Australian and New Zealand Society of International Law

anzsil newsletter

Welcome to the March edition of the ANZSIL newsletter.

In this edition

News in brief

Register now for the annual conference in July!

From the Editors

Welcome to the first issue for 2013 of the ANZSIL Newsletter, the main way in which ANZSIL members are kept up to date on developments involving the Society and its membership.

This issue of the Newsletter includes the results of a survey conducted in 2012 of the ANZSIL membership to find out what the Society is doing well and whether there are things it could do better.

The Newsletter also includes summaries of the 2012 Inaugural Joint Conference of ANZSIL and the Asian Society of International Law held in Sydney, and the 2012 Four Societies Conference hosted at Berkeley in California, as well as details of upcoming events and reports from interns supported by ANZSIL. And of course it includes the helpful summaries of Australian and New Zealand practice, courtesy as always of the Attorney-General's Department, the Department of Foreign Affairs and Trade and the Ministry of Foreign Affairs and Trade.

We also have an upcoming change in our newsletter editorial team - Sarah McCosker, who has been Co-Editor of the Newsletter with Tim Stephens since 2008, will be stepping down from the role, as she has taken leave from the Attorney-General's Department to take up a temporary position with the International Committee of the Red Cross in Geneva. Amelia Telec from the Attorney-General's Department has very kindly agreed to step into Sarah's shoes as co-editor.

We hope you enjoy the newsletter and welcome your feedback and contributions for future issues.

Tim Stephens and Sarah McCosker

(A note from Sarah: may I take this opportunity to say that it's been a pleasure working with Tim to bring you the newsletter over the past five and a half years, and I warmly welcome Amelia to the role of Co-Editor).

From the President

Fourth Four Societies Conference

It has been once again a very busy time for the Society since the last Newsletter.

Since that time ANZSIL representatives took part in the Fourth Four Societies Conference, hosted by the American Society of International Law and Berkeley Law School at the University of California, Berkeley (the report can be found later in this Newsletter).

This month also saw the appearance of the volume of the papers from the Third Four Societies Conference held in Japan in 2010: *International Law in the New Age of Globalization* (Martinus Nijhoff, 2013). Further details (including the table of contents) appear below in this Newsletter.

The Berkeley Conference saw the end of the cycle of Four Societies Conferences. However, the societies involved considered that in view of the success of the conferences, they should initiate another round of conferences, commencing in 2014. As a result, ANZSIL, which hosted the first Four Societies Conference in Wellington in

2006, will be hosting the next Conference in 2014, probably in conjunction with the 2014 ANZSIL Annual Conference. We are soliciting suggestions as to the theme for that conference. Previous themes have been international law and democratic theory, international law in the new age of globalisation, and international law and disasters.

ANZSIL and the Asian Society of International Law

Another highlight of the period since the last Newsletter was the inaugural joint event organised by ANZSIL and the Asian Society of International Law, hosted by the Faculty of Law and Faculty of Arts & Social Sciences at the University of New South Wales. A report on that conference appears below.

ANZSIL International Economic Law Interest Group Workshop

Most recently, the ANZSIL International Economic Law Interest Group held its third annual workshop, this year hosted by Melbourne Law School and convened by ANZSIL Interest Group Co-Chair, Professor Tania Voon. I would like to express my thanks to the IELIG for their work in organising what was once again an engaging workshop with robust engagement around a range of current issues relating to international economic law (report below).

Annual Conference 2013

The 21st Annual Conference of ANZSIL will be held in Canberra from 4 to 6 July 2013 at University House at the Australia National University. The theme of the conference is Accountability and International Law and a wide range of presentations on familiar and new topics have been selected by the Conference Organising Committee.

Our keynote speaker will be Professor Harold Hongju Koh, Sterling Professor of International Law at Yale Law School and until recently Legal Adviser, United States Department of State. The provisional program for the conference and registration details, as well as information about accommodation, can be found on the ANZSIL website. The ANZSIL Postgraduate Workshop will take place on 3 July 2013.

My Thanks to Colleagues

This will be my last contribution to the Newsletter in my capacity as President, as my second two-year term comes to an end at the ANZSIL conference this year. The activities of the Society reflect the vibrant international law community in Australia, as can be seen from the high quality and wide range of offerings at the annual conferences and the significant program of activities between conferences. A full review of the year's activities and my thanks to all those who have supported the work of Society during my time as President (they are many) will be included in my report to the ANZSIL AGM, to be held on 5 July 2013 at 12.45 pm. However, I would particularly like to express my thanks to the Editors, Tim Stephens and Sarah McCosker, for their excellent work in producing this Newsletter on a regular basis, and colleagues in the Australian and New Zealand governments who have prepared the instructive and valuable summaries of recent state practice for the Newsletter, as well as other colleagues who have contributed items to the Newsletter. I would also like to welcome Amelia Telec as an Editor of the Newsletter.

I look forward to seeing many of you at the 21st Annual Conference in Canberra in July.

Andrew Byrnes

Register now for the 2013 Annual Conference

ANZSIL 21st Annual Conference

Thursday, 4 July 2013 - Saturday, 6 July 2013

ACCOUNTABILITY AND INTERNATIONAL LAW

The 21st Annual Conference of the Society will take place from Thursday, 4 July 2013 to Saturday, 6 July 2013 at The Australian National University, Canberra. The conference will be hosted by the Centre for International and Public Law, ANU College of Law.

Central to many understandings of international law is the concept of accountability.

While the concept takes traditional forms in the context of the law of State responsibility and the responsibility of international organisations, the notion is much broader in scope. The accountability of international law-makers to their communities and to a broader international community for their acts and failures to act; of the State to its citizens in the fields of diplomatic protection and human rights; the evolving law in relation to responsibilities of non-State actors including corporations; global administrative law; the accountability of arbitral tribunals; the accountability of international and national NGOs for their activities; and the role played by civil society institutions in filling lacunae in the international systems of accountability. All these are aspects of the operation of international law that might be fruitfully explored from the perspective of accountability (or its absence).

We are delighted to announce that the Conference keynote speaker will be Professor Harold Hongju Koh, Sterling Professor of International Law, Yale Law School.

The draft conference program is available here.

Registration information is available here.

2012 Member Survey - Results

In the September 2012 Newsletter we asked members to participate in a short online survey.

The results of the survey are in and can be found here.

Recent Australian Practice in International law

Attorney-General's Department International Law Colloquium

On 29 November 2012, the Attorney-General's Department hosted the second International Law Colloquium. The Colloquium provided an opportunity to bring together in Canberra academics, legal practitioners and government officials to discuss emerging issues of international law under the theme of 'Looking Ahead: Cross-cutting Issues in International Law'.

The day included four sessions, which included stimulating debate and discussion on a diverse range of issues. The first session of the Colloquium examined the interaction of Australia's domestic courts with the international legal system. The second session considered the rule of law and the United Nations Security Council—a particularly topical subject given Australia's recent election to the Council. The third session focussed on the new frontiers of technology and international law and considered the challenges posed by modern technology for international regulation in areas as diverse as nanotechnology, cyber warfare, and outer space security. The final session touched on a range of emerging issues in the coming decade, including detention in international military operations and human rights law and the internet.

The Colloquium also featured a display on the United Nations Convention of the Law of the Sea, celebrating the 30-year anniversary of the adoption of that Convention, the proclamation of Australia's extended continental shelf and other Australian law of the sea milestones.

Agreement on Strengthening the Implementation of the Niue Treaty on Fisheries Surveillance and Law Enforcement in the South Pacific Region

The Agreement on Strengthening the Implementation of the Niue Treaty on Fisheries Surveillance and Law Enforcement in the South Pacific Region (Agreement) was adopted on 2 November 2012 by the 17 Pacific Island Parties to the Niue Treaty on Fisheries Surveillance and Law Enforcement in the South Pacific Region. Known informally as the 'Niue Treaty Subsidiary Agreement', the Agreement provides for flexible cooperation in conducting a broad range of cooperative fisheries surveillance and law enforcement activities, including sea patrols and aerial surveillance, port inspections and investigations. This gives effect to a 2010 directive from Pacific Island Forum Ministers, endorsed by Leaders, to conclude negotiations by the end of 2012 on a multilateral treaty to strengthen fisheries management and provide for more cost-effective and efficient maritime surveillance in the region.

The Agreement incorporates innovative legal solutions in the fight against illegal, unreported and unregulated fishing by: including a mechanism for one country to request another country to exercise fisheries surveillance and law enforcement

functions on its behalf, including through sharing vessels and aircraft; allowing the use of reliable technical means to continue 'hot pursuit' of suspected illegal fishing vessels; and including provisions on the exchange of fisheries data and intelligence and the use of that information for broader law enforcement purposes. The Agreement is open for signature by Parties to the Niue Treaty and will enter into force once it has been ratified by four Parties. To date, Palau, Papua New Guinea and Tuvalu have signed the Agreement.

Australia participated actively in the negotiation of the Agreement, including through funding a legal officer to act as the Chair's Assistant during the drafting process and along with a new legal position within the Pacific Islands Forum Fisheries Agency to assist Pacific Island Countries with the implementation of the Agreement. Australia is also providing capacity building assistance to a number of Pacific Island Countries to prepare them to conduct cooperative activities pursuant to the Agreement. Australia is currently undertaking the domestic processes required to enable it to sign and ratify the Agreement.

Copenhagen Process on Detention in International Military Operations

The Copenhagen Process on detention in international military operations was finalised on 20 October 2012 with participating States and organisations welcoming a set of non-legally binding Principles and Guidelines on the handling of detainees in such operations. A copy of the Principles and Guidelines, and the Chairman's Commentary, can be found here. This Process had been initiated in 2007 by the Government of Denmark, which led a process that included the participation of 22 States, including Australia, and a number of international organisations. The process was chaired by Ambassador Thomas Winkler, the Legal Adviser to the Danish Ministry of Foreign Affairs, with assistance of Melbourne University's Associate Professor Bruce Oswald. Australia was represented at all three Copenhagen Conferences and was an active supporter of the process.

The aim of the process was to develop a set of best practice guidelines on the standard of treatment for persons deprived of their liberty in the course of international military operations. The Principles and Guidelines apply to detention during the course of these operations in the context of non-international armed conflict and peace operations, and draw on existing rules of international humanitarian and human rights law, as well as State practice in this area.

The Copenhagen Process Principles and Guidelines are an important step in the dialogue on the regulation of detention in international military operations, and will complement the current work being undertaken by the International Committee of the Red Cross on the protection of persons deprived of their liberty. While they are non-legally binding in nature, the Principles and Guidelines constitute an explicit recognition of the application of international law to this area of State activity and have contributed towards developing greater clarity about the applicable normative framework for detention in international military operations.

International tobacco plain packaging litigation

The Tobacco Plain Packaging Act 2011 came into full effect 1 December 2012. The legislation prohibits tobacco industry logos, brand imagery, colours and promotional text other than brand and product names in a standard colour, position, font style and size appearing on retail packaging of tobacco products. Expanded requirements to place graphic health warnings on tobacco products have also been imposed by way of an Information Standard under the Australian Consumer Law. Plain packaging is part of a comprehensive suite of measures designed to reduce the incidence of death and disease caused by smoking in Australia.

Tobacco companies have taken domestic and international legal challenges against these measures in three fora: constitutional challenges before the High Court of Australia, investor-State arbitration and dispute settlement in the World Trade Organization (WTO).

Challenges to the plain packaging legislation were brought by British American Tobacco (BATA), Imperial Tobacco, Philip Morris and Japan Tobacco International (JTI). Two of these challenges were heard by the High Court of Australia between 17-19 April 2012: British American Tobacco Australasia Limited and Ors v. Commonwealth of Australia and J T International SA v. Commonwealth of Australia. On 15 August 2012 the High Court handed down orders for these matters, and found that the Tobacco Plain Packaging Act is not contrary to s 51(xxxi) of the Constitution. The

Court's reasons for decision were handed down on 5 October 2012. By a 6:1 majority (Heydon J in dissent) the Court held that there had been no acquisition of property that would have required provision of 'just terms' under s.51(xxxi) of the Constitution. The BATA and JTI matters have now been concluded. Costs were awarded in favour of the Commonwealth. The parties' written submissions, the full transcript of proceedings, and the orders made can be viewed on the High Court's website.

Philip Morris Asia Limited is also challenging the plain packaging legislation under the 1993 Agreement between the Government of Australia and the Government of Hong Kong for the Promotion and Protection of Investments. This challenge is being heard by an arbitral Tribunal constituted on 15 May 2012 under the United Nations Commission on International Trade Law Arbitration Rules 2010. Three arbitrators are hearing the case: Professor Karl-Heinz Böckstiegel (presiding arbitrator), Professor Don McRae (appointed by Australia) and Professor Gabrielle Kaufmann-Kohler (appointed by Philip Morris Asia Limited). The seat of arbitration is Singapore. The Tribunal held a first procedural meeting on 30 July 2012. On 31 December 2012 the Tribunal issued Procedural Order No. 7 which set the forward timetable for the proceedings. Philip Morris Asia is required to submit a full Statement of Claim (together with the evidence on which it seeks to rely) by 28 March 2013. Australia is required to submit its full Statement of Defence (together with the evidence on which it seeks to rely) by 23 October 2013. A hearing on bifurcation will be held on 20 February 2014 in Singapore. Procedural Orders 1 - 7 have been published on the website of the Permanent Court of Arbitration. The Procedural Orders and other information on the proceedings are available on the Attorney-General's website.

Australia has participated in WTO dispute consultations with Ukraine (12 April 2012), Honduras (1 May 2012) and Dominican Republic (27 September 2012). They claim that Australia's legislation on tobacco plain packaging is inconsistent with its WTO obligations. A dispute settlement panel with Ukraine was established on 28 September 2012. A record number of 35 WTO Members have joined the dispute as third parties. Honduras (15 October 2012) and Dominican Republic (9 November 2012) have requested the establishment of a WTO dispute settlement panel. Australia rejected Honduras' first request on 19 November 2012 and Dominican Republic's on 17 December 2012. Neither country has made a second request for the establishment of a panel. Australia can refuse a first request for the establishment of a panel but cannot refuse a second. Information on these disputes can be viewed on the Department of Foreign Affairs and Trade's website.

Recent New Zealand Practice in International Law

1. Australia-New Zealand Closer Economic Relations (CER) Investment Protocol: Entry into Force

On 1 March 2013 the CER Investment Protocol will enter into force for both New Zealand and Australia. The CER Investment Protocol builds on existing goods and services agreements under the CER relationship and maintains the CER's status as one of the world's most comprehensive free trade agreements. The Protocol will make two-way investment flows across the Tasman easier and in particular, qualifying non-government investors will be able to make larger investments in business assets without being required to seek approval.

2. New Zealand Intervention in the ICJ Case Whaling in the Antarctic (Australia v Japan)

In November 2012 New Zealand submitted a Declaration of Intervention pursuant to Article 63 of the Statute of the International Court of Justice in the case concerning Whaling in the Antarctic (Australia v. Japan). As a party to the International Convention for the Regulation of Whaling, New Zealand has an interest in the proper interpretation of the provisions of the Convention, and in particular its Article VIII on Special Permit Whaling. On 6 February the International Court of Justice decided that New Zealand's intervention was admissible. The oral hearing is expected to be later in 2013. Further information on the ICJ proceedings can be found here.

3. South Pacific Regional Fisheries Management Organisation (SPRFMO)

The first Commission meeting of the South Pacific Regional Fisheries Management Organisation (SPRFMO) was held in Auckland from 28 January to 1 February. SPRFMO governs the non-highly migratory high seas fisheries of the South Pacific Ocean. The current Members of the Commission are Australia, Belize, Chile, the Cook

Islands, Cuba, the European Union, Denmark (in respect of the Faroe Islands), Korea, New Zealand, Russia and Chinese Taipei.

Among other things, the Commission adopted conservation and management measures on jack mackerel, gillnets, data standards and an IUU fishing list, as well as the organisation's Rules of Procedure, Rules for Cooperating non-Contracting Parties and Financial Regulations. Guidance was provided to the Scientific Committee and to the Compliance and Technical Committees regarding their work programmes, and New Zealand and Australia confirmed their intention to work intersessionally during 2013 to develop a conservation and management measure on bottom fishing, to replace the current interim measure.

4. WTO Dispute Settlement Cases

The Appellate Body's three eagerly awaited decisions on the WTO Agreement on Technical Barriers to Trade (TBT Agreement) in 2012 contribute significantly to the body of jurisprudence on Articles 2.1 (national treatment) and 2.2 (whether technical regulations are "more trade restrictive than necessary to fulfil a legitimate objective"). The difference in findings between the Panels and the Appellate Body however suggest the complexity of the issues raised. The findings are of interest to New Zealand which was a Third Party in the US–Cool and US-Tuna disputes. In each case, the final result saw findings of violation under Article 2.1, but no violation in respect of Article 2.2, demonstrating a willingness on the part of the Appellate Body to recognise a country's policy space to regulate domestically. However, the stumbling block for the US was in ensuring that such regulation was put in place on a non-discriminatory basis.

Of note, in US - Clove Cigarettes (concerning the US measure to ban clove flavoured cigarettes which aimed to discourage youth from smoking) while the Appellate Body accepted the Panel's findings that that the US measure violated Article 2.1, it rejected the Panel's reliance on regulatory purpose in determining "likeness" preferring to emphasis the competitive relationship between the products (and whether one could be substituted for the other). In US –Tuna II (concerning the US' legislation setting out "dolphin safe" labelling requirements for tuna products) the Appellate Body reversed both findings of the Panel, reading Article 2.1 as covering de facto discrimination (where regulations appear on their face neutral), and therefore finding the US in violation. With regards to Article 2.2, the Appellate Body found that the proposed alternatives would not be as effective as the US measure, and therefore found that the US' measure was not more trade restrictive than necessary.

Finally, in US-Cool (concerning the US' mandatory labelling regime for beef and pork), the Appellate Body criticised the Panel for taking only the first step in assessing whether there had been a violation of Article 2.1 (that the US measure modified the conditions of competition in the market to the detriment of imported livestock), without going on to assess whether that detrimental impact stems exclusively from a legitimate regulatory distinction (which the Appellate Body found it did not). As in US-Tuna the Appellate Body also rejected the Panel's finding that there had been a violation of Article 2.2, finding that the US' measure contributed to the legitimate objective of providing consumers with information, and there was insufficient evidence of a less trade-restrictive alternative.

Four Societies Conference

The Fourth 'Four Societies Conference' was held in Berkeley in September 2012. The Conference brought together early career researchers from the American, Australian and New Zealand, Canadian and Japanese societies of international law.

Karen Scott, one of the Society's Executive Councillors, offered these closing remarks in the final session of the conference.

I was fortunate to attend the third Four Society event two years ago in Japan as a participant and speaker. In August 2010, I don't think I had ever heard the label 'international disaster law' and certainly had no particular awareness of it as a discipline. However, just over a week after returning from Japan, Christchurch experienced the first in a series of devastating seismic events, which would change the face of the city and the lives of Cantabrians, including myself, forever. I was therefore personally delighted when David Caron, on behalf of ASIL, chose International Disaster Law as the theme for the fourth workshop.

Over the last two days, through 16 wonderful presentations I have learned much about

the breadth, depth and parameters of this emerging discipline.

For me personally, one of the enduring themes of this conference is that natural disasters are seldom purely 'natural'. We play a role in contributing to natural disasters whether we refuse international assistance as in the case of Myanmar, release radioactive waste into the sea as in the case of Japan, contribute to climate change or develop systems of international economic and investment law that see a large proportion of the world's population suffer or go hungry.

More prosaically, as illustrated in Professor Daniel Farber's keynote address, a failure to plan for and mitigate the risks of a disaster undoubtedly contributes to the loss of human and animal life. In Christchurch, on the 22 February 2011 over 100 people, including a number of young Japanese language students lost their lives in the collapse of one building, the CTV building. It has emerged as a result of the Royal Enquiry into the Christchurch earthquake that the CTV Building did not meet essential building standards as they stood in the 1980s, when the building was constructed, let alone 2011, and that at least one of the engineers involved in the building lacked appropriate experience in connection with high rise structures.

As international lawyers we cannot stop earthquakes, bush fires, hurricanes, tornados or Tsunamis but we can respond to the human side of natural disasters.

However, I have been personally delighted that every paper presented over the last couple of days has provided ideas for how better to respond to the human side of natural disasters. Some papers focused on improving coordination and capacity in terms of offering and accepting emergency response assistance including issues of privileges, immunity and state responsibility. Others addressed weak or fragile states and the particular challenges associated with international disasters. Several papers focused on the role played by international and non-governmental organisations in responding to international disasters, including responding to those with disabilities (and I am pleased to see several representatives of such organisations here). Others focused on the role played by new technologies in predicting and responding to disasters such as satellites. Other papers explored the role that law can play more generally in developing this area as a discipline, or, to use the term developed by Doug Cubie in the final paper, an acquis humanitaire, whether drawing on existing treaties such as the Refugee Convention, custom, general principles, soft law or the codification of rules.

I do not doubt that this conference and the resulting publication will make a substantive contribution to defining and developing this emerging discipline of international disaster law. And that is an achievement that you all should be proud of and I feel privileged to have been a part of this event. I would like to thank you all on behalf of all of the Societies for all your hard work in producing papers of such a high standard and contributing to the vibrant discussion, making the last couple of days so rewarding.

I would also like to thank our hosts, ASIL and Betsy and Berkeley and David for providing such wonderful facilities at the workshop and accommodation at Claremont and for all their work in organising this event. I would particularly like to thank David, for his generous hospitality not only in hosting this workshop but in opening his home to us all last night.

This is sadly the last of this round of the Four Society conferences but it gives me great pleasure to announce that the Steering Committee has agreed that there will be a second round and I am pleased to inform you that the first workshop in the second round will be hosted by ANZSIL in Canberra in 2014. The intention is to hold it immediately prior to the annual ANZSIL conference in the first week of July and we hope that speakers and society representatives will choose to stay on for that conference. Many people in this room have been to more than one of the four society conferences and I hope that some of the 2012 speakers will remain involved with this initiative through your societies. Andrew and I, on behalf of ANZSIL, are looking forward to welcoming some of you and your colleagues to Canberra in two years time.

Joint ANZSIL-ASIANSIL Conference

The Australian and New Zealand Society of International Law & the Asian Society of International Law Joint Conference on 'International Law and Justice' Sydney, Australia, 25 - 26 October 2012. This Joint Conference of ANZSIL and the Asian Society of International Law (AsianSIL) took place from Thursday 25 October to Friday 26 October 2012, hosted by the University of New South Wales in Sydney, Australia. The Conference was coordinated by a Steering Committee Co-Chaired by Andrew Byrnes (ANZSIL President), Shirley Scott (AsianSIL Executive Council/ANZSIL) and Sarah McCosker (AsianSIL Executive Council/ANZSIL. The conference was an historic occasion, as the first formal event jointly organised by ANZSIL and the AsianSIL. It involved two days of presentations and discussions, including a conference dinner. For a copy of the detailed programme please see the conference website.

Tim Stephens, one of ANZSIL's Executive Councillors, offered these closing remarks in the final session of the conference.

It is a great honour to be asked to offer some concluding reflections on this lively and interesting conference on international law and justice, although, I must say, that it seems manifestly unjust to ask Professor Zhu and myself to sum up two days of rich discussion in just a few minutes, with the words uttered in the final panels still ringing in our ears, and a lovely Friday afternoon in Sydney calling us outside. So I hope you will forgive me if my summation can deliver no more than summary justice to the ideas and arguments advanced in the many stimulating presentations that we have heard.

The formidable challenge in drawing together in any meaningful way the many strands explored in this conference is trumped only by the metaphysical impossibility of being present at the many parallel sessions. Perhaps this was why we were given yellow conference bags at registration emblazoned with the imperative ‘Never to Stand Still’. Being able to attend only five from among 16 diverse panels with many distinguished speakers, what is the just thing to do? In the original position, behind a veil of ignorance which panels should be preferred? I settled for the opportunity for self-improvement, avoiding topics with which I have passing familiarity, and instead attending panels addressing topics about which I know much less, including those on international criminal law and justice, international financial and economic law, regionalism and diversity, international law in a rising Asia, and international law and security.

As Professor Mani noted in his remarks at the opening of the conference, the enduring tension between international law and justice provides a ‘sumptuous feast’ for discussion, and this conference has certainly not failed to fulfil. From this feast I can offer only a degustation of the recurring themes, at least as I saw them, across the varied panels I attended. The three themes I would like to focus upon are first the tension between procedural and substantive justice, second, the tensions between cosmopolitan justice and Asian or other particularised notions of justice, and third, the tension between justice and peace.

Turning first to substantive vs. procedural justice. International law is much better

at attending to procedural justice than resolving hard questions of substantive justice. Most notably, international law is not oriented in any comprehensive way towards providing present and future generations with a fair share of the planet's natural resources and ecosystem services. As Professor Gerry Simpson suggested in his remarks, the process of doing justice has spawned a hyperinstitutionalism in response to virtually every crisis and international disorder. This has resulted in an indescribably complex morass of procedures, that have become an end in themselves rather than a means to the end of realising substantive goals of justice should be. The dilemmas of pursuing substantive justice through procedures of justice were thrown into stark relief by Susan Lamb in her account this morning of the challenges faced by the Cambodian Extraordinary Chambers. The Global Administrative Law project is one influential manifestation of the fascination with procedural justice, designed to bring transparency, participation, reasoned decision, legality and review to global governance – in short to instil liberal notions of procedural fairness. But as B S Chimni has noted, the GAL project depoliticises an essentially Western process, as institutions of international criminal law and collective security are co-opted at the expense of the South.

A focus on an apparently procedurally neutral justice can obscure substantive injustice. The was evident in Panel 2, the first of the conference's four sessions on international and transnational criminal law and justice. Firew Kabede Tiba ably traced the imperial march of international criminal justice and procedure into Africa, beginning with a provocative quotation from Desmond Tutu as to how it is 'we decide that Robert Mugabe should go the International Criminal Court, Tony Blair should join the international speakers' circuit, bin Laden should be assassinated'. Professor Zhu Wenqi continued the discussion of international criminal law, reminding us of China's significant participation in the Tokyo Trials, and offering an assessment the prospects of China joining the International Criminal Court. Professor Zhu challenged the assumption that non-ratification of the ICC is to be equated to hostility, and argued that China could be a friend of the Court, as seen in China's non-exercise of its veto in UNSC Resolution 1973, which referred the Libyan situation to the Court. Although, as Andrew Garwood-Gowers told us this afternoon, China's non obstructionism on Resolution 1373 was less a beneficent gesture than a result of a unique confluence of political factors. Speaking on the experience of the International Criminal Tribunal for the Former Yugoslavia, Ambassador Arnaut highlighted the comfort the process has brought to the victims of atrocity, notwithstanding the many imperfections of the Tribunal. Finally Lorraine Finlay examined what to many appears a clear case of victor's justice, the trial and execution of Saddam Hussein and others by the Iraqi High Tribunal. Concluding that it was more than the face of United States justice with an Iraqi mask, Lorraine exhorted perseverance in the project of international criminal justice, noting that the perfect should not be the enemy of the good, to which Gerry Simpson responded in the questions, whether we have actually lowered our expectations of international criminal justice too far, and pointing out that the greater enemy of the perfect is the worst, not the best.

Panel 6, which examined international financial, economic and investment law also revealed aspects of the procedure/substance distinction. Professor Chi Manjiao examined the delicate negotiation underway in China's utilisation of the WTO's dispute settlement procedure; identifying the law of unintended consequences, what he termed spill over effects from major trade cases, that could challenge the social, cultural and political status quo in China, by for instance, undermining its censorship system. He Ling Ling and Razeen Sappideen discussed another dispute settlement procedure, arbitration under investment treaties, and the Australian government's recent decision to drop investor-state dispute resolution procedures from future agreements. This for me promoted once again the question whether it is always the case that more procedure means more justice, particularly when we reflect on the strategic way in which investor state arbitration has been used to attack government policies on environmental protection or human health, as shown most clearly by the Phillip Morris case against the Australian government in respect of its cigarette packaging laws.

The substance/procedure distinction can be seen more broadly as one aspect of the distinction between justice and law, between an instrumental vision, and a formal, proceduralised conception of law. In her plenary address, Shirley Scott spoke of the minimal conditions of cosmopolitan justice embedded in the Vienna Convention on the Law of Treaties, which renders void by Article 52 any treaty the conclusion of which is procured by the threat or use of force, but which leaves standing

a manifestly unjust treaty, so long it was entered into freely. This is a reaffirmation of justice as procedural justice, stripped of a broader conception. In his address in the plenary session Professor Tony Anghie explored this dynamic from an historical perspective, charting the original congruence of law and justice in the natural law tradition, that was overthrown by the emergence of the sovereign state, and with Austinian positivism ushering in a new the polarity between morality and international law. Gone are the certainties with which Christopher Columbus could claim the Americas in the name of law and justice, and this is a good thing. But Professor Anghie spoke, provocatively, of a new naturalism in which the quest for economic development has become the new theology binding developing and developed states alike, conditioning governmental legitimacy, and even sovereignty itself, upon economic growth. In his presentation in Panel 6 on international financial and economic law, Ross Buckley unmasked another aspect of this new naturalism, the tremendous expansion of the global financial system which has taken place largely outside of law, or at least beyond the purview of law to control. He made a forceful case for a form of the Tobin tax, a minute impost on an indescribably large body of financial transactions, which could raise half a trillion dollars and could go to redistributive ends, including climate adaptation.

If I might continue for a moment on the procedure/substance divide, 2012 has been a major year for restatement but also rebalancing of formalism and instrumentalism within the ICJ. In the Jurisdictional Immunities of the State Case, decided in February, the Court concluded that the procedural guarantee of foreign state immunity in domestic courts could not be overturned, and indeed was not in reality in conflict with, the peremptory prohibition of serious international crimes. As the Court said, '[t]he rules of State immunity are procedural in character and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State. They do not bear upon….whether or not the conduct in respect of which the proceedings are brought was lawful or unlawful.' Yet in a decision a few months later a far more cosmopolitan and substantive vision of justice was embraced by the Court in Questions Relating to the Obligation to Prosecute or Extradite, in which it found, clearly for the first time, that any state party to a convention establishing obligations erga omnes partes, in this case the Convention Against Torture, could invoke the breach of that convention in order to advance its higher common purpose, in the case of the Torture Convention being the prevention of torture, and the prosecution of is authors. Just how radical this change is, in aligning procedure to the aims of substantive justice, is seen in Judge Xue's dissenting judgment in which she argues for the status quo in Article 42 and not Article 48 of the ILC's Articles on State Responsibility.

Turning now to universal or cosmopolitan justice vs. regional and other particularised visions of justice. This was a theme explored in many presentations throughout the conference, which is of course to be expected in a conference involving the Asian Society of International Law occurring at the dawn of the Asian Century in which approaches to international law in this region will receive ongoing attention. Her Excellency Judge Xue noted that while justice is a basic tenet of all legal systems, its manifestation in particular social contexts renders it in some ways an indeterminate concept. Judge Xue spoke of distinctive Asian Pacific approaches to justice, emphasising in particular distributive justice. And Professor Anghie, answering a question from Professor Chesterman observed that in this respect sovereignty itself can be a mechanism of justice, allows for diversity by providing for states to pursue self-determined visions of justice particular to their community. This is the positive vision of sovereignty as a barrier against intrusive interference, and I know was the subject of several presentations in other sessions, including this afternoon which explored the various possible meanings ascribable to the Responsibility to Protect doctrine. In Panel 9 on regionalism and diversity in theory and practice we were treated to a very lively discussion on Eurocentrism in international law by two Japanese scholars, Professor Onuma Yasuaki and Professor Toyoda Tetsuya, which resulted in an accommodation of sorts being reached on the limits of the Eurocentric critique of international law. But it struck me this morning in the discussions of international law that in the Asian century, as Sarah McCosker held up the latest issue of Foreign Affairs which the heading screaming Europe Kaput!, that we may soon need to think about Asian centrism in international law. Catherine Renshaw explored the role of regional institutions in pursuing justice, explaining the combination of principled and pragmatic reasons that have been raised for devolving global power to regional scales to achieve justice. Taking us across a variety of regions, and historically from Churchill's proposal at Dumbarton Oaks for regional councils to be tasked with peacekeeping duties, she spoke of the role that regional organisations can sometimes,

but not always, play in contributing useful pieces to the puzzle of piece.

Turning finally to the third theme that has been particularly prominent throughout the conference, that is to the tension between justice and peace. Judge Xue spoke of the value of peace and stability as a precondition for the attainment of justice, noting that the quest for peace cannot be dismissed as a secondary consideration, it is the primary value. Gerry Simpson's presentation spoke of the delegations at the Peace of Westphalia knowing they were against justice, but which gave rise to the system of sovereignty that, coupled much latest with the prohibitions on force and intervention in the 20th century, provided some protection against injustice. The UN Charter balances, as Judge Xue noted, several values that are sometimes in opposition – peace, security, justice, human rights and development. But above all it privileges peace over justice, on the premise that it is better to have an unjust peace than a never-ending conflict waged under the banners of just war. It is a Faustian bargain, trading the soul to preserve the body. But the Charter compromise reached in the aftermath of the Holocaust does not, cannot do, away with justice altogether, as its absence produces the conditions for conflict and conflagration. And so, as Robert Cooper argues in his book The Breaking of Nations, justice in the Charter 'originates not in the desire of the weak for protection, but in the tragic experience of the strong'. In my view, the contemporary policy arena 3 raising the most acute dilemma in balancing justice and peace is protecting our life support system, the biosphere. Paul Govind examined environmental challenges and environmental justice, pointing to the elements of justice in the climate change regime, but despite the lofty references in the UN Framework Convention for Climate Change to justice, I think, unfortunately, that justice may be dead, as new emitters like China overtake the historical ones, and the urgency of the need for a response hits home. Can or will states persevere with the niceties of justice when the very material conditions for survival are under threat?

So to conclude by asking the question posed in the call of papers for this conference – can international law really be an instrument of justice? In his remarks yesterday Professor Andrew Byrne invoked Oscar Schachter's familiar image of the invisible college of international lawyers, all united, at least to some degree, by common assumptions, including the imperative of global justice. The appeal of turning to justice in testing the legitimacy of institutions of global governance is that it offers an ethically principled basis for the distribution of benefits and burdens, and one that it well-suited to expression in legal form. Although she didn't ask for a show of hands among us, Shirley Scott in the first plenary suggested that there were factions in this invisible college, between the visionaries in the room measuring international law against the ruler of some ideal of justice, the practitioners amongst us engaged in the active pursuit of justice for our clients, and the government lawyers at the political coalface, having to reach an accommodation between justice and power. For me the chief value of this very first joint conference of the Asian, Australian and New Zealand societies of international lawyers such as this, is not in producing a strong shared vision of justice. Which is surely impossible, even if it were desirable. There is no point for a quest, with apologies to Superman, for 'truth justice and the Asian way'. But the dialogue we have engaged in can produce a shared commitment to asking touch questions about whether the work we do as members of an invisible college of international lawyers in Asia in the Asian century makes some small contribution to the achievement of justice. It was striking to hear that Sarah McCosker and Damien van der Toorn, two of Australia's leading government international lawyers, are embarked on just such a project of self reflection. I will conclude by reiterating a point Judge Xue made in the opening plenary session: justice is best seen 'not as an event but as a process, directed to the attainment of human dignity' and this surely remains so if even in our best moments as a species that goal always remains over the horizon and just out of reach.

International Economic Law Interest Group Symposium

On 1 March 2013, Melbourne Law School's Institute for International Law and the Humanities (IILAH) hosted the Annual Symposium of the International Economic Law Interest Group (IELIG) of the Australian and New Zealand Society of International Law (ANZSIL).

Convened as part of IILAH's Global Trade program by Professor Tania Voon (Associate Dean (Research) at Melbourne Law School and IELIG Co-Chair), the day was also facilitated by IELIG Co-Chair Lisa Toohey (UNSW Law School) and Vice-

Chairs Ravi Kewalram (Department of Foreign Affairs and Trade) and Oliver Toohey (Department of Climate Change and Energy Efficiency).

As in previous years, the Symposium provided an opportunity for representatives of government, private practice and academia with an interest in international economic law to meet and discuss a range of important issues currently facing Australia and the world in this field.

The program included an impressive list of speakers from the public and private sectors and Australian and New Zealand universities. Highlights included Australia's former Ambassador to Croatia, Tracy Reid OAM of the Department of Foreign Affairs and Trade, highlighting the disputes to watch at the World Trade Organization in 2013, and ARC Future Fellow, Professor Anne Orford of Melbourne Law School, discussing the implications of international economic law for food security.

The forty participants engaged in vigorous debate throughout the day and into the evening, with Professor Luke Nottage of Sydney Law School presenting on investor-State dispute settlement over dinner at University House.


L-R: Professor Anne Orford, Melbourne Law School, Gillian Moon, UNSW Law School, Dr Lisa Toohey, UNSW Law School

Internship Reports

Under its internship support program, ANZSIL provides financial support for unpaid internships with International Organizations and NGOs.

Edward Elliott

International Criminal Court

With the assistance of an internship support grant from ANZSIL, I recently wrapped up an exciting and rewarding internship at the International Criminal Court (ICC) in The Hague, The Netherlands. The ICC, not to be confused with the International Cricket Council, or the International Criminal Tribunal for the former Yugoslavia (as a Washington Times contributor recently did in his criticism of the Milosevic trial), is the world's first permanent international criminal court. Its constitutive treaty, the Rome Statute has, at the time of writing, 122 states parties, including Australia.

The ICC is divided into four organs, the Presidency, Judicial Divisions, Office of the Prosecutor, and the Registry. I was an intern to the Appeals Chambers of Judge Sang-Hyun Song, who is both the President of the Court and a Judge of Appeal. The presence of the Office of the Prosecutor within the Court structure, and physically within the building of the Court, was a rather foreign concept to me as an Australian trained common law lawyer, but as a Court with many hybrid common law and civil law features, it was simply a feature of design. The influence of civil law in the Court's legal texts and jurisprudence is not to be underestimated, and it was not long after I arrived that I was asked to locate decisions of the French Cour de cassation and German Bundesverfassungsgericht. Further, the requirement in article 21 of the Rome Statute that the Court's jurisprudence must be consistent with international human rights

means that the Court frequently looks to decisions of other international courts and bodies, such as the European Court of Human Rights (ECHR). Not being immediately familiar with civil law research or the ECHR, this research was challenging and difficult, but with the assistance of the experienced staff of the Appeals Chamber, I was able to develop my skills and finished the internship with increased confidence in conducting global legal research.

My time at the ICC was particularly exciting for two reasons. First, the Appeals Chamber was seized of a number of novel appeals. This included an appeal against the conviction and sentence of Mr Thomas Lubanga Dylio, the Court's first verdict; an appeal against a decision concerning reparation to victims in the Lubanga case; an application to stay a decision of the Trial Chamber releasing Mr Mathieu Ngudjolo Chui, the Court's first acquitted person; and an appeal against a controversial decision of the Trial Chamber to recharacterise the facts in the case against Mr Germain Katanga. Secondly, at the time I arrived in September 2012, the Court was in the midst of celebrating its 10th anniversary, and a number of events were happening in celebration thereof, including guest lectures in The Hague and a two day conference on contemporary issues in International Criminal Law organised by the Grotius Centre of Leiden University, which I was able to attend.

Apart from that conference, The Hague is truly the capital city of international law, especially when it comes to academic events, and being there meant I was frequently able to attend lectures, presentations and conferences featuring the world's leading academics. Three events that stand out in my mind were a presentation and speech by Professor Bassiouni, a conference on terrorism and the laws of armed conflict hosted by the TMC Asser Institute, and a conference on humanitarian assistance and international humanitarian law hosted by Leiden University. There is enormous opportunity for interns in The Hague to attend such events and I certainly encourage future interns to do so.

Apart from the professional experience, the internship presented a great social experience. My colleagues came from around the world and made for great office sharers, lunch mates, and travel partners. A particularly moving experience was travelling to Krakow, Poland, with a group of interns, where we visited the Auschwitz and Birkenau concentration camps, a particularly fitting trip as the atrocities committed by the Nazis led to the creation of the Nuremberg Trials, without which the ICC may not be what it is, if at all in existence.

The internship was overall a rewarding and positive experience, and would have been extremely difficult if not impossible without the support of ANZSIL, and so I conclude this report by thanking the Society for its contribution.

Zyanya Hill

Extraordinary Chambers in the Courts of Cambodia (ECCC)

Thanks to ANZSIL, in 2012 I undertook a 6 month internship with the Office of the International Co-Prosecutor at the Extraordinary Chambers in the Courts of Cambodia (ECCC). In these 6 months, I learned a lot and was exposed to a wide array of legal work. I gained an insight in to the inner workings of the United Nations system.

I undertook my internship in Phnom Penh from July 2012 until December 2012. This proved to be a very interesting time to be at the court, with many on-going legal issues and practical issues coming to the fore.

The ECCC is a hybrid Cambodian-United Nations tribunal charged with prosecuting senior leaders and those most responsible for crimes committed during the Khmer Rouge period, being from April 1975 to January 1979. The Trial Chamber of the ECCC is currently hearing its second case. This second case includes charges of Crimes against Humanity, War Crimes and Genocide against the four surviving senior leaders of the regime. These Accuseds are sometimes referred to as Pol Pot's "Inner Circle". Due to immense size of the case, the Trial Chamber has severed the case into several smaller trials and is currently hearing Case002/01 which focusses on the forced movement out of the cities. On 17 April 1975, the day the Khmer Rouge took power, the inhabitants of Phnom Penh (approximately 3 million people), including elderly, pregnant women and even hospital patients, were forced to leave the city taking with them only that which they could carry.

There were two phases of this forced movement of the population. First, the total evacuation of the cities to the countryside, and then the subsequent forced movement of the population to the work sites (such as dams) where it was determined further

labor was required to carry out the “great leap forward” envisaged by the Khmer Rouge. During the three years and eight months of the Khmer Rouge rule of Cambodia, it is estimated that close to two million people died from starvation, torture, execution and forced labor.

Due to my previous experience as a barrister in New Zealand, my work at the ECCC was heavily focused around court requirements and witness preparation. This included reviewing witness and victim statements, looking for connections with other statements or evidence, analyzing and prioritizing evidence, preparing questions for examination, and assisting in court. Several expert witnesses, such as internationally renowned specialist in Cambodian history, David Chandler, gave evidence during my time there, which was fascinating. I also was heavily involved in the research and writing of the submissions regarding the fitness to plead of several Accuseds, both at the trial and appellate hearing stage.

Ieng Thirith, sometimes referred to as Cambodia’s “First Lady” but more accurately the Khmer Rouge Minister of Social Affairs and the wife of Khmer Rouge Foreign Minister Ieng Sary, was one of the four charged in Case 002. During my internship, she was found unfit to plead after a diagnosis of dementia, probably Alzheimer’s disease. The Office of the Co-Prosecutor did not dispute this decision, nor her subsequent release, but argued that conditions should be placed on her release. A Supreme Court hearing on this matter was held and, judgment issued a week before the end of my internship. The Supreme Court judgment examined both domestic and international law regarding what happens when an Accused is found unfit to plead, with little likelihood of recovery, and decided to impose the majority of the conditions requested by my office.

The period I spent at the ECCC was a sometimes tense and controversial time for the Court: it faces extreme financial difficulties which, at one point during my internship, posed a risk to the on-going employment of United Nations court staff and lawyers, thus endangering the on-going trials. While the court does still continue to function, it requires on-going financial support to continue its vital work. Both Australia and New Zealand have contributed in the past, and made further contributions during my time there, including one accompanied by a personal visit from New Zealand Prime Minister John Key.

It was also a difficult time regarding the health of the Accuseds- Ieng Thirith was found unfit to plead, as mentioned above, and her husband, Ieng Sary, former Khmer Rouge Foreign Minister, also submitted that he was unfit to plead and court was delayed due to a long hospital stay. A hearing as to his fitness was held and the Trial Chamber found him fit to plead. It is likely that this will be an on-going issue for the Court as Khieu Samphan, the youngest of the Accuseds in Case 002, is 81 years old. The release of Ieng Thirith was not well received by the Cambodian people in general, but international civil society supported the decision as upholding essential fair trial rights.

On a personal level, I will never forget the good memories of my time in Phnom Penh, and the chance to meet and work alongside other interns from across the world. As half the staff at the Court are Cambodian and half are United Nations staff from all over the world, it really was a multi-cultural experience. It was wonderful opportunity to learn advocacy skills from exceptional and dedicated lawyers and to gain an insight into the world of international tribunals and prosecution of international crimes.

I wish to convey my sincere thanks to ANZSIL for its financial assistance as I undertook this internship. The internship, like most in the international law field, was entirely unpaid. Many United Nations staff told me that undertaking at least one internship (if not several) is essential to forging a career in international criminal law. This creates a real barrier to access for those of us who cannot afford to undertake the internships without some help. ANZSIL offers one of very few organizations who offer funding for New Zealanders and Australians wishing to intern with international organizations and thus directly assists with the creation of an Antipodean field of human rights and international lawyers. It is much appreciated.

UNHCR Award for Statelessness Research

UNHCR and Tilburg University’s Statelessness Programme invite academic institutions to nominate excellent research at the undergraduate, graduate and doctoral levels in the field of statelessness for the newly established UNHCR Award for Statelessness Research. Three awards from a total prize pool of € 3,000 will be granted to the best research at the undergraduate, graduate and doctoral levels.

The deadline for nominations is 17:00 hours, Greenwich Mean Time, 1 May 2013.

Topic: Any work that offers a clear contribution to increasing understanding of the nature and scope of the problem of statelessness, identifying stateless populations and understanding the reasons which have led to statelessness, in particular in regions or within disciplines where little research has been done, may be nominated for the Award. Research exploring other topics directly relating to statelessness may also be nominated, including such questions as the operation of legal safeguards to prevent the occurrence of statelessness, the denial or deprivation of nationality resulting in statelessness, protection frameworks for stateless persons and experiences of statelessness from historic, economic, anthropological, sociological, psychological or political perspectives.

Eligibility: Nominations may cover research in any discipline. The research may be theoretical in nature or incorporate empirical and/ or field research. All nominations must meet the benchmarks in terms of methodology and analysis that are applicable within the relevant discipline. Any research completed in the three years prior to the nomination deadline is eligible: nominations are accepted for any work completed between the 1st of May 2010 and the 1st of May 2013.

Nominations should be submitted as PDF files to Statelessness.Programme@tilburguniversity.edu.

Further information can be found here.

Academic Vacancy - American University in Cairo

Job Description

The Department of Law at The American University in Cairo invites applications for a tenure-track position in Law and Market Governance at the Assistant or Associate Professor level beginning in Fall 2013. Applicants should have a research and teaching specialization in public regulatory and/or market related private law regimes, especially from a comparative and/or international law perspective. The Search Committee is eager to review applications of individuals with demonstrated excellence in teaching and research, plus an interest in living and working in the Middle East. The American University in Cairo is committed to recruiting a diverse faculty to complement the diversity of its student body.

Requirements

JD/SJD or Ph.D. is required by date of appointment. A potential for excellence in research is expected. In addition to teaching and research, the successful candidate will also participate in departmental and University wide service.

Additional Information

Position is open until filled.

See the information here.

Recent Publications

International Law in the New Age of Globalization (Martinus Nijhoff, 2013), xvi, 448 pp

Editors: Andrew Byrnes, Mika Hayashi, Christopher Michaelsen

This volume comprises revised and updated versions of papers originally presented at the Third Four Societies Conference, hosted by the Japanese Society of International law in 2010. Every two years this series of conferences brings together early career scholars from ANZSIL, the American Society of International Law, the Canadian Council of International Law, and the Japanese Society of International Law.

This collection comprises a series of essays which address some of the challenges that globalization poses to the international legal order. It examines the interaction of globalization and international law through four sub-themes: the adaptation of classical international legal tools to regulate and adjudicate community interests and conflicts in the era of globalization; coordinating dialogues and governance strategies within and between international legal systems and institutions; globalization and the diversification of actors; and the exposure of State sovereignty to private actors and the

need to preserve the regulatory powers of States. The volume will be of interest to international law scholars, practitioners and students, as well as to those working in the fields of international relations and globalization. Further details and a table of contents available here.

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