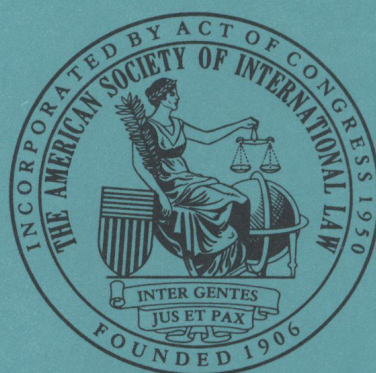


*American
Journal of
International
Law*

*January 2004
Vol. 98 No. 1*



Published by

The American Society of International Law

New from OXFORD

International Human Rights and Islamic Law

MASHOOD A. BADERIN

This volume is a comprehensive and authoritative comparative analysis which asks whether Muslim states can comply with international human rights law whilst adhering to Islamic law. The traditional arguments on this subject are examined and responded to from both international human rights and Islamic legal perspectives.

(Oxford Monographs in International Law)

2003 \$95.00

Principles of Public International Law

Sixth Edition

IAN BROWNLIE

The sixth edition of this comprehensive and authoritative text has been thoroughly revised and updated to take into account all changes in the field of public international law since 1998. Its clarity, excellent structure, detailed referencing and depth and maturity of analysis make it the ideal text for students, scholars and practitioners.

2003 cloth \$115.00 paper \$45.00

Justice, Legitimacy, and Self-Determination

Moral Foundations for International Law

ALLEN BUCHANAN

Buchanan advances vigorous criticisms of the central dogmas of international relations and international law, arguing that the international legal system should make justice, not simply peace among states, a primary goal, and rejecting the view that it is permissible for a state to conduct its foreign policies exclusively according to what is in the "national interest."

(Oxford Political Theory)

2003 \$35.00

New in Paperback!

International Economic Law

ANDREAS LOWENFELD

This important volume presents a comprehensive exploration of the legal foundations of the international economy. Covering all aspects of international economic law, such as the GATT/WTO, the International Monetary System, transnational investment and economic sanctions, it will be of interest to international lawyers and non-specialists alike.

(International Economic Law Series)

2002 (paper 2003) paper \$45.00 cloth \$125.00

New in Paperback!

Commitment and Compliance

The Role of Non-Binding Norms in the International Legal System

Edited by DINAH SHELTON

This is the first book to evaluate the impact of state behavior of international norms adopted in forms that are not legally binding. Whether and how such norms can be used effectively to supplement or substitute for legally binding obligations forms the heart of this discussion.

2000 (paper 2003) paper \$35.00 cloth \$140.00

Human Rights

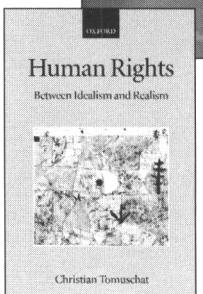
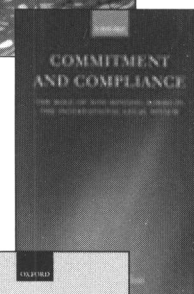
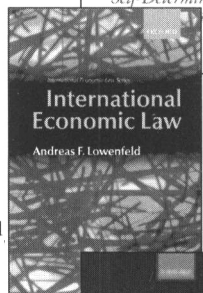
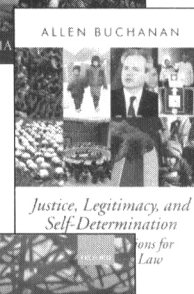
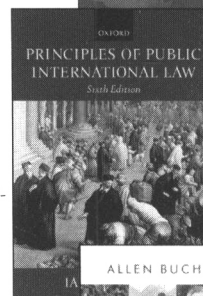
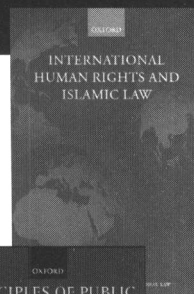
Between Idealism and Realism

CHRISTIAN TOMUSCHAT

Beginning with an analysis of the historical and conceptual foundations of human rights, this volume focuses on the different mechanisms which may be employed in translating human rights from a promise into a reality.

(Collected Courses of the Academy of European Law)

2003 paper \$40.00 cloth \$80.00



OXFORD
UNIVERSITY PRESS

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

AMERICAN JOURNAL OF INTERNATIONAL LAW

VOL. 98

January 2004

NO. 1

CONTENTS

PAGE

Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict	<i>Kenneth Watkin</i>	1
<p style="padding-left: 2em;">Increasingly, the use of force during armed conflict is being assessed through the perspective of human rights law, as a result of the overlap between the paradigms of criminal law enforcement and international humanitarian law. Situations of noninternational armed conflict, occupation, and terrorism are especially suited to the application, with some adjustment, of the better developed human rights accountability principles to ensure that there are no gaps in humanitarian protection.</p>		
Oscar Schachter (1915–2003)	<i>Lori Fisler Damrosch</i>	35
Agora: The United States Constitution and International Law		
Editors' Introduction	<i>Lori Fisler Damrosch and Bernard H. Oxman</i>	42
International Law as Part of Our Law	<i>Harold Hongju Koh</i>	43
Misusing International Sources to Interpret the Constitution	<i>Roger P. Alford</i>	57
International Materials and Domestic Rights: Reflections on <i>Atkins and Lawrence</i>	<i>Michael D. Ramsey</i>	69
The Uses of International Law in Constitutional Interpretation	<i>Gerald L. Neuman</i>	82
International Law, Sovereignty, and American Constitutionalism: Reflections on the Customary International Law Debate	<i>T. Alexander Aleinikoff</i>	91
Editorial Comment		
International Law Status of WTO Dispute Settlement Reports: Obligation to Comply or Option to "Buy Out"?	<i>John H. Jackson</i>	109
Notes and Comments		
The Challenge to the Mandatory Death Penalty in the Commonwealth Caribbean	<i>Joanna Harrington</i>	126
Current Developments		
Restrictions on U.S. Attorneys Practicing Before International Criminal Tribunals	<i>Jonathan G. Cedarbaum</i>	141
International Decisions		
<i>United States—Continued Dumping and Subsidy Offset Act of 2000</i> (Mark L. Movsesian)		150
WTO Appellate Body decision regarding challenges to U.S. "Byrd Amendment"		

<i>Loewen Group, Inc. v. United States, and Mondev International Ltd. v. United States</i> (William S. Dodge)	155
ICSID arbitral awards addressing the protection of foreign investment under NAFTA Chapter 11	
<i>UNESCO-France Arbitration</i> (Douglas D. Reichert)	163
Ad hoc arbitration award on the immunity from taxation in France of the retirement pensions of former UNESCO officials	
Contemporary Practice of the United States Relating to International Law	
<i>Edited by Sean D. Murphy</i>	
<i>U.S. Immunity from Suit Under FTCA Regarding Security Measures at Nairobi Embassy</i>	169
<i>UN Resolution Demanding That Israel Not Deport or Threaten Palestinian President</i>	171
<i>Protection of UN and Humanitarian Personnel in Conflict Zones</i>	172
<i>Senate Testimony Regarding U.S. Adherence to Law of the Sea Convention</i>	173
<i>Environmental Torts Do Not Violate Customary International Law</i>	175
<i>Ratification of the 1999 Montreal Convention on Aviation Liability</i>	177
<i>WTO Decision Striking Down U.S. Steel Safeguard Measures</i>	179
<i>Canadian Deportation to United States of Death-Penalty Convict</i>	180
<i>Enactment of PROTECT Act Against Sex Tourism</i>	182
<i>Adoption of UN Convention Against Corruption</i>	182
<i>Testimony by U.S. General Before the ICTY</i>	184
<i>Second Circuit Rejection of Presidential Power to Declare U.S. National "Enemy Combatant"</i>	186
<i>Ability of Detainees in Cuba to Obtain Federal Habeas Corpus Review</i>	188
<i>Turmoil in Iraq, Transitional Arrangements, and the Capture of Saddam Hussein</i>	190
<i>U.S. Support for Multinational Intervention in Liberia</i>	193
<i>U.S./UK Negotiations with Libya Regarding Nonproliferation</i>	195
<i>Refusal to Confirm an Arbitral Award Against Nonsignatory Government</i>	197
Recent Books on International Law	
<i>Edited by Richard B. Bilder</i>	
Review Essay: International Law Casebooks: Tradition, Revision, and Pedagogy. Blakesley, Christopher L., Edwin B. Firmage, Richard F. Scott, and Sharon A. Williams. <i>The International Legal System: Cases and Materials</i> (5th ed.); Carter, Barry E., Phillip R. Trimble, and Curtis A. Bradley. <i>International Law</i> (4th ed.); Damrosch, Lori Fisler, Louis Henkin, Richard Crawford Pugh, Oscar Schachter, and Hans Smit. <i>International Law: Cases and Materials</i> (4th ed.); Dunoff, Jeffrey L., Steven R. Ratner, and David Wippman. <i>International Law: Norms, Actors, Process: A Problem-Oriented Approach</i> ; Janis, Mark W., and John E. Noyes. <i>Cases and Commen- tary on International Law</i> (2d ed.) (David J. Bederman)	200
Book Reviews	
Byers, Michael, and Georg Nolte (eds.). <i>United States Hegemony and the Founda- tions of International Law</i> (Detlev F. Vagts)	214
Klabbers, Jan. <i>An Introduction to International Institutional Law</i> (Frederic L. Kirgis)	216
Schreuer, Christoph H. <i>The ICSID Convention: A Commentary</i> (David D. Caron)	219
Pollack, Mark A., and Gregory C. Shaffer (eds.). <i>Transatlantic Governance in the Global Economy</i> (Kenneth W. Abbott)	220
Barrett, Scott. <i>Environment and Statecraft: Strategies of Environmental Treaty-Making</i> (Jeffrey L. Dunoff)	224
Knop, Karen. <i>Diversity and Self-Determination in International Law</i> (Gregory H. Fox)	229
Aleinikoff, T. Alexander, and Vincent Chetail (eds.). <i>Migration and International Legal Norms</i> (Linda S. Bosniak)	234
Eggli, Ann Vibeke. <i>Mass Refugee Influx and the Limits of Public International Law</i> (Jane McAdam)	237
Books Received	241
International Legal Materials. Contents, Vol. XLII, No. 6 (November 2003); Vol. XLIII, No. 1 (January 2004)	245

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. TROBOFF
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
OSCAR SCHACHTER (1915–2003)
Columbia University School of Law
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>	ANNE-MARIE SLAUGHTER
<i>President Elect</i>	JAMES H. CARTER
<i>Vice Presidents</i>	JOSÉ E. ALVAREZ, LUCINDA LOW, DAVID A. MARTIN
<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, LOUIS B. SOHN, PETER D. TROOBOFF, EDITH BROWN WEISS	
<i>Honorary Vice Presidents:</i> CHARLES N. BROWER, THOMAS M. FRANCK, ARTHUR W. ROVINE	
<i>Counsellors:</i> ROSEMARY BARKETT, RICHARD B. BILDER, IAN BROWNLIE, HILARY CHARLESWORTH, LORI FISLER DAMROSCH, TOM J. FARER, JOHN KING GAMBLE, CONRAD HARPER, RITA E. HAUSER, ROSALYN HIGGINS, JOHN H. JACKSON, SUSAN L. KARAMANIAN, MARTTI KOSKENNIEMI, MICHAEL J. MATHESON, JOHN NORTON MOORE, VED P. NANDA, SANDRA DAY O'CONNOR, W. MICHAEL REISMAN, STEPHEN M. SCHWEBEL, DINAH L. SHELTON, JEROME SHESTACK, PATRICIA WALD, EDWIN D. WILLIAMSON, DIANE P. WOOD	
<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	ALWYN V. FREEMAN*	ROBERT F. MEAGHER
GERALD AKSEN	JOHN KING GAMBLE	HUSAM MESHAL
ARTHUR R. ALBRECHT	RONALD E. M. GOODMAN	W. ROBERT MORGAN*
TEYMOUR A. ALIREZA	KATHERINE GOROVE	VED P. NANDA
MAHNOUSH H. ARSANJANI	CHRISTOPHER J. GREENWOOD	BERNARD H. OXMAN
FRANK A. BAUMAN	JOHN LAWRENCE HARGROVE	HERMAN PHLEGER*
MRS. RICHARD BAXTER*	VICTORIA M. HARIRI	W. MICHAEL REISMAN
DAVID J. BEDERMAN AND LORRE B. CUZZE	RITA E. HAUSER	ANDRÉS RIGO
DANIEL L. BETHLEHEM	JOHN N. HAZARD*	DAVIS R. ROBINSON
JOHN A. BOYD	ALICE AND LOUIS HENKIN	WILLIAM D. ROGERS
CHARLES N. BROWER	KEITH HIGHET*	ARTHUR W. ROVINE
IAN BROWNLIE	HOWARD M. HOLTZMANN	SEYMOUR J. RUBIN*
RODMAN R. BUNDY	CHARLES A. HUNNICUTT	PHILIPPE J. SANDS
WILLIAM J. BUTLER	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
THOMAS M. FRANCK	EDWARD WATSON McWHINNEY	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®/NEXIS® services, P.O. Box 933, Dayton, OH 45401, USA, toll-free (800) 227-9597; and West Publishing Company, provider of WESTLAW®, 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, 188 Madison Ave., New York, NY 10016, (212) 592-7345). 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: (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. Phone: (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 ARTICLES AND BOOK REVIEWS

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. 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. *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*.