

AMERICAN JOURNAL OF INTERNATIONAL LAW

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NO. 3

CONTENTS

PAGE

Precedent, Compliance, and Change in Customary International Law: An Explanatory Theory

Pierre-Hugues Verdier and Erik Voeten

389

This article articulates an explanatory theory of customary international law under which precedential concerns are central to explaining CIL formation, compliance, and change. The theory shows how fundamental legal and institutional features of CIL complicate the use of mechanisms such as reciprocity, retaliation, and reputation. One major reason for states to observe CIL rules, even when tempted not to do so, is that breaches have precedential effects and may weaken and perhaps destroy the rule in question. Standard accounts of state practice, *opinio juris*, and the role of courts are analyzed from this perspective, drawing examples from foreign sovereign immunity and the outer limits of the territorial sea.

Notes and Comments

The Francis Deák Prize

435

Nominations for the Board of Editors

435

Current Developments

Chemical Weapons and the International Criminal Court

Andreas Zimmermann and Meltem Şener

436

The OPCW's Arrangements for Missed Destruction Deadlines Under the Chemical Weapons Convention: An Informal Noncompliance Procedure

Masahiko Asada

448

International Decisions

Edited by David P. Stewart

Featured Decisions

Can the ICTY *Šainović* and *Perišić* Cases Be Reconciled? (Leila Nadya Sadat)

475

International Criminal Tribunal for the Former Yugoslavia rulings on specific direction as an element of criminal liability for aiding and abetting war crimes

Federalism, Treaty Implementation, and Political Process: *Bond v. United States* (Curtis A. Bradley)

486

U.S. Supreme Court decision on presumptive federalism limits to legislative implementation of U.S. treaty obligations

Whaling in the Antarctic (*Australia v. Japan: New Zealand Intervening*) (Sonia E. Rolland)

496

International Court of Justice judgment on legality of Japan's Antarctic whaling program under the International Convention for the Regulation of Whaling

Google Spain SL v. Agencia Española de Protección de Datos (AEPD) (John W. Kropf)

502

European Court of Justice decision on the right to be forgotten under the European data protection directive

| | |
|---|-----|
| <i>Netherlands v. Nuhanović; Netherlands v. Mustafić-Mujić</i> (Miša Zgonec-Rožej) | 509 |
| Dutch Supreme Court judgments on international responsibility of Dutch government for deaths of civilians in Srebrenica | |

Contemporary Practice of the United States Relating to International Law

Edited by Kristina Daugirdas and Julian Davis Mortenson

| | |
|--|-----|
| United States Negotiates Prisoner Exchange to Secure Release of U.S. Soldier Held in Afghanistan | 517 |
| United States Refuses to Grant Visa to Iranian UN Envoy | 523 |
| Multilateral Naval Code of Conduct Aims to Prevent Unintended Conflict in Contested Areas of East and South China Seas | 529 |
| Senate Approves Treaties to Regulate Fishing | 532 |
| United States Indicts Chinese Military Officials for Economic Espionage | 537 |
| U.S. Supreme Court Declines to Terminate Long-Running Efforts to Force Argentina to Pay Defaulted Sovereign Debt | 540 |
| United States Condemns Uganda's Antigay Law as Violating Human Rights | 544 |
| President Barack Obama Certifies That U.S. Peacekeepers in Mali Are Immune from ICC Jurisdiction | 547 |
| United States' Legal Justification for Drone Strike on Anwar al-Awlaki Released | 550 |
| Asserting Self-Defense, United States Seizes Suspect in Benghazi Mission Attack | 556 |
| U.S. Supreme Court Interprets Child Abduction Treaty | 557 |

Recent Books on International Law

Edited by Richard B. Bilder

Review Essay

| | |
|---|-----|
| Informational Services: Going Online, Global, and Local Again | |
| Chander, Anupam. <i>The Electronic Silk Road: How the Web Binds the World Together in Commerce</i> (Michael Birnhack) | 562 |

Book Reviews

| | |
|---|-----|
| Ku, Julian, and John Yoo. <i>Taming Globalization: International Law, the U.S. Constitution, and the New World Order</i> (Kristina Daugirdas) | 568 |
| Goodman, Ryan, and Derek Jinks. <i>Socializing States: Promoting Human Rights Through International Law</i> (David Sloss) | 576 |
| Boisson de Chazournes, Laurence. <i>Fresh Water in International Law</i> ; Boisson de Chazournes, Laurence, Christina Leb, and Mara Tignino (eds.). <i>International Law and Freshwater: The Multiple Challenges</i> (Joseph W. Dellapenna) | 582 |
| Schmitt, Michael N. (ed.). <i>Tallinn Manual on the International Law Applicable to Cyber Warfare</i> (Kristen E. Eichensehr) | 585 |
| Cameron, Lindsey, and Vincent Chetail. <i>Privatizing War: Private Military and Security Companies Under Public International Law</i> (Laura A. Dickinson) | 589 |
| Dunoff, Jeffrey L., and Mark A. Pollack (eds.). <i>Interdisciplinary Perspectives on International Law and International Relations: The State of the Art</i> (Emilie M. Hafner-Burton and David G. Victor) | 597 |

Books Received

| | |
|--|-----|
| International Legal Materials, Contents, Vol. LIII, Nos. 2, 3 | 601 |
| | 606 |

Nihon University

COMPARATIVE LAW

Vol. 30

2013

Comparative Law Institute
Nihon University Tokyo

CONTENTS

ARTICLES

| | |
|---|----|
| <i>Reuel Schiller</i> , Conflicting Obligations: American Political Culture and the Law of the Workplace | 1 |
| <i>Philip Kunig</i> , Internationalrechtliche Einflüsse auf das deutsche Umweltrecht | 13 |
| <i>Thomas J. Schoenbaum</i> , The WTO Agreement on Trade-related Intellectual Property: Public Policy Concerns | 27 |

EAST AFRICAN JOURNAL OF PEACE & HUMAN RIGHTS

Volume 20 Number 1, 2014

The *East African Journal of Peace and Human Rights*, ISSN: 1021-8858 is a bi-annual published by the School of Law, Makerere University under the auspices of the Human Rights and Peace Centre (HURIPEC). Contributions for publication should be original. The text of the article, including footnotes, should be double-spaced. Footnotes should be placed at the bottom of each page and citations should follow *A Uniform System of Citation* (15th ed). Contributors are requested to indicate their professional, academic, and other qualifications as well as their e-mail and physical address for communication. Published authors will receive a free copy of the Journal in which their contribution appears.

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TABLE OF CONTENTS

| | |
|--|-----|
| TREATY INTERPRETATION IN THE AFRICAN REGIONAL HUMAN RIGHTS SYSTEM: STREAMLINING THE 'CONVENTIONAL' AND THE 'SPECIAL' | |
| Sisay A. Yeshanew | 1 |
| LIMITATIONS ON MANDATES OF NATIONAL HUMAN RIGHTS INSTITUTIONS: PERHAPS A RECONSIDERATION IS OVERDUE | |
| Emma Charlene Lubaale | 18 |
| REGIONAL HUMAN RIGHTS INSTITUTIONS: A COMPARISON OF THE EUROPEAN AND THE AFRICAN HUMAN RIGHTS SYSTEMS | |
| Befekadu Bogale | 44 |
| MULTIPLICITY OF MARRIAGE FORMS IN CONTEMPORARY SOUTH AFRICA | |
| Roberto Garetto | 68 |
| MAGISTRACY AND INTERNAL SECURITY CHALLENGE IN THE ADMINISTRATION OF CRIMINAL JUSTICE IN CONTEMPORARY NIGERIA | |
| Timothy F. Yerima & Hanafi A. Hammed | 91 |
| LANGUAGE FAIR TRIAL RIGHTS IN THE UGANDA CRIMINAL JUSTICE SYSTEM | |
| Catherine S. Namakula | 121 |
| THE NEED FOR LEGAL REGULATION OF ASSISTED REPRODUCTIVE TECHNOLOGY IN NIGERIA | |
| Ibraheem O. Tajudeen | 152 |
| THE LEGAL STATUS OF HOLDING CHARGE AS A DETENTION MECHANISM UNDER THE NIGERIAN CRIMINAL JUSTICE SYSTEM | |
| Eric A. Okojie & Lucky E. Enakemere | 168 |

EXPLORING THE VIABILITY OF THE AMNESTY LAW ON CRIMINAL
JUSTICE IN UGANDA

Edrine Wanyama 184

UNPACKING THE RIGHT TO PARTICIPATION FOR THE BATWA
INDIGENOUS MINORITIES IN UGANDA

Patricia Achan - Okiria 200

The Environmental FORUM

Advancing Environmental Protection Through Analysis • Opinion • Debate



Fall In For The Nutrient Wars

Developing World

*A Responsibility
to Mitigate*

EPA in Action

*Regulating for
Sustainability*

Statutory Evaluation

*Which Environmental
Law Is the Most Vital?*

Ralph
Butler**Page 24**

Regulating for Sustainability

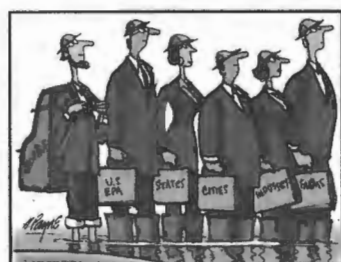
HEADNOTE • EPA's history shows that it is possible. It will take long-term, concerted effort. But we believe that the principles of sustainability can be embedded in the agency's rules, guidance, permitting, and enforcement programs.

BY GEORGE WYETH and BETH TERMINI
Environmental Protection Agency and the Horinko Group

A Responsibility to Mitigate

HEADNOTE • Notwithstanding the principle of common but differentiated responsibilities and respective capabilities, developing countries are required to prevent significant transboundary harm because this customary obligation is equally binding for rich and poor nations alike.

BY ELENA KOSOLAPOVA
Amsterdam Center for Environmental Law and Sustainability

**Page 30**Henry
Payne**Page 34**

The Nutrient Wars

HEADNOTE • States battle with green organizations, regulated industry, cities, agriculture, and the federal Environmental Protection Agency over promulgating Clean Water Act criteria for pollution from nitrogen and phosphorus.

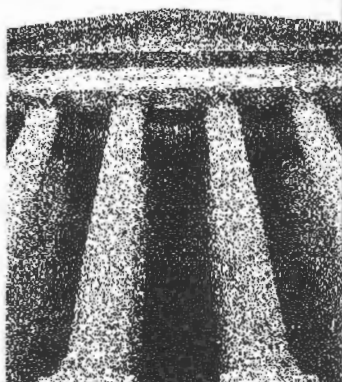
BY RICHARD SCHWARTZ and DAVID CHUNG
Crowell & Moring LLP

With a **SIDEBAR** by Nathan Gardner-Andrews of the National Association of Clean Water Agencies

TESTIMONY | An Environmentalist's Story

HEADNOTE • JAMES GUSTAVE "GUS" SPETH was a founder of organizations and an early leader in the foundation of environmental law as a field. Herein he tells his story of the past and his concerns about the future, in an excerpt from his memoir *Angels by the River*, due out in November from Chelsea Green Publishing.

**Page 40**



Page 48

THE FORUM | Which Is the Most Important Environmental Statute?

HEADNOTE ♣ Herein we assemble a group of the foremost experts on a suite of statutes, asking each to make the case that a specific act has proven to be the most important federal law in attacking the nation's pollution and resource problems. The Clean Air Act, Clean Water Act, Endangered Species Act, CERCLA/RCRA, the National Environmental Policy Act, and the Administrative Procedure Act — each can be shown to be critical in preserving the biosphere.

B L O G S

- | | |
|--|--|
| <p>The Federal Beat..... 8 By David P. Clarke Reductions in funding along with mandates to reduce carbon dioxide abatement rules.</p> | <p>Fast Forward 16 By Ann Klee Prioritizing our efforts based on risk and where our involvement can have the most impact.</p> |
| <p>Around the States..... 10 By Linda K. Breggin States are literally all over the map in responding to climate threats.</p> | <p>Science and the Law 18 By Craig M. Pease Where on Earth is this excess energy going? If not the atmosphere, look in the oceans.</p> |
| <p>In the Courts..... 12 By Richard Lazarus The Chamber of Commerce describes the havoc that would occur absent higher review.</p> | <p>The Developing World 20 By Bruce Rich The country has an outstanding legacy of agricultural biodiversity.</p> |
| <p>An Economic Perspective 14 By Robert N. Stavins Direct climate benefits a jurisdiction reaps will be less than the costs it incurs.</p> | <p>Notice & Comment 22 By Stephen R. Dujack We are lucky to live on a planet that still sustains and nurtures life.</p> |

In the Literature: G. Tracy Mehan III on financing the next wave — **Page 6**

ELI Report: Leadership Council takes a power trip — **Page 56**

Closing Statement: John C. Cruden on California Dreamin' — **Page 60**

The Environmental FORUM

Advancing Environmental Protection Through Analysis • Opinion • Debate



Companies Grapple With Corporate Social Responsibility

Dwindling

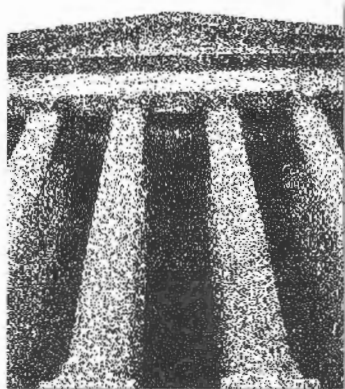
*Fresh Approaches to
Freshwater Supplies*

Regulating

*Defining "Waters of
the United States"*

Managing

*Environment, Health,
and Safety in Action*



Page 54

THE FORUM | "Waters of the United States"

HEADNOTE Supreme Court rulings have left "waters of the United States" under the Clean Water Act without a good understanding as to its meaning. During the Bush administration, there was an attempt to define the term administratively, but the Environmental Protection Agency's Water Office gave up the task when the White House ordered the agency to stand down in the face of concerns expressed by conservation interests. Into the breach moved the Obama EPA and the Army Corps of Engineers when they announced a rulemaking, now in progress, to define the term. At press time the agencies were just concluding public comment, and a final rule will be due in several months.

B L O G S

The Federal Beat 10

By David P. Clarke

Groups tangle over wording of proposed rule meant to clarify federal jurisdiction.

Around the States 12

By Linda K. Breggin

States are on the front lines for managing aquifers, which are increasingly at risk.

In the Courts 14

By Richard Lazarus

Environmental law's history bears witness to Joe Sax's and David Sive's eternal wisdom.

An Economic Perspective 16

By Robert N. Stavins

Cap-and-trade was collateral damage in a much larger political war.

Fast Forward 18

By Ann R. Klee

Improved fossil fuel efficiency can achieve immediate benefits, outpacing renewables.

Science and the Law 20

By Craig M. Pease

I doubt our political and legal institutions will produce a solution for climate change.

A View From the EU 22

By Gabrielle Williamson

Changes in the European Commission will affect environment, health, and safety.

Notice & Comment 24

By Stephen R. Dujack

On a motor trip to New Jersey, signs that environmental progress is moved by markets.

Forum@eli.org: Lawyer claims reviewer's article is a fish story — Page 6

In the Literature: G. Tracy Mehan III on the book on jobs — Page 8

Movers & Shakers: ELI Founder Fred Anderson dead at 73 — Page 62

ELI Report: Researchers on top of the Marcellus Shale — Page 64

Closing Statement: John C. Cruden on ELI's international work — Page 68

Ralph
Butler

Fresh Water, Fresh Approaches

HEADNOTE ♣ All sectors — government, business, utilities, environmental advocates, and consumers — need to come together to resolve the world's emerging crisis in water quality and quantity, a fundamental human right and a necessary resource for society as a whole.

By Erin Bullard and Gabriel Eckstein

Houston Law Center and Texas A&M University

With a SIDEBAR by **Lester Snow** of the California Water Foundation

Page 26

Teaching the Business Case

HEADNOTE ♣ Environmental, health, and safety managers must educate their company that if the firm addresses only compliance, it has an incomplete EHS system. But if it has a risk-based regime integrated into the corporate culture, compliance, and greater profitability, will follow.

By Frank B. Friedman and James K. Vines

Frank B. Friedman and Associates and King and Spalding

With a SIDEBAR by **Alan B. Horowitz** of AstraZeneca Pharmaceuticals



Page 34

Henry
Payne

Attitude & Latitude

HEADNOTE ♣ Practical advice on how to successfully navigate the emerging, dynamic, and important area of corporate social responsibility and companies' role in, and obligations to, sustainable development.

By James N. Cahan and Jason E. James

Northwestern University and University of Chicago

With a SIDEBAR by **David Etzwiler** of the Siemens Foundation

Page 40

TESTIMONY | When Comity and Consensus Prevailed

HEADNOTE ♣ **Leon G. Billings** (seated) and **Thomas C. Jorling** were congressional staff present at the creation of the first modern environmental laws, a time when bipartisanship was not just a catchword but the engine that propelled bills reflecting public will and concern into durable law.



Page 46

European Human Rights Law Review

Issue 5 2014

Table of Contents

Opinion

Analysis of the UNESCO Approach to the Notions of Human Rights, Peace and Development in the Context of Culture of Peace

Christian Guillermet Fernández and David Fernández Puyana

439

Bulletin

456

Bulletin: Counter-Terrorism and Human Rights

462

Articles

The Emergence of the EU Charter of Fundamental Rights in UK Law

Richard Clayton QC and Cian C. Murphy

469

The Right to Privacy and the Retention of DNA Profiles—Getting the Balance Right

Hilary Biehler

479

The judgment of the Court of Justice of the European Union in *X, Y and Z v Minister voor Immigratie en Asiel*: a glass half full for “rainbow refugees”?

Laurens Hueting and Livio Zilli

490

A Shift in the Approach of the European Court of Human Rights in Surveillance Cases: A Rejuvenation of Necessity?

Maria Helen Murphy

507

Case Analysis

Rendition, Detention and Torture in Europe: Territorial Responsibility and the Right to Truth

John Wadham

519

Case and Comment

Durisotto v Italy

527

Paulet v United Kingdom

530

McDonald v United Kingdom

532

Gray v Germany

534

Stichting Ostade Blade v Netherlands

537

| | |
|----------------------------|-----|
| De La Flor Cabrera v Spain | 539 |
| Fernández Martínez v Spain | 542 |
| Labassee v France | 546 |
| Book Reviews | 551 |

Journal of Planning & Environment Law

Issue 10 2014

Table of Contents

Current Topics

| | |
|----------------------------------|------|
| Criminal Justice and Courts Bill | 1055 |
| Selby DC and the Local Ombudsman | 1056 |

Articles

| | |
|---|------|
| Applications for Planning Permissions by Gypsies and Travellers II <i>Raymond Cooper</i> | 1057 |
| The Proposals for the Reform of Land Use Planning in Wales <i>Victoria Jenkins</i> | 1063 |

Correspondence

1081

Parliamentary and Departmental News

1083

Case Law Reports

| | |
|--|------|
| Holder v Gedling BC and Charles-Jones | 1087 |
| Hannan v Newham LBC | 1101 |
| Dunsfold Park Ltd v Secretary of State for Communities and Local Government | 1106 |
| Gallagher Homes Ltd (2) Lioncourt Homes Ltd v Solihull MBC | 1117 |
| R. (on the application of Fox Strategic Land and Property Ltd) v Chorley BC and Preston CC and South Ribble BC | 1152 |

Summaries of Cases

1186

Ministerial Planning Decisions

1190

Local Government Ombudsman Reports

1201

Journal of Planning & Environment Law

Issue 11 2014

Table of Contents

Current Topics

- Islington's Fight Over Article 4 Directions 1205

Articles

- Solar Farms: Ground Mounted Solar Photovoltaic Developments 1207
Alec Samuels

- Fracking and the Legal and the Extra-Legal in Planning Procedures 1211
Dr Lucy Finchett-Maddock

- Parliamentary and Departmental News 1216

Case Law Reports

- Sanger and Sanger v Newham LBC 1218

- Ali v Newham LBC 1236

- Lloyd v Secretary of State for Communities and Local Government and Dacorum BC 1247

- Europa Oil and Gas Ltd v Secretary of State for Communities and Local Government and Surrey CC and Leith Hill Action Group 1259

- Upper Tribunal Decisions 1270

- Summaries of Cases 1289

- Ministerial Planning Decisions 1294

Journal of Planning & Environment Law

Issue 12 2014

Table of Contents

Current Topics

| | |
|---|------|
| Government Policy: The Difference Between New Policy and the Clarification of Existing Policy | 1307 |
| Article 4 directions and Islington LBC | 1309 |

Articles

| | |
|--|------|
| Analysing Conservation Covenants <i>Natalie Pratt</i> | 1310 |
| The Community Infrastructure Levy: The Principles (such as they are) and the Challenges <i>Alec Samuels</i> | 1320 |

| | |
|-------------------------------------|------|
| Parliamentary and Departmental News | 1326 |
|-------------------------------------|------|

Case Law Reports

| | |
|---|------|
| R. (on the application of Nicholas Perry) v Hackney LBC and Newmark Properties (SN) LLP v Sainsbury's Supermarkets Ltd | 1329 |
| R. (on the application of Ecotricity (Next Generation) Ltd v Secretary of State for Communities and Local Government | 1338 |
| Breyer Group Plc, Free Power for Schools LP, Homesun Holding Ltd, Touch Solar Ltd v Department of Energy and Climate Change | 1346 |
| Gleeson Developments Ltd v Secretary of State for Communities and Local Government and the Planning Inspectorate and Wiltshire CC | 1386 |
| Upper Tribunal Decisions | 1395 |
| Ministerial Planning Decisions | 1399 |

Journal of Planning & Environment Law

Power to the People?

Papers from the 42nd Joint Planning Law Conference held at New College, Oxford, in September 2014, organised by The Law Society, The Bar Council, The Royal Institute of Chartered Surveyors, and The Royal Town Planning Institute

Foreword

Mike Hayes CBE BA MCD MRTPI Hon FRIBA AoU

Mike Hayes is an independent consultant. As an urban planner, he has worked in senior positions in the public sector. A former President of the RTPI, he is Secretary of the National Planning Forum, an Examining Inspector with the Planning Inspectorate, a Design Council CABE "BEE" and a member of the English Heritage Advisory Committee.

OP1

Papers

Keynote Address: The English planning system: In glorious expectation of the life to come
Dr Hugh Ellis

Hugh is Chief Planner at the Town and Country Planning Association ("TCPA"). He is responsible for leading the Association's efforts to shape and advocate planning policies that put social justice and the environment at the heart of the planning debate.

OP4

Heroes and Villains—Challenge and Protest in Planning: What's a Developer To Do?

Simon Ricketts

Simon is a Partner at King & Wood Mallesons SJ Berwin. He has been voted the country's most highly rated planning solicitor in Planning magazine's annual surveys 2010–2014 and is co-author of *Localism and Planning* (Bloomsbury, 2012).

OP9

An Environment for Change: Using Law to Protect the Planet

Gita Parihar LLM

Gita is Head of Legal at Friends of the Earth ("FoE") England, Wales and Northern Ireland. Before joining FoE she worked for environmental and human rights law firm Public Interest Lawyers and trained at Bates, Wells & Braithwaite.

OP31

Fit to Frack?

Catherine Howard

Catherine is a Senior Associate at Herbert Smith Freehills LLP. She has promoted a number of infrastructure projects, including the New Tyne Crossing and EDF Energy's Hinkley Point C nuclear power station. She is currently acting for Cuadrilla Resources in relation to their hydraulic fracturing operations in the UK.

OP43

Planners as Alchemists: How to Deliver the Homes that we Need

Kate Davies

Kate joined Notting Hill Housing as Chief Executive in 2004. She was previously Chief Executive of Servite Houses and Director of Housing in Brighton and Hove. She has experience in local government and the private and voluntary sectors.

OP78

Making the Past—Delivering the Future

Kelvin MacDonald MCIH FRTPI FRSA

Kelvin is Senior Visiting Fellow at the Department of Land Economy, Cambridge. He is Specialist Advisor to the House of Commons Communities and Local Government Select Committee and a member of the Board of Shelter. He has been an Examining Inspector with the Planning Inspectorate.

OP88

Local Heroes: Neighbourhood Planning in Practice

Ruth Stanier OBE

Ruth is Director of Planning at the Department for Communities and Local Government. She led work to introduce the National Planning Policy Framework and the Growth and Infrastructure Act 2013. She has previously worked on housing policy and has also held posts at the Cabinet Office, Department of Health, and Department for Transport.

OP105

Neighbourhood Planning on the Ground

John Walker BA(Hons) MRTPI

John is the Operational Director for Development Planning at Westminster City Council overseeing the busiest planning authority in the UK. The pressure for development is intense with over 12,000 applications handled every year.

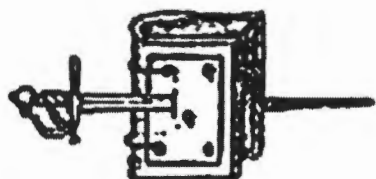
OP117

Legal Update: What Have Been the Key Issues Emerging From Cases Over the Past Year?

Richard Harwood OBE QC MA LL.M (Cantab)

Richard is a leading planning and environmental Silk at Thirty Nine Essex Street. A case editor of the Journal of Planning and Environment Law, his books include Historic Environment Law and Planning Enforcement.

OP139



LAW & LITERATURE

FALL 2014 VOLUME

26
NUMBER 3

- 261 Literary Criticism and the Polygraph
Maria Sequeira Mendes
- 281 "It Could Only Happen in England": Law and the State of
the Nation in the Plays of Terence Rattigan
Alex Feldman
- 303 Fraternal Fracture and the Court of Law: New Zealand's
1954 Parker-Hulme Trial
Nadia Gush
- 321 The Damned Dolls
Bruce L. Hay
- 343 Biopolitics and Thanatopolitics at Guantánamo, and the
Weapons of the Weak in the Lawfare over Force-Feeding
Marouf Hasian, Jr.
- 365 Heart, Science, and Regulation: Victorian Antivivisection
Discourse and the Human
Sara Murphy
- 389 Fragmented Method: Walter Benjamin, Law, and
Representation in Joseph S. Jenkins' *Inheritance Law and
Political Theology in Shakespeare and Milton*
Matthew Nicholson

JRNL
R512

Revue belge de droit international

**VOL. XLVI
2013 - 2**

Table des matières - Inhoud - Table of Contents

DOSSIER SPÉCIAL :

sous la direction de Jan WOUTERS et Matthieu BURNAY

The international rule of law: European and asian perspectives

| | | |
|------------------------------|---|-----|
| WOUTERS, J. et BURNAY, M. | Introduction — The International Rule of Law: European and Asian Perspectives | 299 |
| HACHEZ, N. | What Elements of the Rule of Law can be put to use at International Level? | 307 |
| HIVONNET, J. | The EU and the Promotion of Rule of Law in Post- conflict Situations: the Case of Kosovo | 325 |
| BURNAY, M. et WOUTERS, J. | China in the UN Security Council: What are the Impli- cations for the International Rule of Law? | 343 |
| VANOVERBEKE, D. | Exporting the Rule of Law in East Asia: Japan's Expe- riences from the 1990s to Present | 364 |
| SEN, R. | The Indian Perspective on the International Rule of Law: Through the Lens of International Agreements on Free Trade | 382 |

DOSSIER SPÉCIAL :

coordonné par Olivier CORTEN

Les obligations internationales de l'Union européenne et de ses États membres concernant les relations économiques avec les colonies israéliennes

| | | |
|---------------|---|-----|
| DUGARD, J. | Avant-propos | 407 |
| DUBUISSON, F. | Les obligations internationales de l'Union européenne et de ses États membres concernant les relations écono- miques avec les colonies israéliennes | 408 |
| MOULIER, I. | Les implications des obligations de non-reconnaissance et de non-assistance au maintien de la situation illicite issue de la politique de colonisation d'Israël pour les États tiers | 490 |
| KOLB, R. | Commentaires iconoclastes sur l'obligation de faire respecter le droit international humanitaire selon l'ar- ticle 1 commun des Conventions de Genève de 1949. | 513 |

ÉTUDES - STUDIES - STUDIES

| | | |
|---------------------------|--|-----|
| PAPAU, A. et WYLER, E. | Le droit international public libéré de ses sources for- melles : nouveau regard sur l'article 38 du statut de la Cour internationale de justice | 525 |
| ALBINE, G. | La doctrine de l'étranger proche et les conflits gelés | 585 |
| WEYERS, L. | La chasse à la baleine dans l'Antarctique : une applica- tion du principe de l'exercice raisonnable des compé- tences discrétionnaires de l'État. | 618 |

COMPTES RENDUS - BOEKBESPREKINGEN - BOOK REVIEWS

INDEX 2013

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September 2014

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CONTENTS

| | |
|---|----|
| Evolution of Chattel Paper: From Possession to Control <i>Thomas E. Plank</i> | 1 |
| The UNCITRAL Guide on the Implementation of a Security Rights Registry: Part IV in a Great UNCITRAL Saga <i>Spyridon V. Bazinas</i> | 51 |
| Consumer Financing Pre-Dispute Mandatory Arbitration: Consumer Financial Protection Bureau (CFPB) Developments <i>Louis F. Del Duca</i> | 71 |
| Current Literature | 93 |



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