiguity that is the term 'appropriate levels of human control'. It will expand upon the contributions already made in the area of autonomous weapon systems and international humanitarian law and will add to the literature that has analysed and examined ways to better regulate autonomous weapon systems.

Tarisa Yasin started at Bond University in September 2014 as a Bachelor of Laws and International Relations student and graduated in February 2018. She was subsequently admitted into the legal profession in the Supreme Court of Queensland. Tarisa began her PhD journey as a LLM (Research) student in January 2019 and converted to a PhD in February 2020. Her research interest is in public international law and topics that involve both law and international relations. The focus of Tarisa's thesis is on international humanitarian law and the regulation of autonomous weapon systems. Specifically, on the concept of human control and how it can help ensure that current and future autonomous weapon systems comply with international humanitarian law.

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[2] See International Committee of the Red Cross, *Autonomous Weapon Systems: Technical, Military, Legal and Humanitarian Aspects* (Expert Meeting Report, 26-28 March 2014); International Committee of the Red Cross, *Autonomous Weapon Systems: Implications of Increasing Autonomy in the Critical Functions of Weapons* (Expert Meeting Report, 15-16 March 2016); Neil Davidson, 'A legal perspective: Autonomous weapon systems under international humanitarian law' (Conference Paper, Convention on Certain Conventional Weapons Meeting of Experts on Lethal Autonomous Weapons Systems (LAWS), 11 April 2016) 7; United States of America, 'Implementing International Humanitarian Law in the Use of Autonomy in Weapon Systems' (Working Paper No 5, Group of Governmental Experts on Emerging Technologies in the Area of Lethal Autonomous Weapon Systems, 28 March 2019) 2.

[3] See International Committee of the Red Cross, *Autonomous Weapon Systems: Technical, Military, Legal and Humanitarian Aspects* (Expert Meeting Report, 26-28 March 2014) 8.

[4] See Neil Davidson, 'A legal perspective: Autonomous weapon systems under international humanitarian law' (Conference Paper, Convention on Certain Conventional Weapons Meeting of Experts on Lethal Autonomous Weapons Systems (LAWS), 11 April 2016) 7; Markus Wagner, 'The Dehumanization of International Humanitarian Law: Legal, Ethical, and Political Implications of Autonomous Weapon Systems', (2014) 47(5) *Vanderbilt Transnational Law* 1371, 1388, 1399.

[5] Kathleen McKendrick, 'Banning Autonomous Weapons Is Not the Answer', *Chatham House The Royal Institute of International Affairs* (Blog Post, 2 May 2018). <https://www.chathamhouse.org/expert/comment/banning-autonomous-weapons-not-answer>.