

# FROM THE DIRECTOR

NEWSLETTER

AUTUMN 2013 | ISSUE 22



Photo credit: www.channel4.com

## If International Law cannot prevent war, what good is it? **A view From The Director**

International law matters. We are obviously aware of this simple fact. But to many legal academics, the subject seems a rather alien speciality. It is a kind of optional add-on for students interested in esoteric pursuits, rather than preparation for their actual career as lawyers.

The general public seems to notice the subject only at moments of grave international crisis. These are situations involving what states sometimes claim to be vital interests—situations where compliance with international law has in the past not always been at its strongest. If international law cannot prevent war, we are asked, what good is it?

The stock answer of pointing to the routine practice of governments everywhere of complying with international law is then often brushed aside. Reference to the crucial role of international law in facilitating commerce and communications, international cooperation to combat contagious disease or to protect the environment also rarely persuade the sceptics.

The case for international law was not strengthened when key states that like to consider themselves defenders of the international legal order were evidently breaching it, to the point of using force illegally. In the UK alone, over a million people marched outside the House of Commons when war on Iraq was debated and decided upon in 2003. The launch of the conflict, followed by the discovery that the legal grounds advanced by the governments involved in the operation were as unpersuasive as the claimed factual evidence concerning Iraq's purported arsenals of weapons of mass destruction led to further cynicism about the subject.

However, the international legal system proved resilient to this challenge. A new consensus confirming the need to preserve the credibility of the prohibition of the use of force emerged. At the 2005 UN World Summit, states were unanimous in confirming that the provisions of the Charter remained decisive, and sufficient, in judging claims to the use of force.

Over the past weeks, the UK again provided the focal point for the debate on the possible use of force, this time in relation to Syria. The world had been shocked by pictures of another mass atrocity, this time apparently involving the large scale use of chemical weapons. It was argued that the use of force would be necessary to prevent or deter further attacks against the civilian population. As had been the case in 2003, the government put forward a legal case in favour of armed action.

On this occasion, the House of Commons voted against a motion supporting the use of force. This was in part because the motion has been miss-timed. It was not clear why force should be used before a UN inspection team had established the facts on the ground. Moreover, the House was still suffering from a sense of betrayal, stemming

(...continued on page 2)

from the Iraq war. If the government had relied on the wrong facts then, why should its assessment be trusted now? Finally, there was a sense that peaceful avenues had not been exhausted. The UN Secretary-General had requested dramatically: ‘Give peace a chance’.

While the supporters of the motion suffered a painful political defeat, three facts are striking from the international legal perspective. First, once again, considerations of international law were highly important, if not decisive, in the way public and parliamentary opinion shaped up. Second, the government complied with previous practice and held a parliamentary debate on the possible use of force. In so doing, it bound the hands of the executive where matters of peace and war are concerned. And third, again in compliance with what may emerge as a parliamentary convention, it supplied a formal legal view in advance of the debate. While rather condensed, we are assured that, this time, the legal position accurately summarises the authoritative advice given by the Attorney-General to the Prime Minister.

The legal position that was offered is highly interesting. In fact, it represents a return of the UK government to a principled legal position on forcible humanitarian action. At the end of the Cold War, the UK departed from the broad consensus holding that there is no right of so-called humanitarian intervention. But in 1992, in the wake of the operation to rescue the threatened Kurds of Northern Iraq, the UK made a formal claim that this right is well established in international law.

However, in subsequent years and episodes, the UK position appeared more ambiguous. The government seemed to assert various conditions for the application of force in support of humanitarian aims. However, it seemed unwilling to commit itself to the doctrine of humanitarian intervention as a matter of law. The position offered at the end of August in relation to Syria, on the other hand, is deliberately framed as a position of law and of principle.

The claim to a legal right to humanitarian intervention is supported by a set criteria for its invocation. These are quite restrictive, aiming to forestall the possible abuse of the doctrine by states seeking to advance their own interests, rather than acting



out of genuine humanitarian motives. Undoubtedly, these can be debated and developed further. But what matters is that a legal case has been made, rather than simply asserting a political necessity for action. Given the political confusion that ensued, and the fact that the legal view was issued in the context of the use of chemical weapons, there is a risk that this development may be overlooked in further debates about forcible humanitarian action in general. That would be a pity, as the merits of the UK legal claim deserve to be debated further.

Of course, the arguments about the possible use of force against the Syrian government have also had political repercussions. While the initial threat of the use of force appeared to bear the risk of creating further divisions between the US and the Russian Federation, the episode turned out to open up an avenue of possible cooperation between the two states. They fashioned an arrangement, accepted by the Syrian authorities, aiming to place its chemical weapons under international control and to secure their destruction. If implemented, such an outcome would represent a significant step in the international campaign to ban the possession and use of chemical weapons. Of course, any such arrangement cannot affect accountability for past actions.

As the UN General Assembly convenes for its new session at the time of writing, a sense of hope for concerted action by the US and the Russian Federation, and the UN Security Council, is emerging. This reaches beyond the chemical weapons issue. The prospect of peace negotiations for Syria has been revived. The Special Representative of the UN Secretary-

General, Lakhdar Brahimi, has noted that this process may commence later this year, if this consensus holds.

At the Lauterpacht Centre, we have been heavily involved in supporting the prospects for a peaceful settlement in Syria. This involvement commenced with the drafting of what became the Geneva Communiqué on Syria of 30 June of last year, which sets out an agreed road-map for a transition in Syria, and it has been carried through to the preparations for the prospective Geneva Conference on Syria. It is to be hoped that these important negotiations can now be launched, and completed, with the urgency that is required.

We have also continued to support the implementation of the 2011 peace agreement for Yemen through a major national dialogue process, leading to a redrafting of the Yemeni Constitution. This advisory work flows directly into our larger research project, which considers *Legal Tools for Peace-making*.

As this edition of the newsletter confirms, a whole host of other research projects and conferences have taken place over the past months. A significant number of publications were published or have been handed over to the press. We were particularly pleased by the award of the Hague Prize for International Law to Professor Sir Elihu Lauterpacht QC, and by the award of Australia’s highest honour (Companion of the Order of Australia, General Division) to Professor James Crawford. In addition, we have again been enriched by a stellar cast of Visiting Fellows and Scholars. Moreover, we are pleased to welcome this year a number of additional Fellows and Associate Fellows to the Centre, allowing us to add further to the strength of our scholarship.

We also acknowledge gratefully the sterling work of Alexia Solomou and Tara Grant in putting this edition of the newsletter together. Unfortunately, Tara will now be leaving the Centre to work full time at the Registry’s Office. We will miss her, are greatly indebted to her, and wish her well.

Marc Weller  
*Marc Weller serves as legal advisor and Senior Mediation Expert to the UN Secretary-General’s Special Envoys to Syria and Yemen. The views expressed are the author’s alone and not attributable to any institution or organization.*

## Professor James Crawford honour roll!

When a recent article in *The Australian* declared 'James Crawford is on a roll', it articulated something that we at the Lauterpacht Centre have known for some time. It was referring to two very welcome events.

First, on 30 October 2012, the Australian government officially supported Professor Crawford's candidature for the International Court of Justice. Every three years, elections are held for five of the fifteen seats on the Court. Professor Crawford will be nominated for elections to the Court due to take place in late 2014 by the independent Australian National Group, which comprises the Australian members of the Permanent Court of Arbitration. Australia's support will strengthen the campaign for Professor Crawford's election.

Australians have a mixed history of election to the Court. Sir Percy Spender sat on the Court from 1958–67. In 1966, his casting vote in favour of South Africa as president of the Court in the *South-West Africa* case, which was angrily received by African and Asian states, effectively scuppered the candidature of the next Australian to run, Sir Kenneth Bailey. So far, signs are encouraging that Professor Crawford can become the first Australian judge on the Court since Spender.

*In typical style, it has been a productive year for Professor Crawford. In addition to his intensive practice and teaching commitments, in July his new book 'State Responsibility: The General Part' was published as part of CUP's Cambridge Studies in International and Comparative Law series (see p. 13) and he delivered the three-week long General Course to approx. 350 attendees of the Public International Law course at the Hague Academy (see p. 6).*



Photo credit: <http://www.theaustralian.com.au/>

Full article at: <http://www.theaustralian.com.au/archive/business/silk-of-choice-james-crawford-goes-to-bat-for-australia/story-e6frg97x-1226663454109#mm-premium>

Second, on 10 June 2013, Professor Crawford was one of two recipients of Australia's highest civilian honour, the Companion of the Order of Australia, 'for eminent service to the law through significant contributions to international and constitutional legal practice, reform and arbitration, and as a leading jurist, academic and author'. He received his award in Canberra on 13 September.

Rowan Nicholson  
Research Associate to Professor Crawford

### Hi's and bye's

The start of the 2013-14 academical year will coincide with a number of personnel changes at the Centre.

The Centre welcomes **Andrew Sanger**, the first Volterra Fietta Junior Research Lecturer (see p. 7), as well as and the first tranche of visiting fellows and scholars to arrive following the implementation of set stay periods (see p. 5).

But the Centre waves goodbye to:

**Tom Grant** who leaves after many years with us to take up a visiting fellowship at Stanford;

**Tara Grant** who moves to the University's Registry's Office on a full-time basis from October;

**Callista Harris** who leaves James's research team to join Freshfields, Paris

We wish them the very best in their new endeavours and thank them for their contributions to the Centre.



## International Law Association Use of Force Committee Meeting

The International Law Association's Committee on the Use of Force held a meeting at the Lauterpacht Centre on 28-29 June 2013. At the heart of the meeting was a discussion of the latest draft of the Committee's report on Aggression. The mandate given to the Committee in 2010, was to "investigate and report on the prohibition of aggression and the international law on the use of force." The report will cover a range of issues, including the current state of the prohibition on the use of force, challenges in the area of self-defence, emerging issues such as cyber operations, and use of force in relation to rescue of nationals and humanitarian intervention.

Over twenty Committee members participated in the Cambridge meeting, coming from all over the globe, including the UK, Germany, the US, Brazil, Australia, the Netherlands, and more.



The meeting was chaired by Sir Michael Wood (Committee Chair) and Professor Noam Lubell (Committee Rapporteur), and an extremely fruitful and lively discussion took place over the course of the two days. A new draft of the report is now in preparation, with the final draft to be presented at the 2014 ILA Biennial Conference-ASIL Annual Meeting, in Washington.

Professor Noam Lubell,  
Rapporteur

## Sir Elihu Lauterpacht jointly awarded Hague Prize for International Law 2013

Sir Elihu Lauterpacht CBE QC LL.D., founding Director of the Centre and Director, 1983-95, was awarded the Hague Prize for International Law on 27 June 2013, jointly with his pupil from long ago, and friend, Professor Georges Abi-Saab. The Prize was established by the City of The Hague in 2002 to recognise individuals who 'through publications or achievements in the practice of law have made an outstanding contribution to the development of public or private international law or to the advancement of the rule of law in the world'.

This year's prizes were awarded at a ceremony held at the Hague Academy of International Law in June. The Chair of the Hague Prize Foundation, Dr Bernard Bot, introduced the proceedings, during which Professor Nico Schrijver, the Chair of the Hague Prize Nominating Committee, in the laudatio made mention of Sir Elihu as follows:



From left to right: Georges Abi-Saab, Bernard Bot (Chair of the Hague Prize) and Sir Elihu Lauterpacht

### « Professor Sir Elihu Lauterpacht,

Today we pay tribute in The Hague to your pioneering work as a scholar and practitioner of international law who played the role of mentor of dozens of international lawyers and who made great personal contributions both to the development and application of international law. Particularly in your role as a practitioner-advocate, adviser, arbitrator and judge – you, Sir Eli, have given impulse to the re-fashioning of the international legal order, in a way that is both unique and transformative. Born as the son of Hersch and Rachel Lauterpacht, you studied law at Trinity College, Cambridge University, and graduated in 1950. In 1953, you were appointed Assistant Lecturer in Law at Cambridge University, where you taught until 1995, lastly as an Honorary Professor of International Law.

Sir Eli was called to the Bar in 1950, and became involved right the next year at the International Court of Justice in the well-known *Nottebohm* case. This was but the first of many important cases before the Court in which he participated. It is truly remarkable to read through the list of International Court of Justice cases that Sir Eli has been involved with: it is as if one is looking at a textbook entry for major international law cases, including the *North Sea Continental Shelf*, the *Barcelona Traction*, the *Nuclear Tests*, *Qatar v Bahrain* and *Avena* cases, the *Sipidan/Ligitan* and other islands cases. Professor Sir Elihu Lauterpacht has appeared in many other international

courts, including the International Tribunal on the Law of the Sea and the European Commission of Human Rights, as well as a great number of arbitrations and leading English House of Lords cases. Many know Sir Eli also from his opinion as an ad hoc judge at the ICJ in the *Genocide case of Bosnia and Herzegovina v. Yugoslavia*.

Beyond practice, his contribution has been in teaching and conducting research. His published works in the form of books and articles are significant. Of particular note are his fine book *Aspects of International Adjudication*, his early book on the development of the law of international organisations in decisions of international tribunals (A Hague Academy course in 1976) and, in five volumes, the editing of his father's papers, Sir Hersch Lauterpacht's papers and manuscripts. More recently, he has written a moving and widely acclaimed biography of his father, Sir Hersch Lauterpacht.

Sir Eli is also an institution-builder who sought ways to transmit knowledge and information about international proceedings and activities at a time when this information was available only to a small number of individuals, who were closely connected with the proceedings as counsel or staff. It is perhaps commonplace in the Internet and social media age to think about disseminating information and building community. Sir Eli assumed the editorship of the *International Law Reports*

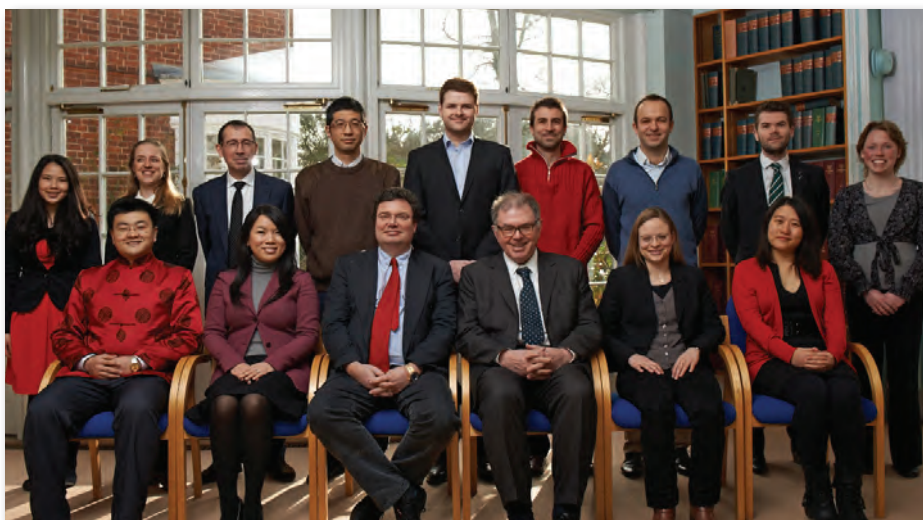
upon the death of his father, Sir Hersch, having previously begun the series of British materials on international law which helped to set the standard for annotated documentary collections of governmental materials such as *International Legal Materials*. I also would like to recall Sir Eli's charming personal initiative for the publication of the *Who's Who in Public International Law*, the first edition of which appeared in 2007. With this *Who's Who* he wanted to show the admirable spread of expertise in the subject in all regions of the world and to demonstrate that international law is not a European subject and, indeed, has not been for many years. And, finally, Sir Eli established in 1983 at the University of Cambridge a research center for international law where scholars from around the world can gather to conduct their own research as visiting fellows or to connect with colleagues. Professor Lauterpacht served as its first Director until 1995, after which year it was renamed the Lauterpacht Centre for International Law. In sum, also Professor Sir Eli Lauterpacht stands out in the illustrious group of international lawyers, because he is multifaceted – a leading practitioner, an important scholar, a visionary with regard to the dissemination of information resources and the creation of institutional bases. ”

Professor Nico Schrijver  
27 June 2013, Chair, Hague Prize  
Nomination Committee



Previous recipients of the Prize include Professor Shabtai Rosenne, Professor Cherif Bassiouni, Dame Rosalyn Higgins and Professor Paul Lagarde. This year's recipients each received a diploma and cash prize of €25,000 and Sir Elihu has very kindly donated his award to the Centre. Information on the Prize, including the speeches from the ceremony, is available at: [www.denhaag.nl/the-hague-prize.htm](http://www.denhaag.nl/the-hague-prize.htm)

## Change to research visit format from Michaelmas 2013



From Michaelmas Term 2013, research visits by Visiting Fellows and Scholars to the Centre will operate on a 'termly' basis. Loosely scheduled around the Cambridge academical terms, there will be four set periods of stay per year, with visitors welcome for a minimum of one 'term' up to a maximum of four (representing a yearly stay).

Research visits to the Lauterpacht Centre are very popular, with the 2013-14 academical year currently full. Researchers wishing to apply as a Visiting Fellow or Scholar should visit the Centre's website ([www.lcil.cam.ac.uk/visiting\\_the\\_centre](http://www.lcil.cam.ac.uk/visiting_the_centre)) before contacting the Centre's Administrator Anita Rutherford ([admin@lcil.cam.ac.uk](mailto:admin@lcil.cam.ac.uk)) with the relevant information.

Research periods for the next two years are as follows:

### 2013-14

'Term'	LCIL research visit dates	Cambridge Term dates
Michaelmas:	30 Sept – 20 Dec 2013	8 Oct – 6 Dec 2013
Lent:	13 Jan – 4 Apr 2014	14 Jan – 14 Mar 2014
Easter:	22 Apr – 4 Jul 2014	22 Apr – 13 Jun 2014
Summer:	7 Jul – 19 Sept 2014	to 30 Sept 2014

### 2014-15

'Term'	LCIL research visit dates	Cambridge Term dates
Michaelmas:	29 Sept – 19 Dec 2014	7 Oct – 5 Dec 2014
Lent:	13 Jan – 28 Mar 2015	13 Jan – 13 Mar 2015
Easter:	14 Apr – 3 Jul 2015	21 Apr – 12 Jun 2015
Summer:	7 Jul – 18 Sept 2015	to 30 Sept 2015



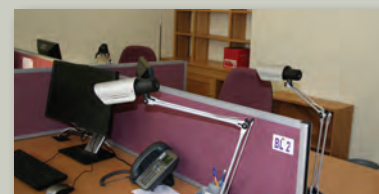
## LCIL Annual Report 2012-13



The Centre's Annual Report for the 2012-13 academical year is now available:

[www.lcil.cam.ac.uk/about\\_the\\_centre/annual-reports](http://www.lcil.cam.ac.uk/about_the_centre/annual-reports)

## Planning Permission Granted



The Centre is pleased to announce that it has been granted planning permission to create more office space in Bahrain House.

The Centre's two buildings, at Nos 5 and 7 Cranmer Road are currently subject to mixed-use planning rules, meaning both buildings must retain an element of residential use to be in compliance with planning permit. With the Centre developing an increased emphasis on projects and research, there is ever greater need for more office and research space. The recent approval to vary the planning permission increases our research capacity and is extremely welcome. Both buildings will continue to provide accommodation.

## Hague General Course 2013 delivered by Professor James Crawford

*“Chance, Order, Change. The Course of International Law”*



From 8–26 July 2013, Professor James Crawford delivered an insightful Hague General Course to 350 eager participants. The Course examined the development of international law, its evolution towards a complex system of ordering and its ongoing change to address modern challenges – that is, the course of international law

over time. The participants’ journey into the theory, process and practice of international law was facilitated by three defended positions that constituted the scaffolding for each subsequent week: (1) that international law is law, (2) that there is an international legal system, and (3) that there is, or at least there *can* and *should be*, an international rule of law. Each week addressed five unresolved questions about international law as a discipline, culminating in a *tour de force* that was thought provoking, enlightening and humorous.

To illustrate the themes of the course, a series of graphics by the English constructivist artist Kenneth Martin (1905-1984) were used – one for each lecture respectively. Participants voted for the image they considered to best illustrate the course overall,

which will become the front cover image for the monograph.

With the aid of PowerPoint presentations to assist communicating complex ideas, and to prompt questions, the strongman “Norm” was a particularly well-received character in discussion on legal hierarchy, as were images of George Bush junior’s shock realisation that international law was another legal system he had to contend with. The traditional language of international law, French, translated the address in real-time.



As Professor Crawford shuttled between the International Court of Justice, where he appeared as counsel for the applicant in the *Australia v. Japan* whaling case, and the Academy, the students witnessed first hand the vital intersection between international law as a field of study and a professional endeavour with real world consequences. So appealing was this link that even counsel for Japan spent an afternoon or two sitting in on Professor Crawford’s lectures.

Overall, the course was very well received. Only one diploma was awarded this year, to Cambridge University PhD candidate Fernando Bordin, who receives our warmest congratulations.

Stuart Bruce  
Research Associate to Professor Crawford

## ‘Navigating my way to the Hague Academy Diploma: A course I’ll never forget’ by Fernando Bordin

At the beginning of the session, there was a mock exam by reference to which candidates for the Diploma were pre-selected. The Hague Academy offers ‘Directed Studies’ (otherwise known as ‘Travaux Dirigés’) conducted in both English and French and running for three weeks. Because of the imbalance in numbers between Anglophones and Francophones, I was asked to attend the French section. This was a stroke of luck, as I had the opportunity to participate in Professor Samantha Besson’s wonderful seminars, which focused on five topical conceptual questions arising from contemporary public international law.

The written exam took place on the Tuesday of the third week, and consisted of a five-hour essay on the question: ‘In what sense and to what purpose is international law a system?’ In the oral exam, which took place a couple of days later, I was asked to give a ten-minute presentation on the topic ‘preemptive self-defence’. This was followed by a twenty-minute discussion on several issues of international law, ranging from the possibility of international law constituting a system in the absence of adequate rules of adjudication to the significance of the recent order appointing experts in the *Burkina Faso/Niger* case issued by the International Court of Justice.



I am happy to have returned to the Academy to fulfil an old plan of sitting for the Diploma. It had been too long since a Brazilian had passed the exam, and it was nice to take the time to fill gaps in my knowledge of the field (ask me about maritime delimitation and I might be able to pull it off!) while attending Professor Crawford’s brilliant General Course.

Fernando Lusa Bordin,  
Hague Academy Diploma in PIL 2013, PhD Candidate, Cambridge

## Inaugural Volterra Fietta Junior Research Lectureship Awarded to Andrew Sanger

*Volterra Fietta fund joint research lectureship between LCIL and Newnham College*



The first Volterra Fietta Junior Research Lectureship, to be held jointly at the Lauterpacht Centre for International Law and Newnham College, has been established on the initiative and with the generous support of the international law firm, Volterra Fietta. It has been awarded to Andrew Sanger of Selwyn College.

Andrew graduated in law at Cambridge in 2007. He then did an LL.M in international law at the London School of Economics and was called to the Bar in 2010. Since 2009, he has worked intermittently as a research assistant to Sir Elihu Lauterpacht CBE QC LL.D and for the last three years, he has been working in Cambridge on his PhD thesis, the subject of which is 'Corporate Responsibility in International Law'. The thesis focuses on the role of public and private international law in securing the accountability of transnational corporations, principally in the field of human rights law. During his three years at the Centre, he intends to build on this research by examining further

the fundamental issues involved in the debate on corporate responsibility; in particular, the approach of domestic legal systems to international law, especially in the English and the United States systems, and the impact of the decisions of national courts on the creation of international law, especially those concerning immunity and the responsibility of domestic actors for violations of international rules. He will also examine the place of international norms and standards that do not fit neatly into the traditional presentation of the sources of international law.

Andrew has published articles and case notes in the Cambridge Law Journal, the International and Comparative Law Quarterly, the Yearbook of Humanitarian Law and the American Journal of International Law. He was one of the founders and editors-in-chief of the Cambridge Journal of International and Comparative Law and one of the organisers of the 2012 Cambridge conference on 'Agents of Change: The Individual as a Participant in the Legal Process'. He will, of course, be involved in some of the larger, collaborate research projects at the Lauterpacht Centre. He will also be doing college teaching in constitutional and public international law.

## Seminar on the Formation and Evidence of Customary International Law

On 18 and 19 January 2013, the Lauterpacht Centre for International Law hosted an informal seminar on 'Formation and evidence of customary international law', a topic added to the programme of work of the International Law Commission at its 2012 session. The seminar was chaired by Sir Michael Wood, the Commission's Special Rapporteur on the topic, and was attended by a small group of academics and practitioners both from the UK and abroad, including members of the Commission, as well as by the Director and several members of the Lauterpacht Centre.

The participants exchanged views on the scope and aim of the topic, its possible outcomes, its distinction from the International Law Association's 'Statement of Principles applicable to the Formation of General Customary International Law' which was adopted in 2000, the form of the Commission's output, and the Rapporteur's suggested plan of work. This general exchange of views was followed by a stimulating in-depth discussion on an early draft of the first introductory report on the topic, which was distributed to the participants by the Special Rapporteur. The debate focused on issues such as the relevance of *jus cogens* to the topic, the existence of different approaches to the formation of customary international law depending on the relevant field of

international law, as well as the identification of the material that the Commission should look into for guidance on the formation of customary international law.

The seminar, which followed a pattern adopted in the past (for example by James Crawford when he was Special Rapporteur for State responsibility) attests to the Centre's continuing interest in the work of the International Law Commission and hopefully has assisted the Special Rapporteur with the task that was assigned to him.

*Vaios Koutroulis, Visiting Scholar 2013*



# Hersch Lauterpacht Memorial Lectures 2013: Professor Philippe Sands QC on “*La Cour!*”

26-28 February 2013, Finley Library

It was a dark and cold February afternoon in Cambridge, of the kind when students hide in the coziness of college libraries or in the warmth of their dining halls. There was something different attracting an unexpected influx of cars, bicycles and pedestrians on the otherwise quiet Cranmer Road this evening: the first Lauterpacht Lecture of the year and the Centre was buzzing with excited students and scholars of all generations: from the keen undergraduates and Erasmus students, to the melancholic doctoral candidates. Researchers, lecturers, professors: all international lawyers based in and around Cambridge were gathered there!

The lecture began with a spirited introduction by Sir Eli Lauterpacht. Professor Sands took the floor and began his lecture on the topic of “*La Cour!*” by recalling the 19th century resolution of the *Institut de Droit International* stating that international judges are the guardians of the international legal order. The lecture was divided in three parts in the course of three days and it concluded with a session of questions and answers. The first lecture focused on the judges of the International Court of Justice (ICJ) and their independence. It assessed critically the standard of judicial independence applied by the Court in various cases, in comparison to the standard required by other international judicial and arbitral bodies. The second lecture addressed the issues of the extramural activities of the judges and the role of the Registry of the Court, particularly with regard to procedural orders and the admission of evidence. The lecture assessed the appointment of ICJ judges as arbitrators in light of the closely linked issues of transparency, coherence and propriety. Finally, the third part



The Inaugural session of the ICJ, 18 April 1946

addressed the assessment of evidence by the ICJ and the conduct of hearings. The discussion focused on the unsettled issues of the standard of proof and on the obtaining and assessment of expert evidence, to conclude that clear guidelines ought to be laid down.

While the overall focus of the Lauterpacht Lecture was on the procedure and practice of ‘*La Cour*’, it penetrated the philosophical foundations of international law, including sovereignty, legal values, global public interest and the role of the individual in the international legal order. A special quality of the lecture, seen through the eyes of a PhD candidate, was its discourse, which was oriented towards the future of international adjudication and its calling upon us, the youngest generation of scholars and practitioners, to help the Court face the challenges and opportunities of the modern era.

Rumiana Yotova  
PhD candidate, St. Catharine’s College

## Karen Lee becomes joint Editor as the *International Law Reports* celebrate 150 Volumes



Sir Christopher Greenwood and Sir Elihu Lauterpacht at the reception in the Wren Library

The publication of the 150th Volume of the *International Law Reports* was marked by a wonderful reception in the Wren Library, Trinity College in November 2012. Editors Sir Christopher Greenwood and Sir Elihu Lauterpacht spoke about the history of the ILR and the successes and challenges it has faced, and continues to face, in an ever-changing and competitive market. The celebrations were marked by the announcement that Karen Lee, who has worked as Assistant Editor on the *Reports* for many years, was to become Joint Editor with effect from volume 151. Congratulations to all.

This year, ILR volumes 151, 152 and 153 were published and volumes 154 and 155 submitted for production to Cambridge University Press. More information on the series can be found on the Centre’s website:

[http://www.lcil.cam.ac.uk/publications/  
international-law-reports](http://www.lcil.cam.ac.uk/publications/international-law-reports)



# Roundtable on Armed Conflict and Aggression: Questions of Individual and State Responsibility

Held on 14 May 2013, Finley Library



A Visiting Fellows Roundtable was held at the Finley Library at the Lauterpacht Centre for International Law on 14 May 2013, chaired by Professor Christine Gray. The panel comprised of Dr Vaios Koutroulis, Ms Meagan Wong, Mr Vladyslav Lanovoy and Dr Douglas Guilfoyle. The Discussion was centred on ‘*Armed Conflicts and Aggression: Questions of Individual and State Responsibility*.’

Vaios presented a paper on ‘*Dealing with armed conflicts before domestic courts: war crimes and the classification of armed conflicts by the national judge*.’ Acknowledging that domestic courts play a central role as organs implementing international humanitarian law, he focused his discussion on the role of the national judge with respect to qualifying the acts committed by armed forces as a violation of international humanitarian law, and possibly a war crime, in order to evaluate the role of the national judge as an effective means of implementing international humanitarian law. Drawing upon case-law from domestic courts relating to war crimes and the classification of armed conflicts, he examined whether national judges subscribed or deviated from a mainstream or ‘orthodox’ interpretation of international humanitarian law rules.

Meagan, who is currently writing her PhD on the crime of aggression, presented the underlying question of whether individuals can be considered victims of the crime of aggression. Titled, ‘*The victim of the crime of aggression: the interplay between international criminal law, jus ad bellum and jus in bello*,’ her presentation explored this question through three legal frameworks. Upon examination of these frameworks, she argued that individuals may not be considered victims of the crime of aggression, thus highlighting a fundamental difference between the crime of aggression from the other core international crimes (genocide, crimes against humanity and war crimes). As the crime of aggression is the only international crime where the victim is exclusively the entity of a state, she discussed the ramifications of this in the context of the legal interest of the victim state under international law.

Vladyslav, who is working on his PhD on complicity, examined ‘*War reparations and the law of state responsibility: examples from the past, challenges for the future*’. Examining select problems that war reparations raise from the perspective of the law of state responsibility, he discussed the approach taken by the international dispute settlement mechanisms to the evaluation of damages and the applicable causal standards. He examined the practice of the United Nations Compensation Commission and the Eritrea-Ethiopia Claims Commission to shed some light on questions of law and fact, discussing the commonalities and discrepancies in the approach that these two mechanisms took with respect to *jus ad bellum* and *jus in bello* claims. He questioned whether monetary compensation constitutes a legally appropriate remedy for direct injuries to state other than those involving actual material or pecuniary loss.

Douglas, who is on sabbatical from his position as Reader at the Faculty of Laws, University College London, presented on ‘*Sustaining conflict and exacerbating violence: state failure to contain small arms proliferation*.’ He considered the limitations of instruments dealing with small arms and light weapons, with special reference to the Arms Trade Treaty 2013 (which was adopted only a few weeks later). Examining explanations of why small arms and light weapons have proved so hard to regulate, he focused on the question of the state responsibility of arms exporting states for the ‘negative externalities’ of the legal arms trade.

The Roundtable Discussion was organised by the four panellists in light of their mutual research interests. The event was open to all members of the Lauterpacht Centre, as well as the wider audience of the law faculty and the general public. We were delighted by the attendance and would like to extend our gratitude to Karen Fachechi for her assistance in the coordination of the event.

*Meagan Wong, Visiting Scholar  
PhD Candidate, Leiden University*

# Cambridge Conference on Interpretation in International Law: Leading experts call for cross-cutting approach as crucial issue draws debate



The Keynote Panel (from left): Sir David Baragwanath, Ingo Venzke, James Crawford (chair), and Andrea Bianchi

In August 2013 the Lauterpacht Centre for International Law and the Faculty of Law at the University of Cambridge hosted a major conference on interpretation in international law. The event was convened by Daniel Peat and Matthew Windsor, two PhD candidates at Gonville and Caius College, and was attended by over 100 delegates.

The conference was developed on the basis that the relevance of interpretation to the academic study and professional practice of international law is inescapable. Yet interpretation in international law has not traditionally been examined as a distinct field and foundational concept. Given that international law is constituted, in practical terms, by acts of interpretation, there is a need for greater methodological awareness of interpretive theory and practice in international law.

The keynote panel, chaired by Professor James Crawford (University of Cambridge), included presentations by: Professor Andrea Bianchi (The Graduate Institute, Geneva), who used the metaphor of the game to explain how interpretation works in international law; Sir David Baragwanath (President of the Special Tribunal for Lebanon), who considered the interpretive challenges of adjudication across the common law/civil law divide; and Dr Ingo Venzke (University of Amsterdam), who interrogated the implications of considering international law as a language for interpretive practice.

A second plenary panel, chaired by Sir Michael Wood (20 Essex Street/International Law Commission), comprised presentations by: Professor Duncan Hollis (Temple University), who considered the existential function of interpretation in international law; Professor Jean d'Aspremont (Manchester University), who distinguished content-determination and law-ascertainment in interpretive theory; Professor Rene Provost (McGill University), who discussed interpretation in international law as a

transcultural project; and Jens Olesen (Oxford University), who elucidated the relationship between interpretation and politics.

The topics of other panels included: treaty interpretation; interpretation and legal theory; interpretation and adjudication; interpretation and the sources of international law; interpretation and the interpreters; and interpretation and rights.

Professor Philip Allott (University of Cambridge) closed the conference by canvassing the programmatic, preventent and pragmatic dimensions of interpretation in international law.

In their presentations and discussions, the many distinguished academics and practitioners in attendance met the following objectives of the conference. Rather than focusing exclusively on textual interpretation or doctrinal exposition, the identity of the interpreters and the epistemic communities involved in interpretation should be foregrounded. Rather than focusing exclusively on how to interpret, who has or claims to have the authority to interpret should be examined. Rather than approaching issues of interpretation with disciplinary insularity, the practice and process of interpretation should be approached in a cross-cutting way.

*Matthew Windsor and Daniel Peat*



From the left: Jean d'Aspremont, Jens Olesen, Rene Provost, Duncan Hollis, Sir Michael Wood

## Cambridge Dialogue: Technology Transfer and Intellectual Property Protection in the Climate Change Context



From left: Peter Lunenborg, Margaretha Wewerinka, Markus Gehring, Wei Zhuang and Michael Waibel

On 27 April 2013, a Dialogue on *Technology Transfer and Intellectual Property Protection in the Climate Change Context* took place at the Faculty of Law, University of Cambridge. It was organised by Ms Wei Zhuang, a visiting scholar of the Lauterpacht Centre for International Law. Dr Markus Gehring chaired the meeting.

The objective of the dialogue was to contribute to a better understanding of the issues relating to state responsibility, transfer of technology and intellectual property rights (IPRs) in the climate change context. Article 4(5) of the United Nations Framework Convention on Climate Change (UNFCCC) makes technology transfer an international obligation on Annex I countries (developed countries) towards developing countries. Technologies are crucial in addressing and mitigating climate change. Yet, innovation of low-carbon technologies and ownership of related IPRs are highly concentrated in a few industrialised countries and transfer of technologies to developing countries is too slow to enable a global low-carbon transformation. Therefore, technology transfer and IPRs remain essential elements of any international climate regime.

Panelist Ms Margaretha Wewerinka (Visiting Scholar at the Lauterpacht Centre) argued that provisions of human rights law could be construed as imposing positive obligations on states to ensure universal access to life-saving technologies. Studies showing strong correlations between energy poverty, lack of adaptive capacity and human rights deprivations in low-income countries informed these obligations. International law required that practical effect be given to human rights obligations of international cooperation and to parallel obligations under Article 4(5) of the UNFCCC.

Panelist Mr Peter Lunenborg from South Centre (a Geneva-based intergovernmental organisation) argued that the extent, scope and regulation of IPRs are naturally part of international

climate discussions. He also noted that net payments of royalty and license fees by low and middle income countries increased from USD 2.5 billion in 1995 to USD 30 billion in 2011, largely induced by the implementation of the TRIPS agreement. Yet, IPRs may not be a barrier in all cases. He contended that multilateral commitments on technology transfer are well established but not implemented or operationalised. The Technology Executive Committee set up under the UNFCCC should play an effective role in transfer of environmentally sustainable technologies (ESTs).

Ms Wei Zhuang discussed the North-South divide over the role of IPR protection in EST transfer and she explored constructive solutions to reconcile this divergence. She noted that industrialised countries and multinational companies generally consider strong IP protection as an essential condition for EST transfer. In contrast, developing countries and technology users often contend that IPRs, particularly patents, act as a barrier to EST transfer necessitating the loosening of IP rules for ESTs. These polarised positions threaten the long term prospects for combating climate change. Ms Zhuang proposed the use of TRIPS flexibilities and the establishment of the patent pools for ESTs as possible solutions.

Dr Michael Waibel provided an eloquent commentary on the presentations. The workshop was well attended and received numerous comments from IP lawyers, climate change specialists and engineers. Further discussion continued during the reception that followed, which was kindly sponsored by Cambridge University Press.

*Wei Zhuang, Visiting Scholar, 2013*

## Legal Tools for Peace-Making Project update



It has been a year since the launch of the Legal Tools for Peace-making Project and the research team, comprising Dr Tiina Pajuste and Ms Alexia Solomou, has made steady progress in developing the analytical database of peace agreements – the first stage of the project. The team has compiled a collection of around 920 treaties and set up an arrangement with the UN Department of Political Affairs (Policy and Mediation Division, Mediation Support Unit) to share any new peace agreements that either party comes across. Having collected the treaties, the next step was to create a matrix of general and specific issues or topics that would be covered in the database. This matrix was derived from an initial scan of the available agreements and the issues they tend to cover. It was then developed throughout the analysis of the

treaties and after consultations with the UN Mediation Support Unit (MSU).

The team has made significant headway in the categorisation of the peace agreements and aims to have that stage of the project done by early autumn. For two months over the summer the project team was helped along by enthusiastic and studious US undergraduate, Benjamin Schaub, who conducted supervised research experience under the guidance of Dr Tiina Pajuste.

A dedicated area has been created in the projects section of the Lauterpacht Centre’s website ([www.lcil.cam.ac.uk](http://www.lcil.cam.ac.uk)), to raise awareness of the project and to provide a location for the publication of results and research outputs. Different sections provide background information on the project: aim and objectives, project background, conceptual elements, methodology and outputs.

Collaboration with the MSU has been maintained throughout the project. We have agreed to let the MSU host the database on their website (<http://peacemaker.un.org/>), mirroring it on the project homepage. After a phone conference with the project team, the MSU IT specialists started building the database in August. Until now a Word-based database has been in use. A visit and a presentation to the MSU is planned for early winter 2013. Once the database is completed, the project team will move on to compare and evaluate practice through case studies addressing major topical areas.

*Tiina Pajuste, Legal Tools Project*

## Customary IHL Project Update

Researchers of the Project on Customary International Humanitarian Law (IHL), a joint undertaking of the British Red Cross and the International Committee of the Red Cross (ICRC), continue to enjoy having their academic home at the Centre. Their numbers were strengthened in January 2013, when Dr Michael Carrel, Natália Ferreira de Castro and Vanessa Holzer were joined by Helen Obregón Gieseken. Helen had previously worked as a diplomatic attaché at the ICRC in Geneva.

The aim of the Customary IHL Project is to update the practice section of the ICRC’s customary IHL database ([www.icrc.org/customary-ihl](http://www.icrc.org/customary-ihl)). The database offers free access to the original ICRC study on customary IHL of 2005. The Customary IHL Project has been adding new national and international practice, with the most recent update having taken place in the summer of 2013.

The ICRC database is a global reference resource for customary IHL. Easily navigated, the database allows practitioners and academics to carry out research into the customary IHL rules identified by the ICRC and the supporting practice. The database covers a variety of countries and topics, ranging from Algeria to Zimbabwe and from attacks against combatants to war booty. It is widely used by experts in the field, with a sizeable and growing number of visitors per year and the most frequently searched themes reflecting current debates in IHL. For example, in 2012 Belgium drew on practice collated on the ICRC customary IHL database in its submissions to the ICJ in the Case concerning

Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal). Moreover, the Sixth Committee of the UN General Assembly noted that during its deliberations on the status of the 1977 Additional Protocols, some delegations welcomed the updating of the ICRC database on customary IHL.

The British Red Cross researchers based at the Centre are affiliated with Wolfson College, where they gave a well-received presentation on the Customary IHL Project in early 2013. A podcast of the presentation, which was organised by the Wolfson Law Society, is available on the University SMS (<http://sms.cam.ac.uk>).

**Stop Press!** Congratulations to Vanessa Holzer on her appointment as Project Lead with effect from Jan 2014, following Michael’s retirement this December.



The CIHL team (left to right): Helen Obregón, Vanessa Holzer, Natália Ferreira de Castro, and Michael Carrel

## State Responsibility: The General Part by James Crawford



Extract of *Aerei* by Alighiero Boetti, 1989.

In *Aerei*, featured on the front cover of James Crawford's new book, *State Responsibility: The General Part*, Alighiero Boetti uses line drawings of modern and historical aeroplanes to create 'skies crammed full of aircraft – multiplying like viruses, showing order and chaos, speed and stillness, at once exhilarating and terrifying'. 'Order and chaos, speed and stillness, at once exhilarating and terrifying' – perhaps Boetti was reflecting on the international legal system when he painted the work?

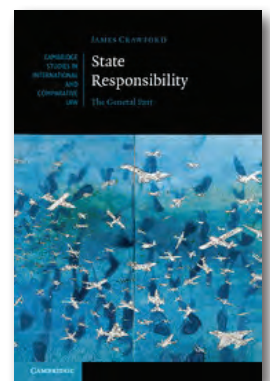
*State Responsibility: The General Part* develops on the work Professor Crawford undertook as ILC Special Rapporteur on State Responsibility. It incorporates developments which have occurred since the ILC completed its work on the topic in 2001 and critically analyses the present law and its functioning. The book also deals with issues which the ILC declined to deal with – including issues relating to the responsibility of states for the acts of international organizations – and considers questions of dispute settlement.

The 700-odd pages of the book are divided into six parts, commencing with a part which explores the historical development of state responsibility and outlines basic

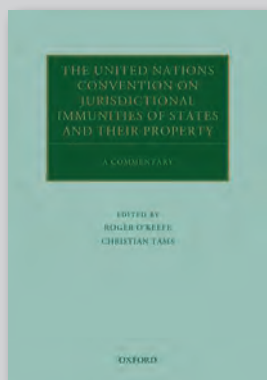
concepts. The second part considers attribution and the third breach – material and temporal aspects of breach and circumstances precluding wrongfulness. Part four of the book addresses collective or ancillary responsibility and includes chapters on responsibility for breaches of communitarian norms and succession to responsibility. Cessation and reparation are covered in the fifth part, with the final part dedicated to issues relating to the implementation of responsibility, both through judicial and extrajudicial processes.

The book also represents a significant milestone in the *Cambridge Studies in International and Comparative Law* series, being the 100th book published in the series, which was first established in 1946.

Callista Harris



## United Nations Convention on Jurisdictional Immunities of States and their Property: A Commentary by Roger O'Keefe and Christian Tams



Congratulations to Centre Deputy Director, Dr Roger O'Keefe, whose book, edited jointly with Professor Christian Tams, was published by Oxford in March.

The book provides article-by-article commentary on the text of the Convention, complemented by a number of chapters highlighting general issues beyond the scope of any single provision, such as the theoretical underpinnings of state immunity, the distinction between immunity from suit and immunity from execution, the process leading to the adoption of the Convention, and the general understanding that the Convention does not extend to criminal matters. It presents a systematic analysis of the Convention, taking into account its drafting history, relevant state practice (including the considerable number of national statutes and judicial decisions on state immunity), and any international judicial or arbitral decisions on point.

<http://ukcatalogue.oup.com/product/9780199601837.do>

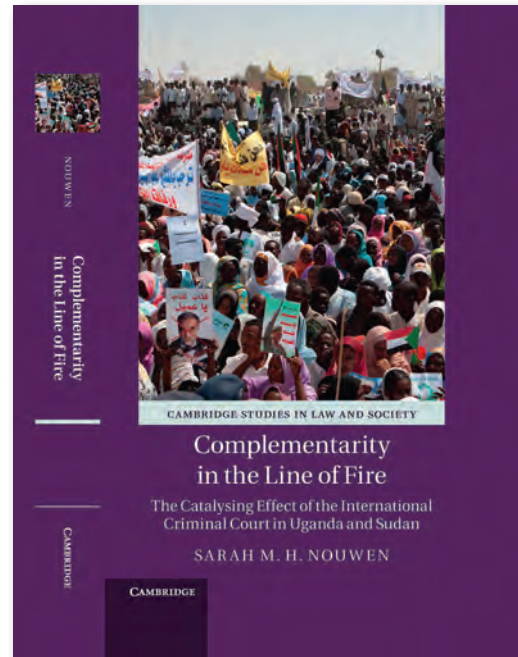
# Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan (CUP, 2013)

Alexia Solomou interviews Sarah Nouwen about her forthcoming book

In his inaugural speech in 2003, the first prosecutor of the world's first permanent International Criminal Court paradoxically defined a successful court as one without cases. Luis Moreno-Ocampo explained this counter-intuitive statement by reference to the principle of complementarity, according to which national justice systems, rather than the ICC, have the primary right to investigate and prosecute crimes within the Court's jurisdiction. Academic literature and policy-makers expected complementarity to have a catalysing effect on domestic justice systems: because of complementarity states were expected to start investigating and prosecuting international crimes, and reform their justice systems to make that possible. But what happened in reality?

This is the question that inspired Lauterpacht Fellow Sarah Nouwen to investigate complementarity's catalysing effect in two countries in which the ICC has opened investigations: Uganda and Sudan. Has complementarity had a catalysing effect and if so, what kind of effects has it catalysed? How have these effects been brought about? Who are the key actors? Do the ICC and states parties support domestic proceedings, or do they focus on establishing the ICC? These were the questions with which Sarah Nouwen went to the ICC, Uganda, Sudan and many other places in the world, eight years ago.

Combining a rigorous legal assessment of complementarity with insights from International Relations, socio-legal studies and anthropology, the



resulting book has just been published by Cambridge University Press: an occasion for an interview.



AS: So, what have you found: has complementarity catalysed any effect?



SN: The principle of complementarity has catalysed all kinds of effects: crimes within the ICC's jurisdiction were incorporated into domestic law, even in Sudan, a state not party to the Rome Statute. Domestic courts specialising in international crimes proliferated. Some less predicted effects appeared, too: adultery—where committed 'within the framework of a methodical direct and widespread attack'—was included in the list of crimes against humanity; mini ICCs mimicked the Court not just in subject-matter jurisdiction, but also in terms of budget, discourse and audience.

But the ICC also catalysed processes that went against the encouraging effect on domestic proceedings that

complementarity was expected to have: states outsourced the responsibility for investigations and prosecutions to the ICC; mediators took the topic of accountability off the peace-talks agenda because the ICC was already dealing with the issue; human rights activists' operational space was reduced, rendering the domestic promotion of international norms, including those related to accountability, more difficult.

Notably, the one and only effect that is directly relevant for an invocation of complementarity before the Court, namely the initiation of genuine domestic investigations and prosecutions of crimes within the ICC's jurisdiction, is for the most part yet to occur in Uganda and Sudan.

AS: Does the book contain findings that are relevant beyond Uganda and Sudan?

SN: I hope so. In tracing the processes that brought about these effects and

seeking to explain effects that were catalysed and the non-occurrence of widely expected effects, the book reveals several developments and paradoxes that pertain to the work of the ICC generally. Let me just give a few examples:

The principle of complementarity has been living a *double life*. Legally, complementarity is a technical admissibility rule in the Rome Statute that determines when the ICC may proceed with the investigation or prosecution of a case within its jurisdiction. However, writers, diplomats, activists and legal practitioners have also conceptualised complementarity as a 'big idea' that entails more than its technical legal meaning. Complementarity as big idea includes 'responsibilities' and even obligations for states. In many of its manifestations, complementarity as big idea bears little resemblance to the admissibility rule. Consequently, complementarity's legal

life differs remarkably from the rhetoric on complementarity as big idea. It is mostly complementarity as 'big idea', rather than the technical admissibility rule, that has had catalysing effects. But because complementarity as big idea has little to do with the legal life of complementarity, these domestic reforms will usually not be sufficient, and sometimes irrelevant, to an admissibility challenge in the ICC.

By merely referring to a state's duty to exercise criminal jurisdiction over international crimes in a preambular recital while at the same time establishing a court on the very assumption that states fail to investigate and prosecute, the Statute contains the seeds of the *normative paradox of complementarity*. As the Ugandan referral illustrates, the creation of the ICC can actually erode the pressure on states to discharge the responsibility to investigate conflict-related crimes.

The idea of a state's responsibility or obligation to investigate or prosecute domestically has been further weakened by the emergence of a *pro-ICC ideology*. This ideology is based on three sometimes interrelated beliefs, namely that:

- (1) international courts mete out better justice than domestic systems;
- (2) international crimes, particularly those committed by those bearing the greatest responsibility, must be prosecuted as international crimes and, ideally, in international courts, because such crimes have been committed 'against humanity'; and
- (3) at a minimum, once the ICC is involved the fledgling Court must be seen to succeed. Whilst lacking a legal foundation, this ideology has been at times more powerful than complementarity and has thus thwarted the latter's catalysing effect.

Complementarity's catalysing effect has also been limited as a result of *misrepresentation* of the principle. The use of complementarity in its literal sense (references to the ICC and domestic courts 'complementing' each other, with the ICC trying the 'big fish' and domestic courts the 'small fry') is misleading because the admissibility rules giving effect to the principle of complementarity apply to *all* cases before the ICC, including those pertaining to persons bearing the greatest responsibility.

The book ends with the *catalysing effect paradox*: to date, the ICC has been most keen to exercise its jurisdiction in precisely

those cases where complementarity has had the greatest chances of catalysing genuine domestic proceedings. And this has much to do with the ICC's position of a legally independent court that is heavily dependent on political support.

AS: Why did you start this research?

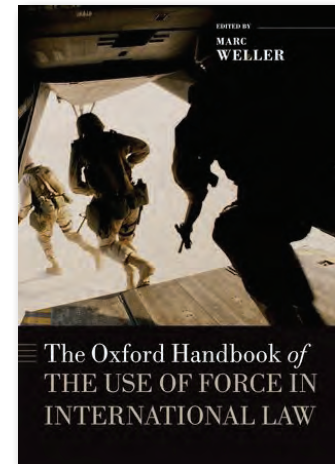
SN: Studying law in the Netherlands, beginning in the year that the Rome Statute was signed, I unconsciously came to equate international law with peace, justice and many other good things. But when I then studied in South Africa, did research in Senegal, and worked in Sudan, a nagging feeling emerged that many of those very dominant yet quiet assumptions that underpinned my faith in international law were supported by very little empirical evidence. One episode in Sudan in particular brought home how the field of international criminal law generally, and the literature on complementarity specifically, lack empirical grounding for its great assumptions, ambitions and ideals. I thus decided to see how complementarity works *in the line of fire*, there were it matters most, namely in countries where there are strong indications that international crimes have been or are being committed and not investigated or prosecuted domestically.

AS: And then?

SN: Seven years followed of studying complementarity's catalysing effect theoretically and empirically, conducting field research at the ICC, in Uganda and Sudan, and several hundreds of interviews all over the world. To me personally, those interviews were the most enriching part of the research. They showed the very diverse thinking among hundreds of unique individuals on the role of the ICC in this world. Whatever people think of the theories, I hope that the book's empirical material, ranging from pictures of the Sudanese anti-ICC campaign to excerpts of interviews with community leaders, government ministers, ICC officials, intelligence officers and ICC suspects, will be useful to many people, whether academics, practitioners, or other people whose lives are affected by the ICC, one way or the other.

AS: Thank you, Sarah. We look forward to reading your book!

## Use of Force Handbook goes to Press



In an impressive feat of scholarly endeavour, endurance and indeed patience, the *Oxford Handbook of the Use of Force in International Law* was recently submitted to press.

The prohibition of the use of force in international law is one of the major achievements of international law in the past century. The attempt to outlaw war as a means of national policy and to establish a system of collective security after both World Wars resulted in the creation of the United Nations Charter, which remains a principal point of reference for the law on the use of force to this day. There have, however, been considerable challenges to the law on the prohibition of the use of force over the past two decades.

With over sixty experts assessing the law from a range of inter-disciplinary perspectives, the Handbook, due for publication in March 2014, is set to provide the most comprehensive, authoritative and detailed study into the use of force in international law yet available. The Editor is enormously appreciative of all the time and effort invested by the contributors.

<http://ukcatalogue.oup.com/product/9780199673049.do#>

## Enforcement of Penalties and Rule of Law: A New Emerging Trend in the Interpretation of Article 7.1 ECHR?

by Jon-M. Landa

The principle of legality, as crystallised in Article 7 of the European Convention of Human Rights (ECHR), occupies a central place in the ECHR because it is one of the few provisions that cannot be derogated even in war times or times of public emergency (Article 15 ECHR). Its prominent place within the ECHR contrasts, however, with the limited use the European Court of Human Rights (ECtHR) has made of it. Some figures could illustrate it at best: since the first time the ECtHR found a violation of Article 7(1) in the case of *Welch v. The United Kingdom* in 1995<sup>1</sup>, there has been a record of only 33<sup>2</sup> violations of the first paragraph of this mentioned provision. Moreover, if we consider the period of time previous to the case of *Kafkaris v. Cyprus* [2008],<sup>3</sup> the total number of cases where it had been declared a violation of the principle of legality, descends to eleven.<sup>4</sup>

I will argue that case law interpreting Article 7(1) ECHR has evolved since the landmark decision of *Kafkaris v. Cyprus* [2008] in a way that enables a better control of the enforcement of penalties. In doing so the ECtHR has broadened its interpretation related to the scope of the principle of legality in a way that has been recently confirmed by another important judgment, *Del Rio Prada v. Spain* [2012], currently pending before the Grand Chamber.<sup>5</sup> Therefore, Article 7(1) ECHR has begun to be applied in a growing number of cases and, particularly where the control of the execution of penalties is at the centre of the discussion.

From the very beginning, regardless of its limited invocation, the ECtHR succeeded in establishing a framework of principles for the interpretation of Article 7. Traditionally, there have been two key points for identifying a violation of Article 7 ECHR: first, the concept of penalty; and, second, complementary criteria ascertaining whether the penalty had been accessible and foreseeable. We could consider these two key points as two progressive filters that the ECtHR utilises in order to discern whether safeguards of the rule of law should apply to a particular case.

According to this two-stage analysis, a range of safeguards have been applied by the ECtHR to ensure the rule of law. New definitions of crime and more severe penalties are banned when they are applied retroactively. Moreover, the ECtHR prohibits analogies in *malam partem* (i.e. against the convict) because criminal law must not be extensively construed to an accused's detriment. The Court establishes at the same time a general requirement of precision in defining criminal matters.



These principles, however, are not applied as far as enforcement of penalties is concerned. Since 1986,<sup>6</sup> the European Commission of Human Rights, followed by the ECtHR,<sup>7</sup> made a distinction between a penalty as a such, likely to be scrutinised in light of Article 7 ECHR, and the manner of its execution. This changed after the judgment in *Kafkaris v. Cyprus* [2008] was handed down.

The *Kafkaris* case dealt with a mandatory life sentence imposed to the applicant on three counts of premeditated murder, where there was an apparent contradiction between its meaning according to the substantive definition of the penalty<sup>8</sup> and its real meaning in practice, up to a maximum of 20 years, following the interpretation of General Prison Law of Cyprus<sup>9</sup> in combination with its enforcement and daily application by the prison authorities. *Kafkaris*, the applicant, while in prison, lost his chance for early release, after having served a term of 20 years because the Supreme Court of Cyprus declared unconstitutional the afore-mentioned prison regulations that considered life sentence as tantamount to 20 years imprisonment. The applicant claimed a violation of Article 7 due to a retroactive application of the consequences of that new mentioned ruling of the Supreme Court of Cyprus.

The ECtHR dealt with this matter in a peculiar way. First, it broadened the concept of penalty including the fundamental aspects of enforcement as a matter of scrutiny under Article 7. This teleological approach considers aspects of the execution as part of the concept of penalty. The ECtHR expanded the concept of 'penalty' by incorporating substantive criteria, such as the impact of the measure and its severity. In so doing, it paved the way for applying further criteria (accessibility and foreseeability). In this regard, though, a second major change took place: a new criterion was added, the so-called "quality of law" standard. As a consequence, there is a new perspective stretching the potential of accuracy or precision of the law as the central safeguard inherent to the principle of legality.

The ECtHR could have dealt with this issue in a straightforward way. In light of the fact that the conviction from the domestic criminal authorities stipulated that the penalty of life sentence would entail imprisonment for the entire biological life, the ECtHR could have simply dismissed the case by holding that it was a matter related to the manner of its execution and, therefore, falling out of the scope of Article 7 ECHR.

In the aftermath of *Kafkaris*, the activity of the Court has increased in a remarkable way expanding the scope of Article 7 ECHR to cases dealing with enforcement of penalties. The Court is now more likely to find violations of Article 7. Between the handing down of judgment in *Kafkaris* in 2008 and July 2013, the ECHR has found violations of Article 7(1) in 22 cases: amongst



them at least nine related to core aspects of enforcement and another two more – up to eleven – involving issues subject to protection by the Convention in applying the new criterion of the “quality” of law.<sup>10</sup> The increase of cases, including those that deal with enforcement matters, is remarkable. Paradigmatic examples could be found in two important leading cases: *M v. Germany* [2009] and more recently *Del Rio Prada v. Spain* [2012].<sup>11</sup>

In the case of *Del Rio Prada*, a convicted terrorist was imprisoned without the opportunity of early release due to a retroactive application of new criteria for accumulating penalties by the sentencing Court (Audiencia Nacional).<sup>12</sup> Spain argued against a conviction of the applicant, Del Rio, based on the fact that criteria for accumulating penalties belong to the manner of execution, not to the substantial definition of the penalty. By contrast, the ECtHR applied the same interpretation adopted in the *Kafkaris* case. Therefore, the Court denied that the new approach of the Supreme Court of Spain putting forward a new interpretation of accumulation criteria would amount to a “mere” operation of enforcement. The ECtHR stressed, first, its substantial nature as far as it affected the severity of the penalty. Enforcement of fundamental aspects of the penalty were subject to Article 7 ECHR scrutiny, as a result of a whole, substantive, consideration of the law. This new broader concept of penalty paves the way for the second, and definitive, line of argument. The ECtHR went beyond appearances and found a substantive violation of Article 7 for retroactive application of a heavier penalty than the one that was applicable at the time the criminal offence was committed. The new interpretation made by the Supreme Court of Spain, as it was applied to the case under scrutiny, was found to be in violation of Article 7 of the Convention.

#### CONCLUSION

Since the leading *Kafkaris* case there is a new pattern of interpretation, which has led to a remarkable increase in the

number of violations of Article 7(1) ECHR. This evolution in the interpretation of Article 7 ECHR affects fundamental aspects of the execution of penalties.

This new interpretation was reached based on two main lines of argument: *first*, a broader concept of penalty that attracts those aspects considered relevant in terms of impact upon the penalty, although formally they could be placed at the stage of enforcement; *second*, a more intensive scrutiny of the foreseeability and accessibility standards: i.e. a higher demand of preciseness for the law. When the “quality” of the law is put at risk (either because from the beginning there is not any clear foreseeable penalty or because it was clear but *ex post facto* there is change for worse) the violation of Article 7 is going to be declared.

According to the new view, Article 7 ECHR could play – is already playing – a very important and complementary role in reassuring that European prison policy sticks to human rights standards. In doing so Article 7 has become an unexpected ally of Article 5 ECHR.

Jon-Mirena Landa

Jon-M. Landa is Associate Professor in Criminal Law at the University of the Basque Country, Spain. He was a Visiting Fellow of the Centre from July to August in 2011 and in 2012.



#### Postscript

During my visiting fellowship at the Lauterpacht Centre (July-August 2012) I completed an article on this topic, which has been summarised above. A full published version in Spanish may be consulted online at: <http://www.indret.com/pdf/924.pdf>

#### ENDNOTES

1 *Welch v. The United Kingdom*, Judgment 9.02.1995, Application no. 17440/90.  
 2 According to the information available through HUDOC database (last access 12 August 2013): *Welch v. The United Kingdom*, Judgment of 9.02.1995, Application no. 17440/90; *Jamil v. France*, Judgment 8.06.1995, Application no. 15917/89; *Baskaya and Okcuogly v. Turkey*, Judgment 8.07.1999, Application no. 23536/94 and 24408/94; *Ecer and Zeyrek v. Turkey*, Judgment 27.02.2001, Application no. 29295/95 and 29363/95; *E.K. v. Turkey*, Judgment 7.02.2002, Application no. 28946/95; *Veeber v. Estonia*, Judgment 21.01.2003, Application no. 45771/99; *Gabbarri Moreno v. Spain*, Judgment 22.07.2003, Application no. 68066/01; *Puhk v. Estonia*, Judgment 10.02.2004, Application no. 55103/00; *Unsal Ozturk v. Turkey*, Judgment 4.10.2005, Application no. 29365/95; *Pessino v. France*, Judgment 10.10.2006, Application no. 40403/02; *Dragotoni and Militaru-Pidhorni v. Romania*, Judgment 24.05.2007, Application no. 77193/01 and 77196/01; *Kafkaris v. Cyprus*, Judgment 12.02.2008, Application no. 21906/04; *Kononov v. Latvia*, Judgment 24.07.2008, Application no. 36376/04; *Korbely v. Hungary*, Judgment 19.09.2008, Application no. 9174/02; *Sud Fondi Srl and others v. Italy*, Judgment 20.01.2009, Application no. 75909/01; *Liivik v. Estonia*, Judgment 25.06.2009, Application no. 12157/05; *Scoppola v. Italy*, Judgment 17.09.2009, Application no. 10249/03; *Gurguchiani v. Spain*, Judgment 15.12.2009, Application no. 16012/06; *M. v. Germany*, Judgment 17.12.2009, Application no. 19359/04; *Kallweit v. Germany*, Judgment 13.01.2011, Application no. 17792/07; *Mautes v. Germany*, Judgment 13.01.2011, Application no. 20008/07; *Schummer v. Germany*, Judgment 13.01.2011, Application no. 27360/04 and 42225/07; *Jendrowiak v. Germany*, Judgment 14.04.2011, Application no. 30060/04; *O.H. v. Germany*, Judgment 24.11.2011, Application no. 4646/08; *Mihai Tomav. Romania*, Judgment 24.01.2012, Application no. 1051/06; *Alimucaj v. Albania*, Judgment 7.02.2012, Application no. 20134/05; *K. c. Germany*, Judgment 7.06.2012, Application no. 61827 /09; *G. v. Germany*, Judgment 7.06.2012, Application no. 65210/09; *Del Rio Prada v. Spain*, Judgment 10.07.2012, Application no. 42750/09 (referral to the Grand Chamber 22.10.2012); *Canmilleri v. Malta*, Judgment 22.01.2013, Application no. 42931/10;

*Kasymakhunov and Saybatalov v. Russia*, Judgment 14.03.2013, Application no. 26261/05 and 26377/06; *Vyerentsov v. Ukraine*, Judgment 11.04.2013, Application no. 20372/11 (not definitive); and *Maktouf and Damjanović v. Bosnia and Herzegovina*, Judgment 18.07.2013, Application no. 2312/08 and 34179/08.

3 *Kafkaris v. Cyprus*, Judgment 12.02.2008, Application no. 21906/04.

4 Amounting so far (July 2013) to 22 the decisions of the Court that had declared the violation of Article 7(1) ECHR.

5 *Del Rio v. Spain*, Judgment 10.07.2012, Application no. 42750/09 (referral to the Grand Chamber 22.10.2012 and hearing held on 20 March 2013).

6 *Hogben v. The United Kingdom*, European Commission of Human Rights Decision 3.03.1986, Application no. 11653/85.

7 See, for all, recently *Del Rio v. Spain*, Judgment 10.07.2012, Application no. 42750/09, & 48.

8 Sections 203 (1) and 203 (2) of the Criminal Code of Cyprus (Cap. 154).

9 Prison (General) Regulations of 1981 and the Prison (General) (Amended) Regulations of 1987, adopted under section 4 of the Prison Discipline Law (Cap 286).

10 See footnote 2 above.

11 *M. v. Germany*, Judgment 17.12.2009, Application no. 19359/04; *Del Rio Prada v. Spain*, Judgment 10.07.2012, Application no. 42750/09 (referral to the Grand Chamber 22.10.2012).

12 Article 70 of the 1973 Spanish Criminal Code stated 30 years term of imprisonment as a maximum for cases of accumulation of penalties. The prison benefits had been systematically applied to that maximum reducing in fact the time to be served in prison. However, the case-law of the Spanish Supreme Court changed suddenly in 2006 (Judgment 197/2006 of 28 February) introducing the so-called ‘Parot doctrine’, under which prison benefits were to be applied to each sentence individually, and not to the maximum. As a result, for the case of the applicant, the maximum imprisonment term to be served was not reduced in any way after the application of the prison benefits.

## Visiting Fellows and Scholars: Views from...

**Katarzyna Gałka**  
**Bohdan Winiarski Scholar**  
**Cardinal Stefan Wyszyński University**

I spent three months at the Lauterpacht Centre of International Law (May - July 2013) as a Bohdan Winiarski Scholar. I am aware that this will not come as a surprise to you, but it was a really fruitful time for me, from all perspectives: research, professional contacts and friendships.

The Centre provides a great environment for work. As a visiting scholar, I had hoped to find in Cambridge a shelter from the buzz of everyday life - a place where I could fully focus on my research project. But the Centre, with its truly inspiring and stimulating research atmosphere, is much more than that.

The most important asset of the Lauterpacht Centre is its people: from eminent experts in international law to talented junior researchers and visiting fellows. I had many informal discussions on my project and different aspects of international law with my colleagues. These conversations, sometimes longer sometimes shorter, were without exception intriguing and inspiring. So were the events, which I attended: Friday and evening lectures, the visiting fellows panel, talks and debates. The many possibilities to exchange views and opinions was one of the aspects that I appreciated the most (morning coffee – what an excellent idea!)

Of course, life is not only work. I will remember all BBQs, picnics, garden parties, punting (not as difficult as I thought and such fun!), the Shakespeare summer festival, Sunday visits at the Orchard in Grantchester etc. – unforgettable moments that I shared with my friends and colleagues from different continents.

*Katarzyna Gałka, 3 May 2013 - 31 July 2013*



**Prof Wang Chen-Yu (Blake)**  
**Assoc. Prof of Law, National Taipei University, Taiwan**

*Research: Toward trade liberalization and decontrolization under Preferential Trade Agreements*

It's really a good idea for living at LCIL in Cambridge sunny days!!

My research project here is about “trade liberalization and decontrolization under preferential trade agreements (PTAs)”. Since the WTO was established after 1995, PTA/FTA and Custom Unions have rapidly increased through GATT XXIV and GATS V toward regional economic integration. The diversity rules of RTAs not only heavily impacted the multilateral legal regime, but also formed an even more complex and conflict trade legal framework, which is often called “Spaghetti Effects”. Although globalization brought economic growth and prosperity, it simultaneously caused an unequal distribution of wealth and social inequalities in certain countries. Critics of anti-globalization blamed WTO with current problems, such as social inequalities, higher unemployment rate, and conflicts between developed and developing countries.

Taiwan first experienced trade liberalization after entering into WTO in 2002. It has conducted trade negotiations with Mainland China (ECFA) and other trading partners (ECA with Singapore and New Zealand) in recent years. Facing trade liberalization, many people are concerned about the problems of unemployment, uncertainty, and inequalities will be sooner and worse in Taiwan. All these debates are currently ongoing in Taiwan as well as many WTO members (especially emerging economic entities). My research explores the relationship between *trade liberalization and decontrolization on domestic laws*, and provides the suggested solutions for above issues.

Thanks to the LCIL administrative committee and staff for arranging my stay at the Centre. I enjoy the friendly working place of the LCIL, not only for the excellent academic environment, but also for many friends, who are visiting fellows from around the world. Although my university only allows me to stay here three months during the summer, I will never forget the “Blue Door” of 5 Crammer Road, the lovely Bahrain Library, the beautiful garden, as well as all interesting activities arranged by the centre. I really hope that I can visit LCIL for longer period in the near future.

*Blake C.Y. Wang, 14 July – 14 October 13*



## Mamadou Hebie Brandon Research Fellow, Graduate Institute, Geneva

The Brandon Research Fellowship gave me an opportunity to conduct my research at the Lauterpacht Centre for International Law in a vibrant and welcoming community of international lawyers. My stay at the Centre extended from 1<sup>st</sup> July to 30 August 2013. Though relatively short, it was very productive and enriching both on the academic and the social levels. During these two months, I converted my Ph.D thesis on 'The Agreements between Colonial Powers and Local Political Entities as Title of Territorial Sovereignty' into a seventy pages article.

My research at the Centre benefited tremendously from the environment of the Centre. I want to thank the Director and the Vice-Director of the Centre for showing me kindness in meeting and sharing their academic experience and pieces of advice with me. The diversity of researchers at the Centre and the variety of their research topics make of the multicultural environment a stimulating place to learn and to take part in instructive discussions. Unfortunately, my stay took place during the academic holidays, during which academic events at the Centre were rare, but the daily coffee-break provided regular opportunities to meet with other researchers, in addition to the frequent social activities.



Cambridge is a great place for academics. I really love this city. It has the quietness that any soul longs for when it needs to call into existence those things that are yet to be. At the same time, it provides opportunities for taking well deserved breaks (from time to time). In fact, I look forward to my next opportunity to visit the Centre.

*Mamadou Hebie, 1 July - August 2013*

## Erica Oppenheimer Snyder Fellow 2012, Maurer School of Law, Indiana

*Research: Criminal law and international human rights; International investment law*

Following graduation from Indiana University Maurer School of Law, I had the privilege to be a Snyder Fellow at the Lauterpacht Centre for International Law at Cambridge University. My fellowship started in September and ended in December 2012. During my time at the Centre, my main objective was to produce a report analysing the international human rights implications of domestic prosecutions of juveniles for acts of terrorism in various countries. Likewise, I sought to expand my general knowledge of international investment law and investor-state relationships. To facilitate this latter project, I teamed up with visiting fellows Dimitrij Euler, Sheng Zhang (Jerry), and Alice Ruzza and sought guidance from Professor Michael Waibel. After numerous discussions, our group worked on collecting and developing a database of concession agreements and joint venture contracts for natural resource development, particularly excerpts containing stabilization and dispute resolution clauses.

In addition to fostering groundbreaking research, the Lauterpacht Centre for International Law also provided a warm, welcoming atmosphere to meet and have numerous lively exchanges with visiting fellows and faculty alike. During the fall 2012, my colleagues and I attended Lauterpacht Friday Lunchtime Lectures, including presenters Professor Philip Allott, Professor Marc Weller, and Sir Elihu Lauterpacht. We were even able to attend a panel discussion on the scholar and international legal practice, debuting Brownlie's *Principles of Public International Law*, eighth edition edited by Professor James Crawford.

Beyond our work, the fellows and I hosted numerous meals together on a weekly basis at the Bahrain House and the Centre, cooking authentic Chinese, Malaysian, Italian, French, German, and American food. Throughout the fall, we also celebrated holidays including Chinese New Year, Halloween, Thanksgiving, and Christmas. For example, for Halloween we decorated the kitchen at the Centre with artificial cobwebs and plastic spiders and had fifteen pumpkins delivered. Many fellows and staff carved a pumpkin for the first time and designs ranged from legal themes, such as the scales of justice, to more traditional scary faces. In November, we held a potluck Thanksgiving dinner for fellows, staff, and their families. Scholars Anna Hood and Kae Oyama helped prepare two large turkeys, which were enjoyed by everyone. Finally in December before my departure, the entire Centre staff, faculty, and visiting fellows celebrated Christmas in The Hall of Saint John's College. What a wonderful capstone to my time at the Lauterpacht Centre.

Special thanks to the administrative staff at the Lauterpacht Centre for helping arrange my visit and facilitate my research. A warm thank you also to the visiting fellows and faculty who made my time so memorable. I look forward to returning to the Centre soon and hopefully working again with such wonderful colleagues and friends.

*Erica Oppenheimer, 14 September - 19 December 2012*



# Events Diary

## Michaelmas Term Lecture Programme

Lectures are subject to change without notice and unless otherwise stated, take place in the Centre's Finley Library. Friday lunchtime lectures are usually preceded by a sandwich lunch from 12.30 pm.

Lectures are kindly supported by Cambridge University Press, (<http://www.cambridge.org/law>).

Friday	11 Oct	1pm	<b>PROF JAN KLABBERS (GRADUATE INSTITUTE, GENEVA)</b> <i>'Research as Curiosity'</i>
Friday	18 Oct	1pm	<b>PROF LOUISE CHAPPELL (UNIVERSITY OF NEW SOUTH WALES)</b> <i>'Gender Justice and Legitimacy at the ICC'</i>
Friday	25 Oct	1pm	<b>PROF GUGLIELMO VERDIRAME (KING'S COLLEGE LONDON/20 ESSEX ST)</b> <i>'The Devil and the Holy Water: Will Human Rights Tame War or will War Corrupt Human Rights?'</i>
Friday	1 Nov	1pm	<b>DR FEMI ELIAS (WORLD BANK ADMINISTRATIVE TRIBUNAL)</b> <i>'Recent Developments in the Administration of Justice in International Organizations'</i>
Friday	8 Nov	1pm	<b>MR ROBERT VOLTERRA (VOLTERRA FIETTA LAW FIRM)</b> <i>'Facts, Evidence and Causation: Practice of the ICJ'</i>
Friday	15 Nov	1pm	<b>MS PENELOPE NEVILL (20 ESSEX ST)</b> <i>'Sanctions: Current Issues of Implementations and Enforcement'</i>
Friday	22 Nov	1pm	<b>DR STEPHEN HUMPHREYS (LONDON SCHOOL OF ECONOMICS)</b> <i>'Theorising International Environmental Law'</i>
Monday	29 Nov	5pm	<b>MS BILQUEES ESMAIL (FORMERLY WITH UNHCR)</b> <i>'Nationality Laws and the Prevention of Statelessness in Sudan and South Sudan'</i>
Friday	6 Dec	1pm	PANEL DISCUSSION: <i>'International Law: the Year in Review'</i> Chaired by PROF MARC WELLER and including: PROF CHRISTOPH SCHREUER and JUDGE CHRISTINE VAN DEN WYNGAERT

## Dates for your Diary

17-20 February 2014      6pm      Sir Hersch Lauterpacht Memorial Lectures  
*'The Art of Peace'* by **PROF MARY ELLEN O'CONNELL**

Please note, this year's Lectures start on Monday 17 February, with the Q&A on the Thursday.