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FROM THE LOCAL TO THE GLOBAL
SPECIAL ISSUE EDITOR: ALBERTO COSTI

THIS ISSUE INCLUDES CONTRIBUTIONS BY

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Dame Sian Elias
Rosie Fowler

Robert French AC
Emma Palmer
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FOREWORD: FROM THE LOCAL TO THE GLOBAL ... AND BACK

This special issue of the *New Zealand Journal of Public and International Law* brings together a selection of papers delivered at the 26th Annual Conference of the Australian and New Zealand Society of International Law (ANZSIL), held from 5 to 7 July 2018 at Victoria University of Wellington's Faculty of Law. This issue also comprises the revised version of a public lecture by the Chief Justice of New Zealand, Rt Hon Dame Sian Elias, delivered on 28 February 2019, shortly before her retirement, and an article on cyber operations by a recent law graduate of the University of Auckland.

ANZSIL was established in 1992, to develop and promote the discipline of international law; to provide a forum for academics, government lawyers, non-governmental organisations, students and practitioners to discuss research in, and issues of practice of, the subject; as well as to increase public awareness and understanding of international law. The annual conferences, typically held in this spirit, also include a postgraduate workshop, helping promote the next generation of international lawyers while also supporting the teaching of the discipline.

The 26th ANZSIL Annual Conference occurred at a time of ongoing tension in international law between the development of global rules and institutions, on the one hand, and, on the other, the ascendancy of regionalism – as seen for example in the preference for regional trade agreements over new World Trade Organization rules and the argument that the international community has little role to play in security disputes in particular regions.

When speaking of international affairs, debates often focus on the relations between states and multilateral organisations. With increased scrutiny of globalisation and the turn to neo-liberalism, however, there have been growing frictions between the local and global realms. The 25th ANZSIL Annual Conference, in 2017, built on that theme. It focused on the resurgence of nationalism around the world. Its background included political parties in Europe boasting anti-immigration platforms; a majority of voters in the United Kingdom favouring Brexit; anti-globalisation and protectionist rhetoric during the 2016 presidential election campaign taking effect in the United States of America; not to mention arms races and strategic contests in Asia.

New challenges continually arise for the international community. Meanwhile, the existing ones continue, albeit at a time of greater promotion of national interests at the expense of the stability of the international order. In this context, questions include whether the existing international legal frameworks are capable of effectively responding to these developments. Are the principles underlying our international legal order under threat? Or can we be confident that the international rule of law is sufficiently robust to make our contemporary challenges no more problematic than those that arose in the past?

Bearing these questions in mind, the 26th ANZSIL Annual Conference took on a more positive vision of international affairs. In effect, local actors increasingly claim and obtain a key role in the development of international law. Moreover, there is significant opportunity for local actors, be it states, non-governmental organisations or interest groups, to address some of the most pressing challenges concerning the efficacy and legitimacy of international law in areas as diverse as human rights, financial regulation and climate change, to name a few. Questions arising include how domestic law and politics affect international law, and are national legal systems becoming more open or more closed to international influences, and for what reasons? And to what extent are there major differences in how national legal systems conceptualise international law? Does this undermine assumptions about the universality of international law, or does it rather strengthen its foundations and extend its appeal?

Thus, in July 2018, keynote plenary speakers and presenters in 18 panels, comprising scholars, government lawyers, practitioners and civil society actors, addressed a range of issues around the general theme of "International Law: From the Local to the Global". Participants in the 26th Annual Conference of ANZSIL were truly privileged to hear from over 70 specialists in the discipline of international law hailing from Australasia, but also Asia, North America, South Africa, the United Kingdom and continental Europe, and international bodies, such as the International Committee of the Red Cross.

The papers presented ranged across all fields of international law. Those included in this issue comprise the keynote address delivered at the Annual Conference by Hon Robert French AC, former Chief Justice of Australia (2008-2017), and scholarly articles from some presenters addressing international criminal law and transitional justice issues. Neither the 26th ANZSIL Annual Conference nor the publication of this special issue would have been possible without the generous financial support of the New Zealand Law Foundation.

This special issue begins with Dame Sian Elias advancing some thoughts about judicial review and its role in maintaining constitutional balance.¹ Her fascinating address examines the case law of the past four decades, covering four jurisdictions. Among the many points she makes, she reminds us that in New Zealand, judicial review and the obligations of the courts to maintain the rule of law are not confined to supervision of the actions of government authorities, but also to that of powers exercised by private bodies and individuals. She offers some reflections on the extent to which the supervisory jurisdiction in New Zealand is concerned with public law and explains some differences with Australia, Canada and the United Kingdom regarding judicial review. She concludes that:²

... supervisory jurisdiction may be best understood as constitutional review, which is observed by public and private actors alike if they have power to affect the rights or interests of others. Judicial review to ensure that such power is not abused does not weaken, but strengthens good administration and the rule of law.

1 Sian Elias "Judicial Review and Constitutional Balance" (2019) 17 NZJPIL 1.

2 At 18.

Dame Sian Elias' public lecture was a momentous occasion. The Chief Justice's written text is both a fascinating retrospective on her career as a practitioner and a judge and a rich and fertile ground for reflection on judicial review in this country.

Following on is the revised version of the Sir Kenneth Keith Lecture, delivered by Hon Robert French.³ The Lecture was established in 2015 to be held during the ANZSIL Annual Conference when it takes place in Wellington. It celebrates the career of Sir Kenneth Keith, one of New Zealand's most eminent international lawyers, scholars, advisers and judges, and New Zealand's only judge elected to the International Court of Justice (2006-2015). Delivering the Lecture on 6 July 2018, Hon Robert French, who sat on the bench in a variety of domestic and foreign courts and tribunals throughout his own illustrious career, presented some observations on the "interconnectedness manifested in what appears to be an international legal ecosystem – an ecosystem in which different species of legal rule, 'soft law' norms, domestic law and day-to-day practice, interact."⁴ His vast experience provides him with an invaluable perspective for analysing the relations between international law and domestic law before courts and tribunals, and to show that these various norms are more compatible with each other than one might think. Such viewpoint appears particularly fitting to the delivery of the Sir Kenneth Keith Lecture. The judicial oath represents but one of the values both distinguished lawyers share.

Yao Dong then offers a study of the norms of international law on the use of force (*jus ad bellum*) applicable to "cyber attacks".⁵ Reminding the reader of some of the key incidents of the past decade, such as the cyber operations against Estonia in 2007, and against Georgia in 2008, as well as the well-known Stuxnet operation that damaged Iranian nuclear facilities and the alleged Russian hacking into the United States Democratic National Committee's computer network, among numerous other targets, she analyses whether and how existing international law principles apply to cyber warfare. The article discusses some of the key instruments and case law applicable to cyber operations; provides an updated discussion and critique on the *jus ad bellum* in the cyber context; and makes recommendations for international law to better adapt to the new effects and capacities of cyber operations.

Follow two articles building on papers presented at the 26th ANZSIL Annual Conference and dealing with international criminal law issues.

Emma Palmer discusses the decision of the Philippines to withdraw from the International Criminal Court (ICC), following the ICC Prosecutor's decision to open a preliminary examination of alleged international crimes committed in the "war on drugs" in the Philippines.⁶ The article highlights some of the tensions between the ICC's universalist aspirations and the diversity of domestic

3 Robert French "Public and Private Spaces: Dispute Resolution in International Trade and Commerce" (2019) 17 NZJPIL 19.

4 At 21.

5 Yao Dong "The *Jus ad Bellum* in Cyberspace: Where Are We Now and What Next?" (2019) 17 NZJPIL 41.

6 Emma Palmer "Complementarity and the Implementation of International Criminal Law in the Philippines" (2019) 17 NZJPIL 67.

approaches toward prosecuting international crimes. She argues that whether the ICC commences a full investigation, or actors within the Philippines pursue investigations or prosecutions concerning the "war on drugs", legislation that was enacted in the Philippines to implement the Rome Statute of the ICC will continue to play an important role. Her conclusion suggests that the ICC's approach to international criminal law can affect and be adapted by politicians, civil society and other actors, institutions and procedures, and may further advance the goal of implementing international criminal law.

In a joint article, Rosie Fowler and Steven Smith complete this special issue with a critical assessment of the work of the Extraordinary Chambers in the Courts of Cambodia (ECCC), the hybrid tribunal created to prosecute the high-ranking surviving members of the Khmer Rouge regime.⁷ The authors contrast the rigidity of the tribunal structure and its formalistic rules of procedure and high threshold of evidence with the initial enthusiastic fervour of the local population for a system that allowed the participation of victims as civil parties before the ECCC. They introduce the ECCC, their functions and the difficulties in bringing the few and now frail remaining leaders of the Khmer Rouge to court. In so doing, they ask some difficult and serious questions. What justice, reconciliation or peace is there in a mechanism that is not understood, or connected in anything more than a remote sense to the millions of victims themselves? Does "justice" have to come from the authority of a United Nations-endorsed, internationally reputable tribunal to be considered legitimate? Or, could there be an approach that takes its form and meaning directly from the injury of the victims, and through this deliver a sense of justice perhaps more tangibly than through an imported solution? They argue that to be meaningful, transitional justice requires a change of focus towards a victims-oriented, context-specific approach.

All the contributors to this special issue provide thought-provoking reflections on the ongoing debate concerning the local and the global and the challenges that lie ahead. They propose a range of different approaches to legal issues at the intersection of comparative, domestic and international law. More importantly, they demonstrate that the law does not evolve in one direction, and that domestic legal orders learn from their interactions with each other as domestic and global players and public and private actors.

Alberto Costi
Special Issue Editor

7 Rosie Fowler and Stephen Eliot Smith "Lessons from Cambodia: Towards a Victims-Oriented Approach to Contextual Transitional Justice" (2019) 17 NZJPIL 93.