



ABILA Newsletter

Issue No. 76

ILA—Founded 1873

January 2007

MESSAGE FROM THE PRESIDENT

As we inaugurate some new programs, and because members and those who might consider being members sometimes need a bit of guidance about the Branch's structure, it seemed to be a good idea to review what we do and how we do it.

The American Branch is one of approximately 50 (the number changes periodically) branches of the International Law Association, which is headquartered in London. Every member of the American Branch is also a member of the ILA and, indeed, more than half of an individual member's dues go to the ILA.

The Branch has two principal categories of activity: committee work and conferences. A visit to our website (<http://www.ambranch.org>) shows the committees, ranging from arms control to use of force. When they work best, the committees demonstrate the entrepreneurial spirit the Branch cultivates: because of the Branch's stunning lack of bureaucracy, the committees exist to enable members to pursue their own ideas. Those range from book length reports, such as the Law of the Sea Committee's pending publication, to *amicus* briefs, which have come from the Human Rights Committee and the now-sunset Committee on Extradition and Human Rights, to the multi-author volume put together by the International Criminal Courts Committee some years ago. The Committees exist largely to provide a congenial environment for those with ideas to pursue.

The second principal function is our conferences: International Law Weekend each autumn, International Law Weekend—West every other year in January or February, and a range of regional conferences. (See attached schedule.) Again, conferences provide opportunities to assemble a panel to discuss a topic of shared interest, as well as a very important bridge to both law students (the conference is free to them) and the broader legal community. On a smaller scale, ILW-W provides like opportunities on the West Coast. In fact, we are contemplating an "ILW-Middle" conference, perhaps in Chicago in years when ILW-W does not occur.

Beyond the committees and the conferences, we are initiating a number of new modes of participation:

- Professor Paul Dubinsky is in the process of developing a series of talks by American Branch members to audiences ranging from law students to the general public.
- Professors Peter Yu and William Aceves are working on a form on our website, to which people could submit short articles or even drafts of articles for comment. (See below.)

Pursuing the theme of lack of bureaucracy, we would welcome other suggestions for participation in the Branch.

The ILA likewise operates through committees and more *ad hoc* study groups. One of the benefits of membership in a Branch committee is an opportunity to participate in an ILA committee. Again, the ILA committees are viewable at its website (<http://www.ila-hq.org>). The ILA also holds conferences, one every other year. The most recent was in Toronto and the next will be in Brazil. Professor Louise Ellen Teitz reports below on the International Dispute Resolution Committee meeting in Toronto.

Our branch has offered to hold the ILA Conference in 2016, the first time it has done so since 1972. We have every hope the offer will be accepted. We will then begin thinking of a proper venue.

The ILA has observer status at the United Nations. Its delegate is Professor Martin Glassner, who has prepared a report for this issue. Two of our members have recently been appointed alternates and we will begin receiving reports from them.

We hope that you will take a look at the committees and if you do not find one that interests you, think about starting your own. Please contact our new Directors of Studies, Professors Valerie Epps (vepps@suffolk.edu) and Philip Moremen (moremeph@shu.edu). We hardily welcome the participation of all other members on the theory that we all have something to gain from the knowledge of each other.

Charles Siegal

UPCOMING CONFERENCES

INTERNATIONAL LAW WEEKEND—WEST SANTA CLARA LAW SCHOOL FEBRUARY 2-3, 2007

Santa Clara University School of Law is pleased to host the ABILA's fourth biennial International Law Weekend—West Conference. The conference will be held on February 2 and 3, 2007 at Santa Clara University School of Law (SCU) in the San Francisco Bay Area. The conference will bring together legal practitioners and academics to discuss prominent issues in international and comparative law and the impact of globalization on the practice of law.

Friday's session will culminate in a keynote address, reception and dinner. The keynote will be delivered by Professor Neal Katyal of Georgetown Law Center. Professor Katyal was counsel for Salim Hamdan, the individual detained on Guantanamo who successfully challenged the Bush Administration's military commission program. Prior to joining the Georgetown faculty, he was law clerk to Justice Stephen G. Breyer of the U.S. Supreme Court and to Judge Guido Calabresi of the Second Circuit Court of Appeals. During 1998-99, Professor Katyal served as National Security Adviser to the Deputy Attorney General, U.S. Department of Justice.

Throughout Friday afternoon and all day Saturday, the conference will feature concurrent panels on the following timely topics:

- Recent Developments in NAFTA/CAFTA (moderated by Andrea Bjorklund of UC Davis School of Law);
- Law, Society & Geography (moderated by Hari Osofsky of U. of Oregon School of Law);
- Protecting the Cultural Heritage in War and Peace (moderated by Jim Nafziger of Willamette Law School);
- The Impending Extraordinary Chambers of Cambodia to Prosecute the Khmer Rouge (moderated by Beth Van Schaack of SCU);
- Protecting Intellectual Property Abroad (moderated by Alan Kindred, Esq.);
- Developments in Climate Change Litigation (moderated by Wil Burns, SCU);
- Aliens and Due Process (moderated by Lee Boyd, Pepperdine Law School);
- The Justice Cascade in Latin America (moderated by Beth Van Schaack of SCU);
- The Domestication of International Criminal Law (moderated by Alan Kindred, Esq.);

- The Future of Democracy Promotion After Iraq (moderated by Greg Fox of Wayne State School of Law); and
- Combating International Corruption Through law & Institutions (moderated by Bill Black of University of Missouri—Kansas City).
- Trying Enemy Combatants (Ida Bostian of SCU).

Like its East Coast sibling, ILW-West is free and open to the public. Prior ILW-West conferences have been held at Pepperdine Law School (2001), Loyola Law School (2003), and Whittier Law School (2005) with great success.

INTERNATIONAL LAW FORUM

In 2007, the ABILA will launch on its website a new International Law Forum, which will include original essays, speeches, and reprinted op-eds and Web log entries from ABILA members and international law experts. The site will also feature as guest contributors international law practitioners and professors. If you would like to participate in the International Law Forum, please contact Profs. William Aceves of California Western School of Law (wja@cwsl.edu) or Peter Yu of Michigan State University (peter_yu@msn.com).

TORONTO ILA CONFERENCE

COMMITTEE ON INTERNATIONAL COMMERCIAL ARBITRATION

Professor Louise Ellen Teitz

The Committee on International Commercial Arbitration, chaired by Professor Filip De Ly, Professor of Law at Erasmus University, Rotterdam, presented its final reports on *Res Judicata* and *Lis Pendens*, at the ILA June meeting in Toronto. The Committee had presented an earlier Interim Report on *Res Judicata* in Berlin in 2004. Audley Sheppard, a partner at Clifford Chance in London, served as Rapporteur for the entire project that was completed in Toronto. The Reports and the accompanying Recommendations address the increasing problem of parallel proceedings, both between an arbitral tribunal and a state court and between two arbitral tribunals (the Report also addresses the problem of proceedings before an arbitral tribunal and a supra-national court or tribunal), and the interrelated issue of finality and *res judicata* (the Final Report from 2006 and the Recommendations are available on the ILA website, under the International Commercial Arbitration Committee at www.ila-hq.org).

Many parallel proceedings, either in national courts or before arbitral tribunals, could be avoided or limited, depending on the conclusiveness of an earlier proceeding and the scope of any preclusion. Both *Res Judicata* and *Lis Pendens* implicate efficiency concerns and are a critical part in implementing party autonomy in choice of forum. The Committee Recommendations and Commentary, broken into two parts, one addressing *Res Judicata* and one addressing *Lis Pendens*, are designed to aid arbitrators when faced with these problems, rather than to set rules for state courts in applying their domestic laws. The Committee was also mindful of the possibility at this time of recommending transnational rules in some areas but also recognizing the need for further natural development to occur in some areas and the reference to conflict rules, especially in the area of *Res Judicata*. The *Lis Pendens* Recommendations generally encourage deference to earlier filed arbitral proceedings but consider situations and factors that might counsel otherwise. A tribunal is also encouraged to stay its own proceedings temporarily in light of other proceedings (court or arbitral) where it will avoid duplication or oppressive tactics by one party. The Recommendations also address the situation of parallel proceedings before a court, both that of the place of the arbitration and those outside that jurisdiction. For the latter situation, the arbitral tribunal is encouraged to proceed to determine its own jurisdiction under the general principles of *competence-competence*. When viewed together, the Recommendations for *Lis Pendens* and *Res Judicata* make a substantial contribution to avoiding duplication and resolving conflicting decisions.

The Committee has begun work on its next project, and in keeping with its penchant for those that concern Latin phrases, the project will address the determination of the content of applicable law in international commercial arbitration, *iura novit curia*. The ILA approved the appointment of Luca Radicati di Brozolo of Milan University and Mark Friedman of Debevoise and Plimpton's London office as Rapporteurs to replace Audley Sheppard who has stepped down after ten years of service to the Committee. The Committee anticipates presenting a report and recommendations at the 2008 Rio Conference. The next meeting of the Committee will be in March in Madrid.

BOOK REVIEWS

Universal Jurisdiction: International and Municipal Legal Perspectives

Luc Reydams

Oxford University Press, 2004 ISBN-13 9780199274260
ISBN-10 0199274266

Review by: Dr. Richard J. Erickson

When can a country prosecute and punish a foreigner for a crime committed abroad against another foreigner? This study of "universal jurisdiction" seeks to answer that question. It was written in fulfillment of requirements for the SJD degree at Notre Dame (the author has been on the adjunct faculty at the University's Political Science Department). Unlike most dissertations, this is a culling together of existing, rather than creative, thinking. The author raises intriguing and innovative questions but does not always explore them fully, notably the erosion of the concept of nationality by mass migration and high mobility, and the impact of technological advances on the concept of territoriality. Nonetheless, he offers a useful introduction to the topic, on which little is available in English.

Human rights movements embrace universal jurisdiction as a means of assuring accountability and avoiding impunity, but why would States want to try crimes without a territorial or nationality connection or absent a clear treaty obligation? The author poses several possible reasons: interests of a political nature, crime committed in a former colony, or furtherance of rule of law. Yet, for all the talk of universal jurisdiction, it is hard to identify anyone currently serving a jail sentence based upon it.

The study is restricted to a survey of national, not international courts. Its concern is crime, not torts or regulation of economic activity. The author is not concerned with the expediency of universal jurisdiction, the legality of investigations or proceedings, nor the immunity under international law of foreign officials. His focus is on with the concept of universal jurisdiction and its basis in municipal law.

Three doctrinal approaches to universal jurisdiction are discussed: "(1) the secondary or subsidiary jurisdiction of the custodial state over serious offenses if extradition of the subject is impracticable; (2) the jurisdiction, whether primary or subsidiary, of the custodial state over international offenses only; (3) the primary right of any State to try international offenses without regard to the offender's whereabouts." After reviewing the jurisdictional clauses of several multilateral treaties, the author concludes that the *aut dedere aut iudicare* (extradite or prosecute) is the prevailing formula.

Finally, the author reviews the municipal law of 14 countries selected because of the existence of criminal statutes or cases with universal jurisdiction aspects, because they represent the major legal systems, and because of the dominant role some of the countries play in shaping international law and policy. But he readily admits that the selection is not statistically

representative. Nearly all are “of the Western legal tradition.” Senegal is perhaps an exception, although it has a French heritage (yet only two and a half pages are devoted to it). Omitted are all Latin American, Asian and African (except for Senegal) countries. Also omitted are Russia, China, Brazil and Japan. One cannot help but believe that evidence of universal jurisdiction (or perhaps equally important, rejection of it) cannot be found in these legal systems.

Given continuing calls for the exercise of “universal jurisdiction” by sovereign states, this remains an important (if incomplete) study.

International Law: Cases and Materials

Donald K. Anton, Penelope Mathew & Wayne Morgan
Oxford University Press, 2005

ISBN: 019 551648 6

Reviewed by: Prof. Wil Burns

In this recent addition to the list of textbooks for an introductory international law course, the authors contend that it reflects the “changing nature of Australian law teaching, and . . . an attempt to present a more integrated approach to the fundamentals of the system.” Some U.S. professors may view the volume as an excellent opportunity to introduce a degree of comparative perspective into an introductory international law course, others may not.

The first chapter focuses on the nature of international law, its institutional structures, and key actors. Generally, the discussion takes a traditional approach, outlining the tenets of sovereignty, consent and positivism that underpin international law, providing a brief overview of the United Nations, and describing key State and non-state actors in the international legal system and critical issues in this context, such as recognition, jurisdiction and State immunities. The authors seek to introduce students to “new stream” international legal theory (the realm of critical, feminist, postcolonial and postmodern theorists) through two selections from feminist authors who argue that gender bias evinces the highly subjective nature of international law and the role of gender in international ideology.

Chapter 2 addresses the settlement of disputes, sources of international law, and state responsibility. The relationship of these three topics is not immediately apparent, and no justification is provided for conflating them. Nonetheless, the text does a credible job of describing the role of the ICJ and the contentious jurisdictional issues that often are associated with efforts to assert ICJ jurisdiction. Notably absent is any discussion of other dispute resolution forums, such as

regional courts or treaty-based mechanisms. The section on sources of international law is particularly strong in addressing issues associated with the elements of customary international law and its evolution. However, the sources section only devotes half a page to treaties, and then returns to a detailed treatment of this topic in the third chapter. The chapter does a good job of providing an overview of the elements for establishing state responsibility and important defenses.

Chapter 3 is devoted to treaty law. It does a good job of discussing the key provisions of the Vienna Convention on the Law of Treaties and describing how domestic and international courts have grappled with interpreting treaty provisions.

The second half of the book deals with the relationship between municipal and international law and the use of force, concluding with chapters on several substantive areas of regulation: trade, human rights, and the environment. The chapter on the interface of municipal and international law is particularly strong in introducing students to actual State practice in reconciling municipal and international law, though it suffers from an almost singular emphasis on the practice of western States. The chapter on international environmental law is clearly the weakest, focusing almost entirely on sustainable development issues and soft law instruments, while failing to introduce the students to the more than 700 multilateral environmental agreements that form the backbone of international environmental law practice in the 21st Century.

REPORT FROM THE UNITED NATIONS

Professor Martin Glassner, the ILA Delegate to United Nations, is a Branch member, and has had an extensive career in the Foreign Service, as a consultant and in academia. He has written many books, including two on landlocked states, a subject on which he has advised a number of governments and international organizations. The following are comments, somewhat edited, presented by Professor Glassner prior to the launch of the book described.

Geography Against Development—A Case for Landlocked Developing Countries

Publication organized by The United Nations Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States, July 2006

The following comments are intended to indicate certain features of the book that should be viewed with extra caution. I begin with the title. "Geography Against Development—A Case for Landlocked Developing Countries" immediately establishes opposition: man against nature, rich against poor, landlocked against coastal. In all of my work with landlocked countries and in my publications, I have emphasized the need for cooperation, not opposition. I believe a better title might have been "Geographical Challenges to Landlocked Developing Countries." If I have learned anything from my work on landlockedness over the past 40 years, it is that landlockedness is inherently a political problem, not a geographical one. It is caused by international boundaries, all of which are created by people, who nearly always have other priorities in mind and may not consider transit matters at all. This publication would have been even more valuable if it had taken political factors into account as well as economic ones.

Chapter 1, "The Development Quandary of Landlocked Developing Countries," rather thoroughly analyzes the question of just why landlockedness is a handicap to economic and social development. It explains even to uninformed readers, why some of these countries have made little or no progress in the past half-century.

Chapter 2, "Main Transit Transport Corridors Around the World," introduces the concept of the transport corridor, through which pass all forms of transport and communications that are managed as an integrated, rational system, a notion that has taken hold around the world in the last three decades. Systematically, the more important corridors in Africa, Asia and South America are described and evaluated. Perhaps the most significant change taking place in this sphere is the growing cooperation between the public and private sectors in improving transit transport.

Chapter 3, "Legal Framework for Transit Cooperation," discusses the most important legal instruments produced at the global, regional, subregional and bilateral levels that are designed both to stimulate and to regulate the movement of traffic in transit. The proliferation of such documents since the collapse of the Soviet Union has necessitated their rationalization and consolidation, a process that is continuing.

Chapter 4, "Role of the International Community in Mitigating the Disadvantages of Landlockedness," summarizes much of the foregoing material on global, regional and subregional action on behalf of landlocked developing countries and introduces the Almaty Programme of Action, adopted by the International

Ministerial Conference of Landlocked and Transit Developing Countries on 29 August 2003.

We can learn a great deal from this book. The only way to solve the problems of land-lockedness *definitively* is to eliminate the boundaries between the land-locked and transit States, instantly converting land-locked States into interior districts of coastal States. Since all States are reluctant to surrender their sovereignty (and indeed the trend seems to be in quite the opposite direction), we may eliminate this solution. The next best is economic integration. This is only slightly less difficult to achieve, but even in the early stages it can result in reduction of formalities at the borders and perhaps in the ports. Regional cooperation can achieve results in respect of transit similar to those of integration without the costs and risks invariably attached thereto.

Finally, I note that this book has been in the editing process for well over two years. By now some of the contents are undoubtedly obsolete. Nevertheless, it remains exceptionally valuable for anyone interested in international trade, economic development, transport, landlocked countries and related topics. Its value will be considerably enhanced if it can be updated regularly. I'm sure that OHRLLS would be thrilled at the prospect of this additional workload!

BOOK REVIEW OPPORTUNITY

Members interested in preparing a review on a volume of general interest to the Branch membership 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 or Cambridge University Press's website at www.cambridge.org/us/law and then send their proposal to Executive Committee member David Stewart at stewartdp@state.gov. Mr. Stewart, who oversees the Branch's book review program and serves as the ABILA liaison to both Oxford University Press and Cambridge University Press, will work out the necessary arrangements.

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	
Feminism and International Law	Sujata V. Manohar	Annette Lansink	Janie Chuang
International Civil Litigation and the Interests of the Public	Catherine Kessedjian	Richard Garnett Gaetan Verhoosel	
International Commercial Arbitration	Filip De Ly	Luca G. Radicati di Brozolo	Charles Brower Philip O'Neill Louise Ellen Teitz
International Criminal Court	Torsten Stein	William Schabas Goran Sluiter	Leila Sadat Michael Scharf
International Family Law	Barbara Stark		
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	Daniel Wueger	Marsha Echols Constance Wagner
International Law on Foreign Investment	Christoph Schreuer	Peter Muchlinski Federico Ortino	Jeffery Atik Andrea Bjorklund Daniel Magraw, Jr.
International Law on Sustainable Development	Nicolaas Schrijver	Duncan French Ximena Fuentes	
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International Trade Law	E. U. Petersmann	Frederick Abbott Petros Mavroidis	Gary Horlick Joel Trachtman (Alternate) John Jackson
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Nuclear Weapons, Non-Proliferation			
Outer Continental Shelf	Dolliver Nelson	David Ong A.G. Oude Elferink	John Noyes
Rights of Indigenous Peoples	James Anaya	Gregory Marks	
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 Ved Nanda Michael Scharf
Use of Force	Mary Ellen O'Connell	Judith Gordon Christine Gray	James Gathii

AMERICAN BRANCH COMMITTEES

ARMS CONTROL AND DISARMAMENT

Chair: Vacant

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USE OF FORCE

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2007 ABILA EVENTS

JANUARY 26-27, 2007

**NINTH ANNUAL INTERNATIONAL WILDLIFE LAW CONFERENCE
STETSON UNIVERSITY COLLEGE OF LAW**

The Wildlife Committee of the American Branch of the International Law Association annually convenes the International Wildlife Law Conference (IWLC). The purpose of the conference is to bring together participants from throughout the world in an ongoing colloquy about the role of international law and legal institutions in furthering the goal of species conservation and protection of the Earth's biological diversity.

FEBRUARY 2-3, 2007

**INTERNATIONAL LAW WEEKEND—WEST
SANTA CLARA LAW SCHOOL**

The event will explore a range of topics in international scholarship. Registration information is posted at the American Branch website, <http://ambranch.org>.

MARCH 2, 2007

**JOURNAL OF INTERNATIONAL LAW AND POLICY SYMPOSIUM
U.C. DAVIS**

THE EVOLUTION OF COLONIALISM IN A GLOBAL ECONOMY

The Journal of International Law and Policy ("JILP") at the University of California, Davis, Law School hosts an annual symposium. The 2007 symposium will mark the sixtieth anniversary of Indian and Pakistani independence, the start of the process of decolonization that transformed world politics in the mid-twentieth century. Symposium participants will examine the residual effects of old-style colonialism.

MARCH 28-31, 2007

**AMERICAN SOCIETY OF INTERNATIONAL LAW CONFERENCE
WASHINGTON, DC (Fairmont Hotel)
THE FUTURE OF INTERNATIONAL LAW**

MAY 1-5, 2007

**ABA INTERNATIONAL LAW SECTION SPRING MEETING
WASHINGTON, DC (Fairmont Hotel)**

SEPTEMBER 28, 2007

**ABILA REGIONAL MEETING
CASE WESTERN RESERVE UNIVERSITY SCHOOL OF LAW Cleveland, Ohio**
Commemorating the 60th anniversary of the negotiation of the Genocide Convention.

OCTOBER 25-27, 2007

**INTERNATIONAL LAW WEEKEND
ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK**