

# ABILA Newsletter

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## WORLDS IN COLLISION? INTERNATIONAL LAW AND NATIONAL REALITIES

The ABILA's annual **International Law Weekend** will take place **October 14-16, 2004** at the Association of the Bar of the City of New York. The Weekend is free to all members of the ABILA and co-sponsoring organizations. The theme for this year's conference will be: *Worlds in Collision? International Law and National Realities*.

Charles Siegal, Esq. and Professor Philip Moreman are Co-Chairs of the Weekend. Any member who would like to propose a panel for the Weekend 2004 should contact Charles Siegal at SiegalCD@mto.com. He can also be reached by telephone at (213) 683-9181 or by mail at Munger, Tolles & Olson, 355 South Grand Avenue, 35th Floor, Los Angeles, CA 90071-1560.

Younger members are particularly encouraged to think about organizing a panel. The ILSA Journal of International and Comparative Law, of the Nova Southeastern University Law Center, will again publish papers presented at the Weekend.

## 2003 INTERNATIONAL LAW WEEKEND and ELECTION OF OFFICERS

The 2003 International Law Weekend took place October 23-25 in New York. The meeting, whose theme was "International Law in Crisis – and in Business," featured some 40 panels and special sessions. On United Nations Day, October 24, the Singapore Mission to the United States hosted Weekend attendees at a reception. The featured speaker at the Annual Luncheon, October 25, was Professor Thomas Franck of the New York University School of Law and Honorary Vice President of the ABILA. Charles Siegal and Philip Moreman co-chaired the Weekend.

Highlights of the Executive Committee and Annual Business Meetings included a report and discussion on the ABILA's successful membership campaign. The ABILA's total membership has nearly doubled during the

last five years, after dipping to a low level in 1998. At the Business Meeting, the proposed amendments, as reported in the September 2003 Newsletter, were approved unanimously, as were corresponding Bylaws proposed to the Executive Committee.

The following officers were reelected or newly elected to their positions (\*) during the annual meeting:

*Chair, Executive Committee:*

Alfred P. Rubin

*President:*

James A.R. Nafziger

*President-Elect:*

Charles D. Siegal

*Vice Presidents:*

Leila Nadya Sadat (Washington University)\*, Valerie Epps, John F. Murphy, John E. Noyes, Ruth Wedgwood

*Honorary Vice Presidents:*

Charles N. Brower, Nicholas R. Doman, Thomas M. Franck, Theodore R. Giuttari, Edward Gordon, Louis Henkin, P. Nicholas Kourides, Luke T. Lee, Cynthia C. Lichtenstein, Ved Nanda, Cecil J. Olmstead, Louis B. Sohn, Robert B. von Mehren

*Honorary Secretary:*

Carlos Pelayo

*Honorary Treasurer:*

Michael Gruson

*Members, Executive Committee:*

William Aceves, Roger Alford (Pepperdine University)\*, Kelly Dawn Askin, Jeffery Atik, Gail McK. Beckman, David J. Bederman, Christina Cerna, Malvina Halberstam, Gary N. Horlick, Scott Horton, Karen Hudes, Philip Moreman, Peter Oppenheimer, Alison Renteln, Leila Nadya Sadat, Jan Schneider, Michael P. Scharf, Joel P. Trachtman, George K. Walker, Mark S. Zaid.

Roger Alford and Leila Sadat are the new Co-Directors of Studies, and Philip Moreman and Charles Siegal serve as Co-Chairs of the Planning Committee for International Law Weekend 2004. Ruth Wedgwood will continue to serve as New York and Washington-Area Liaison; John Noyes as Editor-In-Chief of the Proceedings; and Houston Putnam Lowry as Webmaster.

## DUES AND GIFTS FOR 2004

It is membership renewal time! ABILA dues are \$75 per year for Regular Members, \$200 for Sustaining Members and \$80 per year for Institutional Members. International Law Weekend and International Law Weekend–West remain free to all members. Also, because of our ongoing need for gifts, we would be most grateful for your generosity again this year. Our endowment and occasional gifts enable us to stay in the black.

Checks for Regular, Sustaining or Institutional Memberships and gifts to the Branch should be made payable to the *American Branch ILA* and sent to our Honorary Treasurer: Michael Gruson, Esq., Shearman & Sterling, 599 Lexington Avenue, New York, NY 10022.

## REGIONAL CONFERENCE IN DENVER February 28, 2004

An ABILA regional conference will take place Saturday, February 28, 2004 at the University of Denver on the theme of Collective Security and the Use of Force. The specific sessions are Changing Perspectives on Security – Focus on Human Security; Historical Context and the Role of the Security Council and Regional Organizations in the Use of Force; and Unilateral Use of Force – Preemptive Use and Humanitarian Use. Workshops include a Case Study of Iraq – Preventive or Preemptive Use; Case Study of Kosovo – The Role of NATO Without UN Blessing; Case Study of Regional Interventions in Liberia and Haiti; Case Study of Unilateral Interventions in Panama and Grenada by the US; and a Case Study of Unilateral Interventions in Czechoslovakia and Afghanistan by the Soviet Union.

For further information, please contact Professor Ved P. Nanda, University of Denver College of Law, 2255 East Evans, Denver, CO 80208. He may also be reached by e-mail at [vnanda@law.du.edu](mailto:vnanda@law.du.edu).

## WORLD BANK SESSION FOR ABILA MEMBERS March 4, 2004

On the morning of March 4, 2004, ABILA members are cordially invited to attend a session at the World Bank in Washington, D.C. on national governance and accountability. The focus will be on Ghana. Karen Hudes, a member of the ABILA Executive Committee and Senior Counsel at the World Bank, has organized the session. It will involve a distant-learning interchange between World Bank personnel and a group of local organizations and donor agencies in Ghana.

The session will cover the requirements in legal systems for civic engagement. These requirements

include laws on freedom of association, mobilization of resources, freedom of expression and the media, access to public information, and public participation and dialogue with others, especially government actors.

This unusual opportunity for ABILA members will take place on March 4, at 8:30 - 10:00 a.m., in Room MC-C2 130 at the World Bank headquarters, 1818 "H" Street, NW, Washington, DC. For reservations and further information, please contact Karen Hudes (202-458-1622 or [<KHudes@worldbank.org>](mailto:KHudes@worldbank.org)).

## ILSA SPRING CONFERENCE March 31 – April 3, 2004

This year's conference of the ABILA's student affiliate and sister organization, the International Law Students Association (ILSA), will be held March 31 - April 3, 2004. It will take place during the latter half of the Shearman & Sterling International Rounds of the Jessup International Law Moot Court Competition, at the Wyndham Washington Hotel in Washington, D.C. This year's conference will feature speakers on a wide variety of topics, including international environmental law, international security, and corruption. In addition, the Conference will conclude with the ILSA Spring Congress, which is the annual business meeting of ILSA's chapters. Among other business, the chapters will elect the student officers of the organization for the coming year.

For further information, contact Michael Peil, Executive Director, ILSA, at (312) 362-5025 or by e-mail at [peil@ilsa.org](mailto:peil@ilsa.org).

## BOOK REVIEW

Nina H.B. Jorgensen, *THE RESPONSIBILITY OF STATES FOR INTERNATIONAL CRIMES*, Oxford University Press, 331 pages (2000).

\* Reviewed by Gloria J. Browne-Marshall.

In 1999, just before Nina H.B. Jorgensen's *THE RESPONSIBILITY OF STATES FOR INTERNATIONAL CRIMES* was published, the International Criminal Court was a debatable reality and the hope for peace lay in a new millennium. Since that time, September 11th has become a global frame of reference, the International Criminal Court has filled its complement of judges, and issues of international law have taken center-stage. *THE RESPONSIBILITY OF STATES FOR INTERNATIONAL CRIMES* offers a dispassionate history of the development of international criminal justice. Jorgensen provides a schematic by which the reader is guided through the multiple treatises, declarations, cases, and reports which

evolved into the international criminal procedure and substantive due process in place today.

Jorgensen approaches the subject of illegal conflict first from the ancient theological perspective of a "Just War" (*bellum justus*), which allowed war only to avenge a wrong suffered by the righteous, and quickly moves through an analysis of war as a necessary evil. With the advent of the 20th century, a letter from Wilhelm II to the Austrian Emperor depicts war as a contest of brutality: "It is essential to kill men and women, children and old men, not to leave standing a single house or a single tree." Jorgensen provides a keen insight into how such expressions of brutality against civilians led to the further development of international rules of war.

Leaders of states began to question the inevitability of war. International agreements were drafted with specific language stigmatizing certain acts of aggression as a crime. By 1945, the U.S. Chief Prosecutor of the German Major War Criminals, U.S. Supreme Court Justice Robert Jackson, quotes from a plea made to King James "that even a king is still 'under God and the law.'" However, progress was often painstakingly slow.

Jorgensen thoroughly searches for progress in the minute changes of language within each agreement. She then examines how those changes impacted doctrinal development in international criminal justice. Her research meticulously dissects the evolution of such foundational concepts as state responsibility, crime, and punishment, particularly as those terms relate to liability. The reader is provided with the language and agreements which sustained an evolution from holding a high-ranking individual responsible for crimes against civilians to imposing liability on the official as well as the state itself for those actions. Thus, the title *THE RESPONSIBILITY OF STATES FOR INTERNATIONAL CRIMES* evidences the author's primary intent.

This book is an excellent reference for the legal scholar, international law practitioner, and historian. Written initially as a Ph.D. dissertation, the book assumes a familiarity with international governmental organizations. One might argue that important influences outside of the established intergovernmental bodies are unfortunately absent from her analysis. For example, the role of civil society, refugees, and non-governmental organizations is not examined. However, the depth of the research provided in *THE RESPONSIBILITY OF STATES FOR INTERNATIONAL CRIMES* undoubtedly advances the study of international criminal justice.

\* Assistant Professor, John Jay College of Criminal Justice; Executive Director-Counsel, The Law and Policy Group, Inc.

## HAGUE CONFERENCE UPDATE

### THE HAGUE CONFERENCE: CURRENT WORK ON A CHOICE OF COURT CONVENTION AND REVISIONS TO THE EVIDENCE AND SERVICE CONVENTIONS

By Louise Ellen Teitz & Glenn P. Hendrix\*

The Hague Conference on Private International Law ("Hague Conference") is currently working on three projects involving judicial cooperation that will have an impact on cross-border litigation and transactions. The Hague Conference is an intergovernmental organization, made up of over 60 member countries, that negotiates and drafts multilateral conventions in different fields of private international law. After preliminary negotiations by member states, preparatory research is conducted by the Permanent Bureau of the Hague Conference and preliminary drafts of the conventions are drawn up by "Special Commissions" consisting of experts designated by the member states of the Hague Conference. The drafts are then discussed and adopted at a plenary Diplomatic Session of the Hague Conference. Special Commissions are also convened from time to time to review the practical operation of existing Hague conventions. In the latter instance, the Special Commission seeks to harmonize the interpretation of a convention among member states through the preparation and issuance of "practical handbooks" and reports, which are routinely cited by courts as persuasive authority.

Since 1993, the United States has been negotiating a Convention on Jurisdiction, Recognition, and Enforcement of Foreign Judgments in Civil and Commercial Matters. The convention is designed to create common jurisdictional rules and to provide for international recognition and enforcement of judgments in civil and commercial matters. The U.S. is currently not a party to any multilateral treaty in this area, with the enforcement of foreign judgments being largely controlled in the U.S. by state law. After several sessions and drafts, a Special Commission produced a comprehensive text in June 2001, which had extensive

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\* Professor Louise Ellen Teitz, of the Roger Williams University School of Law, chairs the ABILA Committee on International Civil and Commercial Dispute Resolution. She has been a member of the U.S. delegation representing the ABA at the Special Commission on Jurisdiction, Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters.

Glenn P. Hendrix, a litigation partner with Arnall Golden Gregory LLP (Atlanta), was designated by the State Department as a private sector advisor to the U.S. delegation to the Special Commission on the Hague Evidence and Service Conventions.

bracketed provisions reflecting areas where no consensus had been reached and over 200 footnotes. The 2001 draft sparked controversy primarily in connection with jurisdiction, especially general, "doing business" jurisdiction. Other areas of concern included ecommerce, intellectual property, and the intersection with consumer transactions.

In 2002, a decision was made by the Hague Conference to begin work on a smaller, less comprehensive convention, covering choice of court agreements for commercial transactions. A series of informal meetings of private parties produced a draft convention which was considered by a Special Commission convened in December 2003. The draft Convention on Exclusive Choice of Court Agreements is viewed as providing for litigation what the New York Convention provides for arbitration and arbitral awards. The draft, Working Document 49, is available at the Hague website, <http://www.hcch.net/e/workprog/jdgm.html>. It has an impact not only on dispute resolution but also on transactional planning, since it would provide enforcement of exclusive choice-of-court clauses as well as the resulting judgments.

In a survey of practitioners conducted by the ABA Section of International Litigation and Practice<sup>\*\*</sup>, over 98% of the respondents said that a convention on choice-of-court agreements would be useful for their practice and over 70% said that a convention would make them "more willing to designate litigation instead of arbitration" in their contracts.<sup>\*\*\*</sup> A second meeting of the Special Commission is scheduled for late spring to address several unresolved issues, including scope, coverage of intellectual property, relationship to other regional conventions (particularly the European Union), bases for refusal to recognize choice-of-court agreements and judgments, and the treatment of damage awards in judgments. If consensus can be reached on a final text, a Diplomatic Session would be scheduled for late 2004. The convention has the potential to offer increased certainty and subsequent enforceability for consensual commercial transactions.

The second area in which the Hague Conference made significant progress this past fall is in the existing conventions on evidence and service. The Special

Commission, meeting in The Hague from October 28 to November 4, 2003, reviewed the practical operation of these two longstanding Hague conventions – the 1970 Convention on the Taking of Evidence Abroad in Civil or Commercial Matters ("Evidence Convention") and the 1965 Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters ("Service Convention"). Because the last such Hague Commission to review the operation of these conventions was convened in 1989, there was much ground to cover.

With regard to cross-border service, the Commission considered service of process by means of "new information technologies" such as electronic mail and fax; whether destination states may charge fees for effectuating service; the refusal of certain countries to serve complaints in American lawsuits due to punitive damage claims that are perceived to be "excessive"; the "send" versus "serve" debate under Article 10(a) of the Service Convention (that is, whether the Convention permits service abroad through postal channels); whether service by "postal channels" under Article 10(a) should be deemed to encompass service via private courier firms; the problem of delays in executing service of process; whether parties may contractually exclude the application of the Service Convention; and a host of other issues. The provisional version of the Hague Conference's new Practical Handbook addressing these questions can be accessed at [http://hcch.net/e/workprog/lse\\_intro.html](http://hcch.net/e/workprog/lse_intro.html).

With regard to cross-border evidence-gathering, much of the discussion focused on American discovery practices and Article 23 of the Evidence Convention, which permits a state to "declare that it will not execute Letters of Request issued for the purpose of obtaining pretrial discovery of documents". Most states have made unconditional Article 23 reservations; however, a few have made more limited reservations, allowing production of documents that are requested with some degree of particularity. The Commission's final report, available at [http://hcch.net/e/workprog/lse\\_intro.html](http://hcch.net/e/workprog/lse_intro.html), made a strong recommendation that states limit their Article 23 reservations and, as a model, pointed to Article 16 of the *Additional Protocol of 1984 to the Inter-American Convention on the Taking of Evidence Abroad*. The Commission also addressed a trend in certain countries to apply the Article 23 standards not only to requests for documents, but also to requests for oral testimony. The Commission rejected that approach, noting that "Article 23 expressly refers to 'documents' and that the scope of the provision should not be extended to oral testimony." The Commission reviewed and endorsed the growing practice of cross-border evidence-taking through modern technologies, such as video depositions and video links.

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<sup>\*\*</sup>The survey is a product of the ABA Working Group on the Hague Convention on Choice of Court Agreements, which is co-chaired by Louise Ellen Teitz and Janis H. Brennan, a partner at Foley, Hoag in Washington, D.C. Douglas Earl McLaren also helped to develop the survey. Assistance was also provided by the D.C. Bar Association and the Association of the Bar of the City of New York.

<sup>\*\*\*</sup> The survey was based on the draft prior to the December 2003 Special Commission; the draft provided some coverage of non-exclusive choice of court agreements.

As these two recent Special Commission sessions demonstrate, the Hague Conference continues to provide an opportunity for multilateral cooperation in commercial cross-border dispute resolution and transactions. In a world of increasingly global business, The Hague Conference offers a valuable forum for harmonization of different legal cultures and laws.

## **INTERNATIONAL LAW FORUM**

Volume 5, Issue 4, of FORUM is now available in PDF format on the members' only area of the ILA website <[www.ila-hq.org](http://www.ila-hq.org)>. To assist you in accessing the journal directly, click on: <http://www.ila-hq.org/members/FORUMvol5issue4.pdf>. You will be asked for the ILA user name and password. If you have mislaid these details, please e-mail ILA Headquarters ([info@ila-hq.org](mailto:info@ila-hq.org)) with a request for them to be resent to you.

## **CONGRATULATIONS, George Walker!**

Professor George Walker is the third recipient of the prestigious North Carolina Bar Association's John J. Dortch International Service Award. Professor Walker is a member of the ABILA Executive Committee and of the Wake Forest University School of Law faculty. He also chairs the ABILA Committee on the Law of the Sea, directing a major project to define terms in the 1982 UNCLOS III Convention. This award honors someone for their exemplary service and leadership in the advancement of International Law and Practice within North Carolina.

## **BEST WISHES, Michele Valentin! WELCOME, Eileen Ahearn!**

Michele Valentin, former Assistant to Honorary Secretary Carlos Pelayo of Davis Polk & Wardwell has recently left the firm. All of us in the ABILA who have worked with Michele will miss her. We thank her for her great contributions to the ABILA. Best wishes, Michele!

We are pleased to introduce Michele's successor, Eileen M. Ahearn, who has twelve years of experience working for several law firms, most recently as a patent paralegal. Prior to working in the legal industry Eileen held positions as an executive assistant for an international bank; a manager of direct marketing for an international relief organization; and a letter of credit document specialist. Eileen can be reached at [eileen.ahearn@dpw.com](mailto:eileen.ahearn@dpw.com). Welcome Eileen!

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## **IN MEMORIAM: Oscar Schachter**

Oscar Schachter, an Honorary Vice President of the ABILA and long-time leader in the organization, died on December 13, 2003. He was the Hamilton Fish Professor Emeritus of International Law and Diplomacy of Columbia University. His distinguished career included service as Director of the General Legal Division of the United Nations Secretariat and as Deputy Director of UNITAR. Professor Schachter was the author of numerous books and articles, primarily on topics of international organization and the use of force.

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## **BOOK REVIEW OPPORTUNITY**

Members interested in writing a book review for the Newsletter in the ABILA's program with the Oxford University Press should review the list of recently published international law titles at <http://www.oup.co.uk/law/services/email-news>. Thereafter, contact Executive Committee member Peter Oppenheimer ([poppenheimer@yahoo.com](mailto:poppenheimer@yahoo.com)). Mr. Oppenheimer serves as the ABILA contact with Oxford University Press in overseeing the book review program.

## **PROGRAM ON GERMAN, EUROPEAN AND INTERNATIONAL ECONOMIC LAW**

The German Academic Exchange Service, in cooperation with the University of Bonn, will offer a Program June 13-25, 2004. The Program, which is conducted in English, involves lectures and discussions in Bonn, Leverkusen, Cologne, Luxembourg, Karlsruhe, Berlin and Potsdam. Designed for a group of up to 20 distinguished Americans and Canadians from academic institutions, government, and business, the Program features presentations by internationally renowned speakers from a wide variety of backgrounds: German government, the European Commission, the media, and academic organizations.

For further information, please contact: Dipl.-Ing. Lieselotte Krickau-Richter (Director) or Gabi Lochter (Program Officer), Office of International Affairs, University of Bonn, Poppelsdorfer Allee 53, D-53115 Bonn, Germany: phone +49 228/73-77 07, -7293, -7438; fax +49 228/73-77 22; e-mail [lochter@uni-bonn.de](mailto:lochter@uni-bonn.de).