

ASIL

The American Society of International Law

Proceedings *of the* 94th Annual Meeting

INTERNATIONAL

LAW IN FERMENT:

A NEW VISION

FOR THEORY

AND PRACTICE

April 5-8, 2000

Washington, DC

ASIL

The American Society of International Law

Proceedings
of the **94th**
Annual
Meeting

INTERNATIONAL

LAW IN FERMENT:

A NEW VISION

FOR THEORY

AND PRACTICE

April 5-8, 2000

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 nonlawyers, who are interested in the challenging problems of law and policy. Its large and diverse membership of some 4,400, 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 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 its programs of research, study and outreach.

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

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 its 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 INFORMATION

ASIL members and nonmembers may order the *Proceedings of the 94th Annual Meeting* for \$75; or \$95 for delivery outside the United States. To place an order or to receive information on back issues, please contact The American Society of International Law, 2223 Massachusetts Avenue, NW, Washington, D.C. 20008-2864; telephone (202) 939-6000, fax (202) 797-7133.

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 \$5.00 per copy, plus \$0.25 per page, is paid directly to CCC, 222 Rosewood Drive, Danvers, Mass. 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: 0272-5037/00, \$5.00 + 0.25. Educational copying is permitted. Please address requests to CCC Academic Permissions Service; telephone (508) 750-8400, fax (508) 750-4744.

PROPER CITATION

The Proceedings should be cited according to following example:
94 ASIL PROC. 214 (2000).

© 2000 The American Society of International Law

**PROCEEDINGS OF THE NINETY-FOURTH ANNUAL MEETING
OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW**

CHAIRS OF THE COMMITTEE
ON THE ANNUAL MEETING
Peter H.F. Bekker
Makau Mutua
Paul B. Stephan III

EDITOR OF THE PROCEEDINGS
Paul B. Stephan III
PRODUCTION EDITOR
Sarah J. Bailey

CONTENTS

<i>Note about the Proceedings</i>	x
<i>Introduction</i>	xi
International Law and Practice: Dealing with the Past in the South African Experience (Second Annual Grotius Lecture)	
<i>Kader Asmal</i>	1
International Law in Ferment: Recent Developments in Private International Law	
REMARKS BY:	
<i>Jeffrey D. Kovar</i>	11
<i>Charles H. Brower, II</i>	13
<i>Amelia Boss</i>	15
Accountability and Democracy in the Case of Using Force Under International Auspices	
<i>Charlotte Ku and Harold K. Jacobson</i>	19
What is TWAIL?	
<i>Makau Mutua</i>	31
<i>Commentary: Antony Anghie</i>	39
ICSID and the Rise of Bilateral Investment Treaties: Will ICSID be the Leading Arbitration Institution in the Early 21st Century?	
REMARKS BY:	
<i>Antonio R. Parra</i>	41
The History of International Law: Universality and Particularity	
The Birth of International Law as the Law of International Society	
<i>Onuma Yasuaki</i>	44
Latin American Contributions to International Law	
<i>Claudio Grossman</i>	45
The Role of History in International Law	
<i>Outi Korhonen</i>	45
International Law in Domestic Litigation	
Customary International Law and Private Rights of Action	
<i>Curtis A. Bradley</i>	47
Treaties and Non-Self-Execution	
<i>John C. Yoo</i>	47
State Law, Customary International Law, and the Need for Federal Legislation	
<i>Michael D. Ramsey</i>	48

Recovering the Charming Betsy Principle <i>Ralph G. Steinhardt</i>	49
---	----

The Third World and International Law: Voices from the Margins

REMARKS BY:	
<i>Dianne Otto</i>	50
<i>Roberto Aponte-Toro</i>	50
<i>Anthony Farley</i>	51
DISCUSSION	52

Unmasking International Law: Stories and Discourses of Empire, Progress, Exclusion, and Inclusion

Imperial Rivalry and the Genealogy of Human Rights: <i>The Nationality Decrees Case</i> <i>Nathaniel Berman</i>	53
--	----

Political Corruption as an International Offense

REMARKS BY:	
<i>Daniel K. Tarullo</i>	56
<i>Claire M. Dickerson</i>	56
<i>Joel Paul</i>	57
<i>Susan Rose-Ackerman</i>	58

Provisional and Protective Measures in International Litigation: *Mareva* and *Grupo Mexicano*

REMARKS BY:	
<i>Peter D. Trooboff</i>	60
<i>Lawrence Collins</i>	60
<i>Timothy McEvoy</i>	61
<i>Janet Walker</i>	62
<i>Gavan Griffith</i>	62

The Single Superpower and the Future of International Law

REMARKS BY:	
<i>Johan van der Vyver</i>	64
<i>Michael Byers</i>	64
<i>Georg Nolte</i>	65
<i>James C. Hathaway</i>	67
<i>Karin Mickelson</i>	69
<i>Ruth Wedgwood</i>	70

The Project of Reconfiguration: How Can International Law Be Reconstituted?

REMARKS BY:	
<i>Siegfried Wiessner (Introduction)</i>	73
<i>Hilary Charlesworth</i>	74
<i>Maxwell Chibundu</i>	75
<i>Raul M. Sanchez</i>	77
<i>Fernando Tesón</i>	78
<i>Siegfried Wiessner</i>	79

Extraterritorial Sanctions and Legality Under International and Domestic Law

REMARKS BY:	
<i>Edward McWhinney</i>	82
Extraterritoriality, Regulatory Conflicts and “The Horizontal Dormant Commerce Clause” <i>Jeffery C. Atik</i>	83

The Democratic Legitimacy of Extraterritorial U.S. Trade Sanctions on Environmental Grounds: The WTO Shrimp-Turtle Case <i>Gregory Shaffer</i>	84
On the Restitution of Jewish Cultural Property Looted in World War II <i>Yehuda Z. Blum</i>	88
Islam and Human Rights: Beyond the Universality Debate <i>Abdullahi A. An-Na'im</i>	95
<i>Commentary: Louis Henkin</i>	101
My Talk at the ASIL: What is New Thinking in International Law? <i>David Kennedy</i>	104
Should International Commercial Arbitration Awards Be Reviewable? REMARKS BY: <i>Eric A. Posner</i>	126
<i>Nathalie Voser</i>	128
The West and the Rest: The Politics of Asylum and Immigration Laws Recent Developments in U.S. Asylum Law <i>James Stillwaggon</i>	135
Asylum and the Politics of Humanitarian Assistance in East Africa <i>Monica Kathina Juma</i>	136
A Note on the Legal Dimensions of Preventing Forced Migration <i>Arthur C. Helton</i>	137
The Foreign Affairs Powers of the U.S. Executive in Light of Changing Conceptions of States' Rights REMARKS BY: <i>David A. Martin</i>	139
Foreign Affairs Authority and the Myth of "States' Rights" <i>Martin S. Flaherty</i>	139
Missouri v. Holland: Beside the Point? <i>Peter J. Spiro</i>	140
The Massachusetts Burma Law Case <i>Andrew N. Vollmer</i>	141
"Treaty? What Treaty?" <i>Paul Wolfson</i>	142
Globalization and Human Rights: Does One Hurt the Other? Human Rights, the World Bank and the Washington Consensus: 1949–1999 <i>James Gathii</i>	144
The Subject of Globalization: Economics, Identity and Human Rights <i>Anne Orford</i>	146
International Litigation in Practice: Alien Tort and Other Claims Before National Courts REMARKS BY: <i>Gregory H. Fox</i>	149
The 1996 Terrorism Amendment to the Foreign Sovereign Immunities Act <i>Mark S. Zaid</i>	150
Litigating Labor Rights SUMMARY OF PANEL BY: <i>Donna Young</i>	151

Rapidly Changing Functions and Slowly Evolving Structures: The Troubling Case of the IMF

Daniel D. Bradlow 152

The Proliferation of International Courts and Tribunals: International Adjudication in Ascendance

Roger P. Alford 160

International Law in the Russian Constitutional Court

Bakhtiyar R. Tuzmukhamedov 166

International Law in Ferment and the World Court: A Discussion on the Role and Record of the International Court of Justice

REMARKS BY:

Peter H.F. Bekker, Stephen M. Schwebel, Eduardo Valencia-Ospina, Keith Highet, and Thomas Franck 172

Human Rights and the Right to Proselytize: Inherent Contradictions?

SUMMARY OF PANEL BY:

John Witte, Jr. 182

Explaining the Sources and Methods of International Law

Some Costs and Benefits of Economic Analysis of International Law

Jeffrey L. Dunoff 185

Treaties, Custom, Rational Choice, and Public Choice

John K. Setear 187

“Constructivism” as a Method in International Law

Phillip A. Karber 189

International Law and Health, Two Approaches: The WHO’s Tobacco Initiative and International Drug Controls

REMARKS BY:

Douglas W. Bettcher (Opening and Closing Remarks) 193

Allyn L. Taylor 193

Laurence Boisson de Chazournes 194

Virginia Leary 195

Herbert S. Okun 195

CEDAW: Threat to, or Enhancement of, Human Rights?

The CEDAW Convention: Its Contribution Today

Anne F. Bayefsky 197

REMARKS BY:

Denesha Reid 200

Kathryn Balmforth 201

Exploring the Evolution of Purposes, Methods and Legitimacy: Accountability of Intergovernmental Organizations

REMARKS BY:

Edward Kwakwa 204

Niels Blokker 204

August Reinisch 205

Vera Gowlland-Debbas 206

Regional International Law in Ferment: The Contribution of the Inter-American Juridical Committee

- The Inter-American Juridical Committee and International Law
Jonathan T. Fried 208

Legal Theory in Ferment: What International Legal Theory Can Learn from International Relations Theory

- International Law and International Relations: A Scheme for Classifying Their Literatures
Robert J. Beck 211
- International Regimes and International Relations Theorists
Christopher C. Joyner 212
- A Growing Commonality of Interest
Robert D. Vander Lugt 213

Human Rights, Development, and Environmental Protection: A Holy Trinity or Conflicting Regimes?

- REMARKS BY:
- Errol Meidinger* 215
- Dinah Shelton* 215
- Human Rights Accountability of Private Business: A Question of Sustainable Development
Romina Picolotti 216
- Making Development Accountable to Human Rights and Environmental Protection
Richard Herz 216
- SUMMARY OF POSTPRESENTATION REMARKS 217

The Limits of International Trade: Workers' Protection, the Environment and Other Human Rights

- REMARKS BY:
- Frederick Abbott* 219
- Limits to International Trade: the Constitutional Challenge
Thomas Cottier 220
- REMARKS BY:
- John H. Jackson* 222

Universality and Particularity: The Effect of Regional Legal Systems on Global Trade and Standards

- SUMMARY OF PANEL BY:
- Frank J. Garcia* 225

Africa: Isolation and Marginalization

- REMARKS BY:
- Ziyad Motala* 228
- Africa and International Criminal Law: Progress or Marginalization?
John Dugard 229
- The Marginalization of Africa
Vaughan Lowe 231
- Africa: Neither Isolated nor Marginalized
Emile K.M. Yakpo 232

Southeastern Europe: An Endeavor Consistent with the Transatlantic Vision and Indicative of the Changing International Environment (Plenary Address)

- Thomas R. Pickering* 234

A Liberal Theory of International Law

Anne-Marie Slaughter 240
Commentary: José Alvarez 249

The South African Transition to Democratic Rule: Lessons for International and Comparative Law

Adrien Katherine Wing 254

Critical Race Theory and International Law: Convergence and Divergence

Ruth Gordon 260

China's Approach to International Law: A Historical Perspective

Jacques deLisle 267

Evolution of Substantive International Criminal Law Through Specialized International Criminal Tribunals and the ICC

REMARKS BY:

Theodor Meron 276
Contributions by the International Criminal Tribunal for Rwanda to Development of the Definition of Genocide
Asoka De Z. Gunawardana 277
Contributions of the International Criminal Tribunals for the Former Yugoslavia and Rwanda to Development of Definitions of Crimes against Humanity and Genocide
Payam Akhavan 279
Contributions by the Ad Hoc Tribunals for the Former Yugoslavia and Rwanda to the Ongoing Work on Elements of Crimes in the Context of the ICC
Knut Dörmann 284

Five Years After Beijing: A Report Card on Women's Human Rights

REMARKS BY:

Athena D. Mutua 287
Issues of Women's Poverty, Economic Justice and Development Since Beijing
Kerry Rittich 288
Constitutional Barriers to Challenging Women's Inequality in Family Property Arrangements
Celestine Nyamu 289
Developments in the Enforcement of Claims Against Violence Against Women in International Tribunals and the United States
Jennifer M. Green 289

The WTO and a Constitutional Framework for the World Economy

REMARKS BY:

Gary N. Horlick 291
William J. Davey 291
Petros C. Mavroidis 292
Edwini Kessie 293

State Responsibility: Reflections on the International Law Commission's Draft Articles

REMARKS BY:

Andrew Jacovides 295

Comparative Peace: A Look at Recent Peace Agreements

REMARKS BY:

Michael Scharf 298

Bosnia and Herzegovina & Kosovo	
<i>Paul C. Szasz</i>	298
REMARKS BY:	
<i>Paul Williams</i>	299
<i>Geoffrey R. Watson</i>	300
Human Rights and Humanitarian Intervention: The Legality of the NATO-Yugoslav-Kosovo War	
Justification for the NATO Air Campaign in Kosovo	
<i>Michael J. Matheson</i>	301
The Intervention in Kosovo: A Law-Shaping Incident?	
<i>Sean D. Murphy</i>	302
The Benefits of Legal Restraint	
<i>Jules Lobel</i>	304
New Social Movements: Alternatives to Development	
Postdevelopment as a Vision For a Third World Approach to International Law	
<i>Balakrishnan Rajagopal</i>	306
Kitchen Table Lessons: Why the Local Matters	
<i>Julie Mertus</i>	307
Lessons from Kerala's Social Reform Movement Led by Narayana Guru	
<i>Mohan Gopalan Gopal</i>	308
Old Laws and New Wars: Justifying Humanitarian War in the Balkans	
Assessing the NATO Intervention Under the UN Charter	
<i>Julie Mertus</i>	310
Conflicting Claims on Sovereignty in Kosovo: How Will the UN Mission Handle the Problem?	
<i>Mihailo Crnobrnja</i>	311
Old Laws and New Wars	
<i>Jeffrey K. Walker</i>	312
International Norms and Indigenous Peoples: The Contest over Group Rights	
REMARKS BY:	
<i>Robert T. Coulter</i>	314
Collective Rights of Indigenous Peoples in the Inter-American Human Rights System, Organization of American States	
<i>Oswaldo Kreimer</i>	315
Scholars in the Construction and Critique of International Law	
REMARKS BY:	
<i>Lori Fisler Damrosch</i>	317
<i>Beth Stephens</i>	317
<i>Jack Goldsmith</i>	318
<i>Bruno Simma</i>	319
<i>Harold G. Maier</i>	319
2000 Annual Meeting Program	321
2000 Phillip C. Jessup Moot Court Competition	340
Appendices	342
Index	350