



ABILA Newsletter

Issue No. 72

ILA—Founded 1873

September 2005

PRESIDENT'S NOTE

This final Newsletter of 2005 illustrates the range of activities by the American Branch and its members. It begins with a description of International Law Weekend, by Paul Dubinsky. Professor Dubinsky, with his co-chair, Professor Lee Boyd, have worked tirelessly to put together perhaps the most imaginative ILW in memory. We hope that all of you—and many of your friends—will join us there on October 20-22.

Wil Burns, chair of the International Law Wildlife Law Committee, next outlines that committee's recent activities. The fact of the committee illustrates the premise of the American Branch—that people who have projects they want to pursue can initiate them within the context of the Branch, where we hope to support them.

Lee Boyd and Louise Ellen Teitz describe two recent and very different developments in International Law. Professor Boyd describes a recent Ninth Circuit decision addressing the rights of holocaust survivors to bring claims against the Vatican Bank. Professor Teitz writes about the recently-signed Convention on Choice of Court Agreements. Both professors actually participated in the developments they write about, Professor Boyd as an attorney for the Plaintiffs in the Alperin case and Professor Teitz as a negotiator at the Hague Conference on Private International Law.

Finally, we note a number of recent books which our members either wrote, edited or contributed to. The topics run from a Model Family Law Arbitration Act to the law of war. We mention two other conferences which American Branch is either sponsoring or co-sponsoring—a regional meeting at Case Western Reserve University School of Law on the aftermath of 9/11 and the American Bar Association's Section of International Law 2005 Fall Meeting, to be held in Brussels on October 26-29.

We encourage other members to bring your diverse and creative ideas to the Branch, be they small conferences, new committees or stand alone projects.

Charles D. Siegal

INTERNATIONAL LAW WEEKEND

By Paul Dubinsky

From October 20-22, International Law Weekend 2005 will take place in New York City at the House of the Association of the Bar of the City of New York on 44th Street and Sixth Avenue. This year's conference, entitled "International Norms in the 21st Century: Development and Compliance Revisited," will feature more than thirty panels and other events exploring a common theme -- the extent to which international law has progressed beyond the age of widespread noncompliance to an era in which legal norms are being complied with by a range of actors (e.g., states, international organizations, multinational business entities) and across a wide range of subject areas, both public and private.

The opening session will feature a roundtable discussion among five jurists who have served with distinction on appellate courts in five different countries: Baltazar Garzon Real of Spain, John Gibbons of the United States, Sujata Manohar of India, Lord Gordon Slynn of the United Kingdom, and Xhezair Zaganjori of Albania. Each will draw upon his or her personal experience in applying international law in the context of litigation in domestic courts and the growing difficulty of doing so because of the increasing complexity of international law.

The keynote address at the annual Saturday luncheon will be delivered by the Honorable Theodore Meron, President of the International Criminal Tribunal for the former Yugoslavia. Judge Meron, an authority on international humanitarian law, will speak on the continuing relevance of customary international law in that field.

This year's ILW will also feature several events on the relationship between international law and the arts. These events include an exhibition of the work of an award-winning photographer, Paolo Pellegrin, whose work has focused on the AIDS epidemic in Uganda and the mass displacement of victims in Sudan. A lunch seminar on Friday, October 21st will feature a discussion of the role of art, music, film, and literature in portraying and elucidating wartime atrocities. The conference will conclude with a screening of *Videoletters*, an award winning documentary filmed in the former Yugoslavia and featured in the 2005 Human Rights Film Festival.

This year's conference continues the ILW tradition of a reception hosted by a country mission to the UN. This year's reception will take place on the evening of Friday, October 21st. It will be hosted by the Venezuelan mission with the financial support of the law firm of Lieff, Cabraser, Heimann & Bernstein LLP. There will also be a Thursday night reception hosted by the law firm of White & Case LLP.

ILW 2005 is free of charge to ABILA members, students, and members of co-sponsoring organizations. Others may attend for a \$50 registration fee payable in advance or at the door.

The co-chairs of the ILW organizing committee are Professor Lee Boyd of Pepperdine Law School and Professor Paul Dubinsky of Wayne State University Law School. A complete schedule of events, registration forms, and other information can be found on the ABILA website, www.ambranch.org.

COMMITTEE REPORTS:

ACTIVITIES: WILDLIFE LAW COMMITTEE By Wil Burns, Chair

The Wildlife Law Committee of ABILA seeks to contribute to efforts to conserve endangered and threatened wildlife species by developing programs to strengthen international wildlife treaty regimes, regional accords and national legislation that implements international treaty regimes. The Committee has been involved in several ongoing projects in the past year. In November, 2004, the Committee sponsored the 8th International Wildlife Law Conference at Tulane Law School. The meeting brought together 150 participants and included panels on the International Whaling Commission and regional cetacean conservation regimes; the impacts of anthropogenic sources of noise on ocean species; and emerging regimes to control invasive species. A special symposium issue of the *Journal of International Wildlife Law & Policy*, to be published in December 2005, will feature longer versions of the presentations from the ocean noise panel.

In November 2005, the 9th International Wildlife Law Conference will convene at Tulane Law School, and will include panels on regional wildlife regimes in the Caribbean and Antarctic, sea turtle conservation regimes, the Convention on International Trade in Endangered Species and approaches to conserve species in international rivers.

The Committee's website, <http://www.internationalwildlifelaw.org>, includes the text of hundreds of wildlife treaty regimes and national wildlife

legislation, research bibliographies, and a discussion list on migratory species. The site's resources have been substantially expanded in the past year and the site is now fully searchable.

Finally, as part of its role as an NGO Partner to the Agreement on the Conservation of Cetaceans of the Black Sea, Mediterranean Sea, and Contiguous Area, the Committee's Chair is developing a position paper on how to operationalize the precautionary principle in the regime. The paper will be presented at the 4th Meeting of the Scientific Committee of the regime in 2006.

DEVELOPMENTS:

HOLOCAUST RESTITUTION AND THE VATICAN

By Lee Boyd, Professor, Pepperdine University Law School and Counsel for Plaintiffs

On April 18, 2005, the Ninth Circuit Court of Appeal issued an opinion reversing in part the dismissal of a suit brought by survivors of the Holocaust against the Vatican Bank and the Order of Franciscan Monks. *See Alperin v. Vatican Bank*, 410 F.3d 532 (9th Cir. 2005). In a 2-1 decision, the Ninth Circuit recognized that the survivors' claims for restitution of property stolen during the Nazi government in the former Yugoslavia known as the Ustasha were not barred by the political question doctrine, the sole ground upon which the trial judge dismissed the lawsuit. The dissenting judge's critique of the majority's decision as "nothing less than the wholesale creation of a World Court, an international tribunal with breathtaking and limitless jurisdiction to entertain the World's failures," evidences the significance of the victory for the plaintiffs. *Id.* at 569 (Trott, J., dissenting).

Analyzing whether the political overtones required dismissal of the case, the court struggled with the Executive branch's continued silence in the case despite plaintiffs' request to intervene. With a clear nod to the coordinate branch, the court suggested that it was not too late for the Executive to weigh in. *Id.* at 556. However, as of the date of this Newsletter, the State Department has again declined the plaintiffs' request to intervene to broker a settlement as it has in other Holocaust restitution cases.

Looking to the future, the opinion detailed the massive "hurdles" that plaintiffs face on remand, including certification of over 70,000 class members, indicating that their victory may be pyrrhic after all. *Id.* at 539. Nevertheless, the majority stated that "in the landscape before us, this lawsuit is the only game in town with respect to claimed looting and profiteering by the Vatican Bank." *Id.* at 558. Whether the Vatican will voluntarily open its archives to shed light on the alleged transfers of

money from the Ustasha, remains to be seen. The plaintiffs hope that the Vatican Bank will now reconsider its assertion that the lower court still has no jurisdiction in the case, and drop its other arguments for dismissal, such as lack jurisdiction under the Foreign Sovereign Immunities Act, or expiration of the statute of limitations. The parties return to the Northern District of California this September.

HAGUE CONFERENCE: CONVENTION ON CHOICE OF COURT AGREEMENTS

By Louise Ellen Teitz, Roger Williams University School of Law

On June 30, 2005, the Hague Conference on Private International Law concluded the Convention on Choice of Court Agreements in a formal signing in the Peace Palace, after almost thirteen years of negotiations on jurisdiction and judgments. In an attempt to gain greater respect for U.S. judgments abroad and create a "level playing field," the United States government in 1992-93 encouraged the Hague Conference to begin work on a multilateral convention on foreign judgments. The negotiations on a comprehensive convention ultimately stalled and a decision was made after 2001 to put the comprehensive convention on hold. The Hague Conference instead began work on a smaller, scaled-back convention that would address choice of court clauses in the commercial context and provide an analogue for litigation to the Convention on Recognition and Enforcement of Foreign Arbitral Awards-- the New York Convention.

The final text is built around three basic rules: (1) the court chosen by the parties in an exclusive choice of court agreement has jurisdiction (Art. 5); (2) if an exclusive choice of court agreement exists, a court not chosen by the parties does not have jurisdiction, and shall decline to hear the case (Art. 6); and (3) a judgment resulting from jurisdiction exercised in accordance with an exclusive choice of court agreement shall be recognized and enforced in the courts of other Contracting States (Art. 8).

The Convention also includes an optional reciprocal declaration for countries wishing to recognize and enforce judgments (not agreements) resulting from non-exclusive choice of court agreements (Art. 22). In addition, States may declare that they will not apply the Convention to specific matters (such as asbestos for Canada), which will result not only in non-enforcement of a judgment in the declaring State, but also non-enforcement of choice of court agreements that designate the courts of the declaring State (Art. 21). The Convention language for non-enforcement of exclusive choice of court agreements provides a close parallel to the current U.S. standard under the *Bremen* case,

although the Convention does create a presumption of exclusivity of a choice of court agreement if not otherwise stated. The Convention has the potential to offer increased certainty and subsequent enforceability for commercial transactions. The text, subject to correction, is available on the Hague Conference website, www.hcch.net. Concluding the Convention is only the first step in the process of ratification in the U.S. On Friday, October 21st at 9am, a panel of distinguished experts will present the text of the Convention and provide perspectives on the path to ratification in the United States, Europe, and Canada.



BOOKS BY BRANCH MEMBERS

The United States and the Rule of Law in International Affairs (Cambridge University Press, 2004)

By John Murphy

The United States and the Rule of Law in International Affairs analyzes why the United States does not always accept the rule of law in international affairs, even though it has made immense contributions to its creation, adoption, and implementation. Examining the reasons for this failure, it analyzes a number of cases, not to make a case that the United States has been an international outlaw, but to illustrate the wide-ranging difficulties standing in the way of U.S. adherence to the rule of law. It explains how the nature of the U.S. legal system and the idiosyncrasies of the international legal process combine to compound problems for the United States, and explores several alternative scenarios for the position of the United States vis-à-vis international law.

Digest of U.S. Practice in International Law
Co-edited by David P. Stewart and Sally J. Cummins
International Law Institute

Since resuming publication in 2000, four annual volumes of this invaluable resource have been published, (for the years 2000-2003). The volume for 1989-90 has been out, and the multivolume set for 1990-1999 has gone to the printer. Orders can be placed at www.ili.org.

The World Trade Organization: Legal, Economic and Political Analysis

Articles by Gary Horlick (Macrory, Appleton and Plummer, eds.) 2005.

Law in the War on International Terrorism,
Edited by Ved P. Nanda (Transnational 2005)

Recent legal responses to international terrorism have been unprecedented and, in certain instances, controversial. Challenges for the legal community, especially scholars, are to explore alternatives and recommend measures within a legal framework to solve

this multi-faceted problem. Contributors to this important book have accepted and risen to this challenge. They describe and provide a comprehensive and insightful analysis of the pertinent domestic, bilateral, regional and international legal developments in the war against terrorism. Subjects covered include: terrorism, international law and international organizations; the U.N. in the war against international terrorism; lawful and unlawful wars against terrorism; the threat of nuclear terrorism; detention of terrorists as unlawful combatants and their trial by American military tribunals; and much more. For more information on this publication, please go to www.transnationalpubs.com.

Model Family Law Arbitration Act

By George Walker

American Academy of Matrimonial Lawyers

Copies of the Model Act, including associated rules, can be obtained by sending a check or money order for U.S. \$20 per copy to the American Academy of Matrimonial Lawyers, 150 N. Michigan Avenue, Chicago, IL 60601.

We encourage those who would like to submit book reviews to contact David Stewart, stewartdp@state.gov.

UPCOMING EVENTS:

OCTOBER 7, 2005, ABILA REGIONAL MEETING, CASE WESTERN RESERVE UNIVERSITY SCHOOL OF LAW

In the aftermath of 9/11, many Americans across the political spectrum felt that it would be appropriate for the United States to use unconventional methods of obtaining information from suspected terrorists in order to prevent another major attack. But shocking revelations emerging from U.S. detention centers in Guantanamo Bay, Iraq, and Afghanistan, as well as the disclosure of the practice known as "extraordinary rendition" in which suspected terrorists are sent for interrogation to countries the U.S. Department of State condemns for human rights abuses, has transformed "torture and the war on terror" into one of the most controversial issues of our time. Are such practices moral, legal, effective, and sound policy? If not, what domestic and international forums are most appropriate for challenging them? These questions will be addressed in a day-long Regional Meeting of the American Branch of the International Law Association featuring former government and international organization officials, prominent academics, and

leading practitioners in the field. For details see: <http://www.law.case.edu>.

OCTOBER 26-29, 2005—AMERICAN BAR ASSOCIATION, SECTION OF INTERNATIONAL LAW FALL MEETING

The American Bar Association, Section of International Law will be returning to Brussels for their 2005 Fall Meeting at the Radisson SAS Hotel on October 26-29, 2005. The meeting will allow lawyers from both sides of the Atlantic and other parts of the world to network, exchange ideas, and learn more about emerging transatlantic and global cutting-edge legal and practice issues. Meeting highlights to include: Three full days of programming with tracks, which include Dispute Resolution, Trade, Antitrust, Commercial/Business, Finance, and Public Law. Also there will be a session with His Excellency Jaap de Hoop Scheffer, *Secretary General*, North Atlantic Treaty Organization, "an afternoon at the EU Institutions" focusing on the functioning of the decision-making bodies in Europe, and working sessions with leading individuals from international companies, public administrations and law firms. Finally, there will be a reception at Palais de Justice and a dinner at the Palais d'Egmont. For details on the 2005 Fall Meeting, please visit <http://www.abanet.org/intlaw/fall05/overview.html>.

NOVEMBER 4-5, 2005—UNCITRAL AND THE CENTER FOR INTERNATIONAL LEGAL EDUCATION OF THE UNIVERSITY OF PITTSBURGH SCHOOL OF LAW

The CISG and the Business Lawyer: The UNCITRAL Digest as a Contract Drafting Tool, A Symposium Celebrating the 25th Anniversary of the Vienna Sales Convention, November 4-5, 2005, at the University of Pittsburgh School of Law, Pittsburgh, Pennsylvania, U.S.A. The cost is U.S. \$200.00 for the two-day program, including lunch. Further information is available at <http://www.law.pitt.edu/academics/programs/cile-uncitral2005.php>, or contact cile@law.pitt.edu.

Save the Date!!

*October 20-22, 2005, at the House of the Association of the Bar of the City of New York
44th Street and 6th Avenue, New York City*

International Law Weekend 2005

International Norms in the 21st Century: Development and Compliance Revisited



Opening Night Roundtable Discussion Among Appellate Judges from Albania, England, India, Spain, and the United States

Friday Night Reception at the Venezuelan Mission to the UN

Saturday Luncheon Address by the Honorable Theodore Meron, President, International Criminal Tribunal for the Former Yugoslavia

Photography Exhibition, "Darfur 2004"

Screening of *Videoletters*, Winner of the 2005 HR WIFF Nestor Almendros International Documentary Film Prize

AND

Over 30 panel presentations on the impact of international law in arbitration, disability rights, environmental law, feminism, global insurance regulation, intellectual property protection, international sales, nuclear nonproliferation, sovereign debt restructuring, terrorism, torture, universal jurisdiction, UN reform, war crimes, and more

Free of charge to law students and members of sponsoring organizations. Details, registration forms, and full program available at www.ambranch.org