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The Nobel Effect

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POSTER SESSION

This poster session was convened at 12:15 p.m., Friday, March 27, as a research showcase to allow more than a dozen academics to present their innovative work in an informal environment. Below are brief summaries of their varied research.

THE NOBEL EFFECT

By Roger P. Alford[*]

This project approaches the history of modern international law from the perspective of the constructivist theory of international relations. Constructivism is one of the leadings schools of thought in international relations today. Essentially, this theory posits that state preferences emerge from social construction and that state interests are evolving rather than fixed. Constructivism further argues that international norms have a life cycle composed of three stages: norm emergence, norm acceptance (or "norm cascades"), and norm internalization. As such, constructivism treats international law as a dynamic process in which "norm entrepreneurs" interact with state actors to advance new norms with the objective of states adopting and ultimately internalizing those norms. Given the importance of this school of thought, it is surprising that scholars have yet to map the history of modern international law from the constructivist perspective. This Article is the first part of a larger project that attempts to do just that, applying the constructivist theory of international relations to argue that Nobel Peace Prize Laureates have been profoundly instrumental as norm entrepreneurs in the emergence, cascading, and internalization of international law norms.

Examining the history of modern international law through a constructivist lens reveals that international law has had several distinct periods, each with its own particular narrative. The Pacifist Period (1901-1913) began with a vision of the abolition of war and the peaceful settlement of international disputes. The Statesman Period (1917-1938) built on that foundation with fragile institutions, imperfectly constructed to secure and maintain international peace and security. It also saw the emergence of more lasting international norms combating the unlawful use of force. The Humanitarian Period (1944-1959) established a more effective international architecture and crystallized international humanitarian norms regarding the use of force. The Human Rights Period (1960-1986) emphasized protection of the individual as one of the central pillars of international law. Finally, the Democracy Period (1987-present) witnessed the triumph of democracy at the end of the Cold War, with widespread recognition that only the democratic form of government was suitable for realizing deeper yearnings of international peace and justice.

The Laureates during the Pacifist Period focused on realizing the dream of the abolition of war and the pacific settlement of disputes. This movement included populist pacifists, parliamentary pacifists, and international jurists. The populist strand of pacifists envisioned a future world without war. These pacifists worked through peace congresses, mass media, and pacifist publications to influence popular opinion about the inhumanity of war and the inevitability of perpetual peace. The parliamentary pacifists were political elites who shared the pacifist vision but were more grounded in political reality. Through

[*] Professor, Pepperdine University School of Law. Roger Alford, *The Nobel Effect: Nobel Peace Prize Laureates as International Norm Entrepreneurs*, 49 VA. J. OF INT'L. L. 61 (2008).

parliamentary discourse across national boundaries, these Laureates helped transform the pacifist dreams into serious political debate. Finally, the Laureates who were international jurists actively participated in the Hague Peace Conferences and offered technical expertise in establishing legal principles for a future world that could be governed by law rather than power.

The Laureates during the Statesman Period were markedly different from the Laureates of the Pacifist Period. The most notable Laureates during this period were statesmen. These Laureates were honored for their efforts to build a global infrastructure and use practical politics to promote international peace. Two of these Laureates, Léon Bourgeois and Woodrow Wilson, were recognized at the dawn of the League of Nations for their work in structuring international relations based on a vision of an international legal regime. It was during this period that Laureates promoted regional peace through the treaties of mutual non-aggression known collectively as the Locarno Pact. Laureates also were recognized for the Kellogg-Briand Pact—which renounced war as an instrument of national policy in relations between nations.

In the aftermath of the Second World War, the Nobel Peace Prize shifted its emphasis yet again, this time to humanitarianism. Humanitarianism is understood in the traditional sense of promoting human welfare, saving human lives, and alleviating human suffering. But it also embraces the legal definition of humanitarian law, i.e., the international law dealing with the regulation of the conduct of war, including the use of the means of warfare and the treatment of prisoners of war and civilian populations in armed conflict. Several humanitarian organizations were recognized during this period. The International Committee of the Red Cross (ICRC) was honored for its field operations and for its efforts to promote international humanitarian law. With the 1949 Geneva Conventions, the ICRC dramatically expanded the protections under international humanitarian law, including the treatment of wounded soldiers, prisoners of war, and civilians under enemy control. The postwar period also honored numerous individual humanitarian Laureates, including notable humanitarians such as George Marshall and Albert Schweitzer.

Beginning in 1960 with the recognition of the first black recipient, Zulu Chief Albert Lutuli, the Nobel Committee turned a dramatic new direction toward human rights. During this period, human rights came to be recognized as an indispensable ingredient for achieving peace. Several human rights Laureates were instrumental in establishing major international human rights treaties. Other Laureates played central roles in the evolution of human rights law as victims of injustice who served as symbolic representatives of their people. The last human rights Laureates during this period are among the most remarkable religious leaders of the century.

The final period in the history of the Nobel Peace Prize is the current age of democracy. Beginning in 1987, the Nobel Committee began emphasizing the intimate relationship between peace and democracy. The democracy Laureates generally fall into three major categories. The first category represents the pro-democracy dissidents in countries where political freedom is threatened. The second category includes transformational statesmen who were instrumental in helping guide their respective country to becoming transitional democracies. The third category of Laureates includes democracy advocates who used their political or institutional clout to promote democracy in their region.

THE COSTS OF DECENTRALIZED ENFORCEMENT OF WTO LAW*

By Alessandra Arcuri † *and Sara Poli* ‡

LEGAL BACKGROUND

As is well-known, under the World Trade Organization (WTO) legal framework, when a violation is deemed to occur, Members have recourse to a quasi-automatic dispute settlement system. If a violation persists after the WTO Dispute Settlement Body (DSB) has adopted a report, Members hurt by the illegal measures can be authorized to retaliate against the scofflaw Member. The WTO obligations are, thus, centrally enforced by this body.

We study the possibility of letting DSB decisions be enforced within the European Community (EC) legal order; such mode of enforcement is accordingly termed as "decentralized." This prospect has surfaced each time private parties bearing the brunt of retaliation have initiated disputes before the European courts. The recent *FIAMM* case,[1] delivered on appeal by the European Court of Justice (ECJ) in September 2008, appears to have consolidated an approach facially precluding any possibility of directly resorting to the DSB's rulings in order to obtain damages due to the EC non-compliance with such rulings and is complementary to *Van Parys*[2] where the ECJ refused to review the legality of the EC legislation in light of the DSB's decisions.

In the first case mentioned above, the ECJ dismissed the appeal lodged by two Italian companies, FIAMM and Fedon, claiming compensation for damages suffered because of retaliatory measures ("suspension of concessions") imposed by the United States. The United States was authorized by the WTO DSB to suspend tariffs concessions up to ca. $191.4 million annually as a consequence of the EC import regimes for bananas from African Caribbean and Pacific (ACP) countries, found to be in violation of WTO law; accordingly, the United States raised tariffs to 100 percent (from as low as 3.5 percent) on a number of products, including spectacle cases produced by Fedon and industrial batteries produced by FIAMM. Such producers, having nothing to share with the EC bananas import regime, are often referred to as collateral victims of "trade wars."

The damages allegedly suffered by specific companies and the related jurisprudence of the Luxemburg courts have made more visible the fact that international law may have serious and tangible consequences for private parties. This turns the seemingly highly theoretical question of WTO law's status in the Community legal order into a politically sensitive issue, calling for more detailed scrutiny.

* Thanks to Francesco Parisi, Anthony Ogus, Louis Visscher, Ann-Sophie Van den Berghe, Alessio Pacces, Siewert Lindenbergh, Ellen Hey, Michael Faure, and Giuseppe Dari Mattiacci for insightful comments. We are also grateful to the participants of the 2009 ASIL Conference, and, in particular, to Tomer Broude, Alberta Fabbricotti, Carlos Esposito, and Gabrielle Marceau. The usual disclaimer applies.

This essay summarizes the research conducted by the authors and published as an article in Opinio Juris in Comparatione in 2010: Sara Poli & Alessandra Arcuri, *What Price for the Community Enforcement of WTO Dispute Settlement Body's Rulings?*, Vol.1/2010, Paper No. 1 (Mar. 26, 2010), *available at* http://ssrn.com/abstract=1578831.

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[1] Case C-120/06 P, FIAMM v. Council & Comm'n, 2008 E.C.R. I-6513.

[2] Case C-377/02, Van Parys v. BIRB, 2005 E.C.R. I-1465.

Research Questions

Against this background, we seek to advance the debate on the status of WTO law in the EC legal order by addressing the following questions:

- Is it beneficial for the WTO Membership to enhance WTO compliance by introducing decentralized enforcement?
- Is it desirable to unilaterally grant direct effect to WTO law? Or should this only be decided in a multilateral context?
- Should "collateral victims of trade wars" such as Fedon and FIAMM be compensated?

Innovation and Methodology

We contribute to the existing scholarship on this subject in two ways:

1.) We develop a Law and Economics framework analyzing the question of desirability of decentralized private enforcement of WTO law. This is the first attempt to develop a general framework to better understand the consequences of endorsing different rules in relation to the WTO legal status within the Community legal order.

2.) We offer a new perspective on the issue of EC non-contractual liability for lawful acts, whose conditions were discussed at length for the first time in the recently decided *FIAMM* case.

The Economic Framework and its Main Results

We investigate whether forcing compliance through decentralized mechanisms is likely to bring about an efficient allocation of resources by applying the property vs. liability rules framework, originally developed by Calabresi and Melamed.[3] Yet, to fully understand the legal complexity of the WTO legal framework, the model needs to be refined; accordingly, we conceptualize a rule that we call an "aspirational property rule operating through a limited liability rule." By introducing a form of decentralized enforcement, this rule would be transformed into a pure property rule, which we show to be inefficient and, eventually, counterproductive for the system of liberalization of trade.

We also test our conclusions against Joost Pauwelyn's study,[4] which has charted the evolution of WTO law through the exit and voice theoretical framework (originally articulated by economist Albert Hirschman). Under this framework, we conceptualize increasing compliance by means of decentralized enforcement (e.g., direct effect), as the *closure of an exit option*. We conclude that given the current high degree of legalization of the WTO system, the marginal costs of decentralized private enforcement are likely to outweigh its benefits.

Finally, we investigate the hypothesis of whether granting damages to collateral victims of trade wars may be economically desirable. From a Law and Economics perspective, it is particularly interesting to note the reasoning of Advocate General Maduro in the *FIAMM* case. He argued that "the acceptance of a principle of no-fault liability would meet the requirements of good governance. It would force the political authorities ... to assess better

[3] Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85(6) Harv. L. Rev. 1089 (1972).

[4] Joost Pauwelyn, *The Transformation of World Trade*, 104(1) Mich. L. Rev., 1-65 (2005). In a similar fashion, the exit and voice theoretical framework was earlier applied by Joseph Weiler to study the evolution of the European Community. J.J. Weiler, *The Transformation of Europe*, 100 Yale L. J. 2403 (1991).

the *costs* that could ensue for citizens of the Union and to set them against the *advantages* ... .''[5] We submit that this position is not convincing from an economic perspective and show that a system endorsing a no-fault liability rule may have unreasonably high administrative costs.

Conclusion

Unlike some commentators criticizing the European courts, we conclude that their approach has a sound economic rationale. An important caveat applies to our analysis: we did not attempt to shed light on issues of equity. However, we submit that equity gaps are better addressed through risk insurance policies or alternative compensation mechanisms.

Can International Law Secure Women's Health? An Examination of CEDAW and its Optional Protocol

By Dhrubajyoti Bhattacharya[*]

Introduction

The year 2009 marks the thirtieth anniversary of the Convention on the Elimination of All Forms of Discrimination Against Women (''CEDAW'').[1] CEDAW is unique among international agreements in carving out a healthcare provision exclusively for women. Under CEDAW's Optional Protocol (''Protocol''), the CEDAW Committee retains exclusive jurisdiction to consider claims brought by individuals against a state party.[2] Although decisions are not legally binding, the Committee engages in a quasi-legal analysis by applying CEDAW to the relevant facts and articulating precise governmental violations and obligations.

I conducted a comprehensive analysis of all ten decisions issued thus far under the Protocol. I argue that the legal analyses have been unsound and compromised the integrity of the interpretive process. An enhanced framework is proposed to address a number of pressing and emerging women's health issues.

The research addresses three broad questions. First, do CEDAW and the Protocol afford more robust substantive and procedural safeguards to secure women's health? Second, has the CEDAW Committee interpreted the treaty in an objective and consistent manner? Third, what challenges exist to address pressing and emerging women's health issues under CEDAW?

Normative Framework: CEDAW, Protocol, and Rules of Procedure

As a normative framework, CEDAW, its Protocol, and the Committee's Rules of Procedure together afford substantive and procedural safeguards to address health-related individual-

[5] *FIAMM*, 2008 E.C.R. I-6513.

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[1] Convention on the Elimination of All Forms of Discrimination Against Women (''CEDAW''), G.A. Res. 34/180, Annex, U.N. Doc. A/RES/34/46/Annex (Dec. 18, 1979).

[2] Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women (''Protocol''), U.N. Doc. A/54/49 (Oct. 15, 1999).

and population-based claims. The healthcare provision is found in Article 12 of CEDAW, which provides that:

1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.
2. Notwithstanding the provisions of paragraph 1 of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.

Article 12(1) retains elements of *formal* equality, whereby men and women are afforded the same rights, conditions, and opportunities. A number of issues, however, remain unresolved. Socioeconomic status, spousal consent for seeking care, or the availability of female physicians, are examples of access barriers to care. There is no universal model for allocating resources to address disparities and the social determinants of health. Moreover, interpretation is vital to address emerging issues as a result of technological advancements. For example, is emergency contraception "related to" family planning?

Article 12(2) retains elements of *substantive* equality. Recognizing that formal equality may inadvertently create or sustain disparities, the provision requires positive programs exclusively for women. A pressing issue that must be addressed is whether abortion may be characterized as "an appropriate service in connection with pregnancy." Advocates of reproductive rights may argue that it is unequivocally a service "in connection with" pregnancy, namely, the termination thereof. Opponents may counter that the provision ought to be construed in its broader context, which promotes safe and healthy deliveries. Another issue that must be tackled at the national and subnational levels is what threshold of socioeconomic status warrants access to free services.

The Protocol complements CEDAW by empowering individuals (or organizations on their behalf) to raise claims before the Committee alleging treaty violations.[3] It also grants the Committee sole jurisdiction to review claims and issue recommendations.[4] States parties have six months to reply and demonstrate actions taken in accordance therewith.[5] The Committee may also impose interim measures to avoid irreparable harm, the exhaustion of domestic remedies notwithstanding.[6] For conditions and attendant circumstances (e.g., pregnancy, domestic violence), the timeframe is necessary to ameliorate existent harms or threats to the author's health, life, or safety.

The Committee's Rules of Procedure complement the substantive and procedural safeguards of CEDAW and the Protocol. The deliberative process is enhanced and the objectivity is reaffirmed by procuring testimony from international agencies and organizations with expertise in women's issues.[7] Specialized agencies (World Health Organization), intergovernmental organizations and UN bodies (e.g., UN Commission on the Status of Women), and nongovernmental organizations (e.g., Population Council) are all examples of potential entities that may contextualize individual claims to facilitate determination of whether states parties are upholding their treaty obligations.

[3] *Id.* art. 2.

[4] *Id.*

[5] *Id.* art. 6.

[6] *Id.* art. 5(1).

[7] Compilation of Rules of Procedure Adopted of Human Rights Treaty Bodies, HRI/GEN/3/Add.1 (Apr. 18, 2002); *see also* CEDAW, *supra* note 1, art. 22.

INTERPRETIVE TRENDS AND PROPOSED FRAMEWORK FOR ANALYSIS

Although the normative framework does not include an explicit methodology for treaty interpretation, inconsistency and failure to thoroughly examine the relevant legal issues vitiate the deliberative process and compromise the integrity of the outcomes. In at least five instances, the Committee did not address the issue of potential irreparable harm to the aggrieved party. Also, the Committee often relied on its general recommendations as authority for its analysis on the merits. Such recommendations do not enjoy the status of binding legal authority under CEDAW or the Protocol. Moreover, in only one decision was expert guidance alluded to, and even then, the reference appeared in the conclusion rather than the analysis. While existent guidelines may mutually reinforce the Committee's decisions, vague citation in the concluding remarks is neither helpful nor legally sound. Citation of non-binding authority should buttress analysis of legally binding norms and explicit obligations. These brief examples illustrate the challenges of creating objective analyses, in the absence of which, governments would be understandably hesitant to ratify either instrument. My proffered recommendations include a five-step interpretive framework that facilitates admissibility of claims and consideration on the merits.[8] By undertaking a more robust analysis, the Committee may fully utilize the normative framework to secure women's health.

FOLLOW THE MONEY?: DOES THE INTERNATIONAL FIGHT AGAINST MONEY LAUNDERING PROVIDE A MODEL FOR INTERNATIONAL ANTI-TRAFFICKING EFFORTS?

By Karen E. Bravo[*]

INTRODUCTION: TWO CRIMES; TWO REACTIONS

Trafficking in human beings, characterized as "modern day slavery," is a global problem. According to the U.S. State Department's 2008 Trafficking in Persons (TIP) Report, 170 countries have significant trafficking problems and are countries of destination, origin, and/or transit. Through money laundering, the proceeds derived from a multiplicity of criminal activities are integrated into international or domestic financial and banking sectors so that perpetrators may enjoy illegal profits within the legitimate economy.

The two activities share several characteristics, and both have been criminalized domestically and internationally. Each may take place solely within the domestic sphere of individual nations or territories, but each often exploits interstices in domestic and international law in order to access transnational and transborder markets. They are also linked at two stages of their operation: the availability and use of money laundering is linked to the causes of human trafficking; and, like profiteers from other predicate crimes, the trafficker in human beings uses money laundering services to move proceeds and profits into the legitimate economy.

ANTI-HUMAN TRAFFICKING

In 2000, the United Nations Convention Against Transnational Organized Crime and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and

[8] Dhrubajyoti Bhattacharya, *The Perils of Simultaneous Adjudication and Consultation: Using the Optional Protocol to CEDAW to Secure Women's Health*, WOMEN'S RIGHTS L. REP. ___(2009) (forthcoming).

[*] Associate Professor of Law, Indiana University School of Law–Indianapolis. This essay is excerpted from an article of the same name forthcoming in Summer 2009 in the University of St. Thomas Law Review.

Children were opened for signature. In the same year, the U.S. Congress enacted the Trafficking Victims Protection Act. The international and U.S. domestic instruments offer multilateral and unilateral methodologies and frameworks for understanding and combating human trafficking.

Not least of these methodologies is the U.S State Department's annual TIP Report, which directs that countries be ranked according to their level of compliance with the minimum level of anti-trafficking efforts specified by Congress. Countries whose efforts do not satisfy the standards face the threat of U.S sanctions. Eight years after the passage of the international and U.S. instruments, while information gathering and public awareness have increased, there is little evidence that the anti-trafficking efforts are succeeding in forging, and creating, compliance with global anti-trafficking standards.[1]

ANTI-MONEY LAUNDERING

In contrast, in 2000, the Financial Action Task Force (FATF), an independent intergovernmental organization that was created by the Group of Seven countries (the G-7) in 1989 and whose Forty Recommendations form the baseline standards for the international prevention of, and fight against, money laundering, issued a list of Non-Cooperative Countries and Territories (NCCTs). The list named countries whose banking and financial laws and regulations did not meet the standards set forth in the Forty Recommendations.[2] The Initial Report included fifteen countries and territories; six additional jurisdictions were named as NCCTs in the 2001 Report. In late 2007, the FATF issued the 2006/2007 list of NCCTs—*no countries or territories* remained on the list; all of the formerly noncompliant states and territories are now compliant or their compliance is in the process of being confirmed.

The contrasting levels of compliance engendered by inclusion of individual countries on the two lists appear to indicate that the international fight against money laundering is more successful than are international anti-trafficking efforts. This project, therefore, seeks to explore whether the FATF's international anti-money laundering regime may serve as a useful model for international anti-trafficking efforts and whether the institutional standards and methodologies of the anti-money laundering regime can be adapted and successfully deployed in the fight against human trafficking.[3]

[1] The 2008 TIP Report included fourteen countries ranked Tier 3 (non-compliant) and forty countries ranked in the Tier 2 watch list (non-compliant, but making efforts in that direction). A number of these countries had been listed at the same noncompliant levels in previous TIP Reports. In addition, although estimates of the number of trafficking victims have declined over the years, each year, the U.S. TIP Report adds new countries with trafficking problems.

[2] *See* FATF, Report on Non-Cooperative Countries and Territories (2000). In two subsequent reports, the FATF identified countries and territories that the organization would investigate and review in order to determine NCCT designation. *See* FATF, Review to Identify Non-Cooperative Countries or Territories: Increasing the Worldwide Effectiveness of Anti-Money Laundering Measures (2000, 2001, and 2002).

[3] I have asserted elsewhere that the dominant conceptual and legal frameworks deployed to combat the trafficking in humans, including the law enforcement framework, are inadequate. *See* Karen E. Bravo, *Exploring the Analogy Between Modern Trafficking in Humans and the Trans-Atlantic Slave Trade*, 25 B.U. INT'L L. J. 207 (2007). However, I have acknowledged the value of those frameworks even as I have advocated a more structural assault on the trade. Karen E. Bravo, *Free Labor! A Labor Liberalization Solution to Modern Trafficking in Humans*, 18 J. TRANS. L. & CONTEMP. PROBS. 545 (2009). The international anti-money laundering model analyzed here, if adapted to the international fight against human trafficking, would strengthen the implementation of the already dominant law enforcement approach.

METHODOLOGY

In this project, I examine and compare various elements of the regimes, including top-down versus bottom-up stimulus for action; the institutions participating in the regimes; the identity and power of the participants; the standard setting and information gathering methodologies; the international law status of the standards created; perceived neutrality of standards; methodologies such as self-assessments and mutual evaluations; and enforcement mechanisms—effective multilateral shunning versus *threat of* unilateral sanctions.

The project assesses whether the anti-money laundering regime's apparent success withstands scrutiny. It then analyzes the international and domestic interests that are affected by the two markets. The analysis highlights the international community's prioritization of the exploitation of monetary and financial systems in comparison with the exploitation of humans. Finally, the project addresses the potential for, and challenges to, adapting the international anti-money laundering model to international efforts against human trafficking and concludes that the principal challenge to this course of action is the formation of international political will.

INTERNATIONAL LAW AS *GLOCAL* LAW

By Melissa Martins Casagrande[*]

Perceptions of the role of international law vary considerably amongst jurists, political scientists, and the many other institutional players in the international arena. Beyond diverse and historical debates about enforceability, interpretation, and scope, international law also raises views of another nature, which identify the implementation of international law with optimistic solutions for community-based and/or localized issues.

Some of these views are described and analyzed in this study and considered as an emerging trend in the way international law is perceived. In this study, the observation of this trend is undertaken on the basis of the role attributed to international law by some grassroots advocacy groups and local communities, more specifically, from the perspective offered by interactions between indigenous peoples' organizations and international organizations. The results clearly point to the characterization of international law as a symbol of hope and of international law as *glocal* law,[1] and they focus on the promotion of compliance with clear standards established in international law as a powerful tool for accountability on issues of recognition and cultural diversity rights.

The analysis aims specifically at the perception of international law as the conveyer of a type of law that is legitimately concerned with pluralism. The materials analyzed include texts and oral records about negotiations and enforcement efforts of international legislation concerning indigenous peoples' economic development, the environment, and human rights.[2] The results clearly point to the characterization of international law as, indeed, a symbol of hope but also focus on the role of international law as an effective tool that bridges the

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[1] The term *glocal* is a recent neologism in English with similar variations in other languages. It has been used mostly by international organizations and civil society but it has not entered official lexicons yet. It is a word formed by the combination of the words "global" and "local." It usually refers to the ability to think globally and act locally.

[2] International law related to indigenous peoples is largely sponsored or developed under the auspices of the United Nations. Materials analyzed were available through the United Nations system generally, the United Nations Permanent Forum on Indigenous Issues, and documents produced by indigenous peoples organizations.

gap between the international and the local/community-based legal spheres, transforming international law into *glocal* law. This enthusiastic *glocal* perception of the law often bypasses law that emanates from the state or national levels or only analyzes national law in comparison with international legal standards. Within this context, the analysis highlights an interesting nuance for the role of international law in the quest for diversity and equality. This bottom-up perception, embedded in a skeptical approach towards a vertical hierarchy between national law and international law, interestingly appears to be more effective for specific and localized human rights protection.

Clear and straightforward international law mechanisms, especially those that safeguard the right to self-determination and consequently seek the legitimization of legal and political pluralism at local and national levels, are perceived by indigenous peoples' advocacy groups, as well as by many scholars, as key to ensuring dignity, cultural integrity, and targeted or localized monitoring of international human rights standards.[3]

Partnerships for the harmonization and coexistence of international, national, and local legal standards with participation of all those concerned are fairly recent and not fully implemented. In the past decades, consultation on indigenous peoples' issues with all those concerned has existed at the United Nations system[4] and some regional organizations. This participation, not usually facilitated or accounted for at the national level, appears to be one of the factors that enables international law to directly address local concerns and promote legal and political structures of decision-making.

In conclusion, it could be argued that the endorsement, faith, and trust in international law by a majority of indigenous peoples' organizations and advocacy groups is related to, amongst other factors: a) the considerable openness to direct participation at the international organizations' *fora*; b) the binding nature of customary practices established through international law directly affecting indigenous peoples in a positive manner at local and national contexts;[5] c) the relevance given by international law to the unique existence of indigenous peoples in the global order;[6] and d) the clear connection and similarities between international and local level standard-setting language and mechanisms. Despite the obstacles encountered in the negotiation and implementation of international law mechanisms, international law seems to have partially succeeded in presenting effective legal policies and operational frameworks for the protection of indigenous peoples and the improvement of their lives. It could be argued that international law holds a privileged position, acknowledged and respected by those concerned, for the effective identification and implementation of *glocal* self-determination and localized monitoring of human rights standards.

[3] Targeted or localized monitoring of human rights standards in this context refers to the practice of disaggregation of data collected for local and national purposes aiming to acquire an accurate understanding of indigenous peoples' situations in order to monitor the impact of existing initiatives or the development of new ones. *See generally* United Nations Permanent Forum on Indigenous Issues, *Report of the International Expert Workshop on Data Collection and Disaggregation for Indigenous Peoples*, 3d Sess., UN Doc. E/C.19/2004/2.

[4] *See, e.g.*, United Nations Permanent Forum on Indigenous Issues, *Indigenous Peoples, Indigenous Voices* (United Nations Department of Public Information, 2007).

[5] *See generally* S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 61-72 (2d ed. 2004).

[6] Some aspects of this unique existence are described in the preamble of the *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res. 61/295, UN GAOR, 61st Sess., UN Doc. A/Res/61/295 (2007).

THE CROSSROADS OF INVESTMENT ARBITRATION

By Susan D. Franck[*]

International Investment Agreements (IIAs) and associated dispute resolution mechanisms are critical to sustainable global economic development.[1] This paper analyzes investment treaty arbitration (ITA) outcomes and the development status of respondent governments and arbitrators.[2] Although particularized solutions might usefully address potential problems, the current evidence does not suggest that certain development variables are reliability linked to the outcome of ITAs.

PREVIOUS RESEARCH

Previous research found claimants came primarily from the developed world, namely OECD members or High Income countries, but respondents came from both the developed and developing world.[3] Although both governments and investors won cases, governments (57.7%) won more than investors (38.5%). And while the average investor claimed damages of approximately US$343 million, the average award was around US$10 million.[4] In other words, more investors lost than won; and when investors did win, they received less than claimed.

AN OPEN QUESTION

Previous research did not address whether the parties' or arbitrators' development background affected outcome. Given concerns about the legitimacy of ITAs, the issue is critical. If outcome depends upon spurious variables such as a respondent's development status or the development background of an arbitrator's country of origin, this could raise issues about the utility of dispute resolution systems in existing IIAs.

THE RESEARCH

This research used archival data[5] to assess whether there was a reliable relationship between development status and ITA outcome.[6]

[*] Associate Professor of Law, Washington & Lee University School of Law. The Author thanks Professors Andrea Bjorklund, William Burke-White, Christopher Drahozal, Mark Drumbl, Clint Peinhardt, Andrea Schneider, and David Zaring for their comments.

[1] Susan D. Franck, *Empirically Evaluating Claims about Investment Treaty Arbitration*, 86 N.C. L. REV. 1, 31, nn. 138-39 (2007).

[2] "Development status" refers to whether a state or its nationals/arbitrators: (1) is a Member or non-member of the Organization for Economic Co-Operation and Development (OECD), (2) High Income, Upper Middle Income, Lower Middle Income, or Low Income using World Bank criteria.

[3] Most claimants (89 percent) were OECD Members; one-third of respondents were OECD Members. Using World Bank's classifications, 18 percent of respondent states were "High Income," 45 percent were "Upper Middle Income," 28 percent were "Lower Middle Income" and less than 9 percent were "Low Income." Franck, *Evaluating Claims*, *supra* note 1, at 28-32.

[4] *Id.* at 49-50, 57-62.

[5] The data came from eighty-two cases that were publicly available before June 1, 2006. *Id.* at 52. This means that more recent awards against countries like Argentina were not included. *Id.* at 62, n.276.

[6] Susan D. Franck, *Considering Recalibration of International Investment Agreements: Empirical Insights*, *in* THE EVOLVING INTERNATIONAL INVESTMENT REGIME (Ed. Karl P. Sauvant forthcoming 2010); Susan D. Franck, *Development and Outcomes of Investment Arbitration Awards*, 50 HARV. INT'L L.J. 436 (2009).

One study considered the impact of a respondent's development status on outcome. Various analyses demonstrated that there was no statistically significant relationship between a government's development background and ITA outcome.[7]

Another study considered the relationship among outcome, the developmental status of the respondent state, and the presiding arbitrator's country of origin. These statistical analyses consistently showed that—at the macro level—outcome was not reliably associated with the development status of the respondent, the development status of the presiding arbitrator, or some interaction between those two variables. This held true for both: (1) winning or losing ITAs, and (2) the amounts awarded.[8]

Follow-up pairwise comparisons of the non-significant effects nevertheless revealed two statistically significant micro-effects in one subset of potentially non-representative cases. The data suggested that tribunals with presiding arbitrators from Middle Income countries awarded different damages in cases against High Income countries. If the presiding arbitrator was from a Middle Income country, High Income countries received statistically lower awards than: (1) Upper-Middle Income respondents and (2) Low Income respondents. Awards by Middle Income presiding arbitrators for High Income and Lower-Middle Income respondents were statistically equivalent.[9]

Implications

The data from the research suggested ITA appeared to be functioning reasonably well and, overall, development status was not associate with disparate treatment. That evidence, recognizing the limitations of the data and methods, suggests that radical overhaul, rejection, or rebalancing of procedural rights is not necessarily warranted.

The Cautious Good News

The results cast doubt on arguments that: (1) ITA is the equivalent of tossing a two-headed coin to decide disputes, (2) the developing world is treated unfairly in ITA, and (3) arbitrators from the developed and developing world decide cases differently. The data suggests a basis for cautious optimism about the integrity of ITA.

The Crossroads: Tempering the Initial Results

While the simple effects suggest optimism must be tempered, enacting structural safeguards can nevertheless promote procedural justice, help redress perceived concerns about the fairness of IIA dispute resolution, and foster greater confidence in the IIA system.

Creating targeted solutions to address particularized problems responds to stakeholder concerns about systemic integrity. Targeted legislative reforms to specific IIAs might include: minimizing arbitrator discretion and providing greater guidance about how to award damages; strengthening other dispute resolution mechanisms to maximize party interests in negotiated settlements and avoid arbitration; expanding the pool of arbitrators from the developing world; and enacting structural safeguards, such as an arbitrator database or legal advice center, to provide strategic advice about arbitrator appointment.

[7] Franck, *Recalibration*, *supra* note 6.

[8] Franck, *Development*, *supra* note 6.

[9] *Id.*

Conclusion

On the basis of the data, ITA outcomes were not generally affected by the development status of the respondent state or presiding arbitrators. This provides some evidence to support the hypothesis that ITA is not generally applied inappropriately. ITA should strive to interpret and apply standards in IIAs in a reasonable and non-arbitratry manner that involves the neutral application of facts to agreed legal principles. ITA should continue interpreting and applying standards in IIAs in a reasonable and non-arbitrary manner that involves the neutral application of facts to agreed legal principles. Adjudicative outcomes that are not based upon spurious variables foster the certainty, coherence, reliability, and predictability that are central to the rule of law, good governance, and international commercial activity. Those foundations are building blocks that ultimately promote international investment, further economic development, and foster the legitimacy of international law.

Making Laws Rule: The Case for an Institutional Compliance Approach*

By Diane F. Frey†

The purpose of this paper is to contribute to our understanding of how best to establish respect for international human rights in the area of labor rights. Despite almost universal adoption of international labor rights conventions, there is widespread noncompliance. There are many obstacles to effectively implement labor rights but they are often compartmentalized in the process of debating specific reforms. Some commentators argue that laws must be changed, while others contend that it is the enforcement or interpretation of the laws that is the real problem. This paper argues that we need to look at labor rights protections holistically as "institutions" in order to assess obstacles to compliance. Based on this holistic institutional analysis, the paper presents a methodology for identifying reforms appropriate to promote compliance.

The paper first proposes assessing the implementation of international labor rights as institutions rather than measuring them by proxy or indicator. Borrowing from comparative political economy, the standards in International Labour Organization (ILO) Conventions are contrasted with labor rights institutions or "rules of the game" comprised of rules, norms, and actual behaviors. This allows institutional analysis of the multiple pathways through which laws come to rule or, alternatively, become dead letters. The institutional analysis uncovers: (a) the formal institutions, including rules along with their interpretation and enforcement; (b) interactions between formal and informal institutions, including social norms and conventions, such as corruption and blacklisting; and (c) interactions between institutions in different spheres of social and economic life, such as labor and immigration. Interactions along these three dimensions explain the effectiveness of international human rights laws.

Using this framework, it becomes possible to assess institutional outcomes in terms of their compliance with international law and to identify problems and combinations of problems in implementing international law. There may be rule-based problems in which a written rule

* The institutional compliance approach is set out in greater detail in Diane F. Frey, *An Institutional Approach to Compliance: The Case of Forced Labor in Central America and the Dominican Republic*, 17 Advances in Industrial and Labor Relations (forthcoming 2009), *available at* SSRN: http://ssrn.com/abstract=1364242.

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contradicts or fails to adequately give effect to its normative goal and, therefore, undermines it. Alternatively, interpretations of rules may effectively undermine their effectiveness. Of course, even well-written, faithfully-interpreted rules may be inadequately or entirely unenforced. Equally important, formal labor rights institutions interact with informal institutions, such as corruption, and in the face of weak formal institutions, they may prevail in structuring social behavior. Finally, institutions beyond those directly related to the legal rule may enhance or undermine their effectiveness. For example, immigration and citizenship institutions interact with, and influence the efficacy of, international labor laws when undocumented workers are excluded from their protections.

Based on the understanding that institutions reinforce and contribute to labor rights violations, the paper presents an approach to international labor rights compliance founded on Harold Koh's compliance theory of international law.[1] Compliance theory is well suited to institutional approaches because it, like institutional theory, treats norms, rules, and behaviors as critical components in achieving change and compliance. The paper contends that, to be successful, interventions to make labor rights effective must be integrated, multiple, and mutually reinforcing, creating circumstances where actors adopt norm-based behaviors because they have been internalized.

The paper then presents a case study on labor rights compliance in Central America using the "Institutional Compliance Approach." The methodology for the case study is qualitative content analysis of publicly available documents, triangulating from among distinctive and sometimes opposing perspectives, such as those of the International Trade Union Confederation (ITUC), non-governmental organizations, the ILO, UN, and U.S. State Department Human Rights Reports. The goal is a transparent, replicable step-wise process through which documentary evidence is analyzed based on institutional and compliance theories. In this way, assessments as well as institutional and compliance explanations can be compared across time, countries, and legal rights. In many ways, this mirrors the methodology used by the ILO Committee of Experts on the Application of Conventions and Recommendations.

Three examples illustrate the theoretical model in practice.

(1) Formal Institutions: Obligatory overtime in excess of national work-time limits occurs through diverse formal institutional arrangements such as contradictory rules in Nicaragua; clear rules that lack adequate sanctions for violations in El Salvador, Guatemala, and Honduras; and rules that exempt groups of workers from the general rule in Costa Rica and Guatemala.

(2) Interactions between Formal and Informal Institutions: Formal institutional arrangements limiting work time in the Dominican Republic are crowded out and made irrelevant by social conventions that coerce employees to work obligatory overtime in excess of legislated limits. These include locking factory doors, threatening to withhold pay or other accumulated benefits, firing workers, manipulating piece-rate pay systems to lower worker pay, or more subtly refraining from informing employees that overtime work limits exist.

(3) Interactions between Different Sets of Institutions: Diverse institutions, beyond national work-time limits, influence obligatory overtime practices. Some institutions, such as wage-setting rules, are separate but very closely related to obligatory overtime and play a role by establishing low wages that force workers to accept longer hours to make ends meet. Second, labor rights institutions, such as collective bargaining, influence

[1] *See*, for example, Harold Hongju Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 HOUS. L. REV. 623 (1998).

obligatory overtime practices where employers only agree to engage in collective bargaining on the condition that workers accept piece-rate pay systems that negate national laws limiting work-time. Third, at the macro-economic policy level, economic development policies contribute to obligatory overtime practices through unemployment and underemployment.

The paper first explains institutional and compliance theoretical approaches to international labor rights. Part II briefly explains the methodology of this study, and Part III presents illustrations based on examples of ILO Convention implementation in Central America and the Dominican Republic. The illustrations draw on an analysis of the evidence, including comparative institutional assessments and underlying institutional and compliance deficits. Part IV draws some conclusions based on these illustrations concerning the theoretical framework developed in Part I and the methodology explained in Part II. Overall, the paper concludes that in order to make laws rule, compliance interventions must be multiple and mutually reinforcing across institutions.

Reviewing the Security Council

By Matthew Happold[*]

Approaches to the ambit of the Security Council's powers are often framed as divided between theoretical analyses based on abstract interpretations of the Charter divorced from reality, and those based on the practice of the organization and of states. However, the practice of states shows that there are limits to the Security Council's powers, and that states frame those limits in legal terms. Much academic commentary has looked in the wrong places, concentrating on the decisions of international and national courts. More significant are governments' views of the legality of particular resolutions, expressed in political forums, in particular when consequences are drawn from findings that the Council has acted *ultra vires*.

As the principal judicial organ of the United Nations, the International Court of Justice's (ICJ) pronouncements, even if not formally binding, are highly authoritative, but it remains unclear whether the ICJ has the power to judicially review Security Council decisions. On the one hand, the Belgian proposal at San Francisco to confer upon the Court such a power was rejected, and, later, in its *Namibia* advisory opinion, the Court disclaimed the power's existence. On the other hand, both the *Namibia* and the *Certain Expenses* advisory opinions saw the Court examining the legality of acts of UN organs. In practice, moreover, the ICJ has been careful to avoid exercising a power of incidental review.

Other courts apply their own law, whether national law or that mandated by their constituent treaties. The UN Charter may be applied but is unlikely to take precedence. In national courts, national implementing legislation, rather than the relevant Security Council resolution, will be the subject of the court's scrutiny, whilst in some cases there may also be an unwillingness to review Council resolutions for domestic separation of powers reasons. International courts may consider that as they are not members of the United Nations they are not bound by the Charter.

Instead, we might ask whether states have a "right of last resort" to review (and refuse to comply with) Security Council resolutions. Given Article 25's ambiguity, it is difficult to find definitive textual support in the Charter for a right to interpret and review the legality of Council resolutions. Nevertheless, in the absence of any judicial body able to undertake

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the task, there are only two options: the power rests with the Security Council or with the UN member states. Leaving the issue to the Council would mean—practically if not legally—that it is unbound. By default, it might be thought that states must have a right of last resort to review Security Council resolutions.

This situation is still problematic. It would seem to require states to act in good faith (which cannot always be presumed). In addition, if different states take different views on the legality of a particular resolution, then either some are right and some are wrong (but which?); all are right (and the contested resolution is simultaneously valid and invalid); or all are wrong. This has led states objecting to particular Council resolutions within other international organizations on the ground that collective decisions are less easily impeached as self-interested.

Such a view provides a new perspective on the *Lockerbie* and *Bosnian Genocide* cases. Originally, the focus was on what the cases said about the relationship between the Security Council and the International Court of Justice, i.e., whether the Court can review the Council. One can also look, however, at states' and international organizations' views as to the legality of the relevant Security Council resolutions: that is, whether states considered that they had a right to determine the resolutions' legality.

In the *Lockerbie* cases, in its orders of 14 April 1992, the ICJ refused to indicate provisional measures, holding that, by virtue of the operation of Articles 25 and 103 of the Charter, the obligations set out in SC resolution 748 (1992) trumped those under the Montreal Convention, at least *prima facie*. In its judgments on jurisdiction and admissibility of 27 February 1998, the Court reserved final determination of the issue for the merits stage. Both cases were subsequently discontinued, so a decision by the Court on the effects of the relevant resolutions was avoided. In June 1998, however, the Organization of African Unity (composed, at the time, of fifty-three member states) decided, from September 1998, no longer to comply with the Council's sanctions regime, on the ground that SC resolutions 748 (1992) and 883 (1993) "violate[d] Article 27 paragraph 3, Article 33 and Article 36, paragraph 3 of the United Nations Charter."

Similarly, in its orders of 8 April and 13 September 1993 on Bosnia's requests for provisional measures, the ICJ, in the *Bosnian Genocide* case, avoided ruling on Bosnia's claim that SC resolution 713 (1991) (which imposed an arms embargo on the whole of the former Yugoslavia) impaired its inherent right of self-defense and its obligation to protect its people from genocide on the basis that the measures sought were beyond the scope of the Genocide Convention and were addressed to persons not party to the proceedings. However, in December 1994, the Organization of the Islamic Conference (some forty-eight states) demanded that the Bosnian Government "be provided with all necessary means for self defense to exercise ... its inherent right recognized by Article 51 of the UN Charter," claiming that SC resolution 713 (1991), paragraph 6 (the arms embargo) did not "legally" apply to Bosnia and proclaiming its commitment to "act accordingly."

In each case, Security Council decisions were challenged both within and outside of the United Nations, in judicial and diplomatic forums. Moreover, the Security Council itself was only indirectly addressed. Instead, an appeal was made—with some success—to a wider community of states. Throughout, challenges were made in legal terms based on what the UN Charter was said to require. Whether such arguments were made in good faith is, perhaps, irrelevant. They served successfully to delegitimize the Council's actions.

ISLANDS OF EFFECTIVE INTERNATIONAL ADJUDICATION: CONSTRUCTING AN INTELLECTUAL PROPERTY RULE OF LAW IN THE ANDEAN COMMUNITY

By Laurence R. Helfer, Karen J. Alter, and M. Florencia Guerzovich[*]

The Andean Community—a forty-year-old regional integration pact of small developing countries in South America—is widely viewed as a failure. In the article that provided the basis for our poster exhibited at the Annual Meeting,[1] we show that the Andean Community has in fact achieved remarkable success within one part of its legal system. The Andean Tribunal of Justice (ATJ) is the world's third most active international court, with over 1400 rulings issued to date. Over 90 percent of those rulings concern intellectual property (IP). The ATJ has helped to establish IP as a "rule of law island" in the Andean Community where national judges, administrative officials, and private parties actively participate in regional litigation and conform their behavior to Andean IP rules. In the vast seas surrounding this island, by contrast, Andean rules remain riddled with exceptions, under-enforced, and often circumvented by domestic actors. We explain how the ATJ helped to construct the IP rule of law island and why litigation has not spilled over to other issue areas regulated by the Andean Community.

Our analysis makes four broad contributions to international law and international relations scholarship. First, we adopt and apply a broad definition of an effective rule of law, using qualitative and quantitative analysis to explain how the Andean legal system contributes to changing national decision-making in favor of compliance with Andean rules. Our definition and our explanation of the ATJ's contributions to constructing an effective rule of law provide a model that can be replicated elsewhere.

Second, we explain how the Andean legal system has helped domestic IP administrative agencies in the region resist pressures for stronger IP protection from national executives, the United States, and American corporations. We emphasize the importance of these agencies rather than domestic judges as key constituencies that have facilitated the emergence of an effective rule of law for IP. As a result of the agencies' actions, Andean IP rules remain more closely tailored to the economic and social needs of developing counties than do the IP rules of the Community's regional neighbors.

Third, the reality that the ATJ is effective, but only within a single issue area, makes the Andean experience of broader theoretical interest. We offer an explanation for why Andean legal integration has not extended beyond IP. But, our answer suggests avenues for additional research. We note that Andean IP rules are more specific than other areas of Andean law and that most administrative agencies in the region lack the autonomy needed to serve as compliance partners for ATJ rulings. We also find that, outside of IP, the ATJ is unwilling to issue the sort of purposive interpretations that encourages private parties to invoke Andean rules in litigation. The result is both a lack of demand for and supply of ATJ rulings.

Fourth, our study of the Andean legal system provides new evidence to assess three competing theories of effective international adjudication—theories that ascribe effectiveness to the design of international legal systems, to the ability of member states to sanction

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[1] Laurence R. Helfer, Karen J. Alter & M. Florencia Guerzovich, *Islands of Effective International Adjudication: Constructing an Intellectual Property Rule of Law in the Andean Community*, 103 AJIL 1 (2009). For additional analysis, see Laurence R. Helfer & Karen J. Alter, *The Andean Tribunal of Justice and its Interlocutors: Understanding Preliminary Reference Patterns in the Andean Community*, 41 N.Y.U J. INT'L L. & POL. 871 (2009).

international judges, and to domestic legal and political factors. We also explore the possibility that rule of law islands may be emerging in other treaty-based systems subject to the jurisdiction of international tribunals.

TORTUOUS BOUNDARIES AND OVERLAPS: FREE TRADE AND FREE SPEECH IN INTERNATIONAL LAW

By Tomer Broude[*] *& Holger Hestermeyer*[†]

When goods and services cross borders, so do the ideas and information embedded in them. The fates of the expression and of the goods or services are inextricably linked: governmental restrictions on trade may concurrently restrict the freedom of expression. Governmental measures restricting freedom of speech may interfere with international trade. This raises the question whether, with respect to free speech, international trade law and international human rights law are mutually reinforcing. If so, world trade law would offer the prospect of a more effective enforcement system for a human right. Indeed, the California First Amendment Coalition is actively advocating the use of the perceived linkage by formulating a trade law argument against China's internet-filtering practices.[1]

Our study suggests that caution is warranted when using free trade to advance free speech. Despite the basic intuition that free trade and free speech point in the same direction, the capacity of world trade law to promote free speech is significantly restricted. A number of important structural differences between international trade and international human rights law support our conclusion, including the objectives of the regimes, the scope of protected rights and interests, the World Trade Organization's (WTO) limited ability to promote individual rights and the operation of exceptions such as the public morals exception. However, the interplay between the regimes also suggests that lawyers cannot ignore the possible benefits of using various regimes in international law.

FREE SPEECH

The attempt to protect free speech by other means does not stem from a lack of normative protection of free speech: leaving aside regional human rights systems, freedom of expression is protected by Article 19 of the Universal Declaration of Human Rights and Article 19(2) of the International Covenant on Civil and Political Rights (ICCPR), with some limitations. Article 19(2) of the ICCPR guarantees the "right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers," through any media. The fact that the right is protected "regardless of frontiers" and has been interpreted to encompass commercial speech[2] shows that acts blocking transborder trade of speech-related products and services interferes with the freedom of expression. And it is not just the authors of expressions who benefit from the protection: the similar Article 10(1) of the (European) Convention for the Protection of Human Rights and Fundamental Freedoms has been held to protect companies publishing news media[3] as well as the

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[1] Testimony of Gilbert Kaplan, June 18, 2008, *available at* <http://www.uscc.gov/hearings/2008hearings/written_testimonies/08_06_18_wrts/08_06_18_kaplan_statement.php>.

[2] *Ballantyne, Davidson and McIntyre v. Canada*, Communications Nos. 359/1989 and 385/1989, U.N. Doc. CCPR/C/47/D/359/1989 and 385/1989/Rev.1 (1993), ¶ 11.3.

[3] ECtHR, *News Verlags GmbH & Co. KG v. Austria* (App. No. 31457/96), Judgment of 11 Jan. 2000.

broadcasting and cable retransmission of programs,[4] suggesting a similar interpretation for the ICCPR. However, the enforcement mechanism of the ICCPR, under its Optional Protocol, is not the most effective.

Free Trade

The arsenal of international trade law that might be used to pry open borders for the free flow of goods and services—and perhaps of expressions and information—is powerful and too complex to be studied in detail here: Article XI of the General Agreement on Tariffs and Trade (GATT) largely bans quantitative restrictions, Article III GATT demands national treatment for imported products, Article X GATT requires transparency with regard to laws affecting sales or restricting imports—and, thus, potentially censorship laws. The General Agreement on Trade in Services liberalizes services trade. The interplay between trade and freedom of expression is made more complex by the fact that copyright law is part of trade law via the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). Several recent cases illustrate the operation of trade law in the realm of speech. In 2008, the European Union, United States, and Canada challenged Chinese regulations requiring all foreign financial information service providers to act through the central news agency, Xinhua, in China.[5] A pending complaint is directed against requirements for the distribution of audiovisual products.[6] Finally, in 2009, a WTO panel ruled partly against China because its legislation denied copyright protection for works not yet authorized for circulation by the censors.[7]

A closer study reveals, however, that the free speech impact of trade is complex. The operation of exceptions in WTO law and its focus on non-discrimination often fail to promote free speech where it is most vulnerable: where an idea is not available on the "market." The history of copyright law and free speech is even more troublesome, linking copyright and censorship during the birth of Common Law copyright law.[8] Modern copyright law allows censorship under Article 17 of the Berne Convention for the Protection of Literary and Artistic Works, applicable via Article 9(1) of the TRIPS Agreement.

Conclusion

Although usually not in direct conflict, the claim of mutual reinforcement between trade and free speech is overstated. The use of free speech rhetoric in trade disputes can be a distraction from the real interests involved. Human rights advocates have to use caution before being co-opted into a cause that is not theirs.

[4] ECtHR, *Groppera Radio AG and Others v. Switzerland* (App. No. 10890/84), Judgment of 28 Mar. 1990, ¶ 55. The parallel is weaker as the court also refers to the term broadcasting that does not appear in the ICCPR.

[5] *China – Measures Affecting Financial Information Services and Foreign Financial Information Supplier*, WT/DS372/1; WT/DS373/1 and WT/DS378/1; the parties reached a mutually agreed solution.

[6] *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products – Request for Establishment of a Panel by the United States*, WT/DS363/5, 11 Oct., 2007.

[7] *China – Intellectual Property Rights*, WT/DS362/R, 26 Jan., 2009. The panel report was not appealed.

[8] Lyman Ray Patterson, Copyright in Historical Perspective (1968).

"IMAGES, INTERNATIONAL LAW, AND AGENDA-SETTING"

*By Daniel Joyce**

INTERNATIONAL LAW AND THE MEDIA

This presentation is part of a larger research project on the multifaceted relationship between international law and the media.[1] In that research, I consider the influence of law in shaping the image of the media, and also the role of the media in shaping the law. The two worlds collide in a variety of ways, a recent example being the international criminal conviction of media executives in Rwanda for their role in the genocide. This is a relationship that has grown in significance in an age of globalizing media and law. The rise of the Internet and new media has both reignited old debates over the law and media, and called into question existing regulatory mechanisms and assumptions.

Overall, this research attempts to critically analyze the emerging relationship between international law and the media, and to begin to chart the historical origins of its development. It does so at two levels. Firstly, I attempt to map out an "international law of the media" by considering diverse and interconnected areas of regulation such as free speech, incitement, trade, and telecommunications. Secondly, I reverse the inquiry and look at the roles the media plays within the international legal system in the provision of evidence, in securing compliance, in terms of legitimacy, and in agenda-setting.

THE POWER OF IMAGES

I am particularly interested here to examine the influence of "mediatization" on international law as a discipline; and to begin to think about the power of images in shaping international legal agendas.[2] The media is said to operate as a messenger to structure our lives in terms of news and events. It is also true that the media can act to obscure, silence, and distance issues and others. Increasingly, such media representations are driven and shaped by the power of the visual image. We can think of a number of iconic images that have affected public opinion, policy formation, and legal responses. These images can linger in the collective imagination, coming to define events and historical memory.[3]

TORTURE AND AGENDA-SETTING

In general terms, I see agenda-setting as involving the determination of the question of which issues matter, how their relative importance is perceived, and what policies and strategies to adopt in dealing with them. A contemporary example is the "torture debate" that was sparked by images of torture in Iraq and stories of use of torture techniques in the

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[1] Daniel Joyce, "International Law and the Media: A Multifaceted Relationship" (PhD dissertation, University of Cambridge, 2009). See also, Monica Hakimi, *The Media as Participants in the International Legal Process*, 16 DUKE J. COMP. & INT'L L. 1 (2006).

[2] Frédéric Mégret and Frederick Pinto, *"Prisoners' Dilemmas": The Potemkin Villages of International Law?* 16 LEIDEN J. INT'L L. 467 (2003).

[3] NICHOLAS MIRZOEFF, WATCHING BABYLON: THE WAR IN IRAQ AND GLOBAL VISUAL CULTURE (2005).

"war on terror." Coverage in the (old and new) media led to debates over the interpretation and, indeed, viability of the international prohibition of torture, and has had a significant framing role in these debates. Starting out as a media scandal, this quickly became an international legal scandal as well. Images from Abu Ghraib, such as that of a hooded victim holding wires, have spread virally in the new media and have become haunting and divisive icons.

Africa and the Limits of Representation

One widely heard criticism of media representations relates to their tendency to trade in, and hence perpetuate, stereotypes and prejudices. An example, particularly problematic from the standpoint of the international legal imagination, concerns the image conveyed of "Africa." The African continent is commonly represented as a crisis-laden, lawless, and tragic monolith; a place without hope and in need of rescue; a space of refugees, famine victims, violence, and corruption.[4] Africa is thus reduced to being a zone of problems, the answer to which lies in "the rule of law," "development," "intervention," "aid," "international justice," "governance," and "expertise"—all of which international legal actors and institutions claim to offer.

War and the Spectacle of International Justice

Images of war can be used as propaganda, but they have also helped to reveal the suffering and tragedy of armed conflict. Such images have played a role in the development of international criminal justice where publicity and imagery also bring the dangers of spectacle. In its modern and heavily mediated form, international criminal law can be seen to project an image of itself that has ordering and normative implications for those it seeks to describe, contain, protect, and punish. While the imagery of law is connected with legitimacy-building, and the distancing of the "other" as outlaw, such distancing can also reveal the fissures and prejudices within the system. The spectacle of international criminal law can endanger its legitimacy and effectiveness.[5]

The Image of International Law—Future Directions

The media plays a role in determining which issues and images merit international legal attention, and what form that attention should take. The images of international law are open to interpretation and contestation in their reception by global audiences. International law itself is engaged in a process of mediatization, connected with its work on the fabrication of its own image. International lawyers should begin to think about the role of images and will increasingly have to negotiate the terrain of new media such as the Internet. Hopefully, that consideration of the power of images will prompt further inquiry into the multifaceted relationship between international law and the media.

[4] Liisa H. Malkki, *Speechless Emissaries: Refugees, Humanitarianism, and Dehistoricization* 11(3) *Cultural Anthropology* 377 (1996).

[5] Martti Koskenniemi, *Between Impunity and Show Trials*, 6 Max Planck UNYB 1 (2002).

CHARTING PROPOSALS ON INTERNATIONAL NORM GENERATION: LEGITIMACY AND POLITICS IN THE UNCITRAL WORKING METHODS

*By Claire R. Kelly**

The process of international norm generation—i.e., who participates, how decisions are made, and when agendas move forward—affects both the legitimacy of norms, as well as the power of the states involved in their development. This project explores a recent controversy over the methods of work ("Working Methods") at the United Nations Commission on International Trade Law ("UNCITRAL") and examines whether it represents a struggle to achieve more legitimate rules or a political confrontation. By focusing on this controversy, I hope to develop a system for analyzing procedural proposals within international organizations ("IOs").

The current debate over the UNCITRAL Working Methods reflects the concern of some countries, particularly France, that the combination of nonmember participation and a broad view of the meaning of consensus diminishes state control over decisions ultimately adopted.[1] Others, specifically the United States, assert that a broad view of the meaning of consensus is inevitable, and see participation by nonmembers as essential to UNCITRAL's mission.[2] Both of these positions can be seen as either a struggle over legitimacy or power, or both.

In its proposals to alter the Working Methods, France argues that a narrow definition of consensus preserves state sovereignty. One can view this position as political, as a means for France to achieve particular substantive outcomes. Where less agreement is needed to reach consensus, each state's influence is weakened. A member state cannot act as a holdout when its approval is not necessary. Or it can be viewed as an attempt to secure legitimate norms. If one looks at legitimacy as a matter of inputs,[3] e.g., representation, when consensus is reached with less than full agreement of all those represented, no one should be entitled to claim more. Thus, the proposal could be defended based upon an input legitimacy framework. In contrast, if one views legitimacy as a matter of outputs, e.g., effectiveness,[4] the meaning of the term consensus would only be important if it impacted the efficacy of the resulting norms.

Likewise, one can view the concern over participation from either a political or legitimacy perspective. The participation of non-states (or nonmember states) dilutes the influence of member states. Some countries may feel that the influence of nonmembers benefits particular

* Professor of Law, Associate Director of the Dennis J. Block Center for the Study of International Business Law. Many thanks to Victoria J. Siesta for her helpful research assistance and to Brooklyn Law School for its continued support. This work is based upon and takes excerpts from a forthcoming chapter *The Politics of Legitimacy in UNCITRAL Working Methods*, in THE POLITICS OF INTERNATIONAL ECONOMIC LAW, (Cambridge University Press forthcoming 2010) (eds. Broude, Busch and Porges).

[1] U.N. Comm'n on Int'l Trade Law [UNCITRAL], *France's Observations on UNCITRAL's Working Methods*, ¶ 2, U.N. Doc. A/CN.9/635, ¶ 3.1 (May 24, 2007) (discussing the expanded role of non-state actors); *UNCITRAL Rules of Procedure and Methods of Work: Compilation of Comments by Governments (France)*, at 2–3, ¶ 2, U.N. Doc. A/CN.9/660 (May 28, 2008) (expressing concerns over broadening the meaning of consensus).

[2] *See* UNCITRAL, *UNCITRAL Rules of Procedure and Methods of Work: Observations by the United States*, ¶ 9, U.N. Doc. A/CN.9/639 (Nov. 22, 2007) (stating that the current view of consensus is proper); *id.* ¶¶ 12–13 (discussing that expert participation is necessary due to the technical aspects of UNCITRAL's work).

[3] Claire R. Kelly, *Legitimacy and Law-Making Alliances*, 29 MICH. J. INT'L L. 605, 613 (2008); Robert O. Keohane & Joseph S. Nye, Jr., *Between Centralization and Fragmentation: the Club Model of Multilateral Cooperation and Problems of Democratic Legitimacy* 12–15 (Kennedy Sch. of Gov't Working Paper Series, RWP01-004, 2001), *available at* <http://ksgnotes1.harvard.edu/Research/wpaper.nsf/rwp/RWP01-004/$File/rwp01_004_nye_rev1.pdf> (discussing input legitimacy criteria).

[4] Daniel C. Esty, *Good Governance at the Supranational Scale: Globalizing Administrative Law*, 115 YALE L.J. 1490, 1517 (2006).

states because it helps those states dominate the document-drafting process. Thus, the concern over participation may be motivated by political concerns. Since more participation would almost always improve an organization's input legitimacy credentials, any objection would likely be political.

Indeed, UNCITRAL's legitimacy thrives in part on its claim to expertise, both because it is seen as welcoming wide participation by experts as well as states (input), and because its documents are viewed as effective (output). While it is true that the participation of experts might give greater support to one state's position over another's, as long as the contributor is an expert and other experts are also permitted to participate, it would seem to serve the organization's interests and input legitimacy.

The participation of other experts is important. Simply because an entity is an expert does not mean that it holds the only view of what would be an effective standard or rule. The very existence of IOs like UNCITRAL demonstrates that there are a variety of ways to approach difficult problems and that no one view of how the law should operate is correct for all circumstances. Understanding that we live in a world with fundamentally different approaches to legal problems reveals that the term "expert" has its limitations.

Charting these particular suggestions in this one dispute cannot answer all questions for all organizations faced with procedural proposals. Going forward, it is important to view process proposals knowing that both input and output legitimacy criteria are relevant when states evaluate international norms. Any particular organization will likely need its own unique balance of both. Moreover, the same proposal may affect both politics and legitimacy at the same time. Given that legitimacy affects the power (politics) of the organization itself, states with (or without) relative power will be affected by the legitimacy of the IO. Finally, it is important to understand the organization's mission and its constituency, both in terms of participation and in terms of who is affected by the norms it generates.

ADJUDGING THE EXCEPTIONAL AT INTERNATIONAL INVESTMENT LAW

By Jürgen Kurtz[*]

International law has, until recently, played a marginal role in the management of financial crises. Critical attention has instead focused on the lending practices of international financial institutions and their contribution to outbreaks such as the debt crises of the 1980s, the 1994 Mexican crisis, and the 1997-1998 Asian crises. The 2001 Argentine financial crisis has revealed that international investment agreements (IIAs) have significant potential to constrain state autonomy in mitigating adverse effects of such crises. IIAs grant foreign investors the right to challenge signatory state laws for breach of treaty commitments in a range of arbitral institutions. Foreign investors have invoked IIA disciplines to challenge regulatory measures implemented by Argentina in the aftermath of its financial crisis. The arbitral cases to date have largely ruled against Argentina and awarded significant monetary compensation to the claimant investors.

I examine these cases with a focus on the adjudication of a treaty exception that entitles a signatory state to pass emergency measures "necessary" for the maintenance of "public

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order'' or the protection of ''essential security interests.''[1] The arbitral tribunals that have ruled against Argentina's invocation of the exception adopt a remarkable interpretative approach. They draw extensively on customary principles of necessity (taken to be represented by the work of the International Law Commission or ILC) to guide their interpretation and application of the treaty exception. The stringent conditions of the plea of necessity in the ILC Articles on State Responsibility[2] are applied as operative components of the treaty defense. The outcome in all but a few cases has been to refuse Argentina's claim to derogation of liability.

On first view, these cases might be taken as part of the contemporary management of fragmentation of international law. By weaving the treaty exception and customary plea together, the cases offer a visible rejoinder of the criticism that international investment treaties are a self-contained regime in international law, divorced from a broader normative framework. This favorable view of the emerging jurisprudence on the treaty exception is mistaken. As a recent ICSID Annulment Committee constituted in this area has noted, the arbitral tribunals to date fail to rigorously examine the precise relationship between the treaty defense and customary plea.[3]

I aim to uncover the key methodological possibilities of interpreting the treaty exception and its relationship to customary law. In particular, I argue that there are three methodologies open to an adjudicator in understanding the relationship between the treaty exception and the customary plea of necessity. These are termed methodologies I (confluence), II (*lex specialis*), and III (primary-secondary applications). Method I is clearly the dominant and most restrictive approach in the jurisprudence to date, whereby tribunals expressly conflate the treaty defense with the customary plea of necessity. This, I argue, is mistaken both on careful interpretation of these legal standards but also on an investigation of the complex and nuanced history of the shift from customary to treaty protections for foreign investors. Given its popularity in the jurisprudence, there is an important question as to why the adjudicators in these cases would choose to conflate the two legal standards. A close analysis of the awards, though, reveals a set of intriguing clues including evidence of an assumption on the part of the adjudicators of a single and controlling *telos* of investor protection.[4]

An alternate methodology of reading the treaty exception is an expression of *lex specialis*. This approach has the advantage of presenting a plausible account of the relationship between the treaty defense and customary plea. However, there is an open interpretative question of the scope of priority to be accorded to the treaty defense under this reading, which has largely been ignored by those sympathetic to this reading. The flirtation with *lex specialis* in the jurisprudence fails to engage a critical choice between applying custom in a residual fashion (where not in conflict) or displacing it in its entirety. At its most fundamental level, a *lex specialis* reading could see the stringent customary test of means-end scrutiny continue to guide the question of the ''necessity'' of a signatory state's chosen means. This would render the treaty exception inutile, in all but the most exceptional circumstances.

[1] Treaty Between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, *signed* at Washington D.C., Nov. 14, 1991, *entered into force* Oct 20, 1994, at art. XI.

[2] International Law Commission, Draft Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries, U.N. GAOR, 56th Sess., Supp. 10, Ch. 4, U.N. Doc. A/56/10 (2001), at art. 25.

[3] *CMS Gas Transmission Company v Argentine Republic*, ICSID Case No. ARB/01/8, Decision of the *Ad Hoc* Committee on the Application for Annulment, Sept. 25, 2007, at ¶ 131.

[4] *Enron Corporation Ponderosa Assets L.P v Argentine Republic*, ICSID Case No. ARB/01/3, Award, May 22, 2007, at ¶ 331.

Finally, I offer a third methodology to overcome the inherent deficiencies of the earlier approaches. The taxonomy of method III (primary-secondary applications) separates questions of wrongfulness and state responsibility in international law. It characterizes *all* of the treaty provisions at issue—both forms of obligation and exception—as primary legal standards that determine whether a state has committed a wrongful act according to international law. Under this approach, it is *only* if breach is determined by the composite application of these treaty rules, that an adjudicator should examine the secondary possibility of the customary plea of necessity to preclude wrongfulness as a matter of state responsibility. The key implication of my preferred method III is to require an adjudicator to attend to interpretation of key aspects of the treaty defense without simply borrowing or transplanting from the customary plea. The paper concludes by offering a framework for future tribunals charged with two critical interpretative issues: (i) the identification and scope of the notion of "public order" and a state's "essential security interests"; and (ii) the appropriate test of "necessity" or means-end scrutiny in this legal setting.

Regulating Competing Jurisdictions through Methods of Judicial Dialogue

By Nikos Lavranos[*]

States continue to establish international courts and tribunals in an ever larger number, essentially covering all fields of law. In principle, of course, this proliferation of international courts and tribunals must be welcomed as it allows states—but also other actors on the international plane—to resolve their disputes by peaceful means rather than by arms. This institutionalization or, as some argue, even constitutionalization of international law adds to the multiplication of legal orders and (sub)regimes and intensifies the interaction between them. Indeed, we are living in a multi-level, multi-polar, poli-centric world that is dynamic, constantly changing and re-arranging the relationships between states, international organizations, multinationals, non-governmental organizations, individuals, et cetera. The proliferation of international courts and tribunals, and with it, their increasing power to shape these complex relationships, is just one aspect of this globalization and legalization of international relations.

The main problem of this proliferation is the fact that it takes place in an uncoordinated fashion, without clearly regulating, in a formal sense, the jurisdictional relationship between all the various international courts and tribunals. This leads to competing or overlapping jurisdictions. As such, overlapping jurisdictions are neither new nor do they have to be problematic per se. Indeed, there are many examples of multi-level judicial relations, within a federal state or between national courts and the European Court of Justice, which function perfectly well. The difference, however, with the international law level is the lack of organization through hierarchy or any other form of coordination between the courts and tribunals, so that, at the end of the process, there will be one final and authoritative decision that resolves the dispute.

As a result of this uncoordinated proliferation of international courts and tribunals, the chance of conflicting jurisdiction significantly increases. This, in turn, can lead to a fragmentation of the international legal order, in particular if divergent or conflicting rulings on the same legal issues are rendered. Of course, using the metaphor of fragmentation presupposes

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that the international legal order was once a unified, well-organized, legal order and is now threatened by the proliferation of international courts and tribunals. Obviously, that is a fiction in the sense that the international legal order was from the outset never unified and probably never will be, but rather has developed over time in an uncoordinated manner. In other words, the uncoordinated development of international law is the normal state of affairs in international law. Therefore, occasional divergent or conflicting rulings by different international courts or tribunals are not regarded as problematic. However, what is regarded as problematic are major systemic inconsistencies that affect the legal orders or regimes concerned in their proper functioning, development, and interaction with other legal orders or regimes.

My research illustrates that while the various hard-law options in theory promise to be effective tools for regulating jurisdictional competition, the unwillingness of states to implement them by amending the relevant legal instruments essentially eliminates their practical use. Therefore, the solution depends on the judges and arbitrators and their willingness to apply the soft-law tools discussed above. Besides, the utilization of the *res judicata* and *lis pendens* principles, the general application of comity, in particular the *Solange*-method, appear to be effective tools for solving issues of jurisdictional competition in a system-preserving way.

However, the *Solange*-method is only a "voluntary restraint instrument" whose application solely depends on the attitude and readiness of each and every court and tribunal. Nonetheless, it is argued that the *Solange*-method and, for that matter, judicial comity in general is part of the legal duty of each and every court to deliver justice. In doing so, taking due account of the existing jurisdiction of another court and subsequently drawing the conclusion of not exercising its own jurisdiction if the jurisdiction of another court is more appropriate, is of course a task that all courts and tribunals should perform.

Indeed, justice is part of the rule of law, which is the most fundamental principle that underpins the belief in supranational and international cooperation and its advantages for individuals. Without a firm place of the rule of law at the supra- and international level, the shift in sovereignty that we currently perceive in so many different facets will have few benefits for the individual.

Thus, the challenge in each and every case is to find an appropriate balance between the interests of the parties to a dispute, the institutional and systemic interests of the courts and tribunals, the legal orders and regimes involved, as well as the interests of the individuals concerned. The general application of comity, in particular the *Solange*-method, can assist in finding this balance.

FROM ASSERTION TO SOLID METHODOLOGY IN CUSTOMARY INTERNATIONAL HUMAN RIGHTS LAW

By Elizabeth Stubbins Bates[*]

INTRODUCTION

This Article locates the problem with customary international human rights law (CIHRL) in a lack of a solid methodology for its articulation, and a failure so far to investigate empirically how the evidential building blocks of state practice and *opinio juris* might be

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identified. This contrasts with customary international humanitarian law, which has already been the subject of empirical study.[1] The lack of a solid methodology for CIHRL means that references to norms of customary international human rights law may be unproven assertions only.[2] A "modern" approach to custom has led to arguments that CIHRL is a special case, and that the relevant practice considered in the articulation of CIHRL should not be that of states, which frequently violate international human rights law, but that of intergovernmental organizations (IGOs)[3] and non-governmental organizations (NGOs).[4] This Article argues that the practice of merely asserting CIHRL risks the validity of customary international human rights law as law, as each reference to CIHRL may be seen as utopian in Koskenniemi's sense of being disconnected from practice.[5] These modern approaches ignore the empirical requirements for customary international law, so that customary international human rights law may become a byword for *lex ferenda*.

Methodology

Scholars have recently attempted to reconcile traditional and modern approaches to customary international law, and their respective emphases on inductive methodology (where state practice predominates, and analysts find custom through evidence of facts) and deductive methodology (where *opinio juris* predominates, and analysts either ignore state practice, or find custom only in state practice which echoes pre-existing principles).[6] The Author's work in progress, which analyzes CIHRL derived from state practice and *opinio juris* in counter-terrorism detention, uses an inductive method, opting for a mediate approach on a spectrum of inclusion of state and non-state sources for practice and *opinio juris*. The study includes state practice and *opinio juris* from executive, legislative, and judicial sources; statements at diplomatic conferences; state reports to intergovernmental human rights monitoring bodies (including the UN Human Rights Council); and the arguments of state counsel in domestic and international case-law; but excludes the action and statements of IGOs and NGOs.

The Problem of Violation

There are counter-arguments to any approach that favors state sources of CIHRL over those from IGOs and NGOs. Chief among them is the "problem of violation": the argument from the "modern" school of CIHRL that as state practice can show violation of human rights norms, it should be identified by a deductive method which finds evidence of CIHRL from existing international human rights principles, ignoring contrary state practice.[7] If state practice were the only evidential component in CIHRL, this argument holds, a study that

[1] Jean Marie Henckaerts & Louise Doswald-Beck, 1 Customary International Humanitarian Law: Rules (2005).

[2] Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens and General Principles*, 12 Aust. YBIL 82, 83 (1988-1989).

[3] *Id.* at 98-99.

[4] Isabelle Gunning, *Modernizing Customary International Law: The Challenge of Human Rights*, 31 Va. J. Int'l L. 211 (1990-91).

[5] Martii Koskenniemi, From Apology to Utopia: The Structure of International Legal Argument 20 (2006).

[6] Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AJIL 757 (2001).

[7] Oscar Schachter, *International Law in Theory and Practice: General Course in Public International Law*, 178 Recueil des cours 21, 233-342 (1982-V).

yielded evidence of multiple violations of a particular right may suggest that the violations represent a new customary norm.

However, there are three persuasive arguments against this. Firstly, state practice and *opinio juris* may conflict where the state practice indicates violations, because states often violate human rights in secret, without statements indicating that the violations are required by law, and often without corroborative statements that the practice has in fact taken place. Where there is no *opinio juris* to support the creation of a putative new norm of CIHRL, allegations of state practice alone cannot create such a new norm. An inductive method for discerning CIHRL requires both state practice and *opinio juris*. Secondly, human rights violations in one state may result in protest and diplomatic démarches by other states, or by other branches of government within the same state, indicating that a new norm of CIHRL has not emerged. Customary international law requires widespread and consistent state practice and *opinio juris*, and protest indicates disagreement rather than consistency. The methodology sketched above may find evidence of this protest and dialog in states' diplomatic correspondence, or their statements at IGO sessions. Thirdly, a study of each human rights norm across all its factual contexts may discover violations in only one of those contexts, e.g., often unacknowledged detention in secret prisons in the context of the "war on terror," but not in the context of the criminal justice system. Such a result would erode the problem of violation by showing that violations had not created a new customary norm in relation to the right to liberty and security of the person in general. This third argument is not found in the existing literature.

Conclusion: Using a CIHRL Study as a Resource for Practitioners

An empirical study of CIHRL conducted according to a solid methodology may overcome the problem of assertion and conceptual conflation identified above. Choosing an inductive methodology based in state sources may overcome allegations that CIHRL is utopian, in the sense of being disconnected from practice. However, this methodology will not create a readymade advocacy tool to fill the gap between widespread violation of particular norms and perfect compliance. A study carried out according to the methodology above may indicate patterns of compliance and patterns of violation of existing treaty norms.

103RD ANNUAL MEETING PROGRAM

THEME STATEMENT: INTERNATIONAL LAW AS LAW

While 2008 is destined to be a year shaped by political and foreign policy debates, the 2009 Annual Meeting of the American Society of International Law presents a time for us to step back and renew our focus on International Law as Law.

The international legal system is unique. Like domestic law, international law is created, implemented, and enforced—but in a manner that is distinct, varied, and constantly evolving. Understanding how international law functions as law today requires an examination of the nature of the actors in the international legal system and the changing ways in which they interact with one another. These developments are challenging and transforming traditional visions of international law, sparking new and renewed theoretical and practical debates.

The 2009 Annual Meeting will present a broad range of perspectives on the creation, implementation, enforcement, and critique of international law today. We will examine the changing character of fundamental aspects of the international legal system, including the sources of international law, the role of states and their constituent branches of government in generating and implementing international obligations (including the role of domestic courts in enforcing treaty obligations), the law-making and law-executing functions of international organizations, and the role of non-state actors (including civil society, individuals, and businesses) as creators, enforcers, and subjects of international law. We will also examine developments in substantive law and innovations in techniques for achieving compliance.

The American Society of International Law, with its membership of leading scholars and practitioners of international law from around the world, is uniquely situated to provide an unparalleled exploration of these fundamental issues. We invite you to be a part of the 2009 Annual Meeting.

Annual Meeting Daily Program

Wednesday, March 25

9:00am – 1:30pm

6th Annual ITA-ASIL Conference: When Arbitrations Go Bad

Co-sponsored by the Institute for Transnational Arbitration's Academic Council

In recent years the arbitration community has been showing a higher degree of confidence as the system is establishing itself as the preferred method for the settlement of international disputes. At the same time, some of the criticisms become more prominent. This meeting explores a few phenomena of pathology of the arbitration process and provides counsel, user, arbitrator, academic and state perspectives.

Co-chairs: David J. Bederman, Professor at Emory University School of Law in Atlanta and Loukas A. Mistelis, Professor at Queen Mary University in London, the Spring Conference immediately precedes the 103rd ASIL Annual Meeting.

8:30am – 12:00pm

Interest Group Meeting: Intellectual Property Rights in China: Reflections and Directions

Co-sponsored by the Law in the Pacific Rim Region Interest Group and Intellectual Property Law Interest Group

The Chinese intellectual property system has a short history of fewer than thirty years. This seminar will provide an opportunity to gather intellectual property experts to reflect on what China has done so far, to explore on-going tension areas, and to discuss where improvements will be made.

Keynote Speaker: Dr. Zhipei Jiang, Retired Chief Judge of the IP Tribunal, People's Supreme Court of China

FIRST PANEL

Moderator: John Thomas, Georgetown University Law Center

Panelists: Victoria Espinel, George Mason University; James Feinerman, Georgetown University Law Center

SECOND PANEL

Moderator: Elizabeth Chien-Hale, Institute for Intellectual Property in Asia

Panelists: Tracy Durkin, Stern Kessler Goldstein & Fox; Alan Cox, Nera Economic Consulting

12:00pm – 3:30pm

Executive Council Meeting

3:00pm – 4:30pm

Lieber Society Interest Group Meeting: Whither the Law of War for the U.S.?

Moderator: Dennis Mandsager, Naval War College

Panelists: Ashley Deeks, U.S. Department of State; Yoram Dinstein, Tel Aviv University; Richard Jackson, Department of the Army Judge Advocate General

Wednesday, March 25

4:30pm – 6:00pm

Grotius Lecture: Focusing on the Good or the Bad: What Can International Environmental Law Do to Accelerate The Transition Towards A Green Economy?
Co-sponsored by American University Washington College of Law and the International Environmental Law Interest Group

Lecturer: ACHIM STEINER, United Nations Environment Programme
Commentator: DINAH SHELTON, George Washington University Law School

6:00PM – 8:00PM
Grotius Reception
Co-Sponsored by American University Washington College of Law

7:00 PM – 11:00PM
American Journal of International Law Board of Editor's Dinner
By invitation only.

7:00 PM – 9:00 PM
International Legal Materials Corresponding Editor's Reception
Open to members of the ILM Editorial Advisory Committee and Contributing Editors

THURSDAY, MARCH 26

7:00AM – 8:30AM
International Economic Law Interest Group Meeting

Speakers: MIKE CASTELLANO, Counsel and Senior Policy Advisor for Senate Majority Leader Harry Reid; DAVID ROSS, International Trade Counsel, Senate Finance Committee (Minority Office)

9:00AM – 10:30AM
Rights of Indigenous Peoples Interest Group Meeting

9:00AM – 10:30AM
Responsibility to Protect in Environmental Emergencies
Co-sponsored by the International Environmental Law Interest Group

The Responsibility to Protect was adopted at the UN World Summit in 2005. In the context of humanitarian intervention against an abusive government, there have been numerous precedents in the past ten years. In its most fundamental form, the principal to protect is to protect civilian populations from criminal behavior by their own government which threatens the civilian population's physical existence. What if that government threat is predicated on a government's refusal to act, or to accept assistance, in an environmental emergency? Is intervention in the event of an environmental emergency actually less controversial than in other cases?

Moderator: GWEN YOUNG, Bill & Melinda Gates Foundation
Panelists: GARETH EVANS, International Crisis Group; EDWARD LUCK, International Peace Institute; LINDA MALONE, College of William & Mary

9:00AM – 10:30AM
A Comparative Look at Domestic Enforcement of International Tribunal Judgments
Co-sponsored by the International Criminal Law Interest Group

The question of when and how to give domestic effect to decisions of international organs has received renewed attention. In deciding that International Court of Justice judgments are

not directly enforceable in the courts, the U.S. Supreme Court in Medellin relied on its understanding that other nations do not regard such judgments as directly enforceable. In Kadi v. Council, the European Court of Justice treated a UN Security Council Resolution as irrelevant to the content of community law. This panel will look at various nations' approaches to the enforcement of the decisions of international tribunals and other organs.

Moderator: PAUL STEPHAN, University of Virginia School of Law

Panelists: PIERRE VERDIER, Harvard Law School, Canadian Supreme Court; LORI DAMROSCH, Columbia University School of Law; ANDREAS PAULUS, University of Göttingen School of Law; INGRID WUERTH, Vanderbilt University Law School

9:00 AM – 10:30 AM

International Aspects of the Global Financial Crisis

The economic crisis that started in the U.S. real estate market has gone global – in every sense of the word. Its impact can now be felt around the world, in every economic sector, and throughout the financial markets. This roundtable of practitioners and scholars working on issues of market regulation, global finacne, economic development, and transnational networks will offer perspectives and proposal on these and other international questions implicated by the crisis.

Moderator: ROBERT B. AHDIEH, Emory University School of Law

Panelists: MICHAEL BARR, UNIVERSITY OF MICHIGAN SCHOOL OF LAW; SEAN HAGAN, International Monetary Fund; ERIC PAN, Cardozo University School of Law; MARK WEISBROT, Center for Economic and Policy Research; DAVID ZARING, University of Pennsylvania Wharton School of Business

9:00AM – 10:30AM

Feminist Interventions: Human Rights, Armed Conflict and International Law

Co-sponsored by the Women in International Law Interest Group

This session assesses feminist international law's focus on victimhood and sexual violence: what it highlights, obscures, empowers and defeats; its implications for challenging systemic injustices and dominant ideologies locally and globally; and how global feminisms construct global subjects. The roundtable asks hard questions about past and future directions of feminist international law.

Moderator: VASUKI NESIAH, International Center for Transitional Justice

Panelists: DORIS BUSS, Carleton University School of Law; JANET HALLEY, Harvard Law School; RATNA KAPUR, Centre for Feminist Legal Research

9:00AM – 10:30AM

New Voices: Rethinking the Sources of International Law (CLE: VA, CA, NY, PA)

The sources of international law comprise an important part of the discussion of international law as law. This panel offers a fresh perspective on the sources of international law, considering the potential for new sources and novel uses of existing sources.

Moderator: ANTHONY D'AMATO, Northwestern University

Panelists: ANASTASIOS GOURGOURINIS, UCL Faculty of Laws; EVAN CRIDDLE, Syracuse University College of Law; EVAN FOX-DECENT, McGill University Faculty of Law; MARTINS PAPARINSKIS, University of Oxford; ANNECOOS WIERSEMA, Michael E Moritz College of Law, Ohio State University

10:45AM – 12:15PM

Medellin v. Texas and the Self-Execution of Treaties

The Supreme Court's recent decision in *Medellin v. Texas* has raised many questions about when a treaty is or is not self-executing, and about what it means for a treaty to be non-self-executing. These questions are of great interest to Executive and Legislative officials involved in negotiating or consenting to treaties or determining whether past treaties now require implementation; our treaty partners, actual and prospective; and persons whose legal interests are affected by treaties. This panel will consider the meaning and ramifications of the *Medellin* decision for existing and future treaties.

Moderator: RONALD BETTAUER, George Washington University Law School

Panelists: AVRIL HAINES, OFFICE OF THE LEGAL ADVISER, US DEPARTMENT OF STATE; H. KATHY PATCHEL, Indiana University School of Law; ED SWAINE, George Washington University Law School

10:45AM – 12:15PM

Piracy Off of Somalia: the Challenges for International Law

Co-sponsored by the Law of the Sea Interest Group

Is there a military solution to piracy off Somalia? Attacks on international shipping continue, despite a significant international naval presence authorized by the Security Council authority to use "all necessary means" to suppress piracy. In assessing whether international law can meet this challenge, issues of jurisdiction, counter-terrorism treaties, and the Security Council mandates, human rights' extra-territorial application and even definitional debates over the meaning of "piracy" all loom large.

Moderator: DOUGLAS GUILFOYLE, University College London

Panelists: MALVINA HALBERSTAM, Benjamin N. Cardozo School of Law, Yeshiva University; ALFRED P. RUBIN, The Fletcher School, Tufts University; KATHERINE SHEPHERD, Legal Advisers, UK Foreign and Commonwealth Office; TULLIO TREVES, International Tribunal for the Law of the Sea; J. ASHLEY ROACH, US Department of State (formerly) Thursday, March 26

10:45AM – 12:15PM

The United States and the Post-Kyoto Climate Change Treaty

Co-sponsored by the International Environmental Law Interest Group

Will the United States join the post-Kyoto climate change regime? The answer could determine the fate of the new global climate agreement. Yet Congress is still negotiating domestic climate change legislation. The international and domestic climate change debates are thus linked in both substance and sequencing. This roundtable will explore how the two processes can inform each other in a way that is mutually supportive.

Moderator: CYMIE PAYNE, University of California, Berkeley - School of Law

Panelists: C. BOYDEN GRAY, Former Ambassador, United States Mission to the European Union; JENNIFER HAVERKAMP, Environmental Defense Fund; NIGEL PURVIS, Climate Advisers

10:45AM - 12:15PM

The Principle of Legality in International Criminal Law (CLE: NY, PA)

Co-sponsored by the International Criminal Law Interest Group

International criminal law judges have engaged in a full-scale (if unacknowledged) refashioning of international criminal law. Courts have updated and expanded historical treaties

and customary rules, upset arrangements carefully negotiated between states, and added content to vaguely-worded provisions that were conceived more as retrospective condemnations of past horrors than as detailed codes for prospective penal enforcement. In addition to raising questions of due process, these cases provide insight into the dynamics of argumentation, the interpretive attitudes of judges and an emerging philosophy of the nature of international criminal law.

Moderator: SANDESH SIVAKUMARAN, Special Court for Sierra Leone

Panelists: ELISA MASSIMINO, Human Rights First; THEODOR MERON, International Criminal Tribunal for the former Yugoslavia; DARRYL ROBINSON, Queen's University, Faculty of Law; BRAD ROTH, Wayne State University; BETH VAN SCHAACK, Santa Clara University

11:00AM – 12:30PM
International Legal Theory Interest Group Meeting

11:00AM – 12:30PM
HUMAN RIGHTS INTEREST GROUP MEETING

12:30PM – 2:30PM
WOMEN IN INTERNATIONAL LAW INTEREST GROUP LUNCHEON

The annual luncheon of the Women in International Law Interest Group (WILIG) features a speech by this year's recipient of the Prominent Women in International Law Award, Justice Unity Dow of the High Court of Botswana. The luncheon will also follow the time-honored tradition of inviting all attendees to stand and introduce themselves—a wonderful opportunity to get to know colleagues in the field.

Honoree/Speaker: The Honorable Unity Dow, Justice, High Court of Botswana

1:00PM - 2:30PM
Book Discussion Featuring 2009 Winner of the ASIL Certificate of Merit for Creative Scholarship

Discussion of the 2009 Certificate Winner, The Historical Foundations of World Order: The Tower and the Arena (Martinus Nijhoff Publishers 2007), by the late Douglas M. Johnston, the University of Victoria Law School.

Moderator: DEVASHISH KRISHAN, Baker Botts LLP

Panelists: DAVID BEDERMAN, Emory University School of Law; TAI-HENG CHENG, New York Law School; OHN CROOK, George Washington University Law School; MARY ELLEN O'CONNELL, University of Notre Dam

1:00PM – 2:30PM
Multlilateralizing Regionalism and the Future Architecture of International Trade Law as a System of Law

Co-sponsored by the International Economic Law Interest Group

With hundreds of regional trade agreements now in force, it seems no longer meaningful to query whether they are "stumbling blocks or building blocks." Instead, scholars and policy-makers are increasingly examining how trade agreements can be coordinated and integrated to form a coherent and efficient system of international law. To what extent will this process of multilateralizing regionalism entail significant changes to the structure of international trade law?

Moderator: AMELIA PORGES, Sidley Austin LLP

Panelists: ALBERTA FABBRICOTTI, Faculty of Law, University of Rome; GABRIELLE MARCEAU, Cabinet of the WTO Director General; JOOST PAUWELYN, Graduate Institute of International and Development Studies, Geneva; KATI SUOMINEN, Inter-American Development Bank

1:00PM – 2:30PM

Nonproliferation, Arms Control, and Disarmament Interest Group Meeting: Next Steps in Enforcing the Nuclear Nonproliferation Regime

Speakers: ORDE KITTRIE, Arizona State University; GARY MILHOLLIN, Wisconsin Project on Nuclear Arms Control; BRAD SHERMAN, US Congressman (D-CA) and Chair of the House Subcommittee on Terrorism, Nonproliferation, & Trade; LEONARD SPECTOR,MONTEREY INSTITUTE

1:15 PM – 2:30 PM

Closing Guantánamo: The Legal and Policy Isses

On his second full day in office, President Obama ordered the closure of the detention facilities on Guantánamo Bay within one year. Accomplishing that goal will require decisions about whether the detainees not released or transferred to other countries will be preventively detained by the United States as enemy combatants or in some other capacity or charged with crimes and, in either case, about which tribunals will make the necessary determinations. These and related questions will be the subject of this panel.

Moderator: ROBERT CHESNEY, Wake Forest University School of Law

Panelists: DAVID W. GLAZIER, Loyola (Los Angeles) Law School; DEBORAH PEARLSTEIN,PRINCETON UNIVERSITY; JOANNE MARINER, Human Rights Watch GLENN M. SULMASY, US Coast Guard Academy

2:15PM – 3:45PM

Is Legal Empowerment Good for the Poor?

The Report of the Commission on the Legal Empowerment of the Poor is a major event in policy discussions about the relationship between law and development, and human rights and development. This ASIL forum seeks to initiate a critical discussion of the Report and its premises and of the idea of ''legal empowerment'' as a development tool.

Moderator: ANNE TREBILCOCK, International Labor Organization

Panelists: CHRISTINA BIEBESHEIMER, Justice Reform Practice Group in the Legal Vice Presidency of the World Bank; STEVE GOLUB, Boalt Hall Law School, University of California-Berkeley; NARESH SINGH, Canadian International Development Agency, Commission on the Legal Empowerment of the Poor; KERRY RITTICH, Faculty of Law, University of Toronto

2:45 PM – 4:00 PM

In What Sense is International Law Law?

This plenary session will discuss the question of whether and in what sense international law is law. Though the question is familiar, there is no consensus among those interested in the international system. The plenary will address the question from several perspectives, including skepticism about international law, the propensity to comply with international law, rational choice, and liberalism.

Moderator: ANDREW GUZMAN, University of California-Berkeley School of Law

Panelists: JOSÉ E. ALVAREZ, Columbia University School of Law; ANTONIA CHAYES, Tufts University, The Fletcher School of Law; THOMAS FRANCK, New York University Law School; SEAN MURPHY, George Washington University Law School

2:45PM – 3:45PM
Annual General Meeting

The Annual General Meeting of the Society features a presentation of Society awards and honors and an election of officers. Open to all ASIL members.

3:00PM – 4:30PM
International Law in Domestic Courts Interest Group Meeting

3:00PM – 4:30PM
Private International Law Interest Group Meeting

3:00PM – 4:30PM
Teaching International Law Interest Group Meeting: Using Simulations to Enhance International Law Teaching

Moderator: THOMAS MCDONNELL, Pace University School of Law
Panelists: CINDY BUYS, Southern Illinois University School of Law; MICHAEL SCHARF, Frederick K. Cox International Law Center, Case Western Reserve University School of Law

3:45PM – 4:45PM
Plenary: Hudson Medal Lecture

Honoree/Lecturer: CHARLES N. BROWER, Iran-United States Claims Tribunal

5:00PM – 6:30PM
Plenary: The United States and International Law during the Obama Administration: Executive and Legislative Perspectives
Co-sponsored by Georgetown University Law Center

President Barack Obama and his administration have promised to chart a new course on international law. In this session,the speakers will provide perspectives from the Executive and Legislative branches about how the new administrationis or should be approaching questions implicating international law.

Moderator: T. ALEXANDER ALEINIKOFF, Georgetown University Law Center
Panelists: DAVID ABRAMOWITZ, House Committee on Foreign Affairs; JOAN DONOGHUE, US Department of State; Former US Senator CHARLES HAGEL, Georgetown University; ANNE-MARIE SLAUGHTER, US Department of State

6:30PM – 8:00PM
Members Reception
Co-sponsored by Georgetown University Law Center

6:30PM – 7:30PM
Executive Council Reception and Meeting
By invitation only

Speaker: ALI EL-GHATIT, Egyptian Society of International Law

6:30PM – 8:00PM
"L" Alumni Reception
Co-sponsored by the Public International Law and Policy Group
Open to all current and former staff of the Legal Adviser's Office of the US Department of State.

6:30PM – 8:00PM
UN21 Interest Group Meeting

6:30PM – 8:00PM
Patron's Reception
By invitation only

FRIDAY, MARCH 27

7:00AM – 8:30AM
Interest Group Co-Chair's Breakfast

9:00AM – 10:30AM
Law of the Sea Interest Group Meeting: The United States and the Law of the Sea: Hot Topics
Moderator: COALTER G. LATHROP, Sovereign Geographic Inc.
Speakers: MIGUEL G. GARCIÁ-REVILLO, University of Cordoba (Spain); JOHN E. NOYES, California Western School of Law; JOHN T. OLIVER, US Coast Guard

9:00AM – 10:30AM
Dispute Resolution Interest Group Meeting

9:00AM – 10:30AM
Is the UN Security Council Bound by Human Rights Law?
This panel will consider whether and to what extent human rights law governs coercive action authorized by the UN Security Council, drawing on recent groundbreaking decisions issued by the European Court of Justice (Kadi), the European Court of Human Rights, and the U.K. Law Lords (Al Jedda). Questions include which institutions have jurisdiction to assess legality and which actors are responsible for illegal measures.
Moderator: RYAN GOODMAN, Harvard Law School
Panelists: VERA GOWLLAND-DEBBAS, Graduate Institute of International and Development Studies; LINOS-ALEXANDER SICILIANOS, National and Kapodistrian University of Athens; GRÁINNE DE BÚRCA, Fordham University School of Law

9:00AM – 10:30AM
The Impact of International Criminal Proceedings on National Prosecutions in Mass Atrocity Cases
Co-sponsored by the International Criminal Law Interest Group
The panel will discuss the increased need for coordination and cooperation between national and international courts addressing mass atrocity situations. In particular, it will draw lessons from the experience accumulated in the Balkans and Africa concerning attempts to entrust national courts with a more active and effective role in trying international crimes and reducing thereby the remaining "accountability gap."
Moderator: THORDIS INGADOTTIR, University of Reykjavik

Panelists: ANDRE NOLLKAEMPER, University of Amsterdam; MARTIN NGOGA, Prosecutor General of the State of Rwanda; FAUSTO POCAR, International Criminal Tribunal for Yugoslavia; DAVID SCHWENDIMAN, Prosecutor's Office of Bosnia and Herzegovina; YUVAL SHANY, Faculty of Law, Hebrew University; OLIVIA SWAAK-GOLDMAN, ICC-Office of Prosecutor; MARIEKE WIERDA, International Center of Transitional Justice

9:00AM – 10:30AM

Judging International Law as Law

This panel will explore the role that judges play in the creation and application of international law. Is there an underlying commonality – by way of education, training, professional guidelines, etc. – that creates a common tongue for jurists that transcends domestic boundaries, in the same way that scientists and engineers speak the common verbiage of mathematics and technology?

Moderator: DAVID NERSESSIAN, Harvard Law School

Panelists: ROSEMARY BARKETT, US Eleventh Circuit Court of Appeals UNITY DOW, High Court of Botswana; JOHN HEDIGAN, The High Court of Ireland, former Judge for the European Court of Human Rights; MARGARET MARSHALL, Chief Justice, Supreme Judicial Court of Massachusetts

9:00AM – 10:30AM

New Voices: Issues in the Human Side of International Law (CLE: VA, CA, NY, PA)

This panel considers issues across the breadth of international law, all with a human angle. Panelists will consider the competing treatment afforded to immigrants in Europe and the United States, law and geography approaches to climate change and terrorism, secrecy at the international criminal court and the indeterminacy of international humanitarian law.

Moderator: DAVID KAYE, UCLA School of Law International Human Rights Program

Panelists: JANINA DILL, University of Oxford; ALEX LITTLE, US ATTORNEY'S OFFICE FOR THE DISTRICT OF COLUMBIA; ANGELA BANKS, William & Mary School of Law; HARI OSOFSKY, Washington & Lee University

9:00AM – 10:30AM

Governing Through Indicators

Co-sponsored by the International Economic Law Interest Group

This panel will examine who participates in the making and revision of some of the most important indicators; why some indicators are influential and others not; the significance of technical constraints and political framing; the relations of these indicators to international legal norms and to the practices of institutions applying international law; the impacts of indicators on aid allocation and important national and international policy decisions; and the possible future roles of international law and of global administrative law standards (on participation, transparency, review and accountability) in the creation, governance and use of indicators.

Moderator: BENEDICT KINGSBURY, New York University School of Law

Panelists: LESLIE BENTON, Transparency International-USA; SALLY ENGLE MERRY, New York University; CHRISTOPHER STONE, Harvard Kennedy School

10:45AM – 12:15PM

The Security Council and the Rule of Law

The broad law-making powers assumed by the Security Council have provoked considerable debate. This panel will discuss the legal context within which the Council is legislating, the

"threats" capable of triggering the use of its Chapter VII coercive powers, the reviewability of decisions that adversely affect individual rights and the implications for domestic law.

Moderator: SIMON CHESTERMAN,NEW YORK UNIVERSITY SCHOOL OF LAW

Panelists: THOMAS FRANCK, New York University School of Law; CHRISTINE GRAY, University of Cambridge; KIM LANE SCHEPPELE, Princeton University' STEFAN TALMON, University of Oxford

10:45AM – 12:15PM

Challenges of Transnational Legal Practice: Advocacy and Ethics

This panel brings together new and established legal practitioners to answer questions about the challenges posed by transnational legal practice. For example, what ethics rules do or should govern practitioners before international courts and tribunals? And how does the notion of good advocacy vary across legal systems and in the international arena?

Moderator: CATHERINE ROGERS, Dickinson Law School, Penn State University

Panelists: LAUREL BAIG, Appeals Unit, Office of the Prosecutor, ICTY; CHRISTOPHER GREENWOOD, International Court of Justice; VIREN MASCARENHAS, Freshfields, Bruckhaus, Deringer, US LLP; LAUREL TERRY, Penn State Dickinson School of Law

10:45AM – 12:15PM

The Cutting Edge (CLE: VA, CA, NY, PA)

ASIL's new Cutting Edge Panel is designed to introduce conference members to yet to be published work that pushes the boundaries of existing international law analysis. This year's panel introduces three cutting edge projects: "International Law in Domestic Courts: A Conflict of Laws Perspective," "Diffusion through Democracy: How International Norms Shape Voter Choices," and "The Laws of War and the Lesser Evil."

Moderator: ANTHEA ROBERTS, London School of Economics

Panelists: KAREN KNOP, Faculty of Law, University of Toronto; KATERINA LINOS, Harvard Society of Fellows; RALF MICHAELS, Duke University School of Law; GABRIELLA BLUM, Harvard Law School

10:45AM – 12:15PM

The Future of Corporate Accountability for Violations of Human Rights

This panel will take stock of recent developments and consider the next steps in the effort to develop norms governing the responsibility of corporations for human rights violations. In particular, panelists will consider how best to understand and implement the new mandate of the Special Representative of the Secretary General.

Moderator: PENELOPE SIMONS, University of Ottawa Faculty of Law – Common Law Section

Panelists: ADAM GREENE, United States Council for International Business; ROBERT MCCORQUODALE, British Institute of International and Comparative Law; LISA MISOL, Human Rights Watch; CHRISTIANA OCHOA, Indiana University School of Law; JOHN RUGGIE, Harvard JFK School & Special Representative of the Secretary General

10:45AM – 12:15PM

Direct Participation in Hostilities: Operationalizing the ICRC's Guidance (Resource Session)

Circumstances prevailing in contemporary armed conflicts, including proliferation of non-state actors, insurgency/counter-insurgency strategy and tactics, the "war on terror," privatization of the armed forces, and hightech warfare have greatly increased the difficulty of

determining who is directly participating in hostilities and thus subject to attack. The International Committee of the Red Cross (ICRC) plans to publish interpretive guidance on the notion of direct participation in hostilities in the near future. This panel will explore the advantages and disadvantages of clarifying the laws of war in this particular area.

Moderator: JENNIFER DASKAL, Human Rights Watch

Presenter: NILS MELZER, International Committee of the Red Cross

Commentator: STEPHEN POMPER, US Department of State

12:15PM – 2:45PM

Research Showcase: Poster Session

ASIL's new Research Showcase will include more than a dozen academics, drawn from a broad range of areas including trade, investment, human rights and international criminal law, and interdisciplinary approaches to international law. They will present their innovative work in an informal environment allowing time for individual and focused discussion. As with the Cutting Edge Panel, this Showcase focuses on yet to be published work. You are welcome to drop in at any time during the session to engage with the poster presenters on their research.

Poster Presenters: ROGER ALFORD, Pepperdine University School of Law; ALESSANDRA ARCURI, University of Rotterdam, Erasmus School of Law; DHRUBAJYOTI BHATTACHARYA, Southern Illinois University School of Medicine; KAREN BRAVO, Indiana University School of Law; MELISSA CASAGRANDE, McGill University; ROBERT CRYER, Birmingham Law School, University of Birmingham; SUSAN FRANCK, Washington & Lee University; DIANE FREY, London School of Economics; M. FLORENCIA GUERZOVICH, Northwestern University; MATTHEW HAPPOLD, University of Hull; LAURENCE HELFER, Vanderbilt Law School; HOLGER HESTERMEYER, Max Planck Institute; DANIEL JOYCE, University of Helsinki; CLAIRE KELLY, Brooklyn Law School; JURGEN KURTZ, University of Melbourne Law School; NIKOS LAVRANOS, European University Institute (EUI); ELIZABETH STUBBINS BATES, London School of Economics

1:00 PM – 2:00 PM

Presentation and Discussion of the ASIL Task Force Report on US Policy Towards the International Criminal Court

In August 2008, ASIL convened a task force to review and develop recommendations for US policy toward the International Criminal Court. This session will give ASIL members an opportunity to discuss the Task Force's recommendations with some our members.

Moderator: ELIZABETH ANDERSEN, American Society of International Law

Panelists: MICHAEL NEWTON, Vanderbilt University Law School; WILLIAM H. TAFT IV, Stanford University School of Law; DAVID TOLBERT, United States Institute of Peace; PATIRICA M. WALD, former Judge, ICTY

1:00PM – 2:30PM LINDEN

International Organizations Interest Group Meeting

1:00PM – 2:30PM

International Environmental Law Interest Group Meeting: Scientific Whaling and International Law

Speakers: LAURENCE BOISSON DE CHAZOURNES, University of Geneva; ALBERTO SZEKÉLY, Permanent Court of International Arbitration at The Hague

1:00PM – 2:30PM

Africa Interest Group Meeting

Speaker: ALI EL-GHATIT, Egyptian Society of International Law

1:00PM – 2:30PM

Mapping the Future of Investment Treaty Arbitration as a System of Law

Co-sponsored by the International Economic Law Interest Group

Investment treaty arbitration currently faces significant challenges to its integrity as a system of law, including challenges to the enforceability of arbitral awards, conflicting decisions and certain states withdrawing from ICSID and terminating BITs. Are these developments merely growing pains or are they a sign of fundamental flaws in the system? Will the new generation of investment treaties help to resolve these problems?

Moderator: LUCY REED, FRESHFIELDS BRUCKHAUS DERINGER US LLP

Panelists: GABRIELA ALVAREZ-AVILA, Curtis, Mallet-Prevost, Colt & Mosle LLPY; YAS BANIFATEMI, Shearman and Sterling LLP); JAMES CRAWFORD, University of Cambridge and Matrix Chambers; MAKHDOOM ALI KHAN, Fazleghani Advocates; TOBY LANDAU, Essex Court Chambers

1:00PM – 2:30PM

Irresponsible Arms Trade and the Arms Trade Treaty

There is broad agreement that the irresponsible and unregulated trade in conventional arms exacerbates conflicts, fuels human rights and international humanitarian law violations, and undermines security and development. Despite the devastating consequences of conventional weapons for ordinary people, there is currently no consensus on international standards that govern, or should govern, the international arms trade. This panel will explore whether the newly proposed Arms Trade Treaty can establish universal standards capable of substantially reducing the illicit and irresponsible trade in arms.

Moderator: JESSE CLARKE, Foreign & Commonwealth Office, Government of the United Kingdom

Panelists: CLARE DA SILVA, Control Arms Campaign; JOHN DUNCAN, United Kingdom Diplomatic Service; GREGORY SUCHAN, Commonwealth Consulting Corporation; RACHEL STOHL, Centre for Defense Information

1:00PM – 2:30PM

Anthropological Perspectives on Human Rights Law and Lawyers

Recent years have seen a careful examination of human rights laws and institutions by anthropologists doing ethnographic work among lawyers, which has resulted in a much more sophisticated anthropological engagement than the old relativism/universalism debate. This roundtable reflects on how anthropology and ethnography can contribute to other debates in international law, such as how states are ''socialized'' and how human rights law affects the conduct of institutions.

Moderator: NEHAL BHUTA, University of Toronto

Panelists: KAMARI CLARKE, Yale University; LAURA DICKINSON, University of Connecticut School of Law; MARK GOODALE, George Mason University; ANN JANETTE ROSGA, Women's International League for Peace and Freedom

2:45PM – 4:15PM

International Law and the "War on Terror:" A Look Back

Looking back, what effect, if any, has international law had on American conduct in the "war on terror" since September 11, 2001? Has international law played a role in shaping or constraining U.S. practice on issues ranging from the resort to force to detention and treatment of terrorist adversaries? How should the experience of the past eight years influence the approach to international legal issues relating to the "war on terror" going forward? Are we learning the right lessons from our experience in the recent past?

Moderator: ALLEN WEINER, Stanford Law School

Panelists: JENNY MARTINEZ, Stanford Law School; JULIA TARVER MASON, Paul, Weiss, Rifkind, Wharton & Garrison; WILLIAM TAFT IV, Stanford Law School; MATTHEW WAXMAN, Columbia University School of Law

2:45PM – 4:15PM

BORDER TAX ADJUSTMENTS: CLIMATE CHANGE, THE WTO, AND NEW TOOLS FOR INTERNATIONAL ENVIRONMENTAL LAW-MAKING

Co-sponsored by the International Economic Law Interest Group

Border tax adjustments have been proposed as a unilateral tool to mitigate the competitive disadvantages of uneven global action on climate change, to avoid carbon "leakage," and to encourage harmonized approaches to climate policy among trading partners. This session will consist of a two-part debate: (1) Is the use of BTAs in this fashion WTO-consistent? (2) What can BTAs tell us about international law-making more generally?

Moderator: STEVE CHARNOVITZ, George Washington University Law School

Panelists: RACHEL BREWSTER, Harvard Law School; ELLEN HEY, Erasmus University School of Law; LAURA NIELSEN, University of Copenhagen; JONATHON ZASLOFF, UCLA School of Law

2:45PM – 4:15PM

Visions of International Law: Insights from Normative Theory

This panel will draw on several strands of normative legal theory to explore different visions of international law. It will contrast descriptive and prescriptive normative theories as well as legal theories and theories emanating from cognate disciplines such as political science. It will examine, among others, constructivist theories of the role of norms in international law, cosmopolitan projects for a global citizens' law, and theories advocating value pluralism.

Moderator: DIANNE OTTO, University of Melbourne School of Law

Panelists: BRIAN LEPARD, University of Nebraska; JOHN LINARELLI, University of La Verne and Northeastern University School of Law; MARY ELLEN O'CONNELL, University of Notre Dame Law School; ANDREW STRAUSS, Widener University School of Law

2:45PM – 4:15PM

US Implementation of the 2005 Hague Convention on Choice-of-Court Agreements (Resource Session)

Co-sponsored by the Private International Law Interest Group

As the US has recently signed (and the EU seems to be ready to sign) the 2005 Hague Convention on choice-of-court agreements, the Convention could enter into force in 2009. Therefore, the Private International Law IG meeting will convene a discussion on the US perspective on the implementation of the Convention.

Moderator: ALEX CARBALLO, Lauterpacht Centre for International Law
Panelists: KEITH LOKEN, US Department of State; DAVID STEWART, Georgetown University Law Center; LOUISE ELLEN TEITZ, Roger Williams University School of Law; PETER TROOBOFF, Covington & Burling

4:30PM – 6:30PM
Transitional Justice and Rule of Law Interest Group Meeting

4:30PM – 5:45PM
Plenary: International Law as Law at the International Court of Justice
Co-sponsored by George Washington University Law School

This panel will present a rare opportunity to hear three sitting judges of the International Court of Justice discussing the Court's role in the development of international law as law and its relationship with other international institutions.

Moderators: LUCY REED, Freshfields Bruckhaus Deringer, US LLP; RALPH STEINHARDT, George Washington University Law School
Panelists: THOMAS BUERGENTHAL, International Court of Justice; HISASHI OWADA, International Court of Justice; BRUNO SIMMA, International Court of Justice

5:30PM – 6:30PM
President's Reception
Co-sponsored by George Washington University Law School

6:30PM – 11:00PM
ASIL-ILSA Dinner Celebrating the Jessup Competition 50th Anniversary

This special dinner event will commemorate the immeasurable impact the Philip C. Jessup International Law Moot Court Competition has had on international law and legal education across the globe.

Speakers: ROSALYN HIGGINS, Former President of the International Court of Justice; STEPHEN M. SCHWEBEL, Former President of the International Court of Justice and author of the inaugural Jessup Competition Problem

7:00PM – 9:00PM
New Professionals Interest Group Happy Hour
Z-Lounge at the Ritz Carlton (22 & M Street, NW)

SATURDAY, MARCH 28

9:00AM – 10:30AM
International Criminal Law Interest Group Meeting

9:00AM – 10:30AM
Changing Concepts of State Sovereignty

In recent years, the international community has been increasingly willing to recognize human rights as a limit on state sovereignty and use peacekeepers in cases of conflict. This panel will explore these and other changes and the complex and evolving interplay between state sovereignty and international legal rights and obligations.

Moderator: OONA HATHAWAY, University of California, Berkeley School of Law
Panelists: ROSA BROOKS, Georgetown University Law Center; DANIEL PHILPOTT, University of Notre Dame; RUTI TEITEL, New York Law School
Commentator: ROSALYN HIGGINS, Former President of the International Court of Justice

9:00AM – 10:30AM

Learning from Doha: Can "Development" be Operationalized in International Economic Law?

Co-sponsored by the International Economic Law Interest Group

The failure of the WTO's Doha "Development Agenda" underscores a central difficulty in international law. Can the goals of international development and poverty alleviation be translated into operative legal terms? Can the Right to Development, Special and Differential Treatment, "policy space" and "development needs" fulfill positive legal functions, whether in negotiations or in dispute settlement, or are they merely rhetorical?

Moderator: MATJAZ NAHTIGAL, University of Ljubljana

Panelists: UCHE EWELUKWA, University of Arkansas; ROBERT HOWSE, New York University School of Law; ANDREW MITCHELL, University of Melbourne Law School; SANJAY REDDY, Columbia University, Barnard College, and School of International and Public Affairs

9:00AM – 10:30AM

Evolutions of the Jus ad Bellum: The Crime of Aggression

This panel will seek to highlight recent evolutions in the jus ad bellum by confronting the codification of the crime of aggression in the Rome Statute of the International Criminal Court and the recent practice of international bodies in holding states liable for unlawful use of force.

Moderator: DAVIS BROWN, University of Virginia

Panelists: JUTTA BERTRAM-NOTHNAGEL, Permanent Representative of the Union Internationale des Avocats to the United Nations; YORAM DINSTEIN, Tel Aviv University; LARRY MAY, Washington University in St. Louis; NOAH WEISBORD, Duke Law School; ELIZABETH WILMSHURST, Royal Institute of International Affairs at Chatham House

9:00AM – 10:30AM

IMF Governance Reform and its Broader Implications for the IMF's Work

Workshop organized by the University of Illinois College of Law Center on Law and Globalization; co-sponsored by the American Bar Foundation

The present financial crisis underscores the critical role of the International Monetary Fund in the world economy. It also acutely raises the links among the IMF's governance, legitimacy and effectiveness. This panel will address the recommendations of the Manuel Committee for governance reform at the IMF, its implications for the IMF's global activities, and its potential impact on governance reforms of other international financial institutions and international governance bodies.

Moderator: HANS CORELL, Former United Nations Legal Counsel

Panelists: SEAN HAGAN, International Monetary Fund; KENNETH DAM, University of Chicago School of Law, Manuel Committee on International Monetary Fund Governance

10:45AM – 12:15PM

Lecture: Transatlantic Views of International Law: Cooperation and Conflict in Hard Times

Daniel Bethlehem QC is currently UK Foreign and Commonwealth Office Legal Adviser and previously was one of the most prominent private practitioners of international law, regularly appearing before the International Court of Justice and European tribunals, as well as before British courts. Mr. Bethlehem will draw on his experience in both the public and

private sectors in a far-reaching and substantive discussion of the most fundamental legal issues arising in the trans-Atlantic relationship.

Lecturer: DANIEL BETHLEHEM, Legal Adviser, U.K. Foreign and Commonwealth Office
Discussant: JANE STROMSETH, Georgetown University Law Center

FIFTIETH ANNUAL PHILIP C. JESSUP INTERNATIONAL LAW MOOT COURT COMPETITION

THE CASE CONCERNING OPERATION PROVIDE SHELTER

The 2009 Jessup International Moot Court Competition problem, called the *Compromis*, focused on legal issues that arise when members of the international community, either collectively through the United Nations, or individually through unilateral action, intervene in the affairs of a state on humanitarian grounds. Among the many legal issues addressed in the Compromis were the following: the prohibition against the use of force; the responsibility to protect; the role of the Security Council in authorizing humanitarian interventions; the fact finding power of the International Court of Justice (ICJ); the role of the ICJ in matters taken up by the Security Council; restrictions to be applied to humanitarian interventions; international standards of due process; the death penalty under international law; and political asylum.

The dispute at the heart of the 2009 Jessup Problem involved two states—Alicanto, whose population is composed of two large ethnic groups in tension with one another (the Dasu and Zavaabi); and Ravisia, a former colonial power that establishes a military operation in Alicanto, without the consent of the Alicantan Government, in order to prevent what Ravisia characterizes as an impending campaign of ethnic cleansing.

The population of Alicanto is 30 percent Dasu and 50 percent Zavaabi. Both groups espouse the Talonnic religion—the Dasu subscribe to a moderate version of the faith, and the Zavaabi to a more orthodox version. The Dasu enjoy a higher standard of living and have historically occupied more influence in government and business.

In the mid 1990's, a Zavaabi political group called the Guardians gained momentum, promoting their aim of reviving the orthodox Talonnic faith and incorporating its tenets into Alicantan law.

In December 2005, the UN Security Council established UNMORPH, a peacekeeping mission in Alicanto with the purpose of maintaining a ceasefire agreement between Alicanto and its neighboring state New Bennu. The two countries had been involved in a conflict over rampant smuggling of illegal arms and drugs across their shared border. The largest contributor of troops to UNMORPH was Ravisia.

After Alicantans became frustrated with the Government's handling of the conflict with New Bennu, the Dasu-led government was turned out of office and emergency elections were called. The election resulted in the installation of a Zavaabi-led government, which put in place Prime Minister Simurg, the leader of the orthodox Zavaabi movement.

During the period of UNMORPH's two and a half year operation, the conduct of the mission's peacekeeping troops came under criticism by human rights observers who discovered a pattern of sexual exploitation by the troops against local young girls.

UNMORPH also came under fire by Alicantan government officials for broadcasting radio programming targeted towards informing local women and children about health, education, and human rights. Religious leaders protested, claiming the broadcasts to be offensive and inconsistent with orthodox teachings of the Talonnic faith.

Despite the controversy surrounding these practices, UNMORPH quickly succeeded in achieving its mandated goal. By the end of 2007, the peace between Alicanto and New Bennu was secure and the objectives of UNMORPH had been met. In February 2008, the Security Council passed Resolution 1650, calling for the gradual draw down and termination of UNMORPH by 31 July 2008.

As UNMORPH was nearing the end of its mandate, tensions began to increase between the Dasu and Zavaabi within Alicanto. The Zavaabi-led government rolled out plans to incorporate orthodox Tallonic beliefs into Alicantan law. Initially, members of the Dasu group reacted by protesting. Later on, many Dasu reacted by fleeing the country. Sporadic riots turned into significant violence and NGOs began reporting ethnically charged violence.

On July 3, 2008, the Security Council adopted Resolution 6620, noting its concern about the escalating violence in Alicanto, and urging the government of Alicanto to "to take immediate steps to improve the humanitarian situation."

On July 7, 2008, while traveling to the airport, Prime Minister Simurg was killed in an explosion. The assassination was followed by a man hunt for the alleged perpetrator, a Dasu-male named Piccardo Donati. This led to renewed violence between the groups. Six Dasu villages were burned, thousands were killed, tens of thousands of Dasu fled the country, and a weapons cache was discovered.

Ravisia called upon the Security Council and requested that it either (1) renew and expand the UNMORPH mandate; or (2) authorize a collective humanitarian intervention of a group of states led by Ravisia. The Secretary-General submitted a report to the Security Council in which he concluded that a campaign of systematic violence was impending, drawing his conclusions partly on the basis of classified raw intelligence provided by Ravisia. Alicanto demanded access to the intelligence, but the Secretary-General refused to hand it over, citing a promise of confidentiality he made to Ravisia. The President of the Council ruled the demand out of order. After a long debate, resolutions in support of Ravisia's recommended actions failed before the Security Council because two permanent members exercised their veto power.

On July 31, 2008, the Secretary-General terminated UNMORPH as required by Security Council Resolution 1650. Despite this, Ravisian peacekeeping troops remained. The next morning, 600 additional Ravisian troops arrived in Alicanto and the Ravisian Army declared the beginning of "Operation Provide Shelter." Alicanto protested the presence of the Ravisian Army but did not launch any operation to remove OPS troops. Over the next few months, OPS was involved in an average of three operations per week, and effectively extinguished a number of uprisings.

On August 21, the Alicantan Government proceeded to a trail in absentia of Piccardo Donati, whom Alicantan authorities had failed to apprehend in the July manhunt. Donati was convicted and sentenced to death for the assassination of Prime Minister Simurg and other crimes. Later, it was discovered that Donati had been granted asylum by Ravisian forces in Alicanto. The Alicantan Government demanded that Donati be handed over and that Ravisian forces leave immediately.

On September 17, Alicanto informed Ravisia of its intention to pursue legal action before the International Court of Justice. Alicanto and Ravisia later agreed to submit the dispute to the ICJ by special agreement.

Alicanto requested that the Court:

1. declare that the occupation of Alicantan territory by Ravisian armed forces since 1 August 2008 has been, and continues to be, a violation of international law, and order Ravisia to remove its military personnel from Alicanto at once;

2. call upon Ravisia to produce the intelligence that was delivered to the Secretary-General, and if it refuses, deny Ravisia the right to rely on that intelligence directly or indirectly to support the legality of Operation Provide Shelter in international law,

or in the alternative, declare that the Secretary General may lawfully hand over the intelligence to Alicanto;

3. determine that, in broadcasting offensive radio programming and sexually exploiting Alicantan children, Ravisian soldiers have committed violations of international law and the cultural and religious integrity of Alicanto, attributable to Ravisia, and order Respondent to make reparations for the injuries to the victims and to Alicanto's social fabric; and

4. order Ravisia immediately to deliver to Alicanto the fugitive Piccardo Donati so that his lawful sentence may be carried out.

Ravisia requested that the Court:

1. declare that the presence of the Ravisian military forces in Alicanto has been, and continues to be, fully justified under international law;

2. decline to call upon Ravisia to produce its classified intelligence, or in the alternative, decline to afford Alicanto any evidentiary benefit should Ravisia continue to withhold the intelligence, and declare that the Secretary-General may not lawfully hand it over to Alicanto;[1]

3. find that the conduct of Ravisian troops while stationed at Camp Tara did not violate international law, and that, in any event, Ravisia bears no liability for any wrongdoing that may have been committed in the service of the United Nations, and that no alleged injury to Alicanto or its citizens warrants reparations; and

4. hold that the Alicantan citizen Piccardo Donati need not be handed over to Alicanto, where he will be subjected to judicial execution in violation of international law.

Summary of Participation in Jessup 2009

The Jessup's 50th anniversary competition engaged 568 teams of students from eighty countries. The Shearman & Sterling International Rounds were attended by 120 teams from seventy-six countries. There the Stephen M. Schwebel prize for Best Oralist in the World Championship Round was inaugurated in honor of the Jessup's 50th anniversary and the eightieth birthday of the Round's President, Stephen Schwebel. To commemorate the 50th anniversary of the Competition, a special gala dinner was held on Friday March 27. Guest speakers included American Society of International Law President Lucy Reed; Dame Rosalyn Higgins, outgoing President of the International Court of Justice; Stephen M. Schwebel, former President of the International Court of Justice and author of the first Jessup Competition problem in 1960; and Philip Jessup Jr., son of the Competition's namesake.

Shearman & Sterling Jessup Cup World Championship Round

Final Round Judges

Bruno Simma

Judge, International Court of Justice

Ruth Wedgwood

Professor, Johns Hopkins School of Advanced International Studies

Jose Alvarez

Professor, Columbia Law School

Shearman & Sterling Jessup Cup World Champion
Universidad de los Andes (Colombia)
Ricardo Alarcón Sierra
Giselle Margarita Herrera Kheneyzir
Guillermo Otálora Lozano
Sebastián Machado Ramírez

Jessup Cup Runner-Up Team
University College London (United Kingdom)
Harpreet Dhillon
Annabel Lee
Tamara Jaber
Mahesh Rai
Nisha Rajoo

Stephen M. Schwebel Best Oralist Award (Championship Round)
Sebastián Machado, Universidad de los Andes (Colombia)

Other Shearman & Sterling International Rounds Awards

Semifinalists
Universidad de Buenos Aires (Argentina)
Aristotle University, Thessaloniki (Greece)

Quarterfinalists
London School of Economics (United Kingdom)
University of Ottawa, Common Law Section (Canada)
Universidad Catolica Andres Bello (Venezuela)
National Law School of India University (India)

Octafinalists
University of Costa Rica (Costa Rica)
Columbia University (USA)
European Humanities Universities (Baltic Region)
National Law University Jodhpur (India)
University of Oxford (United Kingdom)
National University of Singapore (Singapore)
Ateneo de Manila University (Philippines)
University of Calgary (Canada)

Run-Off Teams
Hebrew University of Jerusalem (Israel)
Washington University in St. Louis (USA)
University of Denver (USA)
Temple University (USA)
Universitas Pelita Harapan (Indonesia)
University of Melbourne (Australia)
Boston College (USA)
George Mason University (USA)

The Alona Evans Award
(Award for the best memorials submitted in the Shearman & Sterling International Rounds)
First Place: Universidad de los Andes (Colombia)
Second Place: University of Denver (USA)
Third Place: University of Costa Rica (Costa Rica)
Fourth Place: Universiteit Utrecht (Netherlands)
Fifth Place: Yerevan State University (Armenia)

The Hardy C. Dillard Award
(Award for the best memorials submitted in the Regional and National Competitions)
First Place: King's College London (United Kingdom)
Second Place: Soochow University (Chinese Taipei)
Third Place: University of Sydney (Australia)
Fourth Place: Lewis & Clark College (USA)
Fifth Place: National University of Kyiv-Mohyla Academy (Ukraine)

The Richard R. Baxter Award
(Top Overall Applicant and Respondent Memorials)
Best Applicant: King's College London (United Kingdom)
Best Respondent: University of Sydney (Australia)

Top Individual Oral Advocates
First Place: Suyash Paliwal, Columbia University (USA)
Second Place: Hayden Teo, University of Western Australia (Australia)
Third Place: Jeanne Semivan, Boston College (USA)
Fourth Place: Lucas Kline, George Mason University (USA)
Fifth Place: Jennifer Poh, Columbia University (USA)

ASIL ANNUAL GENERAL MEETING

MARCH 26, 2009

The Annual General Meeting was convened at 3:00 p.m. in the Grand Ballroom of the Fairmont Washington Hotel.

After the agenda was adopted, Roger Alford presented a tribute for Thomas Wälde, who passed away on October 11, 2008.

President Lucy Reed gave a short sketch of the state of the Society. She began with the embezzlement by Charles Clifton. The amount is close to $400,000. Criminal proceedings have been brought against Mr. Clifton. The Society retained forensic auditors to review the situation and make recommendations. A demand letter has been sent to the Society's former auditors. The Society has implemented new controls, including hiring a new financial officer and creating a new Audit Committee. The Tillar House staff has stepped up and has performed admirably.

Lucy pointed out that there are about 1300 registrants for the current annual meeting, making it the largest since the Centennial meeting. The Society has engaged in many activities this year, including issuing the report of the task force on U.S. policy toward the International Criminal Court. In addition, a joint task force of the ASIL and the ABA's Section of International Law has produced a report on treaties in U.S. law post-Medellin. The Society's Interest Groups have been very active. Our individual members have been very productive, as reflected in the honors and awards they have earned.

Janie Chuang presented the Society's Certificates of Merit, as follows:

> Preeminent contribution to creative scholarship: Douglas Johnston, *The Historical Foundations of World Order: The Tower and the Arena;*
>
> High technical craftsmanship and utility to practicing lawyers and scholars: *Commentary on the Rome Statute of the International Criminal Court,* 2d ed. (Otto Triffterer, editor);
>
> Specialized area of international law: Ralph Wilde, *International Territorial Administration: How Trusteeship and the Civilizing Mission Never Went Away.*

She also mentioned that Mark Drumbl has been given honorable mention in the Preeminent contribution category for his book, Atrocity, Punishment, and International Law, and the editors of The Oxford Handbook of International Investment Law (Peter Muchlinski, Federico Ortino, and Christoph Schreuer) have been given honorable mention in the Specialized area category.

The Lieber Society Prizes were presented as follows:

> Book category: Guénaël Mettraux, *The Law of Command Responsibility*;
>
> Article category: Grant T. Harris, *Human Rights, Israel, and Political Realities of Occupation,* 41 Israel L. Rev. 87 (2008);
>
> Lieber Military Prize: Major Jeffrey S. Thurnher, for his essay, *Drowning in Blackwater;*
>
> Certificates of merit: Commander David W. Glazier, for his essay, *If I Could Turn Back Time,* and Commander Andrew Murdoch, for his essay, *Forcible Interdiction of Ships Transporting Terrorists.*

Lucy Reed explained the background and purpose of the Arthur C. Helton Fellowships, which honor Mr. Helton, who devoted his life to the protection of human rights and who was killed in Baghdad while on a UN mission. The Fellowships, which assist young persons in their human-rights-related summer projects, are funded by a grant from the Planethood Foundation and by individual donors. This year there are eleven Helton Fellows, as follows:

Jeremie Bracka, LLM Transitional Justice Scholar, NYU School of Law;
Peter Forster Chapman, JD candidate, Washington College of Law, American University;
Justin Dubois, JD candidate, McGill University Faculty of Law;
Bahaa Ezzelarab, JD candidate, University of Toronto;
Jacqueline C. Green, JD candidate, Case Western Reserve University School of Law;
Brittan Heller, JD candidate, Yale Law School;
Rachel E. Lopez, JD graduate, University of Texas at Austin;
Amanda Montague, JD candidate, University of Toronto Faculty of Law;
Nicola Palmer, D.Phil candidate, Oxford University Faculty of Law;
Aziz T. Aliba, LLM graduate, University of Arizona, and LLB graduate, University of Itaúna, Brazil;
Rebecca Ann Sutton, JD candidate, University of Toronto Faculty of Law.

Bernard Oxman, Co-Editor-in-Chief of the American Journal of International Law, presented the Deák Prize for the best AJIL article in the past year by a young author or authors to Nicholas DiMascio and Joost Pauwelyn for their article, *Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?,* 102 AJIL 48 (2008).

James Carter, Chair of the Nominating Committee, reported that the nominees this year reflect diversity in several respects. The nominees are:

President-Elect:	David Caron
Honorary President:	Thomas Franck
Vice Presidents:	Diane Marie Amann Donald Donovan D. Stephen Mathias Dinah Shelton Elizabeth Andersen
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	Charles Hunnicutt
	Kenneth I. Juster
	Justice Michael Kirby
	Judge Hisashi Owada
	Michael Scharf
	William H. Taft, IV

It was moved and seconded that the slate be elected as presented. The motion carried without opposition.

Lucy Reed proposed that the 2009-2010 Nominating Committee consist of José Alvarez, Chair, and Jane Stromseth , Charles Hunnicutt, Adrien Wing, Pieter Bekker, with Edith Brown Weiss as the alternate. There was no objection.

David Caron, Chair of the Honors Committee, presented the honors, as follows:

Manley O. Hudson Medal: Judge Charles N. Brower, based on his rich and varied contributions to international law and practice in the public and private spheres;

Goler T. Butcher Medal: Professor Monica Pinto, based on her distinguished professional life devoted to developing and strengthening international human rights law and promoting respect for its values;

Honorary Member: Hans Corell, based on his extraordinary commitment to public service, his efforts in developing international law and diplomacy, and his leadership within the United Nations.

There being no further business, the Annual General Meeting was adjourned at 4:00 p.m.

Respectfully submitted,
Frederic L. Kirgis, Secretary

IN MEMORIAM

THOMAS WÄLDE—by Roger Alford*

For any of you that are in the International Arbitration Community, the news of Thomas Wälde's untimely death on October 11, 2008, was truly a shock. It was a tragic accident that occurred at his retreat in the south of France. Generally, when the news came through the listservs and the emails and the like, there was just a sense of genuine shock. And hundreds of emails filled the inbox of every member who subscribed to Thomas Wälde's arbitration listserv, known as "OGEMID." Rather than just offer my own personal reflections, because there were so many interesting, and thoughtful, and reflective comments in those emails, I wanted to pick out a few of those comments and read them to you to get a sense of the degree of respect and honor that Wälde generated throughout the world.

So, I'll just read a few of them. From Jacques Werner:

"Fatal accidents are quite often caused by stupid reasons, and the present one is no exception. How to accept that a broken ladder put an end to such a rich and useful life? It will take time for all of us to make sense of Thomas' passing."

From Judge Rosalyn Higgins:

"He was a giant in his field. As an academic, a practitioner, an administrator, he was exceptional. This remarkable man with his unique and strong personality was also very tender with persons facing problems. He was an extraordinary person who did so much for his chosen field of endeavor. I also know how much trouble he took over the interest of his students. This is a terribly sad day."

From Nigel Blackaby:

"We lose a truly unique human being who blew away the cobwebs and the preconceptions. Nothing was accepted as a given; every accepted truth was to be challenged. Thomas helped us to understand what we do in the context far wider than we ever imagined. Our minds were broadened by him in the debates he opened to everyone, irrespective of age, status, or origin ... May his spirit live on and continue to break down barriers."

And there are many, many others I could have read; those are just a few short selections.

So, for those of you that don't know Thomas Wälde, he was truly a cosmopolitan—an exceptional—figure in the world of international arbitration. He studied in Heidelberg, Berlin, Frankfurt, Lausanne, and Harvard; he was fluent in German, French, English, Spanish, and proficient in other languages as well. Early in his career, he worked at the United Nations in international investment policy with respect to energy and petroleum, and then in 1991 began his career at the University of Dundee where he remained for the rest of his life. And it was at Dundee that he really poured his energy into his passion, which was dispute resolution in the context of energy, petroleum, and mineral law. An extraordinarily active person acting as council, expert, arbitrator, mediator—he founded centers, journals, and probably what he is best known for, the Oil, Gas, Energy Law Intelligence service. He was actively involved in numerous projects at the time of his death, too many to even name.

* Professor of Law, Pepperdine University School of Law.

David Caron said to me earlier today that in trying to carry on the work of Thomas Wälde, his projects have been delegated to eight separate individuals—that's how active Thomas Wälde was. He will be missed by everyone in the international arbitration community.

Let me just close by saying that the last email sent by Thomas Wälde to the arbitration community was dated October 8, 2008, three days before his death. And he wrote at the beginning of that email, "I'm in my French retreat, reading PhD theses." One of the theses had raised an interesting question in his mind, regarding the distinction between whether domestic law was a factual or legal question under international law, and then he invited commentary in a very excited fashion raising the question "does this issue even really matter or is it a red herring built up only in theory?" So, for an academic, that's not a bad way to go: in your French retreat, reading PhD theses, spending your last days, doing what you love in a place that you love, mentoring students, challenging assumptions, asking questions, and communicating your ideas.

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