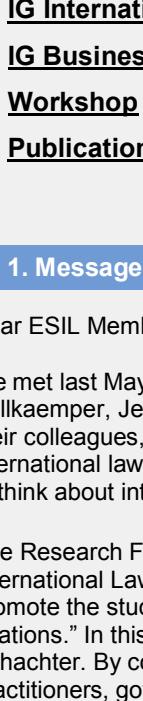


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ESIL Newsletter

## In this issue

Vol. 11, Sept. 2013

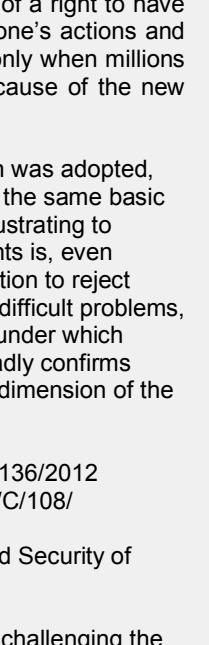
1. Message from the President
2. Guest Editorial - Yuval Shany
3. A Look Back at the 5th Research Forum
4. ESIL Lecture Series - James Crawford
5. IG International Economic Law: Call for Papers
6. IG Business and Human Rights: 2nd Research Workshop
7. Publication: Conference Proceedings

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### 1. Message from the President

Dear ESIL Members,

We met last May at the ESIL Research Forum in Amsterdam. Thanks to André Nollkaemper, Jean D'Aspremont, Wouter Werner, Tarcisio Gazzini, and their colleagues, we were given an opportunity to reflect on our role in international law, to discuss the role of international law in today's world, and to think about international law as a professional discipline.



The Research Forum also allowed us to consider more carefully what the European Society of International Law represents. We, members of the Society, share a common objective "to promote the study of international law and to contribute to the rule of law in international relations." In this sense, ESIL constitutes a 'college', to use a term coined by the late Oscar Schachter. By College, I mean a community of lawyers. For all of us - academics, researchers, practitioners, government officials, judges, diplomats or legal advisers - international law is a profession. Unlike Schachter's conception of an invisible college, ours is very much a visible one and indeed our Society's college seeks to be increasingly visible. Moreover ESIL is a college open to a diversity of relationships and perspectives in Europe and elsewhere. We have forged and are willing to forge relationships with other international law associations and societies, as well as academics and institutions in other regions of the world. ESIL has a large and diverse membership, both in Europe and outside Europe, involved in a wide range of activities. The number of Interest Groups, set up and coordinated by members, continues to increase and ESIL activities include conferences, research forums, a lecture Series, debates, exchanges, a quarterly Newsletter, and a Reflective series. At its Board meeting in May, the Society also decided to sponsor events organized by members of the Society. I would like to encourage all of you to take advantage of all these activities, open to all ESIL members.

We will meet in Bucharest on 26 September to discuss the relationship of international law with domestic law. Later on this year, in November, two ESIL Interest Groups are involved in holding events: we will meet in Ann Arbor at the invitation of the ESIL Interest Group on International Legal Theory and we will also meet in Geneva at the invitation of the ESIL Interest Group on International Environmental Law, and others, to discuss the changing nature of international environmental law. Please check the website of the Society regularly for more information about all ESIL events.

Some members of the Society have started to use the Announcements section of our website to share their news. This is a way for members of the college to communicate; recent announcements include research posts, calls for papers, and news about conferences and courses. Please take full advantage of this opportunity to share your news.

An important recent development is the strengthening of the Society's relationship with the European Journal of International Law (EJIL). The President of ESIL is now an ex-officio member of the EJIL Editorial Board and we are very grateful to the journal's Editor-in-Chief, Joseph Weiler, for having made this possible. We, members of the Society, enjoy reading EJIL and we look forward to further collaboration.

As you can see, the Society has been increasingly active. Even so, members of the Board are very open to hearing from all of you about other ways to further develop our college. Please get involved!

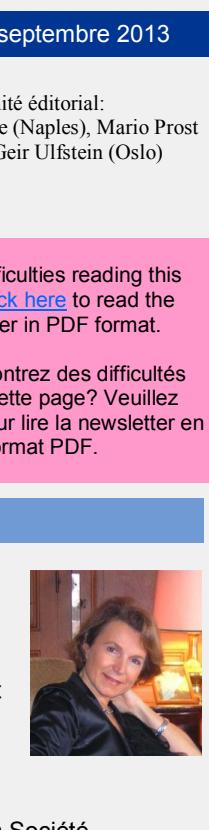
I look forward to meeting you and exchanging ideas.

With best regards,

Laurence Boisson de Chazournes  
President of the European Society of International Law (ESIL) / Société européenne de droit international (SEDI)

### 2. Guest Editorial

**National Immigration Laws and the Universal 'Right to Have Rights'**  
Yuval Shany—Hersch Lauterpacht Chair in Public International Law, Hebrew University of Jerusalem; Member of the UN Human Rights Committee



On July 25 and 26, 2013, the Human Rights Committee adopted Views in two closely-related cases submitted to it under the First Optional Protocol to the ICCPR, involving more than 50 asylum seekers (most of whom carrying the nationality of Sri Lanka) detained in Australian immigration facilities (1). In both cases, the Committee found that the indefinite detention of asylum seekers on security grounds prior to their removal from Australia, without being able to meaningfully challenge the secret evidence underlying their designation as a security risk, constituted violations of article 7 and 9 of the Covenant.

These two Australian cases appear to reflect a global trend in immigration detention practices. International human rights law allows states to resort to prolonged immigration detention under narrow conditions, whose existence must be determined on an individual case-by-case basis (e.g., risk of flight and public safety risk) (2). Still, in recent years, several democracies have resorted to practices of prolonged detention on a large scale, invoking at times dubious legal justifications and offering only a few procedural safeguards. For example, following a 1996 legislative reform mandating detention prior to removal of most immigrants (3), in addition, more than 2,000 migrants are presently detained in Israel pursuant to draconian legislation (passed in 2012), mandating the detention of 'infiltrators', including asylum seekers, for long periods of time (extending up to three years) (4). In a similar vein, Canada passed in 2012 legislation making it easier to detain immigrants for extended periods of time, provided that they were designated by the Minister of Public Safety as 'irregular arrivals' (5). Even the 2008 EU 'returns directive' provides for an extended period of immigration detention (up to 18 months) on the questionable justification of delays in obtaining documents from third states (6).

What is common to all of these laws and practices is the dilution of the right to liberty of immigrants they entail, and the introduction of legal restrictions that far exceed those imposed upon individuals detained outside the immigration context. Hence, countries like Canada or Australia that reject the institution of administrative or preventive detention for public safety reasons, seem to have introduced this institution through the back door for certain categories of immigrants. A country like Israel, which has in place emergency legislation permitting administrative detention of individuals presenting a security threat (for six month periods), introduced a detention regime for immigrants allowing for longer periods of detention without trial than those applied to suspected terrorists. And some have regarded the EU mandatory detention regime for immigrants who have a criminal record as inconsistent with the double jeopardy principle under the US Constitution. Finally, one is also hard pressed to find in Europe, outside the field of immigration law, legal regimes that allow for 18 months of detention without trial for legally competent individuals.

This unhappy state of affairs, under which the liberty rights of immigrants enjoy second class legal protection, cannot but invoke the memory of the words of Hanna Arendt, written in connection with the plight of stateless individuals in the aftermath of World War Two:

"Something much more fundamental than freedom and justice, which are rights of citizens, is at stake when belonging to a community into which one is born is no longer a matter of course and not belonging no longer a matter of choice, or when one is placed in a situation where, unless he commits a crime, his treatment by others does not depend on what he does or does not do... We become aware of the existence of a right to have rights (and that means to live in a framework where one is judged by one's actions and opinions) and a right to belong to some kind of organized community, only when millions of people emerge who had lost and could not regain these rights because of the new global political situation" (7)

It is extremely frustrating to realize that 65 years after the Universal Declaration was adopted, we still live in a world in which the realization that everyone is entitled to enjoy the same basic human rights (including the right to liberty) is still not fully accepted. It is also frustrating to realize how fragile the commitment to the principle of universality of human rights is, even among some of the world's leading democracies, and how strong is the temptation to reject guarantees owed to not belonging individuals when majorities face extremely difficult problems, such as those associated with massive population movements. This situation, under which immigrants are sometimes treated worse than criminals and terror suspects, sadly confirms the Arendt's words of caution about the weak political foundations of the universal, sadly confirmed by the international human rights law project.

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### 3. A Look Back at the 5th ESIL Research Forum

The 5th Research Forum of the European Society of International Law (ESIL), titled "International Law as a Profession", was organized jointly by the Amsterdam Center for International Law (ACIL) of the University of Amsterdam (UvA), and the Department of Transnational Legal Studies, VU University Amsterdam (VU), from 23 to 25 May 2013 in Amsterdam.

The Research Forum featured a plenary opening session with keynote addresses by Andreas Paulus (German Constitutional Court) and Anne Orford (University of Melbourne), as well as a debate between them that was moderated by Jean D'Aspremont (University of Manchester) and University of Amsterdam). The opening session introduced the audience to some of the main topics of the conference, including the history of international law as academic discipline, the interaction between professionals and academics and the moral responsibilities of researchers in international law.

The next two days, the Research Forum consisted of four semi-plenary sessions and fifteen panels, roughly around four themes: International Lawyers' Oscillations of Roles, International Law as Discipline, Research as Profession, and Practicing International Law in the 21st Century.

All these sessions witnessed exchanges on international law and its professions from refreshing and innovative perspectives. Whilst the differences of the specific prejudices, approaches, understandings, and agendas of each profession were highlighted, some underexplored parallels and similarities also came to light. For instance, the extent to which scholarly and professional disagreements are not only a source of pluralism, but also play a constitutive and unifying role in the identity of the community of international lawyers was discussed in sessions. It also appeared that participants shared a common understanding of the importance of the role (and the related responsibilities) of international lawyers as well as of the dialogue amongst them in the evolution and limits of international law and its adaptation to the changing social, political and economic values and interests.

The final day, Ingo Venkze (University of Amsterdam), Veronika Bilíková (Charles University, Prague) and Makane Mbengue (Université de Genève) discussed the various debates at the Research Forum, whereas Pierre d'Argent (Université de Louvain) offered concluding general reflections.

A few parallel events took place during the conference, including the meetings and workshops of several ESIL Interest Groups, and the meeting of the editors of international law journals. The Forum also saw the first use of an ESIL Forum app, that has been a great success. More than 200 visitors consulted the app on the first day.

Some of the papers presented at the Research Forum will be included in the ESIL SSRN paper series, whilst a selection of them will be collected in an edited volume specifically dedicated to the theme of the Research Forum. The video of the Opening Ceremony can be seen on ESIL's YouTube channel as well as on the website of the Research Forum at <http://www.esil2013.nl>.

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This lecture was a combined SHARES lecture and European Society of International Law (ESIL) lecture. A video link of the lecture will be posted shortly on ESIL's YouTube channel and on the ESIL website.

Additional information about this ESIL Lecture can be found [here](#).

### 5. Interest Group on International Economic Law - Call for Papers

The ESIL IELIG is preparing the Call for Papers for the Special Full Day Workshop devoted to international economic law which will take place on Wednesday 3 September 2014 within the ESIL 10th Anniversary Conference to be held in Vienna. The Workshop will be divided in four research panels, focused on the following themes: non-commercial values in WTO and investment law; transparency and participation in international economic law; free trade agreements and global trade; EU debt, investment treaty and recent developments. The Call for Papers will be published in the second part of October 2013 in the ESIL IELIG renovated website.

Contacts of the ESIL IELIG Group: Peter-Tobias Stoll [PT.Stoll@ur.uni-goettingen.de](mailto:PT.Stoll@ur.uni-goettingen.de), Elisa Baronzini [elisa.baronzini@unibo.it](mailto:elisa.baronzini@unibo.it), Marion Panizzon [marion.panizzon@wlv.org](mailto:marion.panizzon@wlv.org)

### 6. Interest Group on Business and Human Rights - 2nd Research Workshop

The Interest Group on Business and Human Rights organised its second research workshop under the ESIL Research Forum framework, which took place in Amsterdam in May 2013. The research workshop, titled Business and Human Rights: From Theory to Practice, attempted to address some of the contemporary issues in the field of business and human rights with a special focus on the practical challenges faced by practitioners. Keeping in line with the overarching theme of the Research Forum, International Law as a Profession, we invited papers addressing the issue from the advocacy, litigation, policy and law making perspectives.

Following an impressive response from scholars and practitioners from Europe and beyond, the final programme featured the following presentations:

- Nadia Bernaz, "Addressing Slave Labour in Supply Chains through Reporting";
- Karin Buhmann, "Responsible sourcing of natural resources: Enriching EU environmental and trade policies and law through the UN Framework and UN Guiding Principles";
- Karen Weidmann, "Monitoring Business Compliance with Human Rights Standards: The Role of the National Contact Points for the OECD-Guidelines for Multinational Enterprises";
- Carmen Marquez Carrasco, Luis Rodriguez Pifero and Laura Iñigo Alvarez, "The implementation of the UN Guiding Principles in Spain";
- Angelica Bonfanti, "Extraterritorial Jurisdiction as a Remedy for Victims of Business-related Human Rights Abuses: European and US Perspectives";
- Shannon Dobson, "Corporate Liability in the United States: The Kibbel Case in International Perspective";
- Julieanne Hughes-Jennett, "Is litigation before national courts the best response to purported human rights violations involving multinational corporations in developing countries?";
- Alessandro Costa, Antonella Sarro, Marta Bordignon, Bandini Chichiglia and Giada Lepore, "Accountability of Banks for Human Rights Violations".

The wide range of cutting edge topics and the combination of academics and practitioners both as presenters and in the audience allowed for an in-depth debate about the most relevant theoretical and practical challenges posed by the current attempts to regulate business activities which impact human rights and advance further the accountability of corporate actors involved in harmful activities.

The Interest Group has over 40 members at present. If you are interested in more information regarding the Group or would like to join, please visit <http://ibusinessandhumanrights.wordpress.com/> or contact Dr. Martin-Ortega, University of Greenwich, UK ([o.martin-ortega@qmul.ac.uk](mailto:o.martin-ortega@qmul.ac.uk)).

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