



ABILA Newsletter

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MESSAGE FROM THE PRESIDENT

Each year brings additional challenges to the international legal order. 2005 was no different. Conflict in Iraq, trade issues involving agriculture, genocide in Darfur, responses to the Indonesian tsunami, all at one level or another raised legal issues. Part of the task of the Branch is to address those issues in its conferences and to develop, through participation in the committees of the International Law Association and through the work of Branch committees, methods of addressing them. In 2005, we had two successful conferences. The first was International Law Weekend—West at Whittier Law School in January. The second was International Law Weekend, at the Association of the Bar of the City of New York in October, at which panels addressed issues of development of and compliance with international law of war and peace, human rights, intellectual property and a range of commercial issues. In addition, as the notices at the end of this Newsletter indicate, the Branch is co-sponsoring a range of meetings in 2006.

We welcome your participation in the activities of the Branch—its committees, its panels and, indeed, its Newsletter. In order to explore ways of making the Branch more useful generally and more useful to its members in particular, we have established a committee on the future of the Branch. David Stewart has generously agreed to chair the committee, Gary Horlick, Leila Sadat, Paul Dubinsky and Phil Moremen have offered to serve on it. We hope to have that report by International Law Weekend.

You may keep up with Branch activities on our website, www.ambranch.org. We welcome your ideas. My e-mail is Charles.Siegal@mtu.com and I am sure the Co-directors of Studies, Leila Nadya Sadat (sadat@wulaw.wusl.edu) and Roger Alford (roger.alford@pepperdine.edu), would like to hear from you, as well.

Charles D. Siegal

MICHAEL GRUSON

Michael Gruson, the Branch's Honorary Treasurer, died in New York on December 20, 2005. Michael was a leading attorney in both the United States and Germany. A long-time partner at Shearman & Sterling, Michael was instrumental in establishing many foreign banks in the United States. He was educated in Germany (University of Mainz, School of Law) and the United States (Columbia University) and was the author of several leading texts, including legal opinions in *International Transactions* and *Sovereign Lending: Managing Legal Risks*. In addition to lecturing and publishing widely, Michael was a visiting fellow at the Centre for Commercial Legal Studies, Queen Mary College, University of London and a visiting professor at Bucerius Law School, Hamburg. He was active in both the International Law Association and the International Bar Association. Michael sat on a range of boards, but we were particularly lucky to have had him as the Honorary Treasurer of our Branch. He handled our business affairs with aplomb and professionalism, but most important, he was an engaging and valued friend. We will miss his presence and his advice.

ADDITIONS TO EXECUTIVE COMMITTEE

At the Fall 2005 General Meeting, the Branch elected a new vice-president and two new members of the Executive Committee.

Vice-President: Gary Horlick

Mr. Horlick is a partner at the law firm of WilmerHale in Washington, DC. He specializes in international trade law and is the author of several books and many articles. In addition, Mr. Horlick lectures at Yale Law School, Georgetown Law Center, and the Universities of Berne, Neufchatel and Fribourg. He has been a member of the Executive Committee since 1984.

Members, Executive Committee:

Professor Lee Boyd

Professor Boyd currently teaches International Litigation, Human Rights, Civil Procedure and Complex Litigation at Pepperdine University School of Law. She has authored and co-authored various publications regarding human rights. She co-chaired the 2005 International Law Weekend.

Lorraine Brennan

Ms. Brennan is the Director of Arbitration and ADR, North America, ICC International Court of Arbitration. She serves as the American advisor to the International Court of Arbitration of the International Chamber of Commerce in Paris, France. Ms. Brennan is also one of eight U.S. members of the NAFTA 2022 Advisory Committee on Private Commercial Disputes.

PARTICIPATION IN ILA COMMITTEES:

The appendix to this Newsletter shows Branch members' participation in ILA committees. There are several additions:

- Professor Mary Ellen O'Connell has become Chairman of the ILA Committee on The Meaning of War.
- Professors Constance Wagner and Marsha Echols have joined the new ILA Committee on Biotechnology and the Law.
- Professor Ved Nanda has joined the ILA Committee on Teaching of International Law.

COMMITTEE CHANGES

We are pleased to announce the new chair of one Branch committee and the formation of a second Branch committee.

Professor James Gathii of Albany Law School has agreed to take over the chair of the Committee on Use of Force.

Professor David Kaye, formerly of the State Department Office of Legal Advisor, and presently at Whittier Law School, has agreed to organize a committee on International Humanitarian Law.

We urge anyone interested in the law of war or international humanitarian law to contact Professors Gathii or Kaye.

NEW ILA STUDY COMMITTEE TO REPORT ON THE MEANING OF WAR

In May 2005, the Executive Committee of the ILA approved a proposal to study the meaning of war in international law. The Committee will have a four year mandate to produce a report on the question. Mary Ellen O'Connell of Notre Dame Law School and the American Branch will chair the committee.

The proposal reads in part:

Since the time of Hugo Grotius and his seminal work, *THE LAW OF WAR AND PEACE*, international law has been organized around the existence of two contrasting social situations: the presence or absence of armed conflict. Of

course there is no immutable, scientifically-definable line between these socially-constructed concepts, and, therefore, a perennial challenge for international law has been understanding what is armed conflict and determining when the rules relevant to armed conflict apply. (Nathaniel Berman, *Privileging Combat? Contemporary Conflict and the Legal Construction of War*, 43 Col.J.Trans.L. (2004).) The challenge might have been somewhat less during the age of formalism when governments formally declared war, and, upon that declaration, the law relevant to war was triggered. But even then, the challenge remained where states were plainly engaged in warfare but did not declare it—or declared it where it was plainly not occurring.

With the adoption of the United Nations Charter, the law relevant to armed conflict is triggered upon facts of fighting, not declarations. (Also, with the adoption of the Charter, the term “armed conflict” was widely substituted for “war.”) With this change the challenge has shifted away from the problem of declarations to the problem of understanding what facts amount to armed conflict. We have a number of examples of governments denying that fighting on their territory amounts to armed conflict, arguing instead it is criminal activity that the government has under control and that the rules of war are therefore not applicable. With the September 11 attacks on the United States, however, we have a reversal of that more common issue—now we have an example of a government declaring war where many would call it crime.

One explanation for these controversies is that international law does not today contain an accepted definition of armed conflict. A definition or understanding can be built from a number of legal sources (Mary Ellen O'Connell, *What is War?*, <http://jurist.law.pitt.edu/forum/oconnell1.php>), but no widely-accepted standard exists against which to measure government claims. We lack such an accepted definition despite the fact that so much in the law turns on the meaning of armed conflict. In particular, a state's right of response under the *jus ad bellum* is determined, in part, by whether it is confronting an armed conflict or a lesser provocation. The *jus in bello* is in its entirety triggered by the existence of an armed conflict. With the passage from peace to armed conflict, the right to life becomes circumscribed by the combatant's right to kill; in armed conflict the enemy may be detained without trial until the end of hostilities, but those of the enemy who fight according to the laws and customs of war, should arguably be treated as prisoners of war, not criminals. Many other rights, such free navigation on the high seas, free trade, and asylum rights may be circumscribed in armed conflict but not in peace. Treaty obligations may be terminated or suspended by armed conflict. The obligations of neutral states are determined by the existence of armed conflict.

The lack of a widely-accepted definition may not have been a serious impediment to the proper functioning of the law when the problem was under-inclusion of armed conflicts. When a government contended it was not involved in armed conflict, it had to comply with the laws of peace, including the full panoply of human rights protections. True, some who should have been declared POWs were labeled common criminals, but that inequity pales in comparison to the rights violations that occur when a government claims the rights and privileges of wartime in non-war situations. In wartime, government forces have “combatant immunity” to kill without warning. They may detain enemy forces until the end of the conflict without the requirement to provide a speedy and fair trial.

The United States and other states, for example Russia, have claimed combatant immunity to kill suspected terrorists anywhere and the right to detain suspects indefinitely. Under this view the US – or any other state—has the legal right to target and kill an Al Qaeda suspect on the streets of Hamburg, Germany, or any other peaceful place. While numerous governments have protested America’s detention policies, few have protested the killing of six persons in Yemen as an exercise of the “combatant’s privilege.” It is not clear whether there is an emerging pattern of state practice and if so whether it is having a modifying effect on the meaning of armed conflict and/or the rules relevant to armed conflict. Antonio Cassese, in a short article published soon after September 11, decried what was being done to the categories of international law in the name of fighting terrorism. (Antonio Cassese, *Terrorism is Also Disrupting Some Crucial Legal Categories of International Law*, 12 EJIL 993 (2001).) More recently Thomas Franck has written suggesting a new legal status for persons accused of terrorism—somewhere between the peacetime status of criminal and the wartime status of combatant. (Thomas Franck, *Criminals, Combatants, or What? An Examination of the Roles of Law in Responding to the Threat of Terror*, 98 Am.J.Int’l.L. 686 (2004).)

It is time to undertake a thorough legal study of the meaning of armed conflict and the legal implications of a situation being characterized as one of war or peace. The study would consider the law as it existed on September 11, 2001 and consider changes that have possibly occurred since that date. The study is well suited to the ILA as the group would need to include recognized experts on international law and the use of force who are independent of any government and can take a long term view of the subject free from the demands of short term policy making. It is also appropriate that the ILA has a Committee/Study Group working on this most crucial question of contemporary international relations.

Mary Ellen O’Connell

BOOK REVIEW

Mann on the Legal Aspects of Money

By Charles Proctor (6th ed., Oxford University Press, 2005)

The increase in international business transactions over the past number of years has inevitably caused an increase in international monetary transactions. Attorneys who never thought they would have to deal with issues arising from international monetary transactions now find that they must do so because their clients are now buying or selling goods and services in international markets.

This makes publication of the sixth edition of *Mann on the Legal Aspects of Money* by Charles Proctor most timely. The first edition was published in 1938. Since the publication of the fifth edition some fifteen years ago, there have been significant developments in the field of money, most notably the introduction of the euro.

The volume is an excellent introduction to the international implications of the law of money. Mr. Proctor has done an excellent job of revising this standard work, particularly taking into account new case law from a variety of jurisdictions and new developments in international monetary law.

The new edition begins with a discussion of the concept of money and the monetary system. Then, the law of monetary obligations is discussed, with particular emphasis on two key principles – nominalism and *lex monetae*. According to the first, the stated value of money is of primary importance and the relative value of money is generally ignored. Thus, if a contract is entered into today for the payment \$100 one year from now, \$100 must be paid one year from now, regardless of the relative value of that \$100 at the time of payment. The second principle provides that each state’s monetary law must be respected by other states.

Proctor explains the legal aspects of exchange controls and rates thoroughly. He also provides an extensive, and mostly new, discussion of monetary unions, particularly the European Union. Of particular interest is his discussion of the effects of the introduction of the euro on international monetary law. Not surprisingly, he concludes that as a practical matter the use of the euro would be difficult to reverse.

This work is extremely well written, generally easily understood and well arranged. Each part and chapter has an introduction laying out the points discussed in that part or chapter. The discussion is thorough and supported by generous footnotes and citations to numerous cases from various jurisdictions. Chronologically, the cases range from the Middle Ages to the present.

Readers should know that the work emphasizes the monetary law of the English legal system and English cases. However, there are extensive discussions of aspects of monetary law in other legal systems, including the American legal system. Further, cases from many jurisdictions are also cited, including many from the United States.

Mann on the Legal Aspects of Money is an excellent addition to treatises on the law of money and belongs in the library of any attorney with an interest in the subject.

Reviewed by James Lynch

INTERNATIONAL CULTURAL LAW: LOOKING BACK AND LOOKING AHEAD

The ABILA and the American Society of International Law are co-sponsoring a panel on "International Cultural Law: Looking Back and Looking Forward" at the centennial meeting of the ASIL. The session will take place at 1:00-2:30 p.m., March 31, at the Fairmont Hotel in Washington, D.C.

During the past 100 years the international community has struggled with a welter of issues related to culture, cultural heritage and cultural divisions. The issues are diverse. Just a few current examples include the looting of museums, libraries and archaeological sites in Iraq; the marginalization of traditional knowledge in a global regime of intellectual property rights; the use by athletes in international competition of steroids and other performance-enhancing drugs; the Muslim headscarf question in France; and the suppression of linguistic and religious minorities throughout the world.

Over the years such issues have generated specific legal regimes and substantial legal commentary. The development of a coherent body of international cultural law is a work in progress whose origins coincide with those of the ILA and the ASIL. Both organizations have contributed significantly to the development of cultural heritage law in particular.

The panel session on March 31 will highlight the historical reciprocity of cultural concerns and international law before turning to cutting-edge developments today, including the work of the ILA Committee on Cultural Heritage Law. Professor James Nafziger, who chairs both that committee and the ABILA's executive committee, will also chair the panel session.

UPCOMING EVENTS:

MARCH 24, 2006—ISLAM, INTERNATIONAL LAW AND THE PROSPECTS FOR A DEMOCRATIC IRAQ, WHITTIER LAW SCHOOL

This symposium will bring together leading scholars in Islamic and international law and practitioners from the American Bar Association and the U.S. Department of State, among other institutions. The Bush Administration's recently published Iraq strategy document proclaims one of its short-term goals as helping foster an Iraq that is "building democratic institutions," and in the medium term, one that has "a constitutional, elected government in place, providing an inspiring example to reformers in the region." The goal is to help put such goals in context. Please contact David Kaye, Acting Director, Center for International and Comparative Law and Visiting Assistant Professor of Law, at (310) 985-2621 for more information.

MARCH 29-APRIL 1, 2006—100TH ANNUAL MEETING, AMERICAN SOCIETY OF INTERNATIONAL LAW, WASHINGTON, D.C.

The American Society of International Law's 100th Annual Meeting will be held at the Fairmont Hotel in Washington, D.C. This year is the centenary of the ASIL. The meeting will reflect on the theme, "A Just World Under Law." U.S. Supreme Court Justice Anthony Kennedy and Judge Rosalyn Higgins of the International Court of Justice will be featured speakers at this year's event. For further information, see <http://www.asil.org/events/am06/index.html>.

APRIL 5-8, 2006— ABA INTERNATIONAL LAW SECTION, SPRING MEETING, NEW YORK

The American Bar Association, Section of International Law will be having its Spring Meeting at the Waldorf-Astoria in New York on April 5-8, 2006. For more information, please visit its website at <http://www.abanet.org/intlaw/spring06/promo.html>.

JUNE 4-8, 2006—72ND BIENNIAL CONFERENCE OF THE INTERNATIONAL LAW ASSOCIATION IN TORONTO, CANADA

The Canadian Branch will host the 72nd Biennial Conference of the ILA. The ILA Conference will follow immediately after the 2006 International Council for Commercial Arbitration (ICCA) Congress in Montreal. ILA 2006 will provide a forum for the consideration and

adoption of the reports and recommendations of the ILA Committees and Study Groups, and for an exciting series of complementary lectures and panel presentations by leading international academics, judges and practitioners on a wide range of matters of topical concern. Many prominent international law organizations and leading law firms are developing the complementary program, which will highlight key issues in areas related to the work of the Committees.

Other activities for the delegates and guests will include the Conference Excursion on June 9 to Niagara Falls, several hosted receptions throughout the Conference, and a gala closing dinner. For more information, registration forms and costs, please visit the Conference website at www.ila2006.org.

INTERNATIONAL LAW WEEKEND—2006

This year's International Law Weekend will take place on October 26-28, 2006. The co-chairs are Lorraine Brennan (lbrennan@uscib.org) and Professor Peter Yu (peteryu@law.msu.edu).

INTERNATIONAL LAW WEEKEND—WEST 2007, SANTA CLARA LAW SCHOOL

Looking way ahead, International Law Weekend—West 2007 will be held at Santa Clara Law School, in Santa Clara, California in January 2007. You may contact Elizabeth Powers, Assistant Dean for the Center on Global Law & Policy, at epowers@scu.edu.

BOOK REVIEW OPPORTUNITY

Oxford University Press has offered to provide complimentary evaluation copies of its international law books to dues-paying ABILA members who prepare short book reviews (no more than 500 words) for publication in the ABILA Newsletter. Members interested in this program should review the list of recently published international law titles on Oxford

University Press's website at www.us.oup.com/us/catalog/general/subject/Law/InternationalLaw/?view=usa. Members may also receive details of new Oxford University Press books in their chosen area of interest on a regular basis by signing up at www.us.oup.com/us/subscriptions/subscribe/?view=usa. Thereafter, they should contact Executive Committee member David Stewart at stewartdp@state.gov. Mr. Stewart, who serves as the ABILA liaison to Oxford University Press and oversees the Branch's book review program, will work out the necessary arrangements.

AMERICAN BRANCH COMMITTEES

ARMS CONTROL AND DISARMAMENT

Chair: *Larry D. Johnson*
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LAW OF THE SEA

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SPACE LAW

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TEACHING INTERNATIONAL LAW

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USE OF FORCE

Chair: *Professor James Gathii*
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International Law Association Committees and U.S. Members

COMMITTEE NAME	CHAIR	RAPPORTEUR(S)	U.S. MEMBER(S)
Aspects of the Law of State Succession	Gerhard Hafner	Wladyslaw Czaplinski Marcelo Kohen	
Compensation for Victims of War	Luke T. C. Lee	Shuichi Furuya Rainer Hofmann	James Nafziger
Cultural Heritage Law	James Nafziger	Robert Paterson	
Diplomatic Protection of Persons and Property	Francisco Orrego Vicuna	David Bederman Juliane Kokott	Richard Bilder David Caron
Feminism and International Law	Sujata V. Manohar	Annette Lansink	Janie Chuang
International Civil Litigation and the Interests of the Public	Catherine Kessedjian	Richard Garnett	
International Commercial Arbitration	Filip De Ly	Audley Sheppard	Charles Brower Philip O'Neill Louise Ellen Teitz
International Criminal Court	Torsten Stein	William Schabas Goran Sluiter	Leila Sadat Michael Schard
International Family Law		William Duncan	
International Human Rights Law and Practice	Martin Scheinin	Andrew Byrnes Menno Kamminga	William Aceves Christina Cerna Hurst Hannum (Alternate) Charles Siegal
International Law on Biotechnology	Thomas Cottier	Michael Blakeney Michael Halewood	Marsha Echols Constance Wagner
International Law on Foreign Investment	Christoph Schreuer	Amazu Asouzu Peter Muchlinski	Jeffrey Atik Andrea Bjorklund Daniel Magraw, Jr.
International Law on Sustainable Development	Nicolaas Schrijver	Duncan French Ximena Fuentes	
International Monetary Law	William Blair QC		Thomas Baxter, Jr. James Freis, Jr. Cynthia Lichtenstein Andre Newburg Ernest Patrikis
International Securities Regulation	Edward Fleischman		Barbara Green Roberta Karmel Cynthia Lichtenstein
International Trade Law	E. U. Petersmann	Frederick Abbott Petros Mavroidis Friedl Weiss	Gary Horlick Joel Trachtman John Jackson Alan Swan
Islamic Law and International Law	HE Judge Awn Al-Khasawneh	James Busuttill Khadija Elmadmad	
Outer Continental Shelf	Dolliver Nelson	David Ong A.G. Oude Elferink	John Noyes
Practice and Procedure of International Tribunals	Campbell McLachlan Philippe Sands		
Space Law	Maureen Williams	Stephan Hobe	Carl Q. Christol Edward Finch, Jr. Joanne Irene Gabrynowicz
Teaching of International Law	Neville Botha	John Gamble	Valerie Epps Charlotte Ku Michael Scharf
Transnational Enforcement of Environmental Law	A. E. Boyle	Christophe Bernasconi Gerrit Betlem	David Bederman Gunther Handl Stephen McCaffrey Edith Brown Weiss
UNCITRAL	Paul Volken		
What Is War?	Mary Ellen O'Connell		