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Comparative International Law? The Role of National Courts in Creating and Enforcing International Law

Anthea Roberts
London School of Economics, Department of Law
International & Comparative Law Quarterly, 2011

Abstract:
Academics, practitioners and international and national courts are increasingly seeking to identify and interpret international law by engaging in comparative analyses of various domestic court decisions. This emerging phenomenon, which I term 'comparative international law,' loosely fuses international law (as a matter of substance) with comparative law (as a matter of process). However, this comparative process is seriously complicated by the ambiguous role that national court decisions play under the international law doctrine of sources, pursuant to which they provide evidence of the practice of the forum state as well as being a subsidiary means for determining international law. This article analyzes these dual, and sometimes conflicting, roles of national courts and the impact of this duality on the comparative international law process.

Consent, Estoppel, and Reasonableness: Three Challenges to Universal International Law

Anthony D'Amato
Northwestern University - School of Law
Virginia Journal of International Law, Vol. 10, 1969
Northwestern Public Law Research Paper No. 10-70

Abstract:
Like consent and estoppel, the concept of reasonableness, while failing to provide an adequate explanation of the source of obligation in customary international law, does play an important psychological role in adding to the pressure of international norms upon states. The result is to increase the sense of legality of the rules that are accepted by states as part of "customary international law." This is not to say that each and every alleged rule of universal international law must contain one or more of the elements of consent, estoppel, or reasonableness in order for it to be "valid."

Unions & the Great Recession: Is Transnationalism the Answer?

Michael J. Zimmer
Loyola University Chicago School of Law
Loyola University Chicago School of Law Research Paper No. 2010-011

Abstract:
For at least 30 years, the union movement at a worldwide level has been generally downward. That trend has accelerated during the Great Recession. During that same period,

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economic inequality has grown significantly. The question this paper raises is whether the union movement can be proactively involved helping the recovery from the Great Recession with a stronger, more equal economic order. The public policy basis for unionism – that labor is not a commodity and that economic inequality is best redressed through freedom of association and collective bargaining – is well established in U.S. and international labor law. That public policy, however, is juxtaposed with the prevailing social, political and economic policy – neoliberalism favoring free markets including labor markets. As economic activity has become increasingly globalized, enterprise has been able to jump the barriers that had been set by national laws and national economies to organize operations around the world to take advantage of local conditions, including labor costs and standards. Thus, more and more employers can take advantage of a global labor market to find conditions most favorable to their businesses. An increasingly global labor market has significant impact on national and local labor markets. Labor unions are generally still trapped within the nations of their organization. Limited to operating in national labor markets, unions have lost the strength and breadth necessary to establish labor monopolies that operate to take labor costs out of price competition. The answer to the question this article poses is that the future of the labor movement may depend on the ability of unionism to reach across borders and operate transnationally. Some unions have taken some steps to go transnational, but a fundamental redirection toward transnationalism may be necessary if the union movement is to have a positive impact as the global economy recovers from the Great Recession.

A Regional Disability Tribunal for Asia and the Pacific: Helping to Change the Conversation?

Terry Carney
University of Sydney - Faculty of Law
Sydney Law School Research Paper No. 10/92

Abstract:
A proposal has been advanced for the establishment of a regional disability rights tribunal to cover the Asian and Pacific region (DR-TAP), the only part of the world currently lacking regional human rights machinery. This paper begins to unpack some of the issues associated with the social policy choices involved in prioritising different possible approaches to the needs of disabled people in Asia and the Pacific, with a focus on the DR-TAP proposal. It is argued that this is not the top priority for regional action; rather it is contended that capacity building and culturally appropriate attitudinal and other change strategies should instead be pursued in the immediate future.

Human Rights and Social Justice: The Convention on the Rights of Persons with Disabilities and the Quiet Revolution in International Law

Penelope J. Weller
Monash University - Faculty of Law
Monash University Faculty of Law Legal Studies Research Paper No. 2010/07

Abstract:
On the 60th anniversary of the Universal Declaration of Human Rights (UDHR), the Commonwealth Attorney-General announced a national public consultation concerning the need for better human rights protection in Australia and the viability of a federal human rights charter. Whether or not the anticipated charter includes social, economic and cultural rights is directly relevant to questions of social justice in Australia.

This paper argues that the legislative acknowledgment of civil and political rights alone will not adequately address the human rights problems that are experienced in Australia. The reluctance to include economic, social and cultural rights in human rights legislation stems from the historical construction of an artificial distinction between civil and political rights, and economic social and cultural rights. This distinction was articulated and embedded in law with the translation of the UDHR into binding international law. It has been accepted and replicated in judicial consideration of the application of human rights legislation at the domestic level. The distinction between the two forms of rights underpins a general ambivalence about the capacity of human rights legislation to deliver social justice and echoes a critical tradition in legal philosophy that cautions against the reification of law.

Coming into force early in the 21st century, the Convention of the Rights of Persons with Disabilities illustrates the effort of the international community to recognise and eschew the burden of the false dichotomy between civil and political rights, on the one hand, and economic, social and cultural rights on the other. Acknowledging the indivisible, interdependent and indissociable nature of human rights in Australia is a crucial step toward achieving human rights-based social justice.

Human Rights and the WTO: Issues for the Pacific

Sarah Joseph
Monash University - Faculty of Law
Victoria University of Wellington Law Review, Vol. 40, No. 1, p. 351, 2009
Monash University Faculty of Law Legal Studies Research Paper 2010/12

Abstract:
In the Pacific, Australia, New Zealand, Fiji, Papua New Guinea, Solomon Islands and Tonga are World Trade Organization members.

This article examines the human rights concerns regarding the WTO, in particular the impact of WTO rules regarding trade liberalisation on poverty and development within developing states. The author comments on the costs of conditional WTO membership and the possible consequences of free trade and globalisation in the Pacific region.

The International Criminal Court in Africa: Challenges and Opportunities

Makau W. Mutua
State University of New York at Buffalo Law School
Norwegian Peacebuilding Centre NOREF Working Paper, September 2010
Buffalo Legal Studies Research Paper No. 2011 - 003

Abstract:
This policy paper is a comparative analysis of the work of the International Criminal Court in Kenya, Uganda, Sudan, and the Central African Republic, and the policy implications for its work for Norway, States Parties, civil society, and key states. The paper argues that all actors, including Norway, should more seriously engage these African states – and key stakeholders within them – to facilitate the work of the ICC to stem impunity. Without such support, the paper concludes, the ICC's objectives in Africa will not be realized. Each of the four countries under review here has its own unique internal political questions that drive its posture towards the ICC. Deference should be paid to these internal differences. But that

should not trump the interests of justice and peace, and the larger international consensus on how to address the question of impunity. Elites in states with a large democratic deficit should be pressed and supported to respond to barbaric atrocities. The paper recommends that the international community works in concert with the ICC to close the "impunity gap".

Terrorism, Torture, and Refugee Protection in the United States

Maryellen Fullerton
Brooklyn Law School
Refugee Survey Quarterly, Forthcoming
Brooklyn Law School, Legal Studies Paper No. 209

Abstract:
In recent years the United States Congress has enacted multiple anti-terrorism laws in its efforts to exclude from the country terrorists and those who associate with terrorists or provide them material support. The anti-terrorism provisions, particularly the material support bar, prevent many individuals with a well-founded fear of persecution based on race, religion, nationality, political opinion, or membership in a particular social group from receiving asylum or protection from refoulement. These statutes deny protection to refugees even though there are no reasonable grounds to consider them dangers to the security of the United States, and, accordingly, these legislative provisions violate international refugee law. In apparent recognition that applying the anti-terrorism bars can lead to unjust and illegal results, Executive Branch officials have issued a series of ad hoc waivers of the material support bar. These waivers, though beneficial to the individuals who successfully navigate the waiver procedures, are insufficient to bring the United States into compliance with international refugee law. Another avenue of protection, the non-refoulement obligation of the Convention Against Torture, has also been utilized when the material support bar has threatened to deprive refugees and asylum-seekers of protection under the Refugee Convention and Protocol. This is a welcome outcome for the sub-group of refugees and asylum-seekers who fall with its scope, but the Convention Against Torture also falls far short of affording all asylum-seekers and refugees the non-refoulement protection guaranteed by the Refugee Convention. Without new legislation, such as the proposed 2010 Refugee Protection Act, U.S. anti-terrorism statutes will remain in violation of international refugee law.

Something is Rotten in the State of Denmark: How Nation States Not Recognizing Dual Citizenship Deprive Residents In Their Territories and Their Citizens around the World of Significant Democratic Rights

Marianne Dellinger
Whittier Law School

Abstract:
People from nations not accepting dual citizenship risk being expatriated against their will if naturalizing in another country and thus do not apply for citizenship in their new host nations. Accordingly, these migrants live and work without the ability to exercise such basic democratic rights as to vote and hold elected office, which require citizenship.

Making matters worse: the very same nations that officially do not accept dual citizenship in fact grant exceptions to as many as 40% of immigrants creating a situation of highly unequal access to dual citizenship.

Using select EU nations as examples, this article describes why modern liberal democracies should work towards allowing dual citizenship and how nations would actually gain from accepting dual citizenship instead of trying to resist it; a fight that has largely proven futile anyway.

In Re South African Apartheid Litigation and Beyond: Corporate Liability for Aiding and Abetting under the Alien Tort Statute

Gunther Handl
Tulane University - Law School
German Yearbook of International Law, Vol. 53
Tulane Public Law Research Paper No. 10-2

Abstract:
In a series of decisions that have their origin in a class action suit brought against various multinational corporations over their activities in apartheid-era South Africa, U.S. federal courts have significantly and controversially widened the Alien Tort Statute's potential reach. This development puts into sharp relief conflicting demands for the protection of human rights abroad and security and predictability for foreign trade and investment.

The present paper examines whether corporate aiding and abetting liability under the ATS strikes a reasonable balance and whether the statute will continue to provide a remedy against human rights abuse by corporate actors in individual cases as well as shape international normative expectations regarding corporate accountability in general. After tracing the evolution of ATS litigation in relation to corporate defendants and affirming corporate actors' direct international obligation to respect core human rights, the paper discusses corporate aiding and abetting liability. It concludes that international customary law rather than federal common law governs the core elements -- as against ancillary aspects – of secondary liability under the ATS. Finally, it offers an assessment of apartheid-era litigation to date and concludes that far from interfering with legitimate business expectations, the case law, as it stands now, enhances the statute's contemporary relevance in complementing broad-based international efforts to strengthen corporate accountability.

A 'Constant and Difficult Task': Making Local Land Use Decisions in States with a Constitutional Right to a Healthful Environment

Michelle Bryan Mudd
University of Montana School of Law
Ecology Law Quarterly, Forthcoming

Abstract:
This article examines the role local governments play in four states that have constitutional rights to a healthful environment – Illinois, Pennsylvania, Montana, and Hawaii. Scholars such as John R. Nolon and Patricia E. Salkin have long noted that local governments work as quiet yet integral third partners with state and federal government by addressing environmental issues through land use regulation. Because local government jurisdiction extends to areas not reached by federal and state laws, and because local government is most familiar with the resources in its jurisdiction, its role in assessing environmental impacts can be profound.

But for local governments in environmental rights states, environmental protection is not just an aspiration, but a constitutional mandate. Thus, this article in Part I argues that environmental rights cannot be fully protected without the strong engagement of local government. Part II of this article then sets forth the constitutional provisions of Illinois, Pennsylvania, Montana, and Hawaii and summarizes how the environmental rights case law intersects with the land use law in each state. Here, the article updates much earlier comparative scholarship on environmental rights, using a land use lens. This comparative analysis reveals some remarkable differences among the four states, as well as important commonalities that help us predict future developments in environmental rights jurisprudence. This part also builds on the observations of Barton "Buzz" Thompson and other environment rights scholars who have noted a gap between the constitutional right to a healthful environment and its regulatory implementation. It is local government that can fill much of this gap.

In Part III, this article combines the theoretical with the practical by presenting a checklist of topics that local governments can consider in designing regulations that protect environmental rights. Even in states lacking a constitutional right provision, local governments can benefit from the practical suggestions offered here. These suggestions are drawn from a comparative analysis of cases and statutes in the four environmental rights states. Although state variations require some differences in approach, the article concludes that when local governments proactively address environmental rights, they will create land use processes that better protect the environment, provide consistency and predictability for landowners, and are more likely to be upheld on appeal.

Human Rights and the Laws of War Under the American Convention on Human Rights

Conor McCarthy
University of Cambridge - Jesus College
European Human Rights Law Review, Vol. 6, p. 762, 2008

Abstract:
This article explores questions arising out of the substantial body of jurisprudence developed within the Inter-American system of human rights relating to the application of the American Convention on Human Rights to the many armed conflicts that have occurred in Central and South America since the Convention entered into force. Two separate, but related, issues will be considered in detail. The first concerns the material scope of the Convention and, in particular, the extent to which the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights can apply international humanitarian law in considering the cases or communications which come before them. The second question concerns what role international humanitarian law plays in interpreting the rights contained in the Convention. If the application of Convention rights is not prevented by the existence of lex specialis in the form of international humanitarian law, then how can the rights contained in the American Convention be applied in armed conflict situations to take proper account of the relevant principles of international humanitarian law? In response to these questions the article identifies two ways in which the Court and Commission use international humanitarian law in respect of substantive rights contained in the Convention. The first is as a means of supplementing the jurisprudence that has been established under the Convention in circumstances where doing so provides additional human rights protection for individuals. The second use is concerned with avoiding normative conflict. In this regard the Court uses international humanitarian law in the process of establishing whether a state's international

responsibility is engaged under Article 1(1) of the American Convention. After considering the different ways in which international humanitarian law is used by the supervisory mechanisms of the Inter-American system, the article concludes by highlighting some potential problems with the Court's approach to these matters. In particular, while international humanitarian law creates reciprocal legal obligations regulating the conduct of both states and non-state actors in an internal armed conflict, converting these obligations into human rights means that they are enforceable against one party to the conflict alone, namely, the state. This discrepancy, it is argued, may give rise to a number of undesirable outcomes.

Is International Law Really 'Law'?

Anthony D'Amato
Northwestern University - School of Law
Northwestern University Law Review, Vol. 79, 1984
Northwestern Public Law Research Paper No. 10-71

Abstract:
International law is enforced by the process I describe as reciprocal-entitlement violation. The violation may be of the same entitlement or, more likely, of a different entitlement. But it is on the whole an effective process - as effective for the international legal system as is the enforcement of most laws in domestic systems via the state-sanctioned deprivation of one or more entitlements held by individual citizens or corporations. It is impossible to understand why nations do or refrain from doing the things they do without understanding what the entitlements are and how nations act to preserve their full complement of existing entitlements.

Verification of Greenhouse Gas Emissions of Annex I Parties: Methods We Have and Methods We Want

Alexander Zahar
Griffith University - Griffith Law School
Climate Law, Vol. 1, No. 3, 2010

Abstract:
Despite the hopeful prediction in the New York Times story (quoted at the head of the article), we are very far from being able to use satellites to verify compliance with the Kyoto Protocol's caps on state (Annex I) greenhouse gas emissions. The problem is not only one of insufficiently developed or installed technology. "Satellite verification" would also mean changing the current system of reporting-and-review of state emissions, opening it up to independent scrutiny, and making it less forgiving of state evasiveness and ambiguity about emissions than it is now. Some states will be interested in this proposal and others will not. In any event, the current MRV system, built on bottom-up state reporting, will remain the dominant framework of international GHG emissions knowledge for the foreseeable future. To safeguard its own credibility, it must progressively be strengthened. In this article I explain the existing verification regime's main shortcomings and argue that the most efficient way around them is to incorporate into the current MRV system top-down (satellite and surface) measurements, resolved by modeling software at the state level, and produced by independent scientific experts in cooperation with the UNFCCC.

Are Corporations 'Subjects' of International Law?

Jose E. Alvarez
New York University - School of Law
NYU School of Law, Public Law Research Paper No. 10-77

Abstract:
Courts and scholars often attempt to draw legal conclusions from the status of entities, whether states, international organizations or corporations. Debates concerning whether corporations are "subjects" of international law and the legal conclusions that supposedly follow from this are particularly vociferous within Alien Tort Claims litigation in U.S. courts. Using the Supreme Court's recent decision in Citizens United as a cautionary tale, the author argues that drawing legal conclusions from the fact of "subject-hood" is fraught with peril, particularly in the case of corporations. He argues that such top-down approaches are likely to lead to unintended consequences and that corporations, like international organizations, should more properly be seen as "participants" than "subjects."

Compliance with Decisions of International Courts as Indicative of Their Effectiveness: A Goal-Based Analysis

Yuval Shany
Hebrew University of Jerusalem Faculty of Law Research Paper No. 04-10

Abstract:
The paper, which is part of the author's broader work in the field of assessing the effectiveness of international courts, seeks to ascertain the manner in which compliance with the remedies provided by a number of international courts is indicative of their goal-attainment. In doing so, it revisits certain conventional assumptions about the relationship between rates of compliance with judicial remedies (remedy compliance) and international Court effectiveness. Using as case studies the changing remedy design policies of the European Court of Human Rights and two recent ICJ cases, I argue that (a) correlation between state practice and judicial remedies tells us little about the impact that courts actually have. For example, 'low aiming' courts (issuing remedies entailing limited compliance costs and/or insignificant changes in state practice) are expected to generate what appear to be higher compliance rates, but would not be necessarily more effective; (b) remedy compliance is only meaningful from an effectiveness viewpoint, if it is discussed in the context of goal attainment – that is, the degree in which the judgment, any remedies ordered thereby and compliance therewith, contribute to promoting primary norm compliance, resolving disputes, supporting and legitimizing international norms and institutions, etc. Hence, compliance rates are in themselves a poor proxy for judicial effectiveness.

Non-State Actor Participation in International Law and the Pretense of Exclusion

Jordan J. Paust
University of Houston Law Center
U of Houston Law Center No. 2010-A-34

Abstract:
For centuries, there have been vast numbers of formally recognized actors in the international legal process other than the state, although far too many assume incorrectly

that traditional or classical international law had been merely state-to-state and that under traditional international law individuals and various other non-state actors did not have rights or duties based directly in international agreements or customary international law. Even today, invidious consequences occur when judges cling to manifestly a historical assumptions about international law and rule erroneously that "customary international law consists of only those norms that are ... obligatory in the relations of States inter se." [2d Cir. panel, Kiobel case, 2010] This article seeks to explode such a false and inhibiting myth by identifying a large number of such actors from each inhabited region of the globe and a number of specific forms of formal participation from the 1700s through the early 20th Century when, according to myth, state-oriented positivism allegedly achieved complete and universal acceptance and denied the existence of any status, role, right, or duty of any non-state actor.

A Grotian Moment: Changes in the Legal Theory of Statehood

Milena Sterio
Cleveland State University, Cleveland-Marshall College of Law
Cleveland-Marshall Legal Studies Paper No. 10-200
Denver Journal of International Law and Policy, Forthcoming

Abstract:
International law has undergone profound changes over the last decades. It has transformed itself from a set of rules governing inter-state relations, where states were the only actors, to a complex web of laws, treaties, regulations, resolutions and codes of conduct that govern a variety of state and non-state actors, in their daily interactions. Scholars have thus written about globalization, and the changes brought about through its potent forces. In the process of globalization, states have lost some attributes of sovereignty, and their bundle of sovereign rights has been meshed in with regional and global rules, which often supersede states' decision-making power. For example, states must consult international organizations and authorities before they decide to use force against other states, before they set applicable import and export trade tariffs, and before they determine that a minority group does not deserve any self-determination rights. If states choose to ignore the existing international order and to engage in independent decision-making processes in an area where international rules apply, such states risk interference by other states in the form of sanctions, isolationism and possibly military intervention.

This kind of fundamental change in the existing world order – the increased chipping away of state sovereignty through the forces of globalization - has produced new rules regarding the legal theory of statehood. As this Article argues below, statehood is no longer satisfied through the four traditional criteria of the Montevideo Convention: territory, government, population, and the capacity to engage in international relations. Rather, for an entity to qualify as a state, and to continue to be regarded as a state on the world scene, additional criteria need to be fulfilled. These additional criteria are in reality subparts of the fourth pillar of statehood, the capacity to enter into international relations, and they include: the need for recognition by both regional partners, as well as the most powerful states, which I refer to as the Great Powers; a demonstrated respect for human/minority rights; and a commitment to participate in international organizations, and to abide by a set world order. This type of profound development in international law (globalization), causing the emergence of new rules and doctrines of international law (statehood), has been described as a Grotian Moment.

This Article will examine the Grotian Moment theory, and its practical application toward the legal theory of statehood. To that effect, this Article will describe, in Part II, the notion of a

Grotian Moment. In Part III, this Article will turn to an examination of the legal theory of statehood in its traditional form. Part IV will describe changes in the legal theory of statehood brought about by the forces of globalization, in a Grotian Moment manner. These changes include a new notion of state sovereignty and the accompanying right to intervention, the emergence of human and minority rights which sometimes affect state territorial integrity, the existence of de facto states, like Northern Cyprus and Republika Srpska, and the concept of state inter-connectivity and the proliferation of regional and international norms and organizations. This Article will conclude that all these changes, caused by globalization, have affected the legal theory of statehood, in a Grotian Moment.

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The Past, Present, and Future of Energy Regulation

Richard J. Pierce Jr.
George Washington University Law School
GWU Law School Public Law Research Paper No. 513

Abstract:
This essay is a contribution to a symposium at University of Utah. It begins with a summary of the history of energy regulation from 1960 until 2011. It then makes three arguments. First, the essay argues that the US should abandon pursuit of the goal of energy independence and pursue exclusively the goal of global warming mitigation. Second, it argues that the US should replace its present reliance on expensive and ineffective subsidies and mandates to mitigate global warming with a single mechanism to attain that goal – a large carbon tax. Third, the essay recognizes that, while a carbon tax offers the best prospect of mitigating global warming, that task is so difficult that it might not be attainable through any means.

Managing Conflicts between Environmental and Investment Norms in International Law

Magnus Jesko Langer
Graduate Institute of International and Development Studies (HEID)
Jorge E. Vinuales
Graduate Institute of International and Development Studies
INTERNATIONAL LAW FACED WITH ENVIRONMENTAL PROBLEMS, Y. Kerbrat and S. Maljean-Dubois, eds., Oxford, Hart Publishing, Forthcoming

Abstract:
The article focuses on the potentially conflicting interactions between international environmental norms and the standards of foreign investment protection. On the basis of an analysis of the relevant investment case law, the authors explore two propositions. First, the relative vagueness of international environmental norms and the role of civil society in their enforcement are reflected in the way in which such norms influence investment disputes. In most cases environmental norms are mobilised as policy justifications underlying domestic measures rather than as international obligations commanding the adoption of specific actions by the host State. The authors argue in this regard that, as international environmental norms become increasingly specific, conflicts between such norms and standards of investment protection will become more and more frequent. Second, investment tribunals have so far been reluctant to adopt clear stances as to the relative hierarchy of environmental and investment norms. Instead, they have tended to avoid

addressing such conflicts by resorting to a number of ad hoc techniques. This reluctance is perhaps the result of the ephemeral nature of such tribunals, which tend to concentrate on deciding the specific cases before them rather than on the development of international law.

Disintegrating Customary International Law: Reactions to Withdrawing from Custom

Christiana Ochoa
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Indiana Legal Studies Research Paper No. 178

Abstract:
Withdrawing from International Custom, a recent article by Curtis Bradley and Mitu Gulati, has sparked interest and debate. Bradley and Gulati's article, develops with significant nuance and detail that, naturally, can be best understood by a careful reading of their work. In essence, it proposes a modification in customary international law (CIL) doctrine – a change that would permit states to unilaterally exit from existing customary international law. This Essay will act as a brief reflection on that article. In Part I, it will explore the analogies Withdrawing makes between CIL and contract and will argue, first that CIL and contract are not analogous and, second, that even to the extent that contract demonstrates how other doctrinal areas order exits from legal relationships, contract illustrates the point that unilateral exit is a recognized abdication of the exiting party's obligations and that exit gives rise to legal liability. In Part II, it explores the analogies Withdrawing makes between governments and agents in order to unpack some of the theoretical political theory constructs on which Withdrawing relies, and to explore the limitations Withdrawing sets on the proposal for unilateral exit. Part III of this Essay will make an affirmative argument for symmetry between CIL formation doctrine and CIL disintegration doctrine. The current proposal anticipates that CIL formation would remain unchanged, but exit for any given state would be far more expeditious than is contemplated by current CIL exit formulations. This Part will illustrate that this proposal violates a strong presumption in favor of symmetrical entrenchment.

Rendition Operations: Does U.S. Law Impose Any Restrictions?

Daniel L. Pines
Central Intelligence Agency
Loyola University Chicago Law Journal, Forthcoming

Abstract:
For centuries, the United States has seized individuals oversees and, outside any formal extradition process, brought such individuals to the United States to stand trial. A more recent wrinkle has been the transfer of such individuals to other countries for the purposes of prosecution or interrogation. Known as "rendition operations," such transfers have often been criticized. Numerous commentators, asserting that many of these activities violate U.S. law, have called on the U.S. government to cease such operations and prosecute U.S. officials who engage in them. Nonetheless, a Special Task Force established by President Obama recently advocated the continued used of rendition operations, though with some policy changes. In order to effectuate such changes, and understand their impact, the Administration, as well as the critics and proponents of rendition operations, need to understand current U.S. law regarding renditions. Yet, despite all the focus, concern and criticism over rendition operations, no scholarly work to date has evaluated the entirety of

U.S. law regarding such activities. This article proposes to do just that. It concludes that, upon close inspection of U.S. law, there are virtually no legal restrictions on these types of operations. Indeed, U.S. law does not even preclude the United States from rendering individuals to a third country in instances where the third country may subject the rendered individual to torture. The only restrictions that do exist under U.S. law preclude U.S. officials from themselves torturing or inflicting cruel and unusual punishment on individuals during rendition operations, or rendering individuals from a place of actual armed conflict or occupation – all of which prove to be narrow limitations indeed. Finally, few actual means exist to prosecute or sue U.S. officials engaged in rendition operations, due to limitations in civil and criminal statutory authority, as well as the courts' continuous reluctance to consider such claims.

The TRIPS Enforcement Dispute

Peter K. Yu
Drake University Law School
Nebraska Law Review, Vol. 89, 2011

Abstract:
2010 marks the fifteenth anniversary of the entering into force of the WTO TRIPS Agreement. When the Agreement was adopted, commentators quickly extolled the unprecedented benefits of having a set of multilateral enforcement norms built into the international intellectual property regime. Although intellectual property rights holders continue to rely on protection offered by the TRIPS Agreement, many of them have now become frustrated with the inadequacy of such protection. The agreement's enforcement provisions, in particular, have been criticized as weak, primitive, and obsolete.

After more than a decade of implementation, these provisions finally became the subject of a dispute before the WTO Dispute Settlement Body ("DSB"). In January 2009, the DSB released an important panel report on the U.S.-China dispute over the protection and enforcement of intellectual property rights under the TRIPS Agreement. In this report, a WTO panel, for the first time, focused primarily on the interpretation and implementation of the TRIPS enforcement provisions. The release of the report is particularly timely in light of the growing demands from both developed and less developed countries for greater reform of the international intellectual property regime.

This Article provides an in-depth and comprehensive analysis of this panel report. It discusses the key arguments made by the China and the United States, the WTO panel's major findings, and the various remedial actions China has undertaken in response to the panel report. The article also discusses the many lessons the report has provided to policymakers, commentators, and intellectual property rights holders. Advancing a novel argument that the outcome of the present dispute reflects the common mistakes made by foreign businesses in China, it explains why this panel report is unlikely to result in dramatic improvements in intellectual property protection and enforcement in China. The article concludes with some concrete suggestions on how to revamp the United States' intellectual property enforcement strategy vis-à-vis China.

International Law from the Periphery: Locating Mithila as the Other

Prabhakar Singh
Jindal Global Law School (JGLS)

Abstract:
The Other has been international law's staple-diet. Arguably, international law proliferates by creating various categories of Others: Asian, African and Latin American. Today when international law is allegedly fragmenting due to the use of experts' methods and vocabulary, I argue that every new area of expertise creates a new type of Other, some of which are the environmental Others and the political Others etc. The demands for self-determination, the author argues, originates from such an Othering: inside a state or internationally. The article uses Levi-Strauss' study of myth to find an instance of feminism in India's periphery Mithila – part of North India bordering Nepal – which occupies Indian Mythology's centre. Extending the epicentre of Judge Radhabinod Pal's dissent at the Tokyo Tribunal to a little West from Nandy's excavations, I trace it to Maithil intellectualism. In this way, this paper substantiates the claim that the Others at the periphery were the true abiders of international law. While embracing Foucault's oriental subtext International law's poststructural engagement with pluralism has also been examined vis-à-vis its regression in European Union (EU). I have tried to situate "the periphery" at the centre of international law formation.

Intervention and Consent: Consensual Forcible Interventions in Internal Armed Conflicts as International Agreements

Eliav Lieblich
Columbia Law School
Boston University International Law Journal, Vol. 29, No. 2, 2011

Abstract:
This article addresses the issue of consensual forcible intervention in internal armed conflict – meaning, intervention undertaken with the consent of a party to an internal conflict – and seeks to clarify the place of such interventions within the framework of the law of international agreements in conjunction with the law on the use of force. The article analyzes the question of consent strictly in the context of the relations between a consenting party and an external intervener ("procedural consent"), as opposed to questions regarding the internal legitimacy or capacity of a party to express consent ("substantive consent") – which are not dealt with in this article. The article attempts to demonstrate that consensual forcible interventions, in their "procedural" sense, are regulated by firm and accepted norms of international law. These are found in the Vienna Convention on the Law of Treaties (VCLT), in customary international law, in the law on the use of force, and are augmented by the law of state responsibility. The article seeks to systematically elaborate on these frameworks and to clarify them. It demonstrates the general dynamics of consensual interventions, exemplifying these as they occurred in the different stages of the conflict in the Democratic Republic of Congo; it then addresses the regulation of consensual interventions under the VCLT and customary international law; discusses the question of withdrawal of consent and aggression; analyzes the dilemma of forward-looking consent in the context of regional defense treaties; surveys the role of consent in relation to U.N. Chapter VII interventions; and briefly touches upon the question of consent and non-state actors, exemplifying this issue through the analysis of the development of the legal status of the Palestine Liberation Organization.

Displacement with Dignity: International Law and Policy Responses to Climate Change Migration and Security in Bangladesh

Jane McAdam
University of New South Wales (UNSW) - Faculty of Law

Ben Saul
University of Sydney - Faculty of Law
German Yearbook of International Law, Forthcoming
Sydney Law School Research Paper No. 10/113

Abstract:
Bangladesh is one of the countries most vulnerable to climate change. One important human dimension of that vulnerability is the potential for large-scale human displacement as a result of climate change impacts. This article examines the extent to which climate change is likely to impact on displacement and migration in and from Bangladesh, and the legal and policy frameworks which might respond to this. It challenges assumptions that there will be mass cross-border displacement from Bangladesh by 2050 requiring regulation through a new international treaty, and that such movement will threaten international security. This article first describes the impacts of climate change on displacement and migration in Bangladesh. Secondly, it examines the nature of such movement, which is likely to be predominately internal rather than cross-border. Thirdly, it considers the security risks of climate change displacement in and from Bangladesh, focusing on resource scarcity, the risk of radicalization and terrorism within Bangladesh, and the transnational security risks of migration. Finally, it sets out options for law and policy reform with respect to climate change-related movement. It considers the need for adaptation – including through migration – as well as ways in which domestic, regional and international legal frameworks could be strengthened and progressively developed.

Taking Stock: The UN Security Council and the Rule of Law

Simon Chesterman
New York University - School of Law, Singapore Programme; National University of Singapore - Faculty of Law

Abstract:

It is now six years since we organized, working with the Austrian Mission to the UN, the first panel on the UN Security Council and the Rule of Law. The series of panels culminated in a report that summarized key findings and proposed concrete recommendations that would enhance the role of the Council in strengthening a rules-based international system. From the beginning, we decided that our work should be pragmatic and realistic. We decided not to consider proposals that would require amending the Charter (such as expanding the membership of the Council) or look narrowly at the foreign policy of specific states. We also attempted to take into account the interests of large and small states, permanent and non-permanent members of the Council, and those from the global South as well as the industrialized North. At the same time, the report that was produced in 2008 was intended to be the starting point for further, more concrete discussion to support the Council's role in strengthening a rules-based international system and maintaining international peace and security under the rule of law. Today is a billed as a "stock-taking" exercise. I'm an academic, but I don't think it's appropriate to grade the performance of the Council in this

area. Instead, what I would like to do is take the opportunity to look back at why we started this process; consider what has been happening in recent years, in particular since the report; and look forward at where we might be going.

Ostrom and the Lawyers: The Impact of Governing the Commons on the American Legal Academy

Carol M. Rose
University of Arizona - James E. Rogers College of Law
International Journal of the Commons, Forthcoming
Arizona Legal Studies Discussion Paper No. 10-37

Abstract:
American legal academics began to cite Elinor Ostrom's Governing the Commons (GC) shortly after its 1990 publication, with citations peaking in the mid 2000s and with signs of a new peak in 2010 in the wake of Ostrom's Nobel Prize in Economics. The legal scholars most interested in GC have worked in three areas: general property theory, environmental and natural resource law, and since the mid 1990s, intellectual property. In all those areas legal scholars have found GC and its many examples a strong source of support for the proposition that people can cooperate to overcome common pool resource issues, managing resources through informal norms rather than either individual property or coercive government. Legal academics have also been at least mildly critical of GC as well, however. A number have tried to balance the attractive features of GC's governance model-stability and sustainability-with more standard legal models favoring toward open markets, fluid change and egalitarianism.

Procedural Rights as a Crucial Tool to Combat Climate Change

Svitlana Kravchenko
University of Oregon
Georgia Journal of International and Comparative Law, Vol. 38, No. 3, Spring 2010

Abstract:
This Article will discuss how a subset of human rights - procedural rights - can play an important role in limiting climate change. These include freedom of expression and the right to seek and receive information, the right to participate in decision-making and the right of access to justice. States must address climate change through a transparent process of giving the public full and complete information during the early stages of decision-making in climate change related issues. States must also give the public a voice by allowing participation by all affected communities, including indigenous peoples.

In Part II, this Article will first discuss how freedom of expression and access to information are embedded in human rights treaties, multilateral environmental agreements, national constitutions and information laws, and in the jurisprudence of regional human rights and domestic courts, as well as national reporting and how these rights can be used for combating climate change. Part II will also briefly evaluate the right of investors to disclosure of climate risk information and the role of Securities and Exchange Commission (SEC) in light of the agency's new interpretive guidance on existing public company disclosure requirements relating to the issue of climate change.

In Part III, this Article will discuss public participation in decision-making related to climate change, first exploring the established legal framework for public participation in "soft law" MEAs, and in environmental impact assessments (EIAs), including the transboundary context. Part III concludes by providing case examples how procedural rights have been used to combat climate change. Finally, Part IV will evaluate the role of civil society participation in the negotiation of an international treaty at the United Nations Framework Convention on Climate Change (UNFCCC) Fifteenth Session of the Conference of the Parties in Copenhagen, as well as the author's participation in the Working Group on Human Rights and Climate Change.

Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)(Judgment) [2010]

Donald K. Anton
Australian National University (ANU) - College of Law
International Court of Justice, April 10, 2010

Abstract:
The Pulp Mills case is the latest in a series of environmental cases to find its way before the ICJ. Pulp Mills contributes to the development of international environmental law by confirming that that transboundary environmental impact assessment is part and parcel of general international law. It is true that deficiencies remain in connection with the nature, scope and content of the EIA (including public consultation). However, states planning projects that pose risks of significant transboundary environmental harm (or threaten shared natural resources) shoulder a significant obligation of due diligence to ensure the environment or resources are protected from harm.

Book Review of Alan Boyle and Christine Chinkin, THE MAKING OF INTERNATIONAL LAW, Oxford University Press, 2007

Sean D. Murphy
George Washington University - Law School
GWU Legal Studies Research Paper No. 518
GWU Law School Public Law Research Paper No. 518
American Journal of International Law Vol. 104, No. 4

Abstract:
An Extraordinary Range of International "Rules" or "Norms" are Created Today Through Mechanisms that Do Not Fit Easily into the Traditional Sources of International Law. In the Making of International Law, Professors Alan Boyle of the University of Edinburgh and Christine Chinkin of the London School of Economics Set Their Sights on Providing a Broad Account of Such Law-Making, Looking Across Different Areas of Organizational Behavior, Both Governmental and Non-Governmental. Although this Volume Has Some Shortcomings, it is an Excellent Starting Point for Those Interested in an Engaging and Informed Survey of Various Ways in Which International Law is Currently Made, and Points the Direction for Those Who Wish to Embark on Even Deeper Inquiries.

Public International Law eJournal
Vol. 5, No. 140, Nov. 08, 2010
Alan O. Sykes, Ed.

Table of Contents

Climate Law

Vol. 1, no. 2, 2010

- Greg Picker, Reflections on climate politics in a sunburnt country

---

European Journal of International Law
Issue Vol. 21 (2010) No. 3

J.H.H. Weiler, Editorial: Copyright, Law Journals and a Romantic View of EJIL (JHHW abstract) (free fulltext)

Symposium : The Interpretation of Treaties - A Re-examination

J.H.H. Weiler, The Interpretation of Treaties - A Re-examination Preface (J.H.H. Weiler abstract) (free fulltext)

George Letsas, Strasbourg's Interpretive Ethic: Lessons for the International Lawyer (George Letsas abstract)

Leena Grover, A Call to Arms: Fundamental Dilemmas Confronting the Interpretation of Crimes in the Rome Statute of the International Criminal Court (Leena Grover abstract)

Lucas Lixinski, Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the Service of the Unity of International Law (Lucas Lixinski abstract)

Isabelle Van Damme, Treaty Interpretation by the WTO Appellate Body (Isabelle Van Damme abstract)

Riccardo Pavoni, Mutual Supportiveness as a Principle of Interpretation and Law-Making: A Watershed for the 'WTO-and-Competing-Regimes' Debate? (Riccardo Pavoni abstract)

Luigi Crema, Disappearance and New Sightings of Restrictive Interpretation(s) (Luigi Crema abstract)

Articles:

Juliet Chevalier-Watts, Effective Investigations under Article 2 of the European Convention on Human Rights: Securing the Right to Life or an Onerous Burden on a State? (Juliet Chevalier-Watts abstract)

Frank Hoffmeister, Litigating against the European Union and Its Member States - Who Responds under the ILC's Draft Articles on International Responsibility of International Organizations? (Frank Hoffmeister abstract)

Anne-Sophie Tabau, Sandrine Maljean-Dubois, Non-compliance Mechanisms: Interaction between the Kyoto Protocol System and the European Union (Sandrine Maljean-Dubois abstract)

Review Essay

Sergio Dellavalle, Beyond Particularism: Remarks on Some Recent Approaches to the Idea of a Universal Political and Legal Order (Sergio Dellavalle abstract) (free fulltext)

Book Reviews

Mark Mazower. No Enchanted Palace: The End of Empire and the Ideological Origins of the United Nations (Jan Klabbers free fulltext)

Thomas Grant. Admission to the United Nations, Charter Article 4 and the Rise of Universal Organization (Anne-Laurence Brugère free fulltext)

Elena Conde Pérez. La denuncia de los tratados. Regimen en la Convencion de Viena sobre el derecho de los tratados de 1969 y practica estatal (Christina Binder free fulltext)

Brian D. Lepard. Customary International Law. A New Theory with Practical Applications (Niels Petersen free fulltext)

Ulrich Haltern. Was bedeutet Souveranitat? , Toni Erskine. Embedded Cosmopolitanism. Duties to Strangers and Enemies in a World of 'Dislocated Communities' , Jeffery L. Dunoff, Joel P. Trachtman (eds). Ruling the World? Constitutionalism, International Law, and Global Governance (Ekaterina Yahyaoui Krivenko free fulltext)

The Last Page

Eric Stein, Cosmos Assessed (Eric Stein abstract) (free fulltext)

Victoria University of Wellington Law Review, Volume 41, Number 2, August 2010

SPECIAL ISSUE: GLOBAL AND REGIONAL PERSPECTIVES ON INTERNATIONAL HUMANITARIAN LAW

Fordham International Law Journal, Volume 33, Number 5, May 2010

DEDICATED TO LORD GORDON SLYNN OF HADLEY

Brooklyn Journal of International Law, Volume 35, Number 3, 2010

SYMPOSIUM: NEW PARADIGMS FOR FINANCIAL REGULATION IN THE UNITED STATES AND THE EUROPEAN UNION

- The Global Dilemma in Short Selling Regulation: IOSCO's Information Disclosure Proposals and the Potential for Regulatory Arbitrage (Eleonora Zlotnikova) p.965

International Journal of Refugee Law
Volume 22 Issue 4 2010

Articles

Hilary Evans Cameron
Refugee Status Determinations and the Limits of Memory
Int J Refugee Law (2010) 22(4): 469-511 doi:10.1093/ijrl/eeq041
Abstract Full Text (HTML) Full Text (PDF)

Jeannie Rose C. Field
Bridging the Gap Between Refugee Rights and Reality: a Proposal for Developing International Duties in the Refugee Context
Int J Refugee Law (2010) 22(4): 512-557 doi:10.1093/ijrl/eeq035
Abstract Full Text (HTML) Full Text (PDF)

Savitri Taylor and Brynna Rafferty-Brown
Waiting for Life to Begin: the Plight of Asylum Seekers Caught by Australia's Indonesian Solution
Int J Refugee Law (2010) 22(4): 558-592 doi:10.1093/ijrl/eeq034
Abstract Full Text (HTML) Full Text (PDF)

Marjoleine Zieck
UNHCR and Turkey, and Beyond: of Parallel Tracks and Symptomatic Cracks
Int J Refugee Law (2010) 22(4): 593-622 doi:10.1093/ijrl/eeq033
Abstract Full Text (HTML) Full Text (PDF)

Case Law

HJ and HT v SSHD
Int J Refugee Law (2010) 22(4): 623-672 doi:10.1093/ijrl/eeq036
Extract Full Text (HTML) Full Text (PDF)

Document
Opinion No. 6/2010 of the Group of Experts on Trafficking in Human Beings of the European Commission: On the Decision of the European Court of Human Rights in the Case of Rantsev v. Cyprus and Russia
Int J Refugee Law (2010) 22(4): 673-676 doi:10.1093/ijrl/eeq037
Extract Full Text (HTML) Full Text (PDF)

Book Reviews

Vincent Chetail
Migration and Human Rights. The United Nations Convention on Migrant Workers' Rights
Int J Refugee Law (2010) 22(4): 677-682 doi:10.1093/ijrl/eeq039
Extract Full Text (HTML) Full Text (PDF)

Ryszard Cholewinski
Refugees, Recent Migrants and Employment: Challenging Barriers and Exploring Pathways
Int J Refugee Law (2010) 22(4): 683-685 doi:10.1093/ijrl/eeq038
Extract Full Text (HTML) Full Text (PDF)

Marco Odello
International Refugee Law, The Library of Essays in International Law
Int J Refugee Law (2010) 22(4): 685-691 doi:10.1093/ijrl/eeq040
Extract Full Text (HTML) Full Text (PDF)

Asian Journal of International Law
Table of Contents - FirstView Articles

Definitional Challenges of Dealing with Sovereign Wealth Funds
Andrew ROZANOV Abstract

Depoliticization and Regulation of Sovereign Wealth Funds: A Chinese Perspective
LI Hong Abstract

Temptation and the Virtues of Long-Term Commitment: The Governance of Sovereign Wealth Fund Investment
Gordon L. CLARK and Eric R.W. KNIGHT Abstract

Human Security: Defining the Elephant and Imagining its Tasks
Tom FARER Abstract

Reflections on the Necessity of Regional Approaches to International Law Through the Prism of the European Example: Neither Yes nor No, Neither Black nor White
Hélène Ruiz FABRI Abstract

International Law and the Peaceful Resolution of Disputes: Asian Perspectives, Contributions, and Challenges
Tommy KOH Abstract

The Women Question in International Law
Hilary CHARLESWORTHAbstract

What Use for Sovereignty Today?
Martti KOSKENNIEMI Abstract

Meaningful Dialogue Through a Common Discourse: Law and Values in a Multi-Polar World
XUE Hanqin

Australian International Law Journal
Vol. 16, 2009

- Roger S Clark, The Review Conference on the Rome Statut e of the International Criminal Court, Kampala, Uganda, 31 May-11 June 2010
- Matthew Gillett, Victim Participation at the International Criminal Court

- Emmi Okada, The Australian Trials of Class B and C Japanese War Crimes Suspects, 1945-51
- Susan Harris Rimmer, Wearing his Jacket: A Feminist Analysis of the Serious Crimes Process in Timor-Leste
- Robert Lancaster, Intervening Interests: Humanitarian and Pro-Democratic Intervention in the Asia-Pacific
- Brent Michael, Responding to Attacks by Non-State Actors: The Attribution Requirement of Self-Defence
- Kelisiana Thynne, Targeting the 'Terrorist Enemy': The Boundaries of Armed Conflict Against Transnational Terrorists
- Andrew Yuile, At the Fault-Lines of Armed Conflict: The 2006 Israel-Hezbollah Conflict and the Framework of International Humanitarian Law
- Irina Kolodizner, The Charter of Rights Debate: A Battle of the Models

---

Stanford Journal of International Law
Vol. 46, no. 1, Summer 2010

- Benjamin Mason Meier, Global Health Governance and the Contentious Politics of Human Rights: Mainstreaming the Right to Health for Public Health Advancement
- Barry Sautman, Scaling Back Minority Rights?: The Debate about China's Ethnic Policies
- David Wallach, The Alien Tort Statute and the Limits of Individual Accountability in International Law

---

Cornell International Law Journal, Volume 43, Number 3, Fall 2010

- Seizing the "Grotian Moment": Accelerated Formation of Customary International Law in Times of Fundamental Change (Michael P. Scharf) p.439
- The Right to Migrate as a Human Right: The Current Argentine Immigration Law (Barbara Hines) p.471
- Traditions in Conflict: The Internationalization of Confrontation (Kweku Vanderpuye) p.513
- NOTES
- Disclosing Stored Communication Data to Fight Crime: The U.S. and EU Approaches to Balancing Competing Privacy and Security Interests (Elise M. Simbro) p.585
- Toward a More Individualized Assessment of Changed Country Conditions for Kosovar Asylum-Seekers (Christian A. Fundo) p.611

University of Miami International and Comparative Law Review, Volume 17, Number 2, Spring 2010

- ARTICLES
- EFFECTIVE PROTECTION AGAINST REFOULEMENT IN EUROPE: MINIMIZING EXCLUSIONISM IN SEARCH OF A COMMON EUROPEAN ASYLUM POLICY (Michael Campagna) p.125
- AFFIRMATIVE ACTION IN BRAZIL: REVERSE DISCRIMINATION AND THE CREATION OF A CONSTITUTIONALLY PROTECTED COLOR-LINE (Christopher DiSchino) p.155

- (F)LINGING (I)NDISPENSABLE (F)REEDOMS (A)SIDE: WHY FIFA'S "6+5" WILL NOT SURVIVE (Michael Levinson) p.191
- HEIRS OF MARTI: THE STORY OF CUBAN LAWYERS (Victoria Quintana) p.229

Buffalo Human Rights Law Review, Volume 16, 2010

- OF SHRINES, MEMORIALS AND MUSEUMS: USING THE INTERNATIONAL CRIMINAL COURT'S VICTIM REPARATION AND ASSISTANCE REGIME TO PROMOTE TRANSITIONAL JUSTICE (Frédéric Mégret) p.1
- 'IN LAND WE TRUST': THE ENDOROIS' COMMUNICATION AND THE QUEST FOR INDIGENOUS PEOPLES' RIGHTS IN AFRICA (Korir Sing' Oei A. & Jared Shepherd) p.57
- WHAT SHOULD ORGANIZED HUMAN RIGHTS ACTIVISM IN AFRICA BECOME? CONTRIBUTORY INSIGHTS FROM A COMPARISON OF NGOs AND LABOR-LED MOVEMENTS IN NIGERIA (Obiora Chinedu Okafor) p.113
- RETURNING HOME: THE CHALLENGE OF REPATRIATING FOREIGN BORN CHILD VICTIMS OF FORCED LABOR FROM INDIA (Kathleen Kerr) p.155
- THE ANALOGY BETWEEN PIRACY AND HUMAN TRAFFICKING: A THEORETICAL FRAMEWORK FOR THE APPLICATION OF UNIVERSAL JURISDICTION (Miriam Cohen) p.201
- JUST WAR IN INTERNATIONAL LAW: AN ARGUMENT FOR A DEONTOLOGICAL APPROACH TO HUMANITARIAN LAW (Ryan Dreveskracht) p.237
- COMMENT: REEVALUATING SELF-DETERMINATION IN A POST-COLONIAL WORLD (Joshua Dilk) p.289

Journal of Space Law, Volume 36, Number 1, Spring/Summer 2010

- Inventions in Outer Space: Need for Reconsideration of the Patent Regime (Sandeepa Bhat B.) p.1
- U.S. Commercial Space Sector: Matured and Successful (Shane Chaddha) p.19
- High Hopes and Low Estimates: New Space's Rocky Contractual Road (Marielle Elisabet Dirkx) p.55
- To the End of the Earth: A Study of the Boundary Between Earth and Space (Theodore W. Goodman) p.87
- The March of Science: Fourth Amendment Implications on Remote Sensing in Criminal Law (Surya Gablin Gunasekara) p.115
- Prometheus Unbound? Proposal for a New Legal Paradigm for Air Law and Space Law: Orbit Law (C. Brandon Halstead) p.143
- Legality of the Deployment of Anti-Satellite Weapons in Earth Orbit: Present and Future (Shang Kuan) p.207
- Insuring Human Space Flight: An Underwriter's Dilemma (Paul Ordyna) p.231
- Use of Outer Space for Peaceful Purposes: Non-Militarization, Non-Aggression and Prevention of Weaponization (Jinyuan Su) p.253
- Enlightened State-Interest—A Legal Framework for Protecting the "Common Interest of All Mankind" from Hardinian Tragedy (Nicholas D. Welly) p.273

International Environmental Agreements: Politics, Law and Economics
Volume 10, Number 4, December 2010

- Special Issue: "Earth System Governance"
- Editorial (Frank Biermann and Ruben Zondervan) p.273-276
- Original Papers
- Earth system governance: a research framework (Frank Biermann, Michele M. Betsill, Joye....) p.277-298
- Allocation and architecture in climate governance beyond Kyoto: lessons from interdisciplinary research on target setting (Norichika Kanie, Hiromi Nishimoto, Yasua....) p.299-315
- Agency in international climate negotiations: the case of indigenous peoples and avoided deforestation (Heike Schroeder) p.317-332
- The role of social learning in adaptiveness: insights from water management (Louis Lebel, Torsten Grothmann and Bernd Siebenhüner) p.333-353
- Pursuits of adaptiveness in the shared rivers of Monsoon Asia (Louis Lebel, Jianchu Xu, Ram C. Bastakoti and Amrita Lamba) p.355-375
- Access and allocation in earth system governance: water and climate change compared (Joyeeta Gupta and Louis Lebel) p.377-395
- Filling the gap? An analysis of non-governmental organizations responses to participation and representation deficits in global climate governance (Kathrin Dombrowski) p.397-416

International Journal of Cultural Property, Volume 17, Issue 3, August 2010

- Justifying and Criticizing the Removals of Antiquities in Ottoman Lands: Tracking the Sigeion Inscription (Fredrik Thomasson) p.493-517
- Intellectual Property for Mystics? Considerations on Protecting Traditional Wisdom Systems (Rosanne Trottier) p.519-546
- Law and the Politics of the Past: Legal Protection of Cultural Heritage in Greece (Daphne Voudouri) p.547-568
- “IN DEFENSE OF PROPERTY”: AN EXCHANGE
- Culture, Property, and Peoplehood: A Comment on Carpenter, Katyal, and Riley's “In Defense of Property” (Michael F. Brown) p.569-579
- Clarifying Cultural Property (Kristen A. Carpenter, Sonia K. Katyal and Angela R. Riley) p.581-598
- BOOK REVIEW
- Beat Schönenberger, The Restitution of Cultural Assets. Utrecht, Eleven International, 2009. Pp. 270. ISBN 978-90-77596-78-4, € 81.00 (Craig Forrest) p.599-602
- Lynn Meskell, ed., Cosmopolitan Archaeologies. Durham/London: Duke University Press, 2009. 296 p.: ill.; 23 cm. ISBN 9780822344322 (cloth: alk. paper) Hard cover $84.95; soft cover $23.95 (Lyndel V. Prott) p.603-607

International Journal of Civil Society Law, Volume 8, Issue 4, October 2010

- Making Gifts to NPOs in Pakistan – Legal and Fiscal Rules- ICCSL Staff and Consultants p.7
- Administrative and Cy-pres Judicial Schememaking: The Fate of These Applications in Canada (Donovan Waters) p.24

- Assessing Developments in the Regulatory Environments for Nonprofit Organizations in Japan and England & Wales (Rosario Laratta and Chris Mason) p.48
- Case Note: Summary of Judgment in Cape High Court Against the National Lotteries Board (Phiroshaw Camay) p.69

Australian and New Zealand Maritime Law Journal, Volume 24, Number 2, 2010

- The Montara Oil Spill and the Marine Oil Spill Contingency Plan: Disaster Response or Just a Disaster? (Tina Hunter) p.46-58
- Somali Piracy and International Law: Some Aspects (Omer Elagab) p.59-75
- The Nairobi Convention: Reforming Wreck Removal in New Zealand (William Irving) p.76-92
- Morella Calder Memorial Prize Winning Essays
- To Limit or not to Limit: Limitation of Liability on West Australian Waters – a Call for Reform (Jacqueline M Allen) p.93-103
- Arranging Deckchairs on the Titanic:Climate Change, Greenhouse Gas Emissions and International Shipping (Jodie Kathleen Moffat) p.104-125
- Casenotes and Articles
- 'The Plot of the Pilot': Pilotage and Limitation of Liability in Maritime Law (Kerryn Woonings) p.126-137
- Masefield AG V Amlin Corporate Member Ltd [2010] 1 Lloyd's Law Reports 509 (Ashwin Nair) p.138-143
- The Effect of Market Conditions on Repudiation and Damages: Zodiac Maritime Agencies Ltd v Fortescue Metals Group Ltd [2010] EWHC 903 (COMM) (Joel Meehan) p.144-147
- Piracy and Off-hire clauses: Cosco Bulk Carrier Co Ltd v Team-Up Owning Co Ltd ('The Saldanha') [2010] EWHC 1340 (Ashwin Nair) p.148-151
- Student Submissions
- The 'Peaceful Purposes' Principle in Antarctica and the Stability of its Peaceful Status (Jinyuan Su) p.152-165

US State Department

Foreign Relations of the United States, 1969-1976, Volume VIII, Vietnam, January-October 1972 (Sept. 2010)

Editor: John M. Carland. General Editor: Edward C. Keefer. The Easter Offensive, and its ramifications, represents the most significant event in Indochina for U.S. policy in this period, and documentary coverage of the event dominates the volume, concentrating mainly on what happened in North and South Vietnam, policy formulation and decision making in Washington, and the negotiations in Paris. Only a very small number of documents relate to events and policy in Laos and Cambodia, and then only as they relate to events and policy in Vietnam.

Looking to the Future

Essays on International Law in Honor of W. Michael Reisman

Edited by Mahnoush H. Arsanjani, Jacob Katz Cogan, Robert D. Sloane and Siegfried Wiessner

Table of contents

Part I W. Michael Reisman, The Person

Chapter 1 An Appreciation *Rosalyn Higgins*;
Chapter 2 Michael Reisman, Dean of the New Haven School of International Law *Harold Hongju Koh*;
Chapter 3 L'honneur des juristes *Prosper Weil*;
Chapter 4 Michael Reisman, Human Dignity, and the Law *Siegfried Wiessner*;

Part II Theory About Making and Applying Law
Chapter 5 Law as a Process of Communication: Reisman Meets Habermas *Adeno Addis*;
Chapter 6 The Uses and Abuses of Illusion in International Politics *Mahnoush H. Arsanjani*;
Chapter 7 Prelude to Decision: Michael Reisman, the Intelligence Function, and a Scholar's Study of Intelligence in Law, Process, and Values *James E. Baker*;
Chapter 8 Prologue to a Theory of Non-Treaty Norms *Daniel Bodansky*;
Chapter 9 How Nongovernmental Actors Vitalize International Law *Steve Charnovitz*;
Chapter 10 Between Façades and Operational Codes: Michael Reisman's Jurisprudence of Suspicion *Menachem Mautner*;
Chapter 11 Scholarship as Law *Jan Paulsson*;
Chapter 12 Between Minimum and Optimum World Public Order: An Ethical Path for the Future *Steven R. Ratner*;
Chapter 13 The Users of International Law *Emmanuel Roucounas*;
Chapter 14 Rethinking Choice of Law: What Role for the Needs of the Interstate and International Systems? *Gary J. Simson*;
Chapter 15 More Than What Courts Do: Jurisprudence, Decision, and Dignity—In Brief Encounters and Global Affairs *Robert D. Sloane*;
Chapter 16 Reconfiguration of Authority and Control of the International Financial Architecture *Eisuke Suzuki*;
Chapter 17 Remarks on Sovereignty in the Evolving Constitutional Features of the International Community *Attila Tanzi*;
Chapter 18 International Law as a Coherent System: Unity or Fragmentation? *Christian Tomuschat*;
Chapter 19 Entrenchment—Human and Divine: A Reflection on Deuteronomy 13:1-6 *J.H.H. Weiler*;
Chapter 20 Obligation of Result Versus Obligation of Conduct: Some Thoughts About the Implementation of International Obligations *Rüdiger Wolfrum*;

Part III Making and Applying Human Rights Law
Chapter 21 Secession or Independence—Self-Determination and Human Rights: A Japanese View of Three Basic Issues of International Law Concerning "Taiwan" *Nisuke Ando*;
Chapter 22 Reflections on the Torture Policy of the Bush Administration (2001–2008) *M. Cherif Bassiouni*;
Chapter 23 Waivers in International and European Human Rights Law *Lucius Caflisch*
Chapter 24 Reflections on the Current Prospects for International Criminal Justice *Antonio Cassese*;
Chapter 25 Human Rights and World Public Order: Major Trends of Development, 1980–2010 and Beyond *Lung-chu Chen*;
Chapter 26 U.N. Human Rights Council Fact-Finding Missions: Lessons from Gaza *Christine Chinkin*;
Chapter 27 Choice of Gender Identity in International Human Rights Law *Aaron Xavier Fellmeth*;
Chapter 28 The International Protection of Human Rights as an Element of World Order *Jochen Abr. Frowein*;
Chapter 29 Toward Minimum Standards for Regional Human Rights Systems *Christof Heyns and Magnus Killander*;
Chapter 30 Sabbatino, Sosa, and "Supernorms" *Kenneth C. Randall and Chimene I. Keitner*;

Chapter 31 Some Remarks about the Realistic Idealism of the European Court of Human Rights *Luzius Wildhaber*;

Part IV Making and Applying Investment and Trade Law
Chapter 32 Investments, Fair and Equitable Treatment, and the Principle of "Respect for the Integrity of the Law of the Host State": Toward a Jurisprudence of "Modesty" in Investment Treaty Arbitration *Gu* [BRILL'S ONLINE TABLE OF CONTENTS END HERE]

Transborder Governance of Forests, Rivers and Seas

Edited By Wil de Jong, Denyse Snelder and Noboru Ishikawa

Contents

1. Transnational Natural Resource Governance in Border Regions
Wil de Jong, Kyoto University, Japan
Kristen Evans, Stone Center for Latin American Studies, Tulane University, USA

2. Social, Spatial, and Sectoral Boundaries in Transboundary Conservation of Central African Forests
Rebecca Hardin and Serge Bahuchet, University of Michigan, USA
Marine Robillard and Serge Bahuchet, Museum of Natural History, France

3. State-Making and Transnationalism: Transboundary Flows in a Borderland of Western Borneo
Noboru Ishikawa, Kyoto University, Japan

4. A Resource-Hungry Malaysia, Transnational Mobile Peoples and the Absence of the State: A Lethal Combination for Natural Resources in Indonesia's Borderlands?
Dave Lumenta, University of Indonesia

5. Territorialization, Regionalism and Natural Resource Management in the Peruvian Amazon
Wil de Jong, Kyoto University, Japan

6. Territorialization Re-examined: Transborder Marine Resources Exploitation in Southeast Asia and Australia
Leontine E. Visser, Wageningen University and Research Center, Netherlands
Dedi S. Adhuri, World Fish Center, Malaysia

7. Circumventing the Sea Cucumber War: Self-Regulation of Sea Cucumber Fisheries in Rishiri Island, Japan
Jun Akamine, Nagoya City University, Japan

8. Beyond Borders: Scaling-Up Marine Turtle Conservation Through Trans-National Arrangements
Andres B. Masipiquena, Mercedes D. MasipiquenaIsabela State University, Philippines
Denyse J. Snelder, Leiden University, The Netherlands and Vrije Universiteit, Amsterdam

9. Adapting to Water Scarcity in a Changing Climate: The Role of Institutions in Transboundary Settings
Darryn McEvoy, University of Maastricht, The Netherlands
Francesc Cots, the Forest Technology Centre, Spain
Kate Lonsdale, UK Climate Impacts Programme, Oxford, UK
Joan David Tàbara, Autonomous University of Barcelona, Spain
Saskia Werners, Wageningen University and Research Center, The Netherlands.

10. Fighting Floods or Living with Floods? Streamlining Multiple Strategies of Flood Risk Management in Transborder River Basins
Denyse J. Snelder, Leiden University, The Netherlands and Vrije Universiteit, Amsterdam

11. Greater Mekong Subregion Cooperation in Hydropower Development and Power Interconnection: Potentials, Challenges and Progresses
Lei Zhuning, Yunnan Academy of Social Sciences, China