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Abstracts

Articles

**Managerial Judging Goes International, but Its
Promise Remains Unfulfilled: An Empirical
Assessment of the ICTY Reforms**

*Máximo Langer &
Joseph W. Doherty* 241

This Article analyzes whether managerial judging reforms introduced to expedite the procedure at the International Criminal Tribunal for the Former Yugoslavia (ICTY) achieved their goal. Using multivariate survival analysis, the Article tests the hypothesis that the higher the number of reforms a case was subjected to, the shorter the pretrial and trial phase of that case should be. Our four models for pretrial and trial reveal that the number of reforms is significantly correlated with longer pretrial and trial phases. The Article explains that the reforms made the process longer rather than shorter because they added new procedural steps, requirements, and work without delivering promised results, such as lower numbers of incidents under discussion at trial, live witnesses testifying at trial, and interlocutory appeals entertained by the Appeals Chamber. The reforms did not deliver these promised results because ICTY judges either did not use their managerial powers or used them deficiently, and the parties managed to neutralize the implementation of the reforms. To explain judges' behavior and the parties' ability to neutralize the reforms, this Article argues that an unnoticed challenge for managerial judging is that the court is likely to have limited information about the case, which may lead judges to restrict use of their managerial powers to avoid making inefficient or unfair decisions, and enables the parties to neutralize the court's decisions. In addition, the ICTY lacked an implementation plan to encourage judges to change their behavior. The Article also explains the incentives that prosecution and defense had to neutralize the reforms.

**Fundamental Norms, International Law, and the
Extraterritorial Constitution**

Jules Lobel 307

*This Article argues that the functional test articulated in *Boumediene v. Bush*, which determines whether the Constitution's Suspension Clause applies to executive detention abroad, is in considerable tension with the fundamental norms jurisprudence that underlies and pervades the Court's opinion. Drawing on Supreme Court precedent and lower court jurisprudence regarding the extraterritorial application of constitutional rights, as well as comparative and historical practice—including the intent of the Framers—the Article seeks to reintegrate the fundamental norms strands of the *Boumediene* opinion into its functional test, and thus to normatively ground the opinion. It does so by arguing that the functional test for extraterritorial application of habeas rights should be informed by international law, a consideration that the *Boumediene* decision omitted from its analysis. The Article concludes that utilizing international law's substantive, fundamental, nonderogable norms to help determine whether constitutional protections apply abroad would both allay the Court's practical concerns and ground the Court's test in the important normative principles that in fact underlie its *Boumediene* opinion. Applied to the habeas context, this analysis suggests that detainees held by the United States military for a prolonged period of time at a military base or other secure facility without being afforded adequate due process are constitutionally entitled to habeas review to assert claims that they are civilians and not enemy combatants.*

The skills and innovations of indigenous and local communities—their so-called “traditional knowledge”—go largely unrecognized by intellectual property law. Meanwhile, patent and copyright law reward the innovative and creative contributions of individuals and firms that freely use traditional knowledge as inputs for a variety of products. This perceived inequity has inspired the ire of indigenous groups, advocates, and developing country governments, has led to impassioned accusations of “biopiracy” and “first-world imperialism,” and has triggered various reform efforts. Despite a decade of trying, however, traditional knowledge holders and their advocates still seek meaningful recognition and rights within the international IP framework. This Article argues that the doctrinal and normative divide between traditional knowledge and intellectual property law has been overemphasized and that trade secret law can potentially narrow it. The application of trade secret law to protect traditional knowledge—a “trade secret approach”—is a practical path forward in the current international impasse. Moreover, the underlying justifications for trade secret law offer a useful normative guide for theorizing traditional knowledge protection and linking it to the broader purposes of IP law. Like trade secret law generally, the protection of traditional knowledge can ultimately serve the broader purposes of IP law by reducing holders’ distrust in negotiating with outsiders and by encouraging the disclosure of potentially valuable secret information to more productive users and improvers.

Cyber-attacks—efforts to alter, disrupt, or destroy computer systems, networks, or the information or programs on them—pose difficult interpretive issues with respect to the U.N. Charter, including when, if ever, such activities constitute prohibited “force” or an “armed attack” justifying military force in self-defense. In exploring these issues, and by drawing on lessons from Cold War legal debates about the U.N. Charter, this Article makes two overarching arguments. First, strategy is a major driver of legal evolution. Whereas most scholarship and commentary on cyber-attacks has focused on how international law might be interpreted or amended to take account of new technologies and threats, this Article focuses on the dynamic interplay of law and strategy—strategy generates reappraisal and revision of law, while law itself shapes strategy—and the moves and countermoves among actors with varying interests, capabilities, and vulnerabilities. Second, this Article argues that it will be difficult to achieve international agreement on legal interpretation and to enforce it with respect to cyber-attacks. The current trajectory of U.S. interpretation—which emphasizes the effects of cyber-attacks in analyzing whether they cross the U.N. Charter’s legal thresholds—is a reasonable effort to overcome translation problems of a Charter built for a different era of conflict. However, certain features of cyber-activities make international legal regulation very difficult, and major actors have divergent strategic interests that will pull their preferred doctrinal interpretations and aspirations in different directions, impeding formation of a stable international consensus. The prescription is not to abandon interpretive or multilateral legal efforts to regulate cyber-attacks, but to recognize the likely limits of these efforts and to consider the implications of legal proposals or negotiations in the context of broader security strategy.

Note

The Battle After the War: Gender Discrimination in
Property Rights and Post-Conflict Property Restitution

Sharanya Sai Mohan 461

Gender discrimination in property law often prevents displaced women from returning to their homes and communities after conflict, leaving them homeless or dependent upon relatives for housing and land. This Note argues that, for the sake of both equality and a peaceful recovery from conflict, property restitution programs need to correct for this discrimination and restore property to women who did not have formal legal rights to their property prior to conflict. Through property restitution, domestic and international actors can use transitional justice as an opportunity to create long-lasting property rights reform in post-conflict states.

