

Proceedings of the 104th International Aw IN A TIME OF CHANGE



March 24–27, 2010 Washington, DC



American Society of International Law

Proceedings of the 104th **INTERNATIONAL** Annual LAW IN A TIME Meeting

OF CHANGE



March 24–27, 2010 Washington, DC

THE AMERICAN SOCIETY OF INTERNATIONAL LAW

The Society is a professional association devoted to the study and use of law in international affairs. Membership is open to people of all nations, lawyers and non-lawyers, who are interested in the challenging problems of law and policy. Its large and diverse membership of some 4,000, drawn from nearly one hundred countries, includes scholars, practitioners, government officials, international civil servants, and students.

Founded in 1906, the Society serves as a meeting place, forum, and collegial research center, hospitable to all viewpoints in its meetings, publications, and other activities. Publications include the American Journal of International Law, International Legal Materials, Studies in Transnational Legal Policy, the ASIL Newsletter, and reports and books produced by the Society's programs of research, study, and outreach.

The Society is a nonpartisan, tax-exempt, nonprofit corporation headquartered at Tillar House on Sheridan Circle in Washington, DC.

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 addresses, remarks, and discussions delivered at the ASIL Annual Meeting and appearing in its printed *Proceedings* are those of the individual speakers and are not to be taken as representing the views of the Society.

SUBSCRIPTION AND AUTHORIZATION-OF-USE INFORMATION

The Proceedings of the 104th Annual Meeting (ISBN 0-9792329-8-5) is available by advance subscription to ASIL members for \$105.00 for delivery within the United States and \$115.00 for delivery outside the United States; and non-members for \$115.00 for delivery within the United States and \$125.00 for delivery outside the United States. ASIL members and nonmembers may subscribe to the *Proceedings* of future ASIL Annual Meetings through the Society's Web site at www.asil.org. Back issues of this and other *Proceedings* are available from William S. Hein & Co., Inc., 1285 Main Street, Buffalo, NY 14209-1987; phone (800) 828-7571 (U.S.) and (716) 882-2600 (outside U.S.). ASIL members receive a 10% discount on all ASIL publications sold by Hein.

Authorization to photocopy items for internal or personal use (beyond that permitted by Section 107 and 108 of the U.S. Copyright Law), or for the internal or personal use of specific clients, is granted by The American Society of International Law for users registered with the Copyright Clearance Center (CCC) Transactional Reporting Service, provided that the base fee of \$5 per copy, plus \$.25 per page, is paid directly to CCC, 222 Rosewood Drive, Danvers, MA 01923. For organizations that have been granted a photocopy license by CCC, a separate system of payment has been arranged. The fee code for users of the Transactional Reporting Service is: 0272-5037/01, \$5.00 + 0.25. Educational copying is permitted. Please address requests to CCC Academic Permissions Service; phone (508) 750-8400; fax (508) 750-4744.

PROPER CITATION

The *Proceedings* should be cited according to the following example: 104 ASIL PROC. 214 (2011).

© 2011 The American Society of International Law

PROCEEDINGS OF THE ONE HUNDRED FOURTH ANNUAL MEETING OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW

CHAIRS OF THE COMMITTEE **CO-EDITORS OF THE PROCEEDINGS** OF THE ANNUAL MEETING K. Russell LaMotte K. Russell LaMotte Hari M. Osofsky Hari M. Osofsky Allen S. Weiner Allen S. Weiner **CONTENTS** Forewordxiii An Introduction: International Law in a Time of Change...... 1 K. Russell LaMotte, Hari M. Osofsky, and Allen S. Weiner New Thinking on Social and Economic Rights: Honoring Virginia Leary Introduction: A Celebration of Virginia Leary The General Comments of the UN Committee on Economic, Social and **Cultural Rights** Remarks by: Mona Rishmawi 10 The Right to Health: Assessing How Far the Discourse Has Evolved Internationally and Within the United States Alicia Ely Yamin 14 Risk, Science, and Law in the WTO Risk, Science, and Law in the WTO: The Centrality of Institutional Choice What Can the WTO Learn from International Environmental Law? Resolving Complex Health-Related Disputes Under the WTO's Dispute Settlement System **Empirical Approaches to International Law** The Transformative Potential of Rigorous Empirical Research Empirical Modalities: Lessons for the Future of International Investment Getting to Closure: Winding Up the International and Hybrid Criminal Tribunals International Law and the Closure of the International and Hybrid Criminal Tribunals

The Security Council's Consideration of the Establishment of Residual	
Mechanisms for the International Criminal Tribunals	
Huw Llewellyn	41
The Role of States in the Closure of the International and Hybrid	
Criminal Tribunals	
Anne Joyce	43
The Special Tribunal for Lebanon and the Discussion of Residual Mechanisms	
Giorgia Tortora	45
	15
New Voices I	
From International Law to International Conflicts of Law: The Fragmentation	
of Legitimacy	
Harlan Grant Cohen	49
The Limits of Legal Citizenship: Reading Aleem v. Aleem	
Máiréad Enright	52
Citizens of the World	
Alexandra R. Harrington	55
Engaging Religious Laws, Players, and Communities	•
Amos Israel-Vleeschhouwer	58
International Human Rights Law, Foreign Sovereign Immunity, and	
National Courts	
Introductory Remarks by:	
Curtis A. Bradley	63
Remarks by:	
Michael J. Edney	64
Immunity and Human Rights? A Bifurcated Approach	
Rosanne van Alebeek	67
The Goldstone Report and the Modern Law of War	
Introductory Remarks by:	
Lucy Reed	73
The Importance of the Goldstone Report	15
Omar Dajani	72
A Critique of the Goldstone Report and Its Treatment of International	15
Humanitarian Law	
	79
Abraham Bell	19
Teaching International Law: Lessons from Clinical Education	
Introductory Remarks by:	
Richard J. Wilson	87
Clinical Education and International Human Rights Law: Retrospective on	
UQAM's Pedagogical Methodology	
Bernard Duhaime	88
Teaching Human Rights to Advance Social Justice in Russia	
Lusine Hovhannisian	92
Remarks by:	
Remarks by: Deena R. Hurwitz	95

Legal Clinics in Continental Western Europe: The Approach of the Utrecht	
Legal Clinic on Conflict, Human Rights, and International Justice	
Héctor Olàsolo	. 98
A Comparative Look at Extraterritoriality: Bagram and Beyond	
Introductory Remarks by:	
Chimène Keitner	103
Remarks by:	
Kal Raustiala	103
Douglas Letter	105
Sabine Nölke	
Ralph Wilde	110
Addendum: Some Cases and Commentary	
Haiti: International Law and Disaster	
Introductory Remarks by:	
Hope Lewis	115
Remarks by:	
Muzaffar Chishti	116
Disability-Inclusive Disaster Preparedness and Response: Challenges and	
Opportunities for Reconstruction in Haiti	
Janet E. Lord	118
Accounting for Haiti's Children After the Earthquake: Immediate Needs with	
Lifelong Consequences	
Jonathan Todres	122
Hat Tanics in CATS and Human Dights	
Hot Topics in GATS and Human Rights Introduction	
James Thuo Gathii	107
Trade in Services Agreements, the Financial Crisis, and Human	127
Rights Implications	
Jane Kelsey	128
Temporary Movement of Workers and Human Rights Protection: Interfacing the	120
"Mode 4" of GATS with Non-Trade Bilateral Migration Agreements	
Marion Panizzon	131
"Predatory Globalization": The WTO Agreement on Trade in Services,	151
Migration, and Public Health in Africa	
Obijiofor Aginam	130
	157
Providing Global Public Goods Under International Law	
Global Public Goods: An Introduction	
Rebecca M. Bratspies	147
Providing Public Goods Under International Law: Of Openness and Enclosure	
Sabrina Safrin	148
Trust, Verify, or Incentivize? Effectuating Public International Law	
Regulating Public Goods Through Market Mechanisms	1.50
Anne van Aaken	153
Women in International Law Interest Group Luncheon	
Where I Sit and Where I Stand	
Dinah Shelton	157
	v

Afghanistan, Pakistan, and the Modern Challenges to Use of Force Law	
Introductory Remarks by:	
Mary Ellen O'Connell	161
Remarks by:	
Paul Pillar	162
Hina Shamsi	165
John Radsan	168
Ganesh Sitaraman	171
Discussion	177
Evolving Intersections Between Treaty Law and Domestic Law	
From Counterterrorism to Climate Change: Are Treaties Necessary to Solve	
International Problems?	
Andrew N. Keller	185
Are Treaties Always Necessary? How U.S. Domestic Law Can Give Teeth to	105
Non-Binding International Commitments	
Mallory Stewart	180
	107
Teaching and Practicing International Law in a Global Environment: Toward	
a Common Language of International Law	
Legal Education in the Twenty-First Century	
Mahnoush H. Arsanjani	.195
Teaching and Practicing International Law in a Global Environment:	
Toward a Common Language of International Law	
Rosalyn Higgins	196
The United Nations Audiovisual Library of International Law	
Deirdre O. Schell	200
Keynote Address: The Obama Administration and International Law	
Harold Hongju Koh	207
	207
Arms Control Challenges Faced by the Obama Administration	
Introductory Remarks by:	
Michael Matheson	223
Remarks by:	
Newell Highsmith	
David Koplow	
Michael Mattler	
Discussion	236
Corruption and Human Rights	
Linking Corruption and Human Rights	
Julio Bacio-Terracino	243
Making the Link Between Corruption and Human Rights: Promises and Perils	
Joel M. Ngugi	246
Corruption and Human Rights: The Challenges of Mineral Resources Stewardship	2.0
	250

International Environmental Justice: Possibilities, Limits, and Tensions	
Introductory Remarks by:	
John H. Knox	255
International Law in a Time of Climate Change, Sovereignty Loss, and	
Economic Unity	
Deepa Badrinarayana	256
New Voices II	
Developing a New Structural Framework for Parties to an International Crime:	
Toward a Capacious Concept of Principalship	
Neha Jain	261
WTO Inconsistent Countermeasures-A View from the Outside	
Kimberley N. Trapp	264
Justice Administration in Meheba Refugee Settlement: Refugee Perceptions,	
Preferences, and Strategic Decisions	
Julie Veroff	270
A Behavioral Approach to Human Rights	
Andrew K. Woods	273
Same or Different? Bush and Obama Administration Approaches to Fighting Terro	rists
The International Legal Framework for Fighting Terrorists According to the Bush	
and the Obama Administrations: Same or Different, Correct or Incorrect?	077
Marco Sassòli	211
Distinction with a Difference	000
Diane Marie Amann	280
Preventing the Next Financial Crisis: Coordination and Competition in	
Global Finance	
Introductory Remarks by:	
Anupam Chander	285
Crisis and Coordination: Regulatory Design in Financial Crises	
Robert B. Ahdieh	286
Prospects for Coordination and Competition in Global Finance	
Barbara C. Matthews	289
Barbara C. Matthews The International Law of Financial Crisis?	289
The International Law of Financial Crisis? Joel P. Trachtman	
The International Law of Financial Crisis? Joel P. Trachtman Updating the Restatement	
The International Law of Financial Crisis? Joel P. Trachtman Updating the Restatement Introductory Remarks by:	295
The International Law of Financial Crisis? Joel P. Trachtman Updating the Restatement Introductory Remarks by: David P. Stewart	295
The International Law of Financial Crisis? Joel P. Trachtman Updating the Restatement Introductory Remarks by: David P. Stewart Remarks by:	295 301
The International Law of Financial Crisis? Joel P. Trachtman Updating the Restatement Introductory Remarks by: David P. Stewart Remarks by: Margaret McKeown	295 301
The International Law of Financial Crisis? Joel P. Trachtman Updating the Restatement Introductory Remarks by: David P. Stewart Remarks by: Margaret McKeown Jurisdiction and Immunities in U.S. Foreign Relations Law	295 301 302
The International Law of Financial Crisis? Joel P. Trachtman Updating the Restatement Introductory Remarks by: David P. Stewart Remarks by: Margaret McKeown Jurisdiction and Immunities in U.S. Foreign Relations Law Barry E. Carter and David P. Stewart	295 301 302
The International Law of Financial Crisis? Joel P. Trachtman	295301302307
The International Law of Financial Crisis? Joel P. Trachtman Updating the Restatement Introductory Remarks by: David P. Stewart Remarks by: Margaret McKeown Jurisdiction and Immunities in U.S. Foreign Relations Law Barry E. Carter and David P. Stewart Remarks by: Oona Hathaway	 295 301 302 307 311
The International Law of Financial Crisis? Joel P. Trachtman	 295 301 302 307 311 313

Non-State Actors and the Emerging Climate Change Law Regime	
Non-State Actor Access and Influence in International Legal and	
Policy Negotiations	205
Elizabeth Burleson	323
The Rising Use of International Law by African Judiciaries	
International Law and African Judiciaries: The Example of South Africa	
Erika R. George	329
Domesticating International Law Through Truth and Reconciliation Commissions: The Case of the Liberian TRC	
Jeremy I. Levitt	333
-	555
Reform and Restructuring at International Financial Institutions	
Introductory Remarks by: Daniel Bradlow	337
Remarks by:	557
Anne-Marie Leroy	340
Sean Hagan	
Jo Marie Greisgraber	343
Jacob Werksman	345
Domenico Lombardi	346
Discussion	347
Creating and Building a "State": International Law and Kosovo	
The Case of Kosovo: Self-Determination, Secession, and Statehood Under	
International Law	
Milena Sterio	361
Building the Rule of Law in Kosovo	244
David Wippman	366
War and Law in Cyberspace	
The Conduct of Hostilities in and via Cyberspace	
By Robin Geiβ	371
Family, Sex, and Reproduction: Emerging Issues in International Law	
Introductory Remarks by:	
Nancy Northrup	375
Procedural Turn in Transnational Abortion Law	277
Joanna N. Erdman Same-Sex Marriage, Transnational Activism, and International Law: Strategic	
Objectives Beyond Freedom to Marry	
Kathleen A. Lahey	380
Maternal Mortality and Human Rights	500
Laura Katzive	383
Sexual Rights and State Governance	
Katherine Franke	385
Theoretical Insights at the Margins of International Law: TWAIL and CRT	
Introduction: Theoretical Insights from the Cutting Edge	
Jeanne M. Woods	389
The Danger of the New Legal Colonialism	
Henry J. Richardson III	393

Remembering Tom Franck: What He Taught Us About the Recourse to Force	
The Recourse to Force by the United Nations: The Contributions of	
Thomas M. Franck	
Dan Sarooshi	. 399
Thomas Franck and the Use of Force	
W. Michael Reisman	. 403
Remembering Tom Franck	
Jordan Paust	. 409
ICSID in the Twenty-First Century: An Interview with Meg Kinnear	
Introductory Remarks by:	
David Caron	113
Remarks by:	. 415
Meg Kinnear	112
Meg Kinnear	. 415
Implications of the Global Financial Crisis on International Trade and	
Investment Regimes	
Origins of the Financial Crisis and International/National Responses: An Overview	,
Chris Brummer	. 435
International Trade and the Financial Crisis	
Elizabeth Trujillo	. 438
The Global Financial Crisis and International Investment Regimes	
Jeffery P. Commission	. 443
The Impact of the Financial Crisis on Trade and Investment	
Padideh Ala'i	. 447
Transnational Legal Dialogue, a Human Rights-Based Hierarchy, and the Creat	ion
of Norms	1011
Introductory Remarks by:	
Erika de Wet	453
The Prohibition on Torture: Driving Jus Cogens Home?	
Jutta Brunnée	. 454
National Security Versus Human Rights: An Uneven Playing Field	
Patricia Wald	. 458
Bottom-Up Constitutionalization of International Law: The Targeted Sanctions	
Regime as a Case Study	
Eyal Benvenisti	. 462
The Future of Transnational Judicial Dialogue	
Melissa A. Waters	. 465
Bottom-Up Strategies for Survival and Resistance: Examples from Latin	
America and Elsewhere	
Good Bananas, Bad Bananas: Hard Lessons from a Soft War	100
•	460
Ibrahim Gassama	07
Ibrahim Gassama Guantánamo as Subordination: Detainees as Resisting Empire	
Ibrahim Gassama	
Ibrahim Gassama Guantánamo as Subordination: Detainees as Resisting Empire	
Ibrahim Gassama Guantánamo as Subordination: Detainees as Resisting Empire Ernesto Hernández-López	
Ibrahim Gassama Guantánamo as Subordination: Detainees as Resisting Empire Ernesto Hernández-López Manley O. Hudson Medal Lecture	472
Ibrahim Gassama Guantánamo as Subordination: Detainees as Resisting Empire Ernesto Hernández-López Manley O. Hudson Medal Lecture On Being Accountable in a Kaleidoscopic World	472

Keynote Address: The Use of Foreign Law—A Comparative View of Canada	
and the United States	
Presented by:	401
Beverley McLachlin	491
ASIL Annual Dinner: Reflections on Change in International Law	
Introductory Remarks by:	
Lucy F. Reed	495
Remarks by:	
David D. Caron	
Stephen Schwebel	
Edith Brown Weiss	499
John Jackson	500
Andreas Lowenfield	
Allen S. Weiner	502
Charles N. Brower	503
W. Michael Reisman	503 _.
Rosalyn Higgins	504
Hari M. Osofsky	505
Theodor Meron	
K. Russell LaMotte	507
The ICC Review Conference and Changing U.S. Policy Toward the Court	
Introductory Remarks by:	
Leila Sadat	509
Remarks by:	007
Christian Wenaweser	510
The Office of the Prosecutor, the ICC Review Conference, and the Way Forward	010
Béatrice le Fraper du Hellen	512
Remarks by:	
Stephen Rapp	514
William R. Pace	
Discussion	
	0.20
China and East Asia on the World Stage	
The Socialization of China, Japan, and Korea (CJK) in International Economic	
Law: Assessment and Implications	
Saadia Pekkanen	529
China on the World Stage: A Trade Law Perspective	
Henry Gao	532
The Road Forward from Copenhagen: Climate Change Policy in the 21st Centur	cy
Introductory Remarks by:	•
K. Russell LaMotte	. 537
Remarks by:	
Daniel Bodansky	538
Jeffrey M. Klein	
Ann Petsonk	

Advancing Women's Rights Internationally Constituting Terms for International Change: Reflecting on Strategies for	
Women's Rights	
Kamari Clarke	561
Lessons from the Cotton Field Case About Gender Justice	501
Rebecca Cook	565
Advancing Women's Rights in Conflict and Post-Conflict Situations Fionnuala D. Ní Aoláin	
Treaty Bodies and Beyond: The Practice and Process of Translating	500
International Norms into Domestic Law	
Introductory Remarks by:	67 1
Celia Goldman	5/1
Iterative Engagements: The European Union and International Normativity Navraj Singh Ghaleigh	572
The International Labor Organization and the Translation of International	512
Norms into Domestic Law	
Arnold M. Zack	576
Poster Sessions	
Judicial Review by EU and Domestic Courts of the Al Qaeda and Taliban Sanctions	
Regime: Counterterrorism, Due Process, and the Search for the Golden Mean	
Miša Zgonec-Rožej	581
Releasing Captured Documents	
Linda Tashbook	584
Laboratory of the International Community? Role of International Organizations in the Re-establishment of the Rule of Law in Kosovo	
Katerina Novotna	588
International Arbitration in Times of Change: Fairness and Transparency in Investor-State Disputes	
Rodrigo Polanco Lazo	591
104th Annual Meeting Theme Statement and Program	597
Fifty-First Philip C. Jessup International Law Moot Court Competition	617
Appendices	
Minutes of the ASIL Annual General Meeting	
Memorial Notices	
ASIL Officers and Executive Council	
American Journal of International Law	
International Legal Materials Proceedings of the Annual Meeting	
Index	. 643