

ABILA Newsletter

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MESSAGE FROM THE PRESIDENT:

The International Law Association held its biannual conference in Rio last month. It was a huge success with a number of our members and other United States participants joining in the work of the committees and addressing various meetings of the organization. In this issue, we have reports from four American Branch participants.

The next conference, in 2010, will be in The Hague. I hope you will start planning now to attend and that you will tell your colleagues who are interested in international law. If you are really thinking ahead, you will note that the conference for 2016 will be in the United States — venue not yet chosen, although the West Coast is under strong consideration.

The American Branch's International Law Weekend will take place next month, on October 16-18, at the headquarters of the Association of the Bar of the City of New York. John Noyes, who, with Catherine Amirfar and Katarina Grenfell, is a co-chair of ILW, describes the events in an article in this issue.

You will receive in the mail in the next few weeks the 2007-2008 volume of the American Branch's Proceedings. It contains the reports of several of our committees, as well as addresses given by speakers at ILW over the past few years. Among the committee reports is a book-length report of the Law of the Sea Committee, detailing its analysis of terms in the Law of the Sea Treaty. That work will become a standard reference for those working in the law of the sea and we congratulate Professor George Walker and his committee on their monumental and incisive study.

This has been a good year for our Vice-President David Stewart. As is noted in the announcement below, David was elected to the Inter-American Juridical Committee of the OAS. More recently, he received the Leonard J. Theberge Award for Long Term Contribution to Private International Law from the American Bar Association's Section of International Law. Prior winners include Louis Sohn, Arthur von Mehren, Monroe Leigh, Don Wallace, Allan Farnsworth and Peter Winship.

This is my last note as President of the Branch. At one point in my life, I studied something called "many body theory," which describes the way aggregates of independent elements act jointly. Volunteer organizations, such as the American Branch, are, in a way, many body objects. They depend upon the individual activities of participants who move according to their own motivating forces, and are not subject to a hierarchical structure. All such organizations depend upon the joint efforts of their members, but there are always some members whose efforts are particularly significant. I cannot thank all of those members who pitched in here and now, but would particularly thank my predecessor, Jim Nafziger, the two honorary secretaries, Carlos Pelayo and Houston Lowry, the honorary treasurer, Jim Lynch, the directors of study, Valerie Epps and Phil Moremen, the co-chairs of four International Law Weekends — who do not, I think, understand how much work it is to put an ILW together, until they are immersed in it, the committees for International Law Weekend — West, and those who rise to take charge of projects when the organization needs them. Thank you all.

Charles D. Siegal

UPCOMING CONFERENCES

INTERNATIONAL LAW WEEKEND NEW YORK OCTOBER 16-18, 2008

The American Branch will hold its annual International Law Weekend in New York, featuring numerous panels, receptions, and the Branch's annual meeting. International Law Weekend 2008 will take place on October 16-18, 2008, at the Association of the Bar of the City of New York, 42 West 44th Street, New York City. The Weekend's overall theme is "The United States and International Law: Legal Traditions and Future Possibilities."

The keynote speaker at the annual luncheon on Friday, October 17, at 12:30 p.m. will be John Bellinger, the Legal Adviser to the U.S. Department of State. The lead-off panel on Thursday, October 16, at 6:30 p.m., entitled *In the Era of a New Presidency, a New U.S. Policy Towards the U.N.?*, will include Republican and Democratic strategists and academic commentators. Confirmed panelists include: Prof. Jose Alvarez of Columbia University, Past President of the American Society of International Law; Prof. Thomas Franck

of New York University, formerly President of the American Society of International Law and an ad hoc Judge on the International Court of Justice; Michael Mattler, Minority Counsel on the Senate Foreign Relations Committee and formerly with the U.S. Department of State; Herbert Okun, Professorial Lecturer in International Relations, International Law and Institutions at Johns Hopkins University and formerly U.S. Ambassador to the United Nations; and Miriam Shapiro, Adjunct Professor of Law at New York University and Georgetown University and formerly Special Assistant to the President and Counselor for Southeast European Stabilization at the White House, formerly Director for European Affairs with the National Security Council, and formerly with the U.S. Department of State. The ILW 2008 program will also feature over thirty other panels, addressing topics relating to international trade and investment, international adjudication and arbitration, human rights, international law in U.S. courts, generation of international law, transitional justice and international criminal law, and the international environment. The ILW 2008 program is available at www.ambranch.org.

On Friday evening, October 17, the Annual Gala Reception will be hosted by the Permanent Representative of Belgium to the United Nations.

For ILW 2008, the American Branch has reserved a block of rooms at the Holiday Inn Express, 15 West 45th St., which is near the Association of the Bar of the City of New York. The cost is \$359 per night plus taxes; reserve by calling 646-688-1116 or 800-465-4329 and identifying yourself as involved with the American Branch's International Law Weekend. These hotel reservations must be made no later than September 15, 2008.

The co-chairs of ILW 2008 are Catherine Amirfar of Debevoise & Plimpton (cmamirfar@debevoise.com), Katarina Grenfell of the United Nations Office of Legal Affairs (grenfell@un.org), and John Noyes of California Western School of Law (jnoyes@cwsl.edu). The International Law Students Association (contact registration@ilsa.org) will handle registration for ILW 2008; a registration form is available at www.ambranch.org. Registration for ILW 2008 is free to members of the American Branch, members of the Association of the Bar of the City of New York, and members of cosponsoring organizations; for others, the cost is \$75.00. Advance registration is advised, to insure a spot at the Friday luncheon, the Friday evening reception, and the Saturday boxed lunch programs.

The American Branch is grateful for the support of the following cosponsors of ILW 2008: American Bar Association Section of International Law; American Society of International Law; American University Washington College of Law; California Western School of Law; Customs and International Trade Bar Association; Debevoise & Plimpton LLP; Edward Elgar Publishing, Inc.;

Freshfields Bruckhaus Deringer LLP; Hofstra University School of Law; ILSA Journal of International and Comparative Law; International Law Students Association; Lawyers Without Borders; Oxford University Press, Inc.; Pace University School of Law; Seton Hall Law School; the Federalist Society; the George Washington University Law School; and University of Baltimore School of Law.

**INTERNATIONAL LAW WEEKEND-WEST
SALEM, OREGON
MARCH 6-7, 2009**

The fifth International Law Weekend-West will be hosted by the Willamette University College of Law. ILW-West offers a particularly convenient opportunity every two years for our western members to convene for panel discussions and other activities, but all members are welcome to attend the conference. Further details will appear in later Newsletters and versions at our website. If you would like to organize a panel, please send a short proposal to the Chair of our Executive Committee, Prof. James Nafziger, Willamette University College of Law, 245 Winter St. S.E., Salem, OR 97301, or by e-mail to jnafzige@willamette.edu.

REPORTS FROM THE RIO CONFERENCE

REPORT OF MOMOCILA AND SECURITIES REGULATION COMMITTEES

By Cynthia Lichtenstein

The Rio Conference was attended by approximately 20 American Branch members, and of the Officers, Cynthia Lichtenstein, former President of the Branch and presently member of the ILA Executive Council, Jim Nafziger, former President and presently Chairman of the Executive Committee of the Branch and John Noyes, President-Elect of the Branch. The former President of the Branch and long time Vice Chairman of the ILA, Robert von Mehren, also attended and a moving encomium was given to him by Lord Slynn of Hadley, Chairman of the ILA, at the First Full Council Meeting of the Conference as Bob had tendered his resignation as Vice Chairman.

At its Biannual Conferences, the ILA conducts a series of working sessions of its international committees in which the reports that the committees have prepared over the prior two years are debated. The working sessions, I believe, are unique to international law organisations and a particular reason to belong to the ILA and attend its Biannual Conferences. (However, members of international committees who are unable to attend a particular Biannual Conference, nevertheless contribute to the work of the ILA by their participation in the preparation of the Committee reports.)

Both the International Monetary Law Committee (MOCOMILA), the longest running committee of the ILA, and the newer International Securities Regulation Committee, presently chaired by American Branch member the Honorable Edward Fleischman, a former Commissioner of the SEC, did not present any substantive Resolutions to the Conference. Instead, they presented to their respective working sessions informative reports covering a variety of topics in their particular areas. Both Committees covered the topics of sovereign wealth funds and issues of Islamic law in financial instruments.

Of particular note in the International Securities Regulation Report is the portion of the Report written by an American lawyer resident in Britain (and hence a member of the British Branch), Ms. Ida Levine, on Principles Based Regulation, a comparison of the use of such Regulation by the British Financial Services Authority (FSA) and by the U.S. SEC. Committee Reports presented to the Conference are available on the ILA Website and will be reprinted, together with a summary of the discussion at the working sessions, in the Conference volume which should appear in six months or so and will be sent (via national Branches) to every ILA member.

REPORT OF COMMITTEE ON LEGAL ISSUES OF THE OUTER CONTINENTAL SHELF

By John E. Noyes

I have valued my work during the past eight years as the American Branch's member of the International Law Association's Committee on Legal Issues of the Outer Continental Shelf. The International Law Association, which is now composed of over forty different national branches, and the ILA's committees, which include representatives from the national branches, offer unparalleled opportunities to work on international law issues. While other international law organizations in the United States serve as valuable educational forums, their primary audience is U.S. international lawyers. In the ILA one works with the most prominent international lawyers from around the world to forge draft treaties or prepare studies that will have wide influence. The seventy-third biennial ILA conference in Rio de Janeiro, Brazil, in August 2008 provided numerous opportunities for exchanges with colleagues, both during meetings and on social outings.

The Committee on Legal Issues of the Outer Continental Shelf, which was formed in 2000, spent its first six years preparing detailed analyses of Article 76 of the 1982 Convention on the Law of the Sea, which concerns the outer limit of the continental shelf beyond 200 miles from baselines. The Commission on the Limits of the Continental Shelf, created by the 1982 Convention to make recommendations about outer continental shelf limits, is now in the midst of considering submissions from coastal states concerning their outer limits. The published work of the ILA Committee has proven to be timely and valuable for the Commission, coastal states, and scholars. Following the ILA's seventy-second conference in Toronto in 2006, the Committee has studied Article 82 of the Law of the Sea Convention. Article 82 provides for payments or contributions in kind of a portion of the production of non-living resources from the continental shelf beyond 200 miles from baselines; payments are to be made through the International Seabed Authority, and are to be distributed equitably, taking into account the needs of developing states. The Committee's report on Article 82 completes its mandate.

A new law of the sea committee will probably be proposed for ILA approval in November 2008. A variety of possible new committee topics have been discussed, including the issues of baselines, high seas fisheries, and the impacts of climate change.

The American Branch has its own active Law of the Sea Committee, chaired by Prof. George Walker. The Branch Committee is completing a multi-year study of definitions of concepts related to the law of the sea. American Branch members who are interested in studying and promoting positions on law of the sea and related environmental issues will find they can actively participate in significant Branch work and can help with ILA committee studies.

REPORT OF COMMITTEE INTERNATIONAL CRIMINAL COURTS COMMITTEE

By Leila Nadya Sadat

The ICC Committee met in Rio and presented its third report. William Schabas, Co-Rapporteur, presented the Committee's findings, which summarized the results of questions sent to national branches during the preceding year. The report addressed the issue of national implementing legislation, surveying national approaches in terms of the substantive crimes, modes of criminal liability, and procedural questions such as immunities. The report also addressed the progress of the working group on Aggression, and highlighted the issues and approaches likely to come up at the Court's review session in 2010. It was decided to extend the ILA's ICC Committee's mandate until 2010, particularly as the Committee may be able to assist in the general stock taking of the Court and its work likely to take place at the review session in 2010.

REPORT ON THE MEETING OF THE INTER- NATIONAL HUMAN RIGHTS LAW AND PRACTICE COMMITTEE

By Christina Cerna

On Wednesday, August 20, 2008, the International Human Rights Law and Practice Committee met to approve its final report on the Impact of International Human Rights Law on General International Law. Professor Martin Scheinin (Finland), the Chair of the Committee, described the work of the Committee on this project over the past four years. At the ILA's 2004 Conference in Berlin, the Committee had received the mandate to prepare a report on the relationship between general international law and international human rights law. An interim report was presented at the ILA's 2006 Toronto Conference. That report was prepared at a Committee workshop held in Maastricht under the auspices of the Maastricht Center for Human Rights. The final report was prepared at a workshop held at the Certosa di Pontignano near Siena, Italy in November 2007, at the invitation of Committee member, Professor Riccardo Pisillo Mazzeschi. At the Siena workshop, the focus of the report shifted from the "humanization" of general international law by international human rights law to the "impact" of international human rights law on general international law.

The draft final report was prepared by Professor Menno Kamminga and circulated to the members on June 7, 2008. I attended the Siena workshop and also presented my comments to the June 7, 2008 draft on June 11, 2008. The final report downplayed the impact of international human rights law on general international law and my comments were designed to emphasize the importance of that impact, in particular in the decisions of the inter-American system.

The draft final report was presented in greater detail to the Rio Conference meeting by Professor Menno Kamminga. Few members of the Committee were present at the Rio Meeting and the Chair expressed his concern that there would be no discussion of the draft final report.

Upon rereading the draft final report before the meeting in Rio, it became clear that there were two errors in the report. First, the report stated that: "At the beginning of the 21st century one of the defining characteristics of the development of international law is the emergence on the global plane of non-state actors (the individual, international organizations, international financial institutions, non-governmental organizations, multinational enterprises etc.)." Second, the report stated that: "The Committee adopted the following method of work. First, it identified legal concepts developed by international human rights bodies (including international human rights treaty bodies, regional human rights courts and international criminal courts and tribunals) that are at first sight difficult to reconcile with traditional international law because they purport to reflect the interests of individuals rather than states."

Regarding the first error, it was suggested that in lieu of the language as presented, the Committee should state that the defining characteristic of the development of international law has been the emergence on the global plane of the "individual as an actor" and not the emergence of non-state actors. The focus on "non-state actors" is of recent vintage and the ILA is just beginning to consider committee work in this area, whereas the focus on the "individual as an actor" has been the feature that most accurately characterizes international human rights law and its impact on general international law.

Regarding the second misstatement, the issue was what the "legal concepts developed by international human rights bodies" were, to which this paragraph referred. Participants could not think of any legal concepts developed by human rights bodies, other than perhaps the notion of "forced disappearance" which had been characterized by human rights bodies as comprising the detention and subsequent denial of custody on the part of the state authorities. The "concepts" referred to, however, were rules of general international law set forth in the Vienna Convention on the Law of Treaties, such as *ius cogens*, the formation of customary international law, etc., and were not "legal concepts developed by international human rights bodies."

After a vigorous discussion of these points, the Chairman skillfully proposed language which satisfied all the parties and a final report and corresponding Resolution were adopted by the meeting.

Following adoption of the report, the Chairman thanked the Rapporteurs, initially Yuji Iwasawa (present) and then Professors Andrew Byrnes (absent) and Menno Kamminga (present) for their work, and indicated that they would all be giving up their posts. The Chair indicated that I had expressed an interest in succeeding him as Chair and that Dr. Ineke

Boerefijn (absent) of the Netherlands was interested in serving as Co-Rapporteur. The Committee had discussed possible topics for the next Committee, and it was suggested that we should focus on "The ICJ and international human rights law", a particularly apt subject given that the next biennial Conference would take place in The Hague. The Chair asked for any comments.

Concerning the impact of Advisory Opinion No. 16 of the Inter-American Court of Human Rights on the litigation before the ICJ in the *LaGrand* and *Avena* cases, it was apparent that recent developments in the United States, specifically the U.S. Supreme Court's decision in the *Medellin* case, require a response from the international legal community and that it would be appropriate for the ILA to provide that response. In *Medellin*, the Supreme Court stated that other countries do not comply with decisions of the ICJ, pursuant to art. 94 of the UN Charter.

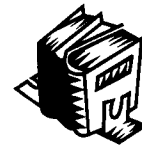
The comparative advantage of the ILA is that it functions by means of national branches. These branches contribute studies regarding how states comply or do not comply with the decisions of the ICJ and international human rights bodies. Another possible aspect of the ICJ and human rights could be to look at the judges currently on the ICJ and their previous experience on international human rights bodies, and how the discourse of human rights has entered into ICJ decisions. Judges Buergenthal, Higgins and Koijmans have served on the UN Human Rights Committee and Judge Buergenthal had also served on the Inter-American Court. Antonio Cancado Trindade, who is expected to be elected to the ICJ this fall, was President of the Inter-American Court for approximately six years, and Edmundo Vargas, the newly elected President of the International Law Commission, was Executive Secretary of the Inter American Commission on Human Rights from 1977-1990.

The Chair mentioned that the Executive Council would choose the new Chair and Rapporteurs for the International Human Rights Law and Practice Committee at its meeting to be held in November 2008.

The current International Human Rights Law and Practice Committee will exist until November 2008, at which time a new Committee will be formed. Each Branch is to nominate members to the new Committee, who are to be vetted by the new Chair. Individuals who are interested in participating in some aspect of this new project (the ICJ and International Human Rights Law) should contact me at (ccerna@oas.org).

INTER-AMERICAN JURIDICAL COMMITTEE

David P. Stewart (Vice-President of the American Branch) has been elected to the Inter-American Juridical Committee. The eleven-member Committee, headquartered in Rio de Janeiro, is an organ of the Organization of American States. It serves the OAS as an advisory body on juridical matters, promotes the progressive development and codification of international law, and contributes to the harmonization of domestic law related to the integration of the developing countries of the Hemisphere. Committee members are elected by OAS Member States at the annual General Assembly. Stewart is currently Assistant Legal Adviser for Private International Law in the Office of the Legal Adviser in the U.S. Department of State. He was also recently elected to the Board of Editors of the American Journal of International Law and serves on the Editorial Advisory Board for International Legal Materials.



BOOK REVIEWS

Should you wish to submit a book review, please submit same to Lucy Martinez at lucy.martinez@freshfields.com.

WANTED

We are looking for a volunteer who can help update and maintain the ABILA website and Forum. This task involves reviewing all written content prior to posting to the Forum. If you are interested, please contact William Aceves at California Western School of Law (wja@cwsl.edu).

STUDENT RESEARCH ASSISTANTS

The co-directors of studies have developed an arrangement with the International Law Students Association (ILSA) to solicit ILSA student members to serve ABILA committees as research assistants and possible co-reporters. Each committee is free to determine the nature and extent of a research assistant's participation.

A committee seeking help should notify the co-directors of studies, who will arrange with ILSA to distribute the committee's request and an application to ILSA members by e-mail and on ILSA's website. The co-directors of studies, Phil Moremen and Valerie Epps, can be reached at: moremeph@shu.edu and vepps@suffolk.edu.