



ABILA Newsletter

Issue No. 87

ILA—Founded 1873

September 2010

President's Message

Next month I complete my term as President. During the past two years, I have been struck again and again by the significant contributions of the International Law Association and the American Branch on many fronts: the work of the Association's twenty-five committees and six study groups, which completed numerous reports at the biennial conference in The Hague in August (as highlighted in this *Newsletter* issue); the excellent recent reports and projects of the Branch's own committees, available on line and to be published in the American Branch's forthcoming biennial *Proceedings*; the Branch's numerous conferences and publications. The annual International Law Weekend and the Branch's 89th annual meeting will be held in New York this coming October 21-23, followed immediately by the inaugural Career Fair (see stories in this issue). The Weekend seems to grow in popularity each year, and the fact that admission remains free to students, Branch members, and members of cosponsoring organizations is a testament to the hard work of the ILW co-chairs and panel organizers, and to the financial support of the Weekend's cosponsors. Our regional ILWs have also been popular – most recently ILW West 2009 at Willamette College of Law in Salem, Oregon, and the first ILW Midwest earlier this year at the University of Denver's Sturm College of Law. These will be followed by ILW West 2011 next February at Southwestern Law School in Los Angeles, and by ILW Midwest at Case Western School of Law in Cleveland, Ohio. It has been my privilege to work with the American Branch.

That so many people contribute their time, talent, and energy to the American Branch is perhaps the best sign of our organization's vitality. First, great credit is due the many Branch committee chairs and active

INTERNATIONAL LAW WEEKEND OCTOBER 21-23 IN NEW YORK

On October 21-23, 2010, the American Branch of the International Law Association and the International Law Students Association will present the annual International Law Weekend (ILW) in New York, in conjunction with the 89th annual meeting of the American Branch. ILW 2010 will take place at the Association of the Bar of the City of New York on October 21, 2010, and at Fordham University School of Law on October 22 and 23. It will bring together hundreds of practitioners, professors, members of the governmental and non-governmental sectors, and students, and will feature numerous panels and distinguished speakers.

This year's theme is "International Law and Institutions: Advancing Justice, Security and Prosperity." The global strategic and financial turmoil of the last several years has created unprecedented challenges and opportunities for international law and institutions. ILW 2010 will address the role of international law and institutions in reducing conflict, promoting security, fostering human rights, protecting the environment, facilitating trade and investment, and resolving public and private international disputes. Panels will examine subjects such as the extent to which treaties currently under negotiation or consideration would further these objectives, and the operation and effect of international

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74th ILA Conference in The Hague

The Dutch Branch of the International Law Association hosted the 74th Conference of the International Law Association in The Hague on August 15-19, 2010. Organized under the theme "De Jure Humanitatis," the Conference featured working sessions of twenty-four of the ILA's twenty-five Committees, with eighteen of those Committees submitting reports. The Association's Study Groups also held sessions. Eight Committees completed their mandates, including those addressing feminism, biotechnology, the outer continental shelf, teaching international law, reparation for victims of armed conflict, use of force, the Interna-



tional Criminal Court, and international commercial arbitration. Beginning on page three of this *Newsletter*, American Branch representatives to many of the ILA Committees highlight Committee developments. Full Committee reports are available at <http://www.ila2010.org/?pid=385> and <http://www.ila-hq.org/en/committees/index.cfm>. An outstanding parallel program included panels on the International Criminal Court, international commercial arbitration, choice of forum and choice of law clauses in contracts, the global financial crisis, Islamic finance, international law arbitration as conflict prevention, the rights of children, biological weapons, climate change, Kosovo,

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CALENDAR OF EVENTS

ILA AND ABILA EVENTS

October 21-23, 2010 —

**International Law Weekend
New York**

October 23, 2010 —

**International Law Weekend —
Career Fair
New York**

February 25-26, 2011 —

**International Law Weekend — West
Los Angeles**

May 29 - June 1, 2011 —

**International Law Association Asia-
Pacific Regional Conference
Taipei, Taiwan, ROC**

August 25-30, 2012 —

**75th Biennial Conference of the
International Law Association
Sofia, Bulgaria**

August 17-22, 2014 —

**76th Biennial Conference of the
International Law Association
Kyoto, Japan**

FOR INFORMATION ABOUT ILA, ABILA AND
CO-SPONSORED EVENTS, PLEASE SEE:
[www.ila-americanbranch.org/
ABILA_ILA_Events.aspx](http://www.ila-americanbranch.org/ABILA_ILA_Events.aspx)

INTERNATIONAL LAW WEEKEND

OCTOBER 21-23 IN NEW YORK

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organizations, international courts, and arbitral institutions on the global legal order. The lead panel on Thursday evening, October 21, moderated by Patricia O'Brien, the Under-Secretary-General for Legal Affairs and the UN Legal Counsel, will address the role of the United Nations in the development of international law.

Following the opening panel, a reception at the Association of the Bar of the City of New York is open to all conference attendees. Advance registration is required for the Friday evening gala reception hosted by the Permanent Representative of Finland to the United Nations, and for the Saturday luncheon address by David D. Caron, the C. William Maxeiner Distinguished Professor of Law at the University of California/Berkeley

School of Law and the President of the American Society of International Law. Space is limited at both the Friday reception and the Saturday luncheon.

The annual members' meeting will take place on Friday, October 22, 2010, at 2:15 p.m.

The American Branch gratefully acknowledges the support of the following cosponsors of ILW 2010:

- ABA Section of International Law
- Allen & Overy LLP
- American Society of International Law
- American University, Washington College of Law
- Baker & McKenzie LLP
- Brill/Martinus Nijhoff Publishers
- California Western School of Law
- Connecticut Bar Association Section of International Law
- Customs and International Trade Bar Association
- Debevoise & Plimpton LLP
- Edwards Angell Palmer & Dodge LLP
- The Federalist Society International & National Security Law Practice Group
- Fordham University School of Law
- Freshfields Bruckhaus Deringer LLP
- The George Washington University Law School
- Hofstra Law School
- Leitner Center for International Law and Justice
- New York State Bar Association Section of International Law
- Oxford University Press
- Pace Law School
- Seton Hall University School of Law
- Simpson, Thacher & Bartlett LLP
- Skadden, Arps, Slate, Meagher & Flom and Affiliates
- Willkie Farr & Gallagher LLP
- Wilmer Cutler Pickering Hale & Dorr LLP

Registration for ILW is free to students, members of the American Branch, and members of cosponsoring organizations. Membership in the Branch is \$70 per calendar year for new members for each of the first two years and \$100 thereafter, and is free for students. Registration for ILW is \$75 for non-members. The ILW 2010 schedule, along with ILW registration and ABILA membership forms, are available at www.ila-americanbranch.org.

AMERICAN BRANCH LAUNCHES CAREER FAIR OCTOBER 23, 2010

A new feature of International Law Weekend begins this year. On Saturday afternoon, October 23, 2010, the American Branch will launch a half-day program of speakers, breakout sessions, and other events designed to help law students gather information about career paths in different areas of international law and to gauge the future demand for lawyers with expertise in different aspects of private and public international law. The program, to be held at Fordham University School of Law, 140 West 62nd Street, New York, NY, will begin with keynote speeches by successful individuals who have practiced international law in more than one setting. Then students will have opportunities to choose among breakout sessions focusing on particular areas of international practice. This year's breakout sessions include: international litigation and arbitration; working for NGOs; immigration law; and international transactional practice. The program will conclude with a reception and an opportunity to speak informally with participants and learn about a variety of summer study abroad programs open to law students.

The American Branch is pleased to initiate the first annual program for J.D. and LL.M. students devoted exclusively to career development in a wide range of international law settings. ABILA is joined in this effort by the American Society of International Law, the American Bar Association Section of International Law, and the International Law Students Association. The program for the event will be available on the ABILA website in early October.

International Law Weekend — West

Every other year the American Branch holds International Law Weekend-West. The next ILW-West will take place February 25-26, 2011, at Southwestern Law School in Los Angeles, which is celebrating its 100th anniversary. The theme of the conference is: "2021: International Law Ten Years from Now." The conference will examine a broad range of legal areas that are coping with and adjusting to the challenges of conflict, tech-

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piracy, human rights and the millennium development goals, the Arctic, access to justice, water rights, the United Nations, international law in domestic legal systems, and the responsibility to protect. A large contingent represented the American Branch at this well-attended biennial conference.



Ridderzaal

Highlights of the Conference included a gala dinner in the Ridderzaal, located in the medieval government center of The Hague, and a reception at the Peace Palace, home to the Permanent Court of Arbitration and the International Court of Justice. One evening was devoted to embassy events, and the U.S. embassy hosted approximately three dozen U.S. delegates for a briefing by Deputy Chief Ned Nolan and a question and answer session with Legal Counsel Karen Johnson. During an optional tour after the end of the Conference, delegates visited the Van Gogh collection at Kröller Müller, and Slot Loevestein, where Hugo Grotius had been imprisoned.

Future biennial ILA conferences will be hosted by the Bulgarian Branch (2012), the Japanese Branch (2014), the American Branch (2016), and the South African Branch (2018).



Slot Loevestein

ILA COMMITTEE ACTIVITIES

Here are reports from some of the American Branch members who attended the ILA biennial conference in The Hague August 15-19, 2010, and represented the Branch on ILA committees meeting there. Full interim and final reports of ILA committees are available at <http://www.ila-hq.org/en/committees/index.cfm>. Due to space constraints, reports from the International Protection of Consumers Committee, the Recognition/Non-Recognition in International Law Committee, and the Study Group on the Role of Soft-Law Instruments in International Investment Law will be published in the January 2011 edition of this *Newsletter*.

BASELINES UNDER THE INTERNATIONAL LAW OF THE SEA

By Coalter G. Lathrop (Committee Rapporteur)

The ILA Committee on Baselines under the International Law of the Sea met for the first time at the 74th Biennial Conference in The Hague in August 2010 in closed and open sessions, with Judge Dolliver Nelson (United Kingdom) as Chair and Coalter Lathrop (American Branch) as Rapporteur. In advance of the conference the Baselines Committee produced a draft discussion paper in response to its mandate, which is to “identify the existing law on the normal baseline and assess if there is a need for further clarification or development of that law.” The primary impetus for the formation of this Committee came from two maritime delimitation cases in which the location and configuration of coastal state baselines were questioned. The issues raised included the role of nautical charts officially recognized by coastal states, the competence of international courts, tribunals, or other entities to challenge coastal state baselines claimed pursuant to the law of the sea, and the effect on baselines – and the maritime zones delineated therefrom – of human induced coastal or sea level change.

The Baselines Committee draft discussion paper is available on the ILA website at <http://www.ila-hq.org/en/committees/index.cfm/cid/1028>. In the closed session Committee members discussed the scope of the mandate and direction of the Committee. In the open working session Commit-

tee members and non-members commented in more detail on the contents of the discussion paper. The Committee anticipates an intersessional meeting in 2011 and plans to produce a draft final report for adoption at the 2012 Biennial Conference in Sofia, Bulgaria.

LEGAL PRINCIPLES RELATING TO CLIMATE CHANGE

By Anita Halvorssen (Committee Member)

The ILA Committee on the Legal Principles Relating to Climate Change was established by the ILA Executive Council in November 2008 in response to a proposal by the Japanese Branch in September 2008. The First Report of the Committee was submitted to the ILA Conference in The Hague in August 2010. It is based on the paper submitted by the Japanese Branch as well as the rich array of structural and substantive comments offered in response to that paper. A heroic job was done by the Rapporteur, Lavanya Rajamani (Indian Branch), to piece this all together. The thirty-two members of the Committee represent ILA branches from all regions of the world, ably guided by the Chair, Shinya Murase (Japanese Branch).

At The Hague, there were three meetings of the Committee (two closed and one open) and one parallel session on climate change, entitled *Changing Climate: Challenges on the Road from Copenhagen*. Lavanya Rajamani chaired the session, and the three panelists were Shinya Murase, Joyeeta Gupta (Netherlands Branch), and Margot Salomon (U.K. Branch).

Defining the scope of the Committee’s work, the members have chosen the thematic approach of first reviewing key principles and legal concepts relevant to climate change, with the goal of analyzing their current legal status, functions, possibilities, and limits within the existing climate change regime. This approach sets the stage for their possible incorporation, with necessary elaboration and/or modification, into the “Legal Principles.” The Committee’s ultimate goal is to have its work on the Legal Principles Relating to Climate Change adopted by the ILA in the form of draft legal principles and attached commentaries.

The First Report introduced a “laundry list” of legal principles relating to climate change,

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nology, and globalization in the modern era. Panels will identify significant developments or issues related to a specific area of international law – e.g., international arbitration and litigation, international finance, international transactions, international trade, international human rights, climate change and international environmental law, international criminal law, and legal developments of note in Latin America or Asia – and analyze their potential impacts in shaping

President's Message

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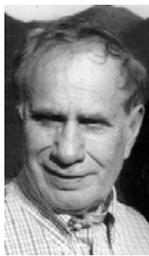
committee members, the Branch's representatives on ILA committees, and our officers, Executive Committee members and Honorary Vice Presidents – all listed at the Branch's website, <http://www.ila-americanbranch.org>. Second, thanks go to those who organize and speak at the Branch's conferences and events and who compile and contribute items for the Branch's publications. Third, the Branch cannot function without institutional support, provided during my term by many individuals at ILA Headquarters in London, California Western School of Law, and the law firms of Munger, Tolles & Olson LLP, Debevoise & Plimpton LLP, and Brown & Welsh LLP (see http://www.ila-americanbranch.org/Law_Firm_Supporters.aspx). I am grateful. Fourth, American Branch members have devoted a lot of time and energy to many, many specific projects: good governance review, financial review, planning for the 2016 biennial ILA conference to be held in the United States, relations with the International Law Students Association, the nominations process, the American Branch-ASIL arbitration transparency project, advice to the State Department on international judicial appointments, membership development, the new Career Fair to follow International Law Weekend and other new Branch programs, and reports to ILA headquarters in London. Valerie Epps and Phil Moremen have done amazing things as Co-Directors of Studies. The advice and hard work of Charles Siegal, the Chair of our Executive Committee, have been truly indispensable, as have the contributions of many other former presidents and current Vice Presidents. Once I start naming names, however, I risk forgetting some, and this note will become too long! So let me simply close by thanking all who contribute so much to the American Branch.

John E. Noyes

the future of international law. This conference will examine current international issues and trends by assessing what the future may look like.

Proposals from those interested in chairing or speaking on a panel may be directed to Professor Robert Lutz at rlutz@swlaw.edu. (Proposals are particularly invited from those in the western United States.) More details will be posted as they become available at http://www.ila-americanbranch.org/Intl_Law_Wknd_West.aspx.

THEODORE RICHARD GIUTTARI PASSES AWAY AT 79



Theodore Giuttari

Theodore Richard Giuttari of Jersey City and Spring Lake, NJ, passed away on August 30, 2010, at age 79. Ted Giuttari was an active officer of the American Branch of the International Law Association, serving the Branch in a number of capacities. He was a member of the Executive Committee from 1969 to 1994, the Honorary Secretary and Honorary Treasurer from 1969 to 1973, Vice President from 1985 to 1994, and Editor of the Branch's published *Proceedings* from 1969 to 1972 and again from 1981 to 1994. Beginning in 1994, Ted Giuttari was elected Honorary Vice President of the Branch, a position he held until his death. He provided the Branch with valuable perspectives on governance issues until recently. The American Branch honors his contributions and will miss his gentle nature, his practical and scholarly perspectives, and his advice.

Ted Giuttari was a graduate of St. Peter's College, received his law degree from Fordham University Law School, and earned two Master's degrees at Columbia, in American History and in International Affairs and Russian Studies, as well as a Ph.D. in International Law and Relations at Columbia. His distinguished legal career focused on the areas of international law and contracts. He

most recently served as legal advisor at Prima Law & Consultation for Prince Abdulrahman bin Saud Al-kabeir in Riyadh, Kingdom of Saudi Arabia, and as legal consultant in the Law Offices of Gebran Majdalany in Doha, Qatar. He had previously practiced law at Wyeth (formerly American Home Products Corporation) and at Bigham, Englar, Jones, & Houston, and worked as Legal Advisor to Saudi Basic Industries Corporation (SABIC) in Riyadh, Kingdom of Saudi Arabia. Ted Giuttari's scholarly publications included *The American Law of Sovereign Immunity* (1970), and he taught courses in history, political science, U.S. foreign policy, and philosophy as an Adjunct Professor at Rutgers University and community colleges.

He is survived by his wife of thirty-seven years, Maria Elena (Domingo) Giuttari, and by his children Joanna Giuttari and husband Matthew Briggs, Melissa Giuttari and husband Christopher Jackson, and Jennifer Giuttari and husband Brandon Jackson.

AMERICAN BRANCH ADVICE ON ICJ NOMINATIONS

In May 2010 the American Branch responded to a request from State Department Legal Adviser Harold Koh, asking for the American Branch's recommendations for a U.S. judge to sit on the International Court of Justice, following the resignation of Thomas Buergenthal. Following extensive discussion among a group of over a dozen Branch officers and Executive Committee members, American Branch President John Noyes communicated to the Legal Adviser the broad agreement among those individuals about a list of potential nominees, and about criteria that the Branch urged the U.S. National Group to consider in making its nomination. The eventual U.S. nominee, Joan Donaghue, formerly Principal Deputy Legal Adviser of the U.S. State Department, was sworn in as a judge on the International Court on September 9, 2010.

The Legal Adviser also asked for the Branch's views concerning Madam Xue Hanqin, who had been nominated by the Chinese National Group for election to the ICJ. The American Branch, however, in keeping with its normal practice, refrained from offering views with respect to a candidate nominated by a National Group of any of the four permanent members of the UN Security Council other than the United States.

ILA COMMITTEE ACTIVITIES

(Cont'd)

LEGAL PRINCIPLES RELATING TO CLIMATE CHANGE (Cont'd)

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based on Article 3 of the United Nations Framework Convention on Climate Change. The list sets out six principles: common but differentiated responsibilities and respective capabilities (CBDRRC), equity, sustainable development, the precautionary approach/principle, and the principle of good faith, and further concepts and principles of relevance to the climate change regime, including the polluter pays principle, among others. At the last closed meeting in The Hague, the Committee agreed to merge CBDRRC with equity and rearrange the principles into thematic clusters and then replace the sixth principle with international economic (trade) principles as they relate to precaution. After three intense hours of work, with wonderful guidance by Shinya Murase, the Committee produced an outline for its future work program. The plan is to have a Second Report, a substantive report, ready for ILA's Sofia Conference in 2012 and to submit its Third (Final) Report to the ILA Conference in Kyoto in 2014.

INTERNATIONAL COMMERCIAL ARBITRATION

By Louise Ellen Teitz (Committee Member)

The International Commercial Arbitration Committee met in The Hague and completed its two-year project on confidentiality in international commercial arbitration. Although most people have assumed that confidentiality is part of commercial arbitration, indeed one of the reasons for selecting it, some court cases raised doubts. These doubts have led both countries and arbitral institutions to address the issue expressly. The current laws and rules are not uniform, and there is also difficulty in enforcing any confidentiality obligations.

The detailed Committee Report surveys current law and practice regarding confidentiality and identifies problems that may arise as a result of the inconsistent and uneven applicability of confidentiality. The Report then considers potential solutions to these problems through law reform, amendments to arbitral rules, or the drafting of contract clauses. In addition, the Report contains a

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model clause for parties to incorporate if they want to insure confidentiality in the arbitral process. The Report is a valuable resource, with its extensive study of existing laws (which is presented both in text and in chart form).

The Committee is proposing that its mandate be renewed. The proposed new topic is the inherent powers of arbitral tribunals. The renewal of the Committee's mandate will likely be considered at the next ILA Executive Council meeting in London in November.

CULTURAL HERITAGE LAW

By James Nafziger (Committee Chair)

Twenty-two members of the Committee on Cultural Heritage Law attended a working session in The Hague. The Committee first reviewed the status of its past projects, focusing this time on the UNESCO Convention for the Protection of the Underwater Cultural Heritage that resulted from the Committee's Buenos Aires Draft Convention on that subject. Now that the treaty is in force, the Committee considered the actual and potential status of accession by maritime powers, including the United States.

The Committee then turned to its current, comparative project concerning international and national export controls over cultural material within the GATT/WTO framework. A draft report represented a synthesis of some eighteen national reports prepared by Committee members and five reports on more global and regional aspects of export controls, such as on the European Union's regime of internal and external control and the relationship between export controls and human rights.

Looking to the future, the Committee decided to prepare a book for publication, to be based on the members' preparation of more comprehensive national and global/regional reports that would consider the import as well as the export side of controls. The Committee further decided to undertake a new project on national and regional provisions for immunity from suit and seizure of internationally loaned cultural material and, on the invitation of the ILA Committee on the Rights of Indigenous Peoples, to review pertinent parts of that Committee's draft report (still in preparation) on the UN Declaration on the Rights of Indigenous Peoples.

INTERNATIONAL FAMILY LAW

By Barbara Stark (Committee Chair)

The ILA International Family Law Committee met for an extended working session during the 2010 Conference in The Hague. Judge Sujata Manohar (India) chaired the working session. The Draft Report, which had been distributed to Committee members prior to the meeting, was introduced and comments were invited. The Report, prepared by Professor Jacqueline Heaton (South Africa) addressed ongoing gender bias in family law. Brief papers on recent developments in custody, forced and child marriage, divorce, visitation, and state natalist policies combined to suggest new forms of old problems. Child abduction, for example, was usually by fathers in the 1980s when the Hague Convention on Abduction was drafted. Then, fathers were unhappy with custody orders in favor of mothers. Now, mothers are the ones abducting children, bringing their children back to the mother's homeland, where she is likely to have more support. The Report was adopted by the Committee in the second half of the session, and discussion turned to the future direction of our work.

There were several suggestions by interested participants who were not members of the Committee. Mr Ranjit Malhotra (India) suggested several new topics, and the participants seemed especially interested in surrogacy. Professor Katherina Boele-Woelki (Netherlands) said that Europeans went abroad to "order" a surrogate mother. At Utrecht University, research was being undertaken funded by the Dutch Ministry of Justice to examine the ethical and legal implications of the increasing numbers of cross-border cases. There were tensions between the right to know one's origins (child) according to Article 7 of the Convention on the Rights of the Child and the right to leave a child. Exploitation of women should also be taken into account. James Ding (Hong Kong) commented that with developments in science and technology and decreasing costs, problems would be likely to increase. He noted that no international panel had yet dealt with these problems. Professor Javid Rehman (U.K.) said that surrogacy raised many issues and taboos from the Islamic perspective. The right of homosexuals to start a family, for example, could not be considered where homosexuality remained a

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DAVID D. CARON

NEW AMERICAN BRANCH PATRON

David D. Caron has become a Patron of the American Branch. The Branch is grateful to Professor Caron, who is the C. William Maxeiner Distinguished Professor of Law at the University of California/Berkeley School of Law and current President of the American Society of International Law. Professor Caron's work relates especially to international arbitration and international oceans law and policy.

Current Branch Patrons include: Charles N. Brower, David D. Caron, Edward Gordon, Cynthia Lichtenstein, John F. Murphy, James A.R. Nafziger, Ved Nanda, John E. Noyes, and Charles D. Siegal. For more information on the Patrons program, visit www.ila-americanbranch.org/Patrons.aspx.

ILA COMMITTEE ACTIVITIES (CONT'D)

INTERNATIONAL FAMILY LAW (Cont'd)

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serious criminal offence.

The consensus seemed to be that the Committee should continue through the expiration of its mandate in 2012. The project will be decided after consultation with the Committee members who were not present. The Chair (Barbara Stark) noted that the existing Report did not contain recommendations, but that the final report could include recommendations on the basis of this one. She considered it a good idea to explore this matter further through informal channels, thanked everyone for coming, and closed the session.

NON-STATE ACTORS

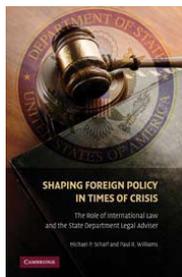
By Barbara K. Woodward
(Committee Member)

On Wednesday, August 18, 2010, at the International Law Association's Biennial Conference held in The Hague, The Netherlands, the newly established Committee on Non-State Actors (NSA) held an open working session and a closed session for Committee members.

BOOK REVIEWS

Shaping Foreign Policy in Times of Crisis: The Role of International Law and the State Department Legal Adviser

Michael Scharf and Paul Williams
Cambridge University Press, 2010
Pp. 322 (Hardback, \$85.00),
available through www.cambridge.org
ISBN 9780521766807



Reviewed by James Lynch, Esq., CPA, Senior Tax Manager, Sobel & Co. LLC

The book begins with a brief review of the ongoing debate on the obligation of nations to follow international law. This is followed by a brief history of the Office of the Legal Adviser (known as "L"). Then, each of the legal advisers from each administration from Carter to Bush (43) gave a brief summary of his career before he became the Legal Adviser. Each adviser then discussed some of the critical moments of his time in office. These essays are followed by a transcript of a roundtable discussion in which the advisers participated. The roundtable was hosted by then American Society of International Law President Anne Marie Slaughter. This is followed by a transcript of a roundtable discussion in which several former legal advisers from different countries participated. This roundtable was hosted by author Michael Scharf. An essay on the treatment of detainees in the war on terrorism followed. An essay on the role of the legal adviser concludes the book.

Each part of the book is of great interest. There is a mixture of the theoretical and the practical. Most readers, like this reviewer, will leave this book with an admiration of the legal adviser and his assistants.

This is particularly true of the chapter on the treatment of detainees in the war on terrorism. According to this book, the Office of the Legal Adviser was not consulted when the initial policies on the treatment of detainees were formulated. As a result, certain proce-

dures that would have been rejected in the past were allowed.

Fortunately, military lawyers objected to the use of these procedures, and these procedures were finally rejected. Eventually, the Office of the Legal Adviser was brought in and a more balanced policy, more consistent with traditional American policy and the norms of international law, was developed.

At the same time, this book will leave some readers saddened because of the lack of outrage on the part of Americans when traditional American policy and, in some cases, the generally accepted interpretation of international law, were ignored. One time when this occurred was in the so-called Iran Contra Affair. American officials were involved in the sale of arms to Iran, whose government supported terrorist organizations, to raise money to support the Contra rebels in Nicaragua. This activity violated the long-held American policy of not negotiating with terrorists. It also violated Congress's disapproval of giving aid to the Contras.

A second example is the treatment of detainees in the war on terror. Not only was the traditional American policy of not torturing prisoners of war violated, but international law forbidding such treatment of detainees was also violated.

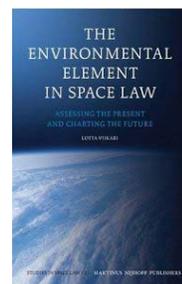
In neither case was there great outrage among Americans. It was as if these over turnings of traditional American policies do not bother Americans.

This is an excellent book, well worth the time it takes to read it.

The Environmental Element in Space Law: Assessing the Present and Chartering the Future

Lotta Viikari
Martinus Nijhoff Publishers/Brill Academic, 2008

Pp. 396 (Hardback, \$163.00), available through www.nijhoffonline.nl/public_home
ISBN 9789004167445



NON-STATE ACTORS (Cont'd)

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The Committee's work has included its first draft report and several publications by Committee members. These included: a book edited by Math Noortmann and Cedric Ryngaert, *Non-State Actor Dynamics in International Law: From Law-takers to Law-makers* (Ashgate, 2010), a series of articles entitled "New Actors in Global Governance and International Human Rights Law," *4 Human Rights & Int'l Legal Discourse* No. 1 (2010), and a monograph by Barbara K. Woodward entitled *Global Civil Society in International Lawmaking and Global Governance: Theory and Practice* (Martinus Nijhoff, 2010).

The Rt. Hon. Lord Mance, Justice of the United Kingdom Supreme Court and Chair of the ILA Executive Council, chaired the well-attended open working session. Lord Mance introduced the Chair of the NSA Committee, Math Noortmann. Then the Co-Rapporteurs, Malgosia Fitzmaurice and Cedric Ryngaert, discussed the content of the first draft report, entitled "Non-State Actors in International Law: Aims, Approach and Scope of Project and Legal Issues." Part one of the Report describes the aims, the functional methodological approach to be employed, and the scope of the project, and it specifies working definitions of important terms and the research questions. The study will expressly include five types of NSAs: non-governmental organizations (NGOs) having some form of recognized international legal status, multinational business enterprises, organized armed opposition groups, so-called sui generis entities, such as the International Committee of the Red Cross (ICRC) and the Holy See, and organized indigenous peoples' groups. It expressly excludes inter-governmental organizations, individuals, illegal and illegitimate organized bodies, such as the Mafia, and illegal bodies not organized in any recognized manner, such as Al-Qaeda and pirates.

Part two maps legal issues relating to three principal functional categories of international law and global governance in which one may find NSA activity: (1) norm-creation (treaty, customary international law, and general principles of law), (2) monitoring compliance with international law

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Reviewed by Prof. Jonathan F. Galloway, Vice President, International Institute of Space Law

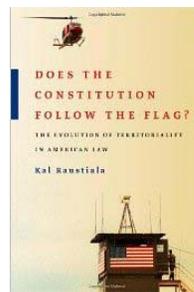
Dr. Viikari of the University of Lapland has written a comprehensive, insightful, and lucid analysis of environmental law and the law of outer space. Principles from environmental law are examined – sustainable development, the precautionary principle, the polluter pays principle, and the problems of the tragedy of the commons and free riders – in relation to problems in outer space including space debris, nuclear contamination, solar power satellites and exobiological contamination. These issues are not the subject of specific articles in the 1967 Outer Space Treaty or other space treaties but are becoming the subject of soft law initiatives such as UN resolutions and codes of conduct.

Students of international law will be drawn to the author's analysis of such questions as the role of powerful interests in influencing the development of the law, the place of environmental impact assessments, and liability requirements for environmental damage in outer space.

The author's analysis is realistic and pragmatic. She also points to the necessity of extending the principle of sustainable development into future space law agreements, which should not be too little and too late.

Does the Constitution Follow the Flag? The Evolution of Territoriality in American Law

Kal Raustiala
Oxford University Press, 2009. Pp. 328.
(Hardback, \$29.95), available through <http://www.oup.com>
ISBN13: 9780195304596



Reviewed by Carl Q. Christol, Distinguished Professor Emeritus of International Law and Political Science, University of Southern California

This book is an analytical history of change from early Westphalian circumstances down to today's condition of globalization as adopted in the policies and practices of the United States. The author invited scholars in the fields of international relations, international law, and U.S. constitutional law to provide their insights as the manuscript was unfolding. The footnotes at the end of each chapter are wide-ranging, evidence of the author's careful research and scholarship. The author's reasoning is clear and compelling. All of the above have given this reviewer a sense of confidence in the validity of the book's arguments and conclusions.

The Westphalian system, traced to the close of the Thirty Years' War in 1648, meant that states were entitled to exercise full sovereignty within their boundaries. By the same token, a state had to refrain from exercising its authority within the territory of a co-equal state. As the conduct of aliens began to affect the well-being of recipient states and their residents, affected countries initiated protective activities. Concurrently the concept of the exercise of national jurisdiction developed, meaning that a state could establish procedures and practices for persons and property, applicable to both citizens and aliens, and applicable both within and beyond its territory.

The arrival of globalization and the growth of the hegemonic power and authority of the U.S. provided the base upon which the country could protect its interests. One means of determining if a State will find foreign activities within its borders to be unacceptable, is to determine if the effects are so adverse that they are unacceptable. This, as the author has pointed out, calls for the application of domestic law prescribing legal liabilities. However, the United States has not seen fit to claim the right to exercise jurisdiction over certain activities transpiring within U.S. territory. The term "extraterritoriality" is applied to the transitory presence of aliens seeking admission at places of entry into the United States, foreign embassies, the real property used as United Nations headquarters, and certain restricted areas in airports engaged in foreign flights. The status of Indian tribes runs two ways; in one respect they can claim the rights of "foreign states," while in other circumstances they are domestic states or domestic dependent nations, classified under the heading of intraterritoriality. In such cir-

BOOK REVIEWS (Cont'd)

(Continued from page 7)

cumstance, tribal members may not receive full constitutional protections and must look to statutory protection and assistance.

Additionally, rules of jurisdiction and rights under the Constitution have developed that depend on the location, domicile, and nationality of persons. The author discussed, in eight separate references, the case of *Johnson v. Eisentrager*, involving German World War II combatants captured in China and imprisoned in Germany. Another World War II case, *Ex parte Quirin*, resulted from the capture of German saboteurs in the United States. The U.S. Supreme Court decided that case in 1942, following the saboteurs' appeal from their conviction by a military commission. The Supreme Court decided the appellants were entitled to use the writ of habeas corpus, since at the time of their arrest they were within U.S. territory.

While the author was preparing this book, several cases were addressing the "war on terror" and the jurisdiction of Article III courts, as well as such military procedures as administrative review boards, combatant status review tribunals, and military commission review courts. The cases reaching the Supreme Court all dealt with habeas corpus. The author examined three of nine Supreme Court cases. One 1990 case considered by the author, *United States v. Verdugo-Urquidez*, involved a non-resident alien who was captured in Mexico on charges of having murdered a federal drug enforcement official, and who, having been returned to the United States, was charged with that crime. He claimed that Fourth Amendment rights had been violated. The Court held he could not invoke this constitutional provision, since the accused at the time of his conduct was a non-resident alien whose conduct occurred in Mexico. The author examined this case from a variety of perspectives, citing it fourteen times.

The U.S. Supreme Court case of *Boumediene v. Bush* (2008), one of the most important cases of the century relating to extraterritoriality, involved the assertion by an alleged terrorist combatant enemy alien held by U.S. forces at the U.S. Naval Station in Guantanamo, Cuba, that he was entitled to rely on the writ of habeas corpus so that he could obtain a hearing by the Supreme Court. In a drawn out set of opinions, including well-

groomed dissents, a 5-4 majority determined that the Guantanamo base, although legally the product of a lease arrangement between the United States and Cuba, was in fact a place where the United States exercised "functional territorial sovereignty" and "the functional equivalent" of sovereignty. The Court therefore concluded that Guantanamo should be treated as if the United States were the territorial sovereign. This outlook allowed the complainant to use the habeas corpus provisions of the Constitution. The majority opinion stressed that nothing further in the form of constitutional rights should be read into the holding. Influencing the majority was the fact that Boumediene had been imprisoned for an extended period of time under adverse conditions, and that other than as a result of the majority opinion he would not be likely to obtain a review of his imprisonment in Article III courts or in military tribunals. The minority argued that the opinion would only serve to complicate the prisoner's condition and add many years to a final decision since there would be the need to test through reviews the future holdings of such tribunals. Added to the tests applicable to extraterritoriality cases was the concept of "functional equivalency." The majority opinion reaffirmed the principle set forth in *Marbury v. Madison* that the Supreme Court was the final arbiter respecting the meaning of the Constitution, which has been challenged by the President and Congress through the adoption of legislation pointing in other directions. An example is the Military Commissions Act of 2006, which quickly negated many of the views appearing in the case of *Hamdan v. Rumsfeld* (2006).

The author considered the proposal voiced by other scholars that the jurisprudence of human rights supported the proposition that such rights were not subject to territorial limitations and reached to all persons everywhere. If this were the case, neither the conditions of citizenship nor territoriality would prevent the exercise of jurisdiction. The Westphalian system inhibiting states from extending their powers and authority into other sovereign entities would be further constrained. Globalism and the exercise of hegemonic controls would be further enhanced, perhaps in the interest of worthy goals.

How should one answer the question posed in the book's title? Like many other legal questions and answers, a valid response might be: "It all depends." We might take into account

the condition of U.S. citizenship acquired via geographical circumstances of place of birth, accompanied by influential factors allowing one to feel a meaningful part of the community, or resolved by naturalization based in some part on proof of a national presence resulting from test-taking, and by legislative enactment depending in some part on the new citizen's not being a stranger in the country of new allegiance. But successfully meeting one of the foregoing conditions need not be the final word. The Supreme Court has decreed that American Indians born on American soil were not citizens despite the provision of the Fourteenth Amendment that a person born within the United States was a citizen, since an Indian was deemed a member of an alien nation that is "a distinct political community." This has not prevented legislation conveying U.S. citizenship on Indians who have served "their country" in the military forces during the recent armed conflict against terrorists.

The coequal branches of the government operate a so-called "moving sidewalk," carrying traffic consisting of legal cases in different stages of resolution, from points of egress to the depot at the end of the line, where they are marked "decided." There may be exit points along the way where some cases are deposited, pending further inquiry, with the expectation that once certain issues are resolved, the cases could regain a position on the "sidewalk" and ultimately be removed from this process. But a marking of finality could by no means assure that a static condition had been achieved, since experience has demonstrated that something considered to be well-decided can with changing circumstances be deemed unacceptable. Just as the Constitution is an emerging set of principles so, too, is the law of extraterritoriality. The author has performed a valuable service in this book.

The American Branch thanks Lucy Martinez of Freshfields Bruckhaus Deringer LLP in New York City for serving as Newsletter Book Review Editor for the past several years. Our new Book Review Editor is Tiffany Basciano of Johns Hopkins University. For questions or to submit a book review, contact her at tbascia1@jhu.edu.

ILA COMMITTEE ACTIVITIES (Cont'd)

NON-STATE ACTORS (Cont'd)

(Continued from page 7)

(administration), and (3) enforcement (dispute settlement, accountability or responsibility of NSAs, and immunities of NSAs). The research will examine various international institutional arrangements, including international organizations and treaty bodies, which have arrangements for NSA participation or other roles for specific NSAs and analyze whether any of these confer rights or impose obligations on such NSAs and the nature of such rights or obligations. A fourth section raises issues concerning the possible "status" of various types of NSAs in international law or international legal personality, or the subject/object dichotomy established in traditional international law theory.

The Rapporteurs responded to valuable questions and contributions from the audience, and other Committee members offered their comments. Several individuals had questions about defining "non-State actors." There were queries concerning how and why the Committee determined which NSAs to include and exclude in the study. Some attendees offered suggestions from their own experience that could be useful to the Committee's work, including one who worked on a relevant case study performed over a decade ago. The response from the audience was enthusiastic, and there were many valuable contributions.

The Committee then held a closed session for Committee members to discuss future plans. The work of the Committee on NSAs is expected to proceed in two main stages lasting two years each. First, Committee members will perform multiple empirical case studies of particular NSAs in the contexts of specific institutional arrangements seeking to answer the research questions. Before this begins, it is necessary to prepare an outline of possible institutional arrangements to include as case studies and a master questionnaire articulating the research questions. After these are finalized, the Committee will welcome the participation and contributions of other academics not members of the Committee. Any member of the ILA American Branch who may be interested in participating should contact Dr. Barbara K. Woodward at barbarak-

woodward@aol.com. The second phase of the project will be more theoretical and will consist of the evaluation of the compiled findings from the case studies and determining what general conclusions, if any, may be drawn. This will include ascertaining whether any of the NSAs studied have any rights or obligations under international law, including whether it is possible to derive a type of legal "status" or international legal personality for any of the NSAs studied.

REPARATION FOR VICTIMS OF ARMED CONFLICT

By James Nafziger (Committee Member)

The Committee on Reparation for Victims of Armed Conflict had a lively open session to review the substantive portion of its Draft Declaration of International Principles of Reparation for Victims of Armed Conflict. The participation of representatives from national governments and international organizations attested to the respect that the project has earned over several years of preparation.

The Declaration seeks to respond to the great suffering of civilian populations during recent armed conflicts and, in a quest for justice, to blend and modernize pertinent provisions of international humanitarian law and human rights law, the exact relationship between which remains a critical issue. Among some sixteen draft articles, each with extensive commentary, the Committee focused on definitions (for example, the scope of the term "victim"), the content of a right to reparation in terms of precedent and other authority, and alternative remedies.

After making several changes of wording, the Committee approved of a final version of the draft. In a later closed session, a core group of the Committee discussed the next stage of the project, which will be focused on procedure, namely, the preparation of a draft model statute or other instrument to encourage implementation of the Draft Declaration by States.

INTERNATIONAL SECURITIES REGULATION, INTERNATIONAL MONETARY LAW, AND STUDY GROUP ON SOVEREIGN INSOLVENCY

By Cynthia Lichtenstein
(Member of Committees)

On Wednesday, August 19, 2010, the Dutch

Organizing Committee for The Hague Conference wisely scheduled in succession the working session of the International Securities Regulation Committee, a complementary program panel on the financial crisis, and the working session of the International Monetary Law Committee (MOCOMILA). Although the two Committees are only part of the ILA's work in what is now called International Economic Law (with the International Trade Committee, the International Committee on Foreign Investment, and the Study Group on Sovereign Insolvency being other offerings), this summary only covers the two Wednesday working sessions, the complementary panel, and the Thursday a.m. meeting and Report of the Study Group on Sovereign Insolvency.

The Reports of the two Committees (Securities Regulation and MOCOMILA) can be accessed at <http://www.ila2010.org/?pid=385>. Neither Committee presented any resolutions for the Conference to adopt, as both were extensively engaged in reporting on the variety of responses – national (nation state), supranational (the EU), and international (G20) – to the 2008 global crisis. In addition, both Committees were studying subject matters traditionally addressed by the Committees' Reports (e.g., in the case of Securities Regulation, corporate governance and asset management; and in the case of MOCOMILA, Islamic finance). Both working sessions were very well attended, and the discussion was extremely lively. In the case of the working session of the International Securities Regulation Committee, two regulators who have recently joined the Committee (in their personal capacities) spoke about their contributions to the Report. These regulators were: Ms. Christina Sinclair of the British Financial Services Authority; and Dr. Rene Maatman of The Netherlands Authority for the Financial Markets (the Dutch equivalent of the SEC, although the remit and division of labor between the Central Bank and the Authority differs from that of the U.S.'s central bank (Federal Reserve) and the SEC, even after the recently passed reform legislation (the so-called Dodd/Franck Act)). The two Co-Chairs of the Committee, the Honorable Edward Fleischman (a former Commissioner of the SEC) and Ms. Ida Levine, were on the dias for most of the working session at which those contributors to the Report who were present in The Hague spoke and responded to questions from the audience; Professor Cynthia Lichtenstein, Chair Emeritus of the Committee, presented the portion of the Session at which

ILA COMMITTEE ACTIVITIES (Cont'd)

INTERNATIONAL SECURITIES REGULATION, INTERNATIONAL MONETARY LAW, AND STUDY GROUP ON SOVEREIGN INSOLVENCY (Cont'd)

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the two regulators spoke and responded to questions.

The MOCOMILA working session was organized similarly: those members of the Committee who had contributed to the Report spoke and answered questions on their presentations. William Blair, the Chairman of MOCOMILA, was on the dias. The highlight of the MOCOMILA session was a talk by Tom Baxter, Executive Vice President and General Counsel of the New York Federal Reserve. He recounted the days during which the Fed rescued Bear Stearns and subsequently was unable (according to Baxter's version) to achieve the same result for Lehman Bros., as all efforts to find a buyer (as J.P. Morgan Chase served for Bear Stearns) failed, and the Fed had no legal power to guarantee Lehman's debts in a vacuum. The audience was transfixed by this insider's account, as many had not watched the various hearings at which Mr. Baxter had made a similar presentation.

In between the two Committee working sessions, a complementary panel chaired by Cynthia Lichtenstein featured Sean Hagan, the General Counsel of the International Monetary Fund, Dr. Rene Maatman of The Netherlands Authority for Financial Markets, and Lee Buchheit, Partner at Cleary Gottlieb Steen & Hamilton. Mr. Buchheit excoriated for a failure of professional responsibility those lawyers involved in the drafting and production of financial instruments that no one – not even their creators – could understand. The panel was well received, and members of the audience asked searching and serious questions. It is to be hoped that the speakers will publish their talks.

On Thursday morning, the Chair of the Study Group on Sovereign Insolvency, Philip Wood of Allen & Overy (London), and one of the Rapporteurs of that Study Group, Michael Waibel, presented the draft of the paper that the Study Group had completed. Again members of the audience became involved and made many comments. It is

understood from ILA Headquarters that the Study Group plans to launch this paper on Wednesday, December 8, 2010, at the offices of Allen and Overy LLP at One Bishops Square, London E1 6AO. It is also understood there will be a similar gathering at a later time in New York City. Any members of the American Branch who might be in London on Wednesday, December 8, may contact the Secretary of the ILA, Juliet Fussell, at info@ila-hq.org to receive an invitation to the launch and discussion.

LEGAL ISSUES OF THE OUTER LIMITS OF THE CONTINENTAL SHELF

By John E. Noyes (Committee Member)

The Committee on the Legal Issues of the Outer Limits of the Continental Shelf, formed in 2000, concluded its work at The Hague. The first six years of the Committee's work were devoted to a detailed study of the outer limits of the continental shelf beyond 200 nautical miles from baselines, Article 76 of the Law of the Sea Convention, and the roles of the Commission on the Limits of the Continental Shelf. That work has been influential as dozens of countries have submitted data to the Commission and the Commission has begun to issue its recommendations. In 2008 the Committee published a report on Article 82 of the Convention, which requires States to make, through the International Seabed Authority, payments or contributions in kind with respect to the exploitation of the continental shelf beyond 200 miles. The Authority has relied on the Committee's work in publishing a recent study of Article 82.

At the meeting in The Hague, the International Law Association adopted a resolution taking note of the Committee's 2008 report and noting its appreciation for the work of the Committee.

RIGHTS OF INDIGENOUS PEOPLES

By Siegfried Wiessner (Committee Chair)

As detailed in my report for last year's ABILA Newsletter (January 2009), the Committee on the Rights of Indigenous Peoples is tasked with developing an Expert Commentary on the UN Declaration on the Rights of Indigenous Peoples (UNDRIP). The Committee has made great strides toward that goal since the 2008 Biennial Conference in Rio de Janeiro.

Upon the resignation of Gregory Marks, for whose work the Committee is most grateful,

Professor Federico Lenzerini of the University of Siena was unanimously elected as the Committee's new Rapporteur. The chairs of the thematically defined subcommittees submitted draft commentary chapters that were discussed in detail at a two-day conference, held in the form of a workshop at the European University Institute in Florence, Italy on December 14 and 15, 2009. The event was co-sponsored by the Academy of European Law. With a great number of members of the Committee present, consensus was reached on several key issues. Based on the input from Florence and further discussions among the Committee members, the subcommittee chairs subsequently submitted final drafts. Our Rapporteur, Professor Lenzerini, did an excellent job in integrating these chapters into a text to be submitted to the 74th Biennial Conference of the ILA in The Hague. While the complexity of the assignment made it impossible to arrive at a final report by the time of the 2010 meeting, our Committee submitted an Interim Report, designed for discussion by the ILA membership at large.

As the task of writing a commentary on the "normative status of the UNDRIP provisions and of Indigenous rights in general" is quite a unique and ambitious endeavor in the universe of ILA reports, this Interim Report ended up covering fifty-two pages. It is subdivided into chapters on (1) Introduction, Methodology of Work, Background and Legal Status of UNDRIP; (2) Understanding the Term "Indigenous Peoples;" (3) Self-Determination; (4) Autonomy; (5) Cultural Rights; (6) Land Rights; (7) Education and Media; (8) Social and Economic Improvement Rights; (9) Treaty Rights; (10) Development and International Cooperation; (11) Reparations, Redress and Remedies; and (12) Rights of Indigenous Peoples under Customary International Law. It can be found in pdf at the Committee's webpage at <http://www.ila-hq.org/en/committees/index.cfm/cid/1024>.

During the ILA Conference in The Hague, the Report was discussed at a closed Committee meeting and an open meeting chaired by Professor James Crawford. Agreement was reached on relevant standards of international law as well as the need to complete work in areas such as language rights and the protection of cultural heritage. With respect to the latter, the Committee on Cultural Heritage Law under the leadership of Professor James Nafziger kindly offered to share expertise – a proposal this Committee gladly accepted.

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The Committee plans to meet again at an intersessional workshop in July 2011, with a view to finalizing its report for the 75th ILA Biennial Conference in Sofia, Bulgaria.

TEACHING OF INTERNATIONAL LAW

By John Gamble (Committee Rapporteur)

The Committee on the Teaching of International Law was established in 1999. Professor Hilary Charlesworth (Australian National University) was the first Chair. Professor Neville J. Botha (University of South Africa) has been Chair since 2006. I have been Rapporteur throughout. The Committee submitted its final report at the ILA Meeting held last month in Den Haag. This brief account represents my views, but I believe I have reflected the consensus that emerged from our deliberations.

We began with an ambitious list of topics to explore:

1. The *raison d'être* of the international law course
2. Place of international law in curricula
3. Teaching international law in venues other than standard university courses
4. New Information technologies and international law
5. The quality of international law teaching materials
6. More wine, same size bottle: the dilemma of the introductory course
7. New teaching techniques in international law

At working sessions held at the ILA biennial conferences in New Delhi (2002), Berlin (2004), Toronto (2006), and Rio de Janeiro (2008), we addressed many of these and related subjects as reflected in the conference publications. Our most intense discussion of myriad issues relating to teaching occurred at two workshops:

- Washington, DC (April, 2004)
- Potsdam, Germany (August, 2004)

Each lasted an entire day and involved a diverse group of professors, practitioners, diplomats, and IGO officials.

The most important issue discussed in our final report is future ILA activities in the area of teaching. Of course, teaching can be

studied in many ways and at different levels, e.g., by the branches, other ILA committees, and other professional associations.

Most Committee members believe teaching will continue to be important, a fact confirmed by a survey we conducted during summer 2010. Professional associations like the ILA and the American Society of International Law tend to underemphasize teaching. The last ASIL Annual Meeting plenary session dealing with teaching was in 1991. To the best of my knowledge, the ILA has never highlighted teaching at a biennial conference.

The Committee has explained why a teaching presence within the ILA is at least desirable and probably essential. Relative to the amount of time professors spend on teaching, it receives minimal attention. There are huge inefficiencies when teachers of international law do not actively collaborate. In an era of an expanding corpus of international law and increased specialization, effective teaching remains an enduring common interest. We recommend that the ILA find the most effective mode to focus more attention on teaching with participation from all interested members.

USE OF FORCE

By Mary Ellen O'Connell
(Committee Chair)

The Final Report on the Meaning of Armed Conflict in International Law is now available on the website of the International Law Association at the Use of Force Committee page: <http://www.ila-hq.org/en/committees/index.cfm/cid/1022>.

On June 21, 2010, Judith Gardam of the University of Adelaide, the Use of Force Committee's Rapporteur, and I, as Committee Chair, sent a draft Final Report on the Meaning of Armed Conflict in International Law to ILA Headquarters in preparation for the 74th Conference of the ILA in The Hague. The draft was posted on the ILA website. Judith and I also prepared a draft resolution for presentation at the Conference.

On Wednesday, August 18, at an open working session at the ILA Conference chaired by Professor Duncan French, I presented the draft report for discussion, including a history of the Committee's work and a summary of the draft Final Report. As many as fifty ILA members participated in all or part

of the working session. Eight members of the Use of Force Committee participated.

A detailed report on the working session will appear in *The Hague Conference Report*. This note provides only a brief account of the session and a summary of the Committee's Final Report.

The draft Final Report reflected a substantial effort by an eighteen-member Committee from thirteen countries during a five-year period. Throughout the five years of work toward the Final Report, the Committee was guided by the initial decisions taken by the Committee. In particular, the Committee agreed: to follow standard international law methodology; to adhere carefully to the Committee's mandate; and to reflect conclusions respecting the Initial Report reached at the Rio de Janeiro Conference in 2008. In the two years between the Rio Conference and the conference in The Hague, the Committee's Initial Report remained posted on the ILA website. I wrote an article about the Report that was published in the *Journal of Conflict and Security Law* and was also posted on-line. During 2009, the Committee received valuable reports from Constantine Antonapolous on human rights and armed conflict and from Eric Myjer on the distinction between armed attack and armed conflict. I published a short article looking into the question of territorial extent of armed conflict. In 2010, Michael Wood and Inger Oesterdahl brought the Committee's attention to new developments respecting the European obligation to provide asylum to persons fleeing armed conflict. In May and June 2010, the Committee engaged in an intensive period of commentary and revision of the draft.

Regrettably, the Report is still very much needed. The United States, for example, despite the election of Barack Obama and the appointment of Dean Harold Koh to the top international law position in the U.S. government, continue to operate under a concept of armed conflict not consistent with the definition of armed conflict reached in the Committee's Report.

The Committee's research led to the following conclusions:

CONCLUSIONS

In 2005, the International Law Association decided that a study of the concept of armed conflict should be undertaken to determine the meaning of this term in international law. De-

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USE OF FORCE (Cont'd)

(Continued from page 11)

spite the importance of the issue over the years, as highlighted by the U.S. "declaration" of a "war on terror" in 2001, the meaning of armed conflict in international law has not been the subject of comprehensive analysis. This was the task of the Committee.

1. The Committee found that the term "armed conflict" had become especially significant with the adoption of the U.N. Charter in 1945 when the term "war" declined in importance. Nevertheless, neither the Charter nor any other important treaty currently defines armed conflict despite the fact that in many sub-fields of international law it is critical to determine whether or not a situation is one of armed conflict. The Committee, therefore, undertook extensive research into hundreds of violent situations since 1945 and identified significant state practice and opinio juris establishing that as a matter of customary international law a situation of armed conflict depends on the satisfaction of two essential minimum criteria, namely:
 - a. the existence of organized armed groups
 - b. engaged in fighting of some intensity.

The Committee's assessment of this evidence is confirmed directly or indirectly in many judicial decisions and in scholarly commentary. These sources also indicate that the following conclusions respecting the concept of armed conflict are confirmed in customary international law:

2. In international law the concept of armed conflict has largely replaced the concept of war.
3. The earlier practice of states creating a *de jure* state of war by a declaration is no longer recognized in international law. Declarations of war or armed conflict, national legislation, expressions of subjective intent by parties to a conflict, and the like, may have evidentiary value but such expressions do not alone create a *de jure* state of war or armed conflict.
4. The *de jure* state or situation of armed conflict depends on the presence of actual and observable facts, in other words, objective criteria.
5. The accurate identification of a situation of armed conflict has significant and wide-ranging implications for the discipline of international law. Armed conflict may have an impact on treaty obligations, on U.N. operations, on asylum rights and duties, on arms control obligations, and on the law of neutral-

ity, amongst others. Perhaps most importantly, states may only claim belligerent rights during an armed conflict. To claim such rights outside situations of armed conflict risks violating fundamental human rights that prevail in non-armed conflict situations, i.e., in situations of peace.

After a full discussion in the working session, the Report was adopted and referred to the full ILA. On Thursday, August 19, the full ILA meeting adopted the Report without opposition, as well as a resolution calling for the Report's wide dissemination.

The Committee has submitted a new proposal to the ILA Executive Council to consider in November 2010 as the next mandate for the Committee.

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