Sir Eli had a distinguished career in international law, combining teaching, research and practice on a broad scale. He was called to the Bar in 1950, became a QC in 1970, and a bencher of Gray’s Inn in 1983. In 1953 Sir Eli became a Fellow of Trinity College, Cambridge and was successively Lecturer and Reader in International Law in the University, being appointed an Honorary Professor of International Law in 1994.

As a member of 20 Essex Court for more than 50 years, he practiced extensively before the International Court of Justice and other international jurisdictions, as well as before the English courts. Sir Eli’s appearances before the International Court of Justice include the Nottebohm case in 1953, the North Sea Continental Shelf cases, the Constitution of the Maritime Safety Committee, the Barcelona Traction case, the Nuclear Tests cases, the Qatar-Bahrain case, the Sipadan and Ligitan case and Timor Leste–Australia in 2014.

He was ad hoc judge in the Bosnia case before the International Court, an arbitrator in NAFTA, ICSID and other arbitrations, the President of the East African Market Tribunal, and a member of the Panel of the UN Compensation Commission, the World Bank and Asian Development Bank Administrative Tribunals and of the Eritrea-Ethiopia Boundary Commission.

Sir Eli has left a permanent mark on international law through his work as author, editor and innovator. In 1956 he started the British Practice in International Law, the forerunner of similar publications in a number of other countries, from which there subsequently evolved in other hands the United Kingdom Materials on International Law. He became editor of the International Law Reports in 1960, and inaugurated the Iran-United States Claims Tribunal Reports in 1983 and the ICSID Reports in 1993. He has lectured at the Hague Academy of International Law and was a member of the Institut de Droit International. He was knighted in 1998. He received the Manley O Hudson Award from the American Society of International Law in 2005, and the Hague Prize for International Law in 2013.

Sir Eli’s professional activity has generated a huge mass of learned opinions and drafts. His published academic works include Jerusalem and the Holy Places (1968), The Development of the Law of International Organizations by the Decisions of International Tribunals (1976) and Aspects of the Administration of International Justice (1991), as well as numerous articles. He has systematically arranged and edited International Law: the Collected Papers of Hersch Lauterpacht, the fifth and final volume of which was published in 2004. In 2010 his biography of his father’s life ‘The Life of Hersch Lauterpacht’ was published by Cambridge University Press.

Perhaps his most significant innovation, at least to us, is the Research Centre for International Law, which he founded in 1983, initially in the annexe to his house at Herschel Road. Sir Eli understood that, although the University of Cambridge had long been a global leader in international law, it lacked an institution that could provide an intellectual home for international legal teaching scholarship. As the Centre’s first Director, Sir Eli pioneered a number of major research projects and introduced the annual Hersch Lauterpacht Memorial Lectures and a series of weekly talks at which students rub shoulders with judges, leading members of the Bar, scholars and
many other people with an interest in international law. In 1996 the University of Cambridge renamed the Centre the Lauterpacht Research Centre for International Law in honour of both Sir Hersch and Sir Elihu Lauterpacht to mark their distinguished contribution to international law at Cambridge, and beyond. Thanks to Eli’s leadership and personal generosity, and his ability to persuade many other generous benefactors of his vision, the Centre has developed from its relatively humble beginnings in Sir Eli’s private study into one of the world’s principal centres for the study of international law. Over six decades, he has mentored dozens of international lawyers, starting with Stephen Schwebel in the early 1950s. Among others, Christoph Schreuer in the 1970s, Christopher Greenwood and Philippe Sands in the 1980s, Daniel Bethlehem in the 1990s, Penelope Nevill in the 2000s, and Andrew Sanger in the 2010s (see his tribute below).

Following his retirement from teaching, Sir Eli continued to be a familiar face around the Centre, as founder, Emeritus Director, member of the Committee of Management and Honorary Fellow. He regularly attended lectures and events, including the annual Christmas Dinner which made him famous for his jokes, and spoke to fellows and visiting fellows about their research. He will be missed deeply by everyone at the Centre, not only as a giant of international legal scholarship and practice, but also as a mentor and friend.

The Lauterpacht Centre

Tributes and obituaries are being collected online: www.lcil.cam.ac.uk/sir-elihu-obituaries
Eli was undeniably a great scholar and a fearless advocate. His enormous contribution to the field of international law will no doubt be discussed extensively in the years to come, but I wanted to share the image of Eli that I carry in my mind. It is of a man sitting behind a mahogany desk, his head raised up, eyes grinning, with a mischievous smile that hardly conceals his generosity of spirit and his capacity and desire to empower others.

Generations of research assistants will attest to the fact that long days of work were regularly punctuated by three of the great joys of life at Herschel Road: food, laughter and companionship. The first time that I was invited to take part in the tradition of tea and crumpets at four, I thought we had missed an important meeting: ‘it’s four thirty already, we’re already late.’ No matter how much work, no matter how much pressure; always tea and crumpets at four. If work went unbroken for many hours, Eli would say something like: ‘it’s tea time now’ and everyone would rush to the kitchen.

One of Sir Eli’s passions in recent years was to retrace the life and work of his father, which resulted in a captivating biography, *The Life of Sir Hersch Lauterpacht* (CUP 2010). While working on the book Sir Eli asked me to translate from Polish several documents and correspondence, including heart-breaking letters written by Sir Hersch’s parents to their son, just weeks before they perished in Nazi-occupied Lwów. I treasure the memories of our conversations and, especially, of the image of Sir Eli reflecting on the Polish inscription on the back of a childhood photograph; even with the passage of years, he remained at heart an eternally youthful boy, full of love and devotion for his parents.

Joanna Gomula

It was Eli’s birthday (13 July) when I started work at the Centre in 1992, almost twenty-five years ago now, and we celebrated with coffee and cake in the kitchen at No 5 Cranmer Road in the customary manner. Eli was the Director of the Centre then, with the office adjacent to the kitchen, and the Centre has subsequently been renamed the Lauterpacht Centre in his and his father’s honour. The *International Law Reports*, which are based at the Centre and which were edited by Sirs Hersch and Eli, were, I know, very important to him and I am proud to be a co-editor of the series, together with Sir Christopher Greenwood.

Karen Lee

Eli was undeniably a great scholar and a fearless advocate. His enormous contribution to the field of international law will no doubt be discussed extensively in the years to come, but I wanted to share the image of Eli that I carry in my mind. It is of a man sitting behind a mahogany desk, his head raised up, eyes grinning, with a mischievous smile that hardly conceals his generosity of spirit and his capacity and desire to empower others.

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hours, the—now legendary—joke file would often make an appearance, accompanied by a smile from Eli and an occasional eye-roll from Cathy. Whether it was the one about the monkey, the colonel or the lollipop, he relished any opportunity to tell a joke—sometimes the same one repeatedly—and did so with an infectious and unrivalled delight. He remains the only advocate to elicit laughter from every judge of a fifteen-strong panel during oral arguments at the International Court of Justice. And then there was the companionship—whether sharing a whisky (or marmite tea) at two in the morning after finishing work, eating together in the kitchen, or simply enjoying company and conversation.

Eli’s generosity, mentorship and care for others was unparalleled. A visit during the winter months often meant wearing an extra thick jumper; not because I was cold, but to avoid a cross examination on my decision to dress so inadequately for the cold weather (‘it’s important to keep your tubes warm’). In the early days, he would lambast me for not wearing a cycling helmet. Eventually he gave me two £20 notes and told me to buy the ‘safest helmet I could find.’ I thanked him but tried to decline the money, insisting that I would buy my own helmet; but he persevered: ‘think of it as employee insurance.’ This inherent kindness was surpassed only by his generosity of time and knowledge, the genuine and sustained interest that he took in people (‘why is it that you enjoy running—more importantly, what are you running from?’), and his willingness to help you out, often before you even realised that you needed anything.

Like so many I owe a profound personal and professional debt to Eli. He hired me—a young man barely out the gate, with no true experience of international law—at a time when I didn’t know what I wanted to be. His faith in me in the early days (‘I hired you because I want to hear your opinion, not because I want you to be deferential to me’), his gift of knowledge and wisdom, and his continued guidance and mentorship have led me and many others to their position in life. He always wanted people to achieve their best and was in every way a great mentor (birthday messages contained good wishes for the ‘auspicious occasion’, but were coupled with the hope that the forthcoming year will be more productive than the last). But as I recall the image of Eli to my mind, it is the laughter, the love of life, and the companionship that I will treasure—and miss—the most.

Andrew Sanger
Was the threat of military action against Syria a violation of the prohibition on the threat or use of force? LCIL Director Eyal Benvenisti discusses whether nations, as the ‘organs of humanity’, have the right to use force to prevent crimes against humanity.

‘We Syrians are human beings of this world, and the world must stop the Assad regime from killing us. Now.’ With these words, Mr Yassin al-Haj Saleh, a Syrian writer and activist, ended his appeal to the United States Congress to authorise a military strike against the Assad regime after its use of chemical weapons on 21 August 2013.

The US Congress was at the time considering President Obama’s request for authorisation to use military force against the Assad regime’s stockpile of chemical weapons. In explaining his move, President Obama made a similar argument to the one stated by Mr Saleh:

“We are the United States of America, and we cannot and must not turn a blind eye to what happened in Damascus. Out of the ashes of world war, we built an international order and enforced the rules that gave it meaning. And we did so because we believe that the rights of individuals to live in peace and dignity depends on the responsibilities of nations.

President Obama’s statement was consistent with his general position, articulated well before the Syrian crisis began. On the occasion of receiving the Nobel Prize for Peace in 2009, he stated:

‘More and more, we all confront difficult questions about how to prevent the slaughter of civilians by their own government, or to stop a civil war whose violence and suffering can engulf an entire region. I believe that force can be justified on humanitarian grounds, as it was in the Balkans, or in other places that have been scarred by war. Inaction tears at our conscience and can lead to more costly intervention later. That’s why all responsible nations must embrace the role that militaries with a clear mandate can play to keep the peace.

The UK government was the first to support military intervention in Syria. Following what it
From the Director

deemed ‘a serious crime of international concern [that] amounts to a war crime and a crime against humanity,’ and in light of the existence of ‘extreme humanitarian distress on a large scale, requiring immediate and urgent relief,’ the British government invoked the doctrine of humanitarian intervention and stipulated that all the conditions for an attack ‘to strike specific targets with the aim of deterring and disrupting further such attacks would be necessary and proportionate and therefore legally justifiable.’ But Prime Minister Cameron decided to seek Parliament’s support for military action in Syria and his motion was narrowly rejected.

Fortunately the US pressure paid off, and on basis of an agreement between the US and Russia, Syria acceded to the Chemical Weapons Convention, and committed to destroy its entire stockpile (although later on Syrian troops employed chemical weapons on at least three occasions).

Was the threat of military action against Syria a violation of the prohibition on the threat or use of force?

It is difficult to revisit this question with clinical detachment as the voices of the desperate people of besieged Aleppo call out for our attention and help in the name of our common humanity, as they await their fate from the hands of the advancing enemy, after weeks without food, water or medicine, and under relentless and indiscriminating bombardments. The UN spokesman described the situation in Aleppo as a ‘complete meltdown of humanity’ and the UN Secretary General referred to Aleppo as ‘a synonym for hell’. But can we exercise detachment? Behind the proverbial veil of ignorance, should we answer this question when envisioning ourselves as potential victims? As potential defenders of victims?

Back in 2013, President Obama and the UK government did not fully articulate the legal theory underlying their asserted right to use of force. But Mr Saleh did, when he succinctly stated that ‘Syrians are human beings of this world.’ The underlying rationale is humanity: all human beings of this world are entitled to live in peace and dignity. One of the more fundamental rules that emerged out of the ashes of the world war and gave meaning to the
international order is the concept of crimes against humanity and the commitment that such crimes will not remain unpunished. And if punishment is both a right and a duty of all, so should be prevention. As Michael Reisman has framed this point, we have the right to act ‘before victims become victims’.

Crimes against humanity are by definition crimes committed not only against those who are physically harmed. They are at the same time committed against each and every one of us. This is what grounds the concept of jus cogens. This is why the violation of jus cogens obligations carries erga omnes consequences. Such obligations include, as the Institut de droit international suggested, ‘obligation[s] under general international law that a State owes in any given case to the international community, in view of its common values and its concern for compliance, so that a breach of those obligation[s] enables all States to take action’.

The idea of crimes against humanity affirms the assertion that all states are subject to certain pre-state norms, which, to use David Luban’s words (p. 139), were not created by any political community at all, but rather by universal human need. Their normative force does not arise from the fact that they have been positivized in the statutes of the international tribunals and a few domestic legal systems, nor from the tepid commitment of states to enforce them.

They represent every human being’s rightful demand that the political rough-and-tumble never again include the uttermost barbarism that crimes against humanity represent. Anyone who transgresses these laws is henceforth an enemy of all humans.

It is because the crimes against humanity are committed against every human being by the enemies of all humans that states have, as the organs of humanity, the right to prosecute the perpetrators. When the Israeli Supreme Court justified Israel’s right to prosecute Eichmann for crimes against humanity (not only crimes against Jews), it invoked the same idea:

the state which prosecutes andpunishes a person for that offence acts solely as the organ and agent of the international community.

The court (at para. 12(d)) cited Morris Greenspan as authority for the view that, ‘Since each sovereign power stands in the position of a guardian of international law, and is equally interested in upholding it, any state has the legal right to try war crimes, even though the crimes have been committed against the nationals of another power and in a conflict to which that state is not a party.’

Although the notion of crimes against humanity is by now entrenched with respect to universal jurisdiction for crime already committed, it is yet to be elucidated in the context of the UN Charter and
the right to use force. Article 51 of the Charter refers to the ‘inherent right of individual or collective self-defence’. If crimes against humanity are perpetrated against every human being by the enemies of all humans, the ‘self’ that resorts to self-defence surely must be every one of us. Our nations, as humanity’s organs, surely have the right to defend us.

This right has already been recognised by Grotius who articulated ‘a just cause for undertaking war on behalf of the subjects of another ruler, in order to protect them from wrong at his hands’. This just cause will be based on ‘the right vested in human society’ by those acting as a guardian, or some other person, (that) goes to law on behalf of a pupil, who is personally incapable of legal action.

A legal system that recognises certain pre-political obligations that apply erga omnes stipulates that the UN Charter is subject to those basic norms of humanity, and that its organs, including of course the Permanent Five, are bound by them. For the same reason, as highlighted by Eliav Lieblich (in his book, p. 205–6), governments that perpetrate such crimes lose their authority to oppose the defenders’ intervention. While the consequences of the breach of jus cogens norms do not necessarily enjoy the same protected status as the norms themselves (e.g., some perpetrators may still be immune from criminal jurisdiction), it remains necessary to examine whether the UN Charter restricts the right to unilateral action to put an end to crimes being committed against humanity.

And if there is a right to use force against hostis humani generis, there is a duty to do so, provided, as Grotius has suggested, that the action is likely to be of service to the victim and the defender’s own life and interests are sufficiently secured.

Of course, the exercise of this right-cum-obligation in response to an attack on humanity is subject to serious constraints of necessity and proportionality, as discussed in the UK government’s statement. Recent experience with interventions in Iraq and Libya demonstrates the concerns of abuse and misuse of military intervention, of intervention that can be more harmful than beneficial. Nevertheless, the basic tenet, that whoever perpetrates crimes against humanity attacks all humanity, seems to be beyond reproach, and should serve as the starting point for any analysis. The possibility of abuse should not become an excuse for evading the responsibility to protect ‘the human beings of this world’ by exercising universal jurisdiction and even, in extreme circumstances and under strict conditions, by military intervention. Grotius acknowledges the concern of using intervention as a pretext, but he adds, ‘a right does not at once cease to exist in case it is to some extent abused by evil men’.

Of course, all this is easier said than done. In his last press conference at the White House in December 2016, President Obama described ‘hours of meetings, if you tallied it up, days or weeks of meetings where we went through every option in painful detail, with maps, and we had our military, and we had our aid agencies, and we had our diplomatic teams, and sometimes we’d bring in outsiders who were critics of ours,’ that led him to conclude that ‘unless we were all in and willing to take over Syria, we were going to have problems, and that everything else was tempting because we wanted to do something and it sounded like the right thing to do, but it was going to be impossible to do this on the cheap.’

In these difficult days for the very idea of us as ‘human beings of this world’ and the bearers of rights and obligations erga omnes, it is perhaps important to reiterate commitment to this idea and to do whatever is possible to stop the enemies of this idea. ‘Now.’

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1 Grotius DE JURE BELLII AC PACIS (On the Law of War and Peace) (Francis W. Kelsey 1925) (1625) Book II, Chapter XXV, part VIII.
2 Id., and part VII.
Professor Philip Allott appointed Honorary Fellow of the Lauterpacht Centre

Professor Philip Allott LL.D FBA, Professor Emeritus of International Public Law at the University of Cambridge, has been appointed an Honorary Fellow of the Lauterpacht Centre. Professor Allott has been a Fellow of Trinity College since 1973, and a member of the Cambridge University Law Faculty since 1976. He has been involved with the Lauterpacht Centre since its inception.

Prior to joining the University, Professor Allott was a Legal Adviser in the British Foreign and Commonwealth Office and a member of HM Diplomatic Service. He was for some years a member of a group of five professors from different countries advising the then Head of the Legal Service of the European Commission on matters of International Law.

The main focus of Professor Allott’s academic work has been the re-conceiving of the international system in terms of a philosophy of Social Idealism. His publications in this area have been widely influential, and include Eunomia: New Order for a New World (OUP, 1990), The Health of Nations: Society and Law beyond the State (CUP, 2002) and Eutopia: New Philosophy and New Law for a Troubled World (Edward Elgar, 2016).

Professor Allott gave the first lecture in our Lent term Friday lunchtime series (see page 56).
The Cambridge International Law Journal (CILJ) succeeds the Cambridge Journal of International and Comparative Law (CJICL) which was established in 2011 by the postgraduate students of the Cambridge University Law Faculty.

CILJ is a double-blind, peer reviewed journal with a broad focus on international law. The Journal provides a platform for both young and well-established academics to publish outstanding research on cutting edge, highly topical international law issues alongside, and in dialogue, with each other. CILJ has recently entered into partnership with Edward Elgar Publishing who are responsible for the publication of the Journal from 2017 onwards. Edward Elgar’s commitment to high quality, original scholarship in international law reflects the values of the Journal.

This year, the Journal is headed by its Editors-in-Chief, Lan Nguyen and Niall O’Connor as well as an Editorial Board comprising postgraduate students at the Law Faculty and researchers of the Lauterpacht Centre. The Journal’s close relationship with the Lauterpacht Centre has been strengthened with the appointment of Professor Eyal Benvenisti as our Honorary Editor-in-Chief. We are also supported in our activities by an Academic Review Board made up of distinguished academics and practitioners.

CILJ publishes two issues per year around April and September. The first issue is based on an open call for papers, while the second issue is composed of selected papers from the Journal’s annual Conference. This year’s Conference is sponsored by Monckton Chambers and will be held on 23 and 24 March 2017 with the theme ‘Transforming Institutions’. The Conference focuses on both international law and European Union law. Additionally, CILJ accepts submissions throughout the year for its blog which forms an integral part of the Journal’s engagement with the international academic community.

More information: http://www.e-elgar.com/cilj

Cambridge International Law Journal launched

We were delighted to welcome Professor Christine Chinkin to the Centre in October 2016, in order to deliver the 2016 Hersch Lauterpacht Memorial Lecture series. Professor Chinkin is Emerita Professor in International Law and Director of the Centre for Women Peace and Security at the London School of Economics, as well as a William Cook overseas faculty member of the University of Michigan Law School and an academic member of Matrix Chambers.

Professor Chinkin’s lectures, titled ‘International Law and Women, Peace and Security’ discussed what is now known as the Security Council’s Women, Peace and Security agenda following the Council’s adoption of Resolution 1325 in October 2000. She then addressed the notions of ‘peace’ and ‘security’, especially their conjunction with ‘women’, as well as the status of WPS under international law, and how international law engages with the concept of peace. She concluded by considering whether the Women, Peace and Security agenda can constitute an international legal regime that conforms with the realities of women’s lives and even have some transformative impact on the structures and processes of international law. The three evening lectures were followed by a lively and stimulating Q&A session.

Professor Chinkin’s lectures are available to stream or download online:

- Part 1: ‘What is the women, peace and security agenda under international law?’
  [Link](http://sms.cam.ac.uk/media/2354651)

- Part 2: ‘Women and peace’
  [Link](http://sms.cam.ac.uk/media/2354675)

- Part 3: ‘Women and security’
  [Link](http://sms.cam.ac.uk/media/2354692)

The 2017 Hersch Lauterpacht Memorial Lectures will be given by Professor Anne Peters on 7–9 March. See page 57 for further details.
The Lauterpacht Centre for International Law, University of Cambridge is pleased to invite applications for the 2016 Brandon Research Fellowship (Brandon Fellowship), funded by a generous gift in 2009 by Mr Michael Brandon MA, LLB, LLM (Cantab.), MA (Yale) (1923-2012) and by Mr Christopher Brandon in 2013.

BRANDON FELLOWSHIP 2017

The Brandon Fellowship is intended to cover a stay of a minimum of one acceptance period (approximately 11–13 weeks) at the Lauterpacht Centre for International Law and has a maximum value of £4,500; any additional travel or other expenses will be the responsibility of the selected Fellow. The Fellowship is tenable between October 2017 and September 2018. Two awards may be made if the strength of the field warrants it.

The Brandon Fellow will undertake a project on some aspect of public or private international law or international arbitration while based at the Lauterpacht Centre. Candidates must specify a project in their application. Candidates working in areas connected to LCIL fellows’ projects and activities are given particular consideration.

REQUIREMENTS

Candidates for the Brandon Fellowship must comply with the following:

- Fellows must produce a report of their work in English at the end of their Fellowship and deposit with the Lauterpacht Centre any publication resulting from the work undertaken during the Fellowship. The support received from the Brandon Research Fellowship at LCIL should also be acknowledged in the publication;
- be fluent in English and at least one of French, German or Spanish;

Preference will be given to candidates who are nationals of members of the European Union; members of the Commonwealth; Argentina; Brazil; Chile; China; Japan; Panama; Serbia; Switzerland; and the United States of America. Preference will be given to candidates who do not have the means to come to the Centre, and who have not yet been to the Centre. Applications from regions or countries underrepresented among former LCIL visiting fellows are particularly welcome.

HOW TO APPLY

Applications should consist of the following documents:

- a completed application form (including an outline of the proposed research);
- the candidate’s CV (curriculum vitae) (maximum 4 pages);
- two letters of reference.

The application form may be downloaded from the Lauterpacht Centre website: http://bit.ly/2clzqRc. All documents should be provided in English. The letters of reference should be sent by post or email directly by the referees. Both the application and the references must be received by the deadline. Late or incomplete applications will not be considered.

Applications should be sent to the Lauterpacht Centre Administrator by email at admin@lcil.cam.ac.uk or by post to Brandon Research Fellowship, The Administrator, Lauterpacht Centre for International Law, 5 Cranmer Road, Cambridge, CB3 9BL, United Kingdom.

DEADLINE: 21 MARCH 2017

The deadline for applications, including the letters of reference, is 21 March 2017. Receipt of applications will be acknowledged if sent by email but only successful candidates will be contacted. The successful candidate(s) will be informed within one month of the closing date. Candidates should not contact the Lauterpacht Centre with questions for which information is already provided in this announcement.
People @ the Lauterpacht Centre

Lorand Bartels appointed Specialist Adviser to the House of Commons Select Committee on International Trade

Congratulations to Lauterpacht Centre Fellow Dr Lorand Bartels, who has been appointed as a Specialist Adviser to the House of Commons Select Committee on International Trade.

The International Trade Committee was created by the House of Commons in October 2016 to examine the expenditure, administration and policy of the Department for International Trade and its associated public bodies. Specialist Advisers provide expert advice to the Committee team and Members by making written contributions to briefing and draft reports and oral contributions at Committee meetings. Last month, the International Trade Committee announced an inquiry into UK trade options after Brexit; the first evidence session can be watched online on Parliament TV.

Fellows’ news

Lorand Bartels gave the paper ‘Legal Aspects of Brexit and UK Trade Agreements’ at the University of Nottingham School of Law in November 2016. He contributed two blog posts on the International Centre for Trade and Sustainable Development website, analysing the UK’s position in the WTO after Brexit, and looking at the likely legal consequences (see also the interview with Lorand in this issue of LCN, page 18). Lorand has also been engaged as part-time Senior Counsel at Linklaters, advising them on Brexit-related trade law issues.

Joanna Gomula organised a symposium on the tobacco plain packaging and Tuna/Dolphin disputes, which it is hoped will be the first in a series of Centre events on recent developments in international trade and investment litigation. The symposium took place at the Lauterpacht Centre.
on 30 November; see p. 46 for a full report. She was also appointed a member of a new committee of the International Law Association: the ILA Committee on the Procedure of International Courts and Tribunals. Its first meeting took place in January 2017. The 2015 Global Community Yearbook of International Law and Jurisprudence includes a note by Joanna about the WTO dispute settlement system; Joanna is also one of the three editors of the Yearbook. Joanna also edited volume 17 of the ICSID Reports, which was published by Cambridge University Press in December 2016.


Henning Grosse Ruse-Khan is organising (with Lionel Bentley) the CIPIL Annual Spring Conference, which seeks to explore the interplay between intellectual property and human rights (11 March, in Cambridge).

Karen Lee continues her work as Co-Editor of the International Law Reports. Six volumes of the ILR were published in 2016 and she is currently working on volume 171. She attended the European Society of International Law conference in Riga in September 2016.

Brendan Plant delivered a presentation on the use and treatment of evidence by the ICJ in the Whaling case at the Queen Mary University of London School of Law on 23 September 2016. The event was organised to mark the publication of Whaling in the Antarctic (Brill, 2016) a volume edited by Malgosia Fitzmaurice and Dai Tamada.

Andrew Sanger was a Visiting Scholar at UC Berkeley School of Law March–September 2016. Andrew was also (with Megan Donaldson) appointed an Associate Editor of the British Yearbook of International Law.

Jamie Trinidad has been completing his book Self-Determination, Disputed Colonial Territories, and the ‘Colonial Enclaves’ Doctrine, under contract with Cambridge University Press. He has also been working on a paper on the disputed waters around Gibraltar, which will appear in the 2016 edition of the British Yearbook of International Law.

In September 2016, Jamie spoke at a conference on the effectiveness of international criminal tribunals, organised by the PluriCourts Centre in Oslo. The paper he presented (co-authored with Avidan Kent) was on the management of amicus participation before ICTs, and it will appear in the International Criminal Law Review in 2017. Another article, ‘International Law Scholars as Amici Curiae’, also co-authored with Avidan Kent, was recently published in the Leiden Journal of International Law 29(4), 1081–1101.

Stephen Wertheim completed two chapters that are forthcoming in edited volumes: one chapter called ‘Grand Strategy: An American Power Politics’ and another called ‘Reading the International Mind: International Public Opinion in Early Twentieth Century Anglo-American Thought’. He gave a talk on the birth of US world leadership at King’s College London (October 2016) and presented papers on the concepts of isolationism and internationalism in US political discourse (Stanford University, October 2016) and on American-British relations (LSE and City University, November 2016). He also published an essay in Foreign Affairs on why Donald Trump is not an American exceptionalist, and the implications.

Rumiana Yotova’s book chapter on ‘Systemic Integration: An Instrument for Reasserting the State’s Control Over Investment Arbitration?’ was published in Andreas Kulick (ed.), Reassertion of Control over the Investment Treaty Regime (Cambridge University Press, 2016). She published a case note on ‘The Principles of Due Diligence and Prevention in International Environmental Law’ in the latest issue of the Cambridge Law Journal. The fifth edition of Rosenne’s Law and Practice of the International Court: 1920–2015, on which she acted as an assistant research editor, was published by Brill. Rumiana was invited for a one-month research visit at McGill University to work on a project with Professor Bartha Knoppers.
We are happy to welcome the following new members of staff to the Lauterpacht Centre:

Cédric Apercé joined in January as a British Red Cross Research Fellow on the joint British Red Cross/International Committee of the Red Cross (ICRC) project on customary international humanitarian law. Prior to joining the project, Cédric worked as an associate at the ICRC Advisory Service on International Humanitarian Law in Geneva, and as a legal assistant to the United Nations International Law Commission. He also conducted several internships with Avocats sans Frontières France, the Office of the High Commissioner for Human Rights, and the International Institute for Peace, Justice and Human Rights in Geneva. Cédric holds an LL.M. in International Humanitarian Law and Human Rights from the Geneva Academy (Switzerland), a Master in International and Comparative Law from the University of Toulouse (France), as well as a Master of Comparative Law from the Universities of Mannheim (Germany) and Adelaide (Australia). Cédric speaks French, English and Spanish.

Sabrina Boudra is a researcher on the ESRC-funded project entitled ‘What price for human rights?’ which focuses on just satisfaction in the European Court of Human Rights. Prior to this, she worked as a casework assistant for Reprieve, where she conducted research on a variety of topics relating to human rights violations occurring in the context of counter-terrorism measures. She also worked as a legal intern for the Prisoners’ Advice Service, as a researcher for Redress’ ICC programme focusing on the rights of victims before the ICC, and as a researcher for the University of Essex Human Rights Clinic on a project in partnership with the NGO Al-Haq in Palestine. Sabrina holds an LL.M in International Human Rights Law from the University of Essex, and a double degree in English and French law from the University of Essex in partnership with the University of Paris 10 Nanterre. She speaks French, English and is learning Arabic.

Hannah Maley joined in December as a British Red Cross Research Fellow on the joint British Red Cross/International Committee of the Red Cross (ICRC) project on customary international humanitarian law. Prior to joining the project, Hannah worked as a committee assistant to the House of Lords EU External Affairs Sub-Committee. She has also worked as a case adviser with the Royal Masonic Trust for Girls and Boys and prior to this as a legal assistant within the International and Group Claims department of Leigh Day solicitors. Hannah obtained her LLB in Law with French from the University of Glasgow. She also holds an LL.M in Public International Law from Utrecht University, where she specialised in international humanitarian law and international human rights law. Hannah speaks English, French and a little Spanish.

Donáta Szabó graduated from the LLM in Cambridge in 2014 and hoped to soon return to work in the Lauterpacht Centre. Her wish came true when she joined Dr Fikfak’s team for her ECtHR Just Satisfaction project. Prior to this, Donata worked in the European Parliament in Brussels and the Movement for Quality Government in Jerusalem. She had publications in the Cambridge Law Journal and the International Human Rights Law Review and was also called to the Bar in July 2016. Donata volunteers with IPSEA, an organisation providing legal advice and support to children and young people with special educational needs and their families.

Natalie Jones joined the Lauterpacht Centre in October as a Research Assistant for Dr Sarah Nouwen’s project Peacemaking: What’s Law Got to Do with It? (see page 38). Natalie is a PhD student in the Faculty of Law (Trinity College), studying non-state participation in international law-making processes. Prior to beginning her PhD she completed her LLM at the University of Cambridge (Emmanuel College), where she won the Whewell Scholarship. She holds an LLB (Hons) and a BSc in Physics from the University of Canterbury, New Zealand.

...but we are sorry to say one goodbye as well:

Emmanette Viney (right) left the Centre in December to return to Australia. Emmanette joined the Centre in April as a British Red Cross Research Fellow, working on the joint BRC/ICRC customary international humanitarian law project. We wish Emmanette all the best for the future and look forward to seeing her back at the Lauterpacht Centre soon!
Research @ the Lauterpacht Centre

The Centre is committed to the advancement of scholarship in international law through research, documentation, dialogue and publication and supports efforts to strengthen the international rule of law. We encourage multi- and interdisciplinary work and offers a home to those wishing to work and collaborate to further such aims. We also host a number of projects from which a range of outputs of relevance to international organizations, governments, NGOs and others is generated.

AJIL Unbound Symposium on the legacies of ICTY and ICTR

Eyal Benvenisti and Sarah Nouwen were the guest editors of a Symposium published by the American Journal of International Law’s digital journal AJIL Unbound in November 2016. Through this Symposium, the editors tried to broaden a debate that has been spurred by a Symposium in the paper-version of the American Journal on the ‘legacies’ of the International Criminal Tribunals for the former Yugoslavia and Rwanda. Published in times of increasing talk of a ‘crisis’ in international criminal justice, the Symposium shines a critical light on the achievements, deficiencies and conditions of possibility of the ad hoc tribunals, from multiple perspectives. Great insights are provided by Larissa van den Herik, Kelly-Jo Bluen, Karen Engle, Kirsten Campbell, Kenneth Rodman, Veronika Bilková, Bing Bing Jia, David Luban and Samuel Moyn.

The UK in the WTO after Brexit

If the UK fails to reach a trade deal with the EU after Brexit, it will have to fall back on WTO rules. Lorand Bartels, University Reader in International Law and a Fellow of the Lauterpacht Centre, spoke to *Lauterpacht Centre News* on 16 November 2016 about the legal implications of Brexit.

*Lauterpacht Centre News*: There’s been some debate about where the UK stands after Brexit in terms of its trade agreements, especially with the World Trade Organization (WTO). What’s your opinion on this?

*Lorand Bartels*: In my view, one has to look at the UK’s current position in the WTO, and that current position is that the UK is a full WTO member. Nobody has challenged this: it’s an original member under Article XI of the WTO Agreement. What is in dispute is the extent of the UK’s obligations in the WTO. As an original WTO member, one had to have what are called schedules of concessions and schedules of commitments, which are formally annexed or deemed to be annexed to the main WTO agreements: that is a requirement for original membership in *Article XI of the WTO Agreement*. Now the question is: what happens if the UK leaves the WTO? Does it have those schedules of concessions and commitments?

And the complicating factor is that – at least for trade in goods under the GATT – the document which contains the concessions that apply to UK territory has ‘European Union’ written at the top. And so there are a number of people who think that that means, when the UK is no longer part of the European Union, that this document no longer applies to the UK.

The second step is that a number of people have thought there is also a continuing obligation to have schedules of concessions as a member. The problem with that is that there isn’t: there is only an obligation to have schedules at the time of original membership. And that’s for a very simple reason, I think, which is that the schedules that were submitted for original members, including all the EU member states, are theirs, and are enforceable as theirs.

The reason I am convinced that these are the UK’s schedules is that the wording of Article XI, the original membership article, is very peculiar: ‘The contracting parties to GATT 1947 … which accept this Agreement and the Multilateral Trade Agreements and for which Schedules of Concessions and Commitments are annexed to GATT 1994 and … GATS shall become original Members of the WTO’. It’s the ‘for which’ bit that’s important, because it doesn’t say that the UK had to submit schedules for itself. There are two ways in which schedules can be submitted: you can do it for yourself, or another entity can do it for you. And this provision is clearly written with the EU in mind: everyone knew that submitting schedules in goods was an exclusive EU competence, so the UK depended on the EU to do this job for it. And the reverse is true in the area of services – in fact, the ECJ case [Opinion 1/94 re WTO Agreement (1994) ECR I-5267] actually said that the EU didn’t have exclusive competence in services. That’s why the schedule in services has everybody’s name on: the European Communities and their member states.

So, the way to understand all of this, I think, is to say that the UK had these scheduled obligations as of 1 January 1995. The role of the EU was to accept responsibility for performing these obligations. Elsewhere in the WTO, the EU also stands in for the UK in the exercise of rights, so this is at the level of exercising rights and performing obligations. The underlying rights and obligations are the UK’s.

In GATS it’s even simpler because Article XX of the GATS says that WTO member ‘shall’ annex a...
schedule. If the UK didn’t do that, then it can’t have become a member in the first place. So I think, in general, there’s a confusion with some people between the autonomy attribution level (which is who does the grunt work of speaking, essentially) and the actual underlying rights and obligations (which are those of the member states and the EU). And this has the advantage that there’s no need for renegotiation. There is one problem: some concessions in the goods schedule are expressed in quantified terms. There are tariff rate quotas, which is an obligation to allow in a certain product at a lower tariff rate than the normal one, and there is also a right to subsidise agriculture up to a certain amount. And both of these quantified commitments obviously aren’t split up between the member states and the EU in any way. And some people then say, ‘well, because we don’t know what to do about apportioning these quantified rights, it means that the schedule can’t be that of the UK’. But the thing about law is: maybe there isn’t an express rule, but you make one, you find one. There are plenty of principles for figuring this out – third parties shouldn’t be harmed, no one should benefit unduly, you look at the last 3 years of trade to get a sense of a baseline that needs to be protected… if there are negotiations, it’s negotiations on this question of law, a point of principle. The fact that one doesn’t know quite how to interpret the UK’s obligations doesn’t mean that it doesn’t have them.

**LCN**: Roberto Azevêdo, Director-General of the WTO, has suggested that there will need to be negotiations because other WTO members will disagree about the UK’s scheduled commitments.

**LB**: This is a little different from saying that they can block the membership of the UK and they get a veto over something fundamental. It is true that any submitted schedule of concessions can be rejected by any other WTO member, depending on whether it’s just a formal change (called a rectification), or it’s a more substantive change (called a modification). In these situations, all of the affected parties – which is, the member with the schedule and the other specially-affected WTO members, so not all of them – are obliged to enter into a process of negotiation, the idea being to reach an agreement that will compensate the third countries for any loss of market access. So, this does not mean that there will be any loss of market access; it all depends on what the UK does.

It’s worth noting that the EU has never – going back to 1974 at least – traded under agreed schedules of concessions. Not once. It’s always some years behind, and it’s always in the process of renegotiating because of enlargement, beginning with the UK and Ireland and Denmark [in 1973]. So, it’s clearly not a big issue. Now, if the other side thinks that it’s getting a worse deal, it can retaliate. But if it retaliates and the UK thinks that it didn’t have a right to retaliate because the other country is in a better situation anyway, the UK can bring a case. And this has happened before, and the other country will have to reduce its amount of retaliation.
– probably to zero, depending on what the UK has done. So, I think the difficulties consequent upon the UK taking the initiative and saying ‘these are our schedules’ are much exaggerated.

The first thing to do is to establish the current legal situation – so the UK will say, ‘these are our commitments’. There was a long practice under the GATT of newly-independent states doing exactly that. They would become independent, and you crossed out ‘United Kingdom’, and you wrote in ‘Jamaica’. This happened 64 times. Now, there was a specific rule for that in the GATT, which is no longer applicable. But at least this shows that the idea that you can cross out the name of a party formerly responsible for a trade schedule that applies to your territory and write in your own name when you have autonomy now and are able to accept responsibility for the performance of those obligations – that is doable, because it has been done, 64 times. None of those times involved tariff rate quotas or other quantified commitments, but that then just becomes a question of dividing up the obligations. It doesn’t touch on the fundamental principle. I don’t really think this is going to be a major issue.

This doesn’t of course mean that the outcome is good for the UK overall. The WTO is a less liberalising agreement than the EU, and so the UK is going to be faced with the standard non-discriminatory tariffs that the EU applies to all third countries unless it can reach agreement with the EU on a free trade agreement, which of course politically depends upon accepting some measure of free movement of persons, because that’s what the EU wants.

**LCN:** And on all of the remaining member states agreeing as well…?

**LB:** Well, actually not really, because it’s interesting times for EU trade agreement law and policy. It has been the practice that these quite elaborate free trade agreements like TTIP and CETA have been treated as so-called mixed agreements, in which the member states and the EU conclude the agreement together, the member states as member states, importantly. But there are only a couple of controversial areas – and by ‘controversial’, I mean whether these areas of regulation fall within the EU’s exclusive competence or not. Firstly, there’s going to be a court case relatively soon which is going to figure this out; and secondly, you can just cut them out. And if you cut them out, that means you don’t need the agreement to be ratified by all of the EU member states: it’s a decision taken by qualified majority voting, and no parliamentary ratification – so the Walloons don’t get a say! But this would be a departure in the EU’s practice. It’s just a possibility. And there’s a difference between getting agreement by the governments of the EU member states, and getting the consent of the people, because sometimes the people can feel differently.

**LCN:** There’s a perception that the UK is ill-equipped to enter into these sorts of negotiations, and that we don’t have enough people with the expertise necessary. Do you see this as a likely problem?

**LB:** I think it’s not nearly as bad as people say. There’s this concept of trade negotiators being thrown around, and apparently the European Commission has thousands of them and the UK doesn’t have enough. But what is a trade negotiator? It’s someone who sits on the front row, brandishing a text at the other side, the lead negotiator… then behind this person you have the lawyers, and behind them you’ve got the policy people and the economists, and then behind them, you’ve got the whole backroom show that puts this into action. Now, I think that the first job is a generic job of negotiating and that someone who gets the brief will be able to master the it and be able to do the job. That’s a negotiating job. If you can negotiate nuclear weapons, you can negotiate trade concessions. If you know what your constraints are and you have instructions, that is assisted by trade lawyers, who tell you what the legal implications of your offers are.
And before that ever happens, you’ve got the economists and the policy people, who formulate your position for you. I think the UK has plenty of policy people and economists. That is easy: it is a matter of understanding the UK economy, figuring out what the import-export system is – and of course, it’s now complicated with services and passporting and all this, but essentially this is the sort of job that a government should be able to do, to work out what its interests are, it is doable. After all, the UK is involved in EU regulation all the time, and when it comes to financial services, it has a big hand in writing those regulations. So I think that formulating position is really not going to tax the system very much. And so if you’ve got the negotiators, the actual negotiators which are not that many, who are negotiators, who can come up to speed on what they’re negotiating about – that’s OK. And if you’ve got all the political and economic analysis, which is think the country is capable of doing today, that’s OK. What is left, where there is almost nobody in the country, is the lawyers. Because lawyers are all in Brussels. And that is obviously a bad thing, I’m sure all our readers can agree. Now, over the period of time, it’s possible to train up the lawyers that exist in the departments in trade law, so that is a possibility, but it’s certainly true that, as of today, this sort of knowledge is quite rare, scarce, in all four departments that are involved in trade negotiations one way or another. Which is EGIS [European and Global Issues Secretariat], DExEU [Department for Exiting the EU], DIT [Department for International Trade] and the FCO [Foreign and Commonwealth Office]. Because the country’s never had to do it. So that, I think, is the gap. But it’s a temporary gap because people will learn. But given that there’s a 2-year timetable for the negotiations with the EU, assuming the EU’s even prepared to start talking about trade, then it’s not much time. It’s not that thousands of people need to be hired, but certainly you’d expect some people to be hired – and where are they going to come from? That’s a problem. They can’t come from other governments, because the primary allegiance of anyone on secondment from another government is going to be that person’s government, and that is likely to be a government that will be talking to this government, and you’ve just got a major conflict of interest problem there. They can’t come from the European Commission: that’s in the same position, even for British nationals – and, in any case, there’s an embargo on them doing other work for a year after they leave. There are law firms who can help, none really very well equipped at the moment in the UK, but that could be done. And that really leaves academics.

**LCN:** There has been a backlash against globalisation and multilateralism, and in particular against regional trade agreements such as TPP. How will this affect the UK’s ability to forge new agreements?

**LB:** I think one has to distinguish between different reasons that these agreements are unpopular. Trade agreements are unpopular in the US for very old fashioned reasons, which is that trade liberalisation means that people lose their jobs. So it’s directly linked to protectionism in a very old-fashioned sense. It’s going to be almost impossible to negotiate a free trade agreement with a country that takes that position. So we don’t know what Trump is going to do. That’s a different type of objection from the objection that trade agreements are an assertion of corporate power over public interest. Trade agreements are unpopular in the US for very old fashioned reasons, which is that trade liberalisation means that people lose their jobs. So it’s directly linked to protectionism in a very old-fashioned sense. It’s going to be almost impossible to negotiate a free trade agreement with a country that takes that position. So we don’t know what Trump is going to do. That’s a different type of objection from the objection that trade agreements are an assertion of corporate power over public interest. And the focal point for that objection is investment, because typically – and this is the case in TTIP and CETA – investment protection provisions come with tribunals to which the investor has direct access, and the payouts for government regulation that undermines the value of the investment can be very, very high. I would predict that investment agreements are not going to be bundled with trade agreements any more, because that is too much of a hot button issue. And the two issues don’t actually have anything to do with each other. If anything, you are more likely to have foreign investment when there is trade protection, so that the companies jump over the tariff wall, that gives them a head start. So there’s actually an inverse
correlation between trade liberalisation and the need for investment protection – or maybe not the need for investment protection, but let’s say the attractiveness of investing in a country. You are much more likely to invest in a country that’s protected by high tariff walls because, once you’re in the country, you get all the benefits.

The issue is to do with the perceived limits on public regulatory power that these agreements impose: the scare stories of Frankenfoods, and chlorine chickens, and hormone-fed beef. I doubt that feeling is very strong in this country. But it will make negotiations on an agreement with the EU – and with any other country that is sceptical of what trade agreements do in terms of affecting countries’ abilities to regulate in the public interest – more difficult. At the moment there is perfect free trade, in theory, between the UK and the rest of the EU, so it would be odd for this set of objections to then arise in the context of a free trade agreement that can’t be more liberalising than what’s already there. The only difference would be enforcement: is it a court that you trust, is it a tribunal that you don’t trust, that sort of thing.

I think that both problems can be fixed, either by not dealing with some of the especially controversial topics like investment arbitration, or by making sure that there aren’t any problems (for example, CETA’s not bad on that, talking about rights to regulate environmental protection and so on). As for protecting the workers… well, that is a problem. So I don’t know what the US is going to do now. Because trade agreements also have a political dimension, and I think it probably suits the new US government to have a trade agreement with a country like the UK. You can always sell a trade agreement by focusing on the export markets that it opens up, as opposed to the imports. But the problem is that the import-affected voters are very, very prominent right now in the US, in the rust belts. That’s how Trump got in. And that’s going to be a big constraint for the US on any trade agreements; usually you can balance these interests against each other, but that is going to be so sacred now for the new Trump administration that I can’t see that much balancing going on.

**LCN:** Do you feel the UK is different in this respect?

**LB:** Yes, very. People are much more polite here! But also … I think this is a very interesting country because public perception has been conditioned ever since the Corn Laws – and because of the nature of imperial economics over a hundred years – I think people are very much in favour of the concept of free trade. The British Empire was quite free-trading in its own terms, and I think that’s stuck. So the idea that the government should step in and protect your job is something that I don’t think resonates as much here.

**LCN:** And yet, that’s precisely what the government is reported to have done with Nissan…

**LB:** It’s funny because now you have a Conservative government behaving like a Labour government in the 1960s! But it’s very odd: I don’t think they’ve actually done anything. There is nothing they could have done that is of any material value to Nissan that would be legal, by definition. That’s why we don’t know what they’ve done. They can’t give them money. They can only promise that they will put their interests at the forefront of any future negotiations. But that doesn’t mean sectoral negotiations, because there’s no such thing in the WTO. A free trade agreement has to cover substantially all the trade. That means 90%, 95% of all the trade. What can be done is non-sectoral
generic subsidies, so a 10% corporation tax is OK, but that’s because it applies to all. You are allowed to divide up on a non-sectoral basis – for example, large companies versus smaller companies – so there are non-sectoral subsidies that are possible. But even then, you can’t have a subsidy which has the effect of leading to greater exports compared to local sales than before. And by before, I mean in the absence of a subsidy, not just timeline before. So again, if the idea is that money was offered to Nissan and, let’s say the domestic market is already exhausted and so necessarily production will mean that there will be a higher proportion of exports than there would have been in the absence of the subsidy, then that would be illegal, even if it weren’t specific. Whereas otherwise subsidies are illegal if they are specific to a sector, an industry or a company and they displace imported products, because that’s discriminatory, you can’t do that either. So the government’s hands are really quite tied.

LCN: This interpretation is at odds with – or rather, more nuanced than – what’s been reported in the media. Are you encountering misinformation and poor public understanding of these issues?

LB: I spend a lot of time writing to journalists! For instance, there’s a level of optimism, an idea that the UK can just have trade agreements with other countries [to replace trade with the EU]. The real problem there isn’t legal, it’s that other countries don’t want trade agreements with the UK. And there are various reasons for that. Until they know what is happening between the UK and the EU – it doesn’t apply to all countries, Caribbean countries I think would be well off to have a trade agreement – but for a lot of countries, that’s just a political reality. And for some of those countries, like Australia and Japan, that’s because the EU’s saying: well, if you do that, then we’re not going to have a trade agreement with you. And they get a choice. So some of this is really hard-nosed politics.

Then there’s also quite a bit of basic misunderstanding about the legal issues. And some of that, I have to say, comes from people who are otherwise knowledgeable in the field of trade, and who are therefore referred to and quoted by journalists, but they don’t understand the law, and they make some mistakes. For instance, there’s a tendency to equate damage to third countries as a result of Brexit with them having a right to complain about it. It’s not true. The classic example would be: you’ve got some car parts being exported from, say, Japan. They go to Sunderland to be turned into UK cars (because the cars are UK cars even though they’re owned by a Japanese company). But those cars can’t be sold in the EU competitively any more because the EU now has a 10% tariff, which means that the car parts exports to the UK don’t happen any more. And there’s clear economic damage to Japan because of that. It’s quite common for people to assume that Japan has a right to be compensated for this – the UK has acted in such a way, via an Article 50 notice, that their economic interests have been damaged. Now of course they’re not saying that the UK can’t do it, they’re just saying that if the UK does, they need to be compensated – and compensation doesn’t take the form of money in the WTO or in trade agreements, it takes the form of market access in other areas. The problem with all of this is that the case law is quite clear, and there is no guarantee in trade law that there will be a market for, in this case, car parts. But what you’re guaranteed is that you get to export them to the UK, to a market that might exist – and if the market exists, that the market is not discriminatory. But if the market dries up because the government decides that it doesn’t want any more car parts,
then that’s fine.

**LCN:** So your Japanese car manufacturer would be better off relocating to within the EU?

**LB:** Exactly, and I think that is what is going to happen. Rather than fight this out – because I don’t think there’s anything to fight about – the companies are just going to leave. And I can’t see any incentives that the [UK] government could offer – other than, say, a low corporation tax. Become Ireland. Just become a tax haven!

**LCN:** Last year, Ireland was asked by the EU to claim tax from Apple…

**LB:** Yes. But also the rules might be slightly different. What happened to Apple seemed to go a bit beyond just the standard low tax rate that Ireland’s got. So that sort of thing would be a problem under WTO law – with a different remedy – but fundamentally, the low tax that the Irish have is OK. And this country could go low-tax, as it was in the past.

**LCN:** The situation with Apple in Ireland was actually held up by pro-Brexit campaigners as an example of where the EU is stifling the ability of a country to make itself attractive to investment.

**LB:** Yes. But also the rules might be slightly different. What happened to Apple seemed to go a bit beyond just the standard low tax rate that Ireland’s got. So that sort of thing would be a problem under WTO law – with a different remedy – but fundamentally, the low tax that the Irish have is OK. And this country could go low-tax, as it was in the past.

**LCN:** So the suggestion that we can make up trade deficits by opening new markets is perhaps too optimistic?

**LB:** I think there was a tendency for [pro-Brexit campaigners] to think in terms of tariffs. I think they had a simplistic idea of what trade actually is about these days, that it’s about things that you make and then sell to other countries. Because most of what is made here, and is made anywhere, is made up of other things that come from other places. Even agriculture depends on imported fertiliser. You’re somewhere in a chain, and now the link’s been broken. You can’t just trade your way out of this by selling jam to the French or whatever it was. And even assuming you could, even assuming they wanted to buy jam or Marmite, that’s not really what’s at stake. The problem is really the – whatever the figures are – the 50% of UK production that goes to the EU. I don’t think that’s easily replaceable with other markets.

**LCN:** What next, as far as you can tell? The government has pledged to trigger Article 50 by the end of March 2017.

**LB:** Yes, I think they’ll have to. I suspect that, not only the government, but a majority in Parliament will feel the need to respect the Brexit vote, and so I think one way or another the Article 50 notice will be given within the course of the next year. What happens after that depends entirely on the EU.

**LCN:** How likely do you think it is that we’ll be able to conclude negotiations with the EU within two years?

**LB:** Well, I think there’ll be able to be negotiations on pensions and the citizenship process and all the rest of it. That’ll be fine. On the trade aspects, there’s probably two options the EU can offer, and possibly a third. One option is the same deal as now, which will be rejected here. The second option is nothing, which might have to be accepted here. And the third option – and I think this is really the only question – is something like what we’ve got now, but rebranded. So instead of talking about citizenship rights, we talk about labour rights. And the irony with this is that citizenship is a much-exaggerated concept in EU law and it essentially does boil down to labour rights anyway. So if that branding that the EU has been keen on recently can be stripped back, maybe a little bit on the flexibility side, some declarations about Jobseekers’ Allowance and so on, if the EU is prepared to help the UK on that rebranding exercise, and if the UK is willing to offer this to the people as a rebranding exercise, I think that’s the only other outcome. What’s highly unlikely to happen is something like a Canada agreement, because the EU doesn’t have sufficient interest in it. The EU does have an interest in an agreement on goods, but the UK has much more of an interest in an agreement on services. And the EU doesn’t have nearly that interest in services, and so it’s at that point that the EU is going to start talking about free movement of persons. So it might be possible to have a goods agreement, but I don’t think that’s going to help the UK. Once services come into it, which is what is important for the UK, then I think that’s going to be tied to free movement. And the analogy with Canada is wrong as well because the political context is entirely different. It’s very important to the EU not to make it seem possible to leave the EU. And the Canada agreement is not very strong on services, anyway.

**LCN:** What would be the best outcome for the UK?

**LB:** Economically the best outcome would be either remaining within the EU or finding some sort of agreement that preserves as much of the current
The EU obviously overstates its hand too. Fundamentally, you don’t need free movement in a customs union, it’s an add-on. But they see it as a cost. They know that it’s a cost, that’s why they impose it on the Swiss. It’s just part of the cost, it’s part of the price that rich countries pay.

LCN: Nationalist parties are gaining support all over Europe. Do you think we’ll see Frexit or Grexit soon?

LB: Yes, I think that it is likely. If it’s France then it’s pretty significant, as the originator of the whole project – but I think if that sort of thing happens then it’s much more likely that the EU will change from the inside. The alternative would be no EU at all – or at least, an EU with Germany and a few small states in it. So I think the French elections are going to be critical to all of this. The Greeks, not so much – it’s too small and the pain is already there. If they leave – pfft, it doesn’t matter. But the French… I think that’s important. I can’t imagine much change coming from the Germans. The Germans need the EU.

LCN: They have forthcoming elections too. But they don’t seem to have such a strong growth in nationalist, populist, anti-EU parties.

LB: Not so anti-EU, no it’s not as strong. I think the postwar mentality of the Germans is so ingrained in so many people that they know that the EU is a sort of apology. For the French, the EU is always a foreign policy vehicle, and if that’s not working out any more – and it hasn’t worked out for a while, actually, for them – if that’s not really working out then, OK. De Gaulle crashed the system before, a number of times. So they can play hardball.

On the upside, classes on EU law are going to be smaller. On the downside, classes in WTO law are going to be bigger…

LCN: So it’s always more work for the lawyers?

LB: Lawyers always win.

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The protection of intellectual property in international law

What is the relationship between intellectual property rights and human rights? How can we resolve some of the conflicts that arise when IP rights clash with interests protected in other areas of international law? Henning Grosse Ruse-Khan, Co-Director of Cambridge University’s Centre for Intellectual Property and Information Law (CIPIL) and a Fellow of the Lauterpacht Centre, talks about his new book, which examines some of these issues and sets intellectual property in a wider international law context.

Lauterpacht Centre News: What started your research looking at intellectual property (IP) issues within international law?

Henning Grosse Ruse-Khan: About ten years ago, I was hired as an IP lawyer to teach IP at the University of Leicester, and then they also asked me to teach the WTO international economic law course to the LL.Ms. I had written my PhD just before that, looking at a particular question of reciprocity in the context of a particular IP protection system in the EU, but I never really had tried to comprehensively understand wider notions of international economic law. Teaching that course forced me to really branch out and try to look at dispute settlement, treaty interpretation and so forth from a broader perspective.

Traditional IP lawyers deal with private rights and see IP law as a sort of technical subject that’s essentially about providing usually strong protection for right holders, because the outcomes – the intellectual creations – are considered to be beneficial for society. But these lawyers are not necessarily general international law experts. And at the same time, you have people who come from a human rights angle or even an environmental law angle, and look at IP as something which potentially creates conflicts with, say, rights for access – access to medicines, access to food. So in a way, IP as a subject is primarily dealt with by private law professionals who see it as their domain, but the impact side of IP has often been looked at by people who come from the human rights or from the broader general international law area, and they look at IP as a potential area which creates conflicts, or tensions at least, with the aims – human rights, biodiversity, climate change rules – that others would want to pursue.

My experience as a private lawyer who had to branch out and teach WTO law exposed me to some of these broader concepts in general international law. Initially, I wrote about similarities between trade, investment and IP – so, still within the broader international economic law framework. But then I tried to look beyond that and understand the relations between, say, environmental law treaties which have rules on technology transfer, technology which at the same time often is protected by patents – for example, how do rules in the CBD [Convention on Biological Diversity] relate to rules in the TRIPS [Trade-Related Aspects of Intellectual Property Rights] agreement? And there are separate debates about human rights and its relation to intellectual property, about investment treaties and how they protect intellectual property… I’ve been working on a range of these different topics for the last 10 years, and I’ve tried in this book to take a broader,
more holistic perspective. I've used well-accepted, traditional tools of public international law: for example, if we look at the TRIPS agreement and if the TRIPS agreement says something in a particular provision, well, can we use, for example, human rights arguments or rules or provisions or rules from the CBD to inform our understanding of the TRIPS provisions? This idea of systemic integration is nothing new, it has been even applied in the IP context before. But I try to go beyond these traditional tools, to use these traditional tools and apply them to more novel questions and provide more comprehensive answers – and I also try to develop separate tools and methods to look at these relationships in a progressive manner. So you have on the one hand more orthodox, traditional approaches which are applied in the book to specific questions, and on the other hand more progressive tools to provide alternative views and additional insights. For example, I use concepts derived from private international law (conflicts of law) to look at the possibility of resolving some of the overlaps, tangents or collisions found in public international law.

LCN: How does your book cover these issues?

HGRK: The book is divided into five parts. The first part begins by discussing these different tools – traditional and non-traditional – as I just mentioned. In parts two, three and four, I divide the broader perspective on IP in the international law context into three sub-questions. Part two looks at tendencies within IP treaties to continuously provide stronger and stronger protections. So a controversial area for example in the TPP [Trans-Pacific Partnership] or TTIP [Transatlantic Trade and Investment Partnership] are the specific provisions on intellectual property, because these provisions in the last 20 years, in a whole range of regional and bilateral treaties, have always tended to expand protection for rightholders. And at the same time, the TRIPS agreement has more and more been assessed for the flexibilities and rights it still leaves developing countries to decide what is best for themselves for IP. But these bilateral treaties have tended to reduce this policy space. So I looked at how far whether these bilateral treaties undermine the flexibilities of the TRIPS agreement, and whether there are there any limits to this? The traditional approach has always been to set only minimum standards in these agreements, leaving countries free to decide whether they want to provide more protection. And there's no upper limit, there's no ceiling to this.

I have tried to rely on notions in general international law of having a treaty amongst some members to a wider treaty in order to understand whether there may be any limits to modifying the provisions of that treaty amongst some of its contracting parties. This often raises the question of whether this wider treaty (say, TRIPS) is one which includes integral obligations rather than reciprocal obligations. Based on an earlier research project at the Max Planck Institute, I've tried to understand some of the provisions of TRIPS in a way which then gives them an almost constitutional position within international IP law. This doesn't make them any sort of jus cogens rules – they're not even phrased as binding provisions – but they set out common objectives of what all WTO members consider to be the utilitarian objectives of an IP system. These provisions [articles 7 and 8 of TRIPS] are, by the way, among the few provisions in the TRIPS agreement which have been informed by proposals from developing countries. TRIPS in its negotiation history stems primarily from proposals the US and other IP-exporting countries put forward and which have often been significantly informed by Industry demands. This has dominated the outcome of the TRIPS agreement in terms of the treaty as we have it. But countries like Brazil and India have been able to influence some provisions. And the common objectives and principles of IP protection, for example, are part of the overall
Research

TRIPS that encourage to strive for an overall welfare-enhancing IP system. Addressing the questions that arise when bilateral or regional treaties significantly depart from the TRIPS objectives is one of the issues that part two of the book on relations amongst international IP treaties looks at.

In the third part, I move from relations within the international IP system to looking at relations between traditional IP treaties and what I call ‘alternative’ rule systems or legal orders that allow rightholders to claim protection for their creations or inventions. Interestingly, that’s human rights law on the one hand, and investment law on the other. Under human rights law there’s the notion of a right to property, which is available not only to natural persons but to legal entities as well. I use the European Convention on Human Rights (ECHR) as an example, to assess how the European Court of Human Rights (ECHR) has applied this right to property to IP rights, and to contrast this with the traditional protection available under the IP treaties.

For example, an IP treaty may give you a right as a state to issue a ‘compulsory license’ (i.e. allowing other companies to manufacture a patented technology, without authorisation of the rightholder, for example because affordable access to the technology is essential for your population). Here, a question would be, well, can these notions of the state allowing someone else to produce a protected technology be considered a form of expropriation, as something which interferes with the right to property? Based on cases decided by the ECtHR, I looked at how this sort of protection for IP under human rights law compares to protection under the traditional IP treaties. And then did the same, more or less, with investment law: investment protection covers, under most of these bilateral investment treaties, intellectual property as a form of protected investment, and there have recently been high-profile cases where rightholders as foreign investors have relied on investment protection in order to complain about certain measures countries have taken to limit IP rights. The most prominent example is probably plain packaging for cigarettes [see p. 46 for a report about a symposium on this topic that was held recently at the Lauterpacht Centre]. Rightholders have not only complained that this is a breach of their right to property, and have pursued this under national constitutional law, but they have also taken steps to sue, for example, Australia and Uruguay under bilateral investment treaties, claiming that this is essentially an expropriation, a breach of the fair and equitable treatment standard, and so on. So again, I am using these examples to look at how investment protection can protect intellectual property rights, and in particular whether the public

![Stribild, a combination drug used to treat AIDS/HIV. Other HIV drugs have been subject to compulsory licensing in Brazil and Thailand. Photo: JörgenMoorla, used under a CC BY-SA 4.0 licence via Wikimedia Commons.](image)
interest safeguards embedded in the IP system – especially under TRIPS – can somehow be imported or can be taken into account when we look at these protections under an investment treaty. Vice versa, based on the Award in the case against Uruguay, one needs to assess whether concepts such as the right to regulate under customary international law apply to TRIPS, or whether that has been ‘contracted out’ by means of more specialised rules in the international IP system. So the third part of the book looks at alternative regimes in international law providing protection for intellectual property.

The fourth part moves away from these ‘alternative’ systems of protection and towards areas which have often been used, especially by developing countries, almost to create a conflict with international IP protections. In the nineteen eighties and nineties, developing countries saw that it would not be easy to pursue their own interests, in particular to foster technology transfer, in international IP treaties such as TRIPS – they simply had to accept a lot of demands by the North in order to be part of the WTO. So these countries have tried to include in the CBD, for example, provisions which declared state sovereignty over genetic resources. Genetic resources at that point became – and still are – an important input factor for creating new medicines, new cosmetics, and so on. Being able to rely on genetic resources from the Amazon basin or from other bio-diverse regions is essential for a lot of life science companies. In the early nineteen eighties, an FAO [UN Food and Agriculture Organization] understanding on plant genetic resources for food and agriculture was explicitly based on the notion of common heritage of mankind, and it seems that developing countries had hoped that this approach would allow them to use freely some technologies or plant varieties which had been developed from genetic resources and were then protected by IP rights. That didn’t work out – arguably because IP treaties continued to grant private rights over technologies and other human interventions based on genetic resources, such as the 1991 version of a treaty on the protection of plant varieties (UPOV 1991) and the TRIPS Agreement. Then, in the late 1980s or early 1990s, the G77 shifted its position from the common heritage approach to a state sovereignty approach: the concept of state sovereignty – and there’s an interesting link to Surabhi’s work! – over natural resources was put in place almost as to create a conflict with private IP rights, such as those protected under the TRIPS agreement.
and that such protection must be modified in order to achieve coherence between the two treaties. The argument is that, if we have state sovereignty over genetic resources, you cannot give private rights over modified versions and other utilisations of these genetic resources, including technologies developed on the basis of genetic resources, because these rights fail to respect and even interfere with our basic control and rights over these resources. A means to resolve this tension between state control and private rights is further developed in the CBD and its Nagoya Protocol with regard to the notion of benefit sharing: the idea is that, if you develop technologies based on genetic resources, then you have to share the benefits, including by means of access to and transfer of such technology, with the countries where these resources originate.

So I’m looking again at how these provisions are phrased, and what effectively they do and do not do. Here, the question arises: is there a right under the CBD for developing countries to claim that these technologies need to be transferred? And can this be relied upon in a way to override IP rights? Unfortunately for these countries, the provisions in bio-diversity treaties such as the CBD are drafted in a way which includes certain caveats – subject to, for example, the effective and adequate protection of intellectual property – so there isn’t really strong evidence that the notion of state sovereignty currently operates in a way that would allow, say, to override or otherwise limit IP protections under the TRIPS agreement, or to give preference to the CBD over TRIPS.

To some extent, that is quite a sober realisation about what these environmental law treaties have effectively not been able to achieve. In the fifth part of the book, I try nevertheless to see how these mechanisms within international IP treaties can be understood and interpreted in the light of environmental law concepts of state sovereignty, the notion of common but differentiated responsibilities in climate change law, and other concerns which have been expressed in the human rights instruments or even in international trade law. Here, the flexibilities and options within the principal IP treaties such as the TRIPS agreement are far-reaching and do allow a lot of policy space for countries to align interests and concerns from distinct global legal orders. Coming back to the more traditional, orthodox tools developed in part one of the book, it’s easy to give effect or put an emphasis on biodiversity concerns, or climate change concerns, when interpreting and applying the TRIPS agreement – primarily because most of the provisions of that agreement contain so much constructive ambiguity. So the last part of the book
takes the insights of primarily of part three and four, and imports them into international IP law. The main idea is to show the level of integration that can be achieved – both on the basis of more orthodox tools of treaty interpretation and systemic integration, but also on the basis of alternative approaches based on conflict of laws methods.

LCN: Do you think that IP law will increasingly be seen in this sort of broader international context, that we’ll increasingly see these kind of conflicts between human rights and individual property rights – especially in view of global threats like climate change?

HGRK: Yes. There are examples of developing countries who tried in the 1970s to reduce protection under copyright treaties in order to provide access to textbooks in local languages. So there were already debates about that in the 1970s. This critique of IP is not new at all: even in the nineteenth century, we had controversies amongst then developing economies in Europe about the role of intellectual property, in particular patents. Nowadays, especially in the digital network environment, we have debates amongst everyday users whether copyright protection goes too far, about the rules being not necessarily in line with social reality and technological advances. These debates are often framed in the context of human rights or data protection narratives – protection is claimed against interference by IP holders who want to monitor internet activities to check how many files you have been downloading and so forth. Alleged large-scale infringers of IP have also relied on freedom of expression: those running the Pirate Bay website in Sweden (a website which purposely tried to make any sort of context, whether copyright protected or not, freely available and accessible for users) complained that criminal convictions for copyright infringement amounted to a breach of freedom of expression under the ECHR. While they lost that case (since states enjoy quite some discretion in balancing the right to property and freedom of expression), the ECHR agreed that their activity in principle falls under the ECHR. So there has been certainly a growing tendency to look at IP and consider its implications from various angles and perspectives, and that’s been happening at the national, European and global level.

In terms of climate change and IP, it’s interesting that in the Paris Agreement for example, the whole issue of IP has not really been addressed at all because it’s such a hot potato. Countries where holders of ‘green’ technology have a strong voice – such as the US, but also in Europe to some extent – are very reluctant to allow the issue of intellectual property protection to be addressed in this forum because they know that the overall focus on facilitating the transfer of green technologies and common but differentiated responsibilities for developing countries will rather lead to a reduction and strengthening of IP protections. The main argument from the side of technology holders is essentially that IP is an important incentive for the private sector to create new technologies. Some countries in the global South see the negotiations as a opportunity for reinvigorating debates about technology transfer, call for revoking patents on green technology which – according to President Morales of Bolivia – belong into the public domain. Because of these diametrically opposed positions, what the climate change negotiations have been heading towards is some sort of a global fund, where money is provided to allow developing countries to purchase technologies which are supposed to reduce the impact of climate change and help to lower emissions. The details probably still need to be worked out – there have been various mechanisms proposed in the past. But under the Paris Agreement, it’s not really about reducing IP protection. That’s something which developing countries have tried, particularly in the Copenhagen round of negotiations in 2010, where various proposals were on the table but none of them really stood a chance of being accepted and they haven’t been part of any climate change deal in recent history.

Whether or not in a given country there is actually an IP barrier in terms of accessing technology which is important for example to address climate change, that is quite a complex question. These rights are territorial rights, so the fact that an international treaty says you must protect patents in all fields of technology (which is what Article 27:1 TRIPS provides) doesn’t mean that in Angola, for example, a patent would necessarily be in the way. Companies usually do not patent their technologies in countries where they don’t think that there is sufficient demand for them, or where they don’t see any competitors being able to actually manufacture a device covered by their patents. So it’s quite a complex picture: there are questions whether and where IP rights stand in the way at all, and probably in most very poor countries they aren’t really an issue – in those countries, the lack of manufacturing capacity serves as a de facto barrier unless there is a marked for importing the technology.

LCN: True, although new technologies are starting to allow more accessible, or devolved, methods of manufacturing (for example, 3D printing). These might allow poorer countries to find ways to manufacture technologies that would have been unaffordable 10 years ago.
HGRK: The real issues at the moment are about the extent to which emerging economies like Brazil and India are obliged to protect the intellectual property rights of foreign rightholders. The whole question of being able to catch up in terms of technological development nowadays will be answered against the context of a range of international IP treaty rules which did not exist at a time when for example Germany or the US tried to catch up and copy technology from, say, the UK. As a historical note, it’s interesting to see that most of the developed countries, whose industry now exports goods and services protected by IP around the globe and claim protection abroad, have been able to get to that stage without being obliged by international agreements to protect anyone else’s IP rights. The origin of the label ‘Made in Germany’, for example, stems from the British Merchandise Marks Act 1887 which forced German imports to carry that label so that the British consumers would be warned against allegedly cheap and low-quality imports and counterfeits from Germany, such as knives manufactured in Solingen, and would instead buy original British steel. No global IP treaty prevented copying or imitation. Nowadays, countries catching up have to be much smarter in order to use the global IP framework to create sufficient policy space to develop a national system which works for them, which still allows them to build up their own industries and technological base.

LCN: You mentioned digital assets: are those putting some strain on the IP protection system? It is much easier to infringe rights when material can be copied, shared or modified so easily.

HGRK: Yes, there are two elements here. Firstly, the digital revolution means that we are able to reproduce information content in a way that copies that are identical to the original in terms of quality, and can be created in any quantity at essentially no cost. Secondly, the creation of a global network – the internet – allows us to share this content very easily, again at hardly any cost. These two elements have made enforcing territorial rights very much more difficult. Someone can just choose to make content available from a server in a country where IP protections are not enforced, or which is not a member to any of the major international conventions. So there are a lot of more possibilities for using this content, for sharing it, for doing things with it which don’t have the authorisation of the rightholder.

At the same time, you have the law trying to respond to these issues by vastly expanding protections, in various ways. For example, reading a [physical] book or listening to music [from an analogue device] involves no act which the rightholder would have had any copyright control over. Controlling how individuals enjoy, or even access, a copyright-protected work was never a part of the rightholder’s rights. Now in the digital context, as soon as I have music, text, movies, or whatever else on a digital device, accessing it and listening to it, reading it or enjoying it in the wider sense will always involve a technical act of reproduction, the making of at least a temporary copy. A reproduction then is in principle an act which the rightholder can control, in the legal sense. There are certain caveats – certain temporary reproductions under certain laws are excluded – but the principal international copyright rules include a right of reproduction – and clarify that this fully applies in the digital environment. In that way, rightholders are given vastly more control over their content.

The main question is still enforcement. And rightholders have long realised that they have no way of going after individual users or going after rogue sites which operate from jurisdictions where they can’t rely on effective IP enforcement. But what rightholders have been trying to do instead is to go after the intermediaries. So they’re going after internet service providers, or even those who simply provide access. So, your broadband provider, for example: Should BT be responsible to cut off access to sites which are illegally sharing copyright-protected works? Should platforms like Youtube and Facebook monitor all content on their systems for copyright infringing material?

LCN: …or are you responsible if someone uses your WiFi connection to share something illegally?

HGRK: Exactly. So we are back with the IP–human rights interface. While rightholders enjoy a right to property, ISPs can claim the freedom to operate, the freedom to conduct business – that’s also a human right under the EU Charter. And the users have a right to privacy, they have a right not to be monitored constantly, whether or not they are sharing files that involve copyrighted material. The European Court of Justice, which has been trying to find balance between protection for IP rightholders, the rights of users, the rights of ISPs and so on, has done so primarily within a human rights framework. The digital context is a great example of where these questions of balancing the traditional notion of IP protection with the rights of others – users, intermediaries – come to a fore.

LCN: Also in the digital context, we are increasingly seeing people waiving their rights by releasing things as open software, or licensing work under a Creative Commons licence (where they can set certain conditions for reuse). This also acts as a way...
to ease those tensions between the needs of the users and the needs of the rightholders. Do you think that we’ll start to see this kind of approach more with other, more physical goods as well? With drugs, for example?

**HGRK:** The first thing to note on these movements, be it Creative Commons or the general public licence idea under the open software movement and so on, is that they are essentially based on the IP framework, because they are licences, right? These systems function on the basis of authorisations by those who have rights in works or inventions, and who then allow others to use it freely under certain conditions (for example, that you allow anyone to use whatever you have created as a derivative work without requesting payment or without preventing the further reproduction and so on). And, yes, in a way we are seeing pharmaceutical companies willing to share their technologies … or rather, to license certain drugs in least developed and some developing countries at a lower royalty rate. But that’s probably mainly corporate social responsibility activity on the part of drugs companies who want to have good publicity and don’t want to be seen as interfering with human rights in poor countries!

What is probably more interesting is the concept of open innovation: internet sites where people can, on a particular issue, pool their ideas and discuss concepts. Firms have apparently been interested in using this framework as a higher-yielding opportunity for creating new and innovative products and services, but the question of who then owns the IP, and who is in a position to exploit these products developed on this basis is tricky… I’m not an expert in this area, it’s not something which I have covered in the book in any way. However, from my discussions with other people who do work on it, it doesn’t seem that even in the open innovation context, we’re really moving away from a property model where private rights are being exercised over concrete inventions or creations which are protectable under patent or copyright law.

I think the issue there is that communities are able to use the IP system in a way which opens access and which creates public domains and frees up goods and services because, based on the freedom of contract, they can license these things under conditions as they desire, and they can create open licences, no problem. But I don’t think, from my knowledge, that the IP laws have yet sufficiently addressed the issue of rethinking the whole property model as the principal starting point. We are still operating under a system where we consider various intangibles to be subject to private rights once they fit in a particular subject area and once they fulfil the conditions of protection. And then we have certain limited exceptions to the basic rule of protection – and, yes, there are initiatives which sometimes broaden these exceptions, or
where the exceptions cover new things which are deemed to be necessary, but that’s sort of tweaking and changing bits and pieces without necessarily really rethinking the system as a whole.

LCN: Research and development is expensive, and involves a lot of focused investment, so it is perhaps unsurprising that companies look for stronger intellectual property rights as a way to protect that investment.…

HGRK: I think it’s correct that, depending somewhat on the sector, industry is very interested in further strengthening (or at least not weakening) protections. The pharmaceutical industry in particular has an interest in prolonging patent protection because they argue that the amount of research and development that they have to undertake to come up with a new drug, or even a new use for an existing drug, is just so much. Often there are additional health and safety issues – clinical...
trials, marketing approvals and so forth – which make it even more expensive, and more lengthy, to show that you have a product which can go onto the market. Pharmaceutical companies have, therefore, been able to extend patent protection beyond the traditional 20-year period in a lot of countries.

But you also see that in a lot of other industries, especially in the IT sector, companies have realised that patents sometimes actually block innovation. If you think of a device like the iPhone, there are hundreds of patents vesting in such a complex product. Leading companies often have patent portfolios which cover hundreds or thousands of patents – and no one really knows what exactly these patents cover in terms of technology, no one really knows how many of these patents are being infringed by a competitor. But because they have such big portfolios, they don’t really worry: if you are being sued, you just sue the other company and find some sort of a solution, like with the Apple and Samsung patent wars about who is infringing whose patents in the iPad or the Galaxy phone.

This is fine for established companies, which have this big patent portfolio. But a newcomer who doesn’t have a portfolio, but who has a good idea and wants to bring this to the market, risks infringing, or to be sued because of allegedly infringing, some sort of patent of another established company’s portfolio. They might, therefore, just not undertake the project, or they might not get venture capital because it is considered too risky. So patents in the IT sector often have been understood to block rather than promote innovation.

**LCN:** Because of the complexity of the systems involved?

**HGRK:** Yes, and the overload of patents in that area, and no one really completely understanding what individually these patents cover and whether or not they are valid, and so forth.

**LCN:** So your book has just been published: where's this taking you next?

**HGRK:** There’s certainly lots of work still to do on looking at IP in the broader international law framework, but for myself I’ve maybe two or three further ideas which are in part emerging from the work I’ve done in relation to the book. One – for which I have to give credit to Eyal Benvenisti for his inspiring suggestions – is to look at the concept of property in a broader sense, and to look primarily at the idea that property, as a social construct, not only entails rights but also obligations. And to look – maybe under different national legal systems, maybe using concepts from international or regional treaties – at what kind of obligations the (intellectual) property holder has, and how these obligations may be, or should be used to facilitate the common good, and facilitate in the context of IP access to the kinds of things protected under intellectual property.

Another idea, informed in part by what Surabhi [Ranganathan] and Rumi [Yotova] and others are doing, is to look at notions of global commons, or this idea of common heritage in different areas. So, in IP we talk about the public domain, about something where no protection exists. There isn’t really any entity which has the role of ensuring that there remains a sufficiently broad public domain: it’s more about allowing rightholders to claim their rights – and the public domain is just what remains left, outside these claims. We’re starting to see a debate about users’ rights nowadays. But in the IP context, these users’ rights generally are not framed as rights, but they’re just limited exceptions to the protections the rightholders enjoy. Users in the IP context are not really seen on the same level with rightholders: they are essentially left with limits and exceptions from the protections available to rightholders, and they’re not really put on an equal footing. Nowadays this changes, of course, if you move the whole debate into, for example, the human rights context, where surely users do enjoy lots of access rights. And that attempt to create ‘countervailing’ rights aligns with the state sovereignty-versus IP debate in the biological diversity/genetic resources context.

But I’m not so sure if it’s always the best thing to simply give more and more rights to different entities who then have to exercise these rights in order to create some sort of a balance. Or whether we should rather consider the idea of the obligations and responsibilities which follow from certain rights, or which are connected to certain rights, for example in the property context. Or whether maybe it should be the state or other communal entities who keep the commons available and free for everyone to use. But these are very initial ideas, which I will be hoping to look into in the future.

**Henning Grosse Ruse-Khan** is Co-Director of Cambridge University’s Centre for Intellectual Property and Information Law (CIPIL). The CIPIL Annual Spring Conference 2017 will be held at the Faculty of Law, University of Cambridge on Saturday 11 March 2017 on the theme ‘Intellectual Property and Human Rights’. Conference places can be booked online here.
Dr Veronika Fikfak, together with researchers Sabrina Boudra and Donata Szabo, are working on a three-year project funded by the ESRC Future Research Leaders grant to analyse the European Court’s treatment of human rights claims. When individuals are tortured or when their human rights are otherwise violated by European governments or domestic authorities, the European Court of Human Rights is responsible for reviewing state actions under the European Convention of Human Rights. If the individuals are successful in proving a violation, the Court may award them damages for the treatment suffered. Whilst domestic courts of the 47 Council of Europe Member States, over which the Court has jurisdiction, usually award damages on the basis of scales that are public and mostly clear, this is not the case with the European Court. The Court sets out no rules or guidelines as to when individuals are likely to get compensation; it also does not explain which elements of their treatment applicants should emphasise nor how much they should ask for. There is no information about maximum or minimum amounts awarded to individuals for specific violations nor about how claims in one case might compare to complaints in other cases. Often, individuals turning to the Court ask for millions of euros in damages, but only receive ten or twenty thousand.

The uncertain practice of the ECtHR has created a significant legal gap on the international level as well as in the domestic laws of the 47 countries of the Council of Europe. The Court’s approach and, in particular the lack of clarity and transparency has been criticised even by judges themselves. The former English judge to the Court, Paul Mahoney even suggested the ‘unthinkable’ – that the function of awarding damages ought to be left to national courts. The aim of the project, Fikfak argues, is to fill the gap created by the Court for the first time. Through an empirical quantitative and qualitative study of the last ten years of case-law relating to damages, the project will discern the legal principles from the practice of the Court and critically assess the Court’s role in awarding compensation for human rights violations. In the end, the aim of the project is to determine what price we assign to human rights.

The project website will be launched in March 2017, and will carry weekly updates:
http://www.constitutionally.co.uk
The What Price for Human Rights? project team. From left to right: Sabrina Boudra, Veronika Fikfak and Donata Szabo.
Peacemaking: what’s law got to do with it?

Between December 2010 and October 2011, LCIL Deputy Director Sarah Nouwen was seconded as an advisor to the African Union High Level Implementation Panel (AUHIP) for Sudan. Her experience of observing these peacemaking negotiations inspired her current research project, Peacemaking: What’s Law Got To Do With It?

During the research for my book on the effect of the International Criminal Court’s complementarity principle in Uganda and Sudan, I happened to observe, or even to get somewhat involved in, four peace processes: northern Uganda, Darfur, Sudan-SPLM/South Sudan and South Sudan. One thing that differed widely in these four processes was the extent to which international ‘norms’ influenced the mediation. I say ‘norms’ because many positivist international lawyers would challenge the suggestion that some of these ‘norms’ are obligations under international law. But they were presented as such, or as ‘best practices’, ‘guidelines’ or ‘standards’, by the mediators themselves or, more often, by experts of headquarters of international organisations, or NGOs monitoring the negotiations. And whether ‘real’ international legal obligations or not, their presentation as ‘norms’ seemed to matter.

These ‘norms’ related to both the substance and the procedure of the peace processes. Substantively, the most obvious example is the putative prohibition on amnesties for a range of international crimes, and possibly also some human rights violations. But there are others, for instance a putative prohibition to talk peace with people sought by the ICC or with ‘terrorists’; the putative requirement to include transitional-justice instruments in a peace agreement; to address gender inequality and to provide for elections. Procedurally, norms concern, for instance, the requirement of women or ‘civil society’ participating in the talks or to have public consultations.

International legal scholarship has shown an increased interest in peace agreements, analysing their provisions, legal status and compatibility with international law and developing concepts such as lex pacificatoria and jus post bellum. While there are wide-ranging opinions on the extent that international law governs or should govern peace negotiations, much of this scholarship does suggest the importance of (international) law for peacemaking. But have mediators also become more interested in international law, and if so, when, why and how?

On the basis of a dozen of case studies over the last two decades, this research project analyses empirically what role putative international norms have actually played in peace negotiations. When did such norms influence how the process was conducted or the actual agreement? When not? Which are the most prevalent “norms”? Who defines them? What process of validation have they gone through? How do they relate to international law and to what extent does this matter? And, the most difficult question, what are the consequences of these norms? Who benefits and how? What are the challenges? A final question is theoretical: if observed, how can the phenomenon of the normativisation of peace negotiations be explained? What drives it?

Supported by the Economic and Social Research Council (grant no. ES/L010976/1), the Leverhulme Trust (PLP-2014-067), and the Isaac Newton Trust (RG79578), my gifted research assistants and sparring partners Natalie Jones and Orfeas Chasapis-Tassinis and I have begun exploring these questions in the context of two case studies: Bosnia (Dayton) and the Sudans (Darfur, North-South, South Sudan). Suggestions, comments and ideas are most welcome (smhn3@cam.ac.uk).
Sarah Nouwen (third from left) at a meeting of the AUHIP for Sudan. Photo: African Union/Abibo Eric Ngandu.
Driven by public opinion turning from indifference towards investment protection and investor-state dispute settlement to scepticism or even fierce opposition, particularly in the context of mega-regional trade and investment agreements such as TPP, TTIP or CETA, Contracting Parties to investment agreements are pursuing many avenues in order to curb a system that is being perceived – correctly or not – as having run out of control. What are these avenues? How do Contracting Parties pursue them? What is their potential for reasserting control over the investment treaty regime? What are the limits that public international law sets to their pursuit? This volume offers answers to these and many other questions pertaining to Contracting Parties’ reassertion of control. It is the first one to do so systematically, from a distinctively doctrinal perspective and with a view to covering the crucial doctrinal and theoretical issues of the phenomenon of reassertion. Its contributions focus on the various avenues to reassert control and evaluate their viability through the lens of public international law – in particular, albeit far from exclusively, the law of treaties. Such avenues include, on the procedural side, claims mechanisms for early dismissal, the establishment of an appeals facility or even an investment court system as well as state-state arbitration and substantive issues such as joint interpretations, treaty termination, detailed definitions of standards of protection as well as treaty drafting. For the purpose of discussing and evaluating such avenues of reassertion, the book takes an almost monographical approach – with a plurality of authors – in targeting the most pertinent issues of reassertion of control over the investment treaty regime with respect to theoretical, procedural, substantive and policy issues. The authors come from a variety of different academic and professional backgrounds and hold a variety of different views on international investment law and arbitration: academics and practitioners, investment law specialists and general public international lawyers, investment arbitration enthusiasts and investment arbitration sceptics, among others. The book was partly conceived during the editor’s stay at the Lauterpacht Centre in August and September 2015 and features, among others, chapter contributions from Centre fellows Fernando Bordin, Michael Waibel and Rumiana Yotova.

More information: http://www.cambridge.org/9781107172654
Moreover, it has also been suggested that the consultation of the House of Commons before the commencement of hostilities represents an emerging constitutional convention.

This monograph offers a critical inquiry into the current arrangements around the operation of the war prerogative. In doing so, it offers the first in-depth conceptual analysis of the nature of the British Parliament’s role in respect of the war prerogative. The book is the first rigorous attempt to classify, explain, and evaluate parliamentary engagement with war powers in the twentieth and twenty-first centuries. It reveals how decisions to go to war are infused with international considerations and how rather than deciding to send troops abroad on the basis of domestic interest and necessity, the government and members of Parliament refer to and accept international norms – sometimes erroneously – as sufficient support for an intervention abroad. It also uncovers that the constitutional functions of Parliament are being frustrated by the timing of engagement and lack of access to relevant information, a practice which is usually justified by the Executive on the basis that providing relevant materials in open parliamentary sessions would be damaging to national security or international relations.

Weaving together their international and public law expertise, the authors (Veronika Fikfak and Hayley J. Hooper, Faculty of Law, University of Cambridge) propose concrete solutions to the debate in the Commons, including detailing how MPs themselves can reformulate their role in this process and a bold new proposal to allow all parliamentarians access to secret intelligence information.

Parliament’s Secret War will be published as part of the Hart Studies in Security and Justice series in 2017.

More information:
http://www.bloomsburyprofessional.com/uk/parliaments-secret-war-9781509902873/

The event was hosted by the Swiss Permanent Mission to the United Nations. It included a panel discussion on the importance of language in peace agreements with Under-Secretary-General for Political Affairs Jeffrey Feltman and former UN Special Representative to the Secretary-General Álvaro de Soto, moderated by the Director of Policy and Mediation Division at the Department of Political Affairs, Teresa Whitfield. Professor Marc Weller addressed the assembled dignitaries and guests on the value of the Language of Peace database for peace settlement, which was followed by a brief demonstration of its functionalities by Andrea Varga.

The Language of Peace database – developed by the research team of the Legal Tools for Peace-Making Project, with the collaboration of the UN Mediation Support Unit and the web developers at PASTPRESENTFUTURE – aims to eliminate the time-consuming and redundant background research which can burden settlement processes. Before this database, whenever mediators or negotiating parties wanted to identify past practice on a particular issue, they had no choice but to spend hours sifting through hundreds of agreements which may or may not have addressed the issue.

Building on the existing UN Peacemaker database, and designed with the needs of mediators, negotiating parties and researchers in mind, Language of Peace is an innovative search engine providing instant access to a rich collection of peace agreements concluded since World War II. Each provision of these agreements has been categorised according to 226 issues commonly faced in peace negotiations, grouped under 26 main headings. These include issues such as ceasefire monitoring, reconstruction and development, and political detainees. Users can browse issue areas, and further refine searches by a number of different criteria, such as type of conflict, country/territory, and date. In addition, the agreements have been transformed into a format which allows searches by specific words or phrases. Last but not least, Language of Peace enables users to bookmark and export the search results relevant to their research, aiding offline use and distribution. With these functionalities, Language of Peace aims to streamline the negotiation process, and thereby contribute to the success of peace-making around the world.

Language of Peace database:
http://www.languageofpeace.org
The External Dimensions of Constitutions

This conference, held at the Lauterpacht Centre on 15 and 16 September 2016, sought to identify and map the external dimensions of constitutions, the ways by which they regulate the various borders between humans, spaces and activities, and perhaps also to understand their motivations and considerations in regulating these borders.

While constitutions are primarily inward-looking, written ‘by the people, for the people’, they also have important external dimensions. Indeed, the very existence of constitution is an assertion of borders, and one of constitutions’ central tasks is to define the internal from the external, the citizen from the outsider. On certain matters, constitutions may require that public and/or private actors take into account the interests of strangers. Hence questions arise as to whether national constitutions take account of their impact on strangers, whether they should do so, and if so, how do they accommodate their concerns. In light of a mounting refugee crisis in Europe and elsewhere, the constitutional obligations that states owe towards refugees are particularly relevant. Indeed it is this question – the obligation that states owe to those seeking admission – that has motivated this conference. But as the various contributions showed, there are several additional dimensions that constitutions are increasingly preoccupied with.

In our conference and ensuing publication in the Virginia Journal of International Law (2017), we provide the framework for exploring the various external dimensions of constitutions. The conference opened with remarks by convenors Mila Versteeg and Lauterpacht Centre Director Professor Eyal Benvenisti. Sessions included ‘Theory and History’, ‘Comparative Studies’, ‘Migration and the Constitution’, and ‘Strangers Within the Constitution’. The event was supported by the ERC-funded GlobalTrust Project.

Eyal Benvenisti

The delegates at the External Dimensions of Constitutions conference break for lunch in the Centre gardens.
International Commissions of Inquiry: What Difference Do They Make?

On 6 January, 16 scholars from across the world convened in Cambridge to discuss the question ‘International Commissions of Inquiry: What Difference Do They Make?’ Together, we_workshopped 8 papers, selected in response to a call for papers. We will not reveal the remarkable findings here – look out for a Symposium in *EJIL* and an edited book on the question.

However, we can disclose some features that made it a very productive workshop:

- Scholars flying in from the Middle East, North America, Europe and Africa, including voices that have not been much heard yet in the dominant international law discourse;
- A 100% attendance rate (no cancellations, despite this being the bugs season);
- All contributors having sent their draft papers prior to the event and everyone having had an opportunity to read them, effectively leading to almost every paper having 15 discussants;
- A workshop dinner before the workshop, not only providing people a chance to get to know each other, but also immediately leading to a round-table discussion about fundamental common questions (how does one define an International Commission of Inquiry; how does one establish impact?; where does the boundary lie between the questions what difference a Commission has made and how it made this difference?);
- And, guess what, entirely equal gender representation (without us having paid explicit attention to this feature; the consequence of a mixed organising team?)

The organisers (Doreen Lustig, Michael Becker and Sarah Nouwen) thank the presenters (Théo Boutruche; Larissa van den Herik; Mohamed Helal; Hala Khoury-Bisharat; Shiri Krebs; Eliav Lieblich; Gerard Maguire; Noelle Higgins and Yvonne Oyieke); the discussants (Megan Donaldson; Pieter van Houten; Jan Lemnitzer and Thomas Probert) and logistics assistant Barry Colfer. They also gratefully acknowledge the organisations that made this event financially possible (Pembroke College; the European Journal of International Law; the British Academy and the Economic and Social Research Council).

Sarah Nouwen
On 23 September 2016, LCIL held a full-day workshop with Sir Michael Wood, Special Rapporteur to the International Law Commission, on the Identification of Customary International Law. The aim of the workshop was to critically review in detail the set of draft ‘Conclusions and Commentaries’ on the Identification of Customary International Law adopted by the ILC on first reading this past summer. This critical review was intended to aid the Special Rapporteur in his preparation for the second reading of the draft ‘Conclusions and Commentaries’. The workshop was attended by a combination of academics, UK Foreign and Commonwealth Office lawyers and barristers.

The draft ‘Conclusions and Commentaries’ was widely praised, both for its comprehensiveness as well as its conciseness: in a rather short 35 pages, the document distills in a schematic and simple way the methodology for the identification of rules of customary international law. There were, of course, some matters which gave rise to some controversy and which led to interesting exchanges. Among others, these included draft Conclusion 4(2), on the role of international organisations to the formation of customary law, and draft Conclusion 10(3), on the role of inaction and silence in the identification of customary law (especially the possibility to infer opinio juris from inaction). As to the former, the consensus seemed to be that the relevance of the practice (and opinio juris) international organisations (if any) will vary depending on the organisation in question. As to the latter, the disagreements seemed to relate more to the circumstances in which inaction will be relevant for these purposes than to the notion that inaction plays an important role in the identification of customary law.

States have been requested to comment on the draft Conclusions and Commentaries before 1 January 2018, after which the second reading process will begin.

Federica Paddeu

Participants in the Identification of Customary International Law workshop enjoying coffee in the Lauterpacht Centre gardens.
On Wednesday 30 November 2016 a two-panel Symposium was held at the Lauterpacht Centre to discuss recent developments in international trade and investment jurisprudence. The organisation of the event was prompted by the presence at the Lauterpacht Centre of two prominent scholars, Professor Tania Voon and Professor Andrew Mitchell (both of the University of Melbourne), who were visiting fellows at the Centre in the 2016 Michaelmas term and who have published extensively on the topics covered by the Symposium.

The first panel was concerned with the so-called ‘tobacco packaging’ disputes, which include a number of cases initiated under both bilateral investment law treaties and the dispute settlement mechanism of the World Trade Organization (WTO), as well as in domestic fora. The first speaker, Professor Tania Voon, presented details of two investment disputes brought by Philip Morris against Australia and Uruguay, in which awards were published in December 2015 and July 2016, respectively. In the first case, the tribunal found that the initiation of the arbitration had constituted an ‘abuse of rights’ by Philip Morris and that therefore the tribunal had no jurisdiction to review the substantive claims. The second dispute reached the merits stage but the tobacco giant’s substantive claims, based on claims of expropriation and violation of fair and equitable treatment, were dismissed. Professor Voon also discussed challenges brought in the WTO against Australia’s tobacco packaging rules by several members: Ukraine (discontinued), Honduras, Dominican Republic, Cuba and Indonesia. At the time of the Symposium, no panel report had yet been issued in these cases.

The other speakers examined some implications of the two investment awards. Professor Loukas Mistelis (Queen Mary, University of London) focused
on questions of jurisdiction, providing an insight on the problem of corporate re-structuring for the purpose of taking advantage of the rights offered to investors by bilateral investment treaties, and also pondered on the relationship between jurisdiction and admissibility. Dr Henning Ruse-Khan (University of Cambridge) deliberated on the intellectual property aspects of the disputes, emphasising the conflict between the right to use a trademark by a trademark holder and the right of a State – possibly an ‘inherent’ right - to regulate in order to protect public health. Public health, but from the perspective of evidential difficulties faced by respondent States in international investment litigation, was discussed by Ms Odette Murray (University of Cambridge), in a very stimulating and colourful presentation. The panel was chaired by Professor Julian Mortenson (University of Michigan).

The second panel was devoted to the ‘Tuna/Dolphin’ disputes in the WTO, which have resulted from restrictions imposed by the United States on the importation of tuna harvested in a manner harmful to dolphins and have been appearing on the agenda of the WTO (and its predecessor, the General Agreement on Tariffs and Trade, GATT) for almost three decades. The history of the disputes and the relevant challenges, involving the interpretation of the exceptions clause of Article XX of GATT and, more recently, the provisions of the Agreement on Technical Barriers to Trade (TBT Agreement), were skilfully recalled in a presentation by Professor Elisa Baroncini (University of Bologna). The other speakers of the second panel focused on the WTO 2012 and 2015 panel and Appellate Body rulings, which resulted from complaints brought by Mexico against the United States on the conditions for the use of the ‘dolphin-safe’ label on tuna products. The first speaker, Professor Andrew Lang (London School of Economics), shed light on the enigmatic notion of ‘standard’ in the TBT Agreement. Professor Lorand Bartels (University of Cambridge) provocatively tackled the Appellate Body’s conclusions with respect to the standards of non-discrimination found in Article 2 of the TBT Agreement. He resorted to the use of a theoretical unit of ‘langs’, to illustrate the complexities of the concept of even-handedness, as applied by the Appellate Body. Dr Joanna Gomula (Lauterpacht Centre) criticised the overly broad notion of ‘technical regulation’ accepted in WTO jurisprudence with respect to challenges under the TBT Agreement. The panel was chaired by Dr Klara Polackova Van der Ploeg (The Graduate Institute of International and Development Studies, Geneva).

The Symposium presentations are expected to be published in 2017.

Joanna Gomula
Knowledge at one’s fingertips

Every September, the Centre welcomes a visiting scholar from Indiana University Maurer School of Law for a three-month research visit. This year’s Snyder Scholar, Donovan Wood, reflects on what makes a research stay at the Lauterpacht Centre unique.

My desk in the Snyder Room looks much like you might expect a law scholar’s desk to look. It has a computer, a few printed articles, some books from the library, a coffee cup (now sitting alongside a very special mug), and my notebook. It’s also got a couple of flyers left from speakers here and on campus, and it has a few pieces of chocolate that I stole away from this morning’s coffee time. But the experiences these things represent are far from ordinary.

I am the 2016 Snyder Scholar from Indiana University, and I visited the Lauterpacht Centre from 27 September to 16 December 2016. I came to study the tense relationship between the International Criminal Court and the states of Africa and to write a paper on some aspect of that topic. Where better to learn than here at the Lauterpacht Centre? The articles and books on the desk and shelves all come from Cambridge’s incredible libraries. Whether I simply got materials from the internet, or took the short walk to either the law library or the main library, all of the knowledge I needed was at my fingertips.

But learning here at the Lauterpacht Centre doesn’t come just from words on a page. In addition to notes on articles and books, the notebook on the desk contains notes from Friday lectures and Peregrine talks, and even from conversations over coffee or dinner. The lectures allowed me to hear from scholars on a wide variety of topics, contributing to a broad perspective of international law. The Peregrine Talks allowed me to hear from other visiting scholars on their works in progress, to ask questions and contribute to discussions. And the conversations were often lively and incredibly interesting. Of course we would often discuss international law, and it is one of the Centre’s great strengths to have the time to do this, whether at the 11 am coffee hour, or over lunch, or over dinner, or over a pint at the Red Bull.

Staying at Bahrain House was really great. Not only was it convenient for walking to work (just next door), the library, or a college to have lunch, it was great for conversations with the other people living there. It was also great for hosting a wonderfully multicultural Thanksgiving dinner or playing croquet in the backyard.

And as for the location, Cambridge is fantastic. Though the Centre isn’t affiliated with any particular college, I still enjoyed talks from speakers in criminology, political science, and African studies around the University. I got to enjoy the museums and walks through the campuses and to Grantchester. It’s a small enough city to keep a person from wondering what’s going on while they are studying, but a beautiful enough city to inspire.

And so, for all of the things on my desk, and for all of the experiences they represent, I want to say thank you. Thank you to Indiana University, Earl Snyder, and all of the wonderful people at the Lauterpacht Centre.

Donovan Wood was the Indiana University Snyder Scholar at the Centre between September and December 2016, researching the role of the International Criminal Court in sub-Saharan Africa.
Views from the Visitors

Donovan outside Bahrain House, his home for the last three months.
The Peregrine Talks

Former Visiting Scholar Klara Polackova Van der Ploeg introduces the Peregrine Talks, a series of seminars for visitors at the Centre.

Not least through its extensive visitor programme, the Lauterpacht Centre has become essentially an obligatory stop in an international lawyer’s career. A visit to a Centre allows spending time in an almost mysteriously stimulating place for one’s work (experienced and mentioned by different generations of visitors and arguably produced by a mixture of inspiring colleagues, beautiful gardens, and in current times also an instant access to practically every Cambridge University Press book online). The visit also provides an opportunity to connect with the impressive heritage of international law in Cambridge, present and past.

Visitors have periodically sought opportunities to present and discuss their ongoing work during their stay through organisation of internal events. This tradition of visitor seminars has been revived during the 2016 Easter Term, under a new title: The Peregrine Talks.

The adjective ‘peregrine’ is an old Middle English word, which of course comes from Latin. In general Latin, the word peregrinus referred to someone ‘coming from the foreign parts’, however, it also has a suitable legal ancestry: as still taught in Roman Law classes on the continent, a peregrinus in Roman times used to designate a free person living in the provinces of the Roman Empire whose affairs were governed by a special body of law with a familiar name and an ‘international law’ pedigree – ius gentium. In modern English, ‘peregrine’ encompasses a multitude of meanings, including foreign, alien, not native, coming from abroad, travelling, wandering or pilgrim – arguably many of the themes (and indeed emotions) that a visit to the Centre entails. All in all a fitting adjective!

Over the course of the past eight months, the Peregrine Talks featured ten seminars, covering diverse aspects of international law, both thematically and methodologically, and provided a platform for discussion among the visitors, the LCIL Fellows, the British Red Cross Research Team and other guests.

On general issues of international law, Jason Rudall (The Graduate Institute, Geneva) explored the legal obligations of states to citizens in other countries in ‘Diagonal obligations in international law: commitment to altruism or belief in karma’; Anlei Zuo (University of Hong Kong) revisited the institutional fragmentation debate as symptomatic of inherent biases of international law and scholarship to legitimise the Western-dominated and Euro-centric international legal system in ‘The institutional fragmentation of international law in a world society: the ontological ethos of international law and the structural biases in international legal scholarship’; and Sondre Torp Helmersen (University of Oslo) examined the patterns of use of scholarship by international courts and tribunals in ‘Does international law say anything about the use of scholarship?’

In relation to the International Criminal Court (ICC), Tom Ruys (University of Ghent) considered the possible effects of the activation of the ICC’s jurisdiction over the crime of aggression on the exercise of genuine humanitarian interventions and jus contra bellum more broadly in ‘Criminalising aggression: how the future of the law on the use of force rests in the hands of the ICC’; and Gabriel Lentner (University of Vienna) analysed the intricacies of the Security Council referrals to the ICC in ‘The legal nature of UN Security Council referrals to the ICC and its consequences for jurisdictional exemptions and personal immunities’.

In the area of international economic law, Patricia Wiater (LMU Munich) explored the impact of natural and legal persons as claimants in investment arbitration and in courts of regional economic communities on advancing international law and rendering contractual state obligations effective in ‘Access to justice in international economic law’; and Jörg Zimmermann (Surrey) analysed investor conduct within the legal framework created by investment treaties from a behavioral economic perspective in ‘International investment regulations – strategic decision-making in a comparative legal context’.

On other topics, Thomas Forster (Switzerland) explored the latest research on the impact of international humanitarian law norms on the conduct of armed conflicts in ‘Armed conflict - what’s law got to do with it?’; Raphael Schäfer (Max
Planck Heidelberg) shared his thoughts on the challenges of the historical analysis of international law in ‘The turn to history in international law: a twisted road to the past?’. Finally, Antje Wiener (together with a guest Jan Wilkens, both University of Hamburg) put forward – from the disciplinary perspective of international relations – a theoretical explanation of how ontological narratives of social reality are created through operation of second-order narratives in ‘A meaningful world among others- contending narrations of legitimate orders’.

In addition to the visitor presenters, the Peregrine Talks speakers also included Surabhi Ranganathan (LCIL) and Alexandre Skander (Koç University) as commentators.

The Peregrine Talks have a format of a one-hour lunchtime talk (from 1–2 pm) with 15–20 minutes reserved for the presentation, 10 minutes for the formal comment (if any), and 30 minutes for the discussion. A draft paper is circulated in advance of the seminar to facilitate the discussion. The Peregrine Talks regularly take place in the Old Library and in the Lent term will be organized by Tomoko Kakee (Yokohama National University) and Ömer Keskin (University of Lausanne).

Klara Polackova Van der Ploeg was a Visiting Scholar at the Lauterpacht Centre between April and December 2016. She is currently completing a PhD in International Law at the Graduate Institute of International and Development Studies, Geneva.
Recently, news outlets have reported different cases of sunken vessels and offering challenging legal questions: the discovery, announced by the Colombian President J.M. Santos, of the remains of the San Jose, a Spanish galleon sunk in Colombian waters in 1708 and a target for different treasure hunters; the discovery in the Black Sea of more than 40 wrecks from the Byzantine and Ottoman periods while mapping the Bulgarian continental shelf; the decision adopted by Scottish Power, an energy company laying a submarine cable between Europe and North America, not to disturb the remains of a German WWI submarine —probably the UB-85— sunk in 1918 in the Scottish North Channel; or the astonishing disappearance of several Dutch and British lost warships sunk in the Java sea during WWII, with their crews aboard, which were allegedly scrapped to re-use their steel.

Wrecks may be subject to multiple legal regimes. As a ‘thing’, a wreck may have an owner, which may be either a public or private person and, consequently, public rules of State immunity may apply, as might private regimes related to property, insurance, rescue or salvage, etc. As an object located in a maritime space, a wreck is also subject to the rules of the law of the sea, mainly codified by the UN Convention on the Law of the Sea (LOSC or UNCLOS), although it does not address the regime of wrecks. If the vessel sank more than 100 years ago, the wreck may also fall under the generally accepted definition of underwater cultural heritage, thereby merit special protection. If, in the interim, it has become an artificial reef, the wreck may be protected by several environmental rules and specific fishing regulations; however, if the wreck contains polluting debris or unexploded ammunitions (or was built from polluting materials), it is subject to other environmental rules. If it poses an obstacle to navigation or safety at sea, then the wreck may also be subject to special norms governing these circumstances. And last but not least, if the wreck (or wreck site) still contains human remains, then other specific rules, including the law of armed conflicts, may also apply.

Thus described, a wreck is an object governed by a legal regime that is usually made up of different building blocks. This note focuses only on three particular aspects of wrecks and their protection: as cultural objects, as gravesites, and as natural landscapes.

As cultural objects, wrecks may be an example of underwater cultural heritage under the 2001 UNESCO Convention for the Protection of Underwater Cultural Heritage. Under this Convention – already ratified by 55 States – once a wreck has spent at least 100 years underwater, whether totally or partially submerged, periodically or continuously, it may be considered as pertaining to the underwater cultural heritage providing it has a cultural, historical or archaeological character. State parties to that Convention thus undertake to protect such wrecks in their territorial seas and contiguous zones under their (adapted, when necessary) domestic legislations. Beyond the outer limit of this zone, the Convention establishes a cooperative system amongst the States parties, which have different responsibilities depending on whether the wreck is located in the exclusive economic zone, on the continental shelf or in the Area. Collaboration and cross-communication are landmark pieces of the cooperative system established in the 2001 UNESCO Convention which, in any case, must be read in accordance with LOSC.

As gravesites, too many wrecks remain the resting place of sailors (civilian and military) and passengers. Vessels and places falling under this category range from the Mercedes to the Arizona, from the Titanic, the Lusitania or the Wilhelm Gustloff to the Estonia, from the wrecks of the Battle of Jutland in 1916 or the Battle of Midway in 1942 to those of the Malvinas/Falkland combats in 1982, to name but a few. In short, the world’s seas have witnessed the deaths at sea of thousands of men and women. Human interference and natural forces may threaten these tombs at sea. Whilst the latter may be unavoidable, and perhaps poetically
enables the return of our figurative ashes to earth, human activities intentionally affecting these gravesites must be prevented. Uncontrolled salvage operations are destroying underwater sites containing human remains, and some States (like Spain, France, the US or the UK) now fiercely oppose such activities. However, other sites remain beyond control, as they lie in international waters or in the waters of third States that are not particularly concerned with these memorial cases.

General international law of armed conflicts protects those who die in combat (including naval combat). If the prohibition of the despoliation of dead bodies is an application of the general prohibition of pillage, it may also cover underwater looting in areas with human remains. Under the British Red Cross and the International Committee of the Red Cross project at the Lauterpacht Centre, Customary International Humanitarian Law establishes that ‘[t]he dead must be disposed of in a respectful manner and their graves respected and properly maintained’ (Rule 115). This Rule is induced from widely accepted conventional norms and practice.

The 2001 UNESCO Convention recalls that ‘States Parties shall ensure that proper respect is given to all human remains located in maritime waters’. Two recent multilateral treaties specifically deal with maritime gravesites: the 1995 Agreement regarding the M/S Estonia and the 2000 Agreement Concerning the Shipwrecked Vessel RMS Titanic (not yet in force). Their characterisation as objective regimes still is under discussion.

Finally, as natural landscapes, wrecks eventually become artificial reefs, which, as marine habitats, are of scientific interest for biological reasons,
amongst others (corrosion studies, interaction with fauna and flora, leisure activities and scuba tourism, etc.). Although practice is growing elsewhere, there are no clear international rules governing these cases except for general environmental ones, as interpreted by domestic legislations and courts, and soft-law rules such as the 2009 London Convention and Protocol/UNEP Guidelines for the Placement of Artificial Reefs.

Wrecks deserve to be protected for all of these reasons. However, they can also be hazardous objects. Some parts of the oceans are particularly threatened by polluting wrecks, the case of the Pacific Ocean being paramount. Although from the outset in the codification of the law of the sea, both a general environmental limit – to prevent pollution of the seas – and a safety-related limit – not to endanger or hamper international navigation – were imposed on States, polluting and otherwise hazardous wrecks have not been a well-governed issue, which has forced the international community to seek out new ad hoc instruments, like the 2007 Nairobi Convention.

To equilibrate the need to protect wrecks and to be protected from some of them is a new challenge to current law of the sea and to maritime law. A multiple legal approach must be made in order to cope with such complex regulation trying to protect and preserve at the same time the underwater cultural heritage, the resting place of human beings, the marine environment, the safety of navigation and other current interests, which may collide if the international community and the different stakeholders are not able to draft an imaginative and thoughtful new regime for wrecks.

Mariano J. Aznar was a Visiting Fellow at the Centre between July and December 2016. He is Professor of Public International Law at the University Jaume I, Spain.
A summer in Cambridge

I arrived at the Lauterpacht Centre in April 2016. Having visited Cambridge before, I knew to expect a unique place that was rich with history, awe-inspiring surroundings and intellect. What I did not fully expect, however, was the warmth of my welcome to the Lauterpacht Centre and just how friendly the people there would be throughout my stay. It was the people I met, those permanent staff and those visiting, who made my stay in Cambridge a really memorable one!

It started with a coffee! The 11am coffee meetings are a staple part of daily life at the Lauterpacht Centre. This is an opportunity for all of those who work at the Centre to get together. At the first coffee morning I attended, Professor Benvenisti personally welcomed all of the new visitors for the Easter Term. As time went on, I learned how valuable these coffee meetings were, not just for the cohesiveness they bring to the Centre but also as a place to share ideas about your research with others. At these, as well as in other settings, the people at the Centre freely share their expertise and insight with you. I was impressed and very grateful, for example, that the most senior academics at the Centre encourage visiting researchers to meet to discuss their work.

In addition to the activities organised by the Centre, like the Friday lunchtime lectures, visitors to the Centre also start initiatives to bring people together. While I was there, a fellow Visiting Scholar organised a monthly research forum (the ‘Peregrine Talks’; see p. 50) which allowed researchers at the Centre to present their work and get feedback from colleagues. This was a very helpful initiative, not least because so many people participated actively in it.

Aside from the activities in the Centre, life in Cambridge is exciting. From debates at the Cambridge Union to punting on the Cam, and from formal halls in college to May Week (in June!), there is rarely a dull moment! The way in which visitors to the Centre can integrate and experience Cambridge fully is wonderful. All in all, I relish another opportunity to spend a summer at the Lauterpacht Centre!

Jason Rudall was a Visiting Scholar between April and September 2016. He is the LL.M Programme Manager at the Graduate Institute, Geneva, where he is also completing a PhD in international law.

Jason Rudall, at a formal hall with Visiting Scholars Anlei, Marie and Klara, and LCIL Fellow Jamie Trinidad.
## Events @ the Lauterpacht Centre

### Friday lecture series: Lent term 2017

<table>
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<tr>
<th>Date</th>
<th>Event</th>
<th>Speaker</th>
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<tr>
<td>20 January</td>
<td>Welcome to Eutopia!</td>
<td>Philip Allott (Cambridge)</td>
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<tr>
<td>27 January</td>
<td>The rule of law in international relations</td>
<td>Antje Wiener (Hamburg)</td>
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<tr>
<td>3 February</td>
<td>The politics of investment treaties in developing countries</td>
<td>Lauge Poulsen (UCL)</td>
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<td>10 February</td>
<td>The ICC at 15: prospects and challenges</td>
<td>Olympia Bekou (Nottingham)</td>
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<td>17 February</td>
<td>Spoilt for choice? The reparation of non-material damage in international law</td>
<td>Stephan Wittich (Vienna)</td>
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<td>24 February</td>
<td>The criminalisation of aggression and soldiers’ rights</td>
<td>Tom Dannenbaum (UCL)</td>
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<tr>
<td>3 March</td>
<td>The historical origin of Russia’s contemporary concept of international law</td>
<td>Lauri Mälksoo (Tartu)</td>
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<tr>
<td>10 March</td>
<td>Hersch Lauterpacht Memorial Lecture (Q&amp;A)</td>
<td>Anne Peters (Heidelberg)</td>
</tr>
<tr>
<td>17 March</td>
<td>What is an international crime?</td>
<td>Nikolas Rajkovic (Tilburg)</td>
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The lecture programme is subject to revision without notice. Please check the Centre’s website for updates and information: [www.lcil.cam.ac.uk/events/](http://www.lcil.cam.ac.uk/events/)

During the University term, the Centre holds Lunchtime Lectures on topical issues in international law given by leading academics and practitioners. Lectures take place from 1pm–2pm with a sandwich lunch provided at the Centre from 12:30pm. More information on the Lauterpacht Centre website: [http://www.lcil.cam.ac.uk/events](http://www.lcil.cam.ac.uk/events)

The Friday lecture series is kindly sponsored by Cambridge University Press.
The Sir Hersch Lauterpacht Memorial Lecture is an annual three-part lecture series given in Cambridge to commemorate the unique contribution to the development of international law of Sir Hersch Lauterpacht.

These lectures are given annually by a person of eminence in the field of international law and a revised and expanded version of the lectures is usually published in the Hersch Lauterpacht Lecture Series by Cambridge University Press.
Genocide vs crimes against humanity: a conversation with Philippe Sands

We were delighted to welcome Professor Philippe Sands back to the Lauterpacht Centre recently, to discuss his recent book *East West Street: On the Origins of Genocide and Crimes against Humanity*. Visiting Scholar Patryk Labuda reviews the event.

On November 2, 2016 the Lauterpacht Centre had the pleasure of hosting Professor Philippe Sands, who discussed his recent book *East West Street: On the Origins of Genocide and Crimes against Humanity*. Organized as a question and answer session, Sarah Nouwen, Deputy Director of the Centre, and Franziska Exeler, Lecturer in History at the Free University in Berlin, explored together with Sands the many personal, ‘secret’ and official histories that weave their way through the book. Sands noted that the project originated in Lviv/Lwow, a city in western Ukraine that used to be part of the Austro-Hungarian Empire and Poland. While preparing to deliver a lecture there in 2010, he discovered that both Raphael Lemkin and Hersch Lauterpacht had studied there, a curious ‘coincidence’ that set him off on a remarkable personal and academic journey that culminated in the book’s publication several years later.

Although much of Sands’ book deals with an academic topic, namely genocide and crimes against humanity and Lemkin and Lauterpacht’s respective roles in devising these concepts, the discussion revolved around more personal themes. Sands reflected upon the many ‘silences’ in the book, or – in other words – the hidden stories that seem to pervade all violent events in history, whether it be the Holocaust or today’s conflicts in cities. “I can’t imagine two students from the United Kingdom coming up with the concept of genocide and crimes against humanity… these are not just intellectual ideas, they are experiential ideas”, said Sands. Reflecting on Lemkin and Lauterpacht’s experiences, Sands suggested there were worrying parallels between Lviv, a rich and multicultural city in the 1920s and 1930s, and modern day Britain, which is experiencing a rise of populism and nationalism. Sands also linked some of the book’s themes back to Cambridge and Cranmer Road, where Lauterpacht resided and where the concept of crimes against humanity was coined. A rich and thought-provoking discussion with one of UK’s finest international lawyers, the event left everyone wanting to hear more about the book’s many intimate and hidden stories and how this informs our understanding of an important aspect of international legal history.

An audio recording of the whole event is available at [http://sms.cam.ac.uk/media/2363490](http://sms.cam.ac.uk/media/2363490).

Patryk Labuda has been a Visiting Scholar at the Lauterpacht Centre since September 2016 and will remain here until April 2017. He is currently completing a PhD in International Law at the Graduate Institute of International and Development Studies, Geneva.
Life @ the Lauterpacht Centre

A round-up of life in Cranmer Road, in pictures.

Top: In September, we took part in the World’s Biggest Coffee morning and raised £135 for the Macmillan cancer charity. Below: these splendid UN cufflinks were a souvenir from the LTPM project team’s trip to New York (see p. 42). Left: our receptionist Karen Fachechi celebrating a recent ‘significant’ birthday at the Centre.
Above: autumn colour seen in Cranmer Road last year. Centre: thanks to Visiting Fellow Ran Guo for sharing these stunning photos of our new sundial after a rainstorm. Bottom: In December, we were delighted to welcome back Professor Malcolm and Mrs Judith Shaw. Professor Shaw, a Senior Fellow of the Centre, kindly donated the 4-volume set of Rosenne’s Law and Practice of the International Court (5th edn).
Above: on 16 December 2016, staff and visitors at the Lauterpacht Centre donned their most festive clothes for Christmas jumper day and raised £68 for Save the Children.

Christmas at the Lauterpacht Centre. Above and left: the Centre was well decorated for the festive season, even the latest ILR. Below: thanks to Emmanette Viney for this photo from the Lauterpacht Centre Christmas dinner, which was held in Pembroke College on 8 December.
Supporting LCIL and the next generation of international lawyers

Donations contribute to LCIL’s mission of fostering research and study in all fields of international law.

You could help the Centre financially in a variety of ways:

- Support early career scholars as ‘Lauterpacht Scholars’
- Endow a visiting fellowship
- Support the Directorship of the Centre
- Name a Lecture or Lectureship
- Become a Friend of the Centre
- Help fund the development of the Centre’s premises

The Centre’s Director and Whewell Professor of International Law, Professor Eyal Benvenisti (eb653@cam.ac.uk) would be happy to discuss different options for support and ways for the Centre to recognise contributions. Donors who give a total of £25,000 will also be eligible to become Patrons of the Faculty of Law.