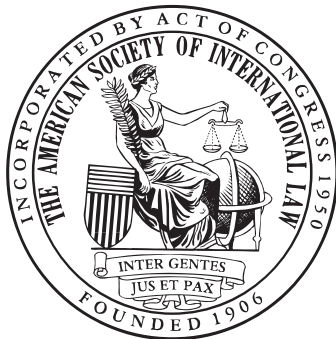




American Society
of International Law

Proceedings
of the **108th**
Annual
Meeting

THE
EFFECTIVENESS
OF
INTERNATIONAL
LAW



April 7–12, 2014
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 nearly 4,000, drawn from more than 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 diverse 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.

Subscriptions and Membership: The electronic version of the *Proceedings of the 108th Annual Meeting* (ISBN 978-0-9842944-9-7) is available to all members of the American Society of International Law by login to the ASIL website, www.asil.org. Print copies of the *Proceedings* are available to members for an additional fee and to non-members through subscription. Information about membership in ASIL is available online at www.asil.org/membership/membership. Information about non-member subscriptions is available online at www.asil.org/proceedings.

Institutional subscription orders and claims should be directed to the JSTOR Fulfillment Department, JSTOR New York, 2 Rector Street, 18th Floor, New York, NY 10006, USA, Phone: (212) 358-6400, Fax: (212) 358-6499, or support@jstor.org (for JSTOR access questions) or fulfillment@jstor.org (for print claims).

Individual subscription orders and claims should be directed to ASIL Member Services, at services@asil.org, or (202) 939-6001.

Claims for undelivered volumes must be made within six months of the publication date specified online at www.asil.org/claims.htm. *Proceedings* of previous ASIL Annual Meetings are available from William S. Hein & Co., Inc., 1285 Main Street, Buffalo, NY 14209-1987, USA, toll-free (800) 828-7571, or online at www.wshein.com.

The *ASIL Proceedings* is available in nonprint forms:

- Online in JSTOR, the database of scholarly journals, either through individual ASIL membership or non-member subscriptions (ASIL Member Services (202) 939-6001), or through institutional subscriptions (JSTOR New York, 2 Rector Street, 18th Floor, New York, NY 10006, USA, Phone: (212) 358-6400, Fax: (212) 358-6499). See www.jstor.org for a current list of institutional subscribers.
- Online in Hein Online, a service of William S. Hein & Co., Inc., at www.heinonline.org; LexisNexis®, part of Reed Elsevier, at www.lexisnexis.com, P.O. Box 933,

Dayton, OH 45401, USA, toll-free (800) 227-9597; and Westlaw®, part of Thomson Reuters, at www.westlaw.com, 610 Opperman Drive, Eagan, MN 55123, USA, toll-free (800) 937-8529.

- On microform from William S. Hein & Co., Inc., 1285 Main Street, Buffalo, NY 14209, USA, toll-free (800) 828-7571; and National Archive Publishing Company, NA Publishing, Inc., 4750 Venture Drive, Suite 400, P.O. Box 998, Ann Arbor, MI 48106-0998, USA, toll-free (800) 420-6272, or email info@napubco.com.

For **permission to reuse** materials from the *ASIL Proceedings*, please access www.copyright.com, or contact the Copyright Clearance Center, Inc. (CCC), 222 Rosewood Drive, Danvers, MA 01923, USA, (978) 750-8400. CCC is a not-for-profit organization that provides licenses and registration for a variety of users.

PROPER CITATION

The *Proceedings* should be cited according to the following example:
108 ASIL PROC. 214 (2015).

© 2015 The American Society of International Law

**PROCEEDINGS OF THE ONE HUNDRED EIGHTH ANNUAL MEETING
OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW**

CHAIRS OF THE COMMITTEE
OF THE ANNUAL MEETING
Oona Hathaway
Larry Johnson
Fionnuala Ní Aoláin

CO-EDITORS OF THE PROCEEDINGS
Oona Hathaway
Larry Johnson
Fionnuala Ní Aoláin

CONTENTS

<i>Foreword</i>	xiii
An Introduction: The Effectiveness of International Law	1
<i>Oona Hathaway, Larry Johnson, and Fionnuala Ní Aoláin</i>	
Corporate Responsibility and Human Rights	
Introductory Remarks by:	
<i>James Anaya</i>	3
Resolution of Disputes Involving the Rights of Indigenous Peoples and Extraction of Natural Resources by Foreign Investors	
<i>Ben Juratowitch</i>	5
The Corporate Responsibility to Respect Human Rights	
<i>Jeffrey S. Collins</i>	8
Remarks by:	
<i>Sara L. Seck</i>	11
<i>John F. Sherman III</i>	15
Connecting the Dots: Visualizing International Law	
Introductory Remarks by:	
<i>Marylin Johnson Raisch</i>	19
Mapping the Law: Building and Using Visual Mind Maps for International Law	
<i>Summary of Jeffrey B. Ritter's Remarks</i>	19
Country Data on the Rule of Law: The World Justice Project Rule of Law Index	
<i>Summary of Alejandro Ponce's Remarks</i>	20
Global Health and Human Rights Law Database: A Case Law Database Project of the O'Neill Institute for National and Global Health Law	
<i>Summary of Ana S. Ayala's Remarks</i>	22
The Fourth Restatement of Foreign Relations Law of the United States	
Remarks by:	
<i>Georg Nolte</i>	27
The Dodd-Frank Wall Street Reform Act's Turn to International Law	
Global Administrative Law and the Post-Crisis Financial Order	
<i>Michael S. Barr</i>	31
Cross-Border Insolvencies of Financial Institutions: An Obtainable Goal? / A Goal Worth Obtaining?	
<i>Jonathan Macey</i>	33
Is International Law Effective? The Case of Russia and Ukraine	
Remarks by:	
<i>Simon Chesterman</i>	37
<i>Peter M. Olson</i>	39

Sixteenth Annual Grotius Lecture	
Women and Children: The Cutting Edge of International Law <i>Radhika Coomaraswamy</i>	43
Commentary on the 2014 Grotius Lecture <i>Diane Marie Amann</i>	65
The Approach of Courts to Foreign Affairs and National Security	
The Approach of the Courts to Foreign Affairs and National Security: A View from New Zealand and The Hague <i>Kenneth Keith</i>	73
Countermeasures in Cyberspace	
Remarks by: <i>Alexandra H. Perina</i>	77
Interpretive Complexity and the International Humanitarian Law Principle of Proportionality	
Introductory Remarks by: <i>Richard Gross</i>	81
Remarks by: <i>Janina Dill</i>	82
<i>Daniel Cahen</i>	83
<i>Yoram Dinstein</i>	84
The Future of International Criminal Law Annual Ben Ferencz Panel	
International Criminal Law in 2013: The Most Significant Developments <i>Milena Sterio</i>	107
Effectiveness of International Adjudication: Assessing Functions and Performance	
Introductory Remarks by: <i>Yuval Shany</i>	113
The Effectiveness of the International Court of Justice <i>Joan E. Donoghue</i>	114
Is It All About Compliance? Towards a Multidimensional Goal-Based Approach for Analyzing the Effectiveness of the WTO DSS <i>Sivan Shlomo Agon</i>	118
Assessing the Contemporary International Criminal Tribunals: Performance, Persuasion, and Politics <i>Victor Peskin</i>	122
Remarks by: <i>Geir Ulfstein</i>	125
Women in International Law Interest Group Luncheon	
Introductory Remarks by: <i>Clara Brillembourg</i>	131
<i>Christie Edwards</i>	132
Honorees: <i>Judge Joan Donoghue</i>	132
<i>Judge Xue Hanqin</i>	134
<i>Judge Julia Sebutinde</i>	135
Special Speaker: <i>Justice Sandra Day O'Connor</i>	136

Domestic Human Rights Enforcement After *Kiobel*

The ATS, the TVPA, and the Future of International Human Rights Litigation <i>Curtis A. Bradley</i>	145
--	-----

Peace Forces at War: Implications Under International Humanitarian Law

Introductory Remarks by: <i>Bruce Oswald</i>	149
Remarks by: <i>Tristan Ferraro</i>	150
<i>Marten Zwanenburg</i>	151
<i>Mona Khalil</i>	152
<i>Johan Heyns</i>	154
Questions from the Moderator	156

The Idea of Effective International Law

‘Effectivity’ in International Law: Self-Empowerment Against Epistemological Claustrophobia <i>Jean d’Aspremont</i>	165
How Compliance Understates Effectiveness <i>Timothy Meyer</i>	168

Can International Norms Protect Us from Natural Disasters?

Can International Law Save Us from Disasters? Urban Search and Rescue and Foreign Medical Teams Are Counting on It! <i>Kirsten Nakjavani Bookmiller</i>	173
How Can International Human Rights Law Protect Us from Disasters? <i>Elizabeth Ferris</i>	177
Will International Law Save Us From Climate Disasters? <i>Michael B. Gerrard</i>	180
Remarks by: <i>Ingrid Nifosi-Sutton</i>	183

Paradigmatic Changes in the Settlement of International Investment Disputes?

Introductory Remarks by: <i>Hi-Taek Shin</i>	187
Do States Have a Duty to Cooperate in the Interpretation of Investment Treaties? <i>Mark Clodfelter</i>	188
The Trend from Standards to Rules in International Investment Law and Its Impact upon the Interpretive Power of Arbitral Tribunals <i>Friedrich Rosenfeld</i>	191
Possible Paradigmatic Changes in the Settlement of International Investment Disputes <i>Jeremy K. Sharpe</i>	193
Interpretational Methods as an Instrument of Control in International Investment Law <i>Anne van Aaken</i>	196

Is Forced Feeding in Response to Hunger Strikes a Violation of the Prohibition of Torture and Cruel, Inhuman, or Degrading Treatment?	
Introductory Remarks by:	
<i>Nigel Rodley</i>	199
Remarks by:	
<i>Walter Ruiz</i>	200
<i>Baher Azmy</i>	201
<i>Stephen Xenakis</i>	202
<i>Rachel VanLandingham</i>	204
<i>William Lietzau</i>	205
Charles N. Brower Lecture on International Dispute Resolution	
The Transnational Protection of Private Rights: Issues, Challenges, and Possible Solutions	
<i>Sundares Menon</i>	219
Everybody Come Together Over Me: Systemic Integration and Vienna Convention Article 31(3)(C)	
WTO Norms as ‘‘Relevant’’ Rules of International Law in Investor-State Arbitration	
<i>Jürgen Kurtz</i>	243
Come Together or Do It My Way: No Systemic Preference	
<i>Martins Paparinskis</i>	246
International Trade Law and International Investment Law: Complexity and Coherence	
Introductory Remarks by:	
<i>Andrew Mitchell</i>	251
Remarks by:	
<i>Mélida Hodgson</i>	251
The Re-Convergence of International Trade and Investment Law: Causes, Questions, and Reform	
<i>Joost Pauwelyn</i>	255
Women’s Economic Rights, International Law, and the Financial Crisis	
Remarks by:	
<i>Sujata Manohar</i>	259
Issues Impacting Migrant Women	
<i>Eric P. Schwartz</i>	262
Using ILO Sources to Vindicate Women’s Economic Rights	
<i>Anne Trebilcock</i>	265
Judges, Diplomats, and Peacebuilders: Evaluating International Dispute Resolution as a System	
Overview of Panel by:	
<i>Anna Spain</i>	271
Remarks by:	
Stephen Schwebel	273
‘‘Law of Warcraft:’’ New Approaches to Generating Respect for the Law	
Introductory Remarks by:	
<i>Elizabeth Stubbins Bates</i>	275

Remarks by:	
<i>Vincent Bernard</i>	275
<i>David E. Graham</i>	275
<i>Laurie Blank</i>	276
<i>Brad Gutierrez</i>	277
The Effectiveness of the United Nations Human Rights Protection Machinery	
The Effectiveness of the United Nations Human Rights Protection Machinery:	
The UN High Commissioner for Human Rights	
<i>Felice D. Gaer</i>	281
The Strengthening Process of the Human Rights Treaty Bodies	
<i>Michael O’Flaherty</i>	285
Human Rights Special Procedures: Determinants of Influence	
<i>Ted Piccone</i>	288
Water: Challenges for International Law and Policy	
The Notion of Environmental Flows and the Law Applicable to International	
Watercourses	
<i>Laurence Boisson de Chazournes</i>	293
Water Scarcity and Security Issues in the Middle East	
<i>Stephen C. McCaffrey</i>	297
New Voices in International Law: Making International Criminal Law	
More Effective	
Politicizing the International Criminal Court: Redefining the Role of the United	
Nations Security Council in the Age of Accountability	
<i>Adejoké Babington-Ashaye</i>	301
Effectiveness Considerations Between Legitimacy and Prosecutorial Discretion	
<i>Maria Varaki</i>	304
Investment Chapters in Trade Agreements: Intellectual Property Rights	
as Protected Investments	
Introductory Remarks by:	
<i>Frederick M. Abbott</i>	311
Compliance of Canada’s Utility Doctrine with International Minimum	
Standards of Patent Protection	
<i>Jerome H. Reichman</i>	313
Remarks by:	
<i>Susan K. Sell</i>	317
Continuities of Violence: What Role for Transitional Justice and the Rule of Law?	
Summary of Panel	321
Remarks by:	
<i>Katya Salazar</i>	322
Aggression and the Use of Force in International Law	
Introductory Remarks by:	
<i>Noam Lubell</i>	325
Remarks by:	
<i>Harold Hongju Koh</i>	326
<i>Claus Kreß</i>	329
<i>Sean Murphy</i>	331
<i>Christine Chinkin</i>	333

Can International Law Keep Up with the Internet?	
Introductory Remarks by:	
<i>Gary N. Horlick</i>	347
Remarks by:	
<i>Usman Ahmed</i>	348
Can WTO Law Keep Up with the Internet?	
<i>Henry Gao</i>	350
Atoms Versus Bits: Consumer Protection in the (Cyber) Trade Regime	
<i>Sonia E. Rolland</i>	353
The Dispute Settlement System of the United Nations Convention on the Law of the Sea: An Assessment After 20 Years	
The Effectiveness of the UNCLOS Dispute Settlement Regime: Reaching for the Stars?	
<i>Natalie Klein</i>	359
Provisional Measures Prescribed by ITLOS and Marine Environmental Protection	
<i>Yoshifumi Tanaka</i>	365
New Voices in International Law: Empirical Perspectives on International Law	
The New Empirical Turn in International Law Scholarship	
<i>Gregory Shaffer</i>	369
Leashing the “Dogs of War”: Examining the Effects of LOAC Training at the U.S. Military Academy and in Army ROTC	
<i>Andrew Bell</i>	370
Reconsidering the Motivations of the U.S. Bilateral Investment Treaty Program	
<i>Adam S. Chilton</i>	373
International Law in Domestic Legal Systems: An Empirical Perspective	
<i>Pierre-Hugues Verdier and Mila Versteeg</i>	376
Plenary Discussion: A Conversation with International Court of Justice Judges Joan Donoghue, Julia Sebutinde, and Xue Hanqin	
Introductory Remarks by:	
<i>Abiodun Williams</i>	383
Remarks by:	
<i>Joan Donoghue</i>	384
<i>Xue Hanqin</i>	385
<i>Julia Sebutinde</i>	386
ILA/ASIL Gala Dinner	
International Law and Effectiveness in the Post–Cold War Era	
<i>Danilo Türk</i>	403
The Effectiveness of International Law in “Greening” the Economy	
The Effectiveness of International Law in “Greening” the Economy: Challenges for the Developed and Developing World	
<i>Kamal Hossain</i>	407
Challenges of Arbitrators in International Investment Disputes: Standards and Outcomes	
Introductory Remarks by:	
<i>Chiara Giorgetti</i>	411
Challenge of Arbitrators at ICSID—An Overview	
<i>Meg Kinnear</i>	412

Remarks by:	
<i>Luke A. Sobota</i>	416
“Late-in-the-Game” Arbitrator Challenges and Resignations	
<i>Judith Levine</i>	419
Remarks by:	
<i>Charles N. Brower</i>	423
Sexual Violence in Armed Conflict	
Gender-Based Crimes at the ICC: Where Is the Future?	
<i>Olga Jurasz</i>	429
State Law Litigation of International Norms	
State Law Litigation of International Norms: Horizontal and Vertical Dimensions	
<i>Zachary D. Clopton</i>	433
An Introduction to International Law in U.S. State Courts: Extraterritoriality and	
“False Conflicts” of Law	
<i>Anthony J. Colangelo</i>	436
Global Litigation, Local Judgment Enforcement	
<i>Cassandra Burke Robertson</i>	439
State Law Claims: The Next Phase of Human Rights Litigation	
<i>Beth Stephens</i>	442
Closing Plenary: Syria: Testing the Effectiveness of International Law	
Introductory Remarks by:	
<i>Donald Francis Donovan</i>	445
Remarks by:	
<i>Vera Gowlland-Debbas</i>	446
<i>Michael Ignatieff</i>	447
<i>Ken Roth</i>	448
<i>Awn Al-Khasawneh</i>	450
<i>108th Annual Meeting Theme Statement and Program</i>	469
<i>Fifty-Fifth Annual Philip C. Jessup International Law Moot Court Competition</i>	495
Appendices	
Minutes of the ASIL Annual General Meeting	501
Memorial Notices	503
ASIL Officers and Executive Council	509
American Journal of International Law	511
International Legal Materials	513
<i>Index</i>	515