
**Anton's Weekly Digest of
International Law Scholarship***(available on <http://donanton.org>)(email subscription available at <http://mailman.anu.edu.au/mailman/listinfo/intlawprofessors>)**Vol. 2, No. 2
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**I. SSRN Legal Scholarship Network/bepress Legal Repository/NELLCO  
Legal Scholarship Repository/Publishers Advances**

(Abstracts in this Bulletin have been significantly edited for brevity)

**Customary International Law and Withdrawal Rights in an Age of Treaties****[Curtis A. Bradley](#)**

Duke University - School of Law

**[G. Mitu Gulati](#)**

Duke University - School of Law

*[Duke Journal of Comparative & International Law, Vol. 21, No. 1, 2010](#)*

The conventional wisdom among international law scholars is that, once a rule of customary international law (CIL) becomes established, nations never have the unilateral right to withdraw from it. In a recent article published in the Yale Law Journal, "Withdrawing from International Custom," we termed this conventional wisdom the Mandatory View of CIL and distinguished it from a possible regime in which nations could opt out of at least some CIL rules through advance notice, something we termed a Default View of CIL. After considering the intellectual origins and functional desirability of the Mandatory View, as well as the extent to which withdrawal rights are available under treaties, we concluded that it was difficult to justify a complete ban on withdrawal from all rules of CIL. That article is the subject of a forthcoming symposium edition of the Duke Journal of Comparative and International Law, in which a variety of scholars raise important questions about our analysis and its implications. In this essay, we seek to advance the analysis set forth in Withdrawing by addressing four topics implicated by the symposium responses: the current state of CIL; the proper way to conceive of CIL and its relationship to treaties; how a shift away from the Mandatory View might occur in practice; and whether a shift to a Default View would make a meaningful difference in state practice. We also identify some issues that could benefit from additional research.

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\* Donald K. Anton, The Australian National University College of Law. This digest draws on independent research together with information gleaned from the RSS feeds of a host of international law publishers, law libraries, and blogs, especially Jacob Katz Cogan's [International Law Reporter](#) and Lawrence Solum's [Legal Theory Blog](#).

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**Denunciation of the ICSID Convention under the General International Law of Treaties****Antonios Tzanakopoulos**

University of Glasgow School of Law

*INTERNATIONAL INVESTMENT LAW AND GENERAL INTERNATIONAL LAW: FROM CLINICAL ISOLATION TO SYSTEMIC INTEGRATION*, Hofmann, Rainer and Tams, Christian, eds, Nomos, Baden Baden, 2011

Following recent denunciations of (withdrawals from) the ICSID Convention by Bolivia and Ecuador and the spate of academic commentary that followed, this paper considers denunciation from the ICSID Convention under the general international law of treaties. It is argued that self-contained interpretation of the provisions on denunciation of the ICSID Convention do not yield any compelling results, leaving contrary positions plausible. The general international law of treaties offers the decisive argument with respect to the effects of denunciation of the Convention, and helps determine whether ICSID jurisdiction can be established after the date of effective withdrawal from the Convention.

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**Human Rights and the Immunities of Foreign States and International Organizations****Riccardo Pavoni**

Faculty of Law, University of Siena

*NORM CONFLICTS AND HIERARCHY IN PUBLIC INTERNATIONAL LAW: THE PLACE OF HUMAN RIGHTS*, Erika de Wet & Jure Vidmar, eds., 2011

By extensively drawing on existing judicial practice, this chapter argues that the relationship between human rights and the immunities of States and IOs may be conceptualized as a tension among competing rules which can be worked out by means of interpretation, thus as an apparent conflict of norms open to the application of conflict avoidance techniques. The chapter particularly advocates an 'alternative-remedies test' as a reasonable balance between the values and interests underlying the competing rules at stake. It considers that jus cogens may well play a role as a chiefly important element to be taken into account in this balancing process. The overall conclusion is that current and evolving practice in this field lends support to the emergence of a de facto human rights-based normative hierarchy in international law.

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**Secessions, Coups and the International Rule of Law: Assessing the Decline of the Effective Control Doctrine****Brad Roth***affiliation not provided to SSRN**Wayne State University Law School Research Paper No. 10-15*

Attempted secessions (eg, Kosovo and Somaliland) and coups d'etat (eg, Madagascar and Honduras in 2009) prompt contestation over whether or not legal status is to be conferred on local exercises of de facto authority. International legal standing has traditionally been established by victory in a trial by ordeal: a region initially integral to an existing state successfully establishes itself as an independent sovereign unit only where its secession movement creates - usually by decisive victory in an armed struggle - facts on the ground that appear irreversible; an insurgent faction successfully establishes itself as a government where it overthrows an existing constitutional structure and secures - even if at bayonet-point - widespread popular acquiescence. Insofar as it is perceived as little more than an imprimatur for 'might makes right' at the local level, this 'effective control doctrine' is manifestly offensive to a rule-of-law sensibility. Notwithstanding the international order's disposition to defer to the outcome of internal conflicts, alternative solutions are available where a state manifestly fails to embody the self-determination of the entirety of the territorial population, or where

a government manifestly fails to represent the political community that the state encompasses. These alternative solutions, however, far from generating new generally-applicable doctrines, tend ineluctably to have an ad hoc character . . .

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### **Antidumping, Countervailing, and Safeguard Measures**

[Winston Chang](#)

State University of New York - Department of Economics

*GITAM Review of International Business*

This paper discusses the key ingredients of WTO antidumping, countervailing, and safeguard measures, and corresponding U.S. trade laws. It explores a number of shortcomings of current U.S. antidumping laws, including the cost- and price-based dumping criteria and the inevitable excessive pass-through outcome of an antidumping case. The paper also examines several special U.S. trade remedies that have been controversial, including the repealed Byrd Amendment, the use of "fair price" and "constructed value" on electric golf carts from Poland, and the disputes over "zeroing" between the U.S. and the EU, Japan and Mexico.

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### **A Dynamic Theory of Resource War**

[Daron Acemoglu](#)

Massachusetts Institute of Technology (MIT) - Department of Economics; Centre for Economic Policy Research (CEPR); National Bureau of Economic Research (NBER)

[Mikhail Golosov](#)

Yale University - Department of Economics

[Aleh Tsyvinski](#)

Cowles Foundation

[Pierre Yared](#)

Columbia University - Graduate School of Business

*MIT Department of Economics Working Paper No. 11-1*

We develop a dynamic theory of resource wars and study the conditions under which such wars can be prevented. The interaction between the scarcity of resources and the incentives for war in the presence of limited commitment is at the center of our theory. We show that a key parameter determining the incentives for war is the elasticity of demand. Our first result identifies a novel externality that can precipitate war: price-taking firms fail to internalize the impact of their extraction on military action. In the case of inelastic resource demand, war incentives increase over time and war may become inevitable. Our second result shows that in some situations, regulation of prices and quantities by the resource-rich country can prevent war, and when this is the case, there will also be intertemporal distortions. In particular, resource extraction will tend to be slower than that prescribed by the Hotelling rule, which is the rate of extraction in the competitive environment. Our third result is that, due to limited commitment, such regulation can also precipitate war in some circumstances in which war is avoided in the competitive environment.

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### **The Evolving Definition of the Refugee in Contemporary International Law**

[William Thomas Worster](#)

The Hague University

Many scholars of international refugee law assert that there is no definition of refugee under international law except that given in the Refugee Convention. This assertion, however, overlooks the dynamic way that the Refugee Convention is interpreted and is usually made without a detailed analysis of customary international law. This article attempts to address this shortcoming in the literature by examining conventional and customary international law contributing to the

contemporary definition of refugee. Furthermore, it will attempt to do this in an even-handed manner, concluding that the definition has expanded in favor of claimants in some aspects, but, actually, contracted again in favor of claimants in others. . . .

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### **Executive Authority, Adaptive Treaty Interpretation, and the International Boundary and Water Commission, U.S. – Mexico**

**Robert John McCarthy**

*affiliation not provided to SSRN  
Water Law Review, Spring 2011*

Conceived as a nineteenth century outpost of Manifest Destiny to demarcate and guard expanded U.S. borders against erosion by meandering rivers; re-engineered in the mid-twentieth century in order to impound and develop the boundary waters; its friends and critics alike say the International Boundary and Water Commission, U.S. – Mexico (IBWC) has become an anachronism, left behind by twenty-first century social, environmental and political issues that it is unwilling or unable to address. Four decades of scholarly criticism consistently portray the U.S. Section of the IBWC as secretive, beholden to regional agricultural interests, indifferent to disappearing water sources, apathetic about associated ecological crises, abusive to its employees, lacking essential diplomatic and professional skills, unresponsive to the needs of a growing border population, and hamstrung by a too-timid reading of treaty language. This article offers alarming new evidence concerning these and even more troubling allegations of gross mismanagement and impending ecological disaster. Yet rather than embrace a crescendo of calls for abolition of the US-IBWC, the author argues that long-neglected constitutional, statutory and treaty authorities provide the key to its salvation. Castigating the U.S. State Department for its pusillanimous refusal to live up to its statutory responsibility for oversight of the U.S. Section, the author urges exercise of dormant Presidential powers to strip the agency of all but diplomatic duties and to assign responsibility for border river management to more competent agencies. Simultaneously, the author delineates treaty, statutory and constitutional authority for adaptive treaty interpretation, to enable the IBWC to address issues such as transboundary aquifer management and cataclysmic climate change.

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### **Local Ownership of Post-Conflict Reconstruction in International Law: The Initiation of International Involvement**

**Matt Saul**

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*Journal of Conflict and Security Law, Vol. 16, No. 1, 2011*

This article seeks to help develop a clearer understanding of the impact of international law on local ownership of post-conflict reconstruction. The particular focus of the article is on popular influence over the decision to initiate international involvement that will at least enable, if not direct, the change and development of state and civil infrastructure. The international legal framework and practice under it are analysed from the perspective of two concurrent, but not entirely co-extensive, rationales for local ownership: a stable situation and self-determination of the people. Attention is given to a number of examples from the last twenty years, specifically, Cambodia, Haiti, Bosnia and Herzegovina, Sierra Leone, Solomon Islands, Kosovo, East Timor, Afghanistan, Liberia, Iraq, and Somalia. A central argument is that the underdeveloped nature of the international legal framework for local ownership is important for the stability of post-conflict situations. In particular, the law of self-determination is argued to be useful because it affords international actors a high level of discretion to determine when a request for their involvement is a sufficient reflection of the will of the people. However, it is also contended that the sustainability of this legal framework rests on international actors exercising their discretion responsibly. This entails refusing to initiate involvement on the basis of a request from a government with little claim to be an embodiment of the will of the people, unless there is strong contextual justification for such a course of action.

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**NGO 'Lawfare': Exploitation of Courts in the Arab-Israeli Conflict**

[Anne Herzberg](#)

NGO Monitor

*NGO Monitor, 2nd Edition, December 2010*

The use of courts to prosecute violations of human rights has grown exponentially since the 1990s. This growth has coincided with the vast accumulation of power by non-governmental organizations (NGOs) and the expansion of the concept of "universal jurisdiction." . . . These legal actions, ostensibly to provide "justice" to "victims," are a form of "lawfare" – a "strategy of using or misusing law as a substitute for traditional military means to achieve military objectives" – intended to interfere with anti-terror operations, as well as to block future actions. . . . This monograph presents a number of case studies analyzing the central role that NGOs have played in the strategy of lawfare, using it to further their political campaign against Israel. The study begins with a discussion of NGO involvement in the movement to promote and expand the concept of universal jurisdiction and the creation of the International Criminal Court (ICC). Second, the paper will detail anti-Israel lawfare at the international level, examining the crystallization of the tactic at the NGO Forum of the 2001 Durban Conference, alternative strategies adopted by the NGO network in lieu of criminal prosecutions of Israelis at the ICC, and the International Court of Justice case against Israel's security barrier. Third, the monograph details several NGO-led universal jurisdiction cases against Israeli officials and those doing business with Israel in the national courts of Europe and North America.

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**Seminar Report on Transboundary Aquifers and International Law: The Experience of the Guarani Aquifer System, University of Surrey, Guildford, UK, 31 August 2010**

[Francesco Sindico](#)

University of Surrey

*International Journal of Water Resources Development, Vol. 26, No. 4, pp. 715-718*

On 31 August 2010 the School of Law of the University of Surrey organised a one day international seminar on the emerging international law of transboundary aquifers with particular emphasis on the Guarani Aquifer System. This seminar contributes to the UNESCO ISARM initiative.

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**Do Cultural Diversity and Human Rights Make a Good Match?**

[Yvonne Donders](#)

Amsterdam Center for International Law

*International Social Science Journal, pp. 15-35, 2010*

The link between cultural diversity and human rights was clearly established by the Universal Declaration on Cultural Diversity, adopted by the Member States of UNESCO in 2001, which holds that "the defence of cultural diversity is...inseparable from respect for human dignity..." and "...implies a commitment to human rights and fundamental freedoms..." The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, adopted in 2005, states that "cultural diversity can be protected and promoted only if human rights and fundamental freedoms...are guaranteed" (Article 2(1)). . . . In order to preserve and promote cultural diversity, there is an increasing demand to improve the promotion and protection of cultural rights. Cultural rights are, however, poorly developed in international human rights law. There is no clear consensus on which rights could be considered "cultural rights" and how to best implement them. There is also discussion on whether the promotion and protection of cultural rights could be consistent with the universality of human rights, as well as with the human rights principles of equality and non-discrimination. Furthermore, the tension between cultural practices that are questionable from a human rights perspective and the advancement of cultural rights and cultural diversity has been the

subject of debate. This contribution analyzes these issues surrounding the relationship between cultural diversity and human rights, in particular cultural rights

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### **The Interaction between Law, Economics and Indigenous Cultures: The Ocumicho Devils**

**Lucero Ibarra-Rojas**

*affiliation not provided to SSRN*

*Oñati Socio-Legal Series, Vol. 1, No. 1, 2011*

Seeing cultural rights as the rights that people have to actively involve with and develop their culture and that one important way to do this is by participating of the many art forms in which the cultural identity can be expressed, this research pretends to analyze the role that public policies have in shaping the cultural meaning of indigenous art. . . .

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### **The Patron's Dilemma: The Dynamics of Foreign-Supported Democratization**

**Michael K. Miller**

Princeton University

**Michael McKoy**

*affiliation not provided to SSRN, Princeton University - Department of Politics*

*APSA 2010 Annual Meeting Paper*

We analyze an under-studied mode of democratization in which the acquiescence of an autocratic regime's external ally, or patron, is pivotal to the success of a democratic movement. Although a democratic patron may prefer having democracy in its dependent allies, regime change threatens the economic and security benefits associated with the alliance. We formalize this dilemma through a repeated principal-agent model and demonstrate that the critical dimension is the patron's beliefs about the potential democracy's policies, rather than the patron's value for democracy or the alliance goods. Patron support hinges on democratic movement signaling of its capacity to rule, popular support, and commitment to preserving the alliance. To test our theory, we analyze 25 democratic openings in American Cold War clients, followed by case studies of US-aided democratization episodes in the Philippines and South Korea. We conclude with implications for our findings for democracy promotion in the Middle East.

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### **The Framework Convention on Tobacco Control – Article 14 'Demand Reduction' (Smoking Cessation) – The Weakest Link of FCTC in Asia**

**Chi-pang Wen**

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**Min-kuang Tsai**

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**Erin L. Shigekawa**

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*Asian Journal of WTO & International Health Law and Policy, Vol. 5, No. 2, pp. 381-404, September 2010*

More than two million deaths from smoking-related diseases occur each year in Asia, but tobacco control programs in Asian countries have not been very effective as assessed by their smoking rates. Among them, the emphasis has mainly been on smoking prevention, or preventing new smokers in the population, more than smoking cessation, or helping current smokers quit. Cessation programs have been the weakest link in tobacco control among Asian countries. This stems from historical, cultural, treatment and policy barriers. In reality, Asian smokers are less informed of the highly addictive nature of smoking, resulting in their less motivation to quit on their own. Furthermore, the environment that Asian smokers are in is not very supportive or enabling. Clinically, treating smokers

is different from treating most other diseases, because smokers seek medical care for reasons other than smoking. Another reason for smokers not interested in being treated for smoking is the frustration from past failures. In terms of policy, smoking cessation programs in Asia have been weak, as policy makers are not familiar with the implications of different tobacco control policies. Asian countries lack national cessation strategies aimed at those responsible for funding and implementation of cessation programs, national treatment guidelines based on up-to-date scientific evidence, and slow to hike cigarette taxes, resulting in some of the lowest cigarette prices in the world, when standard of living was adjusted. The low price of cigarettes has made smokers reluctant to quit. At the health care professional level, they are less committed to tobacco control and rarely provide counseling against smoking during office visits.

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### **EU's Participation in the WHO and FCTC: A Good Case for 'EU as a Global Actor?'**

**[Chien-huei Wu](#)**

Academia Sinica - Institute of European and American Studies

*Asian Journal of WTO & International Health Law and Policy, Vol. 5, No. 2, pp. 467-496, September 2010*

This article examines the participation of the EU in the WHO and FCTC, from the negotiating history to the implementation measures, with the aim to exploring the effectiveness of the EU to act as a global health actor and to locating its role in the multilevel health governance. This article argues that policy coherence, in particular between trade policies and health policies, is essential for the Union to reinforce its role as a global actor. The EU also has to ensure the consistency of its position with those of member states. I argue that the congruence of the EU and Germany during the FCTC negotiating processes and legal challenges by the Germany in the ECJ expose the weaknesses of the EU's ambition to act as a global actor in health policy.

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### **The Bottom Up Journey of 'Defamation of Religion' from Muslim States to the United Nations: A Case Study of the Migration of Anti-Constitutional Ideas**

**[Robert C. Blitt](#)**

University of Tennessee College of Law

This article is intended to elaborate on the existing academic literature addressing the migration of constitutional ideas. Through an examination of ongoing efforts to enshrine "defamation of religion" as a violation of international human rights, the author confirms that the phenomenon of constitutional migration is not restricted to positive norms, but rather encompasses negative ideas that may ultimately serve to undermine international and domestic constitutionalism. The case study also demonstrates that the movement of anti-constitutional ideas is not restricted to the domain of "international security" law, and further, that the vertical axis linking international and domestic law is in fact a two-way channel that permits the transmission of domestic anti-constitutional ideas up to the international level.

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### **Some Thoughts on Libel Tourism**

**[Andrew R. Klein](#)**

Indiana University School of Law

*Pepperdine Law Review, Vol. 38, p. 101, 2010*

This paper addresses the topic of "libel tourism," a phrase used to describe cases where plaintiffs sue for defamation in a foreign jurisdiction and then seek to enforce judgments in the U.S., where the outcome might have been different because of protections for speech embodied in the United States Constitution. A number of commentators have discussed libel tourism at length, and this paper does not provide a treatise on the topic. Rather, it reviews recent reactions from legislators, courts, and

commentators, and then offer some thoughts about whether these reactions appropriately balance concerns of comity and free speech. Ultimately, the essay concludes that U.S. attempts to address the issue of libel tourism have been quite broad, and suggests a more cautious approach that would better contribute to maintaining America's role as a leader in the evolving world of tort law.

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**Human Genetic Manipulation and the Right to Identity: The Contradictions of Human Rights Law in Regulating the Human Genome**

**[Norberto Nuno Gomes de Andrade](#)**

European University Institute - Law Department

*[SCRIPT-ed, Vol. 7, No. 3, December 2010](#)*

This paper analyses an overlooked tension between the right to personal identity and the collective right to human identity in the context of human rights law as it applies to prospective human genetic modification. While the right to personal identity may justify a valid interest in the modification of one's individual genome, the collective right to identity defends a global interest in the preservation of the human genome. . . .

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**The Dog that Barked but Didn't Bite: 15 Years of Intellectual Property Disputes at the WTO**

**[Joost Pauwelyn](#)**

Graduate Institute of International and Development Studies (HEI)

Hope as well as fear was running wild when in 1995 the multilateral trading system incorporated the protection of intellectual property (IP) rights. As one author put it, "the [IP] component of the WTO [World Trade Organization] Agreement represented a revolution in international intellectual property law." This article provides a reality check 15 years after the fact with a particular focus on how the WTO performed in terms of settling IP disputes under the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). It compares conventional expectations associated with the creation of TRIPS and WTO dispute settlement to (i) the number and types of TRIPS disputes actually filed and decided, (ii) institutional and substantive decisions and interpretations reached by WTO panels and the Appellate Body in their application of the TRIPS agreement and, finally, (iii) the status of implementation of adverse WTO rulings under TRIPS. The article offers a number of hypotheses that may explain these descriptive results centered on (i) the rather unique features of WTO dispute settlement, (ii) the TRIPS Agreement itself as compared to other trade agreements and (iii) an escalating cycle of IP-skepticism, due in no small part to the hard-line position taken by many IP industries themselves, and culminating in the 2001 Doha Declaration on TRIPS and Public Health which confirmed and slightly expanded TRIPS flexibilities in the context of the access to essential medicines debate. . . .

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**Globalization and Indigenization: Legal Transplant of a Universal Trips Regime in a Multicultural World**

**[Wei Shi](#)**

Bangor University Law School

*[American Business Law Journal, Vol. 47, No. 3, 2010](#)*

This article considers the harmonizing effect of TRIPS and the global enforcement of IPR through a discussion of legal transplantation and cultural adaptation. Part I examines the harmonizing effect of TRIPS and its implications to the countries at different development levels, particularly countries in the process of industrialization. It argues that the peripheral role of the developing countries from participation to assimilation in the process of globalization has exemplified the significant harmonizing effect of the TRIPS Agreement. Apart from focusing on the global intellectual property regime, Part II



seeks to demystify the cultural facets of East Asian countries in the process of legal harmonization, taking specific account of Confucianism as a dominant philosophy that underpins attitudes toward legal reform. Having examined the harmonizing effect of the TRIPS Agreement and the distinctive cultural traits of the Confucianized region, Parts III–V provide case studies of three countries Japan, Korea, and China that have emerged in East Asia and have transplanted international IPR norms into their national legal systems during their modernization process. The author argues that the involvement of the pre-industrial countries in the global economy illustrates their strategic reorientation and concludes that legal assimilation is an inevitable cost of the participation in the global trading system.

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### **Financial Crisis, International Relations and International Economic Laws**

**Krishna Shorewala**

*affiliation not provided to SSRN*

The 2008 Financial Crisis has affected nearly every aspect of every economy in the world in some way or another. In a short span of time, its causes and consequences have been analyzed in great detail. However, while plenty has been written about its impact on domestic systems, its impact on international economic law is yet to receive the same kind of attention. This paper discusses the impact of the Crisis on the larger framework of international relations. It then examines the effect these changes have on key ongoing debates in international economic law particularly the much delayed Doha Development Agenda and the regulation of Sovereign Wealth Funds.

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### **Multinationals and Partnerships in Central African Conflict Countries**

**Ans Kolk**

University of Amsterdam - Amsterdam Business School (ABS)

**Francois Lenfant**

Cordaid

*Harvard Africa Policy Journal, Forthcoming*

Attention has increased for the potential role of Multinational Enterprises (MNEs) in helping address conflict issues and/or furthering peace and reconciliation as part of their corporate social responsibility policies. However, despite the alleged importance of and pressure put on MNEs, we lack specific insight, specifically in those countries in Central Africa with a fragile state and weak governance structures. This article examines MNEs and conflict issues, including interactions with non-governmental organizations, and sheds light on possible MNE contributions by highlighting some innovative partnerships of MNEs and non-business partners in Central Africa. It also discusses implications of such activities for the role of the state in fragile contexts.

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### **EU Accession to the ECHR: Implications for the Judicial Review in Strasbourg**

**Tobias Lock**

University College London

*European Law Review, Vol. 35, p. 777, December 2010*

The accession of the European Union to the ECHR raises fundamental questions surrounding the protection of individual rights in the Strasbourg court and the autonomy of EU law. It is argued that any solution should ensure an effective protection for the individual applicant. Thus the appropriate respondent in Strasbourg should be the party which has acted in the concrete case as it can be easily identified. The European Union's autonomy can be preserved by allowing it to join as a co-respondent. Since the individual has no influence over whether a national court makes a reference under art.267 TFEU, the lack of such a reference should not lead to the inadmissibility of the complaint.

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**The ICJ Advisory Opinion on Kosovo: Different Perspectives of a Delicate Question****Peter Hilpold**

University of Innsbruck

When the ICJ on 22 July 2010 finally handed down the much-awaited opinion on Kosovo's declaration of independence the reaction was mostly disappointment. In fact, the question referred by the UN General Assembly to the ICJ in 2008 had the ingredients to pave the way for a stock-taking on some of the most controversial questions of modern international law, first of all on the meaning of self-determination in the 21st century. Some hoped that the ICJ would decline jurisdiction for this case, others hoped to receive all-encompassing guidance on the many thorny subjects the question touched upon. The ICJ sought for a compromise: It declared that it had jurisdiction but it shied away from addressing the substance of the question posed. It appears to be doubtful whether the ICJ, acting this way, really has come up to its "duty to cooperate" within the UN system. In fact, the line of arguments presented by the ICJ is too shaky and as a consequence status and function of the ICJ end up damaged from this proceeding. On the other hand, the ICJ deserves praise for having handled a thoroughly political issue with great sense of responsibility. It is argued here, that notwithstanding all the ambiguities surrounding the distinction between the legal and the political, this distinction still matters - judges should not be asked to do the undone jobs of politicians.

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**To Transfer or Not to Transfer: Identifying and Protecting Relevant Human Rights Interests in Non-Refoulement****Vijay M. Padmanabhan**

Yeshiva University - Benjamin N. Cardozo School of Law

*Cardozo Legal Studies Research Paper No. 319*

Human rights law imposes upon States an absolute duty not to transfer an individual to another State where there are substantial grounds for believing he or she will be tortured or subjected to cruel, inhuman or degrading treatment. . . . In recent years the obligation to provide non-refoulement protection has run into conflict with the State's obligation to protect its public from aliens suspected of involvement in terrorism. . . . This Article argues that human rights law should recognize the important clash of human rights duties that arises in these transfer situations: the State's duty protect aliens from post-transfer mistreatment clashes with its duty to protect members of the public from rights violations committed by dangerous private persons within society. Human rights law has in recent years recognized a duty on the part of States to take reasonable operational measures to protect the public from private person harms where the State knows or should know of the risk. In the case of dangerous aliens, these operational measures would presumably include expulsion. By depriving the State of the ability to expel dangerous aliens, non-refoulement protection places the human rights of dangerous aliens and the public into direct conflict. . . .

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**Learning Our Lessons? The Rwanda Tribunal Record on Prosecuting Rape****Doris Buss**

Law Department, Carleton University

*RETHINKING RAPE LAW: INTERNATIONAL AND COMPARATIVE PERSPECTIVES, pp. 61-75, Clare McGlynn, Vanessa E. Munro, eds., Abingdon, Glasshouse/Routledge, 2010*

This chapter considers the mixed record of the International Criminal Tribunal for Rwanda in prosecuting sexual violence crimes. The first section of the paper outlines the Tribunal's record on sexual violence. In the next section, I examine some of the institutional failings identified by Tribunal watchers, drawing on individual cases as illustrations. I then consider in the final section how the

Tribunal record on rape prosecutions can be read differently. My aim is to consider the different factors that ought to shape how the Tribunal's legacy is understood.

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### **Autonomy in Setting Appropriate Level of Protection Under the WTO Law: Rhetoric or Reality?**

**Michael Ming Du**

Chinese University of Hong Kong - Faculty of Law

*Journal of International Economic Law, Vol. 13, No. 4, pp. 1077-1102, 2010*

In the World Trade Organization (WTO) jurisprudence, the Appellate Body (AB) has repeatedly affirmed that WTO Members have the prerogative right in setting any level of protection that they deem appropriate (ALOP). At the same time, WTO Agreements provide for disciplines that a WTO Member must respect when it selects regulatory measures to fulfill its ALOP. Thus, a WTO Member's autonomy in setting its ALOP, on the one hand, and the full force of other disciplines, on the other hand, are in a constant state of tension. Then, exactly how does a panel balance a Member's right of setting its ALOP with a myriad of other trade obligations? To what extent is this right respected in the WTO dispute settlement processes? This article argues that the case law has confirmed that a Member's obligations under the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) must be read in light of the Member's chosen ALOP, and that the AB has also demonstrated sensitivity and deference to a Member's ALOP under the SPS Agreement. The same conclusion, however, cannot be easily applied to Article XX of the General Agreement on Tariffs and Trade 1994 (GATT 1994). Indeed, the case law under Article XX has demonstrated inconsistencies as to when WTO Members' right to set their ALOP will be respected. I argue that such inconsistencies may be explained by a value-based, pragmatic approach adopted by the AB.

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### **Four Challenges to the Geneva Conventions and Other Existing Law Posed by Detention Operations in Contemporary Conflicts**

**Vijay M. Padmanabhan**

Yeshiva University - Benjamin N. Cardozo School of Law

**John Bellinger III**

Arnold & Porter

*Cardozo Legal Studies Research Paper No. 318*

Since the 9/11 attacks, States have been scrambling to find legal answers to difficult questions surrounding the detention of members of non-State groups. Four questions in particular have proven vexing to States: (1) who is subject to detention; (2) what process must the State provide to those detained; (3) when does the right of the State to detain terminate; and (4) what legal obligations do States have in connection with repatriating detainees at the end of the conflict? . . . This Article crystallizes the existing state of law to create the foundation for development of new law to fill existing gaps. The Article's second objective is to identify areas of convergence on these four questions that may form the basis for future legal development. . . .

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### **TRIPS Enforcement and Developing Countries**

**Peter K. Yu**

Drake University Law School

*American University International Law Review, Vol. 26, 2011*

In January 2009, the WTO Dispute Settlement Body released a panel report on China - Measures Affecting the Protection and Enforcement of Intellectual Property Rights. The dispute concerned the inadequacy of protection and enforcement of intellectual property rights in China under the TRIPS

Agreement. While both China and the United States were quick to declare victory in this dispute, less developed countries might have become the dispute's unintended and unannounced winner. As part of the symposium on the Anti-counterfeiting Trade Agreement (ACTA) and international intellectual property enforcement, this Article focuses on the implications of this panel report for less developed countries. It begins by recapitulating the key arguments made by China and the United States as well as the major findings in the report. The article then evaluates the panel report from the standpoint of less developed countries. It explores both the areas where the report has enabled less developed countries to score some important points in the interpretation of the TRIPS Agreement and where it has provided some disappointments.

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### **Regulating Systemic Risk: Towards an Analytical Framework**

**[Iman Anabtawi](#)**

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**[Steven L. Schwarcz](#)**

Duke University - School of Law

*[Notre Dame Law Review, Vol. 86, No. 4, 2011](#)*

The global financial crisis demonstrated the inability and unwillingness of financial market participants to safeguard the stability of the financial system. It also highlighted the enormous direct and indirect costs of addressing systemic crises after they have occurred, as opposed to attempting to prevent them from arising. Governments and international organizations are responding with measures intended to make the financial system more resilient to economic shocks, many of which will be implemented by regulatory bodies over time. These measures suffer, however, from the lack of a theoretical account of how systemic risk propagates within the financial system and why regulatory intervention is needed to disrupt it. In this Article, we address this deficiency by examining how systemic risk is transmitted. We then proceed to explain why, in the absence of regulation, market participants cannot be relied upon to disrupt or otherwise limit the transmission of systemic risk. Finally, we advance an analytical framework to inform systemic risk regulation.

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### **Emergency and Escape: Explaining Derogation from Human Rights Treaties**

**[Laurence R. Helfer](#)**

Duke University - School of Law

**[Emilie Marie Hafner-Burton](#)**

University of California, San Diego (UCSD) - Graduate School of International Relations and Pacific Studies (IRPS); Woodrow Wilson School

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University of California, San Diego (UCSD)

*International Organization, Vol. 65*

Several prominent human rights treaties attempt to minimize violations during emergencies by authorizing states to "derogate" - that is, to suspend certain civil and political liberties - in response to crises. The drafters of these treaties envisioned that international restrictions on derogations and international notification and monitoring mechanisms would limit rights suspensions during emergencies. This article analyzes the behavior of derogating countries using new global datasets of derogations and states of emergency from 1976 to 2007. We argue that derogations are a rational response to domestic political uncertainty. They enable governments facing serious threats to buy time and legal breathing space from voters, courts, and interest groups to confront crises while signaling to these audiences that rights deviations are temporary and lawful. Our findings have implications for the studies of treaty design and flexibility mechanisms and compliance with international human rights agreements.

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## **Indefinite Detention Under the Laws of War**

**[Chris Jenks](#)**

Government of the United States of America - Judge Advocate General's Corps

**[Eric Talbot Jensen](#)**

Fordham University - School of Law

*[Stanford Law & Policy Review, Forthcoming](#)*

*[Fordham Law Legal Studies Research Paper No. 1729221](#)*

The recent acquittal of the first Guantanamo Bay detainee to stand trial in U.S. federal court on all but one of the 286 charges he faced stemming from the 1998 bombings of two U.S. embassies in Africa has reinvigorated the discussion on indefinite detention under the laws of war. While the issue has been raised in the past, the discussion hasn't extended beyond stating that the law of war, or law of armed conflict (LOAC) as it is often called, provides a legal basis for detention, including detention for the duration of hostilities. In fact, the Obama Administration has made it clear that some detainees will be held indefinitely "under the laws of war" but has provided no clear guidance as to what that detention would look like. This article seeks to extend the dialogue to substantive consideration of whether the LOAC rules on detention are sufficiently flexible and comprehensive to provide worthwhile and meaningful individual protections the United States could apply to those who are detained indefinitely.

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## **Promises to Keep: Diplomatic Assurances Against Torture in US Terrorism Transfers**

**[Naureen Shah](#)**

Human Rights Institute, Columbia Law School

"Diplomatic assurances" are promises not to torture. The US and other traditionally rights-respecting governments have sought these assurances when sending detainees, usually terrorism suspects, to foreign authorities known for torture. This report, the culmination of several years of research by the Human Rights Institute, presents the evolving evidence and jurisprudence of assurances. Without taking a position on whether assurances can work, it describes elements that are necessary to make assurances plausible: judicial review, public scrutiny, and systematic monitoring.

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## **The Ruggie Framework: An Adequate Rubric for Corporate Human Rights Obligations?**

**[David Bilchitz](#)**

South African Institute for Advanced Constitutional, Public, Human Rights and International Law;  
University of Pretoria; University of the Witwatersrand

Sur - International Journal on Human Rights, Vol. 7, No. 12, p. 198, June 2010

John Ruggie, Special Representative to the Secretary-General of the United Nations on Business and Human Rights, has released a framework in which he contends that the key responsibility of corporations is to respect human rights. This paper first seeks to analyse this contention in light of international human rights law: it shall be argued that whilst Ruggie's conception of the responsibility to respect effectively includes a responsibility to protect as well, the nature of the responsibility remains largely 'negative' in nature. The second part of this paper argues that Ruggie's conception of the nature of corporate obligations is mistaken: corporations should not only be required to avoid harm to fundamental rights; they must also be required to contribute actively to the realisation of such rights. A normative argument will be provided for this contention. This understanding of the nature of corporate obligations is of particular importance to developing countries and will be illustrated by considering the duties of pharmaceutical companies to make life-saving drugs available at affordable prices to those who need them.

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**Defining and Defending the Human Right to Water and its Minimum Core: Legal Construction and the Role of National Jurisprudence****[George S. McGraw](#)**

United Nations Mandated University for Peace

This article attempts to contribute to the ongoing academic dialogue surrounding water and its centrality to human life. Its purpose is to provide insight into what may be the most notable water management innovation in human history: the universal human right to water. Specifically, this essay seeks to outline the source and content of the right to water and that right's "minimum core" – both concepts that have reached the level of positive international law. It will then summarize the recent work of numerous national courts "giving content" to the human right to water, addressing the ways in which the international legal norm is strengthened or challenged by this jurisprudence. Without an international body capable of enforcement, the human right to water depends on this activity of national courts to make its philosophical "universality" a matter of legal fact.

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**Freedom of Speech, Support for Terrorism, and the Challenge of Global Constitutional Law****[Daphne Barak-Erez](#)**

Tel Aviv University - Buchmann Faculty of Law

**[David Scharia](#)**Counter Terrorism Committee Executive Directorate UN Security Council  
Harvard National Security Journal, Vol. 2, 2011

In the recent case of *Holder v. Humanitarian Law Project*, the Supreme court of the United States ruled that a criminal prohibition on advocacy carried out in coordination with, or at the direction of, a foreign terrorist organization is constitutionally permissible: it is not tantamount to an unconstitutional infringement of freedom of speech. This Article aims to understand both the decision itself and its implications in the context of the global effort to define the limits of speech that aims to support or promote terrorism. More specifically, the Article compares the European approach, which focuses on whether the content of the speech tends to support terrorism, with the U.S. approach, which focuses on criminalizing speakers who have links to terrorist organizations. Both approaches are evaluated against the background of the adoption of Resolution 1624 by the United Nations Security Council in 2005, which called on states to prohibit by law incitement to commit terrorist acts. The Article then follows the implementation of the resolution by comparing the traditional American resistance to direct prohibitions of incitement that fail to meet the standard set by the *Brandenburg v. Ohio* precedent and European legislation that is open to such limitations subject to balancing tests. It then evaluates the potential advantages and threats each option pose to freedom of speech by examining them from the perspective of the controversy of candor within legal decision-making. Based on this analysis, the Article also articulates the challenge of balancing international norms regarding the limits of freedom of speech with different and even conflicting domestic traditions regarding the scope of protection of freedom of speech.

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**Net Neutrality as Diplomacy****[Jonathan Zittrain](#)**Harvard Law School and Kennedy School; Harvard School of Engineering and Applied Sciences;  
Berkman Center for Internet & Society  
*[Yale Law & Policy Review, Vol. 29, 2010](#)*

Popular imagination holds that the turf of a state's foreign embassy is a little patch of its homeland. Enter the American Embassy in Beijing and you are in the United States. Indeed, in many contexts – such as resistance to search and seizure by a host country's authorities – there is an inviolability to diplomatic outposts. These arrangements have been central to diplomacy for decades so that

diplomats can perform their work without fear of harassment and coercion. Complementing a state's oasis on foreign territory is the ability to get there and back unharried. Diplomats are routinely granted immunity from detention as they travel, and la valise diplomatique – the diplomatic pouch – is a packet that cannot be seized, or in most cases even inspected, as it moves about. Each pouch is a link between a country and its outposts dispersed in alien territory around the world. Citizens and their digital packets deserve much the same treatment as they traverse the global Internet. Just as states expect to conduct their official business on foreign soil without interference, so citizens should be able to lead digitally mediated – and increasingly distributed – lives without fear that their links to their online selves can be arbitrarily abridged or surveilled by their Internet Service Providers or any other party. Just as the sanctity of the embassy and la valise diplomatique is vital to the practice of international diplomacy, the ability of our personal bits to travel about the net unhindered is central to the lives we increasingly live online. This frame differs from the usual criteria for debating the merits of net neutrality. It does not focus on what makes for more efficient provision of broad-band services to end users. It is unaffected by what sorts of bundling of services by a local ISP might intrigue the ISP's subscribers. It does not examine the costs and benefits of faraway content providers being asked to bargain for access to that local ISP's customers. Instead, it recognizes that Internet users establish outposts far and wide, and that a new status quo of distributed selfhood is quickly taking hold.

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### **Asia's Participation in Global Health Diplomacy and Global Health Governance**

**[David P. Fidler](#)**

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*Asian Journal of WTO & International Health Law and Policy, Vol. 5, No. 2, pp. 269-300, September 2010*

This article provides a framework for thinking about Asian approaches to and impact on global health diplomacy and governance that might contribute to more sophisticated analyses on Asia in global health politics, diplomacy, and governance. First, the article examines the "rise of Asia" and "rise of health" as overlapping but unconnected developments in international relations. Second, it analyzes how the shift of power and influence towards Asia, largely caused by China's and India's emergence as great powers, affects global health politics and potential Asian contributions to global health diplomacy and governance in the future. Third, the article looks at normative ideas that characterize Asian approaches to international cooperation and how these ideas affect Asian participation in global health diplomacy and governance. Fourth, the article considers Asian practices on international health cooperation, which include bilateral relations, regional activities, and participation in multilateral organizations. The article ends with conclusions about Asian conceptualizations of and contributions to global health diplomacy and governance.

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### **Federalism, Subsidiarity, and the Role of Local Governments in an Age of Global Multilevel Governance**

**[Dr. Yishai Blank](#)**

Tel Aviv University - Buchmann Faculty of Law

*[Fordham Urban Law Journal, Vol. 37, No. 509, 2010](#)*

One of the hallmarks of our age is a realization - a product of objective discoveries and of ideological transformations - that a growing number of contemporary problems and challenges require decision-making and implementation at different territorial spheres and by different governmental (and political) levels. Immigration, climate change, labor standards, and the economic crisis are high-profile examples of the fact that it is no longer possible - nor is it desirable - to think, decide, and implement rules and policies only at the federal level or at the state level or at the local level; rather, it has become necessary to govern them at many levels of government - sub-national, national, and supra-national - simultaneously. Yet, our legal systems and political institutions have not yet adapted

themselves to this realization and they do not reflect it fully or sufficiently. Furthermore, as I argue in this Article, the two most dominant political theories that are supposed to offer a solution to this growing need of, and belief in, multilevel governance - federalism and subsidiarity - are inadequate and incapable of doing so. And while both theories are invaluable sources for inspiration for the creation of a legal (and political) system that will better fit our changing realization regarding the multi-spherical (global, national, regional, and local) nature of human conflicts and contemporary challenges, I claim two things regarding them: first, that they should be understood as distinct from each other (despite the fact that they are often confused and not theorized as distinct political theories); and second, that subsidiarity is better fit for the task of articulating multilevel governance, even if only as a tool for loosening the grip of federalism over our political and legal theory.

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### **Human Rights and Remedial Equilibration: Equilibrating Socio-Economic Rights**

**Margaux J. Hall**

Wilmer Cutler Pickering Hale and Dorr LLP

**David C. Weiss**

Skadden, Arps, Slate, Meagher & Flom LLP

[Brooklyn Journal of International Law, Vol. 36, 2011](#)

Human rights law guarantees fundamental rights, except when it doesn't. The conventional understanding of human rights – and particularly descriptions of socio-economic rights – characterizes rights as universally agreed-upon norms, representing value choices, the frameworks for which states agree to and which courts or international tribunals define. Efforts to create remedies for human rights violations, in this account, stumble over practical realities such as political and budgetary constraints. This conventional description of human rights thus treats the challenge of designing remedies as a problem separable from that of discerning the content of rights. This account echoes "rights essentialism," in which judges intuit a pure right that is often corrupted when the government translates the right into a remedy. Rights essentialism similarly dominated U.S. constitutional discourse for decades, though it has recently been discredited (or at least challenged). Yet a rights essentialist view of human rights persists in current human rights discourse.

Instead of the rights essentialist, conventional understanding of human rights and attendant remedies, a more nuanced understanding of human rights jurisprudence reveals a symbiotic relationship wherein considerations of remedies affect rights determinations and vice versa. Drawing on theories of "remedial deterrence" and "remedial equilibration," there are several important implications of such an approach. These include understanding that remedial concerns permeate efforts to define the content of human rights, and especially socio-economic rights; considering the institutional division of labor between branches of government if courts alone do not define rights; and recognizing the importance of judicial transparency and candor in describing the challenges courts confront in seeking to create more resonance between rights and remedies. Ultimately, instead of embracing the conventional view of human rights that parses rights from remedies, human rights practitioners and theorists, as well as policymakers, should more thoughtfully consider the rights-remedies relationship as one in which rights and remedies are inevitably interdependent and mutually defining.

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### **Law's Adaptive Capacity and Climate Change's Impacts on Water**

**Craig Anthony (Tony) Arnold**

University of Louisville - Brandeis School of Law

[Environmental and Energy Law and Policy Journal, Vol. 5, 2010](#)

This is an introductory essay to a symposium on Climate Change, Water, and Adaptive Law, held at the University of Houston Law Center in February 2010 and published in the Environmental and Energy Law and Policy Journal. It contends that changing climate conditions are creating pressures



on water law, policy, and management institutions to adapt and questions whether these institutions have the capacity to adapt to climate change. It describes four major effects of climate change as they relate to water resources: 1) precipitation effects; 2) environmental and landscape structural effects; 3) behavioral response effects; and 4) institutional response effects. The essay then describes two articles addressing the dynamics of cross-jurisdictional scale: one by Robin Kundis Craig and one by Noah Hall; two articles addressing cross-sector interrelationships among water and energy: one by Dan Tarlock and one by Lea Rachel Kosnik; and three articles analyzing the adequacy and adaptability of existing trends in decentralized water planning and management: one by Kathleen Miller, one by Tony Arnold, and one by Elizabeth Burleson. The essay then comments on the themes of fragmentation and integration in the context of the systemic evolution and emergence of water law institutions.

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**Toward Transformative Accountability: A Proposal for Rights-Based Approaches to Maternal Health in the MDGs and Beyond**

**[Alicia Ely Yamin](#)**

*affiliation not provided to SSRN*

*Sur - International Journal on Human Rights, Vol. 7, No. 12, p. 95, June 2010*

Meaningful and equitable progress on reducing maternal mortality and meeting Millennium Development Goal 5 calls for the adoption of a human rights-based approach which emphasizes 'accountability.' This article focuses specifically on how to promote accountability for fulfilling the right to maternal health if we seek to transform the discourse of rights into practical health policy and programming tools that can affect development practice - and in turn to transform health systems to better meet women's maternal health needs. After briefly discussing the concept and purpose of accountability in the context of fulfilling women's rights to maternal health, the article then sets out a circle of accountability at the national level that includes: development and implementation of a national plan of action; budgetary analysis; monitoring and evaluation of programs based on appropriate indicators; and mechanisms for redress, as well as facility-level initiatives. In the final section the article addresses donor accountability.

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**Applicable Law to the International Technology Transfer Agreements (Legislación Aplicable a los Contratos Internacionales de Transferencia de Tecnología) (Spanish)**

**[Manuel Guerrero Gaitan](#)**

*affiliation not provided to SSRN*

*Revista la Propiedad Inmaterial, No. 14, pp. 141-193, 2010*

The international character of a technology transfer agreements imply that they are connected to more than one State, either because the parties involved in such contracts are domiciled in different countries or because the intellectual property rights are to be exploited abroad. In this regard and bearing in mind their connection to different States, it is crucial to determine which law is applicable to the contract. This article deals with the approaches made by selected countries with respect to the choice of law rules in disputes arising out of intellectual property rights issues and disputes of contractual nature of this sort of contracts.

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**[The Post-Medellin Case for Legislative Standing](#)**

Comment. *American University Law Review* 59, no. 3 (February 2010): 732-779

Since its earliest days, the Court has recognized a distinction between treaty terms that are automatically binding ("self-executing") and those that require additional legislative attention ("non-self-executing"). However, early rulings were inconsistent and created confusion in applying this distinction. In Medellín, the Court attempted to clarify this area of the law by endorsing a strict text-

based approach to treaty interpretation. Relying on that approach, the majority asserted the novel concept that a treaty term is not domestically enforceable without further action unless the language in the treaty clearly indicates that the parties intended the term to be self-executing. This Comment argues that this approach to treaty interpretation creates a presumption of non-self-execution and effectively grants the executive the final say in deciding whether to enforce treaty obligations within the United States, thereby increasing executive power. This Comment further argues that this increase in executive power could undermine the constitutional role of legislators in the treaty-making process. Additionally, this Comment uses a hypothetical scenario to explore how the imbalance of power created by Medellín may lead to a situation where senators have standing to sue in their institutional capacity.

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### **How to Integrate Universal Human Rights into Customary and Religious Legal Systems?**

[Yuksel Sezgin](#)

Harvard Divinity School

*Journal of Legal Pluralism, Vol. 60, 2010*

Customary religious legal systems have been utilized in various areas from fighting against crime to such mundane affairs as setting the price of goods and services in the market place or regulating personal and familial relations. Against this background, the present study will exclusively focus its lenses on so-called personal status systems as quintessential example of customary religious legal systems in the contemporary world. In this context the article will first address the question of why modern nation-states (e.g., Israel, Egypt, and India) still continue to employ pluralistic personal status systems and differentiate among their citizens despite the fact that they were originally founded on premises of non-discrimination and equal treatment. Secondly, the study will explain how pluralistic organization of law and justice affect the fundamental rights and freedoms of individuals living under such systems; how they cope with limitations imposed upon their rights by communal/religious institutions; and what tactics and strategies they use to navigate through the maze of personal law. Lastly, after demonstrating what approaches have been successfully used to bring about changes in the context of Israeli, Egyptian, and Indian personal status laws, the paper will identify key lessons and recommendations for the purpose of helping human rights activists, donors and members of programmatic communities who design intervention mechanisms and tools to incorporate universal human rights standards into customary and religious systems around the world.

## **II. Books**

### **[The Responsibility to Protect: Implementation of Article 4\(h\) Intervention](#)**

(Brill, 2011)

Dan Kuwali

- I. Approach and Theoretical Framework of the Study
- II. Preliminary Considerations
- III. Methodology and Materials
- IV. Disposition
  - Part One: The Question of Treaty-Based Intervention
    - 1 The End of Humanitarian Intervention: Article 4(h) Intervention;
    - 2 Authorised Authorisation? The Question of Enforcement by Consent;
  - Part Two: Deciding to Intervene
    - 3 Mass Atrocity Crimes: Conundrum of Conditions for Intervention;
    - 4 Agenda for Prevention: Architecture for Article 4(h) Intervention;
  - Part Three: Modalities of Intervention
    - 5 Negotiating Intervention: Expanding the Frontiers of Article 4(h);

6 Just Peace: Settling the Peace or Justice Debate through Article 4(h);  
 Part Four: Implementation of Article 4(h)  
 7 Actualising Article 4(h) – A Framework for Intervention by the AU;  
 8 "Persuasive Prevention": Methodology for Implementing Article 4(h);  
 9 Conclusion: The Case for "Persuasive Prevention";

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**International Law and Ethics After the Critical Challenge:  
 Framing the Legal Within the Post-Foundational**

(Brill, Jan. 2011)  
 Euan MacDonald

Part I Setting the Scene: Chapter I The Scope and Aims of the Book:  
 Introduction; Some Preliminary Clarifications; Post-Foundationalism; Ethics; Justification and Responsibility; Aims and Limits;  
 Chapter II International Law and the Critical Challenge:  
 The Primacy of the Periphery; The Foundational Contradictions of International Legal Thought; Liberalism and the Modern Problematic; The Critical Challenge to International Law;  
 Chapter III Reactions to the Critical Challenge:  
 Some Preliminary Exclusions; Modern Reactions; Instrumental Pragmatism; Positivism; Hermeneutics; Confessions, Dichotomies, and Trends at the Periphery; Beyond the Critical Challenge;  
 Part II The Foundations of a Post-Foundational Ethics: Chapter IV A Common Problematic:  
 The Common Problematic; Nietzsche and the "Sceptical Attitude"; Ethics in Sartre and Beauvoir; Camus: A Shift in Focus;  
 Chapter V Foucault, Ethics and Enlightenment:  
 Power and Freedom; The Legacy of the Enlightenment; The Ethics of Self-Creation; Towards a New Game?  
 Chapter VI Rorty, Epistemology and Literature:  
 The Possibility of Other Narratives; The Rejection of Epistemology; The Public, The Private and the "Literary Culture"; The Limits of the Public/Private Metaphor;  
 Chapter VII The Foundations of a Post-Foundational Ethics:  
 The Problematic of Ethical Post-Foundationalism;  
 Two Formal Considerations; Inclusion/Exclusion; The Critical Relation; Arguments to Avoid; Epistemology; Fetishism; Disingenuity; Argumentation and Literature;  
 Part III The Turns to Ethics in International Law: Chapter VIII Kratochwil, Rhetoric and Communicative Action:  
 The Turn(s) to Ethics; Post-foundationalism, Ethics and Norms in Kratochwil; Argumentation and Rhetoric; The Normative Dimension of Communicative Action;  
 Chapter IX Korhonen, Situationality and "The Cave":  
 Facing the Post-Foundational; From Silence to the Fortress: *Tekhne* and Phronesis; The Mysticism of "the Cave" ; A "Retreat" to the Fortress?  
 Chapter X Franck, Democracy and Fairness:  
 Franck and Post-foundationalism; The Preconditions of Fairness; Fairness and Democracy; The Disingenuity of Universality;  
 Chapter XI Rawls and the Law of Peoples:  
 Rawls' Trajectory; The New "Original" Position; Human Rights and Distributive Justice; Post-Foundationalism and Justification;  
 Part IV A Shifting Paradigm?: Chapter XII From Contradiction to Aporia:  
 Contradiction and Beyond; Apology/Utopia and Absurdity/Responsibility; From Contradiction to Aporia;  
 Chapter XIII The Recovery of Rhetoric :  
 The Shifting Paradigm; The Expulsion of Rhetoric; The Recovery of Rhetoric; The Limits of the Argumentative Paradigm;  
 Chapter XIV The Expansion of Rhetoric:  
 On Truth in Literature; Beyond Argument; Surface and Enacted Meaning; Ethics and the Literary

Rhetorical Paradigm;

Chapter XV The Rhetoric of *Eunomia*:

Why *Eunomia*?; The Structures of *Eunomia* – An Overview; The Rhetoric of *Eunomia*; Enacted dialectics; Language; Voice; Metaphor; Technique; The Mystification of Society; *Eunomia*, Philosophy, Literature

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### **The Fundamentals of International Human Rights Treaty Law**

(Brill, Feb. 2011)

Bertrand G. Ramcharan

Chapter One: The Nature and Characteristics of International Human Rights Treaty Law

Chapter Two: The Requirement of a National Protection System

Chapter Three: Democracy and the Rule of Law

Chapter Four: Human Rights in Times of Crises or Emergencies

Chapter Five: Preventive Strategies: Obligations to Prevent under International Human Rights Treaties and Jurisprudence

Chapter Six: The Duty to Respect, Protect and Ensure

Chapter Seven: The Duty to Provide Redress

Chapter Eight: The Essence of Supervision in Reporting Systems

Chapter Nine: The Essence of Petitions and Fact-finding Procedures

Chapter Ten: Universality, Equality and Justice

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### **Critical Perspectives on Human Rights and Disability Law**

(Brill, Feb. 2011)

Edited by Marcia H. Rioux, Lee Ann Bassler, and Melinda Jones

Foreword *Ron McCallum* ; Introduction;

Part 1 Human Rights Principles

1 Human Dignity *Lee Ann Bassler*;

2 Values in Disability Policy and Law: Equality *Marcia Rioux & Christopher A. Riddle*;

3 Inclusion, Social Inclusion & Participation *Melinda Jones*;

Part 2 Advancing Dignity

4 Valuing All Lives – Even “Wrongful” Ones *Melinda Jones*;

5 Children at the Edge of Life: Parents, Doctors and Children’s Rights *Michael Freeman*;

6 Involuntary Treatment, Human Dignity and Human Rights *Genevra Richardson*;

7 Sites of Exclusion: Disabled Women's Sexual Reproductive and Parenting Rights *Roxanne Mykitiuk & Ena Chadra*;

8 Price v UK: The Importance of Human Rights Principles in Promoting the Rights of Disabled Prisoners in the United Kingdom *Angela Laycock*;

Part 3 Ensuring Equality

9 Beyond the Legal Smokescreen: Examining Equality Values in Sterilization Jurisprudence. *Marcia Rioux & Lora Patton*;

10 The Role of Reasonable Accommodation in Securing Substantive Equality for Persons with Disabilities: The UN Convention on the Rights of Persons with Disabilities *Rebecca Brown & Janet Lord*;

11 Legal Protection of Persons with Disabilities in Kenya: Human Rights Imperatives *Kithure Kindiki*;

12 Corporate Selective Reporting of Clinical Drug Trial Results as a Violation of the Right to Health *Aaron Dhir*; Part 4 Promoting Inclusion and Participation

13 Political Participation for People with Disabilities *Michael Waterstone*;

14 The Right to Live a Life Free of Violence for People with Disabilities *Rodrigo Jiminez*;

15 Standard Rules on Equality of Opportunities for Persons with Disabilities: Legal View of Provisions on Support Services, Auxiliary Resources and Training/ View from Latin America *Maria Soledad*

*Cisternas Reyes*;  
16 Monitoring Human Rights: A Holistic Approach *Paula Pinto*;  
Conclusion

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**[Trials of Engagement: The Future of US Public Diplomacy](#)**

(Brill, 2011)

Edited by Ali Fisher and Scott Lucas

Part I: US Public Diplomacy Today

Chapter 1. Public Diplomacy on Trial? *Philip M Taylor*

Chapter 2. Rebuilding Public Diplomacy: The Case of Israel, *Eytan Gilboa and Nachman Shai*

Chapter 3. Advisor Non Grata: The Duelling Roles of U.S. Public Diplomacy, *John Robert Kelley*

Chapter 4. 'Let's Make This Happen!': The Tension of the Unipolar in US Public Diplomacy,' *Scott Lucas*

Chapter 5. The Dots above the Detail: The Myopia of Meta-Narrative in the Declarative 'War of Ideas,' *David Ryan*

Chapter 6. Soft Power, US Public Diplomacy and Global Risk, *Giles Scott-Smith*

Chapter 7. Karen Hughes and the Brezhnev Syndrome: The Trial of Public Diplomacy as Domestic Performance, *Nicholas J. Cull*

Chapter 8. Public Diplomacy in the Middle East: Dynamics of Success and Failure, *Lina Khatib*

Chapter 9. The Longer Term Impact of U.S. Public Diplomacy in the Americas during WWII, *Elizabeth Fox*

Chapter 10. Competing Narratives: US Public Diplomacy and the Problematic Case of Latin America, *Bevan Sewell*

Part II: The Public Diplomacy of Tomorrow

Chapter 11: The Seven Paradoxes of Public Diplomacy, *Daryl Copeland*

Chapter 12: The Public Diplomacy Challenges of Strategic Stakeholder Engagement, *RS Zaharna*

Chapter 13: Skills of the Public Diplomat: Language, Narrative and Allegiance, *Biljana Scott*

Chapter 14: Public Diplomacy: Courting Publics for Short-term Advantage or Partnering Publics for Lasting Peace and Sustainable Prosperity? *Naren Chitty*

Chapter 15. Looking at the Man in the Mirror; Understanding of Power and Influence in Public Diplomacy, *Ali Fisher*

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**[Humanitarian Intervention and Changing Labor Relations:  
The Long-term Consequences of the Abolition of the Slave Trade](#)**

(Brill, 2011)

Edited by Marcel van der Linden

In 1807 the British "Act for the Abolition of the Slave Trade" received the Royal Assent. The Act represented the first significant attempt by a Great Power to exert global influence over the development of human rights, and, relatedly, labor conditions worldwide. The essays presented in this book by an international panel of historians and social scientists aim to shed light specifically on the changes which the legal abolition of the slave trade brought about – directly and indirectly – in the labor relations of different regions and continents. The sixteen essays discuss the connected developments in the Americas (Brazil, the Caribbean and the United States), Africa (Cameroon, the Cape Colony, the Belgian Congo) and the Netherlands Indies (Java).

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**National Minorities in Inter-State Relations**

(Brill, 2011)

Edited by Francesco Palermo and Natalie Sabanadze

Ethno-cultural and State boundaries seldom overlap. Almost all States have minorities of some kind, with many belonging to communities which transcend State frontiers. These communities often serve as a bridge between States, fostering a climate of dialogue and tolerance. However, when transfrontier cultural ties take on political significance and States unilaterally take steps to defend, protect or support what they describe as "their kin" outside their jurisdiction, there is a risk of political tension or even violence. To what extent and how can States pursue their interests with regard to national minorities abroad without jeopardizing peace and good neighbourly relations? This is the question addressed by the OSCE High Commissioner on National Minorities in his Bolzano/Bozen Recommendations on National Minorities in Inter-State Relations. The book analyses the Recommendations from the legal and political/security perspective and engages in more general discussion on how questions of national minorities affect inter-State relations.

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**Limitation of Liability in International Maritime Conventions: The Relationship between Global Limitation Conventions and Particular Liability Regimes**

(Routledge 2011)

Norman Martínez Gutiérrez

Limitation of liability for maritime claims is a concept of respectable antiquity which is now deeply entrenched in the maritime industry. Under this concept, the shipowner is entitled to limit his liability for maritime claims up to a maximum sum regardless of the actual amount of the claims. The concept of limitation of liability has been adopted by many conventions ranging from those relating to the carriage of goods by sea, carriage of passengers and their luggage by sea, liability and compensation for pollution damage, to liability for the removal of wrecks. Each of these conventions has its own approach to limitation of liability. However, these particular liability regimes share the international arena with global limitation conventions such as the 1976 Convention on Limitation of Liability for Maritime Claims and the 1996 Protocol thereto.

This book approaches limitation of liability from an international perspective looking at a number of key conventions including the global limitation conventions, the conventions relating to the carriage of passengers and their luggage by sea (1974 Athens Convention relating to the Carriage of Passengers and Their Luggage by Sea and the 2002 Protocol thereto), conventions relating to liability and compensation for pollution damage (1969 International Convention on Civil Liability for Oil Pollution Damage and the 1992 Protocol thereto, the 1996 International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea and the 2010 Protocol thereto, and the 2001 International Convention on Civil Liability for Bunker Oil Pollution Damage), as well as the 2007 Nairobi International Convention on the Removal of Wrecks. . . .

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**Ocean Yearbook 25**

(Brill, 2011)

Edited by Aldo Chircop, Scott Coffen-Smout and Moira McConnell

Issues and Prospects

Marine Farming, *Menakhem Ben-Yami*

Ocean Governance

Ocean Policy in Africa and Treaty Aspects of Marine Fisheries Exploitation, Management, and Environmental Protection, *David Dzidzornu*

Legal Regime for the Exploration and Exploitation of Offshore Renewable Energy, *Francesca Galea*

Living Resources

Conserving Antarctica from the Bottom Up, *Keith Reid*

Environment and Coastal Management

The Impact of Human Activity on Antarctic Coastal Areas, *Walter Patricio MacCormack, Lucas Adolfo Mauro Ruberto, Cristian Leopoldo Vodopivec, Antonio Curtosi and Emilien Pelletie*

Carbon Dioxide in the Coastal Ocean, *Elizabeth H. Shadwick and Helmuth Thomas*

Maritime Transport and Security

Lost in the Ice, *Ryan O'Leary*

Special Theme: National Studies of the Law Applicable on the Continental Shelf and in the EEZ

Observations on the Law Applicable on the Continental Shelf and in the Exclusive Economic Zone: A Comparative View, *Maira L. McConnell*

Book Reviews

Seoung-Yong Hong and Jon M. Van Dyke (eds.), *Maritime Boundary Disputes, Settlement Processes, and the Law of the Sea* (Nien-Tsu Alfred Hu)

Robin Warner, *Protecting the Oceans beyond National Jurisdiction: Strengthening the International Law Framework* (Rosemary Rayfuse)

N. Klein, J. Mossop and D.R. Rothwell (eds.), *Maritime Security: International Law and Policy Perspectives from Australia and New Zealand* (Hugh R. Williamson)

Chuyang Liu, *Maritime Transport Services in the Law of the Sea and the World Trade* (Lesther Antonio Ortega Lemus)

Appendices

A. Annual Report of the International Ocean Institute

B. Selected Documents and Proceedings

C. Directory of Ocean-Related Organizations

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### **Order and Disorder in the International System**

(Ashgate, Dec. 2010)

Edited by Sai Felicia Krishna-Hensel

This volume examines the complex international system of the twenty first century from a variety of perspectives. Proceeding from critical theoretical perspectives and incorporating case studies, the chapters focus on broad trends as well as micro-realities of a Post-Westphalian international system. The process of transformation and change of the international system has been an ongoing cumulative process. Many forces including conflict, technological innovation, and communication have contributed to the creation of a transnational world with political, economic, and social implications for all societies. Transnationalism functions both as an integrative factor and one which exposes the existing and the newly emerging divisions between societies and cultures and between nations and states. The chapters in this volume demonstrate that re-thinking fundamental assumptions as well as theoretical and methodological premises is central to understanding the dynamics of interdependence.

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**Property Rights and Sustainability: The Evolution of Property Rights to Meet Ecological Challenges**

(Brill, 2011)

Edited by David Grinlinton and Prue Taylor

1. Property Rights and Sustainability: Toward a New Vision of Property, *Prue Taylor and David Grinlinton*

PART I: Theoretical Perspectives on Property Rights and Sustainability

2. Property Rights and Sustainability: Can they be Reconciled? *Klaus Bosselmann*

3. Taking Property Seriously, *Eric T. Freyfogle*

4. Property: Faustian Pact or New Covenant with Earth? *J. Ronald Engel*

5. Property Rights Viewed from Emerging Relational Perspectives, *Peter Horsley*

6. Property beyond Growth: Toward a Politics of Voluntary Simplicity, *Samuel Alexander*

7. The Mythology of Environmental Markets, *Nicole Graham*

8. Sustainable Webs of Interests: Reconceptualizing Property in an Interconnected Environment, *Tony Arnold*

PART II: Differing Cultural Approaches to Property Rights in Natural Resources

9. Elusive Forms: Materiality and Cultural Diversity in the Ownership of Water, *Veronica Strang*

10. Maori Concepts of Rangatiratanga, Kaitiakitanga, the Environment, and Property Rights, *Nin Tomas*

11. Communal Governance of Land and Resources as a Sustainable Property Institution, *Lee Godden*

PART III: Changing Conceptions of Property and the Challenge of Accommodating Principles of Sustainability in the Ownership and Use of Natural Resources

12. Evolution, Adaptation, and Invention: Property Rights in Natural Resources in a Changing World, *David Grinlinton*

13. Property Rights across Sustainable Landscapes: Competing Claims, Collapsing Dichotomies, and the Future of Property, *Ann Brower and John Page*

14. South African Natural Resources, Property Rights, and the Public Trusteeship – Transformation in Progress, *Elmarie van der Schyff*

15. International Law's Protection of Foreign-Owned Property against Uncompensated Expropriation: Preserving Host-State Regulatory Freedom, *Amokura Kawharu*

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**Mandatory Rules in International Arbitration**

(Juris Publishing 2011)

George A. Bermann & Loukas Mistelis

The notion of mandatory rules of law has long been of interest in private international law. It is no wonder that the subject has also emerged as something of a preoccupation of those who are involved in the world of international commercial arbitration. As both legal academics and international arbitrators, the editors of this book took a keen interest in how mandatory rules might "fit" into the international arbitration picture. To better understand the phenomenon of mandatory rules (and to gauge whether its importance might possibly even be exaggerated in the international arbitral context), the editors convened at Columbia Law School at a workshop under the joint auspices of Columbia and the School of International Arbitration at Queen Mary University of London. The workshop gathered a small number of leading academics and practitioners to consider whether the notion of mandatory rules of law has a place in international arbitration and, if so, how it might best be accommodated.



### III. Journals

#### **PUBLIC INTERNATIONAL LAW eJOURNAL**

Vol. 6, No. 7: Jan 12, 2011

**ALAN O'NEIL SYKES, EDITOR**

[Global Ecological Integrity and Third World Approaches to International Law](#)

[Sara L. Seck](#), University of Western Ontario

[Toward a More Individualized Assessment of Changed Country Conditions for Kosovar Asylum-Seekers](#)

[Christian Alfred Fundo](#), Cornell Law Review, Cornell International Law Journal

[Creditor Protection in International Law](#)

[Michael Waibel](#), Lauterpacht Centre for International Law, University of Cambridge - Faculty of Law

[Transnational Corporations and the Disjoint of Traditional Structures of Liability to Victims](#)

[Benedict Semple Wray](#), European University Institute - Department of Law (LAW)

[A Consideration of International Law and its Enforcement](#)

[Ajibola Asolo](#), *affiliation not provided to SSRN*

[Harmonizing Climate Change and International Investment Law: Threats, Challenges and Opportunities](#)

[Daniel M. Figer](#), Columbia Center for Climate Change Law, New York University (NYU) - School of Law

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[Organic Global Constitutionalism](#)

[Christine E. J. Schwöbel](#), *affiliation not provided to SSRN*

[The Use of Non-Official Data in Imputations/Estimations of International Organizations](#)

[Hubert Escaith](#), World Trade Organization (WTO), DEFI: Centre de recherche en développement économique et finance internationale

[1989-2010: The Rise and Fall of Democratic Governance in International Law](#)

[Jean d'Aspremont](#), University of Amsterdam

[Collective Responsibility and Transnational Corporate Conduct](#)

[Sara L. Seck](#), University of Western Ontario

[Textual Interpretation and \(International\) Law Reading: The Myth of \(in\) Determinacy and the Genealogy of Meaning](#)

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**PUBLIC INTERNATIONAL LAW eJOURNAL**

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[The Czech Constitutional Court and the Treaty of Lisbon](#)

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[The Challenge for Asian Jurisdictions in the Development of International Criminal Justice](#)

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[The Bottom Up Journey of 'Defamation of Religion' from Muslim States to the United Nations: A Case Study of the Migration of Anti-Constitutional Ideas](#)

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[The Use and Abuse of International Law: Choice of Applicable Criminal Law in Post-Conflict East Timor](#)

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[The Alliance of International Law and Civilization Between Scylla and Caribdis \(La Alianza De La Civilización y el Derecho Internacional Entre Escila y Caribdis o de la Brevísima Historia De Un Anacrónismo Jurídico\) \(Spanish\)](#)

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**Beyond Ratification: The Future for U.S. Engagement on International Tobacco Control**

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**Nanotechnology and the International Law of Weaponry: Towards International Regulation of Nano-Weapons**

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PD: January 2011

VO: 75

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PB: Mohr Siebeck

IS: 0033-7250

URL: <http://www.ingentaconnect.com/content/mohr/rabelsz/2011/00000075/00000001/art00001>

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JN: Rabels Zeitschrift fuer auslaendisches und □internationals Privatrecht

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JN: International Journal of Private Law

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PD: January 2011

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