

Anton's Weekly Digest of International Law Scholarship*

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#### **I. SSRN Legal Scholarship Network/bepress Legal Repository/NELLCO Legal Scholarship Repository/Publishers Advances**

(Abstracts in this Bulletin are sometimes edited for brevity)

##### **Mandatory Versus Default Rules: How Can Customary International Law Be Improved?**

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Customary International Law (CIL) is plagued with uncertainties about its sources, its content, its manipulability, and its normative attractiveness. The rise of law-making through multilateral treaties also makes the proper role of CIL increasingly uncertain. This is an opportune time, therefore, to be thinking of ways to revive and improve CIL. In a prior article, we argued that the "Mandatory View" of CIL, pursuant to which nations are barred from ever withdrawing unilaterally from rules of CIL, is functionally problematic, at least when applied across the board to all of CIL. We also suggested that CIL might be improved by allowing for exit rights similar to those allowed for under treaty regimes, many of which allow nations to withdraw unilaterally, at least after giving advance notice of their intent to do so. In a series of papers in Yale Law Journal's online edition, a number of scholars – Lea Brilmayer, William Dodge, David Luban, Carlos Vázquez, and Isaias Tesfalidet – take issue with our proposal of such a "Default View" of CIL. In this essay, we respond to their arguments, while also emphasizing the need for additional consideration of the ways in which CIL might be improved.

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\* Prepared by Donald K. Anton, The Australian National University College of Law, with the assistance of ANU College of Law students: Emily Kerr, Caitlin Powell, Kate Robinson & Jean Yuan. 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.

\* Information contained in the digest is current to 5.00 pm (local Canberra time) the day before issue.

**State Cooperation & the International Criminal Court: A Role for the United States?****Beth Van Schaack**

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*Santa Clara University Legal Studies Research Paper No. 5-11*

This article appeared in a white paper from the American Society of International Law on the relationship between the United States and the International Criminal Court in the post-Kampala Review Conference period. This article is premised on the recognition that (1) the International Criminal Court is almost entirely dependent on State cooperation to effectuate its mandate to bring to justice individuals responsible for committing "the most serious crimes of concern to the international community as a whole" and (2) cooperation is central to the evolving relationship between the ICC and the United States. Notwithstanding the rapprochement between the ICC and the U.S. under the Obama administration, domestic legislation dating from the Bush Administration prohibits most forms of cooperation with the Court absent specific waivers or other contingencies. If the United States is to best position itself to use all international tools available to it to advance United States interests in responding effectively to the commission of international crimes, this legislation should be repealed or significantly scaled back. Short of ratifying the ICC Statute, this article discusses a number of ways that the United States can work with the Court to both promote the United States' foreign policy agenda and support the mission of the Court. It argues that re-engaging with the Court through appropriate cooperative efforts will go far toward restoring the United States to its prior leadership position in the arena of international justice.

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**A Tale of Two Architectures: The Once and Future U.N. Climate Change Regime****Daniel Bodansky**

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International agreements vary widely in the latitude that they give participating states. Some take a top-down approach, defining particular policies and measures that parties must undertake. Others adopt a more bottom-up approach, allowing each participating state to define its own commitments unilaterally. In the climate change regime, the Kyoto Protocol reflects a top-down approach. Although it gives states freedom in how they implement their commitments, it does not give them similar flexibility in defining the form, nature and content of their commitments. Going forward, the climate change regime faces a choice: continue down the road blazed by Kyoto, or shift to a more bottom-up architecture, focusing on nationally-defined measures. Although the Copenhagen Accord and Cancun Agreements in theory leave this question open, they embrace a bottom-up approach, allowing countries to make national pledges unilaterally. The paper argues that this bottom-up, incremental approach makes sense politically, in order to provide time for countries to learn from experience and to develop trust in the system. Although it is unlikely, in itself, to produce the necessary level of emissions cuts, it represents a useful step forward, by unblocking an apparently stalemated process and by helping to build a foundation for stronger action in the future.

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**The Political Economy of Jus Cogens****Paul B. Stephan III**

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This paper, prepared for a conference hosted by Vanderbilt Law School on foreign sovereign immunity at home and abroad, begins with the dispute now before the International Court of Justice, *Jurisdictional Immunities of the States* (Germany v. Italy). Italy's courts claim that the normal rule of foreign sovereign immunity that it would apply to a civil suit against a foreign state does not apply if the plaintiff's claim alleges violations of jus cogens norms of international law. The paper uses this argument as a lens into the history and meaning of the jus cogens concept in international law. The

paper demonstrates that the vision of jus cogens one embraces depends on background assumptions about the present and future of the international system. A robust conception of jus cogens assumes both (1) that independent judges and tribunals, informed by the views of non-state actors, can identify core international obligations and manage their tradeoffs with other values pursued by the international legal system, and (2) that the actions of independent judges and tribunals, informed by non-state actors, will influence state behavior. Doubts about the abilities of judges and tribunals, or fear about the rise of powerful and authoritarian actors in the international system, will lead one to assign a much narrower role to jus cogens.

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### **Efficient Breach of International Law: Optimal Remedies, 'Legalized Noncompliance,' and Related Issues**

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[\*U of Chicago Law & Economics, Olin Working Paper No. 546\*](#)

[\*Stanford Law and Economics Olin Working Paper Forthcoming\*](#)

In much of the scholarly literature on international law, there is a tendency to condemn violations of the law and to leave it at that. If all violations of international law were indeed undesirable, this tendency would be unobjectionable. We argue in this paper, however, that a variety of circumstances arise under which violations of international law are desirable from an economic standpoint. The reasons why are much the same as the reasons why non-performance of private contracts is sometimes desirable – the concept of “efficient breach,” familiar to modern students of contract law, has direct applicability to international law. As in the case of private contracts, it is important for international law to devise remedial or other mechanisms that encourage compliance where appropriate and facilitate noncompliance where appropriate. To this end, violators ideally should internalize the costs that violations impose on other nations, but should not be “punished” beyond this level. We show that the (limited) international law of remedies, both at a general level and in certain subfields of international law, can be understood to be consistent with this principle. We also consider other mechanisms that may serve to “legalize” efficient deviation from international rules, as well as the possibility that breach of international obligations may facilitate efficient evolution of the underlying substantive law.

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### **Political Science Research on International Law: The State of the Field**

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The discipline of political science has developed an active research program on international institutions. Among its top ranks are scholars who study the development, operation, spread and impact of international legal doctrine and organizations – also matters of great interest to the legal community. Meanwhile, a growing number of public international lawyers have developed an interest in political science research and methods. For more than two decades there have been calls and frameworks for international lawyers and political scientists to collaborate. Some prominent collaborations are under way – sharing research methods and insights. Yet the two fields are still notable for their distance. This essay offers a fresh survey of what political science has learned that

may be of special interest to international lawyers. More than 20 years have passed since the last large essay of this type. During that interim the field of political science has made substantial progress in some areas and also shifted its focus to new questions. For lawyers who are not familiar with political science scholarship, our aim is to introduce some of the basic concepts and methods that could contribute to their own research. For the growing number of legal scholars already engaged with research in political science and the other social sciences our aim is to offer a roadmap to political science research that might not yet be apparent and suggest some areas where collaboration is likely to be especially fruitful.

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### **Deconstructing CEDAW's Article 14: Naming and Explaining Rural Difference**

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[William & Mary Journal of Women and the Law, Vol. 17, p. 347, 2011](#)

[UC Davis Legal Studies Research Paper No. 248](#)

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) is the first human rights instrument to recognize explicitly rural-urban difference. It does so by enumerating specific rights for rural women in Article 14 and also by mentioning their needs in relation to Article 10 on education. In this Essay, I examine the Convention's Travaux Préparatoires to better understand the forces and considerations that led to the inclusion of Article 14 and its recognition of rural people and places. I also assess Article 14's particular mandates in light of both that drafting history and CEDAW's other provisions, and I consider the assumptions implicit in the Convention's embrace of rural exceptionalism. In addition, I offer some thoughts on the expressive significance of the particular rights accorded to rural women, as well as of the explicit acknowledgment of this group – and, by extension, rural populations in their entirety – in this widely ratified treaty. I thus discuss what CEDAW implies about the character of rurality and rural-urban difference. Finally, I argue that CEDAW provides a framework for spatial equality, in addition to the more obvious and comprehensive one for gender equality. This Essay therefore fills a void in the legal scholarship on CEDAW, which often mentions Article 14 in inventories of the Convention's provisions, but which has largely ignored both its meaning and significance.

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### **A Valid International Problem vs. A Valid International Law: Shifting modes of Responsibility in International Criminal Law**

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International crimes tend to have an inherently collective nature, creating a tension with the fundamental notion in criminal law of individual responsibility. In attempting to hold individuals responsible for collective crimes, particularly where there was only indirect participation, we have seen monumental shifts in basic notions such as the principle of legality, requirements of mens rea and participation in the actus reus. Creativity may well be required to deal with new ways in which these crimes are committed, but we must be wary that we are not shifting modes of responsibility beyond the basic tenets of criminal law. The central question of this paper is: by what process does the normative content of ICL develop, in particular modes of liability, and what does this mean in terms of valid sources of ICL? Some important questions which will be considered whether the principle of legality should prevent shifts in recognized modes of responsibility, or whether the problems particular to the international nature of ICL warrant acceptance of such shifts. The conclusion asserts that if a concept in ICL cannot be found directly in one of the sources of international law, there is in fact another way by which the normative content of international criminal law is being developed. A dynamic feedback process between domestic and international law-makers can be observed, based on a communication model of law-making in international law. The controversial notion of Joint Criminal Enterprise (JCE) is taken as a case study for how this process of

law-making takes place, including difficulties with application of a traditional doctrine of sources. Of particular interest is the way in which this mode of liability seems to have grown from its judicial inception to more general application despite uncertainty as to its status under international law. It is the author's belief that the dynamic process by which international criminal law is being developed can explain the place JCE is taking in this field of law. However some attention should be paid to the ruling principles of criminal law if this is to be considered valid law.

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**Rights and Responsibilities for Individuals and NGOs: Moral Challenges Put Forward by the Millennium Development Goals**

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Human rights lawyers and human rights activists often hesitate or even hate to talk about human responsibilities and responsibilities (in short: duties). This is the case for obvious reasons, which can best be understood in light of the very beginning of the history of human rights, relating to the protection of human beings against the abuse of power by States. Talking too much about duties of human beings (and their societal organisations) would be a nice 'playing card' in the hands of authoritarian governments, whether they are communist left, military right or religiously fundamentalist. Despite this, there might be good grounds to talk about human duties, alongside rights. The paper addresses these duties of human beings and their non-governmental organisations towards other human beings and the world society as a whole. The focus is upon a moral appeal connected to forms of accountability, and not upon legally binding obligations. Further to that, the focus is on one selected issue: the need to realise the Millennium Development Goals (MDGs) and the human rights related thereto. Is the MDG-reality 'ordering' us to rethink the notion of duties for not only States but for individuals and their organisations as well?

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**Refugees**

[Itamar Mann](#)

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*Mafe'akh: Lexical Review of Political Thought, No. 2e, Winter 2011*

The article traces the development of the refugee in international law, and develops a critique of this definition based in a moral phenomenology of refugees.

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**Conflict Prevention Through Natural Resource Management? A Comparative Study**

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[Miriam Shabafrouz](#)

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*German Institute of Global and Area Studies (GIGA) Working Paper No. 158*

Natural resources are often held responsible for intrastate conflicts. As a consequence, both national and international measures to avoid the detrimental impact of resource endowments have increasingly been discussed and implemented in resource-rich countries. These measures include stabilization funds, subregional development programs, revenue-sharing regimes, and transparency initiatives. However, comparative empirical studies of the actual impact of these measures, particularly regarding their contribution to conflict prevention, are scarce. This paper contributes to the filling of this gap: combining a medium-N sample of oil-dependent countries and three in-depth case studies (Algeria, Nigeria, and Venezuela), we evaluate different instruments of resource

management and their effects on conflict risk factors. On the one hand, the findings do not show any systematic connection between the countermeasures and a reduction in resource-related risks; on the other, the paper highlights common causal factors for the lack of implementation of resource-related countermeasures.

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### **Domestic Implementation of International Law**

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Austin called international law "positive international morality." According to Austin, law is the command of the sovereign, and the indeterminacy of sovereign at the international level and the lack of coercive force had made him classify international law as mere positive morality. Indeed, the sovereignty of the nation-State is one of the foundational principles of international law. International norms were binding on the States only to the extent expressly consented to by them. Enforcement was based on, what may be called, "naming and shaming." The loss of good faith at the international arena functioned as the only mechanism to ensure compliance with international norms. Over the years now the concept and vigour of international law has seen gradual and momentous change. The contours of sovereignty have evolved so much that we no longer speak with a prescriptive notion of sovereignty, but are rather trying to devise effective mechanisms, both at national and international levels, for furthering the benefits of people individually as well as collectively. The corollary to the traditional conception of sovereignty was the respect for and non-interference with the domestic legal system. But with the transition in the idea of sovereignty nation-States now have to ensure harmony of domestic law with international law. Compliance with international law is no longer an act of morality, but necessary and, in fact, enforceable. This transition primarily occurred due to the interdependence of the States in all walks of life – a move from self-dependence to globalisation. States no longer are mere contributors of law, but are both contributors and recipients of law. India is no exception to this.

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### **On the Uncertainties Surrounding the Standard of Proof in Proceedings Before International Courts and Tribunals**

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*DIRITTI INDIVIDUALI E GIUSTIZIA INTERNAZIONALE, LIBER FAUSTO POCAR, pp. 427-442, G. Venturini & S. Bariatti, eds., Giuffrè, 2009*

In the absence of a treaty provision, the standard of proof in proceedings before international courts or tribunals should be a matter for the "general principles of law recognized by civilised nations" to which reference is made in Art. 38 (1) (c) of the ICJ Statute. This, however, leads to an interesting problem: although every tribunal, national or international, has to apply (explicitly or implicitly) some kind of standard of proof, in comparative national law there would appear to be no true unanimity on what the standard of proof should be in civil proceedings and therefore no general agreement between legal systems which could be the basis for extending a standard of proof to, for instance, inter-State disputes as a general principle of law. International criminal proceedings and fact-finding by human rights courts (at least by the ECtHR) are special cases: there is agreement that a high standard of proof - proof beyond a reasonable doubt - applies to them. But this type of clarity is, on the whole, untypical of international proceedings generally. Notoriously, the standard of proof tends to vary from tribunal to tribunal or even from case to case, in a continuum going from a light standard (balance of probabilities) to a high one (proof beyond reasonable doubt).

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**Women, Islam and International Law: Within the Context of the Convention on the Elimination of All Forms of Discrimination Against Women**

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*Ekaterina Yahyaoui Krivenko, WOMEN, ISLAM AND INTERNATIONAL LAW: WITHIN THE CONTEXT OF THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN, Martinus Nijhoff Publishers, 2009*

Islam and women's human rights entertain an uneasy relationship. Much has been written on the subject. This volume addresses it from a new perspective. It attempts to define some basis for constructive dialogue and interaction in the context of international law and, more precisely, in the context of participation of many Muslim States in the United Nations Convention on the Elimination of All Forms of Discrimination Against Women. Having discovered a constructive potential in both Islam and women's human rights, the author concentrates on the role which international law should play in promoting dialogue and constructive interaction. This is done mainly through analysis of the regime of reservations and of the practice of reservations developed in the context of Muslim States' participation in the CEDAW. The basic thesis defended is the following: Islam as articulated in the practice of States and women's human rights, as reflected in international instruments, are both results of human activity. Their analysis in this study reveals more commonalities than one might expect. International law should be more attentive to their voices and more innovative in using these commonalities in order to promote constructive dialogue between them and thus help to improve the situation of women suffering from discrimination and inequalities.

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**Beyond Fragmentation: WTO Jurisprudence, Environmental Norms and Interactions between Subsystems of International Law**

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*HEI MIS Law Mémoire 2008*

This dissertation begins by looking behind the contemporary unity – fragmentation debate to the complex web of functionally-differentiated, but increasingly interrelated subsystems of international law (part I). In the hope of gaining optimal insight into the incredibly wide-ranging phenomenon of subsystem – subsystem interactions within the scope of a relatively short study, the two contrasting fields of international trade law and international environmental law are chosen with attention focused on the frequently ignored possibility of one subsystem's (the WTO's) jurisprudence impacting upon the development of another subsystem's (international environmental law's) norms (part II). One particular norm of international environmental law, the precautionary principle, presents itself as the sole candidate capable of providing a factual, rather than speculative basis for asserting the existence of such interaction. We therefore spend considerable time analysing how it is understood by each of the two subsystems and exploring the potential for cross-fertilisation of WTO jurisprudence concerning it to the international environmental law realm (part III). While substantially more research must clearly be conducted to test this hypothesis, even within the very specific example analysed, we reveal strong indications that such intersystemic interaction is already quietly occurring or, at the very least, will increasingly occur. Charting our course back from the specific to where we began with the general, we then briefly remark upon the implications of this development for the subsystems of international trade and international environmental law (part IV) and also for the development of the international legal system as a whole (part V). Of particular note is the possibility that this intersystemic phenomenon could result in an uneven development of the broad range of international norms, favouring the values and objectives of the institutionally stronger subsystems over the institutionally weaker subsystems of international law. Such a realisation only serves to render more urgent the need for future research to follow the path laid out by this dissertation's small and modest first step and undertake a thorough investigation of the dynamics of the interactions between subsystems of contemporary international law.

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### **The Legal Barriers to International Movement of Goods and Their Impact on the Administration of Small Scale Organisations in the United Kingdom**

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*African Journal of Social Sciences, Vol. 1, No. 1, pp. 75-82, February 2011*

The carriage of goods across international boundaries involves bulk and sometimes complex transportation and therefore requires planning and the deployment of resources and logistics. In most cases, the use of sea transportation is commonly preferred. The legal issues surrounding the carriage of goods have informed the development of trade laws and international commercial law including the law of contract. Carriage of Goods by Sea, land and air are comprehensive yet dynamic body of law which continues to develop through statute and case laws, both domestic and foreign. The objective of the paper is to discuss some of the fundamental legal hurdles which confront small scale firms engaging in export and import businesses in the United Kingdom; to discuss some of the problems of the current international trade laws; and, to address the possible implications of failing to comply with the legal requirements of international trade.

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### **Beyond the Monopoly of States**

**David Gartner**

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*University of Pennsylvania Journal of International Law, Vol. 32, No. 2, p. 595, Winter 2010*

In the twenty-first century, a wide range of complex global challenges will require unprecedented levels of global cooperation between states and non-state actors. Yet few leading international institutions today are designed to effectively leverage the resources, ingenuity, and connectivity of diverse societal actors. While some scholars maintain the view that civil society should not meaningfully participate in the governance of international institutions, a new generation of multi-stakeholder institutions points to a new way of understanding the relationship between non-state actors and international institutions. This article examines the role of civil society in the governance of international institutions and highlights this new generation of multi-stakeholder institutions that involve non-state actors as full participants in governance. It applies insights from work on associative democracy to suggest a new approach to evaluating civil society participation within international institutions.

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### **The Neo-Liberal Turn in Regional Trade Agreements**

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*Washington Law Review, Vol. 83, No. 3, 2011*

*Albany Law School Research Paper No. 10-40*

This paper makes two primary arguments. First, that the increased resort to bilateral and regional trade agreements has taken a neo-liberal turn. . . . Second, this article argues that bilateralism and regionalism in trade are contemporary fads that are spreading neo-liberal economic ideals in the periphery of the global trading system. . . . [T]his paper argues that the increased number of regional and bilateral trade agreements represents an important opportunity for the further diffusion of neo-liberal economic ideals, an insight often missing in leading accounts that have emphasized how this trend conforms or departs from the norms of the World Trade Organization. This paper does so using a constructivist account of the circumstances under which neo-liberalism arises in the turn towards



regionalism and bilateralism. It shows how ideas about market governance and the institutions and experts that generate and perpetuate these ideas impose an incentive structure within which choices in favor of neo-liberalism are more than less likely to be exercised.

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### **The Gaza Freedom Flotilla and International Law**

[Andrew Sanger](#)

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*Yearbook of International Humanitarian Law, Vol. 13, June 2011*

This paper examines the interception of the Gaza Freedom Flotilla from the perspective of international law, and in doing so, considers three pivotal sets of questions: (1) Does Israel have a prima facie right to blockade Gaza? What is the legal basis for this right? What affect, if any, does the characterisation of the Israeli-Hamas conflict have? (2) If Israel does have a prima facie right to blockade Gaza, is the blockade legally constituted and maintained? What factors are taken into consideration? And finally, (3) can Israel lawfully intercept vessels on the high seas without permission of the flag-state? In what circumstances, and under what conditions, can Israel undertake such an operation? Did Israel act lawfully when it intercepted the Flotilla vessels?

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### **International Assistance and Cooperation for Access to Essential Medicines**

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*Health & Human Rights, Vol. 12, p. 73, 2010*

[Georgetown Public Law Research Paper No. 11-23](#)

[Georgetown Law and Economics Research Paper No. 11-05](#)

Access to essential medicines is a critical problem that plagues many developing countries. With a daunting number of domestic constraints technologically, economically, and otherwise developing countries are faced with a steep uphill battle to meet the human rights obligation of providing essential medicines immediately. To meet these challenges, the international human rights obligations of international assistance and cooperation can play a key role to help developing countries fulfill the need for access to essential medicines. This article seeks to highlight and expand upon the current understanding of international assistance and cooperation for access to essential medicines through a review of obligations identified in international human rights law and a synthesis of official guidance provided on the matter.

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### **Extraterritorial Intellectual Property Enforcement in the European Union**

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*Southwestern Journal of International Law, Forthcoming*

[UNLV William S. Boyd School of Law Legal Studies Research Paper](#)

This paper was prepared for the 2011 ABILA International Law Weekend – West volume of the Southwestern Journal of International Law. It addresses extraterritorial enforcement of intellectual property rights in the European Union. The maximum length of the paper was set by the Journal. The problems associated with extraterritorial enforcement of intellectual property rights in the European Union (the "EU") may be divided into three categories: enforcement of unitary EU-wide rights, enforcement of multiple national rights, and enforcement of rights based on one national law with extraterritorial effects on activities in other countries. Although these are three distinct categories of problems, they are interconnected; problems in one category may exacerbate problems in another category, and solutions developed in one category may contribute to the resolution of problems in another category. This article briefly reviews the three categories of problems and demonstrates the

interrelatedness of solutions that have been developed or will have to be developed to address the problems.

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### International Governance of Autonomous Military Robots

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[Columbia Science and Technology Law Review, Forthcoming](#)

Unarmed aerial vehicles (i.e., drones) are already starting to transform the conduct of military engagements, and these systems are projected an increasingly prominent role in military forces in the future. A number of factors will push these systems toward increased autonomy, raising the possibility of the future development of lethal autonomous robotics (LARs). This article seeks to proactively address the ethical, policy, and legal aspects of ALRs. It first describes the technological status and incentives for LARs, and then reviews some ethical and policy concerns that autonomous systems present. The paper then describes three potential routes for proactive governance of LARs: (i) existing legal and policy regimes such as rules of engagement, laws of war, and international humanitarian law; (ii) arms control agreements; and (iii) "soft law" mechanisms such as codes of conduct and international consultative bodies.

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### Comparative Approaches to Punishing Hate: The Intersection of Genocide and Crimes Against Humanity

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*Stanley Journal of International Law, Vol. 43, p. 221, 2007*

The Genocide Convention protects racial, ethnic, religious, and national groups. It does not cover political groups. Some nevertheless suggest that there is no need to consider revising the Convention to include political groups because they are sufficiently protected under other aspects of international criminal law; namely, the crime against humanity of persecution. This assertion is incorrect. Despite some overlap, persecution and genocide have divergent legal elements and protect different societal interests. Far from covering equivalent ground, the actus reus and mens rea of genocide and persecution vary considerably. Genocide is an inchoate crime aimed at the destruction of groups, whereas persecution is a results-based offense aimed at serious discrimination against individuals. They are not cumulative offenses: an offender can properly be convicted of both crimes arising out of the same underlying criminal transaction. The use of persecution as a proxy for political genocide runs afoul of fundamental principles of fair labeling. It is not enough that a given criminal can be

punished for some international offense. The labels themselves matter. On the whole, genocide is a more serious offense. Labeling acts of political genocide "persecution" understates the gravity of the conduct and mental state at issue and fails to convey that the political group itself was the true victim of the offense. Persecution also is not even available as a chargeable offense in all instances of political genocide, leaving this ultra-serious criminal conduct to be addressed solely as a domestic crime (or not at all). Taken together, the disparity in treatment reflects a value judgment by the international community about the relative worth of racial, national, religious and ethnic groups versus political groups. There is no overt recognition in international law that political groups have the right to physical and biological existence "as such." The existing legal structure thus makes the profound statement that identical acts committed with identical intent against members of political groups never merit the same degree of legal censure as similar acts against members of national, racial, ethnic and religious groups. To the extent that this discrepancy is premised upon the invalid assumption that equivalent protection exists elsewhere in international law, it should be revisited. If political groups indeed are valued equally by the international community — at least insofar as their physical and biological existence — the inescapable conclusion is that a lacuna exists within international criminal law: the scope of protection does not correspond to the degree of worth. This lacuna can be filled only through a parallel offense of political genocide that prohibits the identical criminal conduct intended to destroy political groups "as such."

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### **Charting the Wrong Course: The Doctrine of Legitimate Expectations in Investment Treaty Law**

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*Alberta Law Review, Forthcoming*

The doctrine of legitimate expectations, an administrative law concept found in a number of domestic law jurisdictions, has been incorporated into investment treaty law jurisprudence as a general principle of law. The general principles of law are a source of international law derived from Art. 38.1(c) of the ICJ Statute. Their content is determined by comparing national legal practices and extracting standards common to all (or most) national legal systems. To date, investment tribunals have failed to comprehensively examine the practices of domestic jurisdictions that recognize the doctrine of legitimate expectations when determining the scope of the doctrine. Specifically, tribunals have adopted an approach to the doctrine which recognizes a substantive legitimate expectation. This approach gives tribunals the jurisdiction to review the content of administrative decisions. In contrast, many domestic legal systems consider the doctrine as only providing procedural protection, limiting the review power of courts to the examination of how administrative decisions were adopted. This marks a failure by investment tribunals to consider the reasons why this approach is rejected in so many other jurisdictions. This paper examines the domestic sources of the doctrine of legitimate expectations in order to evaluate whether investment treaty tribunals are justified in interpreting the doctrine to include substantive expectations. It concludes that recognizing substantive expectations as part of the general principles of law is at this point premature and amounts to a misstatement of a general principle of law. Instead, I argue that the solution to this problem is found in the emergence of a body of case law that has integrated a 'balancing test' when considering legitimate expectations.

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### **A Trans-Judicial Dialogue and the Globalizing of Administrative Law**

**Sungjoon Cho**

Chicago Kent College of Law

What if the same commercial dispute is adjudicated both in a domestic court and in an international tribunal? The conventional view (dualism) may tolerate two separate legal conclusions in this situation. However, in the Habermasian postnational constellation, such legal coherence appears not only normatively troublesome but also practically taxing to the global business. Against the backdrop

of the recent "double remedy" dispute between the United States and China, this Article seeks to offer a solution to this dilemma via a "trans-judicial dialogue" between a domestic court and an international tribunal. The Article argues that the WTO Appellate Body qua adjudicator can employ the same hermeneutical tool, such as "reasonableness," adopted by the United States Court of International Trade (USCIT) when the latter reduced the Commerce Department's alleged discretion over the double remedy issue to null. Furthermore, the Article submits that as such a dialogue matures and deepens, both courts may form some kind of interpretive community, in which they can establish an identifiable pattern of common interpretations. This visible, and thus accessible, judicial practice in an overlapping issue-area, such as trade remedy, is a propitious step toward the convergence of domestic and international administrative law and eventually the globalizing of administrative law.

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**Ban on Minarets from the Standpoint of Swiss Constitutional Law and Public International Law (Jus Cogens)**

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*Journal of Sharia & Law, Vol. 45, pp. 69-84, January 2011*

The Swiss vote on the 29th of November, 2009 turned the popular initiative against constructing minarets into a law with a 60% majority of voters. The vote reflects xenophobia and the negative image of Islam or Islamophobia held by the proponents of the initiative. This article deals at the same time with the Swiss Constitutional Law aspects and Public International Law issues, notably the conflict with some of its peremptory norms (jus cogens).

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**The Security Council's Responsibility to Protect**

[Anne Peters](#)

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*International Organisations Law Review, Vol. 8, No. 1/2011*

The objective of this paper is to spell out the legal consequences of the concept "responsibility to protect" (R2P), postulated as a binding legal principle of international law, for the Security Council and its members. The paper is a thought experiment, because the binding legal force of R2P is not settled. My argument is that, once R2P is accepted as a full-fledged legal principle, the Security Council (and its members) would be under a legal obligation to authorize or to take sufficiently robust action in R2P situations. The paper then discusses the problems engendered by the acceptance of such a material obligation and suggests a procedural obligation to justify inaction instead. This issue is salient, because the real problem is not that the United Nations would intervene too often, but that the Security Council has abstained from authorizing military activities even in situations where the qualitative threshold for triggering what later became to be called R2P had been reached. It is a historical fact that the Security Council has failed to prevent and to stop genocide in Rwanda and Srebrenica. The two inquiry reports on those events in both cases blamed the Security Council and explicitly found the body to be "responsible". In 1994 and 1995, that responsibility was not a legal one. Security Council hesitation and inaction then did not constitute a breach of a legal obligation. Under the reign of the new principle of R2P, it might.

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**Drawing the Right Lessons from ICSID Jurisprudence on the Doctrine of Necessity****Amin George Forji***affiliation not provided to SSRN**Arbitration: The International Journal of Arbitration, Mediation and Dispute Management, Vol. 76, No. 1, pp. 44-57, 2010*

Bilateral investment treaties (BITs) and the International Centre for the Settlement of Investment Disputes (ICSID) have over the years injected an important dynamic into public international law, that is, the replacement of a political remedy (peaceful cooperation amongst nations) by a legal one (settlement of investment disputes). The institution of ICSID and the revision of BITs in line with its rules have opened the way for direct investors' claims and investor-state arbitration. The obvious implication of a compulsory arbitration provision is that it has made up for many shortcomings of the diplomatic protection mechanism with, "the potential for an individual investor, with or without the approval of its home government, to press a conflict that may ultimately have diplomatic implications and may affect relations between the two countries concerned". It is however still debated whether such a mechanism guarantees fairness and equity for both investors and host states, or merely advantages one BIT signatory to the detriment of the other. Argentina has had more cases before the ICSID tribunals than any other country. Faced with an economic crisis in 2001–2002, it ran into conflict with foreign investors when it repealed the Convertibility Law on which most of its BITs had been negotiated. Could that action be justified as one taken in times of peril and in dire need, as sanctioned by international law, or was it just an outright breach of Argentina's own contractual commitments?

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**Emergence of the Right to Live in Peace in Japan****Hudson Hamilton**

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*Australian Journal of Asian Law, Forthcoming*

The Constitution of Japan enshrines pacifism in two provisions: the Preamble, which recognises the right of all peoples to live in peace, and Article 9, which renounces war and prohibits the maintenance of war potential. As sweeping as these provisions appear, the Supreme Court of Japan has largely undermined their legal effect. On 17 April 2008, the Nagoya High Court breathed new life into the pacifism of the Constitution when it found a violation of Article 9 in the deployment of Japan's Self-Defense Forces to Iraq, and further held that the right to live in peace is enforceable in certain situations. Less than a year later, the Okayama District Court followed the Nagoya High Court in recognising the right to live in peace, and provided more detail about the right's substance. Although both cases were ultimately dismissed for lack of standing, their recognition of the right to live in peace is a significant development in Article 9 litigation. As recognised by the Nagoya and Okayama courts, the right to live in peace can function as a means to enforce Article 9.

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**The Reality of Social Rights Enforcement****David Landau**

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Despite the American refusal to include socio-economic rights in the U.S. constitution or to enforce them, the vast majority of constitutions around the world now include these rights, and courts are enforcing them in increasingly aggressive and creative ways. Scholars have produced a large and theoretically rich literature on the topic. Virtually all of this literature assumes that social rights enforcement is about the advancement of impoverished, marginalized groups. Moreover, the consensus recommendation of that literature, according to scholars like Cass Sunstein and Mark Tushnet, is that courts can enforce socio-economic rights but should do so in a weak-form or dialogical manner, whereby they point out violations of rights but leave the remedies to the political

branches. These scholars argue that by behaving this way, courts can avoid severe strains on their democratic legitimacy and capacity. Based on an in-depth case study of Colombia, which draws on my extensive fieldwork within that country, and on evidence from other countries including Brazil, Argentina, Hungary, and India, I argue that both the assumption and the consensus recommendation are wrong. In fact, most social rights enforcement has benefitted middle- or upper- class groups, rather than the poor. Courts are far more likely to protect pension rights for civil servants or housing subsidies for the middle class than they are to transform the lives of marginalized groups. Moreover, the choice of remedy used by the court has a huge effect on whether impoverished groups feel any impact from the intervention. Super-strong remedies like structural injunctions are the most likely ways to transform bureaucratic practice and to positively impact the lives of poorer citizens. The solution to the socio-economic rights problem is to make remedies stronger, not weaker.

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**Human Rights in the Context of Disasters: The Special Session of the UN Human Rights Council on Haiti**

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*Journal of Human Rights, Vol. 10, No. 1, pp. 99-111, 2011*

The Thirteenth Special Session of the Human Rights Council (HRC) held under a theme "The Support of the Human Rights Council to the Recovery Process in Haiti after the Earthquake of January 12, 2010: A Human Rights Approach" is a significant culmination of a trend that has increasingly highlighted the utility of a human rights approach to disaster response, recovery, and reconstruction. . . . Numerous initiatives and developments of soft-laws have been undertaken in recent past that seek to address some of the most pressing issues stemming from disasters. The General Assembly, for example, has adopted a number of key resolutions on the topic. The International Law Commission (ILC) is currently considering the possibility of developing and codifying international law applicable to the protection of persons during disasters (ILC 2008). Both the International Federation for Red Cross and Red Crescent (IFRC) and the International Strategy for Disaster Risk Reduction are underscoring the importance of developing legal norms not only for effective humanitarian response but also for reducing vulnerability to disasters and mitigating their consequences. HRC's role in legal development on this topic has so far been indirect. . . . The Council's engagement on the topic of disasters encourages the Council to work towards the fulfillment of its mandate of ensuring the mainstreaming of human rights within the United Nations system. It presents an opportunity for the Independent Expert on the situation of human rights in Haiti (Independent Expert) to play a catalyst role in ensuring that a human rights approach is integrated in operational activities implemented by UN organizations and others. The resolution adopted during the Thirteenth Special Session importantly recognizes the operational involvement of the Office of the High Commissioner for Human Rights (OHCHR) in protection activities on the ground (HRC 2010). . . . By critically reviewing HRC's Thirteenth Special Session and the resolution adopted during the meeting, this essay examines the implications of these developments for the protection of human rights in the context of disasters.

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**Company Law as an Agent for Migration of CSR-Related International Law into Companies Self-Regulation? The Case of the Danish CSR Reporting Requirement**

**Karin Buhmann**

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*European Company Law, Vol. 8, No. 2, 2011*

*University of Oslo Faculty of Law Research Paper No. 2011-05*

An amendment to the Danish Financial Statements Act and related provisions for institutional investors etc. have introduced mandatory Corporate Social Responsibility (CSR) reporting for large Danish private and state-owned companies, institutional investors, etc. The reporting requirement



was preceded by a governmental Action Plan on CSR which, among other initiatives, announced plans to make CSR reporting mandatory. The reporting requirement does not define CSR but provides that CSR is understood as the voluntary integration in companies' policies and practices of human rights, social issues, environment, climate and anti-corruption, amongst others. The reporting provision established an option to report, for the purposes of the Danish Act, through submission of a Communication of Progress (CoP) Report under the United Nations Global Compact and/or the Principles for Responsible Investment (PRI). The reporting requirement seeks to promote CSR through transparency. It has a related objective of making more Danish companies participate in the Global Compact. Reporting itself is enforced through government monitoring and fines. Through drawing on civil society monitoring and social and economic sanctions, the reporting provision in a wider sense complements the rather limited international law regime in relation to adverse business social and environmental impact. Based on the role which the Danish Government's Action Plan and the reporting requirement assign to "internationally agreed principles" and to international human rights and labour rights law in particular, the article argues that initiatives such as the Danish reporting requirement may support a trend towards migration of international human rights law into other legal systems, including national company law, companies' self-regulation and their contracts with business partners.

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### **Litigating Against International Business Corporations for Their Actions Abroad: Recent Environmental Cases from the Netherlands**

[Katinka Danielle Jesse](#)

North-West University

[Jonathan M. Verschuuren](#)

Tilburg University - Center for Transboundary Legal Development; Tilburg Sustainability Center  
*IUCN Academy of Environmental Law eJournal, Vol. 1, 2011*

Globalization may have severe negative side impacts on the environment, especially as a consequence of the growing opportunities for businesses to avoid strict national environmental laws by moving operations (or waste) to places in the world where environmental legislation tends to be less well developed and/or enforced. As international law is primarily directed at states and not at transnational corporations, it has serious weaknesses to counteract such severe environmental impacts. Moreover, the few national legislative attempts to specifically regulate the environmental performance of companies that operate abroad, did not pass through parliament. The limitations of law have led to the rise of non-state environmental law in which national authorities play no or only a very limited role. Still, the role of national law has not been played yet: as from the mid-nineties of the past century there is a steadily growing body of court cases from the home state of the parent company. Although, mainly for tax reasons, a relatively large numbers of transnational corporations have chosen the Netherlands as their elected domicile, only recently we saw the first two court cases – one of them still pending – regarding the alleged liability of (partly) Dutch-based corporations for serious environmental impacts caused while operating in Africa. The first one, the Trafigura case, concerned the dumping of hazardous waste in the African state of Ivory Coast. The second one, the Shell-Nigeria case, relates to environmental damages from oil leakage in Nigeria. This paper discuss both cases. Although both the Trafigura case and the Shell-Nigeria case concern overseas environmental impacts, the cases differ considerably. For one, the Trafigura case followed a criminal law track, whereas the Shell-Nigeria case follows a tort proceeding. Secondly, unlike the (Dutch) national law approach used in the Trafigura case, in the Shell-Nigeria case the actual consequences of the oil leakages in Nigeria, and the way RDS and SPDC responded to these are central. Also, in the Shell-Nigeria case, soft law such as codes of conduct might be relevant to support constructing the violation of the duty of care. Given contemporary calls for corporate sustainability, many companies have either volunteered to adhere to codes of conduct and/or have their own ones in place. Independent monitoring mechanisms are, however, seldom incorporated. Through interpretation of a rule of unwritten duty of care with reference to such codes of conduct, they might be uplifted from a merely public relations effort to a useful purpose in transnational tort law.

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**International Decision. Opinion 1/08, Community Competence to Conclude with Certain Member States of the WTO Agreements Modifying Schedules of Specific Commitments of the Community and its Member States Under the GATS**

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*American Journal of International Law, Vol. 104, No. 3, pp. 466-476, 2010*

Opinion 1/08 of the Grand Chamber of the European Court of Justice (ECJ) resolves a dispute between the European Commission, supported by the European Parliament, on the one hand, and the Council of the European Union (Council) and fifteen member states, on the other, as to the competence of the European Community (EC) to conclude — with certain members of the World Trade Organization (WTO) — particular agreements (Agreements) modifying the schedules of specific commitments (Schedules) of the EC and its member states under the General Agreement on Trade in Services (GATS). More importantly, by interpreting for the first time some of the provisions defining the common commercial policy (CCP) as they were recast by the Nice Treaty in 2001, this opinion clarifies the scope of the external powers of the EC vis-à-vis its member states. The Court held in essence that the Agreements — although concerning neither exclusively nor predominantly sensitive sectors, such as culture, education, as well as social and human health services — fall within the shared competence of the EC and its member states. Interestingly enough, the opinion was rendered on November 30, 2009, on the eve of the entry into force of the Lisbon Treaty, which, inter alia, modified once more the CCP provisions. Yet, this opinion remains relevant to the extent that it helped to resolve another dispute pending before the ECJ on whether the approval of Vietnam's membership in the WTO fell solely under the competence of the EC or whether it also required the participation of the member states.

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**Disputes Related to Healthcare Across National Boundaries: The Potential for Arbitration**

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[George Washington International Law Review, Forthcoming](#)

Trade in international health services has the potential to play a leading role in the global economy, but its rapid growth is impeded by legal barriers. Advances in technology and cross-border movement of people and health services create legal ambiguities and uncertainties for businesses and consumers involved in transnational medical malpractice disputes. Existing legal protections and remedies afforded by traditional judicial frameworks are unable to resolve the following challenges: (1) assertion of personal jurisdiction; (2) choice of forum and law considerations; (3) appropriate theories of liability for injuries and damages arising from innovations in medical care and delivery of health services; and (4) enforcement of foreign judgments. Such legal uncertainties and ambiguities call for a uniform means of redress that is more flexible and predictable than litigation in a court room. Given such needs, arbitration offers a potential solution, as it is a private streamlined adjudication process that has been successfully utilized on an international level to resolve several of the above mentioned legal quandaries. The voluntary, flexible, and legally binding nature of arbitration agreements across jurisdictions makes this form of dispute resolution more efficient and adaptive to changes in the health services industry than litigation. With careful construction of an approach that accounts for arbitration costs, reasonable recovery amounts, and complementary mechanisms such as no-fault compensation, international arbitration of medical malpractice disputes will reallocate the legal risks borne by businesses and consumers more fairly and efficiently.

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**Contracting for State Intervention: The Origins of Sovereign Debt Arbitration**[Mark C. Weidemaier](#)

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[Law and Contemporary Problems, Vol. 73, No. 4, 2010](#)

Most models of contracting behavior assume that contract terms are meant to be enforced, whether through legal or relational means. That assumption extends to dispute resolution terms like arbitration clauses. According to theory, contracting parties adopt arbitration clauses because they want to arbitrate disputes and because they believe that a counter-party who has agreed to arbitrate will keep that promise rather than incur the resulting legal or extra-legal sanction. In this article, I describe how this standard account cannot explain the origins of arbitration clauses in sovereign bond contracts. Drawing on original archival research and secondary sources, the article traces the routine use of arbitration clauses to U.S. dollar diplomacy in the first decades of the 20th century and shows that these early clauses were not designed to facilitate an arbitration between lender and borrower. Instead, the clauses were designed to justify intervention by capital-exporting states on behalf of disappointed citizen-investors and to convince prospective investors that the prospect of such intervention would deter default. These early arbitration clauses, then, were little more than efforts to signify and project power by capital-exporting states. The article traces the evolution of arbitration clauses over the first half of the century and concludes that lenders often hoped (typically in vain) that these clauses would enable them to harness the enforcement capacity of state actors.

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**Côte D'Ivoire: Defending Democracy and Restoring the Rule of Law**[Omoba Oladele Opeolu Osinuga](#)*affiliation not provided to SSRN*

This paper is a commentary on the constitutional crisis in Côte d'Ivoire following the stalemate emanating from the presidential elections of 3 December 2010. The paper examines the rule of law and its impact on democracy. It further looks at the history of conflict in Africa and the enforcement of International Law.

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**Participatory Rights in the Ontario Mining Sector: An International Human Rights Perspective**[Penelope C. Simons](#)

University of Ottawa - Faculty of Law

[Lynda Margaret Collins](#)

University of Ottawa

*McGill International Journal of Sustainable Development Law & Policy, Vol. 6, No. 2, 2010*

There has been a growing focus in Canada on the environmental and social impacts of Canadian extractive companies operating extra-territorially. However, recent disputes concerning the lack of public consultation on proposed large domestic mining projects, as well as disputes surrounding Aboriginal rights in lands subject to mining claims, have highlighted significant human rights concerns associated with Canada's domestic provincial and territorial mining regimes. This article assesses, from the perspective of international human rights law, how both emerging and established international human rights of participation are treated in the Ontario mining sector. It examines the extent to which the general right to participation in environmental decision-making, the right of aboriginal communities to free prior and informed consent, and the right of peaceful assembly have been protected through Ontario's mining regime and by the courts in disputes over mining activity on land subject to aboriginal rights and/or title claims. Two recent cases, Frontenac Ventures Corporation v. Ardoch Algonquin First Nation and Platinex Inc v. Kitchenuhmaykoosib Inninuwug First

Nation, raise serious concerns as to whether domestic law, as it has been applied in the mining sector, is consistent with Canada's international human rights obligations. Moreover, it is not clear that the new Far North Act and recent amendments to the Ontario Mining Act sufficiently address these concerns.

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### **The Spread of Anti-Trafficking Policies - Evidence from a New Index**

[Seo-Young Cho](#)

University of Goettingen (Gottingen)

[Axel Dreher](#)

University of Goettingen (Gottingen); ETH Zurich - KOF Swiss Economic Institute; CESifo (Center for Economic Studies and Ifo Institute for Economic Research); Institute for the Study of Labor (IZA)

[Eric Neumayer](#)

London School of Economics and Political Science (LSE)

We analyze the spread of policies dealing with international trafficking in human beings. Arguing that countries are unlikely to make independent choices, we identify pressure, externalities and learning or emulation as plausible diffusion mechanisms for spatial dependence in anti-trafficking policies. We develop a new index measuring governments' overall anti-trafficking policies for 177 countries over the 2000-2009 period. We also assess a country's level of compliance in the three main constituent dimensions of anti-trafficking policies - prosecution, protection and prevention. Employing a spatial autoregressive model, we find that, with the exception of victim protection measures, anti-trafficking policies diffuse across contiguous countries and main trading partners due to externality effects. We find evidence for learning or emulation effects in all policy domains, with countries looking toward peers with similar political views or cultural values. Surprisingly, major destination countries do not seem to exert pressure on relevant main countries of origin or transit to ratchet up their policies.

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### **Deconstructing CEDAW's Article 14: Naming and Explaining Rural Difference**

[Lisa R. Pruitt](#)

University of California, Davis - School of Law

[William & Mary Journal of Women and the Law, Vol. 17, 2011](#)

[UC Davis Legal Studies Research Paper No. 248](#)

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) is the first human rights instrument to recognize explicitly rural-urban difference. It does so by enumerating specific rights for rural women in Article 14 and also by mentioning their needs in relation to Article 10 on education. In this Essay, I examine the Convention's Travaux Préparatoires to better understand the forces and considerations that led to the inclusion of Article 14 and its recognition of rural people and places. I also assess Article 14's particular mandates in light of both that drafting history and CEDAW's other provisions, and I consider the assumptions implicit in the Convention's embrace of rural exceptionalism. In addition, I offer some thoughts on the expressive significance of the particular rights accorded to rural women, as well as of the explicit acknowledgment of this group – and, by extension, rural populations in their entirety – in this widely ratified treaty. I thus discuss what CEDAW implies about the character of rurality and rural-urban difference. Finally, I argue that CEDAW provides a framework for spatial equality, in addition to the more obvious and comprehensive one for gender equality. This Essay therefore fills a void in the legal scholarship on CEDAW, which often mentions Article 14 in inventories of the Convention's provisions, but which has largely ignored both its meaning and significance.

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**Drawing the Right Lessons from ICSID Jurisprudence on the Doctrine of Necessity****Amin George Forji***affiliation not provided to SSRN**Arbitration: The International Journal of Arbitration, Mediation and Dispute Management, Vol. 76, No. 1, pp. 44-57, 2010*

Bilateral investment treaties (BITs) and the International Centre for the Settlement of Investment Disputes (ICSID) have over the years injected an important dynamic into public international law, that is, the replacement of a political remedy (peaceful cooperation amongst nations) by a legal one (settlement of investment disputes). The institution of ICSID and the revision of BITs in line with its rules have opened the way for direct investors' claims and investor-state arbitration. The obvious implication of a compulsory arbitration provision is that it has made up for many shortcomings of the diplomatic protection mechanism with, "the potential for an individual investor, with or without the approval of its home government, to press a conflict that may ultimately have diplomatic implications and may affect relations between the two countries concerned". It is however still debated whether such a mechanism guarantees fairness and equity for both investors and host states, or merely advantages one BIT signatory to the detriment of the other. Argentina has had more cases before the ICSID tribunals than any other country. Faced with an economic crisis in 2001–2002, it ran into conflict with foreign investors when it repealed the Convertibility Law on which most of its BITs had been negotiated. Could that action be justified as one taken in times of peril and in dire need, as sanctioned by international law, or was it just an outright breach of Argentina's own contractual commitments?

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**Naval Chameleons: Re-Evaluating the Legality of Deceptive Lighting Under International Humanitarian Law****Mike Madden**

Dalhousie University

*Canadian Naval Review, Vol. 6, No. 4, p. 4, 2011*

A warship, like a chameleon, can gain a tactical advantage at sea by changing its appearance, and particularly by employing deceptive lighting measures at night. International Humanitarian Law (IHL), however, only permits certain forms of trickery or "ruses" in armed conflicts, while prohibiting more treacherous forms of "perfidy." In spite of a widespread acceptance of deceptive lighting within naval circles, and a blanket condemnation of the practice from certain academic commentators, this article will demonstrate that deceptive lighting is neither universally permitted nor prohibited under IHL. Naval commanders may require a more nuanced understanding of IHL's perfidy laws if they are to properly assess the legality of deceptive lighting.

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**Forum Shopping Before International Tribunals: (Real) Concerns, (Im)Possible Solutions****Joost Pauwelyn**

Graduate Institute of International and Development Studies (HEI)

**Luiz Eduardo Ribeiro Salles***affiliation not provided to SSRN**Cornell International Law Journal, Vol. 42, 2009*

This article pursues Professor Yasuhei Taniguchi's inclination for procedural questions and applies it to the central problem in one of Taniguchi's most celebrated rulings, Mexico — Soft Drinks (a case he chaired on appeal), namely, forum shopping before international tribunals. The Soft Drinks dispute between Mexico and the United States originated because of contested sugar quotas allocated to Mexico under the North American Free Trade Agreement (NAFTA). When Mexico attempted to enforce those alleged quota rights under NAFTA, the procedure was stranded in the panel selection stage where, according to Mexico, the United States simply refused to appoint panelists in violation of

NAFTA. To retaliate against this state of affairs, and instead of gaining larger quota shares on the U.S. sugar market, Mexico imposed a discriminatory tax on imports of U.S. soft drinks. The United States then decided to challenge the Mexican tax, not under NAFTA, but at the World Trade Organization (WTO). . . . The goal of this article is not to critically examine the Soft Drinks ruling. Rather, the article examines the nature and potential concerns of the relatively new phenomenon of forum shopping among international tribunals. Further, it asks the question whether domestic law principles such as *res judicata*, *lis pendens*, and *forum non conveniens* could be used to alleviate such concerns. The article finds that, to the extent these principles apply before international tribunals, they fail to address the problem. Instead, states should regulate forum shopping explicitly in their treaty regimes, and international tribunals should defer to such explicit treaty clauses. . . .

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### **Beyond the Monopoly of States**

[David Gartner](#)

Arizona State University - Sandra Day O'Connor College of Law

[University of Pennsylvania Journal of International Law, Vol. 32, No. 2, p. 595, Winter 2010](#)

In the twenty-first century, a wide range of complex global challenges will require unprecedented levels of global cooperation between states and non-state actors. Yet few leading international institutions today are designed to effectively leverage the resources, ingenuity, and connectivity of diverse societal actors. While some scholars maintain the view that civil society should not meaningfully participate in the governance of international institutions, a new generation of multi-stakeholder institutions points to a new way of understanding the relationship between non-state actors and international institutions. This article examines the role of civil society in the governance of international institutions and highlights this new generation of multi-stakeholder institutions that involve non-state actors as full participants in governance. It applies insights from work on associative democracy to suggest a new approach to evaluating civil society participation within international institutions.

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### **International Organizations as Law-Makers**

[Jan Wouters](#)

Leuven Centre for Global Governance Studies

[Philip De Man](#)

*affiliation not provided to SSRN*

*Leuven Centre for Global Governance Working Paper No. 21*

This working paper analyzes the law-making processes of international organizations and the impact thereof, particularly in the light of the functionalism-constitutionalism dichotomy and the agency theory. Both doctrines are introduced briefly before expanding upon the attribution of law-making powers to international organizations, their decision-making methods and the decisions of their judicial organs. The working paper then focuses on the impact of international organizations on the adoption of treaties and the development of customary international law. Finally, the issues of democratic deficit and multilevel regulation are addressed. The paper demonstrates that international organizations have become increasingly active players in the field of international law-making. This evolution has not always and necessarily been the result of deliberate considerations on the part of the Member States who hired the international organizations. It rather follows from a combination of constitutionalist-inspired measures taken by the principals in order to minimize and otherwise rectify the agency costs and losses inherent in all functional PA-relationships.

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**Contemporary International Community: Between Hegemony and Constitutionalism****Andraz Zidar***affiliation not provided to SSRN*

In the contemporary international community we can identify two main processes: hegemony and constitutionalism. This work (in the form of a PhD) examines how the two processes influence the shape of international law. Author suggests that the two phenomena represent an antinomy which leads to a new stage in the development of the global community.

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**Proliferation of Regional Trade Agreements: Complementing or Supplanting Multilateralism?****Rafael Leal-Arcas**

Queen Mary University of London - School of Law

*Chicago Journal of International Law, Vol. 11, No. 2, pp. 597-629, 2011*

With the creation of the World Trade Organization (WTO) in 1995, the pyramidal design of the international trading system placed multilateralism at the top of the pyramid, regionalism/bilateralism in the middle, and the domestic trade and economic policies of WTO Member States at the bottom of the pyramid. This article questions whether this vertical structure is still the case today, given the tremendous proliferation of regional trade agreements (RTAs) in recent years and the fact that the WTO is losing its centrality in the international trading system. The thesis of this article is that the multilateral trading system's single undertaking is no longer feasible, hence affirming RTA proliferation as the *modus operandi* for trade liberalization. This article also argues that RTA proliferation implies the erosion of the WTO law principle of non-discrimination, which endangers the multilateral trading system. RTAs can help countries integrate into the multilateral trading system, but are also a fundamental departure from the principle of non-discrimination. This raises the question of whether RTAs are a building block for further multilateral liberalization or a stumbling block. . . .

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**Côte D'Ivoire: Defending Democracy and Restoring the Rule of Law****Omoba Oladele Opeolu Osinuga***affiliation not provided to SSRN*

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**The Nuremberg Roles of Justice Robert H. Jackson****John Q. Barrett**

Saint John's University - School of Law; Robert H. Jackson Center

*Washington University Global Studies Law Review, Vol. 6, pp. 511-525, 2007**St. John's Legal Studies Research Paper No. 11-001*

During 1945-1946, U.S. Supreme Court Justice Robert H. Jackson served, by appointment of President Truman, as U.S. chief prosecutor at Nuremberg of the principal surviving Nazi war criminals. This article, based on a lecture at Washington University's conference on the 60th anniversary of that trial before the International Military Tribunal (IMT), introduces Jackson the person and the public figure. It then considers some of the facets and roles that the Nuremberg trial year was in and for Jackson: the project's importance; relevant background; ambition; self-sacrifice; commitment to law; innocence and optimism; constant recalibration; eloquent, effective voice; international diplomacy;

the London Agreement and IMT Charter; dream (and nightmare) staffing; the Nuremberg indictment; life and work in Allied-occupied former Germany; building and prosecuting the case; effective trial work; vengeance foresworn; seeing the job through; and victory.

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### **Contracting for State Intervention: The Origins of Sovereign Debt Arbitration**

**Mark C. Weidemaier**

University of North Carolina (UNC) at Chapel Hill - School of Law

*Law and Contemporary Problems, Vol. 73, No. 4, 2010*

Most models of contracting behavior assume that contract terms are meant to be enforced, whether through legal or relational means. That assumption extends to dispute resolution terms like arbitration clauses. According to theory, contracting parties adopt arbitration clauses because they want to arbitrate disputes and because they believe that a counter-party who has agreed to arbitrate will keep that promise rather than incur the resulting legal or extra-legal sanction. In this article, I describe how this standard account cannot explain the origins of arbitration clauses in sovereign bond contracts. Drawing on original archival research and secondary sources, the article traces the routine use of arbitration clauses to U.S. dollar diplomacy in the first decades of the 20th century and shows that these early clauses were not designed to facilitate an arbitration between lender and borrower. Instead, the clauses were designed to justify intervention by capital-exporting states on behalf of disappointed citizen-investors and to convince prospective investors that the prospect of such intervention would deter default. These early arbitration clauses, then, were little more than efforts to signify and project power by capital-exporting states. The article traces the evolution of arbitration clauses over the first half of the century and concludes that lenders often hoped (typically in vain) that these clauses would enable them to harness the enforcement capacity of state actors.

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### **The Development of General Principles for EU Competition Law Enforcement – The Protection of Legal Professional Privilege**

**Michael J. Frese**

Amsterdam Center for Law & Economics (ACLE); Amsterdam Centre for European Law and Governance (ACELG)

*European Competition Law Review, April 2011*

*Amsterdam Center for Law & Economics Working Paper No. 2011-03*

This papers discusses the scope of the EU principle of legal professional privilege ('LPP') and the mechanisms for bottom-up integration. LPP refers to the confidential nature of certain written communications between lawyer and client. Bottom-up integration is the process whereby domestic legal principles are elevated to EU legal principles. The recent Akzo Nobel judgment of the European Court of Justice revisits the principle of LPP and clarifies the conditions for bottom-up integration.

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### **The Law Applicable to International Mediation Contracts**

**Patricia Orejudo Prieto de los Mozos**

Universidad de Oviedo

*InDret, Vol. 1, 2011*

Mediation entails the provision of the services of a professional, the mediator, who holds a legal relationship with the disputants: the mediation contract. Where there are transnational elements in the mediation process, the contract is of an international character. In such situation, the Laws of the diverse States involved could claim to be applicable to the same contract. The determination of the (only) Law applicable is of utmost interest in spite of the high degree of standardization of the obligations of both parties in the mediation contract. First, for such lex contractus establishes the limits of the freedom of the contracting parties. And second, for there are important matters that the

parties do not usually tackle within the wording of mediation contracts and that model rules and standards do not either regulate. The present paper aims at illustrating about the functioning of the present and the future instruments of Private International Law that solve the conflict-of-laws issue: Rome Convention and Rome I Regulation.

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### **Non-State Actors from the Perspective of the International Committee of the Red Cross**

**Raphaël Van Steenberghe**

*affiliation not provided to SSRN*

*PARTICIPANTS IN THE INTERNATIONAL LEGAL SYSTEM - MULTIPLE PERSPECTIVES ON NON-STATE ACTORS IN INTERNATIONAL LAW, pp. 204-232, J. D'Aspremont, ed., London and New York: Routledge, Forthcoming*

It is clear that participation of armed groups in armed conflicts renders some ICRC missions particularly difficult to fulfil in practice, especially when the state against which those groups are fighting opposes ICRC contacts with them. This paper emphasises such difficulties in relation to the ICRC right of initiative and the ICRC assisting role in IHL dissemination. Such a conclusion does not however mean that the ICRC is not legally authorized to carry out these tasks for the benefit of armed groups, even against the consent of the state combating those groups. The latter and the former must indeed be considered as two parties to a conflict, having therefore the same duties but also the same rights. Moreover, it is argued, more particularly, with regards to the ICRC assisting role in IHL dissemination that, although states do not have any obligation to disseminate IHL to armed groups, those groups are themselves bound to disseminate IHL among their members, which necessarily implies that the ICRC has still (at least theoretically) a significant role to play in this respect even beyond the goodwill of the states. Besides those specific problems, participation of armed groups in armed conflicts raises a more general and fundamental question, that is, the question of the applicability of IHL upon such groups. Are the latter obliged by IHL and, in the affirmative, on which legal basis? There is no doubt according to the ICRC that a positive answer must be given to the first question, which is actually in line with state practice and international case law. It is far more difficult to determine the ICRC position on the second question. As it is argued in the paper, some specific ICRC documents evidence that the ICRC seems favourable to a theory based on the direct applicability of IHL, while its attitude commonly adopted at the beginning of internal armed conflicts which consists of recalling to all the parties their duty to respect IHL principles suggests that it (also) favours a theory based on customary law. Although they are founded on two very different rationales and lead either to practical or legal problems, respectively, both these theories are the best candidates for explaining the binding nature of IHL upon all armed groups. The first adequately reflects the intention of states regarding the status of armed groups and their obligations while the second avoids any problem of compliance.

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### **The Law, Economics and Politics of Retaliation in WTO Dispute Settlement**

**Joost Pauwelyn**

Graduate Institute of International and Development Studies (HEI)

*Joost Pauwelyn, THE LAW, ECONOMICS AND POLITICS OF RETALIATION IN WTO DISPUTE SETTLEMENT, Chad P. Bown, ed., Cambridge University Press, 2009*

It is hard to think of a better topic for multi-disciplinary study than trade retaliation in the WTO. When a country violates WTO rules, the remedy of last resort is bilateral, state-to-state trade sanctions. Such trade sanctions are imposed against the violating country by one or more other WTO members that took the initiative to challenge the breach. WTO retaliation must, however, be multilaterally authorized by the WTO following, first, an elaborate procedure establishing (continued) breach in the first place and, second, an arbitration on whether the retaliation is 'equivalent' or 'appropriate' in light of the harm caused by the original violation. This is where the law comes in: Arbitrators must apply legal criteria to assess the harm caused by a WTO violation, select benchmarks

and counterfactuals to do so, as well as decide, where requested, on whether the conditions for so-called cross-retaliation are met (that is, retaliation in the form of, for example, suspending intellectual property rights in response to a WTO-inconsistent import restriction). This process obviously involves economics as well, both economic theory (what is the role of violation-cum-retaliation in an incomplete contract?; what is the optimal design of remedies for breach of contract?) and applied or quantitative economics (how does one calculate lost trade, lost royalties or other economic harm caused by a WTO violation?; how does one make sure that the retaliation in response is 'equivalent'?). Finally, the design, implementation and effectiveness of WTO retaliation is deeply political, ranging from the decision of whether to retaliate in the first place (especially salient in developing countries) to selecting specific products to retaliate against (e.g. with a view to compensate or protect domestic, import-competing industries at home, say, Mexico keeping out US corn syrup to please Mexican cane sugar producers; or, alternatively, to exert maximum political pressure in the violating country, say, the EC restricting Florida orange juice to affect US President Bush's re-election chances in 2004).

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### **Elusive Equality: The Armenian Genocide and the Failure of Ottoman Legal Reform**

**Mark L. Movsesian**

St. John's University School of Law

*St. John's Legal Studies Research Paper No. 1600745*

*Islamic Law and Law of the Muslim World Paper, Forthcoming*

This essay, prepared for a symposium on legal aspects of the Armenian Genocide, addresses the treatment of the Armenian community in Ottoman law. For most of its history, the Ottoman Empire adhered to classical Islamic law, which viewed Armenians and other Christians as dhimmis – formally protected, but legally subordinate, minority communities. The nineteenth-century Ottoman reform movement known as the Tanzimat granted dhimmis legal equality for the first time. Equality for dhimmis subverted the traditional social hierarchy and sparked a religious backlash, including the Hamidian massacres of 1894-1896, which killed hundreds of thousands of Armenians and other Christians. The Hamidian massacres in turn initiated a cycle of violence that led eventually to genocide. Although the Tanzimat did not itself cause the Armenian Genocide, the failure of legal reform, and the resentment that equality for religious minorities created in Ottoman society, were important contributing factors.

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### **Muslim Women's Claims to Refugee Status within the Context of Child Custody Upon Divorce Under Islamic Law**

**Ekaterina Yahyaoui Krivenko**

University of Montreal - Faculty of Law

*International Journal of Refugee Law, Vol. 22, No. 1, pp. 48-71, 2010*

This article analyses case law from the UK, New Zealand, and Canada relating to claims for recognition of refugee status presented by divorced Muslim women, revolving around the issue of child custody after divorce under conservative Islamic law, which deprives women of any meaningful relationship with their children. The negative attitude of the UK authorities is compared to the open and positive approach of decision makers in New Zealand and Canada. The use and interpretation of aspects of the refugee definition, such as persecution, particular social group and the standard of state protection, are analyzed in more detail. The article argues that, in order to adequately evaluate this type of claim, decision makers should take into account all aspects of a woman's experiences including the consequences of the decision on their children.

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**'Cowboy Economics' versus 'Spaceship Ecology': Constructing a Sustainable Environmental Ethic**

[Joshua Chad Gellers](#)

University of California, Irvine

In order to improve and protect the environment while keeping in mind economic realities that constrain action it is essential to devise an ethical approach amenable to both economics and environmental ethics. This paper endeavors to provide a framework for achieving such a compromise by: (1) Defining critical tenets of neoclassical economics and deep ecology; (2) Reframing the policy problem; (3) Reviewing the weaknesses of regulative, normative, and cognitive institutionalist perspectives on economics and the environment; and (4) Suggesting a normative analytical framework that allows for a dialogue between economics and environmental ethics. I conclude that a more sustainable environmental ethic which promotes both efficiency and justice should be based on three principles: regulation, education, and participation.

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**Irreversibility, Ignorance, and the Intergenerational Equity-Efficiency Trade-Off**

[Nikolai Hoberg](#)

Leuphana University of Lüneburg - Dept. of Sustainability Sciences and Dept. of Economics

[Stefan Baumgärtner](#)

Leuphana University of Lüneburg - Dept. of Sustainability Sciences and Dept. of Economics

We demonstrate the existence of an intergenerational equity-efficiency trade-off in policy-making that aims at Pareto-efficiency across generations and sustainability, i.e. non-decreasing utility over time. Our model includes two salient characteristics of sustainability problems and policy: (i) temporal irreversibility, i.e. the inability to revise one's past actions; (ii) closed ignorance, i.e. future consequences of present actions in human-environment systems may be "unknown unknowns." If initially unforeseen sustainability problems become apparent and policy is enacted after irreversible actions were taken, policy-making faces a fundamental trade-off between intergenerational Pareto-efficiency and sustainability.

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**Terrorism as Crime: Toward a Lawful and Sustainable Detention Policy**

[Jonathan Hafetz](#)

Seton Hall Law School

*Jonathan Hafetz, HABEAS CORPUS AFTER 9/11: CONFRONTING AMERICA'S NEW GLOBAL DETENTION SYSTEM, Chapter 12, NYU Press, 2011*

The book from which this chapter is excerpted traces the history of the habeas corpus litigation after 9/11 that challenged the military detention and trial of prisoners in the "war on terror." Preceding chapters make the case for a broad conception of habeas corpus review, discussing the gaps left by the Supreme Court's decision in *Boumediene v. Bush* and arguing why habeas jurisdiction should extend to any detention by or at the behest of the United States. This chapter explains why habeas corpus review also is, in many respects, the start, not the end, of the conversation about law and national security. The chapter thus addresses a question at the heart of much of the habeas corpus litigation: who may be detained as a combatant and what is the legitimate scope of the government's military detention power. The chapter advocates a criminal law model rather than a military model in the treatment of suspected terrorists. The chapter thus considers and rejects arguments for indefinite executive detention, military commissions, or other alternative forums to the criminal justice system, such as national security courts. Finally, the chapter describes how the criminal justice system provides an important check not only against unlawful detention but also against torture and other mistreatment.

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### **The Regulatory Anticommons of Green Infrastructures**

[Giuseppe Bellantuono](#)

University of Trento - Department of Legal Sciences

Development of green infrastructures (renewable energy plants and transmission networks) is urgently needed if significant reductions of greenhouse emissions are to be accomplished in the next few decades. But the huge financial investments required by these infrastructures will not be undertaken without a well-designed regulatory framework. This paper argues that barriers to the implementation of such a framework can best be understood by drawing analogies to the Law and Economics literature on anticommons. This analytic framework is employed to assess and criticize EU and US proposals to regulate planning and siting of green infrastructures.

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### **'Refugees' at Home: The Internally Displaced; Which Protection System? (Arabic)**

[Rania Zabaneh](#)

*affiliation not provided to SSRN*

*Birzeit University Working Paper No. 2011/25 (ARA) – MRS Module*

They are described as the "refugees at home"; internally displaced persons who have fled their homes as a result of armed conflict, generalized violence, violations of human rights or natural or human-made disasters, yet remain within the borders of their country of origin. The phenomenon of internally displaced persons has increased since the end of the cold war, because in recent years conflicts have predominantly been internal. There are wide-ranging similarities between the plight of refugees and that of internally displaced persons, originating from the concept of alienation; since both categories are no longer willing or capable of enjoying the protection of their own country. However there is an important legal distinction between refugees who flee their country and "refugees" who become displaced within their own national borders. While refugees benefit from the protection of the 1951 international convention on refugees, the additional protocol of 1967 and the statute of the office of the United Nations High Commissioner for Refugees; internally displaced persons do not enjoy any special legal status since they remain within their own countries and hence subject to its laws. The fact that there is no special legal status for the internally displaced should not imply that they lack protection granted by national laws, international human rights law and international humanitarian law. However, these laws often leave internally displaced persons without adequate protection on the ground due to legal loopholes, lack of tools for enforcement and other obstacles. In the absence of an international treaty on internally displaced persons, the guiding principles on internal displacement were drafted to provide international institutions with guidelines for their staff on the ground, in a time where no support was gained from national governments for the concept of an international treaty, with concerned governments arguing that this is a domestic matter covered by the law of the land. The debate can be summed up thus: would it be sufficient to strengthen the protection of the internally displaced within existing legal frameworks, or should the concept of national sovereignty be bypassed; either by drafting a special treaty on internally displaced persons or by revising the concept of refugees to include the internally displaced?

## **II. Books**

### [The EU as International Environmental Negotiator](#)

(Ashgate, March 2011)

Tom Delreux, University of Louvain, Belgium

Delreux examines how the EU functions when it participates in international environmental negotiations. In particular, this book looks at the internal EU decision-making process with regard to international negotiations that lead to multilateral environmental agreements. By studying eight such decision-making processes, the book analyses how much negotiation autonomy (or 'discretion') the



EU negotiator (the European Commission or the Council Presidency) enjoys vis-à-vis the member states it represents and how this particular degree of discretion can be explained. The book's empirical evidence is based on extensive literature review, primary and semi-confidential document research, as well as interviews with EU decision-makers. It is aimed at a readership interested in EU politics and decision-making, global/multilateral governance, environmental policy science and methodological development of Qualitative Comparative Analysis.

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**Economic Globalisation and Human Rights**

(Cambridge Univ. Press, Feb. 2011)

Wolfgang Benedek, Koen De Feyter & Fabrizio Marrella, eds.

Economic globalisation is one of the guiding paradigms of the twenty-first century. The challenge it implies for human rights is fundamental, and key questions have up to now received no satisfying answers. How can human rights protect human dignity when economic globalisation has an adverse impact on local living conditions? How should human rights evolve in response to a global economy in which non-statal actors are decisive forces? Economic Globalisation and Human Rights was originally published in 2007, and sets out to assess these and other questions to ensure that, as economic globalisation intensifies, human rights take up the central and crucial position that they deserve. Using a multidisciplinary methodology, leading scholars reflect on issues such as the need for global ethics, the localisation of human rights, the role of human rights in WTO law, and efforts to make international economic organisations more accountable and multinational corporations more socially responsible.

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**An Introduction to the International Criminal Court (4th Edition)**

(Cambridge Univ. Press, Feb. 2011)

William Schabas, National University of Ireland, Galway

The International Criminal Court has ushered in a new era in the protection of human rights. Protecting against genocide, crimes against humanity and war crimes, the Court acts when national justice systems are unwilling or unable to do so. Written by the leading expert in the field, the fourth edition of this seminal text considers the Court in action: its initial rulings, cases it has prosecuted and cases where it has decided not to proceed, such as Iraq. It also examines the results of the Review Conference, by which the crime of aggression was added to the jurisdiction of the Court and addresses the political context, such as the warming of the United States to the Court and the increasing recognition of the inevitability of the institution.

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**Law and Practice of EU External Relations: Salient Features of a Changing Landscape**

(Cambridge Univ. Press, Feb. 2011)

Alan Dashwood, & Marc Maresceau (eds)

Part I. Constitutional and Institutional Questions: 1. Direct effect and interpretation of international agreements in the recent case law of the European Court of Justice Francis Jacobs  
2. Defining competence in EU external relations: lessons from the Constitutional Treaty Marise Cremona  
3. Article 47 TEU and the relationship between first and second pillar competences Alan Dashwood  
4. EC Law and UN Security Council resolutions - in search of the right fit Piet Eeckhout  
5. Fundamental rights and the interface between second and third pillar Eleanor Spaventa  
6. The EU as a party to international agreements: shared competences? Mixed responsibilities? Ramses Wessel  
7. Will the common commercial policy be impeded by non-ratification of the Constitutional Treaty? Peter-Christian Müller-Graff

8. The extent to which the EC legislature takes account of WTO obligations: jousting lessons from the European Parliament Jacques Bourgeois and Orla Lynskey  
Part II. Bilateral and Regional Approaches: 9. The relations between the EU and Switzerland Christine Kaddous  
10. The relations between the EU and Andorra, San Marino and Monaco Marc Maresceau  
11. The EU's Neighbourhood Policy towards Eastern Europe Christophe Hillion  
12. The four common spaces: new impetus to the EU-Russia strategic partnership? Peter Van Elsuwege  
13. The EU's Strategic Partnership with the Mediterranean and the Middle East: a new geopolitical dimension of the EU's proximity strategies Erwan Lannon  
14. The EU's transatlantic relationship Günter Burghardt  
Part III. Selected Substantive Areas: 15. With eyes wide shut: the EC strategy to enforce intellectual property rights abroad Inge Govaere  
16. EU environmental law and its green footprints in the world Kirstyn Inglis.

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**Military Threats: The Costs of Coercion and the Price of Peace**

(Cambridge Univ. Press, Feb. 2011)

Branislav L. Slantchev, University of California, San Diego

Is military power central in determining which states get their voice heard? Must states run a high risk of war to communicate credible intent? Slantchev shows that states can often obtain concessions without incurring higher risks when they use military threats. Unlike diplomatic forms of communication, physical military moves improve a state's expected performance in war. If the opponent believes the threat, it will be more likely to back down. Military moves are also inherently costly, so only resolved states are willing to pay these costs. Slantchev argues that powerful states can secure better peaceful outcomes and lower the risk of war, but the likelihood of war depends on the extent to which a state is prepared to use military threats to deter challenges to peace and compel concessions without fighting. The price of peace may therefore be large: states invest in military forces that are both costly and unused.

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**Networks of Nations: The Evolution, Structure, and Impact of International Networks, 1816–2001**

(Cambridge Univ. Press, Feb. 2011)

Zeev Maoz, University of California, Davis

Maoz views the evolution of international relations over the last two centuries as a set of interacting, cooperative and conflicting networks of states. The networks that emerged are the result of national choice processes about forming or breaking ties with other states. States are constantly concerned with their security and survival in an anarchic world. Their security concerns stem from their external environment and their past conflicts. Because many of them cannot ensure their security by their own power, they need allies to balance against a hostile international environment. The alliance choices made by states define the structure of security cooperation networks and spill over into other cooperative networks, including trade and institutions. Maoz tests his theory by applying social networks analysis (SNA) methods to international relations. He offers a novel perspective as a system of interrelated networks that co-evolve and interact with one another.

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**The Problem of Harm in World Politics: Theoretical Investigations**

(Cambridge Univ. Press, 2011)

Andrew Linklater, Aberystwyth University

The need to control violent and non-violent harm has been central to human existence since societies first emerged. This book analyses the problem of harm in world politics which stems from the fact that societies require the power to harm in order to defend themselves from internal and external threats, but must also control the capacity to harm so that people cannot kill, injure, humiliate or exploit others as they please. Andrew Linklater analyses writings in moral and legal philosophy that define and classify forms of harm, and discusses the ways in which different theories of international relations suggest the power to harm can be controlled so that societies can co-exist with the minimum of violent and non-violent harm. Linklater argues for new connections between the English School study of international society and Norbert Elias' analysis of civilizing processes in order to advance the study of harm in world politics.

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**The UN Human Rights Committee: Practice and Procedure**

(Cambridge Univ. Press, 2011)

Yogesh Tyagi, City University of Hong Kong

As a result of its origins in the International Covenant on Civil and Political Rights, and the amount of work that it has done, the UN Human Rights Committee is considered the most important body in the UN human rights treaty system. Sensitive to the viewpoint of developing countries, and taking into account the interplay of law and politics, this comprehensive study of the Committee's procedure and practice assesses its conceptual, institutional and functional frameworks and analyses a large number of cases with which the Committee has dealt. It is based on the drafting history of the Covenant and the Optional Protocols thereto, in-depth analysis of the relevant documents of the United Nations and other international bodies, observations on the functioning of the Committee and interviews with a number of activists, experts and officials dealing with the work of the Committee.

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**Economic, Social and Cultural Rights**

(Ashgate, March 2011)

Edited by Manisuli Ssenyonjo, Brunel University, UK

Economic, Social and Cultural Rights is a collection of seminal papers examining legal, conceptual and practical questions regarding the international legal protection of economic, social and cultural rights. The volume discusses what human rights obligations economic, social and cultural rights entail for states and non-state actors; the nature and scope of substantive economic, social and cultural rights such as education, health, work, water, enjoyment of the benefits of scientific progress, and cultural rights; as well as the justiciability of these rights at an international level and at the national level. The paramount importance of such questions is illustrated, among other things, by the catastrophic situation of economic, social and cultural rights as human rights in developing and developed states. The volume is divided into three main parts which focus on human rights obligations for states and non-state actors arising from treaties protecting economic, social and cultural rights; analysis of selected substantive rights; and finally the justiciability of economic, social and cultural rights in various contexts such as within the United Nations, Europe, Inter-American, and African systems, as well as within the domestic system.

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### NGOs in China and Europe: Comparisons and Contrasts

(Ashgate, March 2011)

Edited by Yuwen Li, Erasmus University Rotterdam, The Netherlands

This volume presents a comparison of the experiences of NGOs in China and Europe. The chapters on China contain the most comprehensive and up-to-date analysis of various types of NGOs currently active in the country. The contributions on foreign NGOs in China, non-governmental think tanks, public interest legal organizations, labour related NGOs and charity organizations, are the first in English to discuss successful experiences as well as the difficulties they face in the post-Mao era. The European studies draw examples from countries where the experiences of NGOs are at various stages of development. The section on NGOs in Central and Eastern Europe examines the rapid expansion of civil society and their pivotal role in promoting political change and building democracy in a transitional society, as well as the challenges they confront in advancing a strong civil society. Those chapters on NGOs' experiences in Western European countries, especially in the Netherlands and the UK, provide insightful information and examination of the most contentious issues concerning NGOs' accountability, governance and relationship with the government.

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### Justice beyond 'Just Us'

(Ashgate, March 2011)

Gregory W. Streich

Notions of justice and community in the United States are increasingly challenged by trends like immigration, multiculturalism, and economic inequality as well as historical legacies like Jim Crow-era racial segregation. These dynamics continually re-shape the communities in which people live, whether by generating new forms of interdependency and inequality, creating new social cleavages or exacerbating existing ones, or generating new spaces in which cross-boundary contact, conflict, or cooperation is possible.

Revealing the ways in which notions of justice and community overlap in American politics and public discourse through concrete political questions which emerge when considering dimensions of time, place, and difference, Gregory W. Streich offers a fresh re-examination of the normative ideas of justice and community. He encourages Americans to move from a view of justice that applies only to people who are "like us" to a view of justice that applies to people beyond "just us."

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### Linguistic Diversity and European Democracy

(Ashgate, March 2011)

Anne Lise Kjær and Silvia Adamo

What role does linguistic diversity play in European democratic and legal processes? Is it an obstacle to deliberative democracy and a hindrance to legal certainty, or a cultural and economic asset and a prerequisite for the free movement of citizens? This book examines the tensions and contradictions of European language laws and policy from a multi-disciplinary perspective. With contributions from leading researchers in EU law and legal theory, political science, sociology, sociolinguistic and cognitive linguistics, it combines mutually exclusive and competing perspectives of linguistic diversity. The work will be a valuable resource for academics and researchers in the areas of European law, legal theory and linguistics.

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### [Ethics and Socially Responsible Investment](#)

(Ashgate, March 2011)

William Ransome and Charles Sampford

This volume breaks new ground by approaching Socially Responsible Investment (SRI) as an explicitly ethical practice in financial markets. The work explains the philosophical and practical shortcomings of 'long term shareholder value' and the origins and conceptual structure of SRI, and links its pursuit to both its deeper philosophical foundations and the broader, multi-dimensional global movement towards greater social responsibility in global markets. Interviews with fund managers in the Australian SRI sector generate recommendations for better integrating ethics into SRI practice via ethically informed engagement with invested companies, and an in-depth discussion of the central practical SRI issue of fiduciary responsibility strengthens the case in favour of SRI. The practical and ethical theoretical perspectives are then brought together to sketch out an achievable ideal for SRI worldwide, in which those who are involved in investment and business decisions become part of an 'ethical chain' of decision makers linking the ultimate owners of capital with the business executives who frame, advocate and implement business strategies. In between there are investment advisors, fund managers, business analysts and boards. The problem lies in the fact that the ultimate owners are discouraged from considering their own values, or even their own long term interests, whilst the others often look only to short term interests. The solution lies in the latter recognising themselves as links in the ethical chain.

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### [NGOs and the Struggle for Human Rights in Europe](#)

(Hart Publishing, 2011)

Loveday Hodson

This publication provides a fresh perspective on the litigation of the European Court of Human Rights by focusing upon the role that non-governmental organisations play in it. The inspiration for this work was the growing literature that points to human rights as the outcome of political and social struggles. The role that NGOs play in these struggles is well-documented in the context of other international and regional human rights tribunals, but has been less widely written about in the context of the European Court of Human Rights. The Court is typically subject to legalistic, as opposed to socio-political, scrutiny. In this book the Court's litigation is re-cast as a site where politically motivated actors attempt to impact upon the meaning that is given to the language of the European Convention on Human Rights and to use the Convention as a mechanism that can contribute to social change.

For the purposes of this research a mixture of quantitative and qualitative research techniques are adopted. These methods facilitate the author's desire to obtain both a de-centred perspective on the Court's functions and a systematic picture of the scale of NGO involvement in the Court's litigation. The core of this work is primarily based on data obtained from a sample of cases in which the Court had delivered judgment, and a plethora of associated materials, including extensive interviews with NGOs that were involved in those cases. Ultimately, this book challenges the idea that the litigation of the Court is bound to the idea of achieving individual justice and highlights the meaningful impact that NGOs have on certain important sections of the Court's litigation.

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### [Ethics and Socially Responsible Investment: A Philosophical Approach](#)

(Ashgate, March 2011)

William Ransome, Griffith University, Australia and Charles Sampford, Griffith University, Australia

This volume breaks new ground by approaching Socially Responsible Investment (SRI) as an explicitly ethical practice in financial markets. The work explains the philosophical and practical shortcomings of 'long term shareholder value' and the origins and conceptual structure of SRI, and links its pursuit to

both its deeper philosophical foundations and the broader, multi-dimensional global movement towards greater social responsibility in global markets. Interviews with fund managers in the Australian SRI sector generate recommendations for better integrating ethics into SRI practice via ethically informed engagement with invested companies, and an in-depth discussion of the central practical SRI issue of fiduciary responsibility strengthens the case in favour of SRI. The practical and ethical theoretical perspectives are then brought together to sketch out an achievable ideal for SRI worldwide, in which those who are involved in investment and business decisions become part of an 'ethical chain' of decision makers linking the ultimate owners of capital with the business executives who frame, advocate and implement business strategies. In between there are investment advisors, fund managers, business analysts and boards. The problem lies in the fact that the ultimate owners are discouraged from considering their own values, or even their own long term interests, whilst the others often look only to short term interests. The solution lies in the latter recognising themselves as links in the ethical chain.

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### **International Law: Examples & Explanations**

[Valerie Epps](#)

Suffolk University Law School

[Lorie Graham](#)

Suffolk University Law School

*INTERNATIONAL LAW: EXAMPLES & EXPLANATIONS, Wolters Kluwer, 2011*

[Suffolk University Law School Research Paper No. 11-09](#)

In recent years, admissions directors in law schools and colleges have indicated that one of the most frequently asked questions by prospective students is what the particular institution has to offer in the area of international law. Law schools and colleges have expanded their course offerings in international law to cover a whole variety of specialized areas, such as international environmental law, international human rights, international business transactions, the law of the sea, and the laws of war, among many others. All of these specialized courses build on the introductory foundational course generally called, simply, "International Law." This book is designed to assist students taking the introductory international law course to understand the framework and subject matter of international law and to work through the EXAMPLES, which consist of realworld problems based on the materials provided. After each EXAMPLE, there follows an EXPLANATION that represents the authors' best attempts at answering the problems posed. The EXAMPLES give students a chance to apply the substantive material they have read and to test their ability to articulate a comprehensive answer. Students are advised to try to answer the problems themselves before reading the EXPLANATION. After answering the problem, students should check their answers with the EXPLANATION. The book is best used as an aid throughout an entire international law course and will also be particularly useful in preparation for examinations. We have found that students grasp the different subjects of international law at a much better level when they have the opportunity to apply their knowledge to problems posed over the full semester in which the course is taught, not just at the end of the course in an examination. By providing substantive information as well as EXAMPLES and EXPLANATIONS related to international law, the authors hope that students will deepen their understanding of the subject and will be encouraged to develop their knowledge further in specialized courses.

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### [Systemic Implications of Transatlantic Regulatory Cooperation and Competition](#)

(World Scientific Books, Feb. 2011)

edited by Simon J Evenett (University of St Gallen, Switzerland) & Robert M Stern (University of Michigan, USA)

Regulations and enforcement decisions that at first appear to have only a domestic impact can have substantial spillover effects on other nations' economies. Experience has shown time and again that



there is no reason to expect that these effects are confined to jurisdictions at the same level of development. Governments on both sides of the Atlantic recognize this, yet their responses in many policy areas are not aligned — sometimes deliberately so. This creates a complex regulatory landscape that appears to be the product of both cooperation and competition, and which can only be fully understood by looking through a number of disciplinary lenses. Drawing on some of the best legal, economic and political science expertise from both sides of the Atlantic, as well as on the knowledge of officials and private practitioners with experience in both industrialized and developing countries, this timely book assesses the systemic, global implications of transatlantic regulatory cooperation and competition. Insights from thematic papers are integrated with those from sector-specific analyses, and a rich set of implications for policymakers, business and civil society is offered.

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Vol. 6, No. 36: Mar 08, 2011

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[Sara Roy](#), affiliation not provided to SSRN

#### **A Fortress Country and a Gated Enclave: Locating the Palestinian Margin**

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[Abaher El-Sakka](#), affiliation not provided to SSRN

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[James J. Woodruff](#), Florida Coastal School of Law

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[Cora Chan](#), University of Hong Kong - Faculty of Law

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[Raphael van Steenberghe](#), affiliation not provided to SSRN

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**Member State Responsibility for the Acts of International Organizations**

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**Transboundary Water Pollution Management: Lessons Learned from River Basin Management in China, Europe and the Netherlands**

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[David G. Victor](#), University of California, San Diego (UCSD) - Graduate School of International Relations and Pacific Studies (IRPS)

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JN: International Review of Finance

PD: March 2011

VO: 11

NO: 1

PG: 123-154(32)

PB: Blackwell Publishing Ltd

IS: 1369-412X

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Click on the URL to access the article or to link to other issues of the publication.

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TI: Cook Islands

AU:

JN: SourceOECD Emerging Economies

PD: February 2011

VO: 2011

NO: 2

PG: 154-167(14)

PB: Organisation for Economic Co-operation and Development

IS: 1608-0173

URL:

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Click on the URL to access the article or to link to other issues of the publication.

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TI: Malaysia

AU:

JN: SourceOECD Emerging Economies

PD: February 2011

VO: 2011

NO: 2

PG: 315-335(21)

PB: Organisation for Economic Co-operation and Development

IS: 1608-0173

URL:

<http://www.ingentaconnect.com/content/oecd/16080173/2011/00002011/00000002/2811011ec030>

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TI: Cook Islands

AU:

JN: SourceOECD Governance

PD: February 2011

VO: 2011

NO: 7

PG: 154-167(14)

PB: Organisation for Economic Co-operation and Development

IS: 1608-0246

URL:

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VO: 2011

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JN: European Journal of Migration and Law

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PG: 1-30(30)

PB: Martinus Nijhoff Publishers

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URL: <http://www.ingentaconnect.com/content/mnp/emil/2011/00000013/00000001/art00001>

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AU: Spiga, Valentina

JN: Journal of International Criminal Justice

PD: 28 March 2011

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PB: Oxford University Press

IS: 1478-1387

URL: <http://www.ingentaconnect.com/content/oup/jicjus/2011/00000009/00000001/art00002>

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JN: Journal of International Criminal Justice

PD: 28 March 2011

VO: 9

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PG: 25-52(28)

PB: Oxford University Press

IS: 1478-1387

URL: <http://www.ingentaconnect.com/content/oup/jicjus/2011/00000009/00000001/art00003>

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PD: 28 March 2011

VO: 9

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PB: Oxford University Press

IS: 1478-1387

URL: <http://www.ingentaconnect.com/content/oup/jicjus/2011/00000009/00000001/art00004>

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VO: 9

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JN: Journal of International Criminal Justice

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PB: Oxford University Press

IS: 1478-1387

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AU: Fletcher, George P.

JN: Journal of International Criminal Justice

PD: 28 March 2011

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IS: 1478-1387

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JN: Journal of International Criminal Justice

PD: 28 March 2011

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JN: European Journal of Education

PD: March 2010

VO: 45

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IS: 0141-8211

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