



Australian  
National  
University



INTERNATIONAL LAW WORKSHOP  
INTERNATIONAL LAW-MAKING AWAY  
FROM THE PUBLIC GAZE

4 FEBRUARY 2019

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**Venue: Law Theatre, ANU College of Law**  
5 Fellows Road, The Australian National University, Canberra

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Centre for International  
& Public Law  
ANU College of  
Law

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# INTERNATIONAL LAW-MAKING AWAY FROM THE PUBLIC GAZE

To result in a binding international rule, international law-making cannot generally be done in complete secrecy. For a customary rule to emerge and bind, States must, if they are not actively participating in the rule creation, at least have an awareness of the practice and subscribe to the *opinio juris* propelling the emerging new rule. For the conclusion of a treaty, more is required: actual volition and thus conscious decision by States parties (leaving aside the question of objective regimes). That said, international law-making is not always done in full public view. When it comes to treaties at least, third parties – those who are not bound – can be excluded altogether, thus dispensing with any need for their knowledge of the rule’s creation in order for the rule itself to emerge; although if the agreement remains unregistered with the UN, it cannot be invoked before the organs of that body. But the impact of non-public law-making types of activity is less evident in other areas. One scenario is when the law-making involves those States that will be bound by the rule, but where those entities whose task it is by virtue of international law to identify the law – eminent writers and judicial bodies –, are excluded from the law-making process and from knowledge of its result. Scenarios of this type are arguably of particular interest today. This is because international law-making ‘away from the public gaze’ is logically more likely to occur in times of increased international tension and most obviously in relation to politically sensitive matters. It can be examined in relation to treaty, custom and indeed, ‘law adjustment’ or ‘refinement’ through interpretation and is particularly interesting in respect of some of today’s more politically charged issues, such as China’s ‘Belt and Road’ initiative and the status of the military uses of outer space. Whilst the topic clearly raises rule of law issues – and in this regard one need only think of the secret treaties propelling the international community into World War One –, this workshop will focus on the process of law-making itself.

## PROGRAM

MONDAY 4 FEBRUARY 2019	
2-2.05pm	<b>WELCOME</b> > <i>Professor Sally Wheeler OBE MRIA FAcSS, Dean, ANU College of Law</i>
2.05–2.15pm	<b>INTRODUCTION: A TYPOLOGY OF NON-PUBLIC INTERNATIONAL LAW-MAKING</b> <i>Associate Professor Sarah Heathcote, ANU Law School</i>
2.15–3.30pm	<b>POSITIONING THE PROBLEM</b> <i>Chair: Dr Kate Mitchell, Principal Research Officer, Parliamentary Joint Committee on Human Rights Secretariat</i>  <b>The fragmentation of interpretative communities in international law: State law-making away from the public gaze</b> (15 minutes) > <i>Trina Malone, Office of International Law, Attorney-General’s Department</i>  <b>Whose gaze matters? Disconnects between international law-makers and law-breakers</b> (15 minutes) > <i>Dr Esmé Shirlow, ANU Law School</i>  <b>The impact of subsequent practice of operational departments on the interpretation of treaties</b> (15 minutes) > <i>Dr Julian Wyatt, CIPL Visiting Fellow, ANU College of Law</i>  Discussion: 30 minutes
3.30–3.45pm	Break*
3.45-5pm	<b>ILLUSTRATIONS FROM PRACTICE</b> <i>Chair: Camille Goodman, Office of International Law, Attorney-General’s Departments</i>  <b>Australian participation in the Belt and Road Initiative (BRI)</b> (15 minutes) > <i>Dr Simon Brinsmead, Office of International Law, Attorney-General’s Department</i>  <b>The UN Security Council and its quasi-legislative activities</b> (15 minutes) > <i>Associate Professor Jeremy Farrall, ANU Law School</i>  <b>The legal regulation of military uses of outer space</b> (15 minutes) > <i>Professor Steven Freeland, Dean, Western Sydney University School of Law</i>  Discussion: 30 minutes
5pm	Workshop close

\* a modest afternoon tea of tea, coffee and biscuits will be provided



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