



American Society
of International Law

Proceedings
of the **105th**
Annual
Meeting

HARMONY AND
DISSONANCE IN
INTERNATIONAL
LAW



March 23–26, 2011
Washington, DC



American Society
of International Law

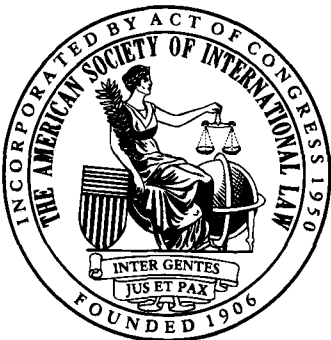
Proceedings
of the **105th**
Annual
Meeting

HARMONY AND

DISSONANCE IN

INTERNATIONAL

LAW



March 23–26, 2011
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 105th Annual Meeting* (ISBN 0-9792329-8-5) 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-become-a-member.cfm. Information about non-member subscriptions is available online at www.asil.org/become-a-subscriber.cfm.

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:
105 ASIL PROC. 214 (2012).

© 2012 The American Society of International Law

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

CHAIRS OF THE COMMITTEE
OF THE ANNUAL MEETING
Catherine Amirfar
Tai-Heng Cheng
Chimène I. Keitner

CO-EDITORS OF THE PROCEEDINGS
Catherine Amirfar
Tai-Heng Cheng
Chimène I. Keitner

CONTENTS

<i>Foreword</i>	xiii
An Introduction: Harmony and Dissonance in International Law	1
<i>Catherine Amirfar, Tai-Heng Cheng, and Chimène I. Keitner</i>	
Thirteenth Annual Grotius Lecture	
The Global Status of Human Rights	
<i>Amartya Sen</i>	3
Amartya Sen’s Vision for Human Rights—and Why He Needs the Law	
<i>Kim Lane Scheppele</i>	12
Opening Welcome and Remarks	
<i>ASIL President David D. Caron</i>	23
Opening Plenary: The Four Freedoms Turn 70: Embracing an Integrated Approach to Human Rights	
<i>Michael H. Posner</i>	27
The Supreme Court and Arbitration Law	
Expanded Levels of Review in Light of <i>Hall Street</i>	
<i>Jack J. Coe, Jr.</i>	33
Legal Origins, Doing Business, and Rule of Law Indicators: The Economic Evaluation of Legal Systems	
Introductory Remarks by:	
<i>Renaud Beauchard</i>	37
Remarks by:	
<i>Kevin Davis</i>	38
<i>Corinne Boisman</i>	42
<i>Carolin Geginat</i>	44
<i>Ralf Michaels</i>	47
International Environmental Law-Making and the International Court of Justice	
Remarks by:	
<i>Ronald J. Bettauer</i>	61
International Courts and Tribunals Interest Group: Judicial Selection	
Introductory Remarks by:	
<i>Brooks W. Daly</i>	67
Remarks by:	
<i>Patrick Lipton Robinson</i>	69
<i>John B. Bellinger III</i>	71
<i>Eloïse M. Obadia</i>	74
<i>Hans Corell</i>	77

Commissions of Inquiry into Armed Conflict, Breaches of the Laws of War, and Human Rights Abuses: Process, Standards, and Lessons Learned	
Introduction: Commissions of Inquiry as Human Rights Fact-Finding Tools	
<i>Philip Alston</i>	81
Human Rights Fact-Finding into Armed Conflict and Breaches of the Laws of War	
<i>Agnieszka Jachec Neale</i>	85
The August 2008 Conflict in Georgia	
<i>Heidi Tagliavini</i>	89
New Voices I: Global Health, Trade, and Common Resource Regimes	
Introductory Remarks by:	
<i>Jeffrey L. Dunoff</i>	95
The Exercise of Public Power Over Global Health Through Public-Private Partnerships and the Question of Responsibility Under International Law	
<i>Lisa Clarke</i>	96
Innovative Governance and Global Health	
<i>David Gartner</i>	100
Good Environmental Governance: Overcoming Fragmentation in International Law for Shark Conservation and Management	
<i>Erika J. Techera</i>	103
Toward a Legal Framework for Regime Interaction: Lessons from Fisheries, Trade, and Environmental Regimes	
<i>Margaret A. Young</i>	107
Women in International Law Interest Group Luncheon	
Political Dissonance and Personal Harmony: Negotiating with North Korea and Iran	
<i>Lucy F. Reed</i>	111
Fragmentation of International Legal Orders and International Law: Ways Forward?	
The Idea of Fragmentation	
<i>Jacob Katz Cogan</i>	123
Structural Questions of Fragmentation	
<i>Nele Matz-Lück</i>	125
The Division of Expert Labor in the International Law Discipline: Genealogies of Fragmentation	
<i>Mario Prost</i>	127
Two Potential Paths Forward from Fragmentation Discourse: Sociology and Ethics	
<i>Sahib Singh</i>	130
Responding to Nuclear Security Challenges in a Fragmented World	
Nuclear Material and Commodity Trafficking as International Crimes: Current Status, Gaps in Coverage, and Potential Steps Forward	
<i>Leonard S. Spector</i>	133
Seamlessness or Segmentation? International Economic Governance and European Sovereign Debt	
Introductory Remarks by:	
<i>Thomas W. Laryea</i>	139
Extending the European Debt Discussion to Broader International Governance	
<i>Odette Lienau</i>	141

Espionage and the First Amendment After Wikileaks	
Government Leaks in the Internet Age	
<i>Roger P. Alford</i>	147
WikiLeaks, Secrets, and Lies	
<i>Simon Chesterman</i>	150
Annual Benjamin Ferencz Session: Integrating the Crime of Aggression into International Criminal Law and Public International Law	
Introductory Remarks by:	
<i>Michael A. Newton</i>	153
The Aggression Amendments: Points of Consensus and Dissension	
<i>Beth Van Schaack</i>	154
Complementarity Issues	
<i>Teresa McHenry</i>	157
Remarks by:	
<i>Clauss Kreß</i>	160
<i>Michael Scharf</i>	162
The Role of International Tribunals in Managing Coherence and Diversity in International Law	
Introductory Remarks by:	
<i>Kevin Gray</i>	167
Remarks by:	
<i>Andrea Bjorklund</i>	168
<i>Giorgio Sacerdoti</i>	168
<i>Valerie Hughes</i>	169
<i>Stephen McCaffrey</i>	170
Is ICSID Losing its Appeal . . . Again?	
Introductory Remarks by:	
<i>Andrea Menaker</i>	193
Remarks by:	
<i>Andreas F. Lowenfeld</i>	193
<i>Stanimir Alexandrov</i>	194
<i>Christoph Schreuer</i>	196
Plenary Keynote: Decisionmaking in International Courts and Tribunals: A Conversation with Leading Judges and Arbitrators	
Introductory Remarks by:	
<i>Chiara Giorgetti</i>	215
Remarks by:	
<i>Edith Brown Weiss</i>	215
<i>Rosalyn Higgins</i>	216
<i>Theodor Meron</i>	219
<i>Charles N. Brower</i>	220
Targeting with Drone Technology: Humanitarian Law Implications	
Introductory Remarks by:	
<i>Naureen Shah</i>	233
Remarks by:	
<i>Rashmi Chopra</i>	235
<i>Anil Vassanji</i>	238
<i>Naz Modirzadeh</i>	239
<i>Chris Jenks</i>	240
<i>Nils Melzer</i>	241

International Environmental Law Interest Group: Roundtable on Research

Methodologies

Introductory Remarks by:

Sara L. Seck 253

Exploring Methodological Challenges Within the Context of Climate Change Law
and Policy

Cinnamon Carlarne 255

What the Kosovo Advisory Opinion Means for the Rest of the World

Introductory Remarks by:

Ralph Wilde 259

Remarks by:

Anne Peters 261

Marko Milanović 262

Qerim Qerimi 262

The Role of Legal Norms in Mediation and Negotiation: Views from the Field

Introductory Remarks by:

Omar Dajani 275

Remarks by:

Nicholas Michel 275

John Crook 277

Joel Hernandez 278

Jennifer Lake 280

Lamia Matta 282

Ethical and Practical Challenges for Corporate Lawyers Advising Clients on Human Rights

Ethical Risks, Corporate Lawyers, and Human Rights

David Nersessian 295

Remarks by:

Rachel Davis 298

The Future of the Guiding Principles

Patrick J. Keenan 301

The New Social License to Operate and the Role of Legal Advisors

Alexandra Guáqueta 303

Advising Corporate Clients on Human Rights and the Challenges of Integrating
Human Rights into Corporate Management Systems

Sarah A. Altschuller 305

Regional Regimes in Comparative Perspective

The Value of Dissonance: Regional Arrangements and the Pursuit of Harmony in
International Law

Richard Burchill 309

“Fact Finding Without Facts”: A Conversation with Nancy Combs

Remarks by:

Nancy Combs 315

Margaret DeGuzman 317

“Fact-Finding Without Facts” from the Perspective of the Fact-Finder

Marko Divac Öberg 319

Remarks by:

Saira Mohamed 321

An Explanation as to Why the United Nations International Criminal Tribunal for the Former Yugoslavia Did Not Experience the Same Degree of Problems with Respect to Fact-Finding as Did Other International Criminal Tribunals <i>Dan Saxon</i>	323
Recent Trends in International Investment Treaty Law	
Introductory Remarks by:	
<i>Nassib G. Ziadé</i>	325
Remarks by:	
<i>Loretta Malintoppi</i>	326
<i>Donald Francis Donovan</i>	330
<i>Carolyn B. Lamm</i>	335
<i>Rudolf Dolzer</i>	339
The Roles and Responsibilities of International Organizations	
Introductory Remarks by:	
<i>Blanca Montejo</i>	343
Revisiting the ILC's Draft Rules on International Organization Responsibility <i>José E. Alvarez</i>	344
The Security Council and Issues of Responsibility <i>Vera Gowlland-Debbas</i>	348
The ILC Draft Articles on Responsibility of International Organizations: The Interplay Between the Practice and the Rule <i>Daphna Shrager</i>	351
The ILC Draft Articles and International Financial Institutions: Select Considerations <i>Maurizio Ragazzi</i>	353
New Battlefields/Old Laws: Shaping a Legal Environment for Counterinsurgency	
Introductory Remarks by:	
<i>William C. Banks</i>	365
Remarks by:	
<i>Rich Gross</i>	366
<i>Robert D. Sloane</i>	370
<i>Ashley Deeks</i>	373
<i>Sarah Sewall</i>	376
Elections and Ethnic Violence	
Election-Related Violence: The Role of Dangerous Speech <i>Susan Benesch</i>	389
Harmony and Dissonance in Extraterritorial Regulation	
Introductory Remarks by:	
<i>Kal Raustiala</i>	393
Extraterritoriality's Watchdog After <i>Morrison v. National Australia Bank</i> <i>George T. Conway III</i>	394
The Presumption Against Extraterritoriality After <i>Morrison</i> <i>William S. Dodge</i>	396
<i>Morrison</i> , the Effects Test, and the Presumption Against Extraterritoriality: A Reply to Professor Dodge <i>Austen L. Parrish</i>	399
<i>Morrison v. National Australia Bank</i> : Defining the Domestic Interest in International Securities Litigation <i>Hannah L. Buxbaum</i>	402

Labor and Migration in International Law: Challenges of Protection, Specialization, and Bilateralism

Introductory Remarks by:

Marion Panizzon 407

Remarks by:

Nisha Varia 410

Bilateralism and Multilateralism in International Migration Law

Jürgen Bast 412

Highly Skilled Immigration: The New Frontier of International Labor Migration

Ayelet Shachar 415

Explaining the Normative Duality of Trade and Migration Agreements

Tomer Broude 419

International Law and the Liability for Catastrophic Environmental Damage

Introductory Remarks by:

Alan Boyle 423

Remarks by:

Gunther Handl 427

Catastrophic Environmental Damage and the Gulf War Reparation Awards: The Experience of the UN Compensation Commission

Peter H. Sand 430

Transboundary Environmental Damage and the Law of the European Union

Monika Hinteregger 433

The Jurisprudence of the International Tribunal for the Law of the Sea and Catastrophic Environmental Damage

Tullio Treves 436

New Voices II: Internationalizing and Domesticating Law

Anglo-Saxonizing Rights: Transnational Public Interest Litigation in Europe

Anna Dolidze 439

Back to Bedrock with U.S. Extraterritoriality? Safeguarding Domestic Rule Integrity as a Touchstone for Judicial Action

Tonya Putnam 443

Are There “Regional” Approaches to International Dispute Resolution?

Remarks by:

Katia Fach Gómez 447

Harmony and Dissonance in International Legal Theory

Introductory Remarks by:

Brian Lepard 451

The Effect of the Participation of Women Judges on the Legitimacy of International Courts and Tribunals

Nienke Grossman 452

Reasonable Pluralism and International Law

John Linarelli 455

Pluralism in International Law: Warnings, Opportunities, and Queries

John R. Morss 459

International Legal Implications of Israel’s Attack on the Gaza Aid Flotilla

Remarks by:
Sari Bashi 463
Law and the Israeli Attack on the Humanitarian Aid Flotilla to Gaza
Daoud L. Khairallah 466
Remarks by:
Sarah Weiss Ma’udi 470
Naz Modirzadeh 473

Plenary Keynote: A Conversation with Angel Gurría

Introductory Remarks by:
Susan L. Karamanian 477
Remarks by:
Angel Gurría 478
Lucinda Low 482

ASIL Annual Dinner: A Celebration of Distinction and Promise

Remarks by:
David D. Caron 491
Tribute to Christopher Merillat, by Elizabeth Andersen 494
Tribute to Shabtai Rosenne, by Bernard H. Oxman 496
Tribute to Louis Henkin, by Lori Fisler Damrosch 497
John Crook 500
Gay McDougall 501
Daniel Halberstam 503

Duplication and Divergence in the Work of the United Nations Human Rights

Treaty Bodies

Introductory Remarks by:
Christina Cerna 507
Remarks by:
Sarah McCosker 509
Duplication and Divergence in the Work of the United Nations Human Rights
Treaty Bodies: A Perspective from a Treaty Body Member
Nigel Rodley 512
Remarks by:
Ibrahim Salama 515

Trade and Investment in Africa: Harmony and Disharmony with the International Community

South-South Trade and Investment Relations: Harmony and Disharmony—African Perspectives
Uche Ewelukwa Ofodile..... 521

Geoengineering Climate Change: Can the Law Catch Up?

Climate Engineering and International Law: What Is in the National Interest?
Lee Lane 525

Author Meets Reader: International Law in the U.S. Supreme Court: Continuity and Change

Two Centuries of International Law in the U.S. Supreme Court
David Sloss 529
Toward a Geopolitics of the History of International Law in the Supreme Court
Mary L. Dudziak 532
Remarks by:
Lori F. Damrosch 538

Transnational Piracy: To Pay or to Prosecute?

Introductory Remarks by:

Milena Sterio 543

Remarks by:

Douglas Guilfoyle 546

Jennifer Landside 549

Thomas Winkler 552

Revolution and Intervention in the Middle East

Introductory Remarks by:

Monica Hakimi 555

Remarks by:

Harold Koh 556

Hussein Hassouna 559

Catherine Powell 561

Mary Ellen O’Connell 563

Ali Aujali 564

105th Annual Meeting Theme Statement and Program 577

Fifty-Second Philip C. Jessup International Law Moot Court Competition 595

Appendices

Minutes of the ASIL Annual General Meeting 599

Memorial Notices 601

ASIL Officers and Executive Council 611

American Journal of International Law 613

International Legal Materials 615

Index 617