

LAUTERPACHT CENTRE NEWS

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LAUTERPACHT CENTRE
FOR INTERNATIONAL LAW

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# The Coronavirus Tests the Limits of International Law

## LCIL Director Professor Eyal Benvenisti

Eyal is Director of the Lauterpacht Centre, Whewell Professor of International Law and a Director of Studies in Law at Jesus College.



The global spread of disease tests also the limits of international law and the functionality of international institutions aiming for rapid and effective responses to epidemics. The *International Health Regulations* (2005) (IHR) adopted by the World Health Organization (WHO), are designed "to prevent, protect against, control and provide a public health response to the international spread of disease in ways that are commensurate with and restricted to public health risks, and which avoid unnecessary interference with international traffic and trade." (IHR, Article 2). In the words of the then WHO Director-General, Dr Margaret Chan, the IHR reflect the vision that, "*[w]hen the world is collectively at risk, defence becomes a shared responsibility of all nations.*" As I will argue here, the shared responsibility to defend stems also, if not primarily, from the shared responsibility for the causes of pandemics, or, more precisely, the shared responsibility for the failure to respond rapidly and proportionately to outbreaks.

The recent Coronavirus outbreak is an opportunity to assess the functionality of the global regime and study the systemic failures precluding member states from meeting their respective responsibilities. I suggest that the problems that have become apparent from this particular outbreak demonstrate the need to revisit international rules and institutions. I will focus on three types of responsible actors: The initially affected state, the WHO, and – counterintuitively perhaps – neighboring and other states that close their borders with the affected state.

The WHO and particularly its International Health Regulations Emergency Committee (Emergency Committee) are the key actors in the global system of response and containment. According to the IHR, the Emergency Committee declared on 30 January 2020 the new Corona virus a "*Public Health Emergency of*

*International Concern*" (PHEIC) and issued a set of "Temporary Recommendations." These recommendations instructed member states how to respond collectively to the threat.

Initial reports about the behavior of China as the initially affected state raise questions for further scrutiny. According to an *investigative report by the New York Times*, the spread of the new virus was noticed by medical professional in Wuhan around Christmas of 2019. But the doctor was reprimanded for "illegal behavior," and the national authorities only alerted the World Health Organization's office in Beijing of an outbreak on the last day of 2019.

WHO's responses have been swift but the declaration of a PHEIC came late in the day. Once informed, it took a month for the Emergency Committee to

issue its declaration, and that declaration was not before conducting a field visit to Wuhan on 20-21 January, and several meetings during which the committee debated the severity of the outbreak. The New York Times report accuses the Chinese authorities in Wuhan and WHO officials of complacency, arguing that the WHO's statements during this period "echoed the reassuring words of Chinese officials."

As expected, the reactions of several neighbouring and other states have been resolute, and arguably excessive. Some states have decided to ignore the Temporary Recommendations by adopting what the WHO regards as disproportionate protective measures. Although the Emergency Committee stopped short of instructing a strict travel ban (a measure it could recommend under Article 18 (2) of the IHR), several countries have imposed bans on the entry of foreign nationals who had been in China, along with the suspension of flights and business operations. The fact that the declaration of emergency did not update the WHO's earlier "[advice for international travel and trade](#)" which had not called for a ban, indicates that the Emergency Committee saw the ban as "unnecessary interference with international traffic and trade."

Disregarding the WHO's Recommendations is in-

compatible with the requirement of the regime of the Convention on International Civil Aviation that [instruct](#) state parties to follow the Interim Recommendations. Travel and trade bans also raise concerns about compatibility with international trade standards. During the so called "swine flu" pandemic in 2009, the World Trade Organization, the Codex Alimentarius Commission and other institutions joined the WHO to [declare](#) that the virus could not be spread through pork products. There as now, several states disregarded this call and banned pork imports from affected countries.

And obviously there are human rights implications to travel and trade bans. The IHR acknowledge these considerations with the insistence on the respect for human rights when imposing restrictions on travel and trade (Art. 32 IHR).

The same concern about excessive reactions has apparently prompted the UN Security Council to issue [Resolution 2177](#) from 2014 which "[e]xpresses concern about the detrimental effect of the isolation of the affected countries as a result of trade and travel restrictions imposed on and to the affected countries" and called on Member States to lift those



(Image copyright: www.pxfuel.com)

restrictions, and "on airlines and shipping companies to maintain trade and transport links with the affected countries and the wider region."

The Emergency Committee has given a more detailed explanation for its stance concerning travel bans in the context of the Ebola crisis. It [stated](#) that

Such measures are usually implemented out of fear and have no basis in science. They push the movement of people and goods to informal border crossings that are not monitored, thus increasing the chances of the spread of disease. Most critically, these restrictions can also compromise local economies and negatively affect response operations from a security and logistics perspective.

While each health crisis merits a unique assessment of risks and appropriate responses - even within China the authorities have imposed a complete travel ban - reactions to the new coronavirus should take into account the concern that states imposing travel and trade bans may be indirectly responsible for the spread of the disease they seek to curtail. A recently published research finds a causal link between the slowness of reporting on new outbreaks by affected countries and the fear of retaliation by neighbouring countries. According to Professor [Catherine](#)

[Worsnop](#), states' tardiness is not only a matter of capacity. Often states conceal outbreaks seeking to avoid becoming "the target of other states' costly barriers."

These findings suggest that it is necessary not only to enhance states' capacity to identify, report and contain pandemics, but also to strengthen other states' commitments to comply with the WHO Interim Recommendations and refrain from excessive responses. In fact, Worsnop's findings suggest that the IHR of 2005 "have not had an overall positive influence on the timeliness of reporting" because affected states dread the WHO's formal declaration of a public health emergency.

Global economic interdependency reallocates health risks among nations. It is important for states that seal their borders to realise that by their very responses they indirectly contribute to the spread of diseases across borders. Acknowledging shared responsibility is not only a noble act of solidarity but also a matter of enlightened self-interest.



Changchun Longjia Airport Terminal 2 Security Check - 26 January 2020

(Image copyright: BoyuZhang1998 [CC BY-SA (<https://creativecommons.org/licenses/by-sa/4.0>)])

## Professor Nico Krisch awarded the first *Max Planck-Cambridge Prize for International Law (MaxCamPIL)*

On Friday 15 November 2019 Professor Nico Krisch, Professor of International Law and Co-director of the Global Governance Centre at the Graduate Institute in Geneva was awarded the first Max Planck-Cambridge Prize for International Law (MaxCamPIL). Below is the Laudatio given by Professor Eyal Benvenist, LCIL Director, at the award ceremony in Heidelberg.

Today, it is my great pleasure to present the inaugural Max Planck-Cambridge Prize for International Law to Nico Krisch, Professor of International Law and Co-Director of the Global Governance Centre at the Graduate Institute for International and Development Studies. The Prize will be awarded biennially to a mid-career scholar, who has not only made an outstanding contribution to the study of international law, but also is likely to continue on that same trajectory. Thus, the Prize simultaneously seeks to illuminate the value of the winner's existing work and to support his or her future endeavours in the field.

The Prize Committee, chaired by Professor Anne Peters and myself, and based on the recommendations of a joint group of younger scholars, selected the prize-winner unanimously. We were impressed with the originality and rigour of Professor Krisch's research, including his innovative and influential contributions to the understanding of the legal and political challenges of governance beyond the state. Today I am delighted to offer you a glimpse of Professor Krisch's scholarship that I hope will explain our enthusiasm.

A notable aspect of Professor Krisch's work is the breadth and depth of his research. His primary research areas consist of the legal structure of international organizations and global governance, authority in global administrative law, politics of international law, and the emergence of a post-national legal order. Through his interdisciplinary approach to the fields of international law, constitutional theory, and political science, his research has enriched international law in both substance and method.

Krisch's sensitivity to the symbiotic relationship between law, power, and legitimacy has already become apparent in an early, significant publication of his, ("International law in times of hegemony: unequal power and the shaping of the international legal order" (2005)) where he observes that "international law is simultaneously instrumental and resistant to the pursuit of power. International law is important for

powerful states as a source of legitimacy, but in order to provide legitimacy, it needs to distance itself from power and has to resist its mere translation into law. International law then occupies an always precarious, but eventually secure position between the demands of the powerful and the ideals of justice held in international society."

This is a profound observation. Legitimacy is the necessary element that law offers for promoting but also restraining power. It is when law loses legitimacy that the raw, arbitrary power behind the law is exposed. No wonder that Krisch has continued to explore the possible sources for law's legitimacy.

In another prominent article of his ("The Decay of Consent: International Law in an Age of Global Public Goods" 2014) Krisch observes that consent as a legitimising tool in the international legal order is increasingly incapable of providing much-needed solutions for the challenges of a globalized world; as countries become ever more interdependent and vulnerable to global challenges, an order that safeguards states' freedoms at the cost of common policies is often seen as anachronistic. According to this view, what is needed—and what we are likely to see—is a turn to nonconsensual lawmaking mechanisms, especially through powerful international institutions with majoritarian voting rules. The article is primarily descriptive and does not set out to offer either a rigorous explanation or a normative assessment of this turn toward nonconsensual structures in international lawmaking. But Krisch does suggest that the trend "reflects the fact that the need for greater cooperation [at the global level] . . . is not always, or not even typically, satisfied by international law." It also gives voice to the concern that the move to informal institutions "point[s] in the direction of more hierarchical forms of governance" that increasingly cater to a small number of powerful states, rather than to the traditional, broad, consent-based order.

Professor Nico Krisch receives his award from Professor Anne Peters, Managing Director of the Max Planck Institute.



This article exposes the limits of the legitimising function of concepts such as accountability of global bodies and of state consent. As George Downs and I wrote in response, "we believe that consent was never a major impediment to the dominant powerful states that could manipulate the global archipelago of treaty regimes to their benefit, relegating consent to a mere formal legitimating tool of submission to power."

His book, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (2010), has received the Certificate of Merit of the American Society of International Law, and is aptly described by Gregory Schaffer as a "tour de force" that "demands reading and reflection." The book attracted a significant number of reviews that invariably praise it. In reviewing the text, Samantha Besson commends the author not only for providing "a very complete and detailed mapping of the literature in different languages and from different disciplines," but also for developing "his own proposal for how best to understand legal pluralism."

In *Beyond Constitutionalism*, Krisch provides a vision for legal frameworks that might offer restraints on power and hence legitimacy to government. This is a thought-provoking text, in which the author proposes that we have entered a post-national legal order where national and international law are not distinct realms and invites the reader to think "in unconventional terms" about the structure of global governance.

Krisch identifies the simultaneous challenge to both the domestic constitutional legal order and to the international order. He observes, but also offers, prediction about their future interaction: "both constitutionalism and international law have come under heavy pressure and are unlikely to survive in their classical form. In both cases, this has to do with their own success and the success of the respective other. Constitutionalism is struggling because international law and global governance have become increasingly effective, thus removing key issues from the reach of national constitutions and domestic political processes. International law, on the other hand, experiences problems because its thin, consent-oriented legitimacy base no longer appears adequate to the task. Now that international law has grown in importance, it is seen as overly formalistic and undemocratic, and a thicker, more substantive foundation seems called for. Constitutionalism stands ready to fill this gap, but to many, it appears as unsuited for this expansion and also as too emblematic of a particular political tradition."

The challenge is indeed momentous, as can be seen from the events unfolding since 2016 in the UK, US, Central Europe and indeed, the rest of the world. Perhaps envisioning the post-Trumpist era, that may or may not be around the corner, Krisch describes an emerging postnational order. He writes (p.4): "The classical distinction between domestic and international spheres is increasingly blurred, with a multitude of formal and informal connections taking the place of what once were relatively clear rules

and categories. ... the national sphere retains importance, but it is not longer the paradigmatic anchor of the whole order.”

Krisch then considers three structural responses for legal ordering in this post-national context: 1) containment of the international order through reinvigorating oversight by national political and constitutional processes; 2) transfer to regional and global levels of domestic concepts such as constitutionalism and democracy; and 3) break through ‘eschew[ing] constitutionalism’s emphasis on law and hierarchy’ for ‘more pluralist models, which would leave greater space for politics in the heterarchical interplay of orders.’(see pp 14–17). Krisch advocates for the last approach – a break – in contrast to a global constitutional one based on a common normative framework and clear allocations of authority.

According to Krisch, “Pluralism, unlike constitutionalism, does not need to decide hierarchies between them; it can grant them space for competition, mutual accommodation, and perhaps eventual settlement. Pluralism’s institutional openness thus corresponds with the openness and fluidity of postnational society in a way that constitutionalism, tailored to less heterogenous societies, does not.” (p 26)

I have a lot to say in support of this pluralist approach, to which I, together with my late friend George Downs, offered the vision of an emergent system of global checks and balances which benefits, rather than suffers, from the lack of a strict hierarchical structure. Indeed, the simultaneous challenge to both the domestic constitutional legal order and to the international order does not necessarily portend competition for primacy, a sort of a zero sum game between the legal spheres, but rather offers an opportunity to form more accountable domestic/global governance mechanisms to rein in power both at the domestic and the global levels.

While international law has indeed “become increasingly effective, thus removing key issues from the reach of national constitutions and domestic political processes” at the same time the regulation at the regional or global level has actually empowered national courts internally, vis-à-vis their respective political branches. This has recently been quite dramatically demonstrated in the UK with the Miller I & II judgments, and in the Global North and South with courts invoking the emerging climate law to impose constraints on passive lawmakers. Viewed transnationally, the challenge Krisch identifies may well be an invitation to closer cooperation between national and supranational review mechanisms, and to legitimise restraints on executive power.

As I tried to show, through his quality scholarship, Professor Krisch has demonstrated his willingness, indeed courage, to enter the fray of scholarly debate on international law. He has done so with a sense of honesty and humility. Recognizing the complexity and ever evolving nature of the structure of global governance, he stressed that his book “does not pretend to have conclusive answers to these big, open questions or to present a comprehensive proposal for the future development of post-national politics and law. If anything, it claims to clarify the challenge we are facing and some of the key choices that lie ahead.”

Professor Krisch’s work is distinguished by his willingness to traverse the bridge between theory and practice in international law, as well as between law and power, by not only identifying and theorising problems, not only offering disparaging critique, but also by responsibly exploring and developing potential solutions.

As the Prize guidelines state: “The aim of the Max-CamPIL is to identify an outstanding mid-career international legal scholar whose seminal contributions to the study of international law have enriched



Professor Nico Krisch talks about his work to the audience at the award ceremony in Heidelberg

the field and are likely to continue in the future. The aim is also to highlight his/her scholarship, support his/her future work, and to provide a model for academic excellence for younger scholars.” I hope that my remarks managed to convey how apt it is to award the inaugural prize to Professor Krisch.

I understand that Professor Krisch completed his PhD in law at the University of Heidelberg. With the presentation of the Max Planck-Cambridge Prize

today, there is a touch of poetic symmetry that we congregate in that same city to recognize the success of his scholarship in the subsequent years. Congratulations Nico, and we look forward to both reading and reflecting on your contributions to the study of international law for many years to come.

Watch the video of the conversation with Nico Krisch at the award ceremony in Heidelberg at:

<https://voelkerrechtsblog.org/13504-2/>

More information:

<https://www.lcil.cam.ac.uk/max-planck-cambridge-prize-international-law>

<https://www.mpil.de/en/pub/research-interaction/max-planck-cambridge-prize.cfm>



# Jam v IFC: a better solution to the restriction of immunity

## Dr Rutsel Silvestre J Martha

Rutsel Martha is the principal of the London-based public international law firm, Lindeborg Counsellors at Law, a firm specialising in INTERPOL matters, treaty-based arbitration, sanctions, politically exposed persons, asset protection, and the law of international organisations. Dr Rutsel is also a Partner Fellow of the Lauterpacht Linked Partnership Programme.



In *Jam et al. v International Financial Corp. ("Jam")* Indian farmers, fishermen and a small village brought a claim in the United States against the International Finance Corporation (the "IFC") for environmental harms suffered when the IFC financed the development of a coal-fired power plant in India. During the proceedings in the United States, the courts were faced with the question of whether the IFC enjoyed absolute immunity from suit under the International Organizations Immunities Act (the "IOIA"). Reversing the decision of the United States Court of Appeals for the D.C. Circuit, the Supreme Court of the United States (the "Supreme Court") decided that international organisations enjoy the same restrictive immunity from suit as that enjoyed by foreign governments under the Foreign Sovereign Immunities Act (the "FSIA"). In reaching this conclusion, the Supreme Court found that:

- (1) the IOIA is to be interpreted dynamically;
- (2) the "IOIA should ... be understood to link the law of international organization immunity to the law of foreign sovereign immunity, so that the one develops in tandem with the other";
- (3) "the privileges and immunities accorded by the IOIA are only default rules. If the work of a given international organization would be impaired by restrictive immunity, the organization's charter can always specify a different level of immunity"; and
- (4) there is no "good reason to think that restrictive immunity would expose international development banks to excessive liability", since the activities performed by international organisations are not necessarily commercial and, even if they are, they do not necessarily have a sufficient nexus to the United States.

The decision in *Jam* opens the door to litigation against

international organisations in the United States (and in other countries that might follow its example). Some have welcomed this ruling as "the end of impunity". I do not share this enthusiasm.

In *Jam*, Justice Breyer rightly explained in his dissenting opinion that "[u]nlike foreign governments, international organizations are not sovereign entities engaged in a host of different activities. ... Rather, many organizations ... have specific missions that often require them to engage in what U.S. law may well consider to be commercial activities". Due to the broad interpretation of the term "commercial", restrictive immunity exposes international organisations to lawsuits that are likely to interfere with their public interest tasks. For this reason, immunity in relation to commercial acts is arguably more important for the functioning of international organisations than for foreign governments. This is particularly so when the *raison d'être* of certain international organisations, such as the IFC, is the performance of commercial functions such as extending finance.

Indeed, in my view, it is not possible to restrict the immunity that international organisations enjoy from domestic legal process without meddling in the independent functioning of multilateral institutions. The absolute immunity of international organisations is necessary to avoid undue interference from domestic courts. Unlike States, international organisations have no territory or citizens and they operate in domestic markets out of functional necessity rather than choice. In this sense, international organisations cannot be treated in the same way as States with regard to the application of the doctrine of immunity (and, in particular, with respect to the distinction between *acta jure imperii* and *acta jure gestionis*). In addition, the suggestion that any issues raised by private parties against international organisations could be handled by domestic courts overlooks the fact that certain matters



Fishing clans live in the shadow of a power plant in Mundra, India  
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are simply beyond national jurisdiction and can only be adequately dealt with by an international tribunal. In short, the equating of international organisations and States for the purposes of immunity is misguided.

This conclusion leads me to my main point: the only way to provide private parties with appropriate means for upholding their rights while respecting international organisations' immunity is for international organisations to establish effective dispute settlement mechanisms to handle complaints from private parties. In fact, the duty of international organisations to establish effective dispute settlement mechanisms to handle complaints from private parties is arguably inherent in their immunity. *Jam* is a reminder that both the United Nations and its specialised agencies, including the IFC, have consistently failed to honour their obligation to provide effective means of settlement for private disputes, whether contractual or otherwise.

Going forward, international organisations should renegotiate their headquarters agreements to provide for a default arbitration mechanism that could be triggered by private parties. Article 24 of the 2009 Headquarters Agreement between INTERPOL and France provides a useful starting point. It provides that, unless the parties agree otherwise and subject to certain carve-outs, "any dispute between [INTERPOL] and a private party shall be settled" by arbitration. In this vein, one wonders whether it is time to create a system modelled on the one that exists under the ICSID Convention, to which international organisations can adhere and where – by default – disputes like the one in *Jam* can be referred to and settled. Such a development would undoubtedly quell the increased calls for the restriction, or even denial, of immunity of international organisations before domestic courts.

Reference: *A pivotal moment for the law of governance? - Professor Eyal Benvenisti, LCIL Director - Lauterpacht Centre News Lent Term 2019 (Issue 28)*

## Lauterpacht Linked Partnership Programme

The **Lauterpacht Linked** partnership programme gives practitioners unique and exclusive access to people, events and research associated with the Centre, in exchange for their support to the Centre's infrastructure and activities. Membership of the programme is open to law firms, barristers' chambers and major companies with an interest in international law.

*LCIL Partner Fellows* financially support the Centre, thereby contributing to the development of its research activities. Partnership is also open to foreign ministries.

Further information available at: <https://www.lcil.cam.ac.uk/about-centre/lauterpacht-linked-programme>



# The Eli Lauterpacht Lecture 2019

## 'Taking Teaching Seriously: How to Teach Treaty Interpretation'

By Professor Joseph Weiler

Summary by Bruno Gelinas-Faucher, PhD Law candidate, University of Cambridge

Professor Joseph Weiler delivered the third Eli Lauterpacht Lecture to a packed Finley Library audience. By his own admission, he described his topic as a bit unusual. After all, it is difficult to remember any distinguished lecture on the topic of teaching rather than about the subject itself. As an introduction, he thus set out to explain his choice of topic.

First, a lecture about teaching is a fitting tribute to Sir Eli who had a reputation as a fantastic teacher. Second, it addresses the common misperception that people who understand a subject are also able to teach it. Lastly, and most importantly, choosing this topic is a kind of protest against the current state of academia as it relates to teaching.

For many years now research and scholarship have become the Alpha and Omega of academic life. Quantitative measurements and rankings are increasingly relied upon to evaluate academic outputs. Though we continue to pay lip service to the importance of teaching, nobody can question that it ranks much lower in how we rank academic excellence. Yet, good teaching can positively impact thousands of students and generate a meaning legacy which coheres with the core mission of universities.

In essence, Prof Weiler's lecture invited the audience to think about how to teach a subject with the same creativity, engagement, and commitment that we are thinking of the subject itself. Thinking about teaching treaty interpretation requires no less seriousness than thinking about the subject matter that we are teaching.

Prof Weiler started by highlighting an important distinction between cognitive and experiential knowledge. Teaching treaty interpretation falls somewhere between the two: some elements can be understood in the abstract, but there are other things that only experience can teach. With that in mind, he proceeded

to discuss a series of proposals regarding the teaching of treaty interpretation.

First, treaty interpretation should be taught right at the start of a course. In many textbooks and courses, treaty interpretation is addressed as a discrete module after treating other topics such as custom (including relationship with treaties), subjects, jurisdiction, etc. But all these topics will involve some issues of treaty interpretation. By following this structure, students will have lost the opportunity to critically assess these previous topics through the lens of treaty interpretation. Instead, treaty interpretation should be a course-long exercise. If taught at the earliest stage, students will be able to learn and practice throughout the entire course while they encounter issues of treaty interpretation in every subsequent module.

Second, it is very important to introduce legal realism in the teaching of treaty interpretation. This is already very common in the US, but less so in the UK. For anyone practising and presenting arguments to an adjudicator, legal realism has an enormous insight.

Another element to consider is the importance of hermeneutic sensibility. Different courts and tribunals looking at the same legal formulation can come to radically different outcomes. This is not just because they are different bodies with different objectives, but also because of their specific hermeneutic sensibility. Teaching this concept requires more than explaining it, it entails practising with students, reading decisions from different tribunals and comparing them. Often, the difficult question of what weight to ascribe to textual, contextual or teleological arguments will depend on the hermeneutic sensibility of the particular adjudicative body.

Similarly, the teaching of treaty interpretation requires that we take into consideration the observational standpoint of the people performing the exercise.



Professor Weiler gives his lecture to a full Finley Library at the Lauterpacht Centre

Negotiators, litigators, and judges will have completely different observational standpoints. This is not just a subtle nuance, various standpoints can generate a fundamentally different approach.

Sharing one of his teaching techniques, Prof Weiler described the usefulness of using and analysing court briefs instead of judgments. Judgements can often be deceptive as to the thought process that went into deciding between different modes of interpretation. For example, judges making hard decisions tend to portray the answer as self-evident. On the other hand, briefs can offer insights of legal realism that you do not get by reading a judgment.

In the last segment of the lecture, Prof Weiler developed an idea that merged the substance of treaty interpretation with how it is being taught. Drawing on the work of Judge Aharon Barak, he posited that various types of documents are interpreted differently. In practice, a will is not interpreted in the same way as a contract or a constitution. Yet, in all cases we use the same method of textual, contextual, and teleological interpretation. The same applies in international law. Article 31 VCLT provides the tools for interpretation, but a unilateral declaration will not be interpreted the same way as a bilateral investment treaty or the UN Charter.

This paradigm can serve as a useful organizing principle. The longstanding debate regarding the relationship between intention and words is a good example: should we look at the words to determine the intention of the parties, or does intention determine our inter-

pretation of the words? Under the Barak paradigm, the closer we are to a unilateral act, the more we should seek to find what was the intention of the party (even by external means) before attributing binding force to the words. Conversely, when looking at a constitution such as the UN Charter, we should focus more closely on the document to see what purpose it serves as a way to determine the intention of the parties. Between those two extremes, the Barak approach can modulate our way of thinking about relationship between intention and words. It can similarly be used to strike the right balance between textual and teleological arguments.

Tying the idea to teaching, Prof Weiler suggested that the concept could be used as a hypothesis. For every case encountered, students can ask where this particular treaty falls in the spectrum. Is it akin to a unilateral act, a bilateral contract, a constitution etc? After determining where it falls in the family of treaties, they can look at the interpretation to see if it confirms or refutes the hypothesis. For Prof Weiler, this organising principle is both logical and borne out in practice.

An audio recording of this lecture is available at: <https://upload.sms.csx.cam.ac.uk/media/3082437>

*The Eli Lauterpacht Lecture series are kindly supported by Dr and Mrs Ivan Berkowitz who are Friends of the Lauterpacht Centre.*

**Professor Weiler is University Professor at NYU Law School and Senior Fellow at the Center for European Studies at Harvard. Until recently he served as President of the European University Institute, Florence. Prof Weiler is Co-Editor-in-Chief of the European Journal of International Law (EJIL) and the International Journal of Constitutional Law (ICON).**

# Lauterpacht Linked Event - Panel Discussion Business and Human Rights in Domestic Courts

## Contemporary Developments and Future Prospects



Richard Hermer QC



Julianne Hughes-Jennett



Dr Axel Marx



Dr Tara Van Ho

**Neli Frost, International Law PhD candidate, summarises the panel discussion on contemporary developments and future prospects in business and human rights litigation involving transnational corporations, which was organised by LCIL Fellow, Dr Andrew Sanger, and held at the Lauterpacht Centre on 6 December 2019.**

Against the backdrop of the recent decision by the UK Supreme Court in *Vedanta Resources*, and in anticipation of the Supreme Court appeal involving claims against Royal Dutch Petroleum, the panel hosted four experts in the field of business and human rights to discuss contemporary developments and future prospects in the field. Chaired by the LCIL's own expert on business and human rights, Dr Andrew Sanger, the discussion centred on the particulars of the *Vedanta* decision which paved the way for Zambian citizens to bring tort claims in English courts against UK-based *Vedanta Resources*; its implications for future tort litigation involving transnational corporations in domestic courts; and the development of international law in this area more broadly.

Dr Sanger provided a starting point for the discussion by broadly outlining three challenges which characterise transnational human rights tort litigation. The dynamic development challenge, concerning the dynamic environment in which transnational corporations operate and the dynamic development of the law in this area; the self-determination challenge, concerning the question of who is entitled to develop and apply the law in this field to determine its breach, as well as questions regarding the impact of jurisdiction on the ability of the injured to achieve justice; and finally, the sovereignty challenge, concerning the role international law plays, and should play, in transnational business and human rights cases.

Richard Hermer QC, who acted as counsel for the Respondents in *Vedanta Resources*, first offered his view on the legal strategy chosen in *Vedanta*, to strip the case from all international law elements. From a strategic perspective, Hermer's choice to dress the case as concerning exclusively domestic tort law, was a success in light of the Court's judgment affirming that general tortious principles can equally apply to transnational cases. Such approach, Hermer contended in response to a question by Dr Sanger, simplifies the legal questions faced by domestic courts in transnational tort litigation, as they only require the courts to apply the law rather than develop it.

From the wealth of her experience in leading the Business and Human Rights Unit of Quinn Emanuel's London office, Julianne Hughes-Jennett offered her perspective of the *Vedanta* decision. From her standpoint, the *Vedanta* decision leads to problematic policy concerns in clarifying that a duty of care might be assumed once a company publicises its connection with its complicit subsidiary. This might discourage companies from abiding by the UN Guiding Principles and carrying out human rights due diligence given they might set themselves hostages to their own reports in exposing their exercise of due diligence of subsidiaries.

Dr Axel Marx, the Deputy Director of the Leuven Centre for Global Governance Studies, elaborated on his recently

published co-authored report *Access to Legal Remedies for Victims of Corporate Human Rights Abuses in Third Countries*. Dr Marx shared several findings of the report, delineating some of the barriers in holding transnational corporation to account in domestic courts for human rights violations and environmental harms abroad. Whilst such violations span twenty-two states, only few cases are actually litigated, and even less succeed in attributing responsibility to European companies. This is due both to technical barriers of producing evidence, as well as to more principled difficulties of establishing causality.

Offering a more optimistic perspective, Dr Tara Van Ho, a leader of the Business and Human Rights Project at the University of Essex, highlighted the success of the *Vedanta* decision in identifying the actual relationships which exist in practice between parent and subsidiary companies, that are often concealed in international law. The *Vedanta* judgment, according to Dr Van Ho, recognised the actual power structure characteristic of corporate groups, the power choices of parent companies to exercise control over their subsidiaries, and the possible implications of these choices for issues of corporate responsibility. She

concluded by reference to the potential of an international treaty to recognise these power choices and address them, opining that such nuance would be better introduced through the development of case-law rather than via an international treaty.

Questions from the floor prompted the discussants to engage further with issues concerning the development of the law in the field of business and human rights. Dr Van Ho and Ms Hughes-Jennett remarked that the risk of fragmentation often thought to be inherent to bottom-up developments of the law is mitigated by the wide acceptance of the UN Guiding Principles by states and corporations alike. Some of the discussants further expressed their optimism regarding the development of international law in this area to recognise corporations as subjects in international law that could be held liable for its breaches, but equally emphasised the significance of market forces and tools other than hard-law which currently prove effective for establishing corporate accountability in practice.



Left to Right: Tara Van Ho, Julianne Hughes-Jennett, Richard Hermer and Andrew Sanger

**A recording of the panel discussion is available on the University of Cambridge Streaming Media Service: <https://upload.sms.csx.cam.ac.uk/media/3119807>**

## Guest Lecture on International Law and Policy in the UN Climate Regime: A Preview of the UNFCCC CoP25 Madrid Climate Conference

On 7 November 2019, Prof Marie-Claire Cordonier Segger, LCIL Affiliated Fellow and Dr Markus Gehring, LCIL Fellow, hosted a full house for a special evening lecture in the Lauterpacht Centre's Finley Library with Prof Daniel Bodansky, Regents' Professor at Arizona State University, to hear his expert views on 'Law and Politics in the UN Climate Regime: A Preview of the Madrid Climate Conference.'

The lecture reviewed developments in the international climate change regime, including the recently concluded UN Climate Change Summit, analysed the state of play of the Paris Agreement in the UN Framework Convention on Climate Change (UNFCCC) regime over 25 years, and provided a preview of the upcoming Conference of the Parties (COP25) to take place in Madrid in December 2019.

The lecture was supported by law and land economy graduate students from Climate Law and Governance Initiative, in partnership with the UNFCCC Secretariat.



Prof Bodansky and Prof Cordonier Segger

## International Law Panels and Experts Workshop on International Law & Governance Contributions to the Implementation of the UNFCCC Paris Agreement: Investment and Oceans

On 26 October 2019, Prof Marie-Claire Cordonier Segger and Dr Markus Gehring in partnership with the United Nations Framework Convention on Climate Change Secretariat (UNFCCC) Secretariat and the Centre for International Sustainable Development Law (CISDL) convened two international law panels and an experts workshop on law and governance contributions to Paris Agreement implementation, with a particular focus on sustainable investment and oceans governance.

There were very few spare seats left in the Finley Library for the International panels, which took place over a full morning and featured over a dozen international guests expert legal practitioners and academics participating from the United Nations, the University of Oslo, the University of Chile, UNIKIS in the DR Congo, the BSIA, the University of Waterloo and McGill University in Canada, the MIT, the EBRD and the ICC Court of Arbitration, among other institutions (either in person or online (to reduce GHG emissions from travel).

Across two panels, experts led dialogue on prospects for advancing ambition and compliance under the Paris Agreement and Katowice Rulebook, and climate law and governance innovations driving sustainable investments and facilitating effective ocean resource management. Among LCIL and Cambridge contributors, on the close relationship between the climate regime and investment Dr Gehring commented that the Paris Agreement may in fact be seen as an investment agreement in itself. Throughout discussions on oceans interlinkages, Dr Alexandra Harrington, CISDL Lead Counsel and Research Director, and Mr Freedom-Kai Phillips, PhD Candidate at the University of Cambridge, highlighted the need to improve coordination and harmonisation of domestic laws in order to progress the environmental protection of oceans.

'Climate change is the justice challenge of our century', commented Prof Cordonier Segger, inviting students and the broader legal community to collaborate in developing innovative practices and identifying avenues to urgently advance Paris Agreement implementation.



## Reflecting on the London Conference on International Law

Jennifer Tridgell is a Staff Lawyer at Volterra Fietta and sits on the Management Committee of the International Law Association, which co-convened the London Conference. Any views are her own. Jennifer was a Research Assistant at the Centre for Prof Eyal Benvenisti during 2019.



From 3 to 4 October 2019, leading and budding international law minds alike congregated for a premier conference in one of the contemporary hearts of international law: London. The London Conference on International Law ("London Conference") encouraged attendees to think deeply about diverse areas of international law ranging from cyberspace to climate change litigation, which all nestled neatly under the overarching theme of "Engaging with International Law."

If London is a beating heart of international law, then Brexit is causing some perceptible coronary palpitations. Throughout the London Conference, various speakers emphasised that the United Kingdom (UK) was there in the past and wants to be part of the future of international law. During the Welcome Reception, the Lord Chancellor and Secretary of State for Justice, Robert Buckland, stressed that "[j]ust because we are not in the European Union does not mean we won't be pro-European." He also spoke at length about the importance of standing firm amidst Brexit uncertainty, and promoting rule of law through a robust and independent judiciary.

Fittingly enough, two renowned judges officially opened the conference proceedings with Lady Hale of the UK Supreme Court making introductory remarks and Judge Yusuf of the International Court of Justice (ICJ) delivering the keynote address. He contended that engaging with international law does not necessarily mean promoting the status quo, since criticism can be constructive. For instance, Judge Yusuf stated that we must remember "sovereignty under, but not above international law" and questioned a so-called "mismatch" between the rights and obligations of non-state actors. In his opinion, which may interest many working in

business and human rights, "[w]e have been too lenient towards the rights of corporations, without clarifying their obligations and remedies where they breach international law – but it may be time to take a closer look..."

The Lauterpacht Centre was well-represented at the London Conference with a number of fellows, alumni and PhD students present. Sir Christopher Greenwood delivered the keynote address at the conference dinner and engaged in a panel discussion on "Effective Advocacy in Inter-State Litigation," in which he encouraged more "fresh voices" at the ICJ by increasing the presence of junior counsel. Dr Sarah Nouwen participated on the panel entitled "[What is the use of the International Criminal Court?](#)" and pondered whether that judicial forum is actually an "International Court of Convenience." She postulated that when a court treats ending impunity as synonymous with securing convictions, this approach could incentivise the court to seek cases with stronger prospects of convictions rather than targeting those individuals who are above the law.

Overall, the London Conference offered a spectacular smörgåsbord of panel topics within the field of international law and generated many enriching discussions between attendees. Consistent with the conference theme of "Engaging with International Law," hopefully this knowledge will disseminate further as people teach what they learn from practice, and practise what they learn from teaching.

The London Conference will take place again in 2021. Some speeches and panel discussions from the 2019 conference are available online: [bit.ly/2SMhAur](https://bit.ly/2SMhAur)

# Term Events

The following events take place in the Finley Library at the Lauterpacht Centre unless otherwise indicated.

For further details of all our events please visit [www.lcil.cam.ac.uk/press/events/all](http://www.lcil.cam.ac.uk/press/events/all). Audio recordings of lectures can be found at: <https://www.lcil.cam.ac.uk/media/lecture-recordings>.

**Evening Lecture: 5.30 pm, Thursday 16 January**

## **International Law and Political Engagement (ILPE) series: In Conversation with Gerry Simpson: On the Politics of Method**

*A series of conversations on international legal scholarship, political engagement and the transformative potential of academia.*



**LCIL Friday Lunchtime Lecture: 1 pm, Friday 17 January**

## **Space resource acquisition and space debris - two challenges for the future order for human uses of outer space**

*Dr Stephan Hobe, University of Cologne*



**LCIL Friday Lunchtime Lecture: 1 pm, Friday 24 January**

## **The Analogy between States and International Organizations**

*Dr Fernando Lusa Bordin, University of Cambridge*



**Evening Event: 5 pm, Thursday 30 January**

## **Legal Histories Beyond the State Seminar: 'Thinking' Inside the Box: 'Modular' Historiography, the Ethiopian Empire and Other Subjects of International Law**

*Dr Rose Parfitt, Kent Law School*



**LCIL Friday Lunchtime Lecture: 1 pm, Friday 31 January**

## **The States We're in: Law, Inequality, Historiography, Resistance**

*Dr Rose Parfitt, Kent Law School*



**Evening Lecture: 5.30 pm, Wednesday 5 February**

## **International Law and Political Engagement (ILPE) series: In Conversation with Dr Luis Eslava: On International Law and the South**

*A series of conversations on international legal scholarship, political engagement and the transformative potential of academia.*



**LCIL Friday Lunchtime Lecture: 1 pm, Friday 7 February**

## **Recovering Looted Assets in the Fight Against Grand Corruption**

*Professor Jason Sharman, University of Cambridge*



**Evening Event: 6 pm, Tuesday 11 February**

## **The Role of the Military Legal Adviser during Armed Conflict and Peacetime Military Operations**

*Commander Dr Ian Park*



**Lunchtime Event: 12.30 pm, Wednesday 12 February**

## **CUArb/LCIL Inaugural Arbitration Lecture:**

**'Cyber-security and the future of the obligation of full  
protection and security in investment law'**

*Richard O'Brien, 4 New Square*



**Evening Event: 5 pm, Thursday 13 February**

## **Legal Histories Beyond the State Seminar: The corporation and law in the making of global capitalism**

*Dr Grietje Baars, University of London*



LCIL Friday Lunchtime Lecture: 1 pm, Friday 14 February

### Minorities and the Making of Postcolonial States in International Law

*Dr Mohammad Shahabuddin, Birmingham Law School*



Evening Event: 5 pm, Friday 6 March

### Recent Austrian practice in the field of international law

*Helmut Tichy, Legal Adviser of the Austrian Foreign Ministry*



Evening Event: 5 pm, Friday 20 February

### 'Controlling Climate Chaos - The Rising Tide of Climate Litigation and New Litigation Rules to Facilitate Access to Climate Justice'



#### Guest Speakers:

Hon. Brian J. Preston Chief Judge of the Land and Environment Court, New South Wales, Australia

David Estrin, Co-Chair, IBA Task Force on Climate Change Justice and Human Rights, Certified Environmental Law Specialist, Distinguished Adjunct

Professor, Osgoode Hall Law School, York University, Toronto, Canada

LCIL Friday Lunchtime Lecture: 1 pm, Friday 13 March

### Emptied Lands: A Legal Geography of Bedouin Rights in the Negev

*Alexandre Kedar, University of Haifa*



Arnold & Porter

LAUTERPACHT CENTRE FOR INTERNATIONAL LAW

The United States' shifting relationship with International adjudication: ICJ, ICC, WTO and arbitral tribunals

Lecture by Harold Hongju Koh



Please Join Arnold & Porter and the Lauterpacht Centre for a Lecture by Harold Hongju Koh on March 11 2020 at Gray's Inn Hall

RSVP now

#### DATE

Wednesday, 11 March 2020  
6:00 PM—Arrival  
6:20 PM—Start  
Lecture will be followed by a reception in the Large Pension Room with drinks and canapes.

#### LOCATION

Gray's Inn Hall  
The Honourable Society of Gray's Inn  
8 South Square  
London  
WC1R 5ET  
[View in Google Maps](#)

#### EVENT SPONSORS

[Arnold & Porter](#)  
[Lauterpacht Centre for International Law](#)

LCIL Friday Lunchtime Lecture: 1 pm, Friday 21 February

### Building a Feminist Approach to International Criminal Law

*Kirsten Campbell, University of London*



LCIL Friday Lunchtime Lecture: 1 pm, Friday 28 February

### A Performative Theory of Judicial Dissent in International Law?

*Dr Hemi Mistry, University of Nottingham*



#### Harold Hongju Koh

- Yale University Sterling Professor of International Law
- Former U.S. Legal Advisor of the Department of State
- Former Dean of Yale Law School

RSVP: <https://comms.arnoldporter.com/6/2913/landing-pages/accept.asp?sid=blankform>

# Human Rights and the Making of Europe: The European Court of Human Rights in the Grand Transformation

**Professor Mikael Rask Madsen**

*University of Copenhagen*



A series of three lectures:

- |                      |                                                                                                                             |
|----------------------|-----------------------------------------------------------------------------------------------------------------------------|
| <b>Tues 3 March</b>  | <b>Legalizing Free Europe: Human Rights, Cold War and the Construction of the Post-War European Legal Order (1959-1989)</b> |
| <b>Wed 4 March</b>   | <b>The ECtHR in the New Europe (1989-2009)</b>                                                                              |
| <b>Thurs 5 March</b> | <b>The End of Consensus: The ECtHR in the Age of Megapolitics (2009-2019)</b>                                               |
| <b>Fri 6 March</b>   | <b>Q&amp;A</b>                                                                                                              |

All three parts of the lecture are from 6 pm - 7 pm

Friday's Q&A session starts at 1pm (sandwich lunch from 12.30 pm)

**Venue:** 3, 4, 5 March at Faculty of Law, LG17  
Fri 6 March - Finley Library, Lauterpacht Centre

In these lectures, I will analyse the place of the European Court of Human Rights (ECtHR) in the making of contemporary Europe. The lectures examines how the ECtHR has both responded to changing socio-political contexts and contributed to the making of Europe since the Court's establishment in 1959. The first lecture focuses on the position of the court in the Cold War (1959-89) and how it navigated these constraints and eventually emerged as a powerful institution of European human rights and integration in the late 1970s. The second lecture (covering the period 1989-2009), analyses the court in the New Europe and the structural and institutional transformations this triggered, notably in terms of institutional reform and deeper national embeddedness. The third lecture, covering the past decade (2009-19), focuses on the growing resistance to the ECtHR in the context of deteriorating intra-European relations. The lecture investigates how megapolitical issues have entered the court's caseload and with wide-ranging consequences. It concludes with a view to the future of European human rights, drawing on comparative lessons from other international courts.

Mikael Rask Madsen is a Professor of European Law and Integration at the Faculty of Law, University of Copenhagen.



The Hersch Lauterpacht Memorial Lecture is an annual three-part lecture series given by a person of eminence in the field of international law to commemorate the unique contribution to the development of international law of Sir Hersch Lauterpacht.

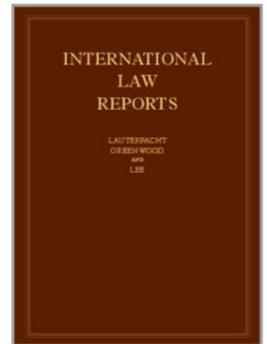
## Publications

The International Law Reports (ILR) have been reporting the decisions of national and international courts and tribunals on issues of public international law for ninety years. The series is under the editorship of Sir Christopher Greenwood and Ms Karen Lee. Volumes are published in print and then online.

Since 2016, there have been six volumes published each year, enabling the series to capture the full range of judgments and awards on issues of international law from the increasing number of international courts and tribunals while expanding coverage of national judgments.

The series is available online via Cambridge Law Reports (CLR) and also from Justis. The latest volume is 185 which was published in January 2020.

More information: <https://www.lcil.cam.ac.uk/publications/international-law-reports>



## Customary IHL Project updates ICRC database; Rules section published in six new languages

On 13 December 2019, the award-winning online [Customary IHL Database](#) of the International Committee of the Red Cross (ICRC) was updated with practice from Djibouti up to the end of 2017. This recently added practice is marked in green throughout the database.

A team of British Red Cross [researchers](#) based at the Lauterpacht Centre, in close collaboration with the ICRC, analysed and processed the source material.

In addition to the recent update of practice, since December 2019 the rules section of the ICRC's 2005 [Study on customary IHL](#) is available on the Customary IHL Database in six new languages: Arabic, Chinese, French, Portuguese, Russian and Spanish.

The aim of the Customary IHL Database is to provide up-to-date, accurate, extensive and geographically diverse information in the field of international humanitarian law (IHL) and to make this information readily accessible to practitioners and researchers. [The Customary IHL Project](#) is a joint undertaking of the British Red Cross and the ICRC, set up in 2007, and updates the practice section of the ICRC's 2005 Study on customary IHL, which was originally published by [Cambridge University Press](#).

The formation of customary law is an on-going process. For this reason, practice is updated regularly to allow users of the Database to monitor:

- the application and interpretation of IHL,
- potential developments in practice and
- the extent to which the rules of IHL contribute to protection for victims of armed conflict and to the regulation of means and methods of warfare.



Photo copyright: T. Pizer/ICRC

# INVESTMENT LAW AND ARBITRATION

The Lauterpacht Centre for International Law, in collaboration with  
Cambridge Judge Business School Executive Education

A five-day, advanced introduction to international investment law and arbitration

**Monday 21 - Friday 25 September 2020**

## Programme Summary

This five-day residential programme provides an advanced introduction to international investment law in the context of public international law and practice focusing on recent developments. It offers the opportunity to learn from Cambridge law and business school academics, as well as leading practitioners drawn from major law firms and barristers' chambers. It is designed both for junior practitioners who are developing a practice in international investment law and for more senior lawyers who wish to re-orient themselves to investment arbitration.



## Who is the Programme for?

- For lawyers in private practice, government departments or in-house counsel, a thorough understanding of the building blocks of international investment law and how it is embedded in general international law is becoming increasingly important.
- Lawyers in private practice who are developing a practice in international investment arbitration, and who seek to consolidate their knowledge of international investment law and general international law.
- In-house counsel or government lawyers working on investment arbitrations.
- Lawyers in private practice who aspire to expand their practice to include investment arbitration (e.g. lawyers specialised in commercial law or international commercial arbitration).



### Further information:

[www.lcil.cam.ac.uk/investment-law-and-arbitration](http://www.lcil.cam.ac.uk/investment-law-and-arbitration)

[Professor Michael Waibel](#) and [Professor Jorge Viñuales](#) are Co-Academic Programme Directors of this course.

## Topics

- State responsibility, including attribution, defences and carve-outs
- Treaty interpretation: the VCLT framework and specificities in investment arbitration
- Strategy for your arbitration practice
- Jurisdiction and admissibility
- Expropriation
- Non-discrimination and fair and equitable treatment
- How to draft a request for arbitration
- Evidence
- Control mechanisms (challenge, nullity, recognition, enforcement)
- How finance professionals value assets and companies
- The challenge of diversity in international arbitration
- Procedural Choices

*"The course was a great opportunity to learn from world-leading academics and practitioners with experience in the field."*

Course participant 2018



For expressions of interest please contact [Pedro Schilling de Carvalho \(ps785@cam.ac.uk\)](mailto:ps785@cam.ac.uk)



## BRANDON RESEARCH FELLOWSHIP 2020-2021

The Lauterpacht Centre for International Law is pleased to invite applications for the 2020 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.

For details on how to apply visit: <http://bit.ly/brandonresearchfellowship>

**APPLICATION DEADLINE: Monday 30 March 2020**

# Fellows' News

## Dr John Barker

Those interested in climate change may wish to have a look at the video interviews of participants at the conference on the ethics of climate change in the summer, jointly hosted by Cambridge Governance Labs (Hughes Hall) and the Intellectual Forum (Jesus College).

Some of the material was filmed at the Lauterpacht Centre, including a discussion between Lord Rees, Astronomer Royal, founder of the Centre for the Study of Existential Risk and an engineering student, Morgan Sheil.



The 'Levers of Change' video features two of our Fellows, Marie-Claire Cordonier Segger and John Barker, along with Michael Berners-Lee (scientist and author), George Marshall (Co-Founder of Climate Outreach), Emily Breatly (Development Economist from the World Bank), Jona David (Founder of the Cambridge School Eco-Council) and representatives from Extinction Rebellion.

The conference brought together scientists, economists, lawyers, specialists in ethics and geoengineering experts to talk about the ethical framework in which decisions are taken that affect the sustainability of life on earth.

More information: [www.conversation.global/cgc-climate-videos](http://www.conversation.global/cgc-climate-videos)

## Dr Sandesh Sivakumaran



Professor Sandesh Sivakumaran, Professor of Public International Law at the University of Nottingham, joined the Lauterpacht Centre as a Fellow in January 2020 as Reader in International Law at the Faculty of Law, University of Cambridge.

Previously, Sandesh has been a non-resident research scholar at the United States Naval War College Stockton Center for International Law and has held visiting fellowships at Melbourne Law School and New York University School of Law.

Sandesh has published on a variety of topics in public international law, and advises and acts as expert for a range of states, international organizations and non-governmental organizations.

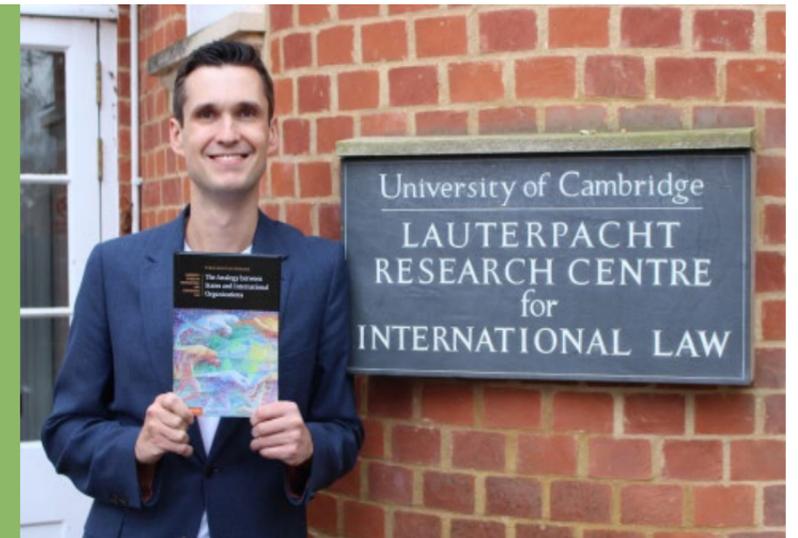
He has served as international legal advisor to the Appeals Chamber of the Special Court for Sierra Leone, conflict advisor to the Secretariat of the World Humanitarian Summit, and a member of the working group on non-state armed groups at the Centre of Competence on Humanitarian Negotiation.

He is a member of the Reading Committee of the ICRC's Commentaries on the Geneva Conventions and Additional Protocols, a member of the advisory board of Geneva Call and was a member of the Core Group of Experts for the Oxford Guidance on the Law Relating to Humanitarian Relief Operations in Situations of Armed Conflict.

Sandesh regularly trains diplomats, members of the armed forces, and UN entities on international law and the law of war. He is a member of the Bar of the State of New York. He also holds an MA and PhD from the University of Cambridge and an LLM from New York University School of Law where he was a Hauser Global Scholar.

Sandesh has been a guest lecturer at the Centre on a number of occasions and we delighted that he has chosen to join us. Welcome to the Centre, Sandesh!

Dr Fernando Bordin with his award-winning book at the Lauterpacht Centre where he is a Fellow.



## Dr Fernando Lusa Bordin

The Lauterpacht Centre is delighted to announce that [Dr Fernando Lusa Bordin](#), a Fellow of the Centre, is being awarded the 2020 Certificate of Merit in a specialized area of international law by the American Society of International Law (ASIL) for his research monograph, [The Analogy between States and International Organizations \(CUP 2019\)](#).

Fernando's book was unanimously recommended for the prize by the ASIL Book Awards Committee:

"This book is an original and rigorous contribution to the literature on the subjects and sources of international law. It considers the role that the analogy between States and international organizations has played in the development of international law applicable to organizations. It does so with particular reference to the work of the UN International Law Commission on the law of treaties and on international responsibility, but goes well beyond those areas, offering fresh insights into the usefulness - and limitations - of analogy as a method of argument in international law. The book is of high theoretical and practical interest, has the merit of being clearly written, and has the potential to be influential over the long-term."

Congratulations, Fernando, on this wonderful achievement!

## Prof Marie-Claire Cordonier Segger



In November 2019, Professor Marie-Claire Cordonier Segger was awarded a Leverhulme Trust Visiting Professorship at the University of Cambridge, and appointed to a Fellowship in Law and as Director of Studies for LLMs/MCLs at Lucy Cavendish College, Cambridge. She was also re-elected Executive Secretary of the United Nations Framework Convention on Climate Change (UN-FCCC) Conference of the Parties (CoP25) Climate Law and Governance Initiative.

Congratulations Marie-Claire on your new roles!

## Professor Rochelle C Dreyfuss is the Arthur Goodhart Visiting Professorship in Legal Science (2019-20)



I am privileged to serve as the Arthur Goodhart Visiting Professor in Legal Science for academic year 2019-2020. My primary appointment is at New York University School of Law, where I co-direct its Engelberg Center on Innovation Law and Policy. My main areas are patent law and international and comparative intellectual property (IP) law. At Cambridge, I am teaching the LLM paper on international IP law.

Much of my current work is focused on the problem of technological inequality. Under the Agreement on Trade Related Aspects of Intellectual Property (TRIPS), members of the World Trade Organization (WTO) are required to adopt minimum standards of IP protection and, through national treatment and most favored nation (MFN) obligations, they are prohibited from discriminating against creators and traders from other member states. Both of these requirements are problematic. Minimum is something of a misnomer in that the obligations to protect IP are extensive. For example, states must make patents available for inventions “in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application.” For innovative states, this obligation creates a mechanism for their citizens to obtain WTO-wide returns on the risky and costly investments required to invent. However, for states that are not at the technological frontier, patents mainly raise costs, reduce output, and impose deadweight loss. Especially for

new medicines, these costs can be exorbitant. IP rights also block innovators in developed and least developed states from adapting protected subject matter in order to satisfy local needs or solve unique problems. In the copyright sphere, for example, the right to translate poses a longstanding problem. Although the Berne Convention or the Protection of Literary and Artistic Works permits unauthorized translations into local languages, it imposes a time lag between publication and translation which makes it difficult for scientists (and other readers) to keep current with modern developments. Obligations to offer national and MFN treatment are thus arguably not nondiscriminatory: they amount to preferences for industrialized countries, enabling them to extract taxes in the form of royalties from less developed states.

My research is intended to help WTO members develop legal systems that improve access to existing knowledge, permit them to respond to local needs,

and enable them to become innovative at world levels. To a large degree, I believe they can adopt such regimes consistent with their international obligations, properly understood. But there is a significant obstacle. Novel measures are subject to challenge under the WTO’s Dispute Settlement Understanding and, in states that have entered into bilateral investment treaties and certain free trade agreements (BITs and FTAs), also through the investor-state dispute settlement (ISDS).

Much of my work is therefore concerned with ways to improve decision making under these instruments. In earlier scholarship, including my book, *A NEOFEDERALIST VISION OF TRIPS* (with Graeme Dinwoodie), I argued that the WTO has failed to recognize the IP regime as a mechanism for balancing private and public rights; that early Panel Reports wrongly conceptualized exceptions and limitations to IP as derogations from rights rather than as enablers of state experimentation with ways to strike the appropriate balance. To some extent, critiques along these lines appear to have influenced the WTO. The Doha Declaration stressed states’ rights to protect health and in a recent Report on a measure limiting the salience of trademarks on tobacco packaging, the panel sided with the Australia in its efforts to reduce smoking. That case is now before the Appellate Body, but the expectation is that it will affirm, even if it rejects some of the panel’s reasoning.

I have now turned my attention to ISDS, which I suggest is too closely aligned with commercial arbitration and, as such, is significantly more disruptive

of sovereign authority than is the WTO’s compliance mechanism. Widespread concern with regulatory chill has led to changes in recent investment agreements and during the Michaelmas Term, I examined the reforms included in the EU-Canada Comprehensive Economic and Trade Agreement (CETA), the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), and in BITs and FTAs signed or ratified in 2019. I’ve found that many now articulate a right to regulate, especially in the health sphere. Some have limited protection against expropriation and roll back the scope of the guarantee of fair and equitable treatment. A few include major changes in the arbitral system. I remain dubious, however, that these moves go far enough in curbing the ability of investors to challenge (and chill) legitimate regulatory activity.

In the remainder of my stay, Dr Henning Grosse Ruse-Khan (LCIL Fellow) and I plan to take a closer look at the obligations of national treatment and MFN, to consider their scope (for example, to decide whether they apply to procedural rules such as forum non conveniens and applicable law), examine existing exceptions, and delineate the leeway WTO members enjoy to develop rules specifically targeted at encouraging domestic creativity and eliminating technological inequality.

Further information: <https://www.law.cam.ac.uk/people/academic/r-dreyfuss/78441>

## Who was Arthur Goodhart?

The University of Cambridge established the Arthur Goodhart Visiting Professor of Legal Science in 1971 to commemorate the eightieth birthday of [Arthur Lehman Goodhart](#), who was, at the time, Emeritus Professor of Jurisprudence at Oxford University, retired Master of University College Oxford, and Honorary Fellow of Trinity Hall and Trinity College Cambridge.

Incumbents have light formal obligations, being expected only to teach, or share in the teaching, of a course in the Law Tripos or LLM, and to participate generally in the activities of the Faculty. The chair is not tied to a particular college, and the visitor has the use of the spacious Goodhart Lodge in Cambridge.



# Sir Elihu Lauterpacht (1928 - 2017)

## A Life in International Law

### A Photo-Biography

By Gabriel Cox



**At the 2019 Lauterpacht Christmas Dinner held at Downing College Eli's daughter, Gabriel Cox, spoke about the Photo-Biography of Eli's life story she had lovingly compiled over the last few years. The following is a transcription of that after dinner presentation.**

Thank you, Eyal for your kind introduction and for your generous invitation to join this evening's Lauterpacht Centre Christmas dinner.

Your invitation provides me with the perfect opportunity to formally present the Centre with a copy of my book, *Sir Elihu Lauterpacht – A Life In International Law*.

As many of you already know the book is a Photo-Biography. An informal illustrated journey through my father's life rather than a traditional or more formal biography.

It was in fact an idea that Eli had after he completed the biography of his father in 2010, when people encouraged him to write about his own life. And, although Eli talked a great deal with Cathy, his family and friends about the project he had only drafted a few chapters before he died in February 2017.

Although I knew nothing about international law and had lived away from the UK all my adult life, I still felt compelled to tell Eli's story. He was so passionate about the photographs and the project, that I felt the need to carry his vision through to completion.

My starting position was my interest in his photographs, some of which I had identified with my father in his last year. I was well organised, computer competent and I had a good idea of the man that Eli was.

I began with two tables, one with all of Eli's words and the other with his collection of nearly 2,000 photographs. I put everything in chronological order and from there I tried to marry the two together. Sometimes I had words without photos, sometimes photos without words and sometimes all I had was a heading from his CV. It was like doing a multi-thousand-piece jigsaw puzzle without knowing what the picture would look like.

This is the point at which I called upon the help of Eli's friends and colleagues, including some of you who are

here tonight. Special thank-yous to Sarah Nouwen, Andrew Sanger, John Barker and Karen Lee for your contributions to the book.

Everyone I approached was encouraging of the project and many were kind enough to fill in the missing parts. With their invaluable help the picture became clearer and it expanded into what we have here, a book of almost 300 pages and 400 photographs.

Throughout the two years that I spent compiling the book, it was a daughter's delight to read the emails received from far and wide and to learn so much more about Eli's fascinating life. I knew he was a remarkable man, but those insights added a whole new meaning to the word remarkable!

Eli was hard-working, extremely capable, generous, fun-loving, kind, loyal, and he had a wonderful sense of humour. These themes are evident throughout the book and you will read many individual accounts of the positive impact he had on the lives of his students and colleagues alike.

Having been an undergraduate at Trinity, Eli became a Fellow of the College in his mid 20s. And for decades he was a lecturer, supervisor and mentor at the university. He was known as an outstanding scholar, for his engaging teaching style and for his extraordinary passion for life and the law. Eli's warm and nurturing personality meant that he was always ready to share his knowledge freely and was always encouraging towards his students, whilst also being an exacting taskmaster.

Eli taught many of the world's leading international lawyers: some of whom became academics, statesmen, judges and four presidents of the ICJ!

Although Hersch was undoubtedly a strong influence on Eli in his younger years, he pursued his own distinct path in international law, one that was less focused on the theoretical and more on finding practicable legal solutions: He relished the opportunity to apply international law in a way that would contribute to a fairer and safer world.

Whilst pursuing his international law practice: advising and assisting individuals, corporations, international organisations and governments, Eli remained connected to his academic roots.

It was upon his return to Cambridge, after spending three years as the Legal Adviser to the Australian Department of Foreign Affairs, that the university gave Eli the opportunity to establish the Research Centre for International Law, in 1983, with a mission to promote international law through a combination of individual and group research.

As you all know, the Centre's size and activities have expanded since then and it was re-named the Lauterpacht Centre for International Law in 1996 in honour of the contributions that Hersch and Eli had made to the advancement of international law here in Cambridge.

There are almost 20 pages of text and photographs within the biography that relate to the Centre and I hope you will find them interesting. They illustrate how the Centre has developed over the past 36 years into the dynamic, thriving and happy place that it is today.

The Centre was a 'home from home' for Eli and in his later years he loved to spend time there, attending events and lectures. He was always happy to stay on afterwards, chatting to students and visitors about their work and the cases the he had been involved with.

Last year, I had the great fortune to spend a week at the Centre doing research for the book. I loved the wonderful atmosphere: serious, academic, light-hearted and friendly, all at the same time. And the buzz of energy during the morning coffee break was such fun with all of you, from so many different places and perspectives, mingling

in the kitchen and chatting so freely. I am indebted to everyone for making it such a positive experience. Anita Rutherford, Karen Fachechi and Vanessa Bystry, thank you for your warm welcome, encouragement and invaluable assistance.

My aim in the telling of Eli's story has been for it to be as inclusive and accessible as possible. I hope that it will be of interest not only to lawyers and those who knew him but also to non-lawyers and those who would like to learn more about his extraordinary life. Included are some chapters about Eli's family and I have ended the book with photographs of Eli with Cathy, their children and grandchildren, who brought great joy to Eli in his twilight years.

I will conclude here with a quote from the book. The words of Judge Christopher Greenwood who was at the ICJ in 2013 when Eli, aged 85, made his final appearance before the Court as counsel for Timor-Leste against Australia. Chris recalled:

*This last time that Eli appeared in the ICJ he spoke seated. But there was no diminution in his authority. Normally the President decides when to adjourn for the mid-morning break. On this occasion, Eli looked up and said he would like a break, to collect his thoughts. There was a short pause. Then we adjourned; he collected his thoughts; he won the case. It was a most fitting end.*

*Eli's career before the Court began in 1953 and lasted 60 years, a record which has never been and is unlikely to ever be matched.*



*Professor Eyal Benvenisti, Centre Director and Gabriel Cox, Eli's daughter with a copy of Eli's Photo-Biography at the 2019 Lauterpacht Centre Christmas Dinner in Downing College, Cambridge.*

# Working at the International Court of Justice

By Catalina Fernández Carter, Judicial Fellow, International Court of Justice (ICJ)

**Catalina Fernández Carter studied law at the Universidad de Chile (summa cum laude) and for a LLM in International Law at the University of Cambridge in 2018-19 where she gained First Class Honours and received the Whewell Scholarship in International Law. Since September 2019 she has been working as a Judicial Fellow at the International Court of Justice (ICJ) at The Hague. Here, she reveals how this came about.**



In December 2018, at the end of the first term of Cambridge's Master in Law, I suddenly realized that I was very behind in the process of figuring out what was I going to do after graduation. Several of my classmates had already attended various rounds of interviews in London, were participating in Skype interviews with firms all over the world, or had already submitted their PhD applications, while I was still pretty much lost. At that moment, I only knew two things: first, that I did not want to go back to private practice (after almost 4 years working in an international arbitration law firm in Santiago), and second, that I wanted to work in something related to international law.

I remember starting the Christmas break looking for possible jobs, having the weird feeling that, although I had only completed one-third of the Master and I still had months of study ahead, it might be too late to find something interesting to do afterwards. It was around that time that I got an e-mail which stated that Cambridge was looking for one candidate to present for the Judicial Fellows Programme at the International Court of Justice. At that moment, I had no idea what the Judicial Fellows Programme was. But working at the International Court of Justice was the dream for anyone that wanted to pursue a career in international law (which was one of the few things I was clear about).

I applied without many expectations, and even when I was informed that Cambridge had selected me as its candidate, my expectations were still low. The Court still had to undertake its own selection process, and in the almost 20 years of the Programme, only 5% of the Fellows had been from Latin America (and there was no other person from Chile), while more than 50% were from the United States, Canada or Europe. Previous Fellows included renowned scholars and practitioners in international law, all of which seemed to set the bar too high to reach.

But in a surprising turn of events, in the second break, I got an e-mail from the International Court of Justice

informing me that I had been selected as a Judicial Fellow and that I was appointed to work with H.E Judge Antônio Augusto Cançado Trindade, precisely the Judge that comes from Latin America. The only downside was that I would have to move from rainy Cambridge to (surprisingly) even more rainy The Hague, and that I would again have to experience a winter with very few hours of light per day (something that is still hard for those of us who are used to living closer to the Equator).

I started working at the Court the first week of September, along with a group of 14 other Fellows from 14 other universities. The group of Fellows is quite diverse, representing 11 nationalities and different levels of study (some just graduating from their JDs, others already with a Master, and some completing or having already finished their PhDs). None of that impedes us from enjoying social and academic events and having passionate discussions about international law and pop culture (sometimes at the same time), communicating mostly in English but also randomly in French (some of us, with a poor accent, and using Spanish to fill the blanks every once in a while).

After completing four months at the Court, I feel immensely privileged for this opportunity to work at the most important international tribunal, and to cover so many different areas of international law. In this short period, I have already engaged with different cases, preparing legal memos and conducting research on areas as diverse as maritime delimitation, reparations for violations of international human rights law and international humanitarian law, provisional measures, jurisdictional issues and alleged violations of the Genocide Convention (in a case that has received much more media attention than the average case, and even included several protests at the doors of the Peace Palace).

The opportunity to work directly with H.E Judge Cançado Trindade has also been extremely valuable and challenging. As each Judge's team is very small (and only consist of a Secretary and an Assistant Legal Officer, in addition to the Judicial Fellow), the Fellow has a lot of exposure to the cas-

es, and usually has similar assignments to the ones given to the Assistant Legal Officer. This has given me a lot of opportunities to engage in analysis of the cases and the legal arguments at an advanced level, requiring me to put into practice what I learned in Cambridge. The Court is also a small institution, which creates a friendly and even family-like atmosphere, where the biggest concern is to remember in what language to greet each person in the morning (things sometimes get confusing in a bilingual organization!).

I am extremely grateful to the University of Cambridge and the Lauterpacht Centre for granting me the opportu-

nity to participate in this Programme, and for their continuing support during this period. I strongly encourage current and future students of the Master in Law to apply for this position, both those that have very clear views of what they want to do, but also those that might be as lost as I was in December 2018 but know that they intend to build a career in international law. One year later, I again do not have a lot of certainty on what my plans are after finishing the Fellowship, but I am certain that this has been a fundamental step in continuing to build the career that I have always dreamed of.



Catalina (third from right) with her fellow Judicial Fellows in front of the International Court of Justice

# Lent Term 2020 Visitors

We welcome the following Visiting Fellows and Researchers to the Centre this term. Visitors' profiles and their research specialisms are available at <https://www.lcil.cam.ac.uk/people/current-visiting-academics-postgraduate-students>



**Dr Markus Beham** is currently an Assistant Professor at the University of Passau, Germany, and an adjunct lecturer in international law at the University of Vienna, Austria. Prior to that, he worked as an Associate in the International Arbitration Group of Freshfields Bruckhaus Deringer LLP, resident in the firm's Vienna office, and as a fellow at the Department of Legal Philosophy of the University of Vienna. He holds a joint doctoral degree from the Université Paris Ouest – Nanterre la Défense and the University of Vienna and a doctoral degree in history from the latter, as well as an LLM degree from Columbia Law School in New York.



**Dr Anna Marie Brennan** joined the University of Waikato as a senior lecturer in law in July 2018. Before joining the law school she held a lectureship at the University of Liverpool. Her book entitled 'Transnational Terrorist Groups and International Criminal Law' was published by Routledge in 2018. She has also worked on the defence of Radovan Karadzic at the ICTY and as a visiting professional to Judge Sylvia Steiner on the Jean Pierre Bemba Gombo trial at the ICC.



**Dr Gerard Conway** is a senior lecturer in law at Brunel University London, from where he obtained his PhD degree. He previously graduated as a Barrister-at-Law at King's Inns, Ireland, and obtained a Master of International & Comparative Law degree from Uppsala University, Sweden, having studied Law and European Studies as an undergraduate at the University of Limerick, Ireland. His research is in the areas of legal reasoning, constitutional law of the EU, comparative public law, and European and international criminal law.



**Dr Enuo Gu** is an assistant professor and master tutor in the School of Law, and also a post-doctoral researcher in the School of Economics and Finance at Xi'an Jiaotong University. Dr Gu's research mainly focuses on International Investment Law and the basic theoretical issues of International Economic Law. She has undertaken three provincial research projects at the Ministry of Justice, Shaanxi Province Social Science Foundation and Chinese Postdoctoral Science Foundation.



**Mr Nikola Hajdin** is a doctoral candidate in international law at Stockholm University. Prior to coming to the Centre, he was a fellow at Harvard Law School (Institute for Global Law and Policy). His research focuses on the outer limits of criminal responsibility for international core crimes, more specifically for the crime of aggression. Previously, Nikola practiced law in Serbia, Sweden, the Netherlands and France. Nikola teaches international public law, international criminal law, international human rights law and legal English at Stockholm University. He regularly teaches at other universities in Sweden.



**Professor Stephan Hobe** is a University Professor and Director of the Institute of Air, Space and Cyber Law as well as Head of Department of Public Law and Deputy President of the German Society of International Law. He is Holder of the Chair for Public International Law, European Law and European and International Economic Law at the University of Cologne.



**Professor Daniel Moeckli** is Professor of Public International Law and Constitutional Law at the University of Zurich. His research focuses on questions related to human rights and democracy. Before joining the University of Zurich, he was a lecturer at the University of Nottingham and worked for the International Bar Association, Amnesty International and the Supreme Court of the Canton of Bern. He has held previous visiting positions at the Hebrew University of Jerusalem, the European University Institute (EUI) and New York University (NYU).



**Ms Alessandra Nepa** is a PhD candidate in International Law at the University "G. d'Annunzio" of Chieti-Pescara (Italy). She holds a Law degree from the University of Bologna (2016) and was admitted to the Italian Bar in 2018. Her research interests include International Heritage Law, International Environmental Law and Human Rights Law. Currently, Alessandra is pursuing her PhD at the University of Pescara. She was awarded a doctoral scholarship by the School of Advance Studies "G. d'Annunzio" and a grant for tutoring and didactic activities from the Department of Legal and Social Sciences.



**Dr Ziaojing Qin** joined Beijing Normal University Law School (BNU) as a lecturer in law in October 2012. Before joining BNU, she completed her LLM and PhD from the University of Manchester, UK. Her principal research interests are in the areas of International Economic Law, WTO law, International Investment Law and the Laws relating to Foreigners' Land Ownership. She has led and participated in many research projects funded by China's Ministry of Education, Beijing Normal University and private companies.



**Dr Mark Retter** is a postdoctoral researcher with an independent grant to pursue inter-disciplinary research on the role of human rights in modernity, under processes of secularisation; and on ethical foundations to international legal order. Prior to this he worked as a Research Associate on the Legal Tools for Peace-Making Project at the Lauterpacht Centre; and he completed his doctoral studies, as a Gates Cambridge Scholar, at the University of Cambridge. Dr Retter supervises undergraduate students in Jurisprudence and Public International Law at the University of Cambridge, and assists with the operation and development of the Language of Peace database.

# Lent Term 2020 Visitors



**Ms Denise Wohlwend** is an Associate in FRORIEP's Litigation and Arbitration Group in the firm's office in Zurich, Switzerland. Previously, she was admitted to the Bar in Switzerland and defended her doctoral thesis in international law at the University of Fribourg, Switzerland, having obtained her Bachelor and Master of Law from the same university. During and after her doctoral studies, she has been a visiting researcher at the University of Oxford and the Max Planck Institute for Comparative Public Law and International Law in Heidelberg.



**Dr Dong Yan** achieved LLB, LLM, PhD in law (specialization: Jurisprudence) from South-west University of Political Science and Law. Her doctoral thesis was entitled: The Hierarchy of Human Rights: Based on the Study of CCPR and CESCR (CCPR for C.N.Covenant on Civil and Political Rights, CESCR for C.N.Covenant on Economical, Social and Cultural Rights). Dong's principal research fields are: International Human Rights Law, Sociology of Law. Her main research method is quantitative analysis.



**Ms Qing Zhao** is currently a PhD candidate at China University of Political Science and Law, and holds an LLM in International Law as well as an LLB in Law. Her research interests include Law of the Sea, Law of the Outer Space and International Environmental Law. Apart from her research, she is one of the conveners of Sino International Law of the Sea Moot Court Competition.



For more information on visiting the Centre, please visit:  
[www.lcil.cam.ac.uk/about-centre/visiting-fellows-and-scholars](http://www.lcil.cam.ac.uk/about-centre/visiting-fellows-and-scholars)

# Visiting Fellows & Researchers

**The Lauterpacht Centre warmly welcomes Research Fellows and Scholars from around the world with interests in international law to come to Cambridge.**

Visitors' profiles and research information for the Lent Term 2020 can be found on the Centre's website: [www.lcil.cam.ac.uk/people/current-visiting-academics-postgraduate-students](http://www.lcil.cam.ac.uk/people/current-visiting-academics-postgraduate-students). Visitors normally stay at the Centre between one term and one year.

Over the course of their stay at the Centre Visiting Fellows and Researchers arrange regular sessions to present their research. This provides a great forum for discussion and debate.

In addition to their academic endeavours, visitors also organise a number of social activities in and around Cambridge. The Centre is grateful to the visitors for their contribution to the Centre, both academic and social.



# Life @ the Lauterpacht Centre





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