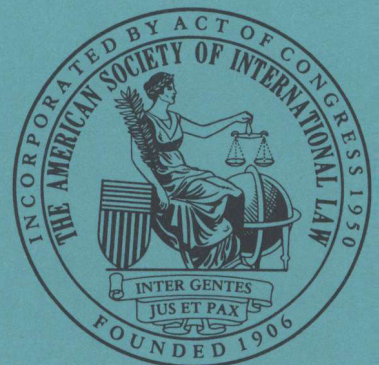


*American  
Journal of  
International  
Law*

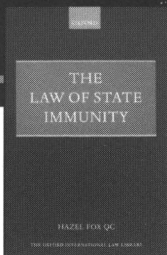
*April 2004*

*Vol. 98 No. 2*



*Published by*

*The American Society of International Law*



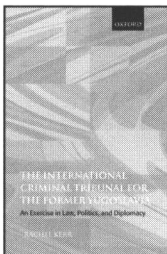
*New in Paperback*  
**THE LAW OF STATE IMMUNITY**

HAZEL FOX QC

This book examines current State practice, particularly as evidenced in English and US courts, and the proposals of the International Law Commission. Recent challenges before international tribunals are also analyzed to give an in-depth, up-to-date account of the doctrine in current international law.

*(Oxford Library of International Law)*

**2003 (paper 2004) paper \$49.95  
 cloth \$120.00**

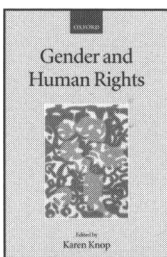


**THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA**  
 An Exercise in Law, Politics, and Diplomacy

RACHEL KERR

This is the first systematic examination of the International Criminal Tribunal for the Former Yugoslavia: what it is, why it was established, how it functions, and where its significance lies.

**2004 \$74.00**



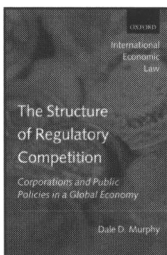
**GENDER AND HUMAN RIGHTS**

Edited by KAREN KNOP

By relating women's international human rights to broader debates about feminism, rights and international society, this collection provides a sophisticated introduction to gender and human rights and offers a variety of fresh theoretical perspectives and methods.

*(Collected Courses of the Academy of European Law)*

**2004 paper \$28.95 cloth \$80.00**



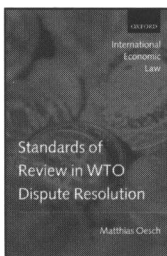
**THE STRUCTURE OF REGULATORY COMPETITION**  
 Corporations and Public Policies in a Global Economy

DALE D. MURPHY

By exploring powerful corporations' investment profiles and regulatory strategies, this book explains why globalization sometimes results in a 'race to the bottom', sometimes in higher common regulations, and sometimes in regulations that differ between countries.

*(International Economic Law Series)*

**2004 \$95.00**



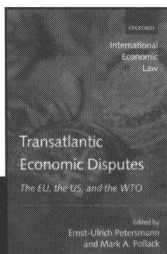
**STANDARDS OF REVIEW IN WTO DISPUTE RESOLUTION**

MATTHIAS OESCH

In this volume, the current state of law and practice which has emerged through panel and Appellate Body reports is analyzed and critically assessed in a commentary on the evolution of, and inconsistencies amongst, the relevant cases.

*(International Economic Law Series)*

**2004 \$99.00**



**TRANSATLANTIC ECONOMIC DISPUTES**  
 The EU, the US, and the WTO

Edited by ERNST-ULRICH PETERSMANN and MARK A. POLLACK

This book analyzes the source of transatlantic disputes, the means employed to prevent and settle such disputes both bilaterally and through the dispute settlement mechanism of the WTO, and to identify promising areas for reform.

*(International Economic Law Series)*

**2004 paper \$49.95 cloth \$175.00**

Prices are subject to change and apply only in the US.  
 To order, or for more information, please call 1 800 451-7556.  
 In Canada, call 1 800 387-8020. Visit our website at [www.oup.com/us](http://www.oup.com/us)

# AMERICAN JOURNAL OF INTERNATIONAL LAW

VOL. 98

April 2004

NO. 2

## CONTENTS

PAGE

### **Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints**

*Richard H. Steinberg* 247

Judicial lawmaking in the WTO is marked by elastic interpretive discourse and constitutional rules that do not serve as a meaningful restraint. Politics, however, constrains both discursive and constitutional latitude, which should alleviate concerns that WTO judicial lawmaking is so expansive as to undermine the sovereignty of powerful states, create a serious democratic deficit for their citizens, or catalyze withdrawal of their support for the organization.

### **Common but Differentiated Responsibilities in International Law**

*Christopher D. Stone* 276

Multinational agreements are increasingly adopting “common but differentiated responsibilities” that impose obligations more heavily on some nations—typically the Rich—than on others—most often the Poor. While the notion of a “differential” obligation remains ill-defined, there are many reasons for negotiators to offer heterogeneous terms as a way of attracting heterogeneous parties. The author explores the circumstances under which various sorts of differentiation are desirable.

### **Editorial Comment**

Sovereign Bankruptcy: *In re* Germany (1953), *In re* Iraq (2004) *Detlev F. Vagts* 302

**Former Legal Advisers’ Letter on Accession to the Law of the Sea Convention** 307

### **Current Developments**

The 2003 Judicial Activity of the International Court of Justice *John R. Crook* 309

The Fifty-fifth Session of the International Law Commission  
*Michael J. Matheson and Sara Bickler* 317

### **International Decisions**

*Edited by David D. Caron*

*Prosecutor v. Nahimana, Barayagwiza, & Ngeze* (Catharine A. MacKinnon) 325  
ICTR judgment and sentence on crimes against humanity and incitement to genocide through broadcast and press outlets

<i>Access to Information Under Article 9 of the OSPAR Convention (Ireland v. United Kingdom)</i> (Ted L. McDorman)	330
Arbitral award regarding duty to provide access to information about nuclear facility under treaty on marine environmental protection	
<i>S.D. Myers, Inc. v. Canada, and Attorney General of Canada v. S.D. Myers, Inc.</i> (Charles H. Brower II)	339
ICSID Additional Facility arbitral award under NAFTA Chapter 11 regarding claimed investment loss due to PCB export ban; Federal Court of Canada ruling on challenge to the award	
 <b>Contemporary Practice of the United States Relating to International Law</b>	
<i>Edited by Sean D. Murphy</i>	
<i>D.C. Circuit Interpretation of Scope of FSIA "Flatow Amendment"</i>	349
<i>Adoption of Central American Free Trade Agreement</i>	350
<i>U.S.-Australia Free Trade Agreement</i>	352
<i>Reviews, Release, and Trials of Detainees at Guantánamo Bay</i>	353
<i>"Proliferation Security Initiative" for Searching Potential WMD Vessels</i>	355
<i>Adoption of Fifth CCW Protocol on Explosive Remnants of War</i>	357
<i>ICJ Advisory Opinion on Israeli Security Fence</i>	361
<i>ICJ Decision Regarding Mexicans on Death Row in United States</i>	364
<i>U.S. Signing of UNCITRAL Convention on Assignment of Receivables</i>	368
 <b>Recent Books on International Law</b>	
<i>Edited by Richard B. Bilder</i>	
<b>Book Reviews</b>	
Simma, Bruno, Hermann Mosler, Andreas Paulus, and Eleni Chaitidou (eds.). <i>The Charter of the United Nations: A Commentary</i> (2d ed.) (Yoram Dinstein)	371
Deflem, Mathieu. <i>Policing World Society: Historical Foundations of International Police Cooperation</i> (David Bryan Sullivan)	374
Lalonde, Suzanne N. <i>Determining Boundaries in a Conflicted World: The Role of Uti Possidetis</i> (Marcelo G. Kohen)	379
Provost, René. <i>International Human Rights and Humanitarian Law</i> (Michael Bothe)	383
Rodley, Nigel S. <i>The Treatment of Prisoners Under International Law</i> (2d ed.) (Ralph G. Steinhardt)	387
Ramcharan, Bertrand G. <i>The United Nations High Commissioner for Human Rights: The Challenges of International Protection</i> (Felice D. Gaer)	391
Franckx, Erik, and Philippe Gautier (eds.). <i>The Exclusive Economic Zone and the United Nations Convention on the Law of the Sea, 1982–2000: A Preliminary Assessment of State Practice</i> (Jaye Ellis)	395
Darrow, Mac. <i>Between Light and Shadow: The World Bank, the International Monetary Fund, and International Human Rights Law</i> (Galit A. Sarfaty)	398
Lillich, Richard B.; Wingfield, Thomas C., and James E. Meyen (eds.). <i>Lillich on the Forcible Protection of Nationals Abroad</i> (Gordon A. Christenson)	401
<b>Books Received</b>	402
<b>International Legal Materials. Contents, Vol. XLIII, No. 2 (March 2004)</b>	406

## BOARD OF EDITORS

### *Editors in Chief*

LORI FISLER DAMROSCH  
Columbia University School of Law

BERNARD H. OXMAN  
University of Miami School of Law

JOSÉ E. ALVAREZ  
Columbia University School of Law

DAVID J. BEDERMAN  
Emory University School of Law

DANIEL BODANSKY  
University of Georgia School of Law

DAVID D. CARON  
Univ. of California (Berkeley) School of Law

HILARY CHARLESWORTH  
Australian National University

STEVE CHARNOVITZ  
Washington, D.C.

CHRISTINE M. CHINKIN  
London School of Economics

JAMES R. CRAWFORD  
University of Cambridge

JOHN R. CROOK  
Rome, Italy

JACK L. GOLDSMITH  
Washington, D.C.

BENEDICT KINGSBURY  
New York University School of Law

HAROLD HONGJU KOH  
Yale Law School

MICHAEL J. MATHESON  
George Washington Univ. Law School

SEAN D. MURPHY  
George Washington Univ. Law School

STEVEN R. RATNER  
University of Texas School of Law

DINAH L. SHELTON  
Notre Dame Law School

BETH A. SIMMONS  
Harvard University

JOEL P. TRACHTMAN  
Fletcher School of Law and Diplomacy

PETER D. TROOBBF  
Washington, D.C.

RUTH WEDGWOOD  
Johns Hopkins University

EDITH BROWN WEISS  
Georgetown University Law Center

DIANE P. WOOD  
Chicago, Illinois

ANNE-MARIE SLAUGHTER

*ex officio*

CHARLOTTE KU

### *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  
The Hague, the Netherlands

RICHARD A. FALK  
University of California at Santa Barbara

TOM J. FARER  
University of Denver

THOMAS M. FRANCK  
New York University School of Law

LOUIS HENKIN  
Columbia University School of Law

JOHN H. JACKSON  
Georgetown University Law Center

FREDERIC L. KIRGIS  
Washington and Lee Univ. School of Law

ANDREAS F. LOWENFELD  
New York University School of Law

THEODOR MERON  
The Hague, the Netherlands

JOHN NORTON MOORE  
University of Virginia School of Law

COVEY T. OLIVER  
Easton, Maryland

STEPHEN M. SCHWEBEL  
Washington, D.C.

LOUIS B. SOHN  
George Washington Univ. Law School

ERIC STEIN  
University of Michigan Law School

DETLEV F. VAGTS  
Harvard Law School

BURNS H. WESTON  
University of Iowa College of Law

*Senior Associate Editor*  
ANNA ASCHER

*Associate Editor*  
STEPHEN SCHER

*Managing Editor*  
CARA M. SMITH

JOSEPH V. MCGRATH

*Assistant Editors*

DOREEN G. YAMAMOTO

## 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. Dues are: regular, \$165; special category, \$110; new professional, \$85; retired, \$110; student, \$30. Sustaining Memberships—contributing (\$275) and patrons (\$10,000)—are also available. Corporations may join ASIL as institutional members (\$2,000). The Society is incorporated by Act of Congress approved September 20, 1950 (64 Stat. 869).

### OFFICERS OF THE SOCIETY, 2003–2004

<i>Honorary President</i> .....	THOMAS BUERGENTHAL
<i>President</i> .....	JAMES H. CARTER
<i>Vice Presidents</i> .....	LUCINDA LOW, DAVID A. MARTIN, LUCY REED
<i>Executive Vice President and Executive Director</i> .....	CHARLOTTE KU
 <i>Past Presidents:</i> CHARLES N. BROWER, THOMAS M. FRANCK, LOUIS HENKIN, COVEY T. OLIVER, WILLIAM D. ROGERS, ARTHUR W. ROVINE, ANNE-MARIE SLAUGHTER, LOUIS B. SOHN, PETER D. TROOBOFF, EDITH BROWN WEISS	
<i>Honorary Vice Presidents:</i> THOMAS M. FRANCK, ARTHUR W. ROVINE, ANNE-MARIE SLAUGHTER	
<i>Counselors:</i> JAMES BACCHUS, ROSEMARY BARKETT, RICHARD B. BILDER, IAN BROWNLIE, HILARY CHARLESWORTH, LORI FISLER DAMROSCH, PIERRE-MARIE DUPUY, TOM J. FARER, JOHN KING GAMBLE, CONRAD HARPER, RITA E. HAUSER, ROSALYN HIGGINS, JOHN H. JACKSON, SUSAN L. KARAMANIAN, MARTTI KOSKENNIEMI, MICHAEL J. MATHESON, DONALD MCRAE, SANDRA DAY O'CONNOR, W. MICHAEL REISMAN, STEPHEN M. SCHWEBEL, DINAH L. SHELTON, JEROME SHESTACK, PATRICIA WALD, EDWIN D. WILLIAMSON	
<i>Secretary</i> .....	FREDERIC L. KIRGIS
<i>Treasurer</i> .....	NANCY L. PERKINS
<i>Assistant Treasurer</i> .....	KENT BRESSIE

### PATRONS OF THE SOCIETY

DOMINGO E. ACEVEDO	THOMAS M. FRANCK	EDWARD WATSON MCWHINNEY
GERALD AKSEN	ALWYN V. FREEMAN*	ROBERT F. MEAGHER
ARTHUR R. ALBRECHT	JOHN KING GAMBLE	HUSAM MESHAL
TEYMOUR A. ALIREZA	RONALD E. M. GOODMAN	W. ROBERT MORGAN*
MAHNOUSH H. ARSANJANI	KATHERINE GOROVE	VED P. NANDA
FRANK A. BAUMAN	CHRISTOPHER J. GREENWOOD	BERNARD H. OXMAN
MRS. RICHARD BAXTER*	JOHN LAWRENCE HARGROVE	HERMAN PHLEGER*
DAVID J. BEDERMAN AND LORRE B. CUZZE	VICTORIA M. HARIRI	W. MICHAEL REISMAN
DANIEL L. BETHLEHEM	RITA E. HAUSER	ANDRÉS RIGO
JOHN A. BOYD	JOHN N. HAZARD*	DAVIS R. ROBINSON
CHARLES N. BROWER	ALICE AND LOUIS HENKIN	WILLIAM D. ROGERS
IAN BROWNLIE	KEITH HIGHER*	ARTHUR W. ROVINE
RODMAN R. BUNDY	HOWARD M. HOLTZMANN	SEYMOUR J. RUBIN*
WILLIAM J. BUTLER	CHARLES A. HUNNICUTT	PHILIPPE J. SANDS
SUSANA AND HUGO CAMINOS	JOHN H. JACKSON	OSCAR SCHACHTER*
DAVID D. CARON	RICHARD A. JOHNSON	STEPHEN M. SCHWEBEL
JAMES H. CARTER	SUSAN L. KARAMANIAN	ANNE-MARIE SLAUGHTER
JAMES RICHARD CRAWFORD	FREDERIC L. KIRGIS	EARL A. SNYDER*
ANTHONY D'AMATO	CHARLOTTE KU	ERIC STEIN
LORI FISLER DAMROSCH AND JEAN BAUER FISLER	JENNIFER LAKE AND DONALD FRANCIS DONOVAN	JOHN R. STEVENSON*
ARTHUR H. DEAN*	JEFFREY LANG	ENRIQUE P. SYQUIA
ELI WHITNEY DEBEVOISE II	ELIHU LAUTERPACHT	GENEVIEVE E. TILLAR*
SARAH WHITCRAFT DEFORD*	ROY S. LEE	PETER D. TROOBOFF
EDWARD DUMBAULD*	JEREMY I. AND CANDACE C. LEVITT	DETLEV F. VAGTS
RICHARD W. EDWARDS, JR.	MRS. RICHARD LILLICH	JILL MCCLANAHAN WATSON
ALONA E. EVANS*	A. VAUGHAN LOWE	RUTH WEDGWOOD
BENJAMIN B. FERENCZ	BRUNSON MACCHESNEY*	BURNS H. WESTON
		EDWIN D. WILLIAMSON
		BASIL S. YANAKAKIS

\* deceased

#### *In Memoriam*

ALEXANDER FREEMAN	HENRY C. MORRIS	JAMES BROWN SCOTT
ARTHUR K. KUHN		STANLEY P. SMITH

### PATRONAGE, GIFTS, AND BEQUESTS

Upon donation to the Society of \$10,000 or more by gift or bequest, any member of the Society or individual eligible for membership may be elected a Patron of the Society. Upon donation of at least \$10,000 in the name of a deceased person, such person may be elected a Patron posthumously. Gifts and bequests may be made in the name of the American Society of International Law, Washington, DC. Such contributions are deductible from federal returns for income, estate, and gift tax purposes.

## ORDERS AND INQUIRIES

**Subscriptions, Back Issues, and Cumulative Indexes:** The *American Journal of International Law* (ISSN 0002-9300) is published quarterly, in January, April, July, and October, and is supplied to all members of the American Society of International Law. The annual subscription rate for nonmembers is \$180 (\$220 outside U.S.). Inquiries should be sent to the American Journal of International Law, 2223 Massachusetts Avenue, NW, Washington, DC 20008-2864; fax (202) 797-7133. Annual subscription orders should be sent to P.O. Box 164, Washington, DC 20055-0164. Order forms and other information are available online at <<http://www.asil.org>>. Claims for undelivered issues must be made in writing to the Society within three months of the mailing date specified online at <<http://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. Cumulative indexes are also available from Hein: 1941–1960, 1961–1970, 1971–1980, and 1981–1990.

### *AJIL* is also available in nonprint forms:

- Online, through: Hein Online, a service of William S. Hein & Co., Inc., at <<http://www.heinonline.org>>; Mead Data Central, Inc., provider of the LEXIS<sup>®</sup>/NEXIS<sup>®</sup> services, P.O. Box 933, Dayton, OH 45401, USA, toll-free (800) 227-9597; and West Publishing Company, provider of WESTLAW<sup>®</sup>, P.O. Box 64526, St. Paul, MN 55164-0526, USA, toll-free (800) 937-8529.
- On the Web in JSTOR, the archive/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, (212) 358-6400). See <<http://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 University Microfilms, 300 North Zeeb Road, Dept. P.R., Ann Arbor, MI 48106, USA, toll-free (800) 521-0600; or 30–32 Mortimer Street, Dept. P.R., London WIN 7RA, England.
- On CD-ROM format, from: University Microfilms.

**Authorization to photocopy** items for internal or personal use (beyond that permitted by sections 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: 0002-9300/02 \$5.00 + .25. Educational copying is permitted. Please address requests to CCC Academic Permission Service: tel. (978) 750-8400; fax (978) 750-4744.

**Advertising:** Inquiries should be sent to the Marketing Manager, ASIL, 2223 Massachusetts Avenue, NW, Washington, DC 20008-2864, tel. (202) 939-6000; fax (202) 797-7133.

\* \* \* \*

Periodicals postage paid at Washington, DC, and at additional mailing office. POSTMASTER: Send change of addresses to American Journal of International Law, 2223 Massachusetts Ave., NW, Washington, DC 20008-2864.

## 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

**Manuscripts** may be sent to the American Journal of International Law, at the American Society of International Law, 2223 Massachusetts Avenue, NW, Washington, DC 20008-2864, USA, or by e-mail to [AJIL@ASIL.org](mailto:AJIL@ASIL.org). Authors are requested to submit their manuscripts on computer disc or by e-mail attachment. If the manuscript is unavailable in electronic form, four paper copies should be submitted. Manuscripts and discs submitted will not be returned to the author. Please do not submit manuscripts via facsimile. The *AJIL* will not consider submissions whose content has been, or will be, published before it appears in this *Journal*.

The *AJIL* uses WordPerfect 9 and can convert manuscripts created in other word-processing programs into that program. Please specify the word-processing program used for manuscripts submitted in electronic form.

**Book reviews** are by invitation: suggestions may be made to the Book Review Office, 2223 Massachusetts Avenue, NW, Washington, DC 20008-2864. **Books for review** should be sent to the same office.

**Format and style guidelines:** All manuscripts should be double-spaced, with double-spaced footnotes. Our full Author Style Sheet is available online at <http://www.asil.org/styledoc.htm>. Subject to variations noted in that document, the *AJIL* conforms to *The Bluebook: A Uniform System of Citation* (17th ed. 2000) and the *Chicago Manual of Style* (14th ed. 1993). The style document can also be obtained via e-mail; please send e-mail requests to [AJIL@ASIL.org](mailto:AJIL@ASIL.org). *The Bluebook* can be obtained from the Harvard Law Review Association, Gannett House, 1511 Massachusetts Avenue, Cambridge, MA 02138.

### INDEXES CARRYING *AJIL*

The *American Journal of International Law* is included in: *ABC POL SCI: A Bibliography of Contents: Political Science and Government*; *Current Law Index*; *IBR—International Bibliography of Book Reviews of Scholarly Literature*; *IBZ—International Bibliography of Periodical Literature*; *Index to Foreign Legal Periodicals*; *Index to Legal Periodicals*; *International Political Science Abstracts*; *Public International Law: A Current Bibliography of Books and Articles*; *Social Sciences Index*.