

**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 have been significantly edited for brevity)

***A. New and Recent Research*****Issues of Shared Responsibility Before the International Court of Justice**

[Andre Nollkaemper](#)

University of Amsterdam - Amsterdam Center for International Law

[Amsterdam Law School Research Paper No. 2011-01](#)

*Amsterdam Center for International Law No. 2011-01*

An increasing number of situations where international responsibility of states is engaged, involve wrongful acts committed by two or more states. Examples of such situations of shared responsibility can be found in the context of multinational military operations, extra-territorial migration policies, or acts that contribute to global environmental problems. The principles applicable to cases of shared responsibility are not well developed. In order to lay a foundation for further study on the topic, this paper systematizes the case law of the International Court of Justice pertaining to shared responsibility. It assesses how the ICJ has treated certain core aspects pertaining to shared

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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: Caitlin Powell & Kate Robinson. 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.

responsibility in such cases as Corfu Channel, Certain Phosphate Lands in Nauru, East Timor and the Legality of the Use of Force, and identifies the questions that require further theoretical work.

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### **On A Differential Law of War: A Response**

Kevin Jon Heller

Harvard International Law Journal Online (Apr. 2011)

A central premise of international humanitarian law (IHL) is that the same rules apply to both parties in an armed conflict "regardless of the type of war they fight, the justness of their respective causes, or the disparities in power and capabilities between them." In her essay, *On a Differential Law of War*, Gabriella Blum questions that premise, asking whether holding powerful parties to higher standards of IHL compliance than weaker parties might better maximize humanitarian welfare in conflict situations. Her answer is that the humanitarian effect of such "common-but differentiated responsibilities" (CDRs) . . . indeterminate because it depends on the nature of the CDR, the type of conflict, and whether the weaker party is a state or nonstate actor. Blum's normative analysis of the desirability of CDRs in IHL is exceptionally powerful, and I agree with most of her conclusions. This brief response, therefore, is intended to be more constructive than critical. In particular, I want to raise five issues that I believe warrant further exploration: (1) whether permitting judges to differentially apply IHL standards could be seen as legitimate; (2) whether proportionality is the kind of standard that permits differential application; (3) whether, and to what extent, CDRs would encourage states and nonstate actors to comply with IHL; (4) whether the case for CDRs might be stronger in noninternational armed conflict (NIAC) than in international armed conflict (IAC); and (5) whether it is possible to assess the humanitarian effect of CDRs without abandoning the *jus ad bellum*/*jus in bello* distinction. I conclude that, in fact, Blum's own analysis supports recognizing at least one kind of CDR: namely, requiring strong states to spend more money than weak states on procuring and using precision weaponry.

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### **Development Disputes in International Trade**

**Tomer Broude**

Hebrew University of Jerusalem - International Law Forum

*LAW AND DEVELOPMENT PERSPECTIVE ON INTERNATIONAL TRADE LAW*, Y.S. Lee, Tomer Broude, Won-Mog Choi & Gary Horlick, eds., CAMBRIDGE University Press, 2011  
*Hebrew University of Jerusalem Faculty of Law Research Paper No. 05-10*

This article introduces the concept of "international development disputes". It argues that despite the well-acknowledged vagueness of 'development' as an operative legal concept, there exists a set of international legal differences (primarily international economic disputes, but not exclusively so) that should be identified as international disputes about development. The range of such disputes is discussed with specific reference to the WTO. Recognizing such disputes has implications for the ways in which such disputes are dealt with. In particular, the effectiveness and legitimacy of using judicial methods to address development disputes should be reconsidered.

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### **Promise against Peril: Of Power, Purpose, and Principle in International Law**

**Robert C. Hockett**

Cornell University - School of Law

*ILSA Journal of International & Comparative Law*, Vol. 17, No. 1, 2010  
*Cornell Legal Studies Research Paper No. 11-10*

I take two recent monographs on international law – Mary Ellen O’Connell’s “The Power and Purpose of International Law,” and Eric Posner’s “The Perils of Global Legalism,” as case studies in a more general inquiry into the role of the “rule of law” ideal in domestic and international law. I argue that

international and domestic law alike give varyingly explicit and effective expression to the rule of law ideal, and that the task before us is accordingly steadily to improve their effectiveness in so doing, not to pretend that there is no role for this ideal to play in interpreting and advancing international legality.

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**An Elementary Consideration of Humanity? Linking Trade-Related Intellectual Property Rights to the Human Right to Health in International Law**

**Lisa Forman**

University of Toronto

*The Journal of World Intellectual Property, Vol. 14, No. 2, pp. 155-175, 2011*

This paper explores methods of achieving linkage in international law between the human right to health and the World Trade Organization (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) ). It explores the relevance to this question of international law's accepted hierarchies, namely jus cogens (peremptory norms), ergo omnes duties (duties "owed to all") and section 103 of the United Nations (UN) Charter. It argues that these rules collectively prohibit gross violations of any rights including health, and place reasonable limits on all human conduct (including trade) to protect human health and life. It turns to historical support for these assertions, including recent de facto recognition that access to AIDS medicines in Sub-Saharan Africa presents a legitimate exception to TRIPS rights. The paper further explores interpretive methods in international law for recognizing the prioritized value of human life and health within existing WTO law and dispute settlement processes, including from the Vienna Convention on the Law of Treaties. It concludes that raising health's priority requires a substantive reordering of the normative priorities that drive trade rules. It suggests that a practical strategy for raising the priority of health within decision making by WTO dispute settlement panels and domestic governments is to advance legal argument about health's appropriate location within international law's existing hierarchies.

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**Water Security: Identifying Governance Issues and Engaging Stakeholders**

**Eric Dannenmaier**

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*WATER SECURITY IN THE MEDITERRANEAN REGION: AN INTERNATIONAL EVALUATION OF MANAGEMENT, CONTROL, AND GOVERNANCE APPROACHES, Andrea Scozzari, Bouabid el Mansouri, eds., NATO Science for Peace and Security Series, Springer, 2011*

This paper examines the concept of environmental security and the relevance of governance frameworks (policies, laws, and institutions) for mitigating water scarcity and degradation concerns in the Middle East and North Africa (MENA) region. The paper highlights the importance of legal and regulatory frameworks that support meaningful risk assessment, policy analysis, strategic planning, and policy implementation in coordination with experts in the scientific community and relevant stakeholders. It emphasizes democratic models for engaging constituencies in addressing water security challenges. The paper was presented as part of a NATO-sponsored workshop in Marrakech, Morocco in June 2010.

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**The Untapped Potential of Investor-State Dispute Settlement Involving Intellectual Property Rights and Expropriation in Free Trade Agreements**

**Bryan Christopher Mercurio**

Chinese University of Hong Kong, Faculty of Law; University of New South Wales, Faculty of Law  
*EWHA Law Journal, 2011*

Much has been written about numerous aspects of investor-state dispute settlement, and the literature grows larger with the release of every publicly available arbitral ruling. One exception,

however, is intellectual property provisions in international investment agreements. The absence of scholarly literature in this area is surprising given not only the voluminous amount of literature written on Intellectual Property Chapters of FTAs but more importantly due to the potential effect the provisions may have on intellectual property rights (IPRs) and on governments to adequately protect areas of domestic interest such as public health. The aim of this article is to draw attention to the potential effect of intellectual property provisions in FTA Investment Chapters on governmental regulatory sovereignty as well as to highlight potential issues and inconsistencies between FTAs and other intergovernmental and multilateral agreements. The article is narrowly focused on recent FTAs, as opposed to longstanding BITs, in order to highlight the modern trends in international trade agreements such as regard for TRIPs standards of IP protection and the recent appearance of TRIPs-Plus provisions. Particular attention is focused on FTAs involving the US, South Korea, Switzerland, China, Australia and Chile. Where applicable, the recently negotiated but not yet implemented South Korea-US FTA (KORUS) will be used as an illustrative example. Both South Korea and US FTAs demonstrate a pro-active approach to negotiating international investment agreements and both nations also have an interest in protecting and enforcing IPRs.

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### **Proliferation of Regional Trade Agreements: Complementing or Supplanting Multilateralism?**

**Rafael Leal-Arcas**

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

*Queen Mary School of Law Legal Studies Research Paper No. 78/2011*

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 paper 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 paper is that the multilateral trading system's single undertaking is no longer feasible, hence RTA proliferation as the modus operandi for trade liberalization. This paper will also argue 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 whether RTAs are a building block for further multilateral liberalization or a stumbling block. . . .

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### **The Competence of Investment Arbitration Tribunals to Seek Preliminary Rulings from European Courts**

**Miloš Olík**

*affiliation not provided to SSRN*

**David Fyrbach**

*affiliation not provided to SSRN*

*CZECH YEARBOOK OF INTERNATIONAL LAW, p. 191, 2011*

In the wake of the accession of new EU Member States in 2004 and in 2007, the portfolio of bilateral investment treaties (BIT) between Member States has become significantly larger. The fact that these BITs overlap with EU law creates friction when BITs are applied by investment tribunals which are constituted thereunder. In the spirit of the requirement that EU law be applied uniformly, these tribunals should have the authority to refer matters to the ECJ for preliminary rulings. Given the peculiarities of commercial and investment arbitration tribunals, it will not do to point to the previous case law of the ECJ on the admissibility of requests for a preliminary ruling by international commercial tribunals (i.e., in particular, Nordsee, Danfoss). In assessing the options of investment

arbitration tribunals for referring matters for a preliminary ruling, one must put the focus on the basis of their jurisdiction, which derives from the provisions of the given legal system, i.e., the international treaty.

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### **Reputational Costs Beyond Treaty Exclusion: International Law Violations as Security Threat Focal Points**

**Andrew Blandford**

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*Washington University Global Studies Law Review, Vol. 10, 2011*

Given the rarity of direct sanctions for violations of international law, the argument for rational compliance often hinges on a vague estimation of "reputational costs." Rationalist international law scholars currently calculate noncompliance reputational costs as the price a state pays when excluded from future treaties due to a reputation as an unreliable treaty partner. From such limited reputational costs, it would follow that international law is powerless in the high stakes security context. This Article proposes a new form of noncompliance reputational costs. Following World War II, states bound themselves to international institutions, allowing for cooperation which increases global welfare while decreasing global security threats. But violations of security-related international law signal a threatening lack of restraint and have historically led to strategic reputational costs: adverse alliance formation, rivals' increased armament, or the denial of informal cooperation. In short, noncompliance reputational costs are not always limited to foregone treaty opportunities but also include costs incurred when states balance against the violator in reaction to what this Article terms "security threat focal points." Thus, the reputational costs for violating international law are greater than previously estimated, strengthening the argument for rational compliance. Current rationalist scholarship is incomplete; international law violations can send costly signals of defection from institutions of international security.

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### **Rape as a War Crime**

**Supreet Kaur**

*affiliation not provided to SSRN*  
April 4, 2011

Violence against women in conflict situations assumes many forms- rape is one of the ways in which women are targeted. But while other abuses like murder, torture and genocide have been long denounced as a war crime, unfortunately rape has been downplayed. It is thus ignored as a human rights abuse. The present article discusses rape as a war crime and how it has evolved through ages. The article also focuses on the evolution of the rape laws- from the first to the present. In the later part, the function of rape during war has been discussed with reasons as to how it fulfills the objectives of perpetrators. The researcher has also looked into some of the important cases decided by ICTY and ICTR and in the end evaluated the role of ICC in the ambit of wartime rape.

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### **Time to Be Heard: How Advocates Can Use the Convention on the Rights of Persons with Disabilities to Drive Change**

**Paul David Harpur**

The University of Queensland - T.C. Beirne School of Law  
*Valparaiso University Law Review, Vol. 45, 2011*

People who use sign language to communicate have argued that they are a linguistic minority and not disabled. Rather than being disabled, people in this group have argued that they simply speak a language different than others, such as Spanish or Russian. Labeling a person as disabled attracts

negative historical baggage. For this reason, some scholars have argued for the term of "ableism" to replace the term "disability discrimination." Although these debates are extremely important, it is equally important to utilize all available tools to achieve social inclusion for all people regardless of their different abilities. This Article will demonstrate how one such tool can be used to benefit persons with disabilities. In particular, this Article will analyze how the norms and state acceptance of the United Nations Convention on the Rights of Persons with Disabilities ("CRPD") can be used by non-government organization ("NGO") and disability person organization ("DPO") advocates to drive change in their communities and achieve law reforms where appropriate. Persons with disabilities are the world's largest minority group. Persons with disabilities have historically confronted systematic discrimination. . . .

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### **The Positive Impact of The Convention on the Rights of Persons with Disabilities: A Case Study on the South Pacific and Lessons from the U.S. Experience**

**Paul David Harpur**

The University of Queensland - T.C. Beirne School of Law  
*Northern Kentucky Law Review, Vol. 37, pp. 363-398, 2010*

The personal integrity of persons with disabilities has been systematically violated for centuries. In 2006, the United Nations, recognizing the vulnerability of persons with disabilities, adopted the Convention on the Rights of Persons with Disabilities (CRPD). . . . This article will analyze the positive impact the CRPD is having in stimulating and guiding legislative protections in developing States. It will briefly consider legislative protection in South Pacific States, and will then analyze policy and pending legislative reforms in Vanuatu, the first Pacific Island State to ratify the CRPD. This article will compare the recently released Vanuatu National Disability Policy and Plan of Action 2008-2012 to the provisions of the CRPD and provide recommendations based upon experiences from U.S. laws.

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### **Value Divergence in Global Intellectual Property Law**

**J. Janewa OseiTutu**

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*Indiana Law Journal, Vol. 87, 2012*  
*U. of Pittsburgh Legal Studies Research Paper No. 2011-10*

It is a challenge for the United States to adequately protect the interests of its intellectual property industries. It is particularly difficult to effectively achieve this objective when the interests of the United States are not in line with the social, cultural and economic goals of other nations. Yet, as a major exporter of intellectual property protected goods, the United States has an interest in negotiating effective international intellectual property agreements that are perceived to be legitimate by the state signatories and their constituents. Focusing on value divergence, this paper contributes to the growing body of literature on developing a robust but flexible global intellectual property system. The paper argues that the trade-based approach to global intellectual property law undermines the apparent gains made in this area because it promotes a utilitarian economic view of intellectual property law while minimizing other values. Trade-based intellectual property also reduces the need for intellectual property interests to align, and therefore fails to achieve mutually beneficial agreement on substantive intellectual property law and policy.

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### **Asian Borderlands and the Legal Protection of Traditional Knowledge and Traditional Cultural Expressions**

**Christoph Antons**

Deakin University



Traditional knowledge related to biodiversity, agriculture, medicine and artistic expressions has recently attracted much interest among policy makers, legal academics and social scientists. Several UN organisations such as the World Intellectual Property Organisation (WIPO) and the Convention on Biological Diversity under the United Nations Environmental Programme (UNEP) have been working on international models for the protection of such knowledge held by local and indigenous communities. Relevant national, regional or provincial level legislation comes in the form of intellectual property laws and laws related to health, heritage or environmental protection. In practice, however, it has proven difficult to agree on definitions of the subject matter, to delineate local communities and territories holding the knowledge and to clearly identify the subjects and beneficiaries of the protection. In fact, claims to "cultural property" have led to conflicts and tensions between communities, regions and nations. The paper will use Southeast Asian examples and case studies to show the importance of concepts such as Zomia and "borderlands" studies to avoid essentialised notions of communities and cultures and to develop a nuanced understanding of the difficulties for national and international lawmaking in this field.

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### **The Role of Private Standardization in Public International Lawmaking**

**Janelle Marie Diller**

*affiliation not provided to SSRN*

*Michigan Journal of International Law, Vol. 33, 2011*

This article explores the emerging role of private international standardization in addressing issues typically regulated through international law and policy within the mandates of public international economic and social institutions. It assesses the advantages and limitations of the increasing trend toward self-regulatory action on a global scale, drawing on the recent development and launch of the private International Standard on social responsibility (ISO 26000) as an empirical example. It argues that international law imposes duties on private standardization bodies to ensure that their decisions and activities are coherent with public international law and to guarantee fairness in their action by satisfying criteria relating to representativity, meaningful participation and transparency. . . . The article posits that, where matters of public interest and policy are concerned, a more deliberate coordination should guide the interaction between private regimes for standardization and public governance structures. Drawing upon international trade rules and human rights law that govern the conduct and responsibility of private actors, the article proposes specific elements for an emerging framework of principles. In conclusion, it considers means for structuring the interaction between private and public spheres by building upon existing international commitments and the principles and procedures adopted by the private actors themselves.

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### **The Role of Non-State Actors in Climate Compliance**

**Eric Dannenmaier**

Indiana University, Indianapolis

*A COMPLIANCE SYSTEM FOR THE INTERNATIONAL CLIMATE CHANGE REGIME, Jutta Brunnée, et al., Cambridge University Press, 2011*

This chapter examines the role of non-state actors in promoting compliance with climate change instruments and finds that their contribution has been substantial. Non-state actors are proven enforcers – sometimes more effective than states. Climate cases brought by non-state actors to non-climate institutions help to demonstrate this point, and effective mechanisms for non-state access to compliance are modeled within multilateral environmental agreements ranging from Aarhus to NAFTA. The author argues that the role of non-state actors should be expanded as climate change frameworks evolve and compliance mechanisms are strengthened. Leaving the public without standing within formal enforcement mechanisms misses a critical opportunity to promote compliance.

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**The Concept of Law in Transnational Arbitral Legal Orders and Some of its Consequences****Thomas Schultz**

Graduate Institute of International and Development Studies; University of Geneva

*Journal of International Dispute Settlement, 2011*

Abstract. If an arbitration system, hypothetically disconnected from states, were to seek to replicate the rule of law beyond the state, in its own transnational order, what would it look like? This question, which seems current given the proliferation of international dispute resolution mechanism and the continuing rise of international arbitration, formed an implicit theme of the scholarship known as the School of Dijon. Some thirty years ago, the School of Dijon asserted the existence of non-national legal systems revolving around arbitration mechanisms, such as the *lex mercatoria*. Over the years, their claim developed into the argument that these systems' own legality forms a basis for claims of autonomy from the state, the presence of law dispensing from the need for control by another legal order. This article argues first that this line of arguments is an enthymeme, as the concept of law has been the object of a near wholesale eschewal of definitional attention by the School of Dijon and its kindred theories. The article then maintains that any concept of law used for the aforementioned rhetorical and political purposes ought to include the fundamental principles of the rule of law. It then examines the guise that the rule of law takes when applied to transnational adjudicative normative orders instead of national legal systems.

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**Refugee Law in Islam****Muhammad Munir**

International Islamic University Islamabad (IIUI)

This paper focuses on the role of Islamic tradition of *hijrah* and *aman* and the law and practice relating to forced migration and to refugee protection in the Muslim world. It concludes that there is contradiction between the Islamic tradition of *hijrah* and *aman* and the law and practice relating to forced migration and to refugees in the Muslim world. The rich heritage of Islam in the field of migration law and refugee protection has been abandoned throughout the Muslim world today. In the past, Islam made a great contribution to the humanization of internal and international relations in the Muslim world. It could play this role even today and could prompt a much-needed humanization of some branches of international law. Given the current importance of this issue, Muslim states must urgently need to revive the Islamic concepts of *hijrah* and *aman* in order to contribute to the improvement of modern refugee law, and to make it more protective for refugees and forced migrants in general.

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**The Irony of International Business Law: U.S. Progressivism, China's New Laissez Faire, and Their Impact in the Developing World****Andrew Brady Spalding**

Chicago-Kent College of Law

*UCLA Law Review, Vol. 59, 2011*

As the financial crisis draws U.S. business overseas and developing countries rise in influence, the regulation of international business has never figured so prominently in federal law. But the dominant paradigm through which academics and policymakers continue to view that law – the so-called “Washington Consensus” – proves deeply misleading. A more accurate account of the components, origins, and aims of U.S. international business law reveals two striking ironies. First, in discrete but critical ways, the U.S. no longer represents the comparatively *laissez-faire* approach to federal business regulation. Rather, owing to its origins in the Progressive Era, U.S. federal law directs corporations toward non-economic social goals, particularly combating corruption (e.g. the Foreign Corrupt Practices Act) and promoting human rights (e.g. the Alien Tort Statute or economic sanctions). By contrast, the alternative legal regime to which the U.S. is frequently compared – China



– largely allows companies to pursue profits internationally without regard to their impact on corruption and human rights. Though it remains true that the U.S. regime and its principal alternative are distinguished by the extent to which the state restricts business conduct to achieve social goals, the roles are now reversed. Second, the rise of an alternative model now substantially thwarts the goals of U.S. progressive regulation. Empirical research in political science and economics demonstrates that because the U.S. regime increases the costs of doing business in emerging markets, U.S. companies tend to invest less. The resulting void in capital is filled by companies from countries – particularly China – that lack prohibitions on bribery and human rights violations. Ironically, enforcement of U.S. progressivism thus creates the very conditions in which corruption and human rights violations occur.

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### **The Status of Palestinian Refugees in Host Arab States**

**Abbas Shiblak**

*affiliation not provided to SSRN*

*Birzeit University Working Paper 2011/3 (ENG)*

This paper studies the status of Palestinian refugees in host Arab countries along with the endeavors undertaken with regard to refugees in those states. It briefly presents the driving forces behind the policies, practices and attitudes towards (and often against) Palestinian refugees in host states. Finally, it makes suggestions for dealing with anti-refugee policies and contributing to changing them.

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### **Debunking a Meta-Narrative: A Few Reflections on South Africa's Truth and Reconciliation Commission One Decade after its Final Report**

**Melodie Slabbert**

University of South Africa

*Journal of Contemporary Roman-Dutch Law, Vol. 73, p. 24, 2010*

South Africa's truth and reconciliation process is described as one of the most ambitious the world has ever seen. Not only was the Truth and Reconciliation Commission (TRC) charged with investigating human rights abuses and granting amnesty to miscreants, but another purpose of the process was to contribute "reconciliation" in South Africa. One decade after the publication of the TRC's final report in 1998, the time is ripe to reflect again on the objectives and fundamental premises of the TRC, particularly in view of the fact that the TRC has since then developed into an international meta-narrative of a restorative justice success story.

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### **Islam and International Humanitarian Law: A Question of Compatibility?**

**Robert Perry Barnidge Jr.**

University of Reading - School of Law

*Israel Yearbook on Human Rights (preprint), Vol. 40, pp. 257-74, 2010*

This article considers the question of compatibility between Islam and international humanitarian law. It begins by providing a broad overview of scholarly perspectives on an Islamic law of war, perspectives that find broad similarities between Islam and international humanitarian law. It then juxtaposes these findings with the philosophy of militant Islam on the conduct of hostilities. Finally, in tying together these thoughts, it stresses the challenges that liberal scholars face in attempting to reconcile these competing narratives in light of militant Islam's philosophical resistance to moderation and uncompromising stance toward all things jahiliyya. These challenges are particularly acute given Islamist understandings of apostasy and militant Islam's rejection of the discursive value of international law itself.

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**Climate Policy Under Sustainable Discounted Utilitarianism****Simon Dietz**

London School of Economics - Grantham Research Institute on Climate Change and the Environment  
and Department of Geography and Environment

**Geir B. Asheim**

University of Oslo - Department of Economics; CESifo (Center for Economic Studies and Ifo Institute  
for Economic Research)

*Working Paper No. 52*

*Grantham Research Institute on Climate Change and the Environment Working Paper No. 42*

Empirical evaluation of policies to mitigate climate change has been largely confined to the application of discounted utilitarianism (DU). DU is controversial, both due to the conditions through which it is justified and due to its consequences for climate policies, where the discounting of future utility gains from present abatement efforts makes it harder for such measures to justify their present costs. In this paper, we propose sustainable discounted utilitarianism (SDU) as an alternative principle for evaluation of climate policy. Unlike undiscounted utilitarianism, which always assigns zero relative weight to present utility, SDU is an axiomatically based criterion, which departs from DU by assigning zero weight to present utility if and only if it exceeds future welfare. Using the DICE integrated assessment model to run risk analysis, we show that it is possible for future welfare to be below present utility along a 'business as usual' development path. Consequently SDU and DU differ, and willingness to pay for emissions reductions is (sometimes significantly) higher under SDU than under DU. Under SDU, stringent schedules of emissions reductions increase social welfare, even if the discount rate is relatively high.

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**SPS National Measures Under the WTO or the Uneasy Relationship between Science and Trade Law****Katia Fach Gómez**

University of Zaragoza

This paper is going to explain the substance of the SPS Agreement, which is focused on achieving a balanced relationship between biotechnology and international trade. Various cases decided by the WTO settlement system in this area will also be referenced (Part II). In addition, the paper will focus on a particularly controversial aspect of applying the SPS Agreement: the Assessment of Risk and Determination of the Appropriate Level of Sanitary or Phytosanitary Protection. The strict interpretation of what the DSS has been doing in regards to Article 5 SPS Agreement has meant so far that all national measures have been considered inconsistent with the SPS Agreement. This result is questionable and calls for reflection on how regulatory diversity on sensitive issues such as SPS measures can be considered as beneficial, or at least tolerable, in the realm of the WTO (Part III). To analyze this question from different prisms, the paper will also devote a section to study the SPS Agreement from the perspective of the developing countries (Part IV). Once all of these considerations have been made, the paper will present a final conclusion (Part V).

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**Planetarian Identity Formation and the Relocalization of Environmental Law****Sarah Krakoff**

University of Colorado Law School

*Florida Law Review, Forthcoming*

*U of Colorado Law Legal Studies Research Paper No. 03-11*

Local food, local work, local energy production – all are hallmarks of a resurgence of localism throughout contemporary environmental thought and action. The renaissance of localism might be seen as a retreat from the world's global environmental problems. This paper maintains, however, that some forms of localism are actually expressions, and appropriate ones, of a planetary

environmental consciousness. The paper's centerpiece is an in-depth evaluation of local climate action initiatives, including interviews with participants as well as other data and observations about their ethics, attitudes, behaviors, and motivations. The values and identities being forged in these initiatives form the basis for timely conceptions of the human relationship with the planet, which in turn provide grist for environmental law and policy design. One overarching conclusion is that environmental laws, even those aimed at solving problems of planetary scale, should include elements that foster localism. The reasons to do so are two-fold, and strangely complementary. First, in an instrumentalist vein, sustained attitude and behavior changes are most likely to be accomplished through the positive feedbacks between personal and community norms. Second, if we fail to reign in carbon emissions as a global matter, at least some communities will have nurtured the attitudes, behaviors, and patterns of living that might be most adaptive to the vicissitudes of a post-climate changed world. By fostering the planetarian identity, localism therefore has the potential to redeem environmental law, even in the face of its potential failure.

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### **A New Twist on an Old Story: Lawfare and the Mixing of Proportionalities**

**Laurie R. Blank**

Emory University School of Law

*Case Western Reserve Journal of International Law, Vol. 43, No. 3, 2011*

The claim that a just cause erases any wrongs committed in war is an old story, just like the opposite claim that an unjust cause renders all acts unlawful. International law has traditionally reinforced a strict separation between *jus ad bellum* – the law governing the resort to force – and *jus in bello* – the law governing the conduct of hostilities and protection of persons during conflict. Nonetheless, we see today a new twist on this old story that threatens the separation between *jus ad bellum* and *jus in bello* from the opposite perspective. In essence, there is an ever-louder claim that excessive civilian deaths under *jus in bello* proportionality render an entire military operation unjust under *jus ad bellum*. . . . This article analyzes the growing use of alleged violations of *jus in bello* proportionality to make claims of disproportionate force under *jus ad bellum*. In doing so, it highlights the strategic and operational ramifications for combat operations and the impact on investigations and analyses of IHL compliance and accountability. Ultimately, this new twist on an old story has significant consequences for the application of IHL, for decisions to use force, and for the implementation of strategic, operational and tactical goals during conflict. Most of all, it places civilians in increasing danger because it encourages tactics and strategies that directly harm civilians.

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### **'Sana Crítica': The System for Evaluating Evidence Utilized by the Inter-American Court of Human Rights**

**Álvaro Paúl**

University of Dublin - Trinity College

April 6, 2011

The Spanish version of the case law of the Inter-American Court of Human Rights often states that this tribunal's assessment of evidence is ruled by *sana crítica*, a notion which has received several translations in the English version of the Court's case law. This concept has a clear meaning in Hispanic civil law systems. *Sana crítica* is a method for evaluating evidence in which a court or tribunal is not constrained by the evidentiary rules of legal proof, but rather is obliged to judge in accordance with the rules of logic and experience, and to state the grounds for its evaluation of evidence. For a better understanding of *sana crítica* or sound judicial discretion, this paper will refer to the other systems used for the weighing of evidence in the Hispanic legal tradition, especially to the oft-loathed method of legal proof, which requires the judge to give a previously defined weight to specific items of evidence. Reference will be made also to the differences between the systems used for evaluating evidence and other related concepts, such as the standards of proof. The above

description of the concept of *sana crítica* will be illuminated with a few comments on how the Inter-American Court applies the system of sound judicial discretion.

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### **Aid Efficiency in an Armed Conflict: The Role of Civil Society in Escalation of Violence in the North Caucasus**

**Huseyn Aliyev**

*affiliation not provided to SSRN  
IFHV Working Paper No. 1*

This study is an analysis of civil society's participation in conflict resolution and implementation of aid efforts in the North Caucasus. Its main goal is to explore the role of civil society in conflict de-escalation in three autonomous republics in the Russian North Caucasus - Dagestan, Ingushetia and Kabardino-Balkaria, which are the scene of a recently emerged armed conflict. It is suggested here that escalation of violence as well as failing humanitarian, development and democratization efforts are linked to the involvement of civil society in the conflict. . . .

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### **Non-Refoulement Obligations in Public International Law: Towards a New Protection Status?**

**Francesco Messina**

University of Kent, Canterbury - Kent Law School; University of Cambridge  
*RESEARCH COMPANION TO MIGRATION THEORY AND POLICY, Satvinder Juss, ed., Ashgate, 2011*

Where do non-refoulement obligations come from, and what is their status, scope and content under international law? This chapter seeks to answer these questions in two ways. For the most part, it offers a contemporary account of the many sources of non refoulement obligations under international law, including customary international law. This is essentially an analysis of the *lex lata*. In its final part, the chapter considers whether a new understanding of non refoulement may be possible by adopting a different perspective on its nature. Arguing *de lege ferenda*, is non refoulement becoming something more than just the most prominent of the many rights enjoyed by refugees and other individuals at risk of ill treatment? Has the European Union Qualification Directive started a transformation that will eventually lead to the recognition of non refoulement as a status of international protection alongside (rather than embedded into) 'refugee status' and EU 'subsidiary protection'?

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### **Hedge Fund Regulation Via Basel III**

**Wulf A. Kaal**

Mississippi College - School of Law  
*Vanderbilt Journal of Transnational Law, Vol 44, p. 389, 2011*

This Article is a rejoinder to a comment by Professor Romano on an earlier paper I coauthored with Christian Kirchner. Professor Romano suggests regulatory arbitrage, rather than the targeted regulation of bank lending to hedge funds under Basel III, as a hedge against systemic failure. I contend that it was not harmonization through Basel II but rather the profitability of certain assets and business strategies that caused banks to hold similar assets and engage in similar strategies. In particular, I find that the increasing role of hedge funds in the credit derivatives market, in combination with the market's recent failure, suggests that an increased emphasis on banks' lending exposure to hedge funds could be justified. Using the methodological approach of New Institutional Economics, I evaluate recent regulatory changes, including the U.S. Dodd-Frank Act, the AIFM Directive, and other pertinent regulation. I provide an impact analysis of regulatory changes, *de lege lata* and *de lege ferenda*, with a special emphasis on, and historical analysis of, hedge fund registration rules and asymmetric regulation in Dodd-Frank and the AIFM Directive.

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**Judicious Influence: Non-Self-Executing Treaties and the Charming Betsy Canon****Rebecca Crootof***affiliation not provided to SSRN**Yale Law Journal, Forthcoming*

Despite their seeming impotency, non-self-executing treaties play an important role in domestic jurisprudence. When a statute permits more than one construction, judges have a number of interpretive tools at their disposal. One of these is the Charming Betsy canon, which encourages judges to select an interpretation of an ambiguous statute that accords with U.S. international obligations - including those expressed in non-self-executing treaties. This piece concludes that the judicial practice of giving indirect force to all treaties through the Charming Betsy canon is both justified and beneficial.

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**The ECJ Rules on Private Copying Levy: Padawan SL v. Sociedad General de Autores y Editores (SGAE) (C-467/08)****Enrico Bonadio**

City University London; The City Law School of City University London

**Carlo Maria Cantore**

Scuola Superiore Sant'Anna - School of Social Sciences

*European Intellectual Property Review, Vol. 33, No. 4, pp. 260-263, 2011*

On October 21, 2010 the European Court of Justice (ECJ) gave its decision in an interesting case regarding the so-called "private copying levy" (Padawan SL v. Sociedad General de Autores y Editores (SGAE) (C-467/08)). The ECJ held that such a levy is in conformity with Directive 2011/79 (on the harmonisation of certain aspects of copyright in the information society) when charged on copying devices sold to individuals, as it can be reasonably be assumed that the equipment will be used for copying.

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**Fraternity, Responsibility and Sustainability: The International Legal Protection of Climate (or Environmental) Migrants at the Crossroads****Benoit Mayer**Centre for International Sustainable Development Law (CSIDL); McGill university, faculty of law  
April 1, 2011

Many lands are becoming uninhabitable because of anthropogenic global warming, either through the rise in sea-level and increasingly severe climate dangers (e.g. Bangladesh, the Maldives) or through desertification (e.g. Nigeria, Egypt). Up to 350 million people may be displaced before 2050 and many will be coerced into seeking refuge abroad. An argument for an international protection of climate migrants may be derived from one or another of the following notions: 1. Fraternity: international responsibility to protect Human Rights of foreign populations whose state is unable to do so, 2. Responsibility, in particular through the common but differentiated responsibility principle or the doctrine of unjust enrichment or a regime of strict liability, or 3. Sustainability: protection of peace and security and human security. Each justification would lead to dramatic differences relating to the nature and the scope of states' obligations, as well as to the content of climate migrants' protected rights.

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**One Size Fits All: The Supreme Court's Interpretation of Ne Exeat Rights for Purposes of the Hague Convention****Fayenisha H. Matthews***affiliation not provided to SSRN*

With wrongful child abductions occurring worldwide, the Hague Convention on the Civil Aspects of International Child Abduction was drafted for the purpose of protecting children from its harmful effects. The United States implemented provisions of the Hague Convention in 1988 into the International Child Abduction Remedies Act, for the same purpose. Under the two, the drafters draw a distinction between "rights of custody" and "rights of access", the determination of which would ultimately establish a parent's right to the return remedy under the Convention. Specifically, if a parent has "rights of custody" a wrongfully abducted child would be ordered back by the abducting parent where as a parent with "rights of access" has no such remedy. In Spring 2010, *Abbott v. Abbott* which entailed the interpretation of "rights of access" and "rights of custody" under the Hague Convention was heard and decided by the United States Supreme Court. In *Abbott*, a Chilean custody ordered granted a father access rights coupled with a ne exeat clause preventing the custodial parent from leaving the country without permission. The issue was whether these rights coupled together amounted to "rights of custody" which would entitle the father to the return remedy. Thus, the mother would have to return the child to Chile. With the facts and circumstances unique to *Abbott*, the United States Supreme Court held that ne exeat rights do confer rights of custody for purposes of the Convention. This paper will examine the danger in the Court's ruling and long lasting negative effects that it is likely to have on the nation and international communities.

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**Universal Jurisdiction and Third States in the Reform of the Brussels I Regulation****Johannes Weber**

Max-Planck-Institut für ausländisches und internationales

*Rechts Zeitschrift für Ausländisches und Internationales Privatrecht, Forthcoming**Max Planck Private Law Research Paper No. 11/7*

In December 2010, the European Commission published a Proposal for a reform of the Brussels I Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. One of the cornerstones of the Proposal is the operation of the Regulation in the international legal order, a subject which has proven to be one of the most intricate issues in European international civil procedure. The following paper will give a first assessment of the Commission Proposal as regards third State scenarios. After a brief discussion of the Union's competence and the Union's interest to legislate in this field, it will turn to the extension of special heads of jurisdiction to third State defendants, the decline of jurisdiction in favour of third States and the proposal for new subsidiary grounds of jurisdiction, before briefly concluding on recognition and enforcement of third State judgments.

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**The Customs Union Between Russia, Kazakhstan and Belarus: First Steps Towards the Revival of the Silk Road****Svetoslav Varadzhakov**

University of Cambridge - Cambridge Central Asia Forum; University of Oxford - Keble College

**Prajakti Kalra***affiliation not provided to SSRN*

March 24, 2011

This article provides a background to the newly formed Customs Union between the three former Soviet republics of Kazakhstan, Russia and Belarus in 2010 and relates this form of economic and political cooperation to the times of the Mongol Empire when trade from Europe to China flourished under a single institutional framework. We provide details on the customs code accepted by the three



member states, especially Kazakhstan, and highlight economic, political and social benefits that this form of cooperation could bring to the participating states and their close neighbors and trade partners.

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**Do Not Blame Non-Singatory Countries: Take Your Own Preventive Measures to Protect Children from International Abduction**

**Hokon S. Yoo**

*affiliation not provided to SSRN*

This Note recommends a preventive legal measure to protect children from international abduction rather than the existing post-abduction remedies. The Hague Convention of International Child Abduction has limited to help the left-behind parent when another spouse wrongfully removes a child because the Convention lacks enforceability. To supplement the Hague Convention's post-abduction remedies, this Note proposes a practical pre-abduction measure, an e-Child database program that judicial, legislative, administrative, and enforcement agencies could share. This Note recommends that each country, regardless of its signatory status to the Convention, set up a child protection package that guides international, domestic, and private measures to prevent abduction in the first place. . . .

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**Is There Light at the End of the Gas Pipe? On the (Provisional?) Applicability of the Energy Charter Treaty to the 2009 Russia-Ukraine Gas Transit Dispute and the Relevance of the Yukos Interim Awards**

**Anna Marhold**

*affiliation not provided to SSRN*

*Proceedings of the Greifswald International Summer Academy on Energy and the Environment, 2011*

This article focuses on the Energy Charter Treaty (ECT) and what role Article 7(7) on energy transit could have played in resolving the gas transit dispute between Russia and the Ukraine in 2009. Subsequently, the article discusses Russia's provisional application of the ECT and its withdrawal from the Treaty in October of 2009, and the implications thereof for a potential future gas transit dispute between the two countries. Finally, the article looks at the conclusions to be drawn from the Interim Awards of the Yukos arbitration in order to answer the question: Is there light at the end of the gas pipe?

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**Accountability in International Project Finance: The Equator Principles and the Creation of Third-Party-Beneficiary Status for Project-Affected Communities**

**Marissa Marco**

*affiliation not provided to SSRN*

*Fordham International Law Journal, Vol. 34, p. 452, 2011*

The Equator Principles are a set of voluntary social and environmental guidelines that apply to the majority of private commercial banks engaged in project finance, which is a method of financing often used to create large infrastructure projects. The Equator Principles provide ten standards to which a project must comply as a condition to obtaining funding, such as requirements to perform a social and environmental assessment and to communicate adequately with project-affected communities. Even for projects that promise to abide by these standards, however, noncompliance continues as investors try to maximize profit and avoid their contractual responsibilities. This failure results in serious social and environmental impacts that leave project-affected communities devastated and often without a legal remedy. Recognition of a third-party-beneficiary right in US contract law may provide a legal remedy for project-affected communities. Recognition of such a right to enforce

compliance with social and environmental standards would challenge borrowers to keep their contractual commitments under the Equator Principles. This Note discusses the viability of gleaning from the Equator Principles a third-party-beneficiary right for project-affected communities to ensure compliance with the project finance industry's social and environmental standards.

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### **Lex Sportiva: Transnational Law in Action**

**Ken Foster**

University of Westminster - School of Law

This paper deals with the concept of *lex sportiva* as an example of transnational law. It attempts a definition of the concept after reviewing the literature, and argues that it is mainly the application of general legal principles to sports-related disputes settled by the awards of the Court of Arbitration for Sport. It further argues for a recognition of the special features of sports jurisprudence as a '*lex ludica*' as a distinct category. It ends by highlighting the extent to which *lex sportiva* is private justice created by global sporting organisations and outside the range of judicial review by national courts.

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### **Emissions Intensity and Global Patterns of Trade and Development**

**Stratford Douglas**

West Virginia University

**Shuichiro Nishioka**

West Virginia University

March 2, 2011

Understanding international differences in the emissions intensity of trade and production is essential to understanding the effects of greenhouse gas limitation policies. We develop data on emissions from 41 industrial sectors in 39 countries and estimate the CO<sub>2</sub> emissions intensity of production and trade. We find no evidence that developing countries specialize in emissions-intensive sectors; instead, emissions intensities differ systematically across countries because of differences in production techniques. Thus, the technology of developing countries drives the greater emissions intensity of their exports. Our results suggest that international differences in emissions intensity, while substantial, do not play a significant factor in determining patterns of trade.

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### **Torture and the War on Terror: The Need for Consistent Definitions and Legal Remedies**

**Linda E. Carter**

University of the Pacific - McGeorge School of Law

This article examines differing definitions of torture and the inadequacies of accountability for torture. The 'torture memos' of the Bush Administration brought to light the problems that arise when torture is defined in different ways. This article contrasts the definitions in the United States with the jurisprudence of the ICTY. In addition to the definition of "severe harm," this article further explores the consequence of differing definitions of the *mens rea* for torture, an area that has largely been overlooked in the discourse on torture. The article further explores the ramifications of limitations on criminal and civil remedies for accountability for torture. The author concludes that the *mens rea*, as currently interpreted in the United States, will result in lack of accountability for torture in situations in which torture would exist under the ICTY interpretation. The author further concludes that present legal actions are inadequate to provide full accountability for torture.

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**International Law and Domestic Gender Justice: Why Case Studies Matter****Catherine O'Rourke**

Transitional Justice Institute (University of Ulster)

*Transitional Justice Institute Research Paper No. 11-04*

This paper reflects on the relationship of feminist-informed developments in international criminal law (ICL) to the gender outcomes of domestic processes of transitional justice. The paper identifies a distinct critical-reflective turn in feminist scholarship in international criminal law, and offers a four-way typology of these more recent feminist critiques of ICL, namely: ICL as legally deficient; ICL as sexualizing and infantilizing women; ICL as silencing individual women and women's movements more broadly; and feminist engagement with ICL as hegemonic and imperialist. The paper notes the move in feminist ICL scholarship away from a concern with the impact of ICL norms on domestic cases of transition. The paper then draws on the Chilean case in order to consider the impact of evolving international legal norms on the official recognition of harms experienced by women under the dictatorship. I argue that attention to the impact of international legal norms on domestic instances of transition might go some way to re-grounding feminist critical-reflective scholarship of ICL, moving away from more abstract critiques at the international level, to applied critiques at the domestic level of gender and transitional justice. Moreover, attending to the domestic impact of international legal norms might provide grounds for greater optimism in the evaluation of the feminist-informed changes in ICL over the past decade and a half.

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**Indigenous Peoples' Human Rights in Africa: The Pragmatic Revolution of the African Commission on Human and Peoples' Rights****Jeremie Gilbert**

Middlesex University

*International & Comparative Law Quarterly*, Vol. 60, No. 1, pp 245-270, January 2011

The definition and scope of indigenous peoples' human rights are usually contentious in the context of Africa. Recently, the African Commission on Human and Peoples' Rights (the Commission) has started to focus its attention on the plights of indigenous communities. In the light of a recent decision of the Commission regarding indigenous peoples' land rights in Kenya, this article examines to what extent the leading human rights institution for the continent is developing its own jurisprudence on indigenous peoples' human rights. The article argues that by offering a pragmatic approach to the rights of indigenous peoples, the Commission has managed to instigate a revolution in the way indigenous peoples' human rights are perceived in Africa. As such the Commission has made an important contribution for the continent but also for the rights of indigenous peoples globally. Moreover, the decision of the Commission also provides one of the first comprehensive adjudications on the practical aspects of a human rights approach to development.

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**The Duty to Settle in WTO Dispute Settlement****Chios C. Carmody**

University of Western Ontario - Faculty of Law

*Asian Journal of WTO & International Health Law and Policy*, Vol. 6, p. 169, 2011

WTO disputes form an important part of the way we think about WTO law today. Nevertheless, given the fact that virtually all of the disputes must, at some point or other, settle, this article argues that an important – and perhaps even preeminent – aspect of WTO law is the law of settlement. There is an actual duty on parties in WTO law to resolve the cases they are involved in. This is not a "hard" obligation in the sense of having to achieve a specific result, but rather one of a softer, process-oriented variety. This article examines the law of negotiation and settlement in domestic labour law

and Aboriginal law as a prelude to examining the extent of this duty as developed in U.S. – Shrimp and U.S. – Continued Suspension.

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### **Hands Off My Pudendum: A Critique of the Human Rights Approach to Female Genital Rituals**

**Obiajulu Nnamuchi**

Centre for Health, Bioethics & Human Rights

April 8, 2011

Can human rights law violate the human rights of the people it seeks to protect? An oxymoron, it seems, but, nevertheless, the response must be affirmative, at least in this instance. In seeking to defend the defenseless, international human rights law prohibits virtually all types of female genital rituals. But, in so doing, it errs in two major ways. First, it fails to distinguish, in its applicability, between the defenseless and those able to protect themselves, thereby violating the human rights of the latter. Second, the blanket ban derives from the notion that adverse health consequences are inevitable for women that have undergone the rituals, a notion that has been seriously undermined by studies arriving at contradictory conclusions. The aim of this paper is to examine this deficiency and show how the extant framework may be rehabilitated.

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### **Securing Investment: Innovative Business Strategies for Conflict Management in Latin America**

**Mariana D. Hernandez-Crespo**

University of St. Thomas - School of Law (Minnesota)

*ADR in Business: Practice and Issues across Countries and Cultures, Vol. 2*

*U of St. Thomas Legal Studies Research Paper No. 11-10*

When tapping into emerging markets such as those in Latin America, foreign investors, lawyers, and policy makers wrestle with finding effective and efficient strategies for reaching the goal of securing investments in the region. The traditional strategy for securing investment in the region has been to ensure viable means of conflict resolution so as to prevent contracts from being rendered vulnerable or even meaningless. Given the backlog, corruption, and inefficiency of the court system, International Financial Institutions (IFIs) have promoted alternative dispute resolution (ADR) as a second option for conflict resolution. However, ADR methods lack the coercive power of the judicial system to enforce outcomes, which forces parties into the courts when one of the parties refuses to abide by the agreement or awards. All of this adds to the cost of doing business in Latin America. As a result, the insufficiency of the traditional paradigms for dispute resolution has led to a greater imperative for finding new ways to secure business investment in Latin America. New and innovative strategies, however, will require a multi-layered approach. First, the negotiation of sustainable agreements that are "nearly self-enforcing" can reduce risk as well as the cost of transactions in the region. Second, investment in building capacity for the maximization of dispute resolution in the region can begin to address some of the systemic issues that create insecurity and instability. Finally, any and all strategies depend on a thorough, first-hand knowledge of the people, cultures, and places in which a business aims to operate. . . .

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### **Interpretation of the WTO Agreements, Democratic Legitimacy and Developing Nations**

**R Rajesh Babu**

Indian Institute of Management (IIM), Calcutta

*Indian Journal of International Law, Vol. 50, No. 1, pp. 45-90, 2010*

The authority to interpret WTO covered agreements has made the panels and the Appellate Body the most influential organs in the WTO institutional framework. They enjoy considerable discretionary

power to decide on the consistency of Members' domestic measures, and also can attribute meaning to specific provisions, influencing the course of WTO jurisprudential development. While the functioning and contributions of the panels and Appellate Body are widely admired, an increasing number of scholars perceive that these bodies are improperly creating new WTO rules and procedures through the technique of 'filling legal gaps', 'completing the analysis' or 'clarifying ambiguity'. Specifically, the discretionary power has been used to read into the WTO rules new obligations which were not foreseen or negotiated during the Uruguay Round of negotiations. Many see this attempt at norm expansion through judicial process as inherently dangerous, usurping the functions of the WTO political bodies in a manner contrary to democratic legitimacy. This paper is an attempt to highlight the extreme pattern of decisions of the panels/Appellate Body, highlight the adverse consequences of such decisions and the need for greater attention and debate on this issue in the policy space. The paper highlights some of the decisions by the panels and Appellate Body where, through innovative interpretation, the Members' obligations were expanded, without deference to the democratic and political process. The paper argues that the panels and the Appellate Body have consistently made improper use of the techniques of interpretation, and often made policy choices to the resentment and detriment of a large majority of the WTO membership.

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### **Institutional Reforms Debate and FDI Flows to MENA Region: Does One 'Best' Fit All?**

**Wasseem Mina**

UAE University; Economic Research Forum (ERF)

December 5, 2010

The paper revisits the policy debate on institutional reform approaches to property rights protection and empirically examines it in the context of FDI flows to the MENA region. Using panel data on 11 MENA countries for the period 1991-2007 and adopting FGLS methodology, the paper finds a positive influence of improvement in the risk of investment expropriation in non-GCC MENA countries and of bilateral investment treaties in GCC countries. The joint influence of domestic institutional functions and bilateral investment treaties is positive in specifications containing investment expropriation risk and government stability in non-GCC MENA countries, and corruption in GCC countries. Results have important policy implications for the institutional reform approach to be adopted.

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### **Guantanamo as a 'Legal Black Hole': A Base for Expanding Space, Markets, and Culture**

**Ernesto Hernandez Lopez**

Chapman University School of Law

*University of San Francisco Law Review, Vol. 45, pp. 141-214, 2010*

Guantanamo appears as a "legal black hole" especially when examining detainee rights, but in reality empire purposefully creates these jurisdictional anomalies. To further U.S. interests overseas in 1903, base jurisdiction was crafted as anomalous between Cuban sovereignty and American occupation. For the 174 still detained, it's still a black hole. After four Supreme Court decisions, anomaly continues to pervade detention litigation. Functional tests for extraterritorial constitutional rights, habeas proceedings, and the unclear fate of Uighur-detainees all suffer from doctrinal obfuscation. Detainees rights, or lack of, are just one aspect of anomaly. Empire's dynamic forces produced these ambiguities. Guantanamo represents American assumptions on: expanding geographic authority, overseas market protections, and cultural superiority. Alejandro Colas explains empires require these three, i.e. "space, markets, and culture." Accordingly, this Essay explores the base and: extraterritorial authority as "empire's space," intelligence acquired through detention for resources wars as "empire's markets," and discriminatory detention for Middle-Eastern and Central Asian nationals as "empire's culture." This Essay asks how assumptions on these three concepts shape law's extraterritorial application.

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**Doha Round Betrayals****Raj Bhala**

University of Kansas - School of Law

*Emory International Law Review, Vol. 24, pp.147-183, 2010*

The Doha Round was supposed to be about the grandest themes of contemporary times, namely, wealth and poverty and Islam and globalization, both of which are inextricably linked to war and peace. Thus, in a commercial sense, it is said the Round is "intended to improve global market access by cutting massive farm subsidies in rich countries and import tariffs in poorer ones . . . ." That characterization is true as far as it goes, but it does not go far enough. The Round – intentionally launched in the heart of the Arab Muslim World – was thought to be an important way to fight oppression and, thereby, wean people in poor countries, especially ones with significant Islamic populations, away from anti-capitalist thinking and, worse yet, violent action. [...]

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**'Fair Compensation' to the Dwellers of Mineral Land: Whether Zakat Al-Ma'Adin Can Form the Quantum?****Abdul Azeez Maruf Olayemi**

International Islamic University of Malaysia (IIUM)

November 17, 2010

Mineral resources such gold, silver and petroleum products are subject of zakat. The zakat of the substance is 20% of its produce or the substance itself. This was the practice from the time of the holy prophet Muhammad S. A. W. down to caliphate period. However, the substance is no more a private property. It is now a public property and public property is not a subject of zakat in the majority opinion of the jurists. This paper suggests that, although, mineral resources may not remain as a subject of zakat, yet, the ratio of its zakat can be adopted as the quantum of 'fair compensation' to the dwellers of the land of mineral resources. The people are lawfully entitled to the zakat and they are not satisfied with the present method of compensation. The dissatisfaction is a cause of conflict across the world. It is however believed that the adoption of the principle of zakat of mineral resources as quantum of compensation will constitute an equitable and judicious method of compensation to the people. This paper argues that the harmonization of the Shar'Ēnah doctrine of zakat of mineral sources to the positive law, as the quantum of compensation on mineral resources will resolve the disputes and the conflicts on the matter.

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**Book Review of 'The International Law of Belligerent Occupation' by Yoram Dinstein, Cambridge University Press, 2009****Konstantinos Mastorodimos**

University of London - Queen Mary - Department of Law

*Web Journal of Current Legal Issues, Vol. 1, 2011*

This is a review of Yoram Dinstein's book 'The International Law of Belligerent Occupation,' Cambridge University Press, 2009.

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**The Forgotten Freedom: Freedom From Fear****J. J. Spigelman**

Supreme Court of New South Wales

*International and Comparative Law Quarterly, Vol. 59, No. 3, pp. 543-570, 2010*

Freedom from fear, expressly recognized in the foundational human rights treaties, has been forgotten in human rights discourse. Fear can have profound behavioural impacts. Without recognition of the importance of freedom from fear, the fulfillment of many human rights is



compromised, particularly physical security. Politico-legal thought, from Montesquieu and Blackstone, has long identified the significance of security of the person and the tension between liberty and security. Comparative exploration of contemporary case law reveals disparate approaches to the recognition of security of the person as an individual right which the State is obliged to protect. Increasing the salience of security of the person and the dimension of freedom from fear in human rights decision making raises the difficult issue of balancing conflicting rights.

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### **Freezing Orders in International Commercial Litigation**

**J. J. Spigelman**

Supreme Court of New South Wales

*Singapore Academy of Law Journal, Vol. 22, pp. 490-512, 2010*

Changes in the economy, in technology and in public policy, notably the easing of exchange controls, have transformed the ease and speed with which assets, particularly liquid assets and records, can be moved and hidden in fulfillment of acts of fraud and corruption. The development of freezing orders (Mareva orders) and search orders (Anton Pillar orders) by common law judges was a practical adaptation to this new challenge, drawing on similar concepts in the civil law. One application of these orders continues to cause difficulty: the extension of such orders beyond the territorial jurisdiction of the court requested to provide a remedy. This is one of a number of contexts in which cross border issues require new forms of judicial assistance and co-operation. This paper considers the difficulty that has arisen in the making of orders in aid of foreign judicial and arbitral proceedings with respect to assets within the jurisdiction. The paper describes the various ways in which major jurisdictions have addressed this issue, and concludes that an inherent power to make an order in aid of foreign proceedings should be recognised as a common law principle by reason of the significance of reciprocity in the international law of nations. This is one step in reducing the transaction costs that impede mutually beneficial exchange by international trade and investment.

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### **Redesigning Global Trade Institutions**

**John Linarelli**

University of La Verne College of Law

*Southwestern Journal of International Law, Vol. 18, No. 1, 2011*

This is a draft of an essay for the symposium, 2021: International Law Ten Years from Now, held by the Southwestern Journal of International Law in cooperation with the International Law Association (American Branch) Weekend West. The essay deals with two questions. First, what is to be of the WTO and world trade institutions generally? It examines the rise of regionalism in international trade agreements and possible roles for variable geometry for the WTO. The essay critiques proposals to move towards (or back to) plurilateralism for the WTO. Second, what should trade agreements do? This question goes to the core values and operating principles for trade institutions. I argue that governments should take questions of distributive justice seriously in the design of global trade institutions.

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### **India's Role in an International Legal Solution to the Global Climate Change Problem**

**Sonali P. Chitre**

*affiliation not provided to SSRN*

Climate change is perhaps one of the modern world's greatest problems. Solving this problem is one of the greatest global challenges because all, or very nearly all, countries are impacted by it, and thus every country must participate in a regime to cut back emissions in order to solve the problem. India, a developing country, is a key player in international climate change negotiations. . . . Part I of this paper explains international climate change law. Part II explains India's obligations and commitments

under these treaties. Part III describes and analyzes India's perspective on environmental law and climate change by first looking at the history of India and fieldwork in India. Part III.C. addresses hurdles to mitigation and compliance that India faces, which include overpopulation, poverty and hunger, and political corruption and poor infrastructure. Part III.D. looks at India's environmental laws and environmental litigation in India. Part IV.A. analyzes different models that have been proposed for long-term carbon emissions reduction, and Part IV.B. proposes a holistic approach that India can use to address climate change. . . .

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### **Environmental Enforcement Networks: A Qualitative Analysis**

**Grant Pink**

Charles Sturt University

This study discusses the utility of environmental enforcement networks (networks). It considers the viewpoints of eight senior managers, from environmental enforcement agencies (EEAs), who represent seven countries and collectively are involved in fourteen networks. . . . The study established that there is utility in networks across the countries and networks studied. It also identified that there are a range of strategies and activities used by EEAs to maximise the benefits of network engagement. The study concludes with a number of recommendations that network members and their respective governing bodies may consider in an effort to maximise network benefits.

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### **Forcible Transfer or Forced Migration of Palestinians in the Occupied Palestinian Territory from an International Law Standpoint**

**Shawan Jabarin**

*affiliation not provided to SSRN  
Birzeit University Working Paper No. 2011/7 (ENG)*

This paper describes the strategic policy of the Israeli occupation aimed at ridding the Palestinian territories of their indigenous population and replacing them with settlers. The various means used to apply such a policy are illustrated. Beside this descriptive part of the paper, the author analyzes the options, especially those related to internal and humanitarian law, available to Palestinians.

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### **The Tainted Interpretation: The Misapplication of the Hague Convention in the Supreme Court Case, Abbott V. Abbott**

**Ashley Smith**

*affiliation not provided to SSRN  
Southern University Law Center Law Review, Forthcoming*

May 17, 2010 served as a monumental day in which a decade of jurisprudence governing the American interpretation of the Hague Convention on the Civil Aspects of International Child Abduction (Convention) would be overturned. In a 6-3 decision, the United States Supreme Court held on this day that a ne exeat right was a right of custody under the proper interpretation of the Convention. This holding was reached in *Abbott v. Abbott*, which involved a father who was awarded a ne exeat right over his son by the Chilean court. Subsequent to the court granting this right, the mother relocated with the child to the United States without the father's permission, thus violating his ne exeat right. The Supreme Court conclusively ruled in favor of the father and ordered the return of the son to Chile, disregarding the traditional application of the Convention in comparable circumstances. The implementation of this decision will plausibly create a domino effect in which parents denied custodial rights may provoke the custodial parent to leave the jurisdictional state in an effort to obtain custodial rights. Thus, in reaching this conclusion and effectuating its decision, the Supreme Court has not only disregarded the international application of this treaty and the drafter's intent, but has

also ignored its traditional domestic interpretation. This article will discuss the Supreme Court's recent rejection of the Convention's traditional application. This journey will begin by examining several historical contexts surrounding the case, including the inception of the ne exeat clause, the drafters' intent in composing the Convention, as well as its traditional application in the United States. It will then continue by exploring the judiciary's current interpretation of the Convention. The article will also scrutinize the role of Justice Sonia Sotomayer and her previous experience dealing with the issue at hand in *Croll v. Croll*. Lastly, It will conclude the survey by examining the appropriate application of the Convention the Court should have been applied in *Abbott*.

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### **Sovereignty Online: Learning from Spatial Theory and the Chinese Case**

**Graham Webster**

University of Washington - Department of Political Science

This paper proposes several ways in which the theory and operationalization of sovereignty in the study of international relations is complicated by the transnational nature of the internet and the architecture of online networks themselves. Basing the analysis in theories of space drawn from critical theory, it analyzes which aspects of sovereignty are more or less affected by internet use, arguing that theories of social space can inform concepts of territoriality in IR. The paper uses the Chinese case as an example throughout, illustrating that existing practices of government and societal actors inside and outside China represent a constantly shifting field for understanding political territoriality in the era of widespread internet use.

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### **Right to Social Justice**

**Somnath De**

*affiliation not provided to SSRN*

March 24, 2011

By social justice I mean the creation of a society which treats human beings as embodiments of the sacred, supports them to realize their fullest human potential. The concept of social justice is taken in its most comprehensive sense- the legislative, the administrative and the judicial. It is true that the preamble to our constitution uses the term "social justice" and Article 38. And in wider sense various fundamental rights somehow protects the concept of social justice in India. But beyond this neither the constitution nor any subsequent legislation provides the key to precise connotation of expression "Social Justice". So as right to social justice only some fundamental rights with the judicial pronouncement comes into picture. The Preamble declares and secure to all citizens justice, social, economic and political. The concept of social justice is a revolutionary concept which provides meaning and significance to life and makes the rule of law dynamic. In *Keshawanand Bharti Case* Supreme Court held that preamble is the part of the Constitution. The Constitution inscribes Justice as the first promise of the Republic, which means that State Power will execute the pledge of Justice in favour of millions who are the Republic. I mean to say Social Justice is People's Justice where the tyranny of power is transformed into democracy of social good. The idea of welfare state is that the claims of social justice must be treated as cardinal and paramount. Social justice is not a blind concept or a preposterous dogma. It seeks to do justice to all the citizen of the state. In the Directive Principles, however, one finds an even clearer statement of the social revolution. They aim at making the Indian masses free in the positive sense, free from the abject physical conditions that had prevented them from fulfilling their best selves.... The essence of the Directive Principles lies in Article 38. In reality, the cry for "social justice" is a call for the State to do something to fix economic and relational inequities without any regard to a universal principle of justice. By describing justice in social rather than legal terms, our attention is immediately drawn to national problems that can only be fixed by a civil government with enough power to enforce its policies. So then, advocates of "social justice" believe that the State plays the major role in rectifying so-called social problems because they are national in scope. Justice and social order had a genetic role in moulding the Indian jurisprudence

and notion of justice. If the rule of law and rule of life run close together, a jurisprudence where man matter will burgeon there. The springs of social justice will arise then - only then.

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### **The Global Trade Mark**

**Edward Lee**

Illinois Institute of Technology - Chicago-Kent College of Law

This Article offers a proposal for WTO countries to adopt global IP rights for a special class of trademarks: famous or well-known marks. Well-known marks are well-suited for greater departure from the territoriality principle, given the transnational protections for well-known marks that already exist under the Paris Convention and TRIPS Agreement. This Article proposes creating a Global Trademark (GTM) for well-known marks, to be governed by one, uniform international law. The GTM will span all countries in the WTO. The GTM is inspired, in part, by the Community Trade Mark (CTM) in the European Union, the first truly transnational IP form. While the CTM is regional in scope, the GTM will be international. This Article proceeds in five Parts. Part I discusses the theory behind the Global Trade Mark (GTM) and why it is worth adopting today. Part II discusses the outlines of the proposed Global Trade Mark Treaty, whose signal feature will be to establish a uniform body of international law to govern the GTM and an International Court of the GTM to resolve conflicts over its interpretation. Part III discusses the two Pathways by which a trademark can be registered as a GTM: (1) international registration of an existing famous mark that is famous in a certain threshold number of countries (here under a proposed Rule of 7 countries, the formula of which is discussed below), or (2) an "intent-to-develop" registration of a mark an owner intends to make famous under the Rule of 7 countries within a prescribed time of 10 years. Part IV discusses enforcement of GTMs in national courts and post-registration issues, including abandonment and genericide. Part V addresses objections.

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### **European Patent Law - Towards a Uniform Interpretation**

**Stefan Luginbuehl**

*affiliation not provided to SSRN*

*EUROPEAN PATENT LAW - TOWARDS A UNIFORM INTERPRETATION, Edward Elgar, 2011*

In his detailed study, Stefan Luginbuehl critically examines the latest efforts to establish a common European and EU patent litigation system and suggests possible alternatives to such a system. Due to the lack of a European patent court, both the EPO and national judges interpret European patents and European patent law. This results in diverging interpretation across Europe and costly litigation for patent holders. Stefan Luginbuehl's proposals to promote the goal of uniform interpretation of patent law and ease the difficulties are timely and highly insightful.

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### **Climate Effects of Carbon Taxes, Taking into Account Possible Other Future Climate Measures**

**Florian Habermacher**

University of Saint Gallen (HSG)

**Gebhard Kirchgässner**

Universität St. Gallen; CESifo (Center for Economic Studies and Ifo Institute for Economic Research)

*U. of St. Gallen Law & Economics Working Paper No. 2011-02*

The increase of fuel extraction costs as well as of temperature will make it likely that in the medium-term future technological or political measures against global warming may be implemented. In assessments of a current climate policy the possibility of medium-term future developments like backstop technologies is largely neglected but can crucially affect its impact. Given such a future measure, a currently introduced carbon tax may more generally mitigate climate change than recent

reflections along the line of the Green Paradox would suggest. Notably, the weak and the strong version of the Green Paradox, related to current and longer-term emissions, may not materialize. Moreover, the tax may allow the demanding countries to extract part of the resource rent, further increasing its desirability.

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### **Federal Constitutions and Global Governance: The Case of Climate Change**

**Blake Hudson**

Stetson University - College of Law

*Indiana Law Journal, Vol. 87, 2012*

Federal systems of government present more difficulties for international treaty formation than perhaps any other form of governance. Federal constitutions that grant subnational governments exclusive regulatory authority over certain subject matters constrain national governments during international negotiations—a national government that cannot constitutionally bind subnational governments to an international agreement cannot freely arrange its international obligations. At the same time, federal nations that grant subnational governments exclusive control over certain subject matters value more stringent decentralization and the benefits it provides in those regulatory areas. The difficulty lies in striking a balance between global governance and constitutional decentralization in federal systems. For example, recent scholarship demonstrates that U.S. federalism may jeopardize international negotiations seeking to utilize global forest management to combat climate change, since subnational forest management is a constitutional regulatory responsibility reserved for state governments. This article expands that scholarship by undertaking a comparative constitutional analysis of five other federal systems—Australia, Brazil, Canada, India, and Russia. These nations, along with the U.S., are crucial to climate negotiations since they account for 54 percent of the world's total forest cover. This article reviews the constitutional allocation of forest regulatory authority between national and subnational governments in these nations to better understand potential complications that federal systems present for global climate governance aimed at forests. The article concludes that federal systems that maintain three key elements within their constitutional structure are most capable of agreeing to an international climate agreement that includes forests, successfully implementing that treaty on domestic scales, and doing so in a way that maintains the recognized benefits of decentralized forest management at the local level—1. national constitutional primacy over forest management, 2. national sharing of constitutional forest management authority, and 3. adequate forest policy institutional enforcement capacity. The article also establishes the foundation for further research assessing how the constitutional structures of federal systems lacking key elements may be adjusted to achieve more effective climate and forest governance.

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### **Energy Liberalization in Antitrust Straitjacket: A Plant Too Far?**

**Malgorzata M. Sadowska**

University of Bologna

*World Competition: Law and Economics Review, Vol. 34, No. 3, September 2011*

The European Commission has launched a number of antitrust investigations against the major energy incumbents in the aftermath of the energy sector inquiry. Most of them have already been settled under Article 9 of the EC Regulation 1/2003 and the undertakings offered far-reaching, sometimes structural, commitments. This article studies the 2008 investigation into price manipulation in the German electricity wholesale market. In spite of no convincing evidence and flaws in the assessment, the Commission was able to negotiate from E.ON substantial capacity divestments. The Commission is straightforward about using antitrust rules to open up energy markets. Sector inquiries, commitment procedure and structural remedies allow for a quick intervention, flexible problem-solving and bring about decisive changes in the energy market setting. However, harnessing antitrust for the purpose of energy liberalization policy has an adverse impact on competition enforcement itself. First, it leads to a number of 'weak' cases, based on far-fetched arguments.

Second, it results in remedies which are not tailored to the abuse at issue, but are in line with a wider objective of energy market liberalization, and as an outcome of negotiations, further swayed by the firm's own interest in the ultimate shape of the commitment package.

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### **Tribal Constitutions and Native Sovereignty**

**Robert J. Miller**

Lewis & Clark Law School

More than 565 Indigenous tribal governments exercise extensive sovereign and political powers within the United States today. Only about 230 of the native communities that created these governments, however, have chosen to adopt written constitutions to define and control the political powers of their governments. Many observers would no doubt ask how a government can function without a written constitution to guide its formation and operation, and how the rights of citizens can be defined and protected without a written constitution. This essay addresses these questions and many more concerning American Indian and Alaska Native tribal constitutions. It is clear that constitutionalism is nothing new to Indigenous peoples in North America. This fact is demonstrated by the Iroquois Confederacy of the Haudenosaunee people who have governed themselves under an unwritten constitution for many hundreds of years, by the Cherokee Nation who apparently created the first written tribal constitution in 1827, by the many dozens of tribal governments who adopted written constitutions from 1837-1930, and by the hundreds of Indigenous governments who adopted constitutions under the federal Indian Reorganization Act of 1934. This essay examines these facts and more, and addresses whether modern day tribal constitutions adequately serve the needs of native communities and help these communities and their political entities to exercise and protect their sovereignty.

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### **Local and Global Sentiment Effects, and the Role of Legal, Trading and Information Environments**

**Candie Chang**

Massey University

**Robert W. Faff**

University of Queensland

**Chuan-Yang Hwang**

Nanyang Technological University (NTU)

March 15, 2011

Based on 23 developed and developing equity markets, we document pervasive overall local and global sentiment effects. A stronger legal environment is generally associated with weaker sentiment effects. Nevertheless, stronger rule of law and better accounting standards are associated with a stronger global sentiment effect. Our results suggest that short selling facilitates arbitrage and reduces sentiment effects. In contrast, lower trading costs are associated with stronger local, but weaker global sentiment effects. Our results indicate that greater foreign investor accessibility reduces the domestic sentiment effect while providing a channel to transmit global sentiment to domestic stock markets.

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### **Commentary on the Trial Judgment in the Case of Prosecutor v. Ljube Boškoski and Johan Tarčulovski**

**Alexander Zahar** Macquarie Law School

*ANNOTATED LEADING CASES OF INTERNATIONAL CRIMINAL TRIBUNALS, André Klip and Göran Sluiter, eds., Intersentia, 2011*

A short critical commentary on the ICTY's Macedonian judgment.



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**Why Do Private Governance Organizations Not Converge? A Political-Institutional Analysis of Transnational Labor Standards Regulation****Luc Fransen**

University of Amsterdam

*Governance, Vol. 24, No. 2, pp. 359-387*

Voluntary governance arrangements focusing on responsible business behaviour have proliferated over the past decades and in many sectors of industry different governance organizations now compete for business participation. This private governance competition has negative consequences for the effective functioning of these arrangements. In the literature up until now, optimism prevails on how a process of policy convergence between organizations may come about that would solve some of the problems that arise because of this competition. It is remarkable however that in one of the key industries referred to in this literature, the garments industry, convergence is virtually absent. This paper explains why this is so and suggests that next to three existing approaches to the evolution and possible convergence of private governance organizations, actually a fourth, pessimist type should be introduced, taking into account the evolution and perseverance of political difference between interest groups creating and supporting private governance arrangements.

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**International Mobile Roaming – An Update****Ewan Sutherland**

University of Witwatersrand, LINK Centre; University of Namur, CRID

Governments in a number of countries are concerned about the high surcharges for international mobile roaming and instances of "bill shock". Russia has used competition law to force down excessive prices. Singapore has introduced consumer protection against bill shock. The USA has consulted extensively on measures to address bill shock. The governments of Australia and New Zealand have held bilateral discussions. The European Commission is preparing its final report on the Roaming Regulation, due in June 2011. It has held a consultation in which the consensus was in favour of a further regulation from 2012 to 2015, continuing price caps, with a further review in 2014. There has not been the anticipated increase in usage, with customers not having changed their behaviour. While operators want to end the regulation, the alternatives seem to be ineffective or counter-productive. The precise levels are uncertain as is the possibility of a retail cap for data roaming. A number of niche services are available to bypass conventional roaming but have had no effect on the behaviour of conventional mobile operators. At a wholesale level there has been a growth in the use of hubs, which allow operators access to large numbers of foreign networks for outbound roaming at undiscounted prices, but with options to negotiate prices and inbound roaming. As yet, these do not seem to have increased competition or reduced prices. Discussions continue in international and inter-governmental bodies including: APEC, Arab League, ASEAN, CITEL, GCC, ITU and OECD. Yet, there remain significant challenges in finding a workable legal basis outside that of the European Union treaties, not least in complying with existing commitments to the World Trade Organisation (WTO).

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**Human Rights and the European Court of Justice: Past and Present Tendencies****Andrew Trevor Williams**

University of Warwick - School of Law

*Warwick School of Law Research Paper No. 2011/06*

The purpose of this paper is to consider the ECJ's jurisprudence as a specific story in the complex web of human rights in the European Union. I aim to do this in two parts. In the first, I analyse the principles that have guided the ECJ in its development of fundamental rights. These consist of largely

jurisdictional issues: when and over which fundamental rights matters, and over whom can the Court exercise judgment? They encompass questions of the sources of inspiration the Court uses for interpreting human rights. The second part then assesses how particular human rights have been developed in the ECJ's case law with specific attention paid to recent decisions. My approach here is to examine the jurisprudence in terms of the rights expressed in the EU Charter of Fundamental Rights. Although this is a fairly recent document (and I have some doubts over its reflection of rights protected over the history of the Union) it is represented by the EU as the most apt compilation of those rights it aims to promote if not respect. Its lack of legal enforceability until the Lisbon Treaty came into force at the end of 2009 has not prevented it shadowing the Court's appreciation of fundamental rights.

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### **War Signals: A Theory of Trade, Trust and Conflict**

**Dominic Rohner**

University of Zurich

**Mathias Thoenig**

*affiliation not provided to SSRN*

**Fabrizio Zilibotti**

University of Zurich; Centre for Economic Policy Research (CEPR); CESifo (Center for Economic Studies and Ifo Institute for Economic Research)

*University of Zurich Economics Working Paper No. 13*

We construct a dynamic theory of civil conflict hinging on inter-ethnic trust and trade. The model economy is inhabited by two ethnic groups. Inter-ethnic trade requires imperfectly observed bilateral investments and one group has to form beliefs on the average propensity to trade of the other group. Since conflict disrupts trade, the onset of a conflict signals that the aggressor has a low propensity to trade. Agents observe the history of conflicts and update their beliefs over time, transmitting them to the next generation. The theory bears a set of testable predictions. First, war is a stochastic process whose frequency depends on the state of endogenous beliefs. Second, the probability of future conflicts increases after each conflict episode. Third, "accidental" conflicts that do not reflect economic fundamentals can lead to a permanent breakdown of trust, plunging a society into a vicious cycle of recurrent conflicts (a war trap). The incidence of conflict can be reduced by policies abating cultural barriers, fostering inter-ethnic trade and human capital, and shifting beliefs. Coercive peace policies such as peacekeeping forces or externally imposed regime changes have instead no persistent effects.

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### **Non-Tariff Barriers in the EAC Customs Union: Implications for Trade in Uganda with Other EAC Countries**

**Peace Nagawa**

*affiliation not provided to SSRN*

A key objective for the adoption of East African Community (EAC) Customs Union was to enhance economic gains through elimination of tariffs and non tariff barriers (NTBs) within the member states. This study has established that several NTBs continue to exist, and some have persisted. The NTBs that have persisted for more than three years include a long list of customs documentation requirements, cumbersome formalities, and limited testing and certification arrangements. Other NTBs that still exist include: un standardized weighbridges; several road blocks; lack of recognition of individual country's standards; and the existence of several unharmonised standards. The simulation results of spatial equilibrium model of maize trade with and without NTBs show that at the EAC level there are positive production, trade and welfare implications attributable to elimination of NTBs in intra regional maize trade. The gains are greatest in trade and production in Uganda compared to Kenya and Tanzania. To eliminate the existing NTBs and to reduce the possibility of new ones being created, first and foremost, the EAC countries need to design effective mechanisms for

identifying and verifying information about NTBs and ensuring their elimination. This will require giving the EAC Secretariat the mandate to compel individual countries to eliminate any identified NTB and to ensure that no new ones are created. Second, policy and legislative decisions made by, for example, Council of Ministers should be communicated in time for effective implementation. Broadly, the Government of Uganda (GoU) needs to examine the trade barriers identified in this study and remove those that are internally instituted while working with the rest of the member states to remove those externally imposed. In the specific and medium term, standards should be harmonized and enforcement of compliance be transferred to one regional body, such as EAC Bureau of Standards. In the short run, the EAC countries should develop a mutual recognition of standards across member countries.

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### **Complimentary Protection for Victims of Human Trafficking**

**Vladislava Stoyanova**

Lund University, Law Faculty

*Göttingen Journal of International Law, Vol. 2, No. 3, 2010*

The international legal framework regulating the problem of human trafficking contains the presumption that the return of victims of human trafficking to their countries of origin is the standard resolution for their cases. However, victims trafficked into Council of Europe member states might have legitimate reasons for not wanting to go back. For those victims, I propose resort to the legal framework of the European Convention on Human Rights. I elaborate on the protection capacity of Article 3 (prohibition on torture, inhuman or degrading treatment), Article 4 (prohibition on slavery or servitude and forced labor), and Article 8 (right to respect for private life) of the European Convention; I utilize the jurisprudence of the Strasbourg court on these provisions and suggest possible arguments for substantiating claims in favor of victims and their right to remain in the territory of the receiving state.

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### **Scuttle the Abandoned Shipwreck Act: The Unnecessary Unconstitutionality of American Historic Shipwreck Preservation**

**Nathan Murphy**

Government of the United States of America - Courts of Appeals

*Tulane Maritime Law Journal, Forthcoming*

This paper analyzes the Abandoned Shipwreck Act of 1987, a topic at the intersection of admiralty and historic preservation law. I conclude that, despite Congress's best intentions in creating the law, the Act has been a failure. Practically, the Act disserves the cause of historic preservation by creating an inconsistent patchwork of state management schemes, and by failing to create incentives for discovering new shipwrecks. More importantly, the Act violates the United States Constitution by restricting the federal courts' admiralty jurisdiction and by disrupting the national uniformity of admiralty law. . . .

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### **Modes and Patterns of Social Control: Implications for Human Rights Policy Program on Human Rights And the Global Economy**

Northeastern University - School of Law

*International Council on Human Rights Policy, 2010*

Modes and Patterns of Social Control: Implications for Human Rights Policy is the latest report of the International Council on Human Rights Policy. This report looks into the human rights implications of contemporary patterns of social control: how laws and policies construct and respond to people, behaviour or status defined as "undesirable", "dangerous", criminal or socially problematic. The report highlights common patterns of criminalisation, segregation, and surveillance – and how they are

shaped by political economy, notions of risk and danger, and regimes of policy transfer. It explores the human rights implications of questions such as: How changing ideas of crime, criminality and risk are shaping social policy? Why does incarceration continue to be a preferred sanction? How are public health and urban governance being reshaped into regimes of discipline and punitiveness? How do contemporary policing and surveillance practices order and organise social relations? Despite the significant amount of research conducted around some of these themes, a considerable gap exists between those engaged in research and theory and those engaged in human rights advocacy and policy. This report seeks to bridge that gap. Drawing on research across five policy areas – infectious diseases, urban spaces and the poor, policing, migrants, and, punishment and incarceration – and a case study of the Roma in Europe, it is relevant to human rights advocates and professionals working in diverse policy areas. . . .

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**Canada**

**Aaron A. Dhir**

Osgoode Hall Law School, York University

**Edward J. Waitzer**

Osgoode Hall Law School; Schulich School of Business

**Aaron Fransen**

*affiliation not provided to SSRN*

**Christen Daniels**

*affiliation not provided to SSRN*

*GLOBAL BUSINESS AND HUMAN RIGHTS, James Featherby, ed., The European Lawyer Ltd., 2011*

This is a chapter on Canada for a new book that explores the growing relationship between human rights and global business and the developing international focus on this topic, particularly as a result of recent United Nations initiatives. This first edition focuses on the legal accountability and due diligence responsibilities of corporations for human rights compliance by their overseas operations.

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**Exchange Trading Rules, Governance, and Trading Location of Cross-Listed Stocks**

**Douglas Cumming**

York University - Schulich School of Business

**Mark Humphery-Jenner**

University of New South Wales (UNSW) - School of Banking and Finance; Tilburg University - European Banking Center

**Eliza Wu**

University of Technology, Sydney - UTS Business School

We examine the location of trades for stocks cross-listed in the U.S. We consider for the first time in this context the role of the actual rules for trading on exchanges, both across countries and over time, to understand trading patterns. As well, we consider various new measures of sovereign governance and shareholder rights across countries to assess other legal and institutional drivers of trading activity. The data indicate that the proportion of trades that occurs on an exchange monotonically increases with sovereign governance and increases at a decreasing rate with the number of stock exchange trading rules.

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**Issues in Anti-Corruption Law: Drafting Implementing Regulations for Anti-Corruption Conventions in Central Europe and the Former Soviet Union**

Bryane Michael, Stockholm School of Economics  
Journal of Legislation 2010

Using a law and economics approach to anti-corruption regulation, this paper seeks to provide an answer to the following question: — how should executive agencies in many Central European and Former Soviet countries write anti-corruption regulations? Executive agencies should write regulations, using economic theory as a guide, such that the social benefits of anti-corruption regulation outweigh the social costs.

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***B. Older Items Uploaded This Week***

**Resurrecting the Doha Round: Devilish Details, Grand Themes, and China Too**

**Raj Bhala**

University of Kansas - School of Law  
*Texas International Law Journal, Vol. 45, pp.1-125, 2009*

The multilateral trading system embodied in the World Trade Organization has contributed significantly to economic growth, development and employment throughout the past fifty years. We are determined, particularly in the light of the global economic slowdown, to maintain the process of reform and liberalization of trade policies . . . and pledge to reject the use of protectionism. International trade can play a major role in the promotion of economic development and the alleviation of poverty. We recognize the need for all our peoples to benefit from the increased opportunities and welfare gains that the multilateral trading system generates. The majority of WTO Members are developing countries. We seek to place their needs and interests at the heart of the Work Programme adopted in this Declaration. . . . Recognizing the challenges posed by an expanding WTO membership, we confirm our collective responsibility to ensure internal transparency and the effective participation of all Members. . . . We shall therefore at the national and multilateral levels continue to promote a better public understanding of the WTO and to communicate the benefits of a liberal, rules-based multilateral trading system.

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**Independent Human Rights Documentation and Sexual Minorities: An Ongoing Challenge for the Canadian Refugee Determination Process**

**Nicole LaViolette**

University of Ottawa - Faculty of Law  
*International Journal of Human Rights, Vol. 13, No. 2/3, pp. 437-476, 2009*

Sexual minorities must meet the same evidentiary burden as all other refugee claimants. Independent country information produced by international human rights organisations plays an important role in meeting this burden. However, in the case of gay, lesbian, bisexual, and transgender claimants, existing country documentation still fails to provide the kind of information refugees need to support their claims. This is due to the continual struggle of human rights organisations to properly document abuses against sexual minorities. Also, the legal questions most relevant to claims based on sexual orientation and gender identity have shifted over the last 15 years. Early cases turned on whether a claimant's fear of persecution was well founded or whether the claimants were able to prove their sexual orientation. Recent cases have focused on the distinction between persecution and discrimination, the availability of state protection, and possible regional contrasts in the treatment of sexual minorities within a country. The shift in legal issues requires evidence that is either not available or is not sufficiently focused or detailed to meet the legal requirements of the Canadian refugee determination process.

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### **Understanding the Role of International Law in WTO Law**

**Rajesh Babu R.**

Indian Institute of Management (IIM), Calcutta

*Indian Yearbook of International Law and Policy, Chapter 10, p. 288, 2009*

This paper is an attempt to understand the role of international law in World Trade law ("WTO Law"), and the scope of such a relationship. The relationship has been viewed at two levels – that the general principles of international law automatically apply to the WTO legal system, unless explicitly 'contract out', and, that international law does not apply to WTO legal system since it has been conceived as *lex specialis*, excluding 'other' international law, unless otherwise provided in the agreements. These contrasting approaches have direct implications on the nature, scope and outcome of the WTO dispute settlement process. The interpretation of the WTO agreements against the background of public international law could offer the WTO adjudicating bodies not only a large body of well established principles helpful in clarifying ambiguities and strengthen remedies, but also in ensuring the completeness of the WTO legal system. On the other hand, the 'fall back' option may lead to expansionist tendencies by the panels and the Appellate Body reading into the WTO law obligations not sanctioned by the WTO Agreement or foreseen by the negotiators in the Uruguay Round of trade negotiations. The paper views international legal system as a coherent whole, mutually dependent body of rules, and general international law could play a significant role in strengthening the WTO law. The paper, however, cautions that incorporation of general international law by the WTO adjudicating bodies 'lock, stock and barrel', may upset the carefully negotiated balance in the WTO legal system and the rights and obligations specifically designed for the WTO framework.

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### **The Principle of Non-Refoulement at Sea and the Effectiveness of Asylum Protection**

**Seline Trevisanut**

University of Cagliari– Department of Public Law and Social Studies; Columbia Law School

*Max Planck Yearbook of United Nations Law, Vol. 12, pp. 205-246, 2008*

This article elucidates how the exercise of sovereign powers in the different maritime zones pursuant to the law of the sea and customary international law gives rise to challenges in the application of the principle of non-refoulement and in the protection of asylum-seekers and refugees at sea. Particular attention must be given to the so-called nonentrée mechanisms made principally to prevent a refugee having access to the procedures for the determination of his/her status. Among those are the interdiction at sea programs. The analysis will not be limited to the modalities of exercising jurisdiction; their consequences must also be considered. In fact, one of the main difficulties related to the management of refugees by sea consists in the heterogeneity of the phenomenon. Case law and practice testify that each arrival is different from another. This contribution argues that there is a common aim underlying both the law of the sea and refugee law which thus can be combined in accounting for security interests of the states as well as the protection of sea-borne asylum-seekers. .

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### **Colombia's Incursion into Ecuadorian Territory: Justified Hot Pursuit or Pugnacious Error?**

**Luz Estella Nagle**

Stetson University - College of Law

*Journal of Transnational Law and Policy, Vol. 17, p. 359, Spring 2008*

On March 1, 2008, Colombian military forces launched a cross-border airstrike and ground operation into Ecuador to attack a jungle encampment occupied by high ranking members of the Colombian



guerrilla army known as the Revolutionary Armed Forces of Colombia (FARC). The specific target of the air attack was Luis Edgar Devia Silva, aka Raul Reyes, the FARC's number two in command and one of Latin America's longest enduring guerrilla leaders. Reyes and several cohorts were killed. . . . The raid sparked a regional crisis that resulted in Ecuadorian and Venezuelan military mobilizations along their borders with Colombia. Colombia's President, Alvaro Uribe, justified the incursion into Ecuadorian territory as an operation of "hot pursuit," an international legal doctrine that allows a nation to give chase across an international frontier in order to capture a rebel force attempting to escape to safe haven in a neighboring country. The justification quickly unraveled, however, when evidence of the actual attack indicated that those in the FARC camp were in bed sleeping at the time of the airstrike on the site, and that the force that went into Colombia on the ground was a clean-up operation rather than an offensive operation. Although the crisis was resolved two weeks later at a Latin American summit, issues remain over international law doctrines such as hot pursuit, preemptive and anticipatory self defense, and use of the Bush Doctrine by other nations for purposes of crossing into another country's territory to pursue combatants involved in an internal armed conflict. This article examines the international law issues surrounding Colombia's actions and its justifications in the face of harsh international reactions.

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### **Geographical Indications: A Discussion on the TRIPS Regulation after the Ministerial Conference of Hong Kong**

**Stefania Fusco**

Stanford Law School; Santa Clara University - School of Law

*Marquette Intellectual Property Law Review, Vol. 12, No. 197, 2008*

For many producers and consumers, geographical indications (GIs) are more than mere economic tools as in many cases they also represent the historical and social identity of particular communities located in a particular territory. However, other interested producers and consumers, because of differing historical and economic backgrounds, do not share the same understanding of GIs and, to a certain extent, consider their protection as a form of unjustified protectionism. This paper presents a study of the international regulation of GIs on products. The purpose of this research is to understand the level of protection that this kind of identifier should receive in order to protect consumers against increasing research costs and balance the promotion of high quality products with the needs of a competitive global market. Despite the recognition of the existence of other significant factors involved in the investigation of this topic, I developed this research through an economic approach, which allowed me to understand the problems underlying the international negotiations on GIs in a more dispassionate manner. I concluded that given the absence of a more efficient alternative, the adoption of a multilateral register for wine and spirits is required. The extension of TRIPS art.23 to products other than wine and spirits should be warranted only in the presence of a strong economic justification. Finally, the EU request to regain the exclusive use of certain GIs should be rejected, as this initiative is not supported by any legitimate basis.

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### **Punishment, Invalidation, and Nonvalidation: What H. L. A. Hart Did Not Explain**

**Richard Stith**

Valparaiso University - Law School

*Legal Theory, Vol. 14, No. 3, 2008*

Elaborating first upon H. L. A. Hart's distinction between imposing duties and imposing disabilities, this article explores the two senses mentioned (but not fully explained) by Hart in which power-holders may be legally disabled. Legal invalidation (nullification) of norms that have been generated by vulnerable power-holders is seen to reduce diversity or pluralism in every normative sphere, from the supranational to the intrafamilial. By contrast, mere legal nonvalidation (noncognizance) of such norms tends to preserve the autonomy of the power-holders that created the norms, thus enhancing legal pluralism. Punishment for creating forbidden norms amounts in principle to an in-between sort

of control, less restrictive than completely invalidating them but more restrictive than just not validating them, that is, just ignoring them. Illustrative examples include the European Court of Justice's early use of invalidation to convert an international treaty into a supranational constitution, and the subtle effects of legal nonvalidation of same-sex marriage.

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### **On Armed Conflict, Human Rights, and Preserving the Rule of Law in Latin America**

**Luz Estella Nagle**

Stetson University - College of Law

*Penn State International Law Review, Vol. 27, 2008*

The rule of law in Latin America is under great stress due to ongoing internal armed conflict, the proliferation of criminal gangs and international crime organizations, the presence of international terrorist cells in the region, government corruption, citizens' loss of faith in their governments, and other social and political factors all conspire to cast the Latin American world into a region of transborder conflict, lawlessness, and long term political and social instability. This article examines the impact on the rule of law in Latin America from internal armed conflict and its attendant terrorism and human rights violations committed by state and non-state actors, and what steps must be undertaken to stabilize the region, reform vital government and legal institutions, and reaffirm that protection of human rights and respect for the rule of law are paramount to long-term development and regional security.

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### **Still Playing Dice with Lives: Darfur and Security Council Resolution 1706**

**Nsongurua J. Udombana**

University of Uyo

*Third World Quarterly, Vol. 28, No. 1, p. 97, 2007*

The Article examines the Security Council Resolution 1706 authorising UN Peacekeeping in Sudan, given the deteriorating humanitarian situation in Darfur. It assesses the African Union Mission in Sudan and elaborates on the reasons for its current fatigue and failure. It interrogates the proposed mandate of the UN Force, the organising principles and rules of engagement and, sadly, the realpolitik that continues to derail efforts at ending the genocide. The Article urges the global community, in particular the Security Council permanent members, to unite their efforts and compel the Government of Sudan to accept UN deployment in order to save the denying and end the atrocities in Darfur.

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### **International Composite Administration: Conceptualizing Multi-Level and Network Aspects in the Exercise of International Public Authority**

**Philipp Dann**

University of Giessen - Chair for public and comparative law

**Armin Von Bogdandy**

Max Planck Society for the Advancement of the Sciences - Max Planck Institute for Comparative Public Law and International Law

*German Law Journal, Vol. 9, p. 2013-2039, 2008*

The concept of composite administration has been presented here as a conceptual tool for a better legal understanding of the various and heterogeneous norms concerning the exercise of public authority through the interplay between international institutions and national administrations, between various member State administrations as well as between various international institutions. In doing so, the concept should demonstrate its usefulness for the legal analysis of such forms of administrative collaboration, and its difference to the concepts of multi-level systems and networks. The aim of the concept is therefore not one of critique. The legitimacy of composite administration

has not been the central focus. The concept's aim is rather to provide an analytical concept to mark typical elements, name recurrent problems and indicate further areas of research. However, even though the main purpose of the concept is heuristic, it carries a normative component as it is embedded in a normative vision of peaceful co-operation between polities organized by international institutions which live up to their publicness. International administration does not always conform to this vision: distrust, neglect, or hegemonic aspirations are not unfamiliar phenomena. Yet we believe that the vision which underlies the concept of composite administration has a sufficient legal basis in order to inform the construction of positive law and provide a meaningful general idea.

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**Social Rights are Human Rights: Actualizing the Rights to Work and Social Security in Africa**

**Nsongurua J. Udombana**

University of Uyo

*Cornell International Law Journal, Vol. 39, No. 2, p. 181, 2006*

The Article examines the rights to work and social security under the African human rights system and calls on all duty-bearers to adopt concrete and positive measures for their realization. It also calls on relevant judicial and quasi-judicial human rights institutions to interpret human rights in ways that take account of their indivisibility and interconnectedness.

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**The Principle International Human Rights Instruments to Which Canada Has Not Yet Acceded**

**Nicole LaViolette**

University of Ottawa - Faculty of Law

*Windsor Yearbook of Access to Justice, Vol. 24, pp. 267-325, 2006*

Although Canada is perceived internationally as an ardent defender of human rights and promoter of democratic values, this article reveals that Canada has yet to ratify 29 treaties relating to human rights. The Author critically examines the motives underlying the Canadian government's refusal to ratify each of these international human rights instruments by dividing the treaties into three main categories: instruments for which motives are unknown; instruments for which ratification no longer seems relevant; and instruments for which ratification remains under consideration. While the author recognizes that the refusal to ratify some treaties is appropriate, she nevertheless emphasizes that in many cases, the Canadian government has either not provided a comprehensive justification for refusing to adhere to a convention, or is unable to move beyond unending negotiations with provincial and territorial governments. The article emphasizes that the treaty ratification process, as it applies to human rights instruments, falls short of establishing a meaningful and thorough public policy process. Accordingly, the author suggests that change must be made to ratification policies and processes to allow for a transparent, accountable and effective examination and approval of human rights treaties.

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**Accountability in Development Aid Law: The World Bank, UNDP and Emerging Structures of Transnational Oversight**

**Philipp Dann**

University of Giessen - Chair for Public and Comparative Law

*Archiv des Völkerrechts, No. 44, pp. 381-404, 2006*

The article analyzes accountability mechanisms in development aid law, defining development aid law as the legal regime regulating the transfer of official development assistance. It focuses on the rules of two multilateral donor institutions, the World Bank and the United Nations Development Program. It also examines the accountability mechanisms pertaining to the recipients of aid, since the transfer

of aid involves not only a donor but also a recipient. The article first conceptualizes the notion of 'accountability' for legal analysis and flashes out the non-legal context of the transfer of development aid. On that basis it goes on to argue that there is a surprising plenitude of accountability mechanisms that go well beyond the conventional mechanisms of supervisory control of International Organizations by member states. Instead, such mechanisms involve several actors, standards and types of sanctions. However, the article also asks whether these mechanisms add up to a coherent system, give voice and access to the relevant constituencies and thus achieve a satisfactory standard of accountability. Finally, the article connects its findings to the wider discussion on the emergence of an international or global administrative law.

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**War is Not Child's Play! International Law and the Prohibition of Children's Involvement in Armed Conflicts**

**Nsongurua J. Udombana**

University of Uyo

*Temple International & Comparative Law Journal, Vol. 20, No. 1, p. 57, 2006*

The paper examines the international normative framework prohibiting the involvement of children in armed conflict. It interrogates the legal regime under international humanitarian, human rights, criminal and labour laws, against the factual background of violent recruitment of children in armed conflicts particularly, though not exclusively, in Africa. It argues that strengthening institutions for accountability is one of the roadmaps towards confronting the problem.

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**The Internationalized *Pouvoir Constituant* - Constitution-Making Under External Influence**

**In Iraq, Sudan and East Timor**

**Philipp Dann**

University of Giessen - Chair for Public and Comparative Law

**Zaid Al-ali**

*affiliation not provided to SSRN*

*Max Planck Yearbook of United Nations Law, No. 10, pp. 423-463, 2006*

External influence on constitution-making today has become much more than a mere migration of ideas or borrowing of concepts. In recent years, multilateral institutions and individual states have involved themselves in national constitutional processes in an increasingly sophisticated manner and in a number of different ways. Indeed, external actors often influence constitutional processes by making use of considerable organizational resources and sometimes even act through particular multilateral institutions in order to satisfy specific objectives. In that regard, one of the issues that has been a constant source of concern for a number of constitution-making societies is the self-interest of external actors. Even though external influence is often intended to be a source of support in a situation of post-conflict crisis, such influence can distort the constitutional-process in favor of concerns that are completely foreign to the relevant country. In this short article, we have distinguished three different categories of external influence by the degree of the influence exerted (total, marginal, and partial), and focused on the category of partial influence. In that regard, our three case studies analyzed different forms in which external influence can manifest itself. In all three cases, the respective constitution-making bodies were supported, directed or influenced by external actors, and as such one can speak of a factual internationalization of the *pouvoir constituant*. From a legal perspective, three variations of partial influence can be distinguished. . . .

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**An Escape from Reason: Genocide and the International Commission of Inquiry on Darfur**

**Nsongurua J. Udombana**

University of Uyo

*The International Lawyer, Vol. 40, No. 1, 2006*

The Article examines the Report of the International Commission of Inquiry on Darfur, which was set up to investigate allegations of commission of international crimes by the Government of Sudan and make appropriate recommendations. The Commission reported that there were evidences of war crimes and crimes against humanity in Darfur, but no evidence of genocide. This Article argues that, contrary to the Commission's Report, evidence of genocide could be gleaned from various data and events. The Article argues that the Commission's legal reasoning merely hides the political motive underpinning its Report and reflects the mindset of an international community that, hitherto, has been reluctant to characterize genocide in situations similar to Darfur, to avoid triggering obligations entailed under the Genocide Convention – the obligation to prevent, suppress and punish genocide.

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**When Neutrality is a Sin: The Darfur Crisis and the Crisis of Humanitarian Intervention in Sudan**

**Nsongurua J. Udombana**

University of Uyo

*Human Rights Quarterly, Vol. 27, No. 4, p. 1149, 2005*

The violent conflict that erupted in Darfur, Western Sudan, in 2003 has led to grave violations of human rights and humanitarian law, particularly by militias backed by the Government of Sudan (GoS). This Article argues that such grave crimes, which are continuing, justify humanitarian military intervention, as diplomacy has failed to prize the GoS into halting the mayhem. It denounces the apparent posture of neutrality by the international community, stressing that such neutrality helps the killers and not the victims. The Article also reflects on the continuing security challenges that face Africa and proffer suggestions towards confronting them.

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**A Question of Justice: The WTO, Africa, and Countermeasures for Breaches of International Trade Obligations**

**Nsongurua J. Udombana**

University of Uyo

*John Marshall Law Review, Vol. 38, No. 2, 2005*

The Article explores some of the legal and developmental issues arising from contemporary international trade – as anchored by the World Trade Organization (WTO) – particularly as they affect Africa. It argues that, contrary to the claims of the WTO apologists, trade liberalization has little positive impact on Africa and that the distribution of benefits deriving from trade seldom takes account of Africa's peculiar situation and needs. The Article, however, sees potential in a reformed WTO and, thus, outlines reform areas so that this Institution could maximize its potentials.

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**Pay Back Time in Sudan? Darfur in the International Criminal Court**

**Nsongurua J. Udombana**

University of Uyo

*Tulsa Journal of Comparative & International Law, Vol. 13, No. 1, p. 1, 2005*

The Article examines the question of criminal accountability in Sudan and justice for victims of the Darfur atrocities. The Article explores factors that led to UN Security Council referral of Darfur to the ICC and examines the Report of the UN Commission of Inquiry that influenced the referral. It interrogates admissibility and other issues that might arise before and during the trial.

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**Placing Blame Where Blame is Due: The Culpability of Illegal Armed Groups and Narcotraffickers in Colombia's Environmental and Human Rights Catastrophes****Luz Estella Nagle**

Stetson University - College of Law

*William & Mary Environmental Law & Policy Review, Vol. 29, p. 1, 2004*

Environmental devastation of man-made origin threaten some of the most sensitive regions of Colombia, where the biodiversity found there is among the most unique in the world. Deforestation due to the cultivation and processing of coca and opium, the collateral damage to the environment from drug interdiction and eradication programs, and the slash and burn agriculture practiced by farmers involved in drug production and displaced indigenous groups forced out of their homelands by drug traffickers have had a drastic impact on Colombia's precious national resources. The spillover effect of drug trafficking has also impacted sensitive environments in neighboring states, as well. For too long, the illegal armed groups and narcotraffickers causing the environmental devastation have gone without being held accountable for their damaging practices, and the inability of the Colombian government to confront drug-related environmental damage has resulted in increased stress on Colombia biodiversity and indigenous territories. This article examines the impact of drug cultivation and processing on the Colombian environment, the laws and enforcement capacity of the nation to fight it, and looks at how the nation and the international community can curtail the loss of more of Colombia's natural treasures.

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**Globalization, Values, and International Law in the World of Work****Janelle Marie Diller***affiliation not provided to SSRN*

February 10, 2004

This chapter explores the role of international law in the governance of globalization, with special attention to the contribution of international labour standards. Following a contextual overview, my perspectives comprise three aspects. I first address the current legal landscape of globalization, which some might call "bad news". I then turn to the potential role that law and values play in a fair governance of globalization, perhaps the "good news". Finally, I consider some of the new directions for the role of international law in globalizaion - what might become, in time, "tomorrow's news".

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**The Immigration and Refugee Protection Act and the International Definition of Torture (La Loi Sur L'Immigration Et La Protection Des Réfugiés Et La Définition Internationale De La Torture)****Nicole LaViolette**

University of Ottawa - Faculty of Law

*Revue Générale de Droit, Vol. 34, pp. 587-610, 2004*

Enacted on June 28, 2002, the Immigration and Refugee Protection Act, which refers explicitly to Article 1 of the Convention against Torture, extends protection to a new category of persons, namely, "person in need of protection". This article discusses how the courts will interpret subparagraph 97(1)a) of the Act when determining whether a person is a "person in need of protection" as defined by the Act. The author suggests that the inclusion of the subparagraph in question constitutes a direct implementation of the principle precluding the return of a person who faces the risk of being tortured to his or her country of origin. Through a brief overview of the principles governing the integration of international law into Canadian domestic law, the author argues that the Courts have an obligation to interpret the word "torture" in accordance with the Convention and the international definition of the word. The author then proceeds to circumscribe the breadth of the international



definition of torture by examining each of the constituent elements of the concept: the conduct, the intention of the offender and the purpose of the conduct, the identity of the offender and the exclusions. In doing so, she assesses the interpretation which different international instruments, jurisprudence and external documents have attributed to these components, including the work of the Human Rights Committee and the Committee against Torture, as well as the jurisprudence of both the European and Inter-American Courts of Human Rights.

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**So Far, So Fair: The Local Remedies Rule in the Jurisprudence of the African Commission on Human and Peoples' Rights**

**Nsongurua J. Udombana**

University of Uyo

*American Journal of International Law, Vol. 97, p. 1, 2003*

The Article examines the jurisprudence of the African Commission on Human and Peoples' Rights on the many aspects and applications of the rule of exhaustion of local remedies and compares it with that of other judicial and quasi-judicial institutions. The Article concludes that, in terms of interpretation of the rule, the Commission has, so far, been fair, though it has shown some inconsistencies in applying the rule to the various cases that have come before it.

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**Globalization of Justice and the Special Court for Sierra Leone's War Crimes**

**Nsongurua J. Udombana**

University of Uyo

*Emory International Law Review, Vol. 17, p. 55, 2003*

The Article examines international criminal responsibility in the context of the Special Court for Sierra Leone's war crimes. It examines the composition and mandate of the Court in comparative perspective and discusses some practical concerns regarding the functioning of the Court. The Article also examines the debate between accountability mechanisms for international crimes and truth and reconciliation mechanism.

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**Challenges of Poverty and Islam Facing American Trade Law**

**Raj Bhala**

University of Kansas - School of Law

*St. John's Journal of Legal Commentary, Vol. 17, pp. 471-514, 2003*

[...] This article is all about questioning the conventional wisdom on a recent and seminal event in international trade law. The event was the Fourth Ministerial Conference of the World Trade Organization ("WTO") held at Doha, Qatar from 9-13 November 2001. The conventional wisdom is that the Doha Conference was a "success." Because of two unmet challenges that concern the Third World and the Muslim World, the conventional wisdom may be wrong – or, at least, giddy. [...]

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**World Agriculture Trade in Purgatory: The Uruguay Round Agriculture Agreement and Its Implications for the DOHA Round**

**Raj Bhala**

University of Kansas - School of Law

*North Dakota Law Review, Vol. 79, pp. 691-830, 2003*

[...] Agricultural trade among Members of the World Trade Organization (WTO) is in Purgatory. No, I do not mean to suggest the souls of deceased citizens of those Members, or the Members individually or collectively are in an intermediate state between Heaven and Hell. That is hardly for me to say. Besides, Purgatory is a process, not a place. Rather, I mean to argue, with respect to international

trade in primary and processed agricultural products, there is neither autarky nor free trade – neither the Hell of closed borders or the Heaven of open ones. The WTO Members generally have rejected protectionism. But, they have failed to embrace fully its opposite. This intermediate situation for their agricultural trade is Purgatory. [...]

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**An African Human Rights Court and an African Union Court: A Needful Duality or a Needless Duplication?**

**Nsongurua J. Udombana**

University of Uyo

*Brooklyn Journal of International Law, Vol. 28, No. 3, p. 811, 2003*

The Article examines the developments of African international judicial institutions, including the question whether the proposal for two continental courts is a necessary duality or a needless duplication. It examines the arguments for and against having two continental courts, in the light of African realities and peculiarities. The author disagrees with the approach taken by the African Union and argues that no new supranational court should be established without first ascertaining if the existing institutions could better perform their duties.

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**Can the Leopard Change its Spots? The African Union Treaty and Human Rights**

**Nsongurua J. Udombana**

University of Uyo

*American University International Law Review, Vol. 17, No. 6, p. 1177, 2002*

This is a critical essay on the African Union Treaty, in particular its human rights objectives. Against the background of routine and gross human rights violations by African States, the Article raises doubts regarding African governments' sincerity in taking human rights seriously, though desirable. The Article identifies some of the tough but necessary measures that states must take to make respect for human rights a reality in Africa.

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**Towards the African Court on Human and Peoples' Rights: Better Later than Never**

**Nsongurua J. Udombana**

University of Uyo

*Yale Human Rights and Development Law Journal, Vol. 3, p. 45, 2000*

The Article examines the Protocol to the African Charter establishing an African regional court for effective human rights protection in Africa. It argues that the omission of a court has undermined public confidence in the African human rights system. For the Court to be truly effective, however, the Article calls on its architects to ensure that it is not handicapped with the same deficiencies and weaknesses that have beset the African Commission. The Article suggests proposals for making the Court effective.

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**No Safe Haven: Sexuality as a Universal Human Right and Lesbian and Gay Activism in International Politics**

**Nicole LaViolette**

University of Ottawa - Faculty of Law

**Sandra Whitworth**

York University, Department of Political Science

*Millennium - Journal of International Studies, Vol. 23, No. 3, pp. 563-588, 1994*

This article briefly outlines the extent of human rights abuses suffered by gay men and lesbians

around the world and the ways in which they have been invisible within traditional human rights instruments. It also documents the rise of a global lesbian and gay politics organised around a human rights discourse. The limitations of relying on human rights instruments are examined, but it is argued the gay and lesbian activists are aware of these limitations, and are charting a path through these difficulties in a manner which sees human rights as one part of a process in which gay and lesbian communities are constructed, nationally and internationally.

## II. Books

### Five Masters of International Law: Conversations with R-J Dupuy, E Jiménez de Aréchaga, R Jennings, L Henkin and O Schachter

(Hart Publishing, March 2011)

Antonio Cassese

This book consists of interviews with five distinguished international lawyers from the UK, USA, Uruguay and France, conducted by the editor, Antonio Cassese, between 1993 and 1995. Each interview is preceded by a brief 'intellectual portrait' of the interviewee. In his general introduction Cassese stresses that the interviews, all based on the same questionnaire, were intended to bring out not only the main ideas associated with each scholar in the fields of international law and international relations, but also his intellectual and philosophical background, his general outlook and his views of the prospects for the evolution of the international community. In his final essay, Cassese brings together the main threads of the interviews and points to the parallels and divergences appearing from them. This book offers a unique and important insight into the legal minds and outlook of a select group of prominent scholars of international law and legal institutions during the last years of the twentieth century.

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### Multi-Sourced Equivalent Norms in International Law

(Hart Publishing, March 2011)

Edited by Tomer Broude and Yuval Shany

Recent decades have witnessed an impressive process of normative development in international law. Numerous new treaties have been concluded, at global and regional levels, establishing far-reaching international legal and regulatory regimes in important areas such as human rights, international trade, environmental protection, criminal law, intellectual property, and more. New political and judicial institutions have been established to develop, apply and adjudicate these rules. This trend has been accompanied by the growing consolidation of treaty norms into international custom, and increased references to international law in domestic settings. As a result of these developments, international relations have now reached an unprecedented level of normative density and intensity, but they have also given rise to the phenomenon of 'fragmentation'.

The debate over the fragmentation of international law has largely focused on conflicts: conflicts of norms and conflicts of authority. However, the same developments that have given rise to greater conflict and contradiction in international law, have also produced a growing amount of normative equivalence between rules in different fields of international law. New treaty rules often echo existing international customary norms. Regional arrangements reinforce undertakings that already exist at the global level; and common concerns and solutions appear in many international legal fields. This book focuses on such instances of normative parallelism, developing the concept of 'multisourced equivalent norms' in international law, with contributions by leading international law experts exploring the legal and political implications of the concept in a variety of contexts that span the full spectrum of international legal norms and institutions. By concentrating on situations governed by a multitude of similar norms, the book emphasizes the importance of legal contexts and institutional settings to international law-interpretation and application.

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**Repertoire of the Practice of the Security Council**

United Nations  
(Online updates, Apr. 2011)

The Repertoire, mandated by the General Assembly in 1952, is a constitutional and procedural guide to the proceedings of the Council since 1946. It presents, as comprehensively as possible, relevant data regarding the practice of the Council and the application of the UN Charter and the Council's provisional rules of procedure.

- [First studies from 2008-2009 volume](#) (available 12 Apr 2011)
- [All chapters of 2004-2007 volume](#) (available 1 Apr 2011)

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**British Overseas Territories Law**

(Hart Publishing, March 2011)  
Ian Hendry and Susan Dickson

This is a manual of law and practice relating to the 14 remaining British overseas territories: Anguilla; Bermuda; British Antarctic Territory; British Indian Ocean Territory; Cayman Islands; Falkland Islands; Gibraltar; Montserrat; Pitcairn Islands; St Helena, Ascension and Tristan da Cunha; South Georgia and South Sandwich Islands; Sovereign Base Areas of Akrotiri and Dhekelia in Cyprus; Turks and Caicos Islands; and Virgin Islands.

Most, if not all, of these territories are likely to remain British for the foreseeable future, and many have agreed modern constitutional arrangements with the British Government. This book provides a comprehensive description of the main elements of their governance in law and practice, and of the constitutional and international status of the territories.

It describes their constitutional relationship with the United Kingdom, and goes on to deal with legislative, executive and judicial authority and controls, their sources of law and human rights protection in the territories. It considers the Offices of the Governor and the Law Officers of the Territories. It analyses defence, security and emergency powers in the territories; the nationality and status of people 'belonging' to them; their public finance arrangements; their relationship with the European Union; and the conduct of their external relations. It examines the position of the territories under international law, including their relationship with the United Kingdom in that context and the United Kingdom's international responsibility for them, and contains a description of the means of terminating British sovereignty over them. An Annex sets out key features of each territory in turn, describing briefly its history, status, constitutional structure, courts, law, economy and, in some cases, regional integration.

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**Economic, Social and Cultural Rights**

(Asgate, March 2011)  
Edited by Manisuli Ssenyonjo

This collection of seminal papers examines the legal, conceptual and practical questions relating to the international legal protection of economic, social and cultural rights. The volume is divided into three main parts: human rights obligations for states and non-state actors; analysis of selected substantive rights; and the justiciability of these 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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**New Wars and New Soldiers: Military Ethics in the Contemporary World**

(Ashgate, April 2011)

Edited by Paolo Tripodi

'It is supremely difficult to "teach" ethics – and equally important to do so. These essays are accessible, diverse, intriguing. On one level they show us troublesome issues of the globe's newest contest grounds peopled with mercenaries, illegals, terrorists, and innocent civilians. At their best, these chapters help us with what contributor Rebecca Johnson thoughtfully calls "moral capacity building for irregular warfare".'

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**Exploring the Boundaries of International Criminal Justice**

(Ashgate, May 2011)

Edited by Ralph Henham and Mark Findlay

This collection discusses appropriate methodologies for comparative research and applies this to the issue of trial transformation in the context of achieving justice in post-conflict societies. In developing arguments in relation to these problems, the authors use international sentencing and the question of victims' interests and expectations as a focus.

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**Comparative Criminal Justice and Globalization**

(Ashgate, July 2011)

Edited by David Nelken

In this exciting and topical collection, leading scholars discuss the implications of globalisation for the fields of comparative criminology and criminal justice. How far does it still make sense to distinguish nation states, for example in comparing prison rates? Is globalisation best treated as an inevitable trend or as an interactive process? How can globalisation's effects on space and borders be conceptualised? How does it help to create norms and exceptions? The editor, David Nelken, is a Distinguished Scholar of the American Sociological Association, a recipient of the Sellin-Glueck award of the American Society of Criminology, and an Academician of the Academy of Social Sciences, UK. He teaches a course on Comparative Criminal Justice as Visiting Professor in Criminology at Oxford University's Centre of Criminology.

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**Ethical Foreign Policy? US Humanitarian Interventions**

(Ashgate, June 2011)

Chih-Hann Chang

'Chih-Hann Chang's study of the influence of ethical realism on President Clinton's foreign policy is a revealing account of the debates within his administration over the use of military force in support of humanitarian interventions overseas. It is a timely reminder of how domestic political pressures, strategic considerations and the need to maintain credibility combine to influence presidential decision making. Based on interviews with those involved and on extensive archival research, this is essential reading for anyone interested in how American foreign policy is made.'

Jon Roper, Swansea University, UK

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**Contracting for Space: An Overview of Contract Practice in the European Space Sector**

(Ashgate, July 2011)

Edited by Lesley Jane Smith

Recent significant developments in the European space sector have had an impact on European commercial space law. This book is an up-to-date guide to the regulatory background of space projects and examines the typical legal problems which need to be solved by practitioners in the field. Taking into account public and commercial international law and practice, this book examines substantive issues of law specific to launchers, satellite manufacturers and space service providers with contributions from leading experts and practitioners in the field of European space law and policy.

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**Ethics and the Use of Force: Just War in Historical Perspective**

(Ashgate, May 2011)

James Turner Johnson

'This work represents James Turner Johnson's current thinking about the just war tradition. As he acknowledges the great variety present in contemporary discourse, Johnson teaches us to evaluate claims and counterclaims in light of historic precedents. The work is clear, insightful, and compelling. A masterful job.' John Kelsay, Florida State University, USA

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**Globalization and International Organizations**

(Ashgate, August 2011)

Edited by Edward Kwakwa

In the context of today's ever-increasing globalization the traditional role of international organizations has changed in recent years from that of facilitator of the activities of their members, to that of director of their own activities. This collection brings together the best published work by leading authorities in the field on issues that are affected by this change of role, such as governance, control, accountability and the privileges of international organizations.

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**International Law in East Asia**

(Asgate, May 2011)

Edited by Zou Keyuan and Jianfu Chen

The development of international law has been influenced by the rise of Asian countries, and the increased influence of other countries in the region through multinational organizations such as ASEAN. This collection of previously published articles by leading East Asian scholars brings together Asian perspectives concerning various issues in international law and provides a comprehensive picture of how and why East Asian countries participate in international law.

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**University of Wisconsin Law Library****Selected Recent Acquisitions related to International Law**

and

**Recent Acquisitions RSS Feed**

(Vol. 37, Issue 3, Mar. 2011)

- Bernstorff, Jochen von and Dunlap, Thomas. The public international law theory of Hans Kelsen: believing in universal law. Cambridge, England: Cambridge University Press, 2010. 324 p. KZ/3375/K45/B4713/2010 [Amazon book details](#) [Library Holding Information](#)



- Breitman, Richard and Goda, Norman J.W. Hitler's shadow: Nazi war criminals, U.S. intelligence, and the Cold War. Washington, D.C.: National Archives and Records Administration, 2010. 101 p.  
<http://purl.fdlp.gov/GPO/gpo3817>
- Epps, Valerie and Graham, Lorie. International law: examples & explanations. Austin, TX: Wolters Kluwer, 2011. 425 p.  
KZ/1242/E67/2011 (Reserve)  
[Amazon book details](#)  
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Henry Shue

[Clean Trade in Natural Resources \[Abstract\]](#)

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TI: [Mexico](#)

AU:

JN: SourceOECD General Economics Future Studies

PD: April 2011

VO: 2011

NO: 3

PG: 108-109(2)

PB: Organisation for Economic Co-operation and Development

IS: 1681-5378

Record 2.

TI: [What we know and what we do not know the legal challenges for international commercial contract formation in a pervasive computing environment](#)

AU: Li, Grace

JN: International Journal of Private Law

PD: March 2011

VO: 4

NO: 2

PG: 252-265(14)

PB: Inderscience Publishers Ltd

IS: 1753-6235

Record 3.

TI: [Crimes Against Humanity: Directing Attacks Against A Civilian Population](#)

AU: Eboe-Osuji, Chile

JN: African Journal of Legal Studies

PD: November 2008

VO: 2

NO: 2

PG: 118-129(12)

PB: Martinus Nijhoff Publishers, an imprint of Brill

IS: 2210-9730

Record 4.

TI: [Ending Impunity: The Case for War Crimes Trials in Liberia](#)

AU: Jalloh, Chennor; Marong, Alhagi

JN: African Journal of Legal Studies

PD: May 2005

VO: 1

NO: 2

PG: 53-80(28)

PB: Martinus Nijhoff Publishers, an imprint of Brill

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TI: [The African Commission on Human and Peoples' Rights and the Demystification of Second and Third Generation Rights under the African Charter: Social and Economic Rights Action Center \(SERAC\) and the Center for Economic and Social Rights \(CESR\) v. Nigeria](#)

AU: Nwobike, Justice C.

JN: African Journal of Legal Studies

PD: May 2005  
VO: 1  
NO: 2  
PG: 129-146(18)  
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TI: [China and International Law](#)  
AU: Qizhi, He  
JN: Grotiana  
PD: June 1987  
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