



# ANZSIL Newsletter

September 2023

[www.anzsil.org.au](http://www.anzsil.org.au)

## Message from the President

It is a pleasure to write my first 'Message from the President' for the ANZSIL Newsletter. I want to begin by thanking Karen Scott for her tremendous efforts as our President over the last four years. As I said at the conference dinner in Wellington, despite the disruption caused by the pandemic, Karen has overseen four highly successful years, including three conferences using different formats to adapt to the changing circumstances, and the establishment of new interest groups and publication prizes.

Second, I want to thank Karen and An Hertogen (co-chairs) and the conference organising committee for the 2023 conference at Victoria University of Wellington. The conference theme, *Is International Law resilient?*, led to wide-ranging discussions in both the plenary sessions and the individual panels. I understand that the postgraduate student workshop, led by An and Daley Birkett, was the scene for many stimulating conversations.

At the conference dinner, held in the beautiful Grand Hall of Parliament Building, the new ANZSIL publication prizes were announced. Jessie Hohmann did a brilliant job in chairing the prize committee and we thank all members who chaired the prize sub-committees and read the submissions. Congratulations to Camille Goodman for winning the book prize for *Coastal State Jurisdiction over Living Marine Resources in the Exclusive Economic Zone*. The committee stated that 'Dr Goodman has provided a compelling case study, showing how the effectiveness and sustainability of a treaty cannot be evaluated on its terms alone, but must involve understanding and tracking its impact on state practice.' Congratulations also to Madelaine Chiam (*International Law in Public Debate*) and Esmé Shirlow (*Judging at the Interface: Deference to State Decision-Making Authority in International Adjudication*) for their honourable mentions in the book prize. Congratulations also to the winners of the Article/Book Chapter Prizes: Ramona Vijeyarasa (*Three Decades of CEDAW Committee General Recommendations: A Roadmap for Domestication, Reporting and Stronger Accountability for Women's Rights*) and Rebecca Barber, who was awarded the ECR prize for *An Exploration of the General Assembly's Troubled Relationship with Unilateral Sanctions*. These new prizes are a fantastic way to recognise the quality of ANZSIL members' scholarship.

The new Council has commenced work with its first meeting in August. As recommended at the AGM, we have surveyed the membership for their views on future ANZSIL conferences (a summary of the results is available on the website) and the Executive will shortly commence work on the question of incorporation.

Finally, thank you to ANZSIL members for your contributions to the Society's activities. There are many ways to be involved, including the conference organising committee (thank you to all who have volunteered for the 2024 conference), judging the publication prizes, becoming a mentor, writing for ANZSIL Perspectives or this newsletter (thanks to An Hertogen and Samuel White for producing this edition), or

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joining an interest group. We are also planning to refresh our website and would welcome the involvement of members with expertise in that area. I look forward very much to working with you on ANZSIL activities over the next year.

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

### **AUKUS: Commencement of negotiations with the International Atomic Energy Agency on an arrangement under Article 14 of Australia's Comprehensive Safeguards Agreement**

Since the 14 March 2023 announcement of the pathway for Australia's acquisition of conventionally armed, nuclear-powered submarines as part of AUKUS, Australia has continued open and transparent engagement with the International Atomic Energy Agency (IAEA) on its non-proliferation approach.

As part of this approach, Australia commenced negotiations with the Agency on an arrangement pursuant to Article 14 of Australia's Comprehensive Safeguards Agreement on 9 May 2023. This arrangement will include a robust suite of verification measures to enable the Agency to meet its technical objectives of ensuring no diversion of nuclear material, no undeclared nuclear material or activities, and no misuse of nuclear facilities with respect to the nuclear-powered submarine program. The IAEA Director General Grossi confirmed the Agency's mandate to engage with Australia bilaterally on this arrangement in his June statement to the IAEA Board of Governors.

Further negotiations between Australia and the IAEA will be held throughout 2023, with Australian Government lawyers from the Department of Foreign Affairs and Trade, the Attorney-General's Department and the Australian Submarine Agency remaining actively involved.

AUKUS partners have emphasised their continued commitment to strengthening the global nuclear non-proliferation regime and setting the strongest non-proliferation standard. Australia's planned acquisition of nuclear-powered submarines is consistent with Australia's international nuclear non-proliferation obligations, including under the *Treaty on the Non-Proliferation of Nuclear Weapons*, our safeguards agreements with the IAEA and the South Pacific Nuclear Free Zone Treaty (Treaty of Rarotonga).

### **Ljubljana-The Hague Convention: Landmark convention on serious international crimes adopted by consensus**

A Diplomatic Conference was held from 15 to 26 May in Ljubljana, Slovenia, to negotiate a Convention on International Cooperation in the Investigation and Prosecution of the Crime of Genocide, Crimes Against Humanity, War Crimes and Other International Crimes. Australia was one of the 80 states that had formally supported the development of the Convention, and engaged actively in negotiations throughout the two-week Diplomatic Conference. The Conference resulted in the convention text being adopted by consensus, and named the *Ljubljana – The Hague Convention*, having previously been referred to as the 'Mutual Legal Assistance (MLA) Initiative'.

The Convention was the culmination of over ten years of work led by a Core Group of states (Argentina, Belgium, Mongolia, the Netherlands, Senegal and Slovenia). The adoption of the Convention was a

significant development, as the first major treaty in the field of international criminal law since the 1998 Rome Statute of the International Criminal Court (ICC). While the Rome Statute defines the core crimes (war crimes, crimes against humanity, genocide) and regulates States' obligations with respect to the ICC, it only encourages and does not oblige states to domestically criminalise these crimes, nor does it seek to regulate the relationship between states in terms of cooperation. If ratified widely, the *Ljubljana-The Hague Convention* has the potential to fill this gap by obliging states to criminalise the core crimes, either extradite or prosecute alleged offenders on their territory, and facilitate improved cooperation between states in the investigation and prosecution of these crimes.

The Convention is more prescriptive than other multilateral crime cooperation treaties, with many provisions adapted from regional European conventions. States Parties will also have the option to extend the application of the Convention to other serious international crimes, including torture, enforced disappearance, and the crime of aggression. The final text of the Convention can be found [here](#).

A signing conference has been scheduled for 14 and 15 February 2024 in The Hague. In the interim, the Convention will go through a process of technical editing and translation, with the English, French, and Spanish texts being equally authentic. The Convention will enter into force when there are three state parties.

The Australian Government will now consider its decision on signature and ratification of the Convention in accordance with Australia's domestic treaty-making process.

## **Open-Ended Working Group on cyber adopts its second annual progress report showing incremental progress on international law**

The Open-Ended Working Group (OEWG) on security of and in the use of information and communications technologies held its fifth substantive session from 24-28 July 2023 in New York. Australia and New Zealand sent Canberra and Wellington-based delegations, respectively, to the meeting, comprising representatives from the Department of Foreign Affairs and Trade, the Attorney-General's Department and the Ministry of Foreign Affairs and Trade. The OEWG session negotiation focused on adoption of its annual progress report (APR), which was adopted by consensus.

The international law section of the APR reaffirms the application of international law to cyberspace, explicitly stating particular obligations and principles of the UN Charter that apply. Although the reaffirmation of particular UN Charter obligations and principles is implicit in language previously agreed that the 'UN Charter applies in cyberspace', the recognition of the application of UN Charter obligations in particular, such as article 2(3) on the peaceful settlement of disputes and article 2(4) on the threat or use of force, is a new development for this OEWG. The APR also includes a reference to the discussion that has been taking place throughout the year on the position of some states on the need for additional legally-binding obligations. It is likely the debate on whether additional legally-binding obligations are needed will continue over the course of the OEWG, which has a mandate to 2025.

As set out in the APR, it is also likely that the OEWG will meet intersessionally before its sixth substantive session in 2024. Pursuant to the recommendation in the APR, such an intersessional meeting could include inviting experts to brief the OEWG on international law.

## **Group of Government Experts on Emerging Technologies in the Area of Lethal Autonomous Weapons Systems adopts substantive report by consensus**

The Group of Governmental Experts (GGE) on Emerging Technologies in the Area of Lethal Autonomous Weapons Systems (LAWS) held its second session for 2023 from 15 – 19 May in Geneva, Switzerland. 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 2023 was to ‘intensify the consideration of proposals and elaborate, by consensus, possible measures ... related to the normative and operational framework on emerging technologies’. During the first session of LAWS GGE in March 2023, Australia submitted a joint proposal alongside Canada, Japan, the Republic of Korea, the United Kingdom, and the United States. Ahead of the May session, Poland also joined as a co-sponsor of the proposal. The joint proposal seeks to clarify the requirements imposed by existing international humanitarian law in relation to autonomous weapons systems and specify measures to effectively satisfy these requirements.

At the end of the May session, the GGE adopted a substantive consensus report capturing a “two-tier approach” to the regulation of LAWS, which categorises LAWS into systems which would be prohibited (“tier one”) and those that would be subject to limitations under IHL (“tier two”). Discussion on the future mandate of the GGE has been deferred to the Meeting of Convention on Certain Conventional Weapons High Contracting Parties in November.

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

### **Panel Report released in New Zealand’s CPTPP dispute against Canada**

The Panel’s Report in New Zealand’s dispute against Canada regarding the administration of dairy tariff rate quotas under the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) was released on 6 September 2023. New Zealand won the dispute. The Panel found that Canada is not administering its dairy TRQs in a manner that allows importers the opportunity to utilise them fully, and that Canada is impermissibly limiting access to TRQ quota to its domestic dairy processors. Under CPTPP rules, Canada has a reasonable period of time to change its TRQ administration to comply with the Panel decision. New Zealand’s expectation is that Canada will comply fully with the outcomes in the report as soon as possible.

The panel in this dispute was composed of Jennifer Hillman (chair), Petros Mavroidis and Colleen Swords. The hearing was held on 14 and 15 June 2023 in Ottawa, where Australia, Japan, Mexico and Singapore participated as third parties. Australia presented both written and oral submissions in the dispute. This was 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.



### **International Courts consider requests for advisory opinions on climate change**

The Commission of Small Island States on Climate Change and International Law (COSIS) has requested an advisory opinion by the International Tribunal for the Law of the Sea (the Tribunal). COSIS has requested the Tribunal’s opinion on how the obligations of state parties to the United Nations Convention on the Law of the Sea (UNCLOS) apply with respect to climate change and its impacts. The Tribunal invited written submissions by 16 June 2023. New Zealand was one of 33 parties to UNCLOS that made

written submissions, together with a number of intergovernmental and non-governmental organisations (all are available here). The oral hearing will begin on 11 September 2023.

The United Nations General Assembly has also requested an advisory opinion from the International Court of Justice (ICJ) on the obligations of states under international law in respect of climate change. This initiative was championed by Vanuatu, with New Zealand part of a core group of supporters. The ICJ has invited a first round of written submissions by 22 January 2024, with comments on other written submissions due by 22 April 2024.

## **Review Panel consideration of Russian objection to SPRFMO jack mackerel allocation**

A Review Panel was established under Article 17 and Annex II of the Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean (SPRFMO Convention), to consider an objection by the Russian Federation to the Conservation and Management Measure for *Trachurus murphyi* (jack mackerel) (CMM 01-2023) adopted by the SPRFMO Commission in February 2023. Russia had objected to its jack mackerel allocation, on the basis that the Commission decision was inconsistent with the SPRFMO Convention and discriminated in form and fact against Russia.

The Review Panel received written memoranda from several SPRMO members, including New Zealand, and held a hearing on 26 June. The Panel issued its findings and recommendations on 1 July. The Panel found that SPRFMO's decision was not inconsistent with the SPRFMO Convention and did not substantively discriminate against Russia, but that the Commission's deliberations did result in procedural discrimination against Russia. The Panel recommended that Russia's allocation be replaced by its alternative allocation as amended by the Panel. This will result in Russia's allocation being higher than that set out in CMM 01-2023, but less than sought by Russia.

## **Global Plastic Pollution Negotiations**

The second session of the Intergovernmental Negotiating Committee (INC2) towards a legally binding instrument on global plastic pollution took place May 29 to June 2, 2023, in Paris. The negotiations follow the decision made by the United Nations Environment Assembly in March 2022 (UNEA-5.2) with the goal to finalise the agreement by the end of 2024.

In these negotiations, New Zealand is focused on eliminating plastic pollution by reducing plastic waste, or avoiding generating it in the first place, as well as considering ways that environmentally-harmful subsidies, such as fossil fuel subsidies, can be addressed. We also want to ensure agreement is complementary of existing international agreements. We anticipate a zero draft text being produced ahead of the third round of negotiations in November 2023.

For more information about New Zealand's negotiating mandate, read the [Cabinet paper](#) and for more information please see New Zealand's Ministry for the Environment's website [Towards a global treaty to combat plastic pollution | Ministry for the Environment](#)



## Internship Report

### Visiting Professional program at the International Criminal Court (Olivia Klinkum)

Earlier this year I completed a year-long Visiting Professional program at the International Criminal Court (ICC) in the Hague, the Netherlands. This was an incredible experience, made possible thanks to the financial support I received from ANZSIL and from the Michael and Suzanne Borrin Foundation. If any ANZSIL members who teach about the International Criminal Court would be interested in a guest lecture about the ICC Visiting Professional program, please feel free to reach out by [e-mail](#).



I worked in the ICC Chambers, which comprises three judicial divisions: the Pre-Trial Division, the Trial Division, and the Appeals Division. I was in the Pre-Trial Division, which plays an important role in overseeing preparatory steps for potential future trials, including deciding on challenges to the Court's jurisdiction, issuing arrest warrants, and determining whether sufficient evidence exists to proceed to trial. Generally, cases are assigned to a Chamber of three Judges, who are supported by Legal Officers in the Division. I worked together with Legal Officers on individual cases as well as contributing to Division-wide projects.

My work was varied and intellectually stimulating, including preparing legal opinions on novel questions of law and procedure, analysing evidence, and reviewing draft judgments. It was particularly interesting being at the ICC as it marked its 20th anniversary, a milestone which coincided with increased global attention on the ICC and its work. One of the highlights of the program for me was attending the ICC's 20th anniversary conference on 'Reflections on the Past, Present and Future' of the Court, as well as the 21st annual session of the Assembly of States Parties to the Rome Statute.

My knowledge of how international criminal law operates in practice grew exponentially during my year as a Visiting Professional. Living in the Hague also allowed me to build a strong network of friends and colleagues, many of whom had also travelled far from home to pursue their goal of working at the ICC or other international institutions based in the Hague. I am very grateful for this experience, and hope to build on the knowledge I gained to contribute to the field of international criminal justice further in my career.

### ANZSIL International Peace and Security Interest Group Report 2022/2023

The signature event of the International Peace and Security Interest Group (IPSIG) is its annual Workshop. This year's Workshop was held on 9 June 2023 at Melbourne Law School on the theme of *The Institutions, Actors and Phenomena Currently Shaping International Peace and Security Law*.

The Workshop's first panel, chaired by Dr Monique Cormier (Monash University), was focused on the institutions shaping international peace and security law, and featured three presentations. Rebecca Barber (University of Queensland) examined the UN's response to the Earthquake in Northwest Syria, and questioned whether the government of a receiving State must consent to the provision of humanitarian aid as a matter of law. Andrea Furger (University of Melbourne) explored whether Joint Investigations Teams are a useful mechanism to overcome challenges encountered in the context of complex serious international crime investigations. Azadah M. Raz Mohammed (University of Melbourne) assessed the prospects of justice being delivered through the International Criminal Court's investigation into the situation in Afghanistan.

Dr Marika Sosnowski (University of Melbourne) chaired a second panel focused on the actors shaping international peace and security law. Ravi Prakash Vyas (University of Sydney) explained the convergences and divergences between China and India's approaches to the right of self-defence. Clementine Rendle

(International Committee of the Red Cross) outlined the distinct and different ways in which the ICRC contributes to the development of international humanitarian law. Dr Carrie McDougall (University of Melbourne) critiqued the Brereton Report's failure to outline the legal framework applicable to the Australian Defence Force's operations in Afghanistan, including its failure to identify the applicability of Additional Protocol II as a matter of treaty law.

Panel three, chaired by Dr Marnie Lloyd (Victoria University of Wellington), explored some of the key phenomena currently shaping international peace and security law. Dr Ricky J. Lee (University of Cambridge) outlined the legal implications of access to missile technology and the use of space assets by non-State actors, including terrorists. Professor Shiri Krebs (Deakin University) identified concerns associated with the use of AI, human and signals intelligence, big data analytics and visual and matching technologies in international efforts to predict and prevent terrorist activity and made proposals as to how these concerns could be mitigated. Maria Rabino-Neria (Victoria University of Wellington) considered how the wording of humanitarian exemptions to UN Security Council counter-terrorism sanctions are shaping the interpretation of international humanitarian law, and suggested that a 'principle-based' humanitarian exemption as found in NZ's Terrorism Suppression Act might address some of the concerns raised in relation to the UNSC model.

The day concluded with an excellent government reflections panel chaired by Netta Goussac (Lexbridge Lawyers/SIPRI) featuring Andrew Williams (New Zealand Ministry of Foreign Affairs and Trade) (who focused on the resilience of international law and New Zealand's Pacific engagement), Claudia Henfry (Australian Department of Foreign Affairs and Trade) (who outlined the accountability measures being pursued in the context of Russia's invasion of Ukraine), Commander Tristan Skousgaard (Australian Department of Defence) (who spoke about Chinese lawfare in the South China Sea) and Andrea Gronke (Australian Attorney-General's Department) (who provided an update on the international law aspects of cyberspace in the context of discussions at the UN Open-Ended Working Group on Cyber).

We take this opportunity to express our thanks to ANZSIL for its generous financial support of the Workshop, which enabled the 26 participants in the Workshop to all attend fee-free, and enabled us to support the travel of two early-career researchers who presented, based in New Zealand and Australia respectively. We are also grateful for Melbourne Law School's in-kind support of the Workshop.

IPSIG Co-Chairs Marnie Lloyd and Carrie McDougall would also like to thank the IPSIG Committee members for their support, as well as ANZSIL President Karen Scott for her never-ending enthusiasm and amazing efficiency and effectiveness, and Ashley Rogge (ANZSIL Secretariat) for her assistance.

## **ANZSIL Member News**

### **Catherine Gascoigne, *Causation in the Law of the World Trade Organization: An Econometric Approach* (Cambridge University Press, 2023)**

*Causation in the Law of the World Trade Organization: An Econometric Approach* (Cambridge University Press, 2023) by Catherine Gascoigne is for both scholars and practitioners of WTO law with an interest in the causal questions that WTO law raises. Assuming no prior knowledge of causal philosophy or statistical analysis, Dr Gascoigne discusses the problems in the current approach to causation in the WTO jurisprudence and proposes an alternative methodology that draws on causal philosophy and econometric analysis. The book demonstrates how this methodology could be harnessed to make causal determinations for the purpose of implementing trade remedies and to make out claims of serious prejudice. It also argues that the methodology could be helpful for assessing the impact of domestic legislation on policy objectives under the General Exceptions and the Technical Barriers to Trade Agreement. The final chapter draws out the implications of using the methodology in order to calculate the amount of retaliation permissible under the Dispute Settlement Understanding.



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