



ANZSIL Newsletter

August 2022

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Message from the President

Tēnā koutou ANZSIL Members,

In July 2022, ANZSIL members and friends gathered in Canberra and online for the 29th annual conference on the theme, appropriately, of International Law and Global Interconnectedness. While the hybrid format presented some significant technical challenges during the conference, the opportunity to connect and re-connect during the conference was welcomed by all. ANZSIL, in its modern form was founded 30 years ago, in 1992, and this anniversary was celebrated by the President's Panel featuring five past presidents as well as (pre-President) Professor Philip Alston in conversation with Dr Maddy Chiam, providing valuable insights into the founding and operation of ANZSIL.

I am pleased to report that ANZSIL has also reconnected with its three sister societies, ASIL, CCIL and JSIL through the delayed (from 2020) eighth Four Societies Conference held online on 16 and 17 August 2022. The theme was 'Areas Beyond National Jurisdiction' and papers focused on the oceans, outer space and cyberspace. I would like to thank Shiri Krebs (Deakin University) and José-Miguel Bello y Villarino (University of Sydney) for representing ANZSIL so ably through the presentation of excellent papers as well as Professor Don Rothwell (ANU) for participating as senior ANZSIL scholar.

Areas beyond national jurisdiction – in particular, oceans and cyberspace – feature prominently in the recent practice updates generously provided by DFAT, the AG's Department and MFAT in this edition, alongside a helpful account of Australia and New Zealand's continuing international response to the war in Ukraine. The intervention of Australia and New Zealand in support of Ukraine against the Russian Federation in the *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide* case before the ICJ is particularly noteworthy as a development with potentially significant implications for the practical evolution of obligations erga omnes (inter partes) and the accountability of states to the international community (and consequent development of the notion of 'international community').

I would like to congratulate ANZSIL members, Dr Alice Edwards and Professor Robert McCorquodale on their appointments as the Special Rapporteur on Torture and Other Inhuman and Degrading Treatment or Punishment (SRT) and as a member of the Working Group on Business and Human Rights (WGBHR) respectively. I encourage ANZSIL members to share news of their appointments and new books with ANZSIL and note that there is a section to highlight new books on the ANZSIL webpage!

I would like to remind members that ANZSIL is accepting applications for ANZSIL support for internships and the deadline for the final round for 2022 is 30 October. ANZSIL will also consider applications for small event funding in one final round for 2022. Applications close 30th September.

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Finally, I would like to thank An Hertogen and Keilin Anderson for the production of another splendid ANZSIL newsletter!

Ngā manaakitanga,

Karen Scott

ANZSIL President

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Recent Australian Practice in International Law (Commonwealth Attorney-General's Department and the Department of Foreign Affairs and Trade)

Russian invasion of Ukraine: response by Australia

Statements in response to Russia's actions against Ukraine

On 30 March, the former Foreign Minister made a statement on Ukraine to the Australian Senate, which listed a range of reported atrocities in Ukraine. The former Foreign Minister stated that 'the targeting of innocent civilians and civilian infrastructure are war crimes – and the President of Russia must be held to account.'

During a UN Security Council Arria Formula Meeting on Ensuring Accountability for Atrocities Committed in Ukraine on 27 April, Australia's Permanent Representative to the United Nations, The Hon. Mitch Fifield, stated that 'Russia has committed egregious war crimes across Ukraine' and listed a range of 'horrific acts perpetrated by Russian forces in Bucha, Mariupol and other cities.'

On a visit to Ukraine on 3 July, the Prime Minister stated Australia would seek justice for war crimes committed in Ukraine.

On 14 July, Australia and 44 other States issued the 'Political Declaration of the Ministerial Ukraine Accountability Conference', which *inter alia* committed to progress work on establishing a Dialogue Group on Accountability for Ukraine. The objective of the Group is to promote 'dialogue across the various national, European and international accountability and documentation initiatives relevant to the situation in Ukraine, as well as the identification of opportunities for enhanced coherence of action in these efforts, where appropriate.'

Australia has also continued to make or join a number of statements in international fora condemning aggression by the Russian Federation against the Ukraine as a gross violation of international law. This has included joining statements as part of the Group of Friends of Accountability following the aggression against Ukraine.

Intervention at the International Court of Justice in support of Ukraine in its case against Russia

On 4 July, following a visit to Ukraine, the Prime Minister released a statement announcing that Australia would intervene at the International Court of Justice (ICJ) in support of Ukraine in its case against Russia (Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide).

On 13 July, Australia joined the G7, European Union, and other partners in a statement supporting Ukraine's case against Russia and indicating that signatories to the statement which are Parties to the Genocide Convention intended to intervene in the proceedings. The Foreign Minister highlighted this statement on Twitter on 14 July and added that 'Russia must be held to account for its illegal and unprovoked aggression against Russia.'

Support for the International Criminal Court Prosecutor's investigation into the situation in Ukraine

On 28 April, in an address to the United States Studies Centre, the former Foreign Minister stated that '[w]e've all seen the disturbing evidence of war crimes and the potential evidence of genocide.' The former Foreign Minister announced \$1 million in voluntary contributions to assist the International Criminal Court's (ICC) investigations, in addition to Australia's annual contributions. She also highlighted that Australia had offered two Australian officers to the ICC and consideration was being given to provide further Australian Federal Police investigative support.

The 20th Anniversary of the Rome Statute of the International Criminal Court

This year, the international community celebrates the 20th anniversary of the International Criminal Court's (ICC) Rome Statute coming into force. On 24 June, Australia delivered a statement in a UN Security Council Arria Formula Meeting on the anniversary, reflecting on the importance of the Court and calling for the Security Council to do more to support the Court's implementation of its mandate. Australian representatives also attended the ICC Conference *International Criminal Court at 20: Reflections on the Past, Present and the Future*, which was held on 1 July at the Hague. A recording of the conference is available to the public on the ICC's YouTube channel.

Draft Convention finalised for the Beijing Convention on the Judicial Sale of Ships

From 27 June to 15 July 2022, Australia participated in the 55th session of the United Nations Commission on International Trade Law (UNCITRAL) in New York. UNCITRAL, a core UN legal body responsible for international trade law, considered a number of items related to modernization and harmonization of rules for international business.

The first item considered by the Commission was the draft text of the Draft Convention on the International Effects of Judicial Sales of Ships. This draft text is the result of the work of UNCITRAL Working Group VI on the Judicial Sale of Ships, which has been progressing work on this draft Convention since 2019. Further detail on the work and progress of the working group is outlined on the page of [UNCITRAL Working Group VI](#). This Convention, if adopted, will allow for the recognition of judicial sales which confer clean title on a purchaser, provided the sale occurred in another Member State. It will provide greater certainty to shipowners and creditors operating internationally.

The draft Convention, which will be known as the 'Beijing Convention on the Judicial Sale of Ships', was finalised by the Commission and has now been submitted to the UN General Assembly for potential adoption at its 77th Session, which will run 13-27 September 2022. The Commission has also recommended a signing ceremony be held as soon as practicable in 2023 in Beijing.

The 44th Antarctic Treaty Consultative Meeting

Australia and New Zealand delegations participated in the 44th Antarctic Treaty Consultative Meeting, including the 24th meeting of the Committee for Environmental Protection, in Berlin from 23 May–2 June 2022. The meetings were held in hybrid format – an impressive feat by Germany as host – and addressed a broad suite of legal, institutional, scientific, operational, management and environmental protection issues. A [communiqué](#) published by Germany as the host country provides further detail on the work undertaken at the meetings.

Australia showcased its significant uptick in funding for its Antarctic presence, scientific capabilities and diplomatic engagement, presenting several related meeting papers and hosting a seminar well attended and received by parties.

Delegates worked hard to ensure the listing of the emperor penguin as a Specially Protected Species under the Environmental Protocol. Despite robust science underpinning the designation, the listing was blocked by one Party. Most parties nonetheless expressed their intent to draw on the draft Action Plan to guide ongoing efforts to protect the emperor penguin, and to return to the matter at the next meeting.

Australia worked with others to maintain the integrity of the forums and broader ATS framework, and will continue to engage in Antarctic matters to support decisions underpinned by the best available science.



IAEA Nuclear Law Conference



Between 25 and 30 April 2022 lawyers from several Australian Government agencies who are working on the AUKUS initiative attended the International Atomic Energy Agency's (IAEA) Inaugural Nuclear Law Conference in Vienna. The program covered what the IAEA describes as the four key pillars of nuclear law: safeguards, security, safety and liability. Sessions included discussions on national regulatory frameworks for civil nuclear energy industries, emerging safeguards technology, nuclear weapon free zones, the regime applicable to small modular reactors and the web of nuclear safety rules that aim to combat nuclear terrorism. Speakers reflected on nuclear law as both an emerging, highly specialised and sui generis regime but also one that is inextricably linked to other fields of international law such as law of the sea and international environmental law.

ILO Forced Labour Protocol

Australia has ratified the International Labour Organization (ILO) Protocol of 2014 to the Forced Labour Convention 1930 (No. 29) (the Protocol). This is the most contemporary international labour standard to address forced labour, and followed the Joint Standing Committee on 'Treaties' recommendation that binding treaty action be taken with respect to the Protocol.

In December 2021, the Western Australian Government passed legislation which will bring its laws in line with the Protocol, ensuring compliance across all State and Territories by the time the Protocol enters into force for Australia on 31 March 2023.

The Protocol adds new elements to the ILO Forced Labour Convention 1930 (No. 29), aimed at tackling the complexities of modern slavery and addressing the root causes of forced labour, with obligations to prevent and suppress forced labour, protect victims and provide access to appropriate and effective remedies, and penalise the perpetrators of forced labour and end their impunity.

Group of Governmental Experts on Emerging Technologies in the Area of Lethal Autonomous Weapons Systems adopts Consensus Report

The Group of Governmental Experts (GGE) on Emerging Technologies in the Area of Lethal Autonomous Weapons Systems (LAWS) held its final meeting for 2022 from 25 – 29 July 2022 in Geneva. The Australian delegation comprised representatives from the Department of Foreign Affairs and Trade, the Department of Defence and the Attorney-General’s Department.

The Group’s mandate for 2022 was to ‘consider proposals and elaborate, by consensus, possible measures...related to the normative and operational framework on emerging technologies in the area of lethal autonomous weapon systems’.

Australia submitted a joint proposal, alongside the United States, the United Kingdom, Canada, Japan and the Republic of Korea, on ‘Principles and Good Practices on Emerging Technologies in the Area of LAWS’. The joint proposal aims to provide immediately implementable measures to strengthen compliance with international humanitarian law (IHL) and to promote responsible behaviour with regard to LAWS.

At its final meeting for 2022, the LAWS GGE adopted, by consensus, a final report. The report reaffirmed that international law, in particular IHL and the UN Charter, should continue to guide the work of the Group, and referred to the principles of the law of State responsibility. The report also summarised the key proposals from States on further regulatory approaches for the use of LAWS, namely: ‘legally binding instruments under the framework of the [Convention on Certain Conventional Weapons]; a non-legally binding instrument; clarity on the implementation of existing obligations under international law, in particular IHL; an option that prohibits and regulates on the basis of IHL; and the option that no further legal measures are needed’. The report recommended that the Group continue its work and ‘intensify the consideration of proposals’.



Open-Ended Working Group on addressing responsible State behaviour in cyberspace adopts Annual Progress Report by consensus

The Open-Ended Working Group (OEWG) on security of and in the use of information and communications technologies (ICT) held its third substantive session from 25-29 July 2022 in New York. The Australian delegation comprised representatives from the Department of Foreign Affairs and Trade and the Attorney-General’s Department. At its third substantive meeting, the OEWG adopted, by consensus, an Annual Progress Report to capture the concrete progress made at the OEWG to date and set out a roadmap for topics within the OEWG’s mandate. Importantly, the Annual Progress Report included reaffirmation by States that international law, in particular the Charter of the United Nations, is applicable and essential to maintaining peace, security and stability in the ICT environment (as set out in the consensus reports of the 2010, 2013, 2015 and 2021 Group of Government Experts (GGE) and the consensus report of the 2021 OEWG). For the first time, the OEWG report also referred to international humanitarian law by quoting the language in the 2021 GGE report. The Annual Progress Report also recommended that States continue sharing national views on how international law applies in the use of ICTs. Finally, the Annual Progress Report proposed that States engage in focused discussions on specific topics of international law at the fourth and fifth sessions of the OEWG in 2023. The Annual Progress Report will be submitted to the General Assembly pursuant to the OEWG mandate in resolution 75/240.

Participation in WTO Dispute Settlement

China–Anti-Dumping and Countervailing Duty Measures on Barley from Australia (DS598)

On 16 December 2020, Australia initiated WTO dispute settlement proceedings challenging China’s anti-dumping and countervailing duties on Australian barley.

Those proceedings are ongoing and further information, including Australia's first and second written submissions, is available on the [WTO disputes page](#) of the DFAT website.

China–Anti-Dumping and Countervailing Duty Measures on Wine from Australia (DS602)

On 22 June 2021, Australia initiated WTO dispute settlement proceedings challenging China’s anti-dumping and countervailing duties on Australian wine. On 4 March 2022, at Australia’s request, a Panel was composed to consider Australia’s claims concerning China’s anti-dumping duty measures on Australian bottled wine.

The proceedings are ongoing and further information, including Australia's first written submission, is available on the [WTO disputes page](#) of the DFAT website.

Australia–Anti-Dumping and Countervailing Duty Measures on Certain Products from China (DS603)

On 28 February 2022, a WTO dispute settlement panel was established to consider China’s claims concerning Australia’s imposition of anti-dumping measures on wind towers, deep drawn stainless steel sinks and railway wheels from China and countervailing measures on deep drawn stainless steel sinks from China. The parties are engaged in the process of selecting panellists to adjudicate the dispute.

Further information is available on the [WTO disputes page](#) of the DFAT website.

Recent New Zealand Practice in International Law (Ministry of Foreign Affairs and Trade)

New Zealand intervention in Ukraine’s case against Russia in the International Court of Justice (ICJ)

On 28 July New Zealand formally intervened in Ukraine’s case against Russia in the ICJ under the Genocide Convention. This is a historic move for New Zealand consistent with New Zealand’s strong support for the multilateral rules-based system and recognition of the key role dispute settlement plays in reinforcing that system. This is not the first time New Zealand has intervened as a third party in the ICJ on a matter of law. In 2012, New Zealand intervened in support of Australia’s successful case against Japan’s ‘scientific’ whaling in the Southern Ocean.

Along with Latvia and Lithuania’s interventions which were filed on 21 and 22 July, New Zealand’s Declaration is now publicly available on the ICJ’s website. The Declaration sets out at a high level the legal basis for New Zealand’s intervention which centres around the key argument that the Genocide Convention must be interpreted reasonably and in good faith, with a particular focus on Articles 1 (the duty to prevent and punish genocide) and 9 (the procedure for managing disputes under the Convention). The intervention builds on the argument advanced by New Zealand in the *Japan Whaling* case that all international legal rights must be exercised reasonably and in good faith, allowing Ukraine to highlight Russia’s bad faith reliance on allegations of genocide for its invasion. As well as supporting Ukraine’s legal argument, New Zealand’s intervention reinforces the importance of effective binding international dispute-settlement mechanisms to

resolve international disputes, including underlining Russia's failure to comply with binding preliminary orders of the ICJ.

On 13 July New Zealand (and Australia) joined a [political declaration](#) along with more than 40 countries in which all those countries party to the Genocide Convention stated an intention to intervene in support of Ukraine in these proceedings. It is therefore anticipated that a number of further interventions will be made in this case.

New Zealand – Canada CPTPP dispute concerning dairy tariff rate quotas

On 12 May 2022, New Zealand initiated dispute settlement proceedings against Canada under the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) challenging Canada's administration of its CPTPP dairy tariff rate quotas (TRQs). New Zealand's Request for Consultations to Canada (the mandatory first step in a proceeding brought under CPTPP), is available on the Ministry of Foreign Affairs and Trade website. This is the first dispute New Zealand has taken under a free trade agreement, and the first dispute that has been taken by any party under CPTPP.

New Zealand and Canada have now completed consultations. New Zealand is currently considering next steps.

New Zealand Sanctions in response to Russia's invasion of Ukraine

Following Russia's aggression against Ukraine, New Zealand has passed the Russia Sanctions Act 2022 which is the first time New Zealand has legislated for comprehensive sanctions outside of a United Nations Security Council mandate.

Unlike other countries' autonomous sanctions regimes, the Russia Sanctions Act is a response to a specific situation – Russia's illegal invasion of Ukraine – and was developed under urgency in early March 2022.

The intention of the Act, and our measures under it, is to join the international community in applying sanctions that will severely limit Russia's ability to finance and equip the war on Ukraine, and to influence people with power in Russia to break their support for the war.

Under the Russia Sanctions Act, Regulations have been made that:

- Apply sanctions on hundreds of individuals (travel bans, bans on any aircraft or ships they own or control entering New Zealand, asset freezes, prohibitions on dealing with securities and a prohibition regarding services). These individuals include members of the State Duma and Federation Council who voted in favour of the recognition the independence of the Donetsk and Luhansk; political, economic and military elites; President Putin and permanent members of the Security Council of the Russian Federation.
- Sanction defence entities, freezing their assets, prohibiting financial dealings, and banning any related aircrafts and ships from entering New Zealand
- Sanction key banks and financial entities, freezing their assets, prohibiting financial dealings, and banning any related aircrafts and ships from entering New Zealand.
- Ban Russian and Belarussian government and military aircraft and ships from entering New Zealand.
- Apply a 35% tariff on all imports of Russian origin and prohibit the export of certain goods to Russia and Belarus, including products that are closely connected to strategic Russian industries (products are listed in the sanctions register). Imports of gold of Russian origin are also prohibited.

New Zealand Maritime Powers Act

A key domestic development related to international law is New Zealand's new Maritime Powers Act. The Act implements rights New Zealand has at international law to exercise maritime powers in international waters into domestic law. These maritime powers are law enforcement powers, including the power to stop,

board, search and detain a ship and arrest individuals that apply in respect of both foreign and domestic vessels.

Australia has comparable legislation which New Zealand looked at closely as part of the development of the Act. There are many similarities between our two regimes – both of which confer enforcement agencies maritime powers which are exercisable in international waters. Both Acts implement rights that Australia and New Zealand have under the United Nations Convention on the Law of the Sea (UNCLOS) and are designed to address criminal offending in international waters, particularly transnational organised crime.

Accession to MARPOL Annex VI

New Zealand has deposited its instrument of Accession for Annex VI (Prevention of Air Pollution from Ships) to the International Convention for the Prevention of Pollution from Ships 1973 as modified by the Protocol of 1978 (MARPOL Annex VI) with the International Maritime Organisation. MARPOL Annex VI will enter into force for New Zealand on 26 August 2022.

MARPOL Annex VI, first adopted in 1997, aims to prevent pollution from ships' exhaust emissions. It contains regulations requiring ships to minimise and manage the emission of ozone depleting substances, nitrous oxides (NOx), sulphur oxides (SOx), and volatile organic compounds (VOCs).

It also sets out requirements for reception facilities, such as those enabling ships to unload hazardous substances, and Port State Control functions to ensure compliance with Annex VI regulations. From 2020, the sulphur requirements for fuel under Annex VI drops from the current level of 3.5 percent to 0.5 percent. Alternatively, ships must fit an exhaust gas cleaning system or use any other technological method to limit sulphur emissions.

More information is available on Te Manatū Waka's (Ministry of Transport) website [here](#).

ANZSIL Member News

In July 2022, the United Nations Human Rights Council appointed Dr Alice Edwards as the Special Rapporteur on Torture and Other Inhuman and Degrading Treatment or Punishment (SRT) and Professor Robert McCorquodale as a member of the Working Group on Business and Human Rights (WGBHR). This is the first time that two Australians have been appointed to such UN positions at the same time.

Both Alice and Robert have strong associations with ANU, with Alice completing her PhD in International Law (under the supervision of Professor Hilary Charlesworth) in 2009 and Robert having been Associate Professor and Head of the School of Law (as well as Treasurer of ANZSIL) in the 1990s.

Alice is the first woman appointed as the SRT, after six previous SRTs, to the UN's second oldest independent expert mandate. This role is a core part of the UN's special procedures on human rights, with responsibilities of engagement with states and civil society on issues of torture and foregrounding the voices of victims. The position involves carrying out fact-finding country visits, studying questions of torture, and transmitting urgent appeals on behalf of persons at imminent risk of such cruelty and inhuman treatment. She brings substantial expertise to the role, having been the Head of the Secretariat of the Convention Against Torture Initiative, which was effective in encouraging more states to ratify and implement the Convention Against Torture and Other Inhuman and Degrading Treatment or Punishment (CAT). She brings specific expertise on the gendered aspects of torture, with extensive work and publications in this and related areas. She worked for over 10 years with the Office of the UN High Commissioner for Refugees, as well as holding academic posts, including at the Universities of Oxford, Nottingham and her home state of Tasmania, and working with civil society.

Robert is one of 5 members of the WGBHR from around the world, and he represents the UN region of "Western Europe and Others", which includes western Europe, Australia, Canada, New Zealand and the USA. The WGBHR has the mandate to provide guidance, consider complaints, undertake country visits and issue reports in the rapidly developing area of corporate accountability for adverse human rights impacts. He

has been working in this field for three decades and brings considerable expertise in working with civil society, corporations and governments. This includes many years as an academic (he is Emeritus Professor of International Law and Human Rights at the University of Nottingham and was at the University of Cambridge), research leader (as Director of the British Institute of International and Comparative Law), legal practitioner (as a barrister in the UK), and a consultant and mediator in this field.



Australian and New Zealand
Society of International Law

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Published by:

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