



Australian
National
University



INTERNATIONAL LAW WORKSHOP
THE INTERACTION BETWEEN
TREATY AND CUSTOM

8 MARCH 2018

Venue: Finkel Theatre, John Curtin School of Medical Research
Building 131, Garran Road, The Australian National University, Canberra

Centre for International
& Public Law
ANU College of
Law

[law.anu.edu.au/event/workshop/
international-law-workshop](http://law.anu.edu.au/event/workshop/international-law-workshop)

The possible interactions between treaty and custom are generally considered by reference to the well-established framework set out by the International Court of Justice in the *North Sea Continental Shelf Cases* of 1969; namely, the declaratory, crystallising and generating effects of a treaty (as for a resolution) on a customary rule. The impact of codification on the time it takes for a customary rule to develop, as well as the nature of the substantive rules that treaty codification might generate (obligations of means in addition to those of result; as a consequence of the acceleration in the rule formation process) are also well canvassed. But other issues relative to the treaty-custom interplay warrant consideration today.

With the International Law Commission focussed on the proper identification of customary international law, and separately on the role of subsequent practice in treaty interpretation, one question that arises is how do we differentiate between what might be practice for the purposes of custom as opposed practice for the purposes of treaty interpretation? Each type of practice is different, with its own conditions, thresholds and effects.

Second, some codification issues stand out as being of particular contemporary relevance, even if they are not new. For instance, one can still ask in relation to the ever-flourishing field of international investment law when and whether an investment treaty operates to derogate from or generate customary rules ('Baxter's paradox'). Other issues of codification pose practical dilemmas, such as the out-sourcing of codification projects today, especially where the private codifier's product (such as the NATO Cooperative Cyber Defence Centre for Excellence's Tallinn Manual 2.0) appears to carry more weight than that of a United Nations organ (specifically, the UN Group of Governmental Experts). Another enduring issue, as ever highlighted by current State behaviour, is the question of custom's potential scope beyond the treaties when it comes to the laws of armed conflict.

PROGRAM

THURSDAY 8 MARCH 2018	
1.50 – 2pm	<p>OPENING REMARKS</p> <p>> <i>Sarah Heathcote</i></p>
2 – 3pm	<p>PRACTICE IN TREATY INTERPRETATION (SUBSEQUENT PRACTICE) V. CUSTOM'S OBJECTIVE ELEMENT</p> <p><i>Chair: Matthew Zagor</i></p> <p>The distinction in theory between practice for the purposes of treaty interpretation and the objective element of custom (10 minutes)</p> <p>> <i>Sarah Heathcote</i></p> <p>The case of the Law of the Sea Convention (10 minutes)</p> <p>> <i>Camille Goodman</i></p> <p>The case of refugee law (10 minutes)</p> <p>> <i>Kate Ogg</i></p> <p>Discussion: 30 minutes</p>
3 – 3.20pm	Break*
3.20 – 4.20pm	<p>CODIFICATION</p> <p><i>Chair: Ernst Willheim</i></p> <p>Codification or derogation? The case of international investment law (10 minutes)</p> <p>> <i>Jessica Casben Fell</i></p> <p>Private codification (or the out-sourcing of codification) (10 minutes)</p> <p>> <i>Marie-Charlotte McKenna</i></p> <p>Do the codification treaties exhaust the normative scope of customary rules and principles of international humanitarian law (10 minutes)</p> <p>> <i>Etienne Henry</i></p> <p>Discussion: 30 minutes</p>
4.20pm	WORKSHOP CLOSE

* Tea and coffee are provided, or can be purchased from Vanilla Bean cafe next to the Workshop venue.

SPEAKERS

- > Jessica Casben Fell, A/g Principal Legal Officer, Office of International Law, Attorney-General's Department
- > Camille Goodman, Sir Roland Wilson Foundation Scholar and PhD Candidate, ANU Law School
- > Sarah Heathcote, Associate Professor and Deputy Director of the Centre for International & Public Law, ANU Law School
- > Etienne Henry, Fellow, Swiss National Science Foundation and CIPL Visiting Fellow, ANU College of Law
- > Marie-Charlotte McKenna, Director, International Law Section, Legal Division, Department of Foreign Affairs and Trade
- > Kate Ogg, Senior Lecturer, ANU Law School

Celebrating International Women's Day 2018

- > internationalwomensday.com

CONTACT US

ANU College of Law
The Australian National University
5 Fellows Road
ACTON ACT 2601
T +61 2 6125 3483
E cipl.law@anu.edu.au
W law.anu.edu.au/research/cipl

CRICOS #00120C

Search ANU College of Law

