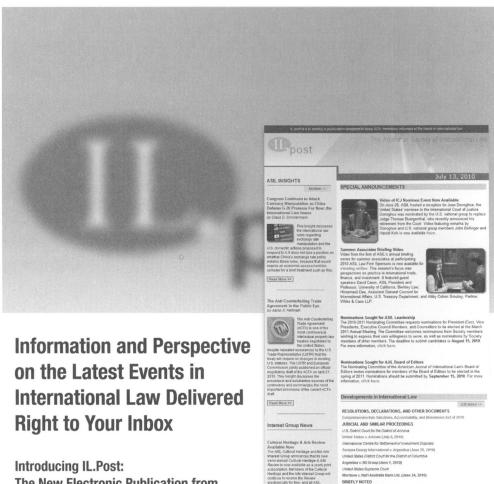
# American Journal of International Law

### **INSIDE THIS ISSUE**

- The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes Máximo Langer
- Agora: The ICJ's Kosovo
   Advisory Opinion
   Richard Falk
   Dinah Shelton
   Marko Divac Öberg



PUBLISHED BY The American Society of International Law



Introducing IL.Post: The New Electronic Publication from the American Society of International Law

Published every two weeks, IL.Post brings the latest in international law right to you. Every issue includes:

- · ASIL Insights: Go behind the headlines for perspective on the latest happenings in International Law
- Developments in International Law: Prepared by the staff of International Legal Materials, this section
  provides links to the latest resolutions, judicial proceedings and treaties that are changing the shape of
  International Law
- Events: A listing of the latest panels, webinars and programs upcoming in the world of International Law
- Compendium: A listing of the latest books and articles published by ASIL members
- Plus regular special features

IL.Post is available exclusively to ASIL members.
For information on ASIL membership, visit our web site at www.asil.org



# AMERICAN JOURNAL OF INTERNATIONAL LAW

VOL. 105	January 2011		NO. 1
	CONTENTS		PAGE
The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes  Máximo Langer			1
political branches to tional crimes, this are jurisdiction cases and state of universal juri starting point for a re	al framework based on the incentives and do exercise universal jurisdiction to prosecut ticle undertakes a global survey of contemped qualitative case studies of five states to analisdiction, predict its likely future evolution ealistic normative assessment of universal judesign of the universal jurisdiction regime.	te core interna- porary universal lyze the current a, and suggest a urisdiction and	
Agora: The ICJ's Kosovo	Advisory Opinion		
The Kosovo Advisory O	pinion: Conflict Resolution and Preced	lent <i>Richard Falk</i>	50
Self-Determination in l	Regional Human Rights Law: From Ko	sovo to	
Cameroon		Dinah Shelton	60
The Legal Effects of Ur	nited Nations Resolutions in the Kosovo	•	
Advisory Opinion		Marko Divac Öberg	81
In Memoriam			
Shabtai Rosenne (1917	<b>(</b> –2010)	Stephen M. Schwebel	91
International Decisions	Edite	d by David J. Bederman	
Pulp Mills on the River	Uruguay (Argentina v. Uruguay) (Cym	ie R. Payne)	94
	of Justice judgment on environmental res onal watercourses, including environmental and consult		
Kononov v. Latvia (Lau			101
application of laws o	Human Rights Grand Chamber judgment of war to prosecutions of offenses during W	t on retroactive <sup>7</sup> orld War II	•
tody" in favor of non- Aspects of Child Ab <i>Her Majesty's Treasury</i>	t opinion on whether <i>ne exeat</i> rights create custodial parents under the Hague Convent duction v. Mohammed Jabar Ahmed and Others	ion on the Civil s; Her Majesty's	108
	ned al-Ghabra; R (on the application of I		114
UK Supreme Court	er Majesty's Treasury (Miša Zgonec-Rož rulings on due process required to impleme serimes against terrorism	,	114

Contemporary Practice of the United States Relating to International Law  Edited by John R. Crook	
Oklahoma Constitutional Amendment Barring Consideration of Sharia and International Law Overwhelmingly Approved by Voters, Preliminarily Enjoined by U.S. Court U.S. Senate Approves Defense Trade Cooperation Treaties with Australia and the United Kingdom, Refuses Effect to Treaty Language Claiming Self-Execution	123 124
Ninth Circuit Finds FSIA Exception for Expropriated Property Allows Claims Against States That Did Not Expropriate the Property United States Apologizes for Unethical Medical Research in Guatemala in 1940s	128 130
Continued U.S. Efforts to Combat Somali Piracy U.S. Naval Forces Contest China's Claims to Exclude Foreign Naval Vessels from Its Exclusive	131
Economic Zone U.S. Trade Representative Releases Text of Anti-counterfeiting Trade Agreement; Critics and	135 137
Supporters Debate Agreement U.S. Human Rights Record Assessed in UN Rights Council's Universal Periodic Review Process Second Circuit Panel Finds Alien Tort Statute Does Not Apply to Corporations Ninth Circuit Upholds Dismissal of ATS and TVPA Claims Against Chevron Senate Judiciary Committee Subcommittee Holds Hearings on the Convention for the	139 142 145
Elimination of Discrimination Against Women Alleged Major Arms Dealer Extradited to United States by Thailand	147 149
U.S. Financial Support for Special Court for Sierra Leone Omar Khadr Pleads Guilty, Sentenced to Maximum of Eight Years, May Be Transferred to Canada Senate Foreign Relations Committee Approves START Treaty; Prospects for Full Senate Approval Unclear	150 151 153
U.S. Court Will Not Set Aside Investment Treaty Award Against Argentina United States Supports Conclusion of Code of Conduct for Security Companies Senate Approves Child Support Convention Brief Notes	154 156 158 160
Recent Books on International Law Edited by Richard B. Bilder	
Review Essay New Approaches to Customary International Law Posner, Eric A. The Perils of Global Legalism; Guzman, Andrew T. How International Law Works: A Rational Choice Theory; Lepard, Brian D. Customary International Law: A New Theory with Practical Applications (Anthony D'Amato)	163
Book Reviews Gross, Michael L. Moral Dilemmas of Modern War: Torture, Assassination, and Blackmail in an Age of Asymetric Conflict (George H. Aldrich) Romano, Cesare P. R. (ed.). The Sword and the Scales: The United States and International Courts and Tribunals (Michael J. Mattler) Pati, Roza. Due Process and International Terrorism: An International Legal Analysis	167 171
(Molly Beutz Land) Mitchell, Andrew D. Legal Principles in WTO Disputes (Marion Panizzon) Janow, Merit E., Victoria Donaldson, and Alan Yanovich (eds.). The WTO: Governance, Dispute Settlement & Developing Countries (Debra P. Steger)	176 181 186
Briefer Notices Thürer, Daniel. Völkerrecht als Fortschritt und Chance (Stephan Hobe) Young, Nigel J. (ed.). The Oxford International Encyclopedia of Peace (Kelly Vinopal)	192 193
Books Received	194
International Legal Materials, Contents, Vol. XLIX, Nos. 5, 6	199

### **BOARD OF EDITORS**

Editors in Chief

LORI FISLER DAMROSCH Columbia University School of Law

MAHNOUSH H. ARSANJANI New Haven, Connecticut DAVID J. BEDERMAN

Emory University School of Law

EYAL BENVENISTI

Tel Aviv University Faculty of Law

Daniel Bodansky

Arizona State University College of Law

CURTIS A. BRADLEY

Duke University School of Law

EDITH BROWN WEISS

Georgetown University Law Center

Jutta Brunnée

University of Toronto Faculty of Law

DAVID D. ĆARON

Univ. of California (Berkeley) School of Law

STEVE CHARNOVITZ

George Washington Univ. Law School

CHRISTINE M. CHINKIN

London School of Economics

JAMES R. CRAWFORD

University of Cambridge

JOHN R. CROOK

Potomac, Maryland

BERNARD H. OXMAN University of Miami School of Law

RYAN GOODMAN

New York University School of Law

LAURENCE R. HELFER

Duke University School of Law

David A. Martin

University of Virginia School of Law

KAL RAUSTIALA

Univ. of California, Los Angeles

DINAH SHELTON

George Washington Univ. Law School

RICHARD H. STEINBERG

Univ. of California (UCLA) School of Law

DAVID P. STEWART

Georgetown University Law Center

JANE E. STROMSETH

Georgetown University Law Center

JOEL P. TRACHTMAN

Fletcher School of Law and Diplomacy

Carlos Manuel Vázquez

Georgetown University Law Center

RUTH WEDGWOOD

Johns Hopkins University

### ELIZABETH ANDERSEN, ex officio

### Honorary Editors

GEORGE H. ALDRICH

The Hague, the Netherlands

RICHARD B. BILDER

University of Wisconsin Law School

CHARLES N. BROWER

The Hague, the Netherlands

THOMAS BUERGENTHAL

George Washington Univ. Law School

ANTHONY D'AMATO

Northwestern University School of Law

RICHARD FALK

University of California, Santa Barbara

TOM J. FARER

University of Denver

Rosalyn Higgins

The Hague, the Netherlands

JOHN H. JACKSON

Georgetown University Law Center

FREDERIC L. KIRGIS

Washington and Lee Univ. School of Law

Cynthia Crawford Lichtenstein

Boston College Law School

ANDREAS F. LOWENFELD

New York University 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

W. MICHAÉL REISMAN

Yale Law School

STEPHEN M. SCHWEBEL

Washington, D.C.

ERIC STEIN

University of Michigan Law School

PETER D. TROOBOFF

Washington, D.C.

DETLEV F. VAGTS

Harvard Law School

BURNS H. WESTON

The University of Iowa College of Law

ANNA ASCHER

Senior Editors

STEPHEN SCHER

Managing Editor
JULIE ROBERTS FURGERSON

ELIZABETH MARIE BOYLAN

Assistant Editors

MELISSA SERNA

### THE AMERICAN SOCIETY OF INTERNATIONAL LAW

The American Society of International Law was organized in 1906 "to foster the study of international law and to promote the establishment and maintenance of international relations on the basis of law and justice." Society membership is open to all persons of any nationality and profession who are interested in its objectives. Information about membership and sponsorship programs is available online at www.asil.org. The Society is incorporated by an Act of Congress approved September 20, 1950 (64 Stat. 869).

# OFFICERS AND EXECUTIVE COUNCIL OF THE SOCIETY, 2010-2011

ŀ	esidentDAVID D. CARON
F	onorary PresidentTHEODOR MERON
Į	ice Presidents Diane Marie Amann, Mahnoush H. Arsanjani, D. Stephen Mathias,
	Mary Ellen O'Connell
E	cecutive Vice President and Executive Director ELIZABETH ANDERSEN
S	cretaryJames A. R. Nafziger
7	reasurerNANCY L. PERKINS

Past Presidents: JOSÉ E. ALVAREZ, CHARLES N. BROWER, EDITH BROWN WEISS, JAMES H. CARTER, LUCY REED, ARTHUR W. ROVINE, ANNE-MARIE SLAUGHTER, PETER D. TROOBOFF

Honorary Vice Presidents: JOSÉ E. ALVAREZ, JAMES H. CARTER, LUCY REED

Council Members: Catherine M. Amirfar, Jeffrey Bates, Andrea K. Bjorkland, Christopher J. Borgen, Curtis A. Bradley, Charles H. Camp, Alex Carballo, Tai-Heng Cheng, Janie Chuang, Eli Whitney Debevoise II, Laura Dickinson, James Thuo Gathii, James Goldston, Kevin R. Gray, Anne Joyce, David Kaye, Hope Lewis, Margaret E. McGuinness, Fionnuala Ni Aoláin, Vikram Raghavan, Dan Sarooshi, Gregory Shaffer, Abby Cohen Smutny, Olivia Swaak-Goldman, Gwen K. Young

Counsellors: John B. Bellinger, III, Laura Bocalandro, Laurence Boisson de Chazournes, Antonia Chayes, John R. Crook, Dorinda G. Dallmeyer, Rita Hauser, Rosalyn Higgins, Charles A. Hunnicutt, Andrew Jacovides, Kenneth I. Juster, Michael Kirby, Stephen C. McCaffrey, Gay McDougall, Nicolas Michel, Sandra Day O'Connor, Hisashi Owada, Henry J. Richardson III, Andrés Rigo Sureda, Michael P. Scharf, Dinah Shelton, Bruno Simma, William Howard Taft IV, J. Harvie Wilkinson III

### PROGRAM OF WORK

In addition to publishing the American Journal of International Law, the ASIL offers a variety of information resources and participation opportunities for members as well as nonmembers. These programs, best viewed at www.asil.org, include publications such as International Legal Materials and Studies in Transnational Legal Policy; electronic bulletins such as ASIL Insights, International Law In Brief, and IL.post; events such as the Annual Meeting and other gatherings in Washington, D.C., and around the world; outreach programs for the judicial sector, the media, and other audiences; an array of resources on the ASIL Web site, such as the Electronic Information System for International Law (EISIL) and the Guide to Electronic Resources for International Law (ERG); and opportunities to be part of an active network bridging expert and nonexpert communities associated with the development of international law.

### 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 Patrons program and to be included in our members' estate plans through the ASIL Heritage Circle. We recognize these contributors below.

### **PATRONS**

Patrons of the Society contribute \$10,000 or more to the ASIL Endowment for International Law. 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 ALVAREZ AND SUSAN DAMPLO JAMES G. APPLE MAHNOUSH H. ARSANIANI Frank A. Bauman MRS. RICHARD BAXTER\* DAVID J. BEDERMAN AND LORRE B. CUZZE Daniel L. Bethlehem RICHARD B. BILDER JOHN A. BOYD CHARLES N. BROWER IAN BROWNLIE\* EDITH BROWN WEISS LEE C. BUCHHEIT THOMAS BUERGENTHAL WILLIAM I. BUTLER SUSANA AND HUGO CAMINOS CHARLES H. CAMP DAVID D. CARON JAMES H. CARTER DAVID A. COLSON JAMES RICHARD CRAWFORD JOHN R. CROOK ANTHONY D'AMATO LORI FISLER DAMROSCH AND JEAN BAUER FISLER ARTHUR H. DEAN\* ELI WHITNEY DEBEVOISE II SARAH WHITCRAFT DEFORD\* TIMOTHY L. DICKINSON THOMAS A. DUBBS EDWARD DUMBAULD\* RICHARD W. EDWARDS, JR. Alona E. Evans\* BENJAMIN B. FERENCZ THOMAS M. FRANCK\* ALWYN V. FREEMAN\* JOHN KING GAMBLE

RONALD E. M. GOODMAN CHRISTOPHER J. GREENWOOD JOHN LAWRENCE HARGROVE VICTORIA M. HARIRI\* Oona A. Hathaway RITA E. HAUSER JOHN N. HAZARD\* ALICE AND LOUIS\* HENKIN ROBERT E. HERZSTEIN ROSALYN HIGGINS KEITH HIGHET\* HOWARD M. HOLTZMANN CHARLES A. HUNNICUTT JOHN H. JACKSON ANDREW J. JACOVIDES MARK R. JOELSON RICHARD A. JOHNSON KENNETH I. JUSTER SUSAN L. KARAMANIAN EDWARD G. KEHOE FREDERIC L. KIRGIS CHARLOTTE KU JENNIFER LAKE AND DONALD FRANCIS DONOVAN JEFFREY LANG ELIHU LAUTERPACHT ROY S. LEE JEREMY I. AND CANDACE C. LEVITT CYNTHIA CRAWFORD LICHTENSTEIN MRS. RICHARD LILLICH DAVID LINDSEY LUCINDA A. LOW AND DANIEL B. MAGRAW A. VAUGHAN LOWE Andreas F. Lowenfeld **BRUNSON MACCHESNEY\*** ROBERT MACCRATE RONALD ST. JOHN MACDONALD\*
D. STEPHEN MATHIAS **EDWARD WATSON MCWHINNEY** ROBERT F. MEAGHER\* THEODOR MERON

W. ROBERT MORGAN\* SEAN D. AND JULIE MURPHY JAMES A. R. NAFZIGER VED P. NANDA ANDRE NEWBURG MARY ELLEN O'CONNELL SHIGERU ODA BERNARD H. OXMAN IAN PAULSSON NANCY L. PERKINS HERMAN PHLEGER\* DANIEL M. PRICE LUCY REED W. MICHAEL REISMAN SANG-MYON RHEE ANDRÉS RIGO SUREDA DAVIS R. ROBINSON WILLIAM D. ROGERS\* ARTHUR W. ROVINE SEYMOUR J. RUBIN\* PHILIPPE J. SANDS OSCAR SCHACHTER\* STEPHEN M. SCHWEBEL ANNE-MARIE SLAUGHTER ABBY COHEN SMUTNY EARL A. SNYDER\* BARBARA STARK **ERIC STEIN** CHARLES W. T. STEPHENSON **IOHN R. STEVENSON\*** DAVID P. STEWART LAURENCE STORCH ENRIQUE P. SYQUIA GENEVIEVE E. TILLAR\* PETER D. TROOBOFF DETLEV F. VAGTS CHARLES O. VERRILL, JR. JILL MCCLANAHAN WATSON RUTH WEDGWOOD BURNS H. WESTON EDWIN D. WILLIAMSON BASIL S. YANAKAKIS BRUCE ZAGARIS NASSIB G. ZIADÉ

### 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) James G. Apple Charles N. Brower James H. Carter Sarah Whitcraft deford\* THOMAS M. FRANCK\*
CHRISTIAN A. HERTER, JR.\*
CHARLOTTE KU
CYNTHIA CRAWFORD LICHTENSTEIN

H. C. L. MERILLAT
OSCAR SCHACHTER\*
JOHN R. STEVENSON\*
GENEVIEVE EAGON TILLAR\*
RICHARD YOUNG

### IN MEMORIAM

ALEXANDER FREEMAN ARTHUR K. KUHN

HENRY C. MORRIS

HUSAM MESHAL

JAMES BROWN SCOTT STANLEY P. SMITH

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

<sup>\*</sup> deceased

<sup>\*</sup> granted posthumously

# ORDERS AND INQUIRIES

**Subscriptions and Membership**: The *American Journal of International Law* (ISSN 0002-9300) is published quarterly, with issues in January, April, July, and October, and is supplied to all members of the American Society of International Law (ASIL). Information about membership in ASIL is available online at www.asil.org/membership-become-a-member.cfm. Information about stand-alone subscriptions is available online at http://www.asil.org/become-a-subscriber.cfm.

Institutional subscription orders and claims should be directed to JSTOR Fulfillment Department, 149 Fifth Avenue, 8th Floor, New York, NY 10010, USA, toll-free (888) 388-3574, or support@jstor.org (for JSTOR access questions) or fulfillment@jstor.com (for print claims).

Individual subscription orders and claims should be directed to ASIL Member Services, at services@asil.org, or (202) 939-6000.

Claims for undelivered issues must be made within six months of the mailing date specified online at www.asil.org/claims.htm. Volumes 1 (1907) to date 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. Cumulative indexes are also available from Hein: 1907–1920, 1921–1940, 1941–1960, 1961–1970, 1971–1980, 1981–1990, and 1991–2000.

# AJIL is available in nonprint forms:

- Online, through: Hein Online, a service of William S. Hein & Co., Inc., at www. heinonline.org; LexisNexis<sup>®</sup>, part of Reed Elsevier, at www.lexisnexis.com, P.O. Box 933, Dayton, OH 45401, USA, toll-free (800) 227-9597; and Westlaw<sup>®</sup>, part of Thomson Reuters, at www.westlaw.com, 610 Opperman Drive, Eagan, MN 55123, USA, toll-free (800) 937-8529.
- On the Web in JSTOR, the database of scholarly journals, either through individual subscriptions by ASIL members only ((202) 939-6000), or through institutional subscriptions (JSTOR, 149 Fifth Avenue, 8th Floor, New York, NY 10010, USA, (212) 358-6400). See www.jstor.org for a current list of institutional subscribers.
- 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, 300 North Zeeb Road, Dept. P.R., Ann Arbor, MI 48106, USA, toll-free (800) 521-0600.

For **permission to reuse** materials from the *American Journal of International Law*, please access www.copyright.com, or contact the Copyright Clearance Center, Inc. (CCC), 222 Rosewood Drive, Danvers, MA 01923, USA, (978) 646-2600. CCC is a not-for-profit organization that provides licenses and registration for a variety of users.

**Advertising**: Inquiries should be sent to AJIL Advertising, American Society of International Law, 2223 Massachusetts Avenue, NW, Washington, DC 20008, USA.

Periodicals postage paid at Washington, DC, and at additional mailing offices. POSTMASTER: Please send change of address to AJIL Change of Address, American Society of International Law Service Center, 2223 Massachusetts Avenue, NW, Washington, DC 20008, USA.

### AMERICAN JOURNAL OF INTERNATIONAL LAW

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 American Society of International Law.

### SUBMISSION OF MANUSCRIPTS

The American Journal of International Law (AJIL) invites submission of manuscripts on international law subjects. Its primary focus is on questions of public international law, including closely related issues of domestic law. It generally does not publish manuscripts focused on private or commercial law or on comparative or foreign law, including the internal law of the European Union.

The AJIL will not consider submissions whose content has been, or will be, published before it appears in this journal.

The AJIL does not require exclusive submissions. Priority consideration will, however, be accorded where the author states that the submission is exclusive for a specified period of at least six weeks and commits to accept an offer of publication within the specified time period. Authors should bear in mind that, as a professionally juried journal, the AJIL is rarely if ever able to make offers of publication in response to requests for expedited review within the time limits typically fixed by other journals that have made offers of publication.

Submissions should be in electronic form and should be transmitted as attachments to e-mail messages addressed to ajil@asil.org. Alternatively, a CD-ROM may be mailed to AJIL, American Society of International Law, 2223 Massachusetts Avenue, NW, Washington, DC 20008-2864, USA.

The AJIL currently uses Word 2007, but can convert manuscripts created in other word processing programs. Please specify the program used.

Format and style guidelines: All manuscripts should be double-spaced in 12-point Times New Roman type; these formatting requirements cover all text, quotations, and footnotes.

- The maximum length for lead articles is 100 letter-sized pages, formatted as indicated.
- The maximum length for "Current Developments" and "Notes and Comments" submissions is 30 letter-sized pages, formatted as indicated.

The AJIL generally conforms to the footnote style of *The Bluebook: A Uniform System of Citation* (19th ed. 2010) and the *Chicago Manual of Style* (16th ed. 2010). For further information on AJIL style and formatting guidelines, see the AJIL Style Guide, available online at www.asil.org/ajil\_style\_guide.pdf.

**Book reviews** are by invitation; however, you may suggest books for review to the AJIL Book Review Office, 2223 Massachusetts Avenue, NW, Washington, DC 20008-2864, USA. **Books for review** should be sent to the same address.

### INDEXES AND ABSTRACTS CARRYING AJIL

The American Journal of International Law is included in Dietrich's Index Philosophicus; EBSCOhost databases; Elsevier databases including SCOPUS; Gale sources including Academic OneFile, Current Law Index, General OneFile, Legal Resources Index, and LegalTrac; H.W. Wilson sources including Index to Legal Periodicals & Books, Index to Legal Periodicals Full Text, and Index to Legal Periodicals Retrospective; IBR—International Bibliography of Book Reviews of Scholarly Literature in the Humanities and Social Sciences; IBZ—International Bibliography of Periodical Literature in the Humanities and Social Sciences; Index to Foreign Legal Periodicals; International Political Science Abstracts; ProQuest databases including CSA Political Science & Governments, International Bibliography of the Social Sciences (IBSS), ProQuest Central, ProQuest Military, and ProQuest Research Library; SwetsWise Online Content; and Thomson Reuters databases including Current Contents Connect, Social Sciences Citation Index, and Web of Science.

Copyright © 2011 by The American Society of International Law Printed by Cadmus Professional Communications, Lancaster, PA 17601