

Volume 111 ■ Issue 2 ■ April 2017

ISSN 0002-9300

AJIL

American Journal of International Law

INSIDE THIS ISSUE

- The Judicial Trilemma
Jeffrey L. Dunoff and Mark A. Pollack
- Human Rights Experimentalism
Gráinne de Búrca
- Constructing an International Community
Monica Hakimi
- Notes and Comments by:
Theodor Meron
J. Samuel Barkin and Yuliya Rashchupkina
David Bosco
- ICJ 2016 Review by:
Christine Gray

AMERICAN JOURNAL OF INTERNATIONAL LAW

Vol. 111

April 2017

No. 2

CONTENTS

PAGE

The Judicial Trilemma

Jeffrey L. Dunoff and Mark A. Pollack

225

International tribunals confront a “Judicial Trilemma.” More specifically the states that design, and the judges that serve on, international courts face an interlocking series of tradeoffs among three core values: (1) judicial independence, the freedom of judges to decide cases on the facts and the law; (2) judicial accountability, structural checks on judicial authority found most prominently in international courts in reappointment and reelection processes; and (3) judicial transparency, mechanisms that permit the identification of individual judicial positions (such as through individual opinions and dissents). The Trilemma is that it is possible to maximize, at most, two of these three values. Drawing on interviews with current and former judges at leading international courts, this article unpacks the logic underlying the Judicial Trilemma, and traces the varied ways in which this logic manifests itself in the design and operation of the International Court of Justice, European Court of Human Rights, Court of Justice of the European Union, and the World Trade Organization’s Appellate Body. The Judicial Trilemma does not identify an “ideal” court design. Rather it provides a framework that enables international actors to understand the inevitable tradeoffs that international courts confront, and thereby helps to ensure that these tradeoffs are made deliberately and with a richer appreciation of their implications.

Human Rights Experimentalism

Gráinne de Búrca

277

Human rights in general and the international human rights system in particular have come under increasing attack in recent years. Quite apart from the domestic and global political events since 2016, including an apparent retreat from international institutions, the human rights system has in recent times come in for severe criticism from academic scholars. Amongst the various criticisms levelled have been: (1) the ineffectiveness and lack of impact of international human rights regimes, (2) the ambiguity and lack of specificity of human rights standards, (3) the weakness of international human rights enforcement mechanisms, and (4) the claim to universalism of human rights standards coupled with the hegemonic imposition of these standards on diverse parts of the world. This article responds to several of those criticisms by introducing the idea of experimentalist governance, interpreting key

aspects of the functioning of certain international human rights treaties from the perspective of experimentalist governance theory, and surveying a body of recent scholarship on the effectiveness of such treaties. Contrary to the depiction of international human rights regimes as both ineffective and top-down, the article argues that they function at their best as dynamic, participatory, and iterative systems. Experimentalist governance offers a theory of the causal effectiveness of human rights treaties, brings to light a set of features and interactions that are routinely overlooked in many accounts, and suggests possible avenues for reform of other human rights treaty regimes with a view to making them more effective in practice.

Constructing an International Community

Monica Hakimi 317

What unites states and other global actors around a shared governance project? How does the group—what I will call an “international community”—coalesce and stay engaged in the enterprise? A frequent assumption is that an international community is cemented by its members’ commonalities and depleted by their intractable disagreements. This article critiques that assumption and presents, as an alternative, a theory that accounts for the combined integration and discord that actually characterize most global governance associations. I argue that conflict, especially conflict that manifests in law, is not necessarily corrosive to an international community. To the contrary, it often is a unifying force that helps constitute and fortify the community and support the governance project. As such, international legal conflict can have systemic value for the global order, even when it lacks substantive resolution. The implications for the design and practice of international law are far-reaching.

Notes and Comments

- The West Bank and International Humanitarian Law on the Eve of the Fiftieth Anniversary of the Six-Day War *Theodor Meron* 357
- Public Goods, Common Pool Resources, and International Law
J. Samuel Barkin and Yuliya Rashchupkina 376
- Discretion and State Influence at the International Criminal Court:
The Prosecutor’s Preliminary Examinations *David Bosco* 395

Current Developments

- The 2016 Judicial Activity of the International Court of Justice
Christine Gray 415

In Memoriam

- Sir Elihu Lauterpacht (1928–2017) *Stephen M. Schwebel* 437

International Decisions

- Edited by David P. Stewart*
Marshall Islands v. United Kingdom, India, Pakistan (Diane Marie Amann) 439

International Court of Justice decisions on the admissibility and justiciability of claims alleging noncompliance with obligations under the Treaty on the Non-Proliferation of Nuclear Weapons

<i>Garcia De Borissow and Others v. Supreme Court of Justice</i> (Santiago Diaz-Cediel)	446
Columbian Constitutional Court decisions on customary international law immunity of foreign diplomatic missions from execution of judgments arising from violations of domestic labor regulations	
<i>Commisimpex v. Republic of Congo</i> (Eloïse Glucksmann)	453
French Court of Cassation decision on validity under customary international law of express waivers of sovereign immunity from execution against state property and related legislation	
<i>Anchugov & Gladkov v. Russia</i> (A.Kh. Abashidze, M.V. Ilyashevich and A.M. Solntsev)	461
Russian Constitutional Court decision on obligation of Russian courts to enforce judgments of European Court of Human Rights that conflict with fundamental principles of the Russian Constitution	
<i>On the Interpretation of Article E(2) of the Fundamental Law</i> (Ágoston Mohay and Norbert Tóth)	468
Hungarian Constitutional Court on whether Hungary's obligations to the European Union violate fundamental rights or national sovereignty as protected by the Hungarian Constitution	

Contemporary Practice of the United States Relating to International Law

Edited by Kristina Daugirdas and Julian Davis Mortenson

United States Abstains on Security Council Resolution Criticizing Israeli Settlements	477
United States Sanctions Russian Individuals and Entities After Accusing Russian Government of Using Hacking to Interfere with U.S. Election Process; Congressional Committees and Intelligence and Law Enforcement Agencies Continue to Investigate President Trump's Connections to Russian Officials	483
Second Circuit Overturns \$655 Million Jury Verdict Against Palestine Liberation Organization and Palestinian Authority	504
New Legislation Seeks to Confirm Immunity of Artwork and Facilitate Cultural Exchange	510
United States Confronts China over Seizure of Unmanned Drone in the South China Sea	513
International Criminal Court Prosecutor Recommends Investigation of Potential War Crimes in Afghanistan, Including Actions by U.S. Military and Central Intelligence Agency	517
United States Strikes Houthi-Controlled Facilities in Yemen, Reaffirms Limited Support for Saudi-Led Coalition Notwithstanding Growing Concerns About Civilian Casualties	523
United States Expands Military Operations in North Africa and Classifies al-Shabaab as a Force "Associated" with Al Qaeda	533

Recent Books on International Law

Review Essay

- Aust, Helmut Philipp and Georg Nolte (eds.). *The Interpretation of International Law by Domestic Courts: Uniformity, Diversity, Convergence* (Kevin L. Cope and Mila Versteeg) 538

Book Reviews

- Halliday, Terrence C. and Gregory Shaffer (eds.). *Transnational Legal Orders* (Donald McRae) 544
- Jo, Hyeran. *Compliant Rebels: Rebel Groups and International Law in World Politics* (Steven R. Ratner) 550
- Grimm, Dieter F. *Sovereignty: The Origin and Future of a Political and Legal Concept* (Tom Farer) 554
- Sands, Philippe. *East West Street: On the Origins of "Genocide" and "Crimes Against Humanity"* (David Scheffer) 559
- Fitzmaurice, Malgosia. *Whaling and International Law* (William R. (Bill) Mansfield) 566

Books Received

572

International Legal Materials, Contents, Vol. 56, No. 2

574

BOARD OF EDITORS

Editors in Chief

JOSÉ ENRIQUE ALVAREZ
New York University School of Law

BENEDICT KINGSBURY
New York University School of Law
University of Utah

DAPO AKANDE
Oxford University
KAREN J. ALTER
Northwestern University
ANTONY ANGHIE
National University of Singapore
EYAL BENVENISTI
Cambridge University
LAURENCE BOISSON DE CHAZOURNES
University of Geneva School of Law
CURTIS A. BRADLEY
Duke University School of Law
CHRISTOPHER BRUMMER
Georgetown University Law Center
DAVID D. CARON
The Hague, the Netherlands, King's College London
Dickson Poon School of Law
BHUPINDER SINGH CHIMNI
Jawaharlal Nehru University
JAMES THUO GATHII
Loyola University Chicago School of Law
TOM GINSBURG
University of Chicago Law School
RYAN GOODMAN
New York University School of Law
LAURENCE R. HELFER
Duke University School of Law
ALEXANDRA HUNEUS
University of Wisconsin Law School

KAREN KNOP
University of Toronto Law School
KATERINA LINOS
Univ. of California, Berkeley School of Law
DONALD M. MCRAE
University of Ottawa Faculty of Law
CATHERINE POWELL
Fordham Law School
KAL RAUSTIALA
Univ. of California (UCLA) School of Law
NATALIE REID
Debevoise & Plimpton
HENRY J. RICHARDSON III
Temple University Beasley School of Law
ANNEISE RILES
Cornell Law School
ANTHEA ROBERTS
Australian National University
GREGORY SHAFFER
Univ. of California, Irvine School of Law
DAVID P. STEWART
Georgetown University Law Center
ALAN O. SYKES
Stanford Law School
CARLOS MANUEL VÁZQUEZ
Georgetown University Law Center
INGRID WUERTH
Vanderbilt Law School

ex officio

LUCINDA LOW
MARK DAVID AGRAST
Honorary Editors

GEORGE H. ALDRICH
St. Michaels, Maryland
RICHARD B. BILDER
University of Wisconsin Law School
CHARLES N. BROWER
The Hague, the Netherlands
EDITH BROWN WEISS
Georgetown University Law Center
THOMAS BUERGENTHAL
George Washington Univ. Law School
CHRISTINE M. CHINKIN
London School of Economics
JAMES R. CRAWFORD
The Hague, the Netherlands
JOHN R. CROOK
Potomac, Maryland
ANTHONY D'AMATO
Northwestern University School of Law
RICHARD FALK
University of California, Santa Barbara
TOM J. FARER
University of Denver
MICHAEL J. GLENNON
Fletcher School, Tufts University
ROSALYN HIGGINS
The Hague, the Netherlands

FREDERIC L. KIRGIS
Washington and Lee Univ. School of Law
CYNTHIA CRAWFORD LICHTENSTEIN
Boston College Law School
DAVID A. MARTIN
University of Virginia School of Law
MICHAEL J. MATHESON
George Washington Univ. Law School
THEODOR MERON
The Hague, the Netherlands
JOHN NORTON MOORE
University of Virginia School of Law
BERNARD H. OXMAN
University of Miami School of Law
W. MICHAEL REISMAN
Yale Law School
STEPHEN M. SCHWEBEL
South Woodstock, Vermont
DINAH SHELTON
George Washington Univ. Law School
PETER D. TROBOFF
Covington & Burling LLP
RUTH WEDGWOOD
Johns Hopkins University

Senior Copyeditor
ERIN LOVALL

Cite-checker
CATHERINA VALENZUELA

Assistant to the Editors in Chief
RACHEL JONES

Submissions Editor 2016–17
NATHAN YAFFE

Associate Submissions Editors 2016–17
SEBASTIAN DUTZ
NAHUEL MAISLEY
CLAIRE SCHUPMANN

AMERICAN JOURNAL OF INTERNATIONAL LAW

The *American Journal of International Law (AJIL)* has been published quarterly since 1907. It features articles, editorials, notes, and comments by pre-eminent scholars on developments in international law and international relations. *AJIL* contains summaries and analyses of decisions by national and international courts and arbitral or other tribunals, and of contemporary U. S. practice in international law. Each issue lists recent publications in English and other languages, many of which are reviewed in depth. The *AJIL* is indispensable for all professionals working in international law, economics, trade, and foreign affairs.

It is the policy of the American Society of International Law not to take an official position, by resolution or otherwise, upon controversial questions. The views expressed in the articles, editorial comments, book reviews, and all other contributions to the *AJIL* are those of the individual authors and are not to be taken as representing the views of the Board of Editors or the Society.

THE AMERICAN SOCIETY OF INTERNATIONAL LAW

The American Society of International Law (ASIL) is a nonprofit, nonpartisan, educational membership organization founded in 1906 by U.S. Secretary of State Elihu Root and chartered by Congress in 1950. Headquartered in Washington, D.C., its mission is “to foster the study of international law and to promote the establishment and maintenance of international relations on the basis of law and justice.” ASIL holds Special Consultative Status with the Economic and Social Council of the United Nations and is a constituent society of the American Council of Learned Societies.

ASIL’s nearly four thousand members hail from more than one hundred nations with nearly 40 percent residing outside the United States. Its members include scholars, jurists, practitioners, government officials, leaders in international and nongovernmental organizations, students, and others interested in international law. Through its many publications, conferences, briefings, and educational events, ASIL seeks to serve the needs of its diverse membership and to advance understanding of international law among policymakers and the public.

ASIL is a volunteer-led organization governed by a sixty-member Executive Council elected by its membership. In partnership with the elected leadership, ASIL is led by an executive director and supported by a professional staff.

Become a member

asil.org/membership

Join one of the Society’s Partner Programs and receive complimentary ad space in *AJIL*

asil.org/financial-support/sponsors-and-institutional-supporters

Follow the Society on Twitter

twitter.com/asilorg

Like us on Facebook

facebook.com/AmericanSocietyofInternationalLaw

OFFICERS AND EXECUTIVE COUNCIL OF THE SOCIETY, 2016–2017

<i>President</i>	LUCINDA A. LOW
<i>Honorary President</i>	ROSEMARY BARKETT
<i>Vice Presidents</i>	CATHERINE M. AMIRFAR, EDWARD KWAKWA, SEAN D. MURPHY, KAL RAUSTIALA
<i>Executive Vice President and Executive Director</i>	MARK DAVID AGRAS
<i>Secretary</i>	JAMES A. R. NAFZIGER
<i>Treasurer</i>	NANCY L. PERKINS
<i>Assistant Treasurer</i>	RONALD J. BETTAUER

Past Presidents: JOSÉ E. ALVAREZ, CHARLES N. BROWER, EDITH BROWN WEISS, DAVID D. CARON, JAMES H. CARTER, LORI FISLER DAMROSCH, DONALD FRANCIS DONOVAN, LUCY REED, ARTHUR W. ROVINE, ANNE-MARIE SLAUGHTER, PETER D. TROOBOFF

Honorary Vice Presidents: LORI FISLER DAMROSCH, DONALD FRANCIS DONOVAN, DAVID D. CARON

Council Members: STANIMIR A. ALEXANDROV, KAREN J. ALTER, ANGELA M. BANKS, R. DOAK BISHOP, ANNA SPAIN BRADLEY, TODD F. BUCHWALD, DONALD EARL CHILDRESS III, SARAH H. CLEVELAND, OLUFEMI ELIAS, CHIARA GEORGETTI, DAWN YAMANE HEWETT, SANDRA L. HODGKINSON, DUNCAN B. HOLLIS, MEG KINNEAR, SAIRA MOHAMED, BLANCA MONTEJO, VINCENT O. NMEHIELLE, JIDE NZELIBE, DAVID L. SLOSS, BETH VAN SCHAACK, CARLOS M. VÁZQUEZ, SAMUEL M. WITTEN

Counselors: DANIEL BETHLEHEM, JEFFREY L. BLEICH, HANNAH L. BUXBAUM, TAI-HENG CHENG, MARCELLA DAVID, JOAN E. DONOGHUE, JAMES T. GATHII, HAROLD HONGJU KOH, PETER MASON, ELISA MASSIMINO, M. MARGARET MCKEOWN, MARY MCLEOD, JOSEPH E. NEUHAUS, DANIEL M. PRICE, HÉLÈNE RUIZ-FABRI, LEILA NADYA SADAT, STEVEN M. SCHNEEBAUM, RICHARD H. STEINBERG, JANE E. STROMSETH, PETER TOMKA, JOEL P. TRACHTMAN, PAUL R. WILLIAMS, ADRIEN K. WING, NASSIB G. ZIADÉ

PHILANTHROPY AND THE SOCIETY

The ASIL accomplishes much of its work through charitable support. The Society is grateful to its many members who contribute to the annual fund and the endowment, the foundations whose grants fund special programs, and the law firms, publishers, universities, and others that sponsor ASIL activity. The Society is particularly honored to receive contributions through the 21st century campaign and Patrons program and to be included in our members' estate plans through the ASIL Heritage Circle. We recognize these contributors below.

21ST CENTURY CAMPAIGN

Leadership (\$1,000,000)

HOWARD M. HOLTZMANN*

Leadership (\$250,000)

CHARLES N. BROWER

Elihu Root Patron (\$50,000)

ANONYMOUS

MAHNOUSH H. ARSANJANI AND

W. MICHAEL REISMAN

GARY B. BORN

DAVID D. CARON AND SUSAN SPENCER

LORI FISLER DAMROSCH

DONALD FRANCIS DONOVAN AND

JENNIFER LAKE

LUCINDA A. LOW AND

DANIEL B. MAGRAW

LUCY F. REED

ARTHUR W. ROVINE

Cordell Hull Patron (\$25,000)

R. DOAK BISHOP

JAMES H. CARTER

TAI-HENG CHENG

ELI WHITNEY DEBEVOISE II

JAMES LEITNER

ABBY COHEN SMUTNY

James Brown Scott Patron (\$15,000)

MARK DAVID AGRAS

JOSÉ E. ALVAREZ AND SUSAN DAMPLO

CHARLES H. CAMP

DAVID COLSON

GLENN P. HENDRIX

O. THOMAS JOHNSON

JUDD KESSLER

BENEDICT KINGSBURY

CHARLOTTE KU

EDWARD KWAKWA

GABRIELLE KIRK McDONALD

SEAN D. AND JULIE MURPHY

JAMES A. R. NAFZIGER

JOSEPH E. NEUHAUS

MARY ELLEN O'CONNELL

DANIEL M. PRICE

ANDRÉS RIGO SUREDA

BRUNO SIMMA

DON WALLACE JR.

PATRONS

Patrons of the Society have contributed \$10,000 or more to the Society. Patrons may also be recognized posthumously upon such a donation being made in their name.**

DOMINGO E. ACEVEDO

GERALD AKSEN

ARTHUR R. ALBRECHT

GEORGE H. ALDRICH

TEYMOUR A. ALIREZA

JOSÉ E. ALVAREZ AND

SUSAN DAMPLO

DIANE MARIE AMANN

CATHERINE M. AMIRFAR

JAMES G. APPLE

MAHNOUSH H. ARSANJANI

FRANK A. BAUMAN*

MRS. RICHARD BAXTER*

DAVID J. BEDERMAN* AND

LORRE B. CUZZE

DANIEL L. BETHLEHEM

RICHARD B. BILDER

R. DOAK BISHOP

JOHN A. BOYD

JOHN BRISCOE

CHARLES N. BROWER

IAN BROWNIE*

EDITH BROWN WEISS

LEE C. BUCHHEIT

THOMAS BUERGENTHAL

WILLIAM J. BUTLER

SUSANA AND HUGO CAMINOS

CHARLES H. CAMP

DAVID D. CARON AND

SUSAN L. SPENCER

JAMES H. CARTER

DAVID A. COLSON

JAMES RICHARD CRAWFORD

JOHN R. CROOK

* deceased

** Since January 2012, Patron designation requires a contribution of \$15,000 or more.

THE ASIL HERITAGE CIRCLE

Members who include the ASIL in their estate plans and so notify the Society may join the ASIL Heritage Circle.

ANONYMOUS (2)

ELIZABETH ANDERSEN

JAMES G. APPLE

FRANK A. BAUMAN*

CHARLES N. BROWER

JAMES H. CARTER

SARAH WHITCRAFT DEFORD*

MICHAEL AND MARY ANN FARLEY

THOMAS M. FRANCK*

CHRISTIAN A. HERTER, JR.*

CHARLOTTE KU

CYNTHIA CRAWFORD

LICHTENSTEIN

H. C. L. MERILLAT*

SEAN D. AND JULIE MURPHY

MARY ELLEN O'CONNELL

OSCAR SCHACHTER*

STEPHEN SCHER

ERIC STEIN*

JOHN R. STEVENSON*

GENEVIEVE EAGON TILLAR*

RICHARD YOUNG*

* granted posthumously

IN MEMORIAM

ARTHUR K. KUHN

HENRY C. MORRIS

JAMES BROWN SCOTT

STANLEY P. SMITH

More information about these and other ASIL philanthropic activities can be found at www.asil.org/financialsupport.cfm.

JOURNAL INFORMATION

AJIL is published in print and digitally by Cambridge University Press on behalf of the American Society of International Law. The journal publishes quarterly, in January, April, July, and October, and to reduce time between acceptance and publication, contributions may appear online as *FirstView* publications in advance of their scheduled publication in an issue. Discover the entire *AJIL* back archive at cambridge.org/ajil/issues.

Subscriptions

The electronic version of *AJIL* is available to all members of the American Society of International Law by login to the ASIL website www.asil.org. Print copies are also supplied to all members.

To subscribe as a non-member or recommend a subscription to your librarian go to cambridge.org/ajil.

Submission of Manuscripts

AJIL invites submission of manuscripts on international law subjects. *AJIL*'s coverage extends beyond public international law to closely related issues of global governance, transnational law, and national or sub-state law. It generally does not publish manuscripts focused on purely private or commercial law or on comparative or foreign law, including the internal law of the European Union. *AJIL* will not consider submissions whose content has been, or will be, published before it appears in this journal.

AJIL welcomes submissions for **Lead Articles**, and shorter **Current Developments** and **Notes & Comments** pieces via *AJIL*'s electronic submission website mc.manuscriptcentral.com/ajil.

Editorial Comments are written by members of the Board of Editors. Content for the **Contemporary Practice of the United States Relating to International Law** section of *AJIL* is generated by the editors of that section and outside submissions are not accepted. The **Recent Books on International Law** section contains book reviews that are solicited by invitation of the editor, Richard Bilder. The **International Decisions** section, edited by David Stewart, focuses on particularly significant decisions concerning important issues of (or developments in) international law. It consists of contributions that are mostly proposed to the editor by readers of the *AJIL*. Proposals for International Decisions should be sent to stewart@law.georgetown.edu.

AJIL Unbound, an online initiative to supplement *AJIL* by publishing short, original essays, periodically issues open calls for short contributions on specified topics.

AJIL is committed to publishing a diversity of authors, whether based in the United States or abroad, and to covering a wide range of subjects and approaches. Suggestions for topics for *AJIL* symposia or Agora should be sent to law.ajil.admin@nyu.edu.

All submissions must follow the *AJIL* Style Guide. Full instructions on how to prepare and submit your paper may be found here:
cambridge.org/ajil/ifc

Claims and Address Updates

subscriptions_newyork@cambridge.org (in the USA, Canada and Mexico)
journals@cambridge.org (elsewhere)

Copyright and Permissions

cambridge.org/about-us/rights-permissions.

To Advertise in the Journal

ad_sales@cambridge.org

Abstracting and Indexing Services

cambridge.org/ajil/abstracting

For other ASIL Publications

www.asil.org

Proper Citation

AJIL shall be cited according to the following example:
111 *AJIL* 219 (2017)

ISSN: 0002-9300

E-ISSN: 2161-7953

© American Society of International Law