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INTERNATIONAL LAW NEWS

SECTION OF INTERNATIONAL LAW AND PRACTICE AMERICAN BAR ASSOCIATION

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SPECIAL FOCUS ISSUE

RULE OF LAW

IRAQ, FAILED STATES, AND THE LAW OF OCCUPATION

By Phillip James Walker

The U.S.-led invasion of Iraq produced a host of thorny international law problems. So far, the world has focused mainly on the legality of the war—how American unilateralism affects the idea of collective security and limitations on force as an instrument of policy. An overlooked issue, however, relates to the scope of authority that an occupying power has to remake a society and government under its control. Iraq presents an interesting case of the reconstruction of a "failed state" in the new millennium.

The scope of authority of the occupying power is a vexing question in the Iraq case because it neatly fits no single category. Iraq's coalition provisional authority (CPA) is not a traditional military occupation authority. It aspires to a complete overhaul of Iraqi institutions and national life, but it is not a truly international effort with a clear mandate to rebuild a post-conflict situation—along the lines of Kosovo or East Timor. It is somewhere in between, and that is the problem.

The "failed state" phenomenon has become the dominant international problem in the 21st century, implicating within it issues such as mass migration of populations and illegal immigration to the developed "north," severe environmental degradation, the eruption of brutal ethno-religious conflicts, and the proliferation of weapons of mass destruction. One need only read about the absence of control over nuclear weapons materials in some former Soviet states to realize that collapse of public order has horrifying consequences for international security.

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CHAIR'S COLUMN

Notes from Abroad: Having a Great Time—Wish You Were Here

By A. Joshua Markus

The Section recently concluded a spectacularly successful Fall Meeting. Those lucky enough to attend it spent two days in The Hague visiting the International Court of Justice, the Permanent Court of Arbitration, the Iran-U.S. Claims Tribunal, the International Criminal Tribunal for the Former Yugoslavia, and the International Criminal Court. We had unparalleled access. From Tom Buergenthal, an esteemed Section member who is now the U.S. judge on the International Court of Justice; Carla Del Ponte and Richard May, prosecutor and presiding judge, respectively, of the trial of Slobodan Milosevic; the Section's Charles Brower, a long-serving judge on the Iran-U.S. Claims Tribunal; and Philippe Kirsch, President of the International Criminal Court, to a host of others, including U.S. Ambassador to the Netherlands and Mrs. Clifford Sobel and Jeroen Brouwer, Chair of the Dutch Bar Association, you couldn't have paid enough to meet with the distinguished people participating in the program..

Josh Markus is a shareholder in Carlton Field's Miami office. He is Board Certified in International Law by the Florida Bar. He practices international and domestic corporate law including joint ventures, strategic alliances, mergers and acquisitions, and general corporate and commercial practice in Latin America, Europe, and the United States.

Attendees then went on to Brussels, stopping off for a "modest snack" at the Antwerp home of esteemed Section members Louis Lafili and Ellen Yost. The Brussels portion of the meeting started the next day with a terrific primer on the European Union (EU) organized by Jim Bergeron, co-chair of the European Law Committee, which was followed by a lunch with Charlotte Cederschöld, Vice President of the European Parliament.

And it got even better from there. Accompanied for much of the Brussels visit by ABA President Dennis Archer, Section members had fantastic educational programs put on by committees and members of the Brussels Planning Committee. Members had lunches with Commissioner Mario Monti, head of the European Union's Competition Directorate, and Pierre Defraigne, deputy trade commissioner for the European Union. They were addressed by R. Nicholas Burns, U.S. Ambassador to NATO; Rockwell Schnabel, U.S. Ambassador to the EU; Ambassador Brenda Schoonover, Chief of Mission of the Embassy of the U.S. to Belgium; and heads and the chairs-elect of the French- and Dutch-speaking Brussels Bar Associations. Perhaps the highlight of the meeting was hearing former French President Valéry Giscard D'Estaing discuss the drafting and structuring of the European Constitution. It was like listening to James Madison discuss the drafting and

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Summer 2004	**April 30, 2004**
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Manuscripts should be typed, double-spaced, on 8 1/2" x 11" paper. If sent via e-mail, manuscripts should be saved in a format compatible with MS Word 97. Send your submissions to Monica Buckley, Managing Editor, ABA Publishing, 750 North Lake Shore Drive, Chicago, IL 60611; 312/988-6097; fax 312/988-6081; e-mail: *buckleym@staff.abanet.org*.

SECTION NEWS

ILEX's J-1 Visa Services

The Section's International Legal Exchange Program (ILEX) is designated by the U.S. Department of State to certify international lawyers' eligibility for the J-1 exchange visitor visa. An international attorney who wants to receive training at a law firm must complete the ABA ILEX application, which is available online. All ILEX applications are processed electronically through the Department of State. An application's processing will take about two weeks. The program fee is $800, which is considerably lower than that of other providers. For more information about the ILEX J-1 visa program, go to *www.abanet.org/intlaw/ilex/j1visa.html*.

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World Bar News: ABA Joins the International Criminal Bar

In an important step to promote the ABA's endorsement of U.S. ratification of the Rome Statute of the International Criminal Court (ICC), the ABA Board of Governors approved the joint request of the Section of International Law and Practice and the Criminal Justice Section for the ABA to become a member of the International Criminal Bar (ICB). In August 2003, the Board of Governors elected David Stoelting as the ABA's representative to the Council of the ICB.

The ICB is the result of more than six years of cooperation among lawyers and academics, and the ABA has been represented at the ICB's many organizational meetings. The ICB will enable lawyers representing defendants, victims, and witnesses before the ICC to speak with a strong voice on issues of common concern, such as the independence of the legal profession, the right to a fair trial, lawyer-client confidentiality, and the structure of legal aid.

The ICB was incorporated under Dutch law and has an office in The Hague, the seat of the ICC. The ICB's first General Assembly was held in March 2003 in Berlin. At this meeting, the General Assembly elected the Council (the ICB's governing body) and approved a Constitution and a Code of Conduct. More than 400 lawyers from every continent and every legal system attended the Berlin meeting. The ICB's worldwide membership includes both individual members and collective members such as bar associations and various lawyers groups. More information on the ICB can be found at *www.bpi-icb.org*.

ICB officials already have been in consultations with the ICC's judges, prosecutor, and registrar. Topics discussed have included a proposed Code of Conduct for lawyers and proposed regulations. These issues require that the views and concerns of counsel be considered and addressed. For the ICC to succeed, defendants, victims, and witnesses must receive effective representation. The ICB will work to achieve these goals.

For more information on the International Criminal Bar, contact David Stoelting at dstoelting@kl.com.

SECTION SNAPSHOTS

Afghanistan Presdient Hamid Karzai (second from right), socializes with (left to right) US Supreme Court Justice Anthony Kennedy, former ABA President Roberta Ramo, and ABA President Dennis Archer, during the Section's Asia Law Initiative Council's dinner in New York City in September.

Dennis Archer, ABA president; Valery Giscard D'Estaing, former president of France; Joshua Markus, Section chair; and David Church, Fall Meeting co-chair, at the Section's Fall meeting in Brussels. The Meeting attracted more than 350 participants, some of whom enjoyed a trip, before the meeting, to the international institutions at the Hague, Netherlands *(see article on p.12).*

ABA SECTION OF INTERNATIONAL LAW AND PRACTICE—*"Your Gateway to Global Expertise and the International Legal Community"*

2004 SPRING MEETING

April 14–17, 2004 • The Plaza Hotel, New York

A MUST-ATTEND MEETING FOR INTERNATIONAL LAWYERS

- Join more than 500 international practitioners, government officials and academics in a marvelous setting in New York City (the Plaza Hotel)
- Take advantage of the opportunity to earn dozens of CLE credits from the expanded slate of more than 50 cutting edge and timely CLE programs (for experience levels ranging from beginner to highly experienced)
- Enjoy the truly unique opportunity to receive advice on applying lessons of the 20th century diplomacy including the Cuban Missile Crisis to 21st Century issues in nuclear proliferation and national security **featuring Theodore Sorensen and Robert McNamara**
- Take advantage of special tracks of programs on key issues of particular interest to different Section constituencies including:
  - **An international litigation/arbitration track** consisting of four programs on recent developments in arbitration, parallel litigation and arbitration proceedings, the Federal Arbitration Act, and the new draft Hague Convention on choice of court agreements and enforcement of foreign judgments
  - **An international corporate/securities law track** consisting of half a dozen programs on critical issues on corporate social responsibility and legal ethics (with present and former top level corporate counsel from **McDonald's, Bank One and Mitsubishi International**), a Sarbanes-Oxley International Update (with leading speakers from the SEC and the securities bar in the US and abroad), a practitioner's workshop on international mergers and acquisitions (including leading M&A counsel from the U.S., Canada and the Europe), and the legal challenges of international business expansion (with corporate counsel **from Starbucks, Cendant, Pfeizer, Dun & Bradstreet and Altria**), among other programs
  - **An international financial/investing program track** consisting of eight programs on international financial and investment issues including programs on international debt restructurings (focusing on sovereign debt and the Latin American meltdown), on international debt and equity funds (addressing issues in the financing of off-shore projects and companies) and conflicts of interests at financial institutions, among other programs
  - **An extensive international trade and customs law track** consisting of a dozen programs on issues such as recent trade law and trade negotiations developments, WTO dispute settlements, NAFTA in a multilateral setting, recent developments in the GATS, international government procurement (in the US and abroad), and two customs law programs (on national security issues and the jurisdiction of the international court of trade), among other programs
- Law Firm Leadership Forum with managing and partners from a number of international law firms
- Three programs on various legal and security issues in Iraq
- Fundamentals in International Business Transactions—a four-hour program with sessions on commonly encountered problems in international sales transactions and important issues in international litigation
- Current state of negotiations and prospects for achieving lasting peace with North Korea
- World-Wide Updates (separate panels review different regions of the world) followed by The Complete International Lawyer—Around the World in 80 Minutes
- Numerous additional programs focused on different regions of the world, particularly Latin America, Europe and various parts of Asia
- Beyond ICANN: International Governance of the Internet in the 21st Century
- The Death Penalty in U.S. Foreign Relations
- Fourth Annual Deans/Practitioners Roundtable
- Two international tax law programs

Other highlights include:

- Attend the unique Day at the United Nations/US Mission to the United Nations or Day on Wall Street at the Federal Reserve Bank and the New York Stock Exchange
- Enjoy two luncheons with prominent speakers, including Aryeh Neier, former executive director of the American Civil Liberties Union (ACLU) and Human Rights Watch, and current President of the Open Society Institute
- Receive extensive program materials (2000 plus pages) on CD-ROM
- Get to know your committee members at the Optional Committee Get-Together Wednesday night and committee breakfast business meetings and divisional breakout sessions Thursday and Friday morning
- Attend three special buffet receptions to be held at the Plaza Hotel (midtown and across the street from Central Park), the Federal Reserve Bank of New York (downtown), and New York University School of Law (Greenwich Village); NYU has organized its LLM reunion weekend to begin when our meeting ends, assuring an even larger than normal contingent of foreign lawyers.
- Enjoy the liveliest city in the world—the city that never sleeps!

You will not want to miss this meeting!

Please go to the Section website at www.abanet.org/intlaw and register today!

BRINGING THE INTERNATIONAL RULE OF LAW TO ELECTRONIC COMMERCE

By Hal Burman and Don Wallace Jr.

International efforts to deal with electronic commerce issues continue to face a flurry of activity and uncertain results.

The International Telecommunications Union (ITU) recently completed the first phase of the World Summit on the Information Society (WSIS), which took place in Geneva in December. The WSIS has a broad agenda, ranging from gaps in the availability of technologies between countries or regions to electronic signature systems. Some have described the WSIS as inviting older style South-North issues and possibly tilting toward future international regulation. The Declaration of Principles and Plan of Action from this first phase are available at *www.itu.int/wsis*. The second phase of the WSIS will be hosted by the Government of Tunisia in 2005.

One controversial issue in the international private law field is whether to combine private law aspects of e-commerce with this type of broader international forum. This, in turn, could lead to renewed consideration of whether such private law matters should be swept up in multilateral trade talks as well.

This contrasts with efforts to handle international private law aspects of e-commerce in bodies more focused on private international law, such as the UN Commission on International Trade Law (UNCITRAL) on the multilateral front and the UN Economic Commission for Europe (UNECE) and the Organization of American States (OAS) in the regional world. UNCITRAL, in particular, has chosen to elaborate detailed international texts on e-commerce that reflect transactional law rather than public law and trade issues. Yet, even that effort is struggling with whether to follow the U.S.-style minimal enabling law approach, in order to allow market economics to settle what practices can benefit from legal support, or the more regulatory approach more common to the system of European Union (EU) directives and those of other like-minded states.

The first of these approaches, minimal enabling laws, was followed in UNCITRAL's first UN Model Law on e-commerce in 1996, which in turn has become the most used source text worldwide, reflected in the United States in the Uniform Electronic Transactions Act and the Federal E-Signature Act and Global E-Commerce Law. Following that, however, the Commission's second product, a 2001 model national law on e-signatures, leaned toward the EU's regulatory vision, favoring particular technologies, an approach opposed by the United States.

UNCITRAL's new effort, a multilateral treaty on formation of contracts in e-commerce, on which a 50-country working group completed its most recent negotiations in November, places these two approaches on the table. Once beyond provisions validating electronic communications as a means of forming contracts, the unresolved zone is whether the text should also adopt rules that could regulate some business practices, albeit on matters a number of countries contend are important to boost their participation in remote e-trade. Such issues tend to be more important for developing and emerging states. These include, for example, whether companies posting offers or concluding contracts need to identify themselves or where they are operating from, where jurisdiction may lie, etc. The ability to correct errors in offer and acceptance, including automated systems, also remains a difficult subject in a computer environment, as those who witnessed the collisions that followed these issues in U.S. debates on the Uniform Computer Information Transactions Act (UCITA) and recent amendments to UCC Article 2 on sales as it relates to virtual goods, data, and software-related rights can attest.

The regional picture may divide along similar lines. Some EU directives on e-commerce are more regulatory than others, especially on privacy in data and e-signatures, and some countries in other regions have picked up that approach. The OAS, however, seems more likely to adopt proposed Inter-American Rules for Electronic Documents and Signatures (IAREDS) that are more compatible with the U.S. market-based approach.

Finally, there has been a concerted effort by the International Chamber of Commerce and other private sector bodies to limit international rules even further, by drafting voluntary best practice rules and getting intergovernmental bodies to restrict their activities in this field for a time. This would allow the private sector to stay in the lead on formulating these international commercial law standards.

In 2004, a picture should start to emerge as to the future of e-commerce in international law.

Hal Burman, State Department's Office of Legal Adviser, and Don Wallace Jr., past Section Chair and Director of the International Law Institute, write in their individual capacities and not on behalf of their organizations. As always, SILP members are encouraged to participate in these projects.

UPDATE ON EU E-COMMERCE INITIATIVES

By Marco Berliri

Rome II Proposal for Cross-Border Obligations

On July 22, 2003, the European Commission adopted a proposal for a regulation—Rome II—on the laws applicable to noncontractual obligations throughout the European Union. Its aim is to clarify which laws apply in noncontractual issues, such as exposure of the publishers to foreign claims for defamation, invasion of privacy, antitrust, and intellectual property infringement. In a cross-border dispute, the applicable law would be that of the country where the damage arose or is likely to arise. The proposal does not mention the Internet or e-commerce and this lack of e-awareness disappoints the online community. Online publishers keen to see rules based on the country of origin, rather than destination, will view with concern the proposed application of the general rules to defamation and privacy disputes.

Taxation of Internet Transactions

A new directive on the value-added tax arrangements applicable to all electronically delivered services (which include Internet services; website design; online sales of software, music, and films; and Internet auctions) came into effect on July 1, 2003. Under Directive 2002/38, non-EU-based companies that supply electronic services to EU consumers must pay VAT at the rate applicable in the customer's country. EU-based businesses need no longer charge VAT on electronically supplied services provided to persons outside the European Union. EU-based businesses must now apply the reverse-charge procedure to all electronically supplied services received from suppliers in other countries (whether inside or outside the European Union). Electronically supplied services provided by a non-EU supplier to private customers inside the European Union will be subject to VAT, regardless of whether the supplier has a fixed establishment in the European Union. Non-EU suppliers that provide electronically supplied services to business customers only are unaffected by the directive. U.S. and other non-EU companies must identify a tax authority in one of the 15 member states and be required to levy that country's VAT rate on all applicable Internet transactions. The member country will then distribute the taxes collected to other countries, based on where the actual sales are made. The Directive provides for

Marco Berliri is a member of the Technology, Media and Telecommunications Group of Lovells. His practice is focused on information technology, including e-commerce and data protection.

a simplified VAT accounting scheme, which allows businesses to register in a single EU member state. The Tax Agencies of most EU Member States have created a website containing the special scheme in English.

Commission Keen to Remove Barriers to E-Commerce

The European Commission launched a consultation on legal barriers encountered by businesses when using e-commerce and other digital business applications. The consultation involves e-businesses and is aimed at identifying the main obstacles to the development of e-commerce in Europe. It is hoped that the feedback will help the commission identify the practical barriers and legal problems that e-businesses commonly encounter. These may range from divergent national legal provisions for electronic

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Iraq, Failed States, and Law of Occupation

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Iraq is a "failed state" within most definitions of the term. Iraq witnessed complete collapse in public order, literal demolition of entire sections of the government in the orgy of looting that occurred after the fall of the Baathist regime, and devastation of the national economy, in the days following the coalition victory. When in power, Saddam Hussein made the State into a tool to serve his cult of personality. When he fell from power, he took Iraq down with him. This fact presented occupation forces with a rude shock. They entered Baghdad expecting to find a government at least capable of carrying out basic functions and found instead complete chaos. True, the recent war precipitated the final collapse. However, the foundations of the State were rotten before the war, that the collapse was almost inevitable.

Whether or not the coalition should have anticipated the collapse, the collapse occurred, and the coalition found itself the only authority capable of exercising normal government functions in Iraq. Furthermore, the collapse was so complete that immediate withdrawal of coalition forces would have led to a power vacuum and probably civil war. Indeed, even eight months after the collapse, there are no Iraqi insitutions capable of exercising sovereignty.

The pattern of the war in Iraq, in which a foreign army stumbles into the role of sole authority in a failed state, is becoming increasingly common. Iraq, Afghanistan, Kosovo, Somalia, and Liberia represent a few examples. If the numbers of failed or failing states continue to grow, the international community will see more great power interventions to pursue humanitarian purposes, to protect foreign nationals in conflict zones, to curb rising criminality, or simply to secure vital national interests. In some sense, these failed states are like the "tar babies" of the old folk tale. Once a foreign military force is "in," it is difficult to pull out in good conscience because the need for basic order can be so dire. The justification or legality of the initial intervention is not relevant to the simple question: "What do we do now?" Does the foreign force accomplish its immediate objective and withdraw, letting chips fall where they may? Does it limit its role to the obligations outlined in the Geneva Conventions? Does it go all out and engage in "nation building"? That question confronts the CPA and almost every foreign military intervention in a failed state or failing state situation.

Phillip James Walker is an international lawyer and development consultant concentrating on democracy and governance issues, primarily in the Middle East. He is based in Dunbarton, New Hampshire.

A government's complete overhaul lies at the margins of the scope of authority of an occupier as mandated by the Fourth Geneva Convention and 1907 Hague Regulations. For example, Article 43 of the Hague Regulations states that the occupier "shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country." Similarly, the Fourth Geneva Convention has little to say about nation building. The Fourth Geneva Convention and Hague Regulations do not preclude an occupying power from exercising jurisdiction to effect fundamental change, but they remain silent on the matter.

Some texts suggest that an occupier can move forward with nation building, but the language is far from certain. Article 43 of the Hague Regulations, noted above, opens the door to an occupier's initiating fundamental change in areas under its jurisdiction. While the article's overall tenor favors status quo, the utter collapse of authority in Iraq, for example, the odious nature of the Baathist regime, and human rights obligations of the occupying powers "absolutely prevent" respect for the preexisting constitutional and electoral system. The Fourth Geneva Convention requires the CPA, as the "[p]ower [that] exercises the function of government in the territory," to respect and apply the international standards enumerated in the Convention with regard to essential governmental functions. Although the Fourth Geneva Convention does not address fundamental governmental change, the Convention establishes that the occupying power exercises jurisdiction while present in the territory and suggests that it shall be bound by applicable international law while exercising that jurisdiction.

International agreements can clarify ambiguities in the Hague Regulations and Fourth Geneva Convention. The 1966 International Covenant on Civil and Political Rights (ICCPR), for example, states: "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals . . . subject to its jurisdiction the rights recognized in the present Covenant. . . ." The ICCPR further requires "each State Party to . . . take the necessary steps . . . to give effect to the rights recognized in the present Covenant." Both the Hague Regulations and the Fourth Geneva Convention establish that Iraqis are "subject to [the] jurisdiction" of the CPA. All constituent states represented in the coalition are state parties to, or otherwise bound by, the ICCPR. The CPA must, therefore, respect the international obligations of its constituent states and apply the ICCPR within its jurisdiction to the extent possible.

The ICCPR is clear on the subject of democratic transformation. Article 25 states that every person

> shall have the right and the opportunity, . . . without unreasonable restrictions:
>
> (a) To take part in the conduct of public affairs, directly or through freely chosen representation; [and]
>
> (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors. . . .

In its General Comment 25 on the ICCPR, the UN Human Rights Committee specifically endorses the provisions of Article 25 and goes on to state that, "[w]here registration of voters is required, it should be facilitated and obstacles to such registration should not be imposed. . . ."

UN Security Council Resolutions 1483 (22 May 2003), 1500 (14 August 2003), and 1511 (16 October 2003) all reinforce the CPA's authority to initiate a process of governmental transformation in Iraq as soon as practicable. They also clarify the role that the Iraqi Governing Council (GC), created by the CPA, can play in this process. In essence, the Security Council adopts the GC as the vessel for Iraqi sovereignty, without explicitly expanding the powers of the CPA beyond those of a traditional occupier. Resolution 1483 "*[c]alls upon* the Authority . . . [to] creat[e] conditions in which the Iraqi people can freely determine their own political future. . . ." The resolution goes on to state that the Security Council "*[s]upports* the formation, by the people of Iraq with the help of the Authority . . . of an Iraqi interim administration as a transitional administration run by Iraqis, until an internationally recognized, representative government is established by the people of Iraq and assumes the responsibilities of the Authority. . . ." Resolution 1500 "*Welcomes* the establishment of the broadly representative Governing Council of Iraq . . . as an important step towards the formation by the people of Iraq of an internationally recognized, representative government that will exercise the sovereignty of Iraq . . . ." Resolution 1511 gives the emerging political process added legitimacy by endorsing a timetable for action. While none of the resolutions explicitly authorize the CPA to initiate the process, it is clear that the goal of the Security Council remains the establishment of democratic institutions capable of exercising sovereignty in Iraq. The Security Council recognizes implicitly that only the CPA, working with and through the Governing Council, can initiate the process of democratic transformation.

In sum, it appears that the situation in Iraq may become a common pattern in the new century, as great powers become increasingly embroiled in the internal affairs of failed or failing states. Dealing with this phenomenon is easiest where there is a clear international consensus as to how the occupying authority should proceed. In the absence of an international mandate, the occupier must resort to the classic texts of the law of occupation. These classic texts have some flexibility, however, and—if read with other sources of international law—can provide a basis for nation building in an occupation setting, even without an explicit international mandate, so long as the exercise is otherwise consistent with relevant international human rights conventions, such as the ICCPR.

ABA CLE Teleconference Series

NEW!!

The Section has initiated a series of monthly teleconference continuing legal education programs in conjunction with the ABA CLE Division. Past programs included "Live from the SEC," a program for attorneys advising clients on cross-border pricing policies, and a program on recent developments in U.S. visa rules for international visitors. Upcoming programs will include:

- **February 11, 2004—**The New ABA/AAA Code of Ethics for Arbitrators
  Ken Reisenfeld and Ben Sheppard, program chairs. Visit *www.abanet.org/cle/programs/t04coel.html* and register today!
- **March 2004—**Recent Developments and Insights on International Evidence Taking and Service of Process Under The Hague Conventions; Glenn Hendrix, program chair
- **March 2004—**The Convergence of International Accounting Standards: GAAP vs. IAAS
- **April 2004—**Fundamentals of International Franchising
  Joyce Mazero and Eric Wolf, program chairs

Additional programs are being developed for May, June, and July to complete this ABA year. For more information, contact Jennifer Dabson (*jdabson@staff.abanet.org*), director of programs, or Darrell Prescott (*prescottd@coudert.com*), Section program officer.

LEARNING AND TEACHING AT THE SAME TIME WITH UZBEKISTAN'S JUDICIARY

By Anthony H. Barash

The author and a team of Uzbek judges, in Washington, D.C., for a Judicial Ethics Study Tour, pose in front of the U.S. Capitol.

When one door closes, another opens. This axiom came to mean a great deal to me when I retired in 2002 as general counsel of Bowater Incorporated in Greenville, South Carolina. I had an itch to combine my years of experience with international public service, and my work with the bar led me to the American Bar Association Central European and Eurasian Law Initiative (CEELI). As a new retiree with energy, initiative, and drive, I have found CEELI to be the perfect fit for me.

Tashkent, Uzbekistan, has been my home away from home since May 29, 2003, when I arrived to begin a year as a pro bono Rule of Law Liaison for CEELI. Tashkent is a city of 2.5 million people in the heart of what was once Soviet Central Asia. This region, largely Muslim in heritage, is famous for its place on the ancient Silk Road from China to Italy. Twelve years after declaring independence from the Soviet Union, Uzbekistan continues to serve as a transit route and cultural bridge between east and west, as it shares borders with Kazakhstan to the north, Kyrgyzstan and Tajikistan to the east, and Afghanistan and Turkmenistan to the south. Uzbekistan has a history and culture that are thousands of years old. Though many traditions and customs are vastly different from my personal experience, I find them fascinating and the people to be well educated and highly literate.

Since I first landed in Tashkent, I have spent my time concentrating on judicial reform programs—work that has afforded me the opportunity to build relationships with inspiring individuals who are struggling to improve the quality of the judiciary and raise its status in their country's legal system.

With the help of an Uzbek staff attorney and program assistant, I work closely with the judiciary of Uzbekistan, the Supreme Court, the Higher Economic Court, and the Uzbekistan Association of Judges to implement judicial reform initiatives. We facilitate trainings for judges throughout the country on human rights, judicial administration, judicial ethics, judicial selection and education, and judicial independence.

Despite a woeful economy, a repressive government, a history of public corruption and human rights abuses, Uzbekistan is a fascinating country with warm and welcoming people, many of whom courageously, and against long odds, fight for a richer and better life for themselves and for their countrymen.

Three months into my tour of duty, I accompanied a team of Uzbek judges on a Judicial Ethics Study Tour to Washington, D.C, sponsored by the United States Agency for International Development and the Academy for Educational Development. Through a competitive process, CEELI selected eight judges from across the country to study U.S. and international judicial ethical standards. The trip was touch-and-go until just before we left Uzbekistan, due to the significance of the issue, the intense interest of the Uzbekistan and U.S. governments in the trip, and newly restrictive U.S. visa requirements. But once we were in Washington, watching the team coalesce—hearing their questions and insights as they met with U.S. judges, ethics commissioners, and lawyers; toured court facilities; and discussed issues of common interest with U.S. government officials—was one of the most fulfilling experiences of my life. The judges bonded, reached consensus on their goals

Anthony H. Barash, Rule of Law Liaison to Uzbekistan, joined the CEELI Tashkent office in May 2003 after practicing law for 34 years in California and South Carolina. Mr. Barash was senior vice president, corporate affairs and general counsel, Bowater Incorporated, in Greenville, South Carolina.

for ethics reform in Uzbekistan, and planned a path forward starting immediately upon their return to the country.

The apparent success of the late August study tour opened many doors, and during the fall, our staff attorney, program assistant, and I traveled throughout the country to conduct workshops, roundtables, and seminars on judicial ethics and judicial independence. The judges from the study tour are very active and involved in our work, writing articles, traveling, and speaking out on the judicial reform. The audiences have been very enthusiastic and interactive. By the end of October, we had spoken to more than half of Uzbekistan's judges, often accompanied by the former Supreme Court Chair, who recently assumed an unpaid leadership position with the Judges Association to work on judicial reform.

We also have been working directly with the Supreme Court and the Higher Economic Court on these issues, with much support from both Courts and the Ministry of Justice. There have been many articles in local, national, and legal papers (including the Supreme Court newspaper); interviews; and a great piece produced by the Supreme Court press officer on national TV. We compiled a 110-page book of U.S. and international resource materials on judicial ethics that was well received at the seminars and generated provocative discussion. We also will organize programs on judicial outreach to the media and the public.

Contrary to many expatriates who often seem cynical about the prospects for human rights and legal reform in Uzbekistan, I remain enthusiastic and optimistic about judicial reform in this country. Helping transform deep-rooted political, social, and cultural behavior patterns is an agonizingly slow process, but we can make an impact. And that is particularly true with respect to judicial reform in Uzbekistan.

Contact CEELI at *ceeli@abanet.org* or 202-662-1950 for more information about contributing your legal expertise to reforms in Central Europe and the former Soviet Union.

BRINGING THE RULE OF LAW TO BELARUS—A REPORT FROM THE FRONT LINES

By Robert Heuer

The American Bar Association Central European and Eurasian Law Initiative (CEELI) has had an on-ground presence in Belarus since 1992, providing technical assistance and support to Belarusian partners to strengthen their efforts in legal reform. Because of the current repressive political environment, the ABA/CEELI Belarus program currently takes a more grassroots approach to legal reform, focusing on legal empowerment of the citizenry, nongovernmental organizations, and independent lawyers who perform pro bono legal assistance outside of the state-controlled Collegium of Advocates.

I left Chicago about a year ago to become a rule of law liaison with the ABA/CEELI Belarus program, and I arrived in Minsk in early December 2002. The rest of the team consists of local Belarusian staff: a staff attorney, an office manager, an institution building consultant, and an interpreter. My experience as a liaison with ABA/CEELI has been tremendously rewarding, and I recently signed on for two more years with the program as the country director for Belarus. The position allows me to work and build relationships with dynamic lawyers and activists (chief among them the local staff with whom I work in Minsk) who are working to create a better Belarus in an extremely difficult and oppressive environment where neither the judiciary nor the legal profession enjoys independence.

One of the first things I did upon arriving was travel across the country to meet many of the local partners operating pro bono legal advice centers, which provide free legal advice and advocacy to their communities. We went to both regional capitals and small villages where these centers are located. Some of these centers have their own office space, and some are run out of small apartments. I spoke with center lawyers and managers about the various problems the people in their community are facing and which brought them to the legal advice center for assistance—issues varying from family law, housing and consumer rights law, constitutional rights and freedoms, union development, labor law, and human rights. We train these lawyers in substantive law and lawyering skills, and we also hold seminars and strategic planning sessions for the management of these centers to develop a strong network among them for information sharing and support. Today, CEELI provides technical assistance to 20 such centers all across Belarus. Lawyers from the centers routinely report a greater ability to assist and counsel their clients on a wider scope of legal issues, as well as greater respect from members of their community.

Robert Heuer is country director for Belarus for the American Bar Association, Central European and Eurasian Law Initiative.

In addition to the training program geared toward pro bono legal advice centers, we also are conducting a training series for 18 lawyers. These lawyers will serve as legal counsel for one of 18 community action teams being formed in the regions of Belarus that will work to solve local community problems. These problems include poor lighting in school districts, irregular trash pickup and sanitation services, and impure drinking water. The lawyers will assist their community action teams in identifying local community problems, creating actions to solve these problems, and rendering any legal assistance needed in fulfilling the action plans.

CEELI also partners with NGOs to implement public legal education campaigns, educating the citizenry about their legal rights in various areas of Belarusian law. Regardless of the theme, each seminar stresses the importance of citizen participation in the legal system to protect one's own rights and interests.

Recognizing law students and young lawyers as the next generation of Belarusian legal professionals and community leaders, we also sponsored the creation of the Belarusian Young Lawyers Association (YLA) in May 2003. CEELI is currently holding an International Law Video Course for members of the association. The course utilizes Russian language versions of the International Law Video Course developed by Elizabeth F. Defeis, a professor at Seton Hall University Law School. In addition to bringing members of the YLA together monthly from different regions, the course also offers broader international legal perspectives for this group of young lawyers as Belarus continues deeper into isolation.

Finally, to ensure sustainability of CEELI's impact in Belarus, our in-house institution building advisor also works with our key rule of law partners to bolster their organizational development, enhance their effectiveness through strategic planning, and ultimately increase their impact on legal reform.

Seeing our rule of law programs make a difference in people's lives makes me feel incredibly fortunate to be a part of CEELI and especially of the Belarus program. In the last authoritarian regime in Europe, we provide support and friendship to very courageous lawyers and activists who are dedicated to improving the lives of Belarusians through legal empowerment.

THE WORLD'S COURTHOUSE: FIVE INTERNATIONAL TRIBUNALS IN ONE INTERNATIONAL CITY

By Beverly Dale

One of the most important benefits of being a Section member is the opportunity to participate in programs such as the one held in October, which studied international courts and tribunals in The Netherlands. Forty Section members gathered in The Hague to learn about five international courts and tribunals and their contributions to international law.

International Court of Justice (ICJ)

Judge Thomas Buergenthal—the U.S. judge on the ICJ (also known as the World Court)—met with the delegation to discuss the court's history, its jurisdiction and unprecedented current caseload, and prospects for its future.

The ICJ is composed of 15 judges from each permanent member of the UN Security Council and 10 judges from other regions of the world. Judges usually sit en banc and rarely sit in chambers in an effort to avoid national bias. A state that brings a case before the court may appoint an ad hoc judge when that state does not have a judge sitting on the court, so that each country in the case will be represented on the tribunal. The court has jurisdiction to hear contentious cases between sovereign nations and advisory jurisdiction, when UN institutions ask for interpretation of a particular question.

Judge Buergenthal noted three surprising things that usually are of interest to American lawyers. First, pleadings may be in both written and oral format. Countries usually ask for one year to file a brief, and the lengthy delays usually are due to counsel. Second, the hearings in the ICJ usually last five to six weeks. Third, after the oral hearing, each judge writes a preliminary decision that is circulated to other judges before deliberations begin. The decision drafting committee is elected by secret ballot.

Today, about 24 cases are pending before the ICJ—a caseload larger than at any other time in the court's history. The docket includes long-standing disputes regarding state borders. It also includes several cases against the United States for denying foreign citizens access to their con-

Beverly Dale served as an intern at the UN International Criminal Tribunal for the Former Yugoslavia. She will graduate in May from the University of California, Hastings College of the Law. The program described in this article was sponsored by the Section's International Courts Committee and UN Affairs Coordinating Committee, in cooperation with the Union Internationale des Avocats.

sulates, in violation of the Vienna Convention on Diplomatic and Consular Relations. Judge Buergenthal noted that one contentious case before the court involves more than 50 Mexican citizens who are on death row in the United States. These individuals were not told that they had the right to access their consulate, an alleged breach of the Vienna Convention. The ICJ issued three temporary injunctions in these cases, but the United States twice ignored the court's orders and executed the Mexican citizens anyway. The "official position" in such matters has been that the ICJ's injunctions are not binding.

The docket also includes a case in which Iran sued the United States for destroying Iran's oil platforms during the first Iraqi war.

Judge Buergenthal theorized that there are two main reasons for the relatively large number of cases pending before the ICJ. First, the end of the Cold War gave the court new life. During the Cold War, there was an assumption that the judges on the court voted by bloc. Today, that ideological rift no longer exists. Judge Buergenthal noted that he and the Russian judge share the same law clerk. Second, the smaller countries are now independent and no longer part of one bloc or the other.

Judge Buergenthal pointed out that amicus briefs have been used, to date, in only one case and are not considered influential. Amicus briefs are often submitted, however, in regard to advisory opinions. Often NGOs submit briefs and reports that the judges consider in both contentious and advisory matters.

The judge also described the collegiality of deliberations based on the diversity of the judges' backgrounds and legal training. He noted that good lawyers are good in any legal system, and that judges who had studied in other countries are the most flexible and open to different solutions. Many of his colleagues on the ICJ have studied law in Western countries.

Judge Buergenthal mentioned that an important topic in the international legal community is the proliferation of other international tribunals and how they will affect the universality of international law.

Permanent Court of Arbitration

Following an extended tour of the Peace Palace, the delegation met with Judy Freedberg, general counsel of the Permanent Court of Arbitration. She discussed the history of the court, noting the important role of the 1899 and 1907 Hague Conventions in establishing the court. Czar Nicholas II of Russia called a Peace Conference in hopes of establishing an institution to avoid future wars and the need for military spending. At the time of the conventions, The Netherlands was a neutral country. Because of its neutrality, Queen Wilhelmina's willingness to host the conferences, and the relatively small size of The Netherlands

(meaning that its influence wouldn't affect the outcome of matters pending before the court), the court was established in The Hague.

The Permanent Court of Arbitration was designed to provide the means of settling disputes between nations. The International Bureau of the Court is a permanent facility that provides the infrastructure for arbitration. As the Peace Palace was being finished, countries around the world contributed decorations and tokens of support for the court. The building was completed in 1913, but World War I heralded the end of the idealistic vision of dispute resolution. After the war, the court slumbered for nearly 60 years until the Iran–U.S. Claims Tribunal sparked a renewed interest in the court. The Permanent Court of Arbitration is now open to disputes among international organizations, nonstate actors, and states.

International Criminal Court

Although many individuals may discuss the International Criminal Court (ICC) as though it were still only a theory, the Rome Statute entered into effect on July 1, 2002, and the ICC is operational and preparing its first prosecutions.

Section members met Judge Philippe Kirsch, president

of the Court, who emphasized the need for the court to establish its credibility in practice and to meet the expectations that have been set for it. His main goals for the ICC are fairness, effectiveness, and transparency: protecting individual rights while drawing lessons from other international tribunals. He emphasized that the ABA would be important to the ICC's future and that the court would need the support and expertise of section members.

ICC Registrar Bruno Cathala explained the court's jurisdiction and powers as granted by the Rome Statute, which created the court, and, more importantly, a universal system for international criminal justice. The court's goal is to bring to justice those responsible for crimes against humanity. These are people who would otherwise escape punishment when a national criminal system was unwilling or unable to prosecute someone who committed a crime against humanity, a war crime, or an act of genocide.

Cathala noted the challenges of beginning to find the means to establish the ICC. He is building on an evolving system of international criminal justice, drawing on lessons from previous national and international criminal courts. He hopes to create a system for international criminal justice, not merely a stand-alone institution. He noted that it is not possible to prosecute every violation, and that he would seek the right balance between prosecuting only the top leadership and all individuals involved in the perpetration of the crime. He also is drafting a code of professional conduct designed to ensure the rights of defendants and the defense counsel. His goal is to ensure that defendants have "the usual rights of the accused in democracies."

The ICC will have jurisdiction over allegations of genocide, crimes against humanity, and war crimes. Since July 1, 2002, when the Rome Statute entered into effect, the court has received 642 communications from 66 countries regarding alleged crimes. Most complaints involve crimes outside of the ICC's limited jurisdiction and reflect misunderstandings about the court and its jurisdiction.

The ICC has jurisdiction over situations referred to the ICC by a state party or the Security Council, or by the prosecutor in *proprio moto*. A panel of three judges must decide whether an investigation should begin. There are many instances where a case cannot begin:

- The state already is investigating or prosecuting the claim, unless the state is unwilling or unable to do so.
- The case has been investigated by a state with jurisdiction to hear such a claim.
- The state reviewed the case but decided not to prosecute, unless the decision resulted from the unwillingness or inability of the state genuinely to proceed.
- The person concerned already has been tried.
- The case is not of sufficient gravity to justify further action.

Klaus Rackwitz of the Office of the Prosecutor (OTP) also addressed the group, outlining the work of the OTP. He noted that he is working with NGOs and humanitarian aid organizations to ensure that they know how to bring a case to the prosecutor's attention. Rackwitz noted that the OTP has received more than 500 communications from individuals and NGOs in 66 countries, including 97 from Germany and 70 from the United States. Many of these communications are baseless, however.

The prosecutor has decided to focus on Ituri, Congo, because of the tremendous number of crimes against humanity that have been committed there since July 1, 2002. The first case before the ICC is thus expected to be from the Congo.

The Milosevic Trial

The delegation visited the International Criminal Tribunal for the Former Yugoslavia (ICTY, a tribunal founded in 1993 pursuant to a Security Council Resolution under Chapter VII of the UN Charter). The delegation received a briefing on the tribunal from Daryl Mundis, who explained that the ICTY has grown into the largest UN mission outside the UN General Secretariat, and that it has more than 1,300 staff members and an annual budget of $120 million. The court has jurisdiction over genocide, crimes against humanity, war crimes, and grave breaches of humanitarian international law. Cases heard at the tribunal are only against individuals, for either their direct responsibility or command responsibility. The prosecutor may bring cases arising after January 1, 1991, on the territory of the former Yugoslavia as that state existed on that date.

Mundis described the basic structure and operations of the court, which was established by the UN Security Council as a peacekeeping measure under Article VII of the UN Charter. He noted that the Rules of Procedure and Evidence used at the ICTY are a blend of common and civil law traditions.

Mundis noted that the international community has encouraged the ICTY to focus on prosecuting senior-level perpetrators. The prosecution is expected to complete all investigations by 2004, with the goal of completing trials by 2008 and appeals by 2010.

Judge Richard May, presiding judge over the Milosevic trial, also spoke to the delegation. He noted the difficulty in trying to combine elements of the common law and the civil law in the court proceedings, and said that it is important for the judges to be flexible and have an understanding of other legal systems. As an example, Judge May noted that hearsay is admissible before the ICTY Tribunal, but that the weight to be given to a particular piece of evidence will be decided at the end of trial. Judge May noted that the downside of this approach is that a lot of irrelevant evidence is admitted into the proceedings.

Chief Prosecutor Carla Del Ponte also met with the delegation and noted that one of the problems of the ICTY has been that it does not have its own police force. In order to function as an international institution, she mentioned that the tribunal must have the cooperation of both the former Yugoslavia and the international community. It is not an easy task to negotiate for cooperation, but she believes that the satisfaction is greater because of the nature of the challenges. Often, however, she noted that politics interfere with the tribunal's work. She mentioned that it is not possible to avoid a long trial in the tribunal, which has been a frequent criticism. She noted that the arrest of fugitives is still an important issue.

The delegation then went to the courtroom, where they observed Slobodan Milosevic cross-examining a witness.

Iran–U.S. Claims Tribunal

The Iran–U.S. Claims Tribunal deals with claims between Iran and the United States, stemming from the 1979 takeover of the U.S. Embassy in Tehran. The tribunal is still in operation after all of these years, but only a handful of cases are left to resolve.

Judge Charles Brower outlined the tribunal's history and the Algiers Accords that established it in 1981. The tribunal was established to deal with the $12 billion in Iranian assets that the United States seized at the time of the hostage taking. Since the court's inception, more than 300 lawsuits have been brought involving billions of dollars. Each panel on the tribunal has drawn from one of three judges from the United States, one of three judges from Iran, and one of three judges from Western Europe.

The tribunal, established in 1981, has lasted longer than had been expected when it was formed. It has performed an important function because there has been no diplomatic relationship between the United States and Iran since 1980. More importantly, the tribunal's judgments have all been published, and they have created an important body of international law now used as precedents by international lawyers around the world.

The activities in The Hague were a prelude to the Section's Fall Meeting in Brussels. They are an example of the extraordinary opportunities available to Section members. Because the programs were so well received, they are certain to be repeated in the future.

UNITED STATES JOINS MADRID PROTOCOL FOR TRADEMARK REGISTRATION

By Brent Hawkins

On November 2, 2003, the United States officially became a member of the Madrid Protocol. The Madrid Protocol is an international trademark application filing treaty that provides no rights per se, but it establishes an efficient mechanism for obtaining multinational trademark protection through a centralized system. As of the end of 2003, 61 countries are members of the Protocol, including Australia, many European countries (not the European Union as a whole), China, Cuba, Korea, Japan, Kenya, Morocco, the Russian Federation, Singapore, and the United States. Presented below are a brief outline of the procedural aspects of the Madrid Protocol from the standpoint of a U.S. applicant and a broad overview of advantages and disadvantages.

Filing under the Madrid Protocol is procedurally fairly straightforward. An owner of a U.S. trademark registration or application (a basic application/registration) files a single international application (IA) for the same mark in the U.S. Patent and Trademark Office (USPTO), designating member countries where protection is sought. It originally was contemplated that all such filings would be electronic. However, due to some bugs in the system, the USPTO currently requires paper filing.

If U.S. procedural requirements are satisfied, the USPTO certifies the IA and forwards it to the International Bureau of the World Intellectual Property Organization (WIPO). The International Bureau then appraises whether the IA conforms to Protocol filing requirements. If the IA passes scrutiny, WIPO (1) registers the mark, (2) publishes the mark in the *WIPO Gazette of International Marks*, (3) forwards a certificate to the applicant certifying the application as an international registration, and (4) notifies designated member countries of the applicant's request for trademark protection there.

Each designated country's national office then independently examines the IA, employing the same standards for applications filed directly in that office. The national offices have a maximum of 18 months to notify WIPO of refusals based upon that country's laws. The trademark

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will be granted protection in each of the designated countries that do not issue a refusal. It is critical to note that the Protocol makes no changes to substantive laws of any member country. An applicant must therefore still evaluate the substantive feasibility of obtaining trademark protection in each country where protection is sought.

The Protocol's procedural machinations translate into significant advantages over individual national filing. Primary among these is the efficiency of filing a single application, in a single language, covering multiple countries. Individual national filings typically require hiring agents in individual countries, incurring translation costs, docketing varying renewal dates, and converting currency. The single Protocol filing results in direct cost savings by eradicating multiple agent and translation fees. Additionally, the IA is assigned a single renewal date, as opposed to differing renewal dates assigned by each national office. This greatly reduces potential docketing snafus and missed dates. The Protocol also provides definitive timelines in which national offices must act—reducing the oft-recurring "black hole" effect. Finally, trademark owners outside the United States may benefit from its membership to the Protocol. They will now have an opportunity to extend protection of their marks to the United States via existing international registrations.

While the Protocol's advantages are notable, its encumbrances are equally evident. A principal disadvantage is the IA's dependency on the basic application/registration. If the basic application/registration is rejected or canceled within five years of the international registration date, the international registration must be converted into multiple national applications within three months to maintain international protection. This conversion precipitates incurring the very fees initially sought to be avoided by filing through the Protocol.

This dependency also may limit an applicant's flexibility in defining the scope of protection. For example, a U.S. applicant may be forced to limit a description of goods or services in a basic application/registration due to USPTO requirements, even if another country might accept a broader description. Because an IA description cannot be broader than the basic application/registration, the applicant will be stuck with the narrower description. The Protocol also restricts assignment of international registrations to a national or domiciliary of member countries, thus imposing uncustomarily stringent restrictions on transferability of rights.

A final point of discussion is the potential quagmire created with clearing marks for use or registration. In the Madrid era, it will be critically important to expand clearance search practices to avoid potential infringement or loss of rights. A U.S. trademark applicant, for example, will now need to search each member country's database as well as that of WIPO to determine whether an entity has filed a Madrid application seeking priority in the United States. Arguably, the costs associated with such an expansive search will exponentially increase the cost of clearing a mark for use or registration.

Commentators and practitioners will praise the Madrid Protocol for the cost-saving measures associated with its filing procedures. Others will deride the treaty for creating unexpected hidden costs. Nonetheless, the Madrid Protocol is sure to offer a more efficient alternative to the current multinational trademark filing practice. Although the transition to full use of the Madrid Protocol will likely be gradual, the legal certainty provided under the treaty will ultimately benefit all trademark owners with international interests.

APPLYING THE RULE OF LAW TO THE CRIMES OF SADDAM

By Christopher Scott Maravilla

The Iraqi Governing Council recently announced plans to prosecute Saddam Hussein and other former leaders of the Ba'athist regime for war crimes, crimes against humanity, and crimes committed against the Iraqi people. The announcement raises important legal and political issues, including whether the tribunal should be national or international, whether the tribunal would use Iraqi criminal law or international law, and whether the tribunal would have the ability to try Saddam and others in absentia.

Other issues include whether a tribunal could prosecute crimes committed against U.S. troops in the 1991 and 2003 Gulf Wars. Possible crimes would include genocide, violations of the Geneva and Hague Conventions, and crimes against humanity. The tribunal would prosecute Saddam as well as Gen. Ali Hassan al-Majid "Chemical Ali" and Rihab Taha al-Azawi "Dr. Germ"—already in U.S. custody. Some commentators have urged the creation of a new tribunal—perhaps some combination of the International Criminal Court and a UN-sponsored tribunal similar to the ones for Rwanda and the former Yugoslavia. The UN Security Council established the international criminal tribunals for the former Yugoslavia and Rwanda as "peacekeeping" measures under Chapter VII of the UN Charter.

The International Criminal Court (ICC) is an independent, treaty-based court that derives its authority from the Rome Statute. The Rome Statute entered into effect on July 1, 2002. There is much misunderstanding about the nature of the ICC—it is not, for example, an international appellate court for criminal cases. Neither is it intended to replace national courts that are functioning and can prosecute criminal violations. Instead, the ICC will have jurisdiction only when a national court is unwilling or unable to prosecute a war crime or a crime against humanity.

The ICC was created to prosecute the types of violations of international law that members of the former Iraqi regime are alleged to have committed. Article 5(1) states:

> The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:
>
> (a) The crime of genocide;
>
> (b) Crimes against humanity;
>
> (c) War crimes;
>
> (d) The crime of aggression.

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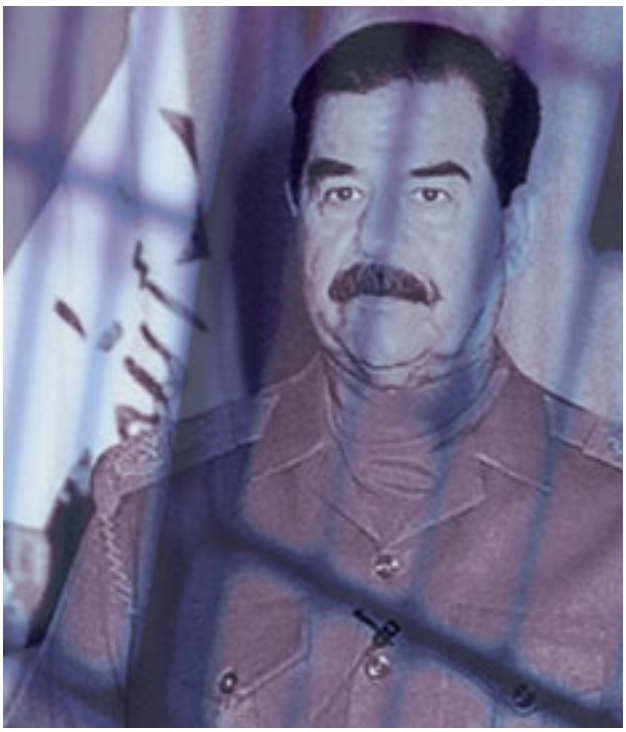

Although four crimes are listed in Article 5(1), the crime of "aggression" has not yet been defined, and the ICC cannot prosecute it. The ICC can prosecute only the first three crimes listed, and only if those crimes were committed after July 1, 2002, when the Rome Statute entered into effect.

Saddam Hussein's flagrant violations of international norms and his overall contempt for human rights have been well documented. Saddam's war crimes include using poison gas against Iranian troops during the eight-year Iran-Iraq War, summarily executing prisoners of war during that conflict, and in 1990–91 invading Kuwait and subsequently waging war against coalition forces. In a 1992 report on Iraqi War Crimes, Pentagon lawyers alleged 16 violations of The Hague and Geneva Conventions. For example, Iraqi troops tortured Kuwaiti citizens and killed 1,082 civilians, including 120 infants who were removed from incubators that were expatriated to Iraq. Also murdered were 150 children between the ages of 1 and 13 and 57 mentally ill persons. Iraqi soldiers also repeatedly raped women. The International Criminal Tribunal for the Former Yugoslavia has explicitly held rape to be a war crime.

During the 2003 Iraq War, war crimes committed by Iraq included pretending to surrender under a flag of truce and then opening fire on U.S. troops, summarily executing and torturing allied prisoners of war, and Iraqi soldiers disguising themselves in civilian garb during combat. It also was reported that Iraqi captors raped Pfc. Jessica Lynch.

Finally, Saddam's crimes against humanity include waging the Anfal campaign against the Iraqi Kurds, where chemical weapons were used in Halabja in 1988 to murder 5,000 people; ordering the destruction of 3,000 villages; undertaking forced deportations of Kurdish and Turkomen families to southern Iraq, which led to 900,000 internally displaced citizens; committing genocide against the Marsh Arabs through a deliberate campaign to drain and poison the marshes; and oppressing the Shi'a majority in the southern part of the country.

Although the ICC would seem to be a natural place to prosecute the alleged war crimes and crimes against humanity, the ICC would not have jurisdiction over Iraq because it neither signed nor ratified the Rome Statute. If Iraq does eventually ratify the Rome Statute, however, it may apply to crimes after the date of ratification, unless Iraq expressly accepts jurisdiction under article 11(2) for crimes committed before its effective date of ratification.

Many in the international community would like to see an international tribunal to prosecute crimes of Saddam and his regime. For example, the U.S. State Department website (*http://usinfo.state.gov/regional/nea/iraq/iraq99h.htm*) states: "The goal of the United States is to see Saddam indicted by an international tribunal." The statement goes on to state: "The United States wants to see Saddam and his close aides investigated, indicted, and if possible, prosecuted by an international tribunal. The Yugoslav war crimes tribunal's May 1999 indictment of Slobodan Milosevic for crimes against the Muslim Kosovar Albanian people shows that when crimes are committed on the scale that Saddam Hussein has committed them, justice should be done not just in the name of the victims, but in the name of all humanity."

Furthermore, in 1998, the U.S. Senate passed a nonbinding resolution calling for the United Nations to administer a tribunal to try Saddam for war crimes and crimes against humanity "for the purpose of indicting, prosecuting and imprisoning Saddam Hussein."

There will continue to be many important developments in the prosecution of war crimes and crimes against humanity for the events in Iraq. We may see an Iraqi tribunal, an international tribunal, or even some combination that may use the resources and expertise of other international criminal tribunals. Whatever the eventual outcome, the people of Iraq and the international community will demand that the rule of law be followed in pursuing justice.

HUMAN RIGHTS: THE DUTY OF THE INTERNATIONAL LAWYER

By Ramon Mullerat

Many centuries ago, somewhere in Europe, a cathedral was being built. Three stonecutters were cutting stones at the site for the construction of the basilica when a passer-by questioned them each separately: "What are you doing?"

"I am cutting stones," answered the first one.

"I am earning one cent a day," said the second.

"I am building a cathedral for God," replied the third proudly.

A lawyer's duties depend on the perception that each lawyer holds of the lawyer's mission. Some lawyers believe that their function is merely a means of livelihood whereby they provide their legal expertise for a fee. In this case, human rights may not be of a particular concern to them. But, if in addition to assisting their clients, they believe that a lawyer has a primary duty toward society—as Roscoe Pound, dean of Harvard Law School, evoked when he referred to the professional's calling in the spirit of public service—human rights acquire paramount transcendence and become their ultimate aim and "raison d'être."

The legal profession is not just a money-getting occupation. It has an excellent mission in society—to defend the rights and liberties of citizens. Furthermore, lawyers' special mediation function of telling ordinary citizens what people in power (legislative, judicial, executive branches) decide and order and conversely telling people in power what ordinary citizens think and wish is a fundamental element of democracy and an essential factor of peace and justice. That is why all dictators, including Shakespeare's Henry IV, Napoleon, Hitler, and Castro, indefectively detest lawyers.

The Universal Declaration of Human Rights proclaimed 50 years ago that "every individual and every organ of society" should play its part in securing the universal declaration of human rights. The Universal Declaration program is strong in rhetoric but weak in force. It is a special obligation of all lawyers to further the fundamental rights

as a basis for civil, economic, and social justice.

There is an unfortunate tendency for many—including lawyers—to consider human rights as another discipline of law, in the same level as corporate, tax, or administrative law. This conception needs to be abandoned. Human rights must interest and concern all lawyers. Human rights is not the business of a few criminal or activist lawyers, but of the legal community as a whole—without exception.

The lawyer is the advisor, the confidant, and the confessor that every person and entity need in this world. If a lawyer, in whichever field he practices, excels in his speciality, but his client breaches human rights, the work of that lawyer is questionable.

If human rights is the duty of all lawyers, international lawyers have a special obligation to advance the human rights combat. International lawyers with multilegal, multijurisdictional, and multicultural training and expertise are especially situated to compare and ponder and to identify and denounce inequalities, abuses, and injustices. International lawyers, who give advice to the more than 53,000 existing transnational corporations and their 400,000 auxiliary companies, which control two-thirds of the world's trade, also are the conscience of such entities and the watchdogs against fundamental rights violations. International lawyers assisting in the myriad daily cross-border transactions exert an enormous influence over economic and human relationships. They must promote and protect the rights of humanity.

At the ABA Conference on the Anniversary of the Declaration of Human Rights in 1998, Elie Wiesel referred to lawyers and human rights and said:

> "It is the lawyers who are at human rights groups, the International League and other rights leagues. Lawyers. Why? Because you realize that the law must be on the side of humanity—not on the side of power, but on the side of humanity. And if it is a suffering humanity, the least we can do is allocate its suffering, the least we can do is to say: look, we are here. We know that you are suffering. The very knowledge that you are suffering pains me and we do not sleep at night."

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Chair's Column

continued from page 2

structuring of the U.S. Constitution. All in all, Section members spent four great days in Brussels, capped off by visits to Waterloo, Ghent, and Bruges.

So many of you know me well enough to ask this key question: Why am I telling you all this? The reason I am telling you this is *not* to give you a nice travelogue. It is to give you a tangible demonstration of the outreach that this one small, humble part of the *American* Bar Association has in the world. This Section is "The Gateway to Global Expertise and the International Legal Community." We proved that we are at these meetings. In a stretch of just seven days the Section brought together 350 lawyers from 28 countries, in fora arranged by more than 60 Section members in Brussels, The Hague, and many other parts of Europe who were willing and excited about helping this Section extend out and serve both U.S. members and its non-U.S. members.

Members don't have to go to Europe, however, to reach out. In the past few years the Section has had meetings in Jackson Hole, Wyoming; San Francisco, California; and Monterrey, Mexico. The 2004 Annual Meeting will be in Atlanta, Georgia, and the next Fall Meeting will be in Houston, Texas. Other meetings have taken place in Montreal and Toronto, Canada; Hamilton, Bermuda; Seattle, Washington; San Antonio and Dallas, Texas; Minneapolis, Minnesota; London; and Mexico City—as well as New York City and Washington, D.C.

All meetings have had the Section's trademark great programming with business/practical tracks and comparative/public international law tracks. And each meeting has included lots of non-U.S. lawyers. While in excess of 25 percent of members are U.S. lawyers practicing abroad, one of the Section's hidden strengths is the number and variety of non-U.S. lawyers who regularly attend meetings. From distinguished luminaries in international bar associations and in world-renowned law firms to lawyers in small and medium-size firms, they come to sample the hospitality and benefit from the camaraderie that is the hallmark of all of SILP meetings: to be a part of the network of those who practice in international settings.

Those who attended the Hague/Brussels meetings benefited greatly by being there. The power of attendance and being engaged is inspiring. Whether it is in a face-to-face setting, as in The Hague and Brussels, or in a committee or a task force or working group, or just "listening in" on a committee listserv, those of you who haven't tapped into it should give it a try.

I'm going to continue to invite you. You are welcome whenever you want to try. Be engaged. See if it inspires you. It does me. Every day.

A Lawyer's Survival Guide to Tokyo

By Sean Kirkpatrick

During its 400-year existence, Tokyo has grown from the simple town of Edo to the governmental, business, and cultural capital of the world's second largest economy. A pulsating mixture of ancient tradition and ultra-modernism, Tokyo serves as a major keystone in East–West business and political relations.

Business Hours

Tokyo never truly sleeps. There are many 24-hour convenience stores, karaoke bars, and Internet cafes. Most large companies and public offices operate 9 a.m. to 5 p.m., with a lunch hour around noon, but Saturday hours are not uncommon, and many work past posted hours. Department stores are open from 10 a.m. to 8 p.m. Banks hours run from 9 a.m. to 3 p.m. Trains stop running at midnight and begin again at 5 a.m.

Because rest and a personal life are for sissies, corporate Japan routinely works into the wee hours of the morning. It is not uncommon for a Japanese lawyer (*bengoshi*) to receive a phone call from a client at 10 p.m., asking for a midnight meeting. Telephone an office at 10 p.m., and there is a good chance someone will pick up.

Transportation

Subways/JR Lines. Japan's railways are phenomenal, especially in its major cities. Ticket prices depend upon distance and can be bought at any station. If you are unsure how much a ticket will cost, buy the cheapest rate and pay the difference at a machine at your destination. Most ticket machines have English instructions, and all signs are written in Roman letters (*romanji*) underneath the Japanese characters.

The Japanese Rail (JR) system (or one of its many equivalents) also can be used to travel to and throughout the rest of Japan. The famed Shinkansen (bullet train) provides the quickest train ride to another major city; however, it often is much quicker and just as inexpensive to fly to your destination. Two very useful links are Route Planner, *www.japanhomesearch.com/travelexpert/te_main.asp,* and Subway Map, *www.tokyometro.go.jp/network/map_english.html.*

Taxis. In the 1980s, getting a taxi in Tokyo was rare enough to be considered a spiritual experience. Times were booming and long lines formed to catch the few available taxis. Thanks to a decade of recession, eager taxicabs flood the streets. But you may get a driver recently downsized from his job, who knows the city about as well as you do and can't speak a word of English (just like in New York City). Most hotel doormen will gladly translate for you. And if you have a map or landmark, most drivers can figure out where you wish to go. A taxi ride costs 660 yen (about $6) for the first 2 km (1.2 miles) plus 80 yen (about 73 cents) for each 274 meters (300 yards) thereafter.

Etiquette

Etiquette is the linchpin of Japanese society. One is always expected to treat superiors with respect. Bowing is the accepted show of respect and occurs constantly throughout a normal day. The lower you bow at the waist, the greater respect you show. Japanese people are used to the Western handshake and a general business greeting consists of both—a small bow and then a handshake—but let them take the lead in offering a handshake.

The Japanese use their last names

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unless they are addressing a close friend or family member. "San" means Mr./Mrs. (Yamada-san). However, doctors, attorneys, and other professionals sometimes are referred to using the "sensei" form (Yamada-sensei).

Business cards (*meishi*) are offered with both hands and a slight bow. When taking a business card, say thank you and return a slight bow. The card is considered an extension of that person, don't write on it or fold it, and don't place it in your back pocket.

Crowds

Anytime you try to fit 30 million people into a metropolitan area, space is going to be at a premium. Homes and offices are small in comparison to American equivalents, and every square foot is utilized for some purpose. During rush hour, passengers will push onto a subway train until it physically cannot hold any more people.

Nothing can be done about a small hotel room, but crowds may be avoided. Do not travel during the rush hours and do not eat lunch at noon. If you must travel on the trains in the morning, take a pair of headphones and try to position yourself so you can look out a window, which will ease the sense of crushing claustrophobia.

For information on restaurants, shopping, and lodging in Tokyo, as well as more tips on doing business as a lawyer in Japan, please visit the Section's website, at www.abanet.org/intlaw/survival_cities.html.

E-Commerce Initiatives

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invoicing to different legal treatment of online and offline business. A summary of replies and opinions is expected to be published online in early 2004.

The Privacy and Electronic Communications Directive

The Privacy and Electronic Communications Directive 2002/58/CE should have been implemented by the Member States of the EU by October 31, 2003. It provides that the use of electronic communications networks to store information or to gain access to information stored in a subscriber's or user's equipment is only allowed if the user or subscriber (i) receives clear and comprehensive information in accordance with the EU Data Protection Directive and (ii) is offered the right to refuse such storage of information. Two exceptions arise where (i) member States adopt specific legislation to restrict the right of confidentiality or (ii) recording is done to provide evidence of a commercial transaction or other business communication. As to unsolicited communications, the Directive provides that prior consent is requested for the use of emails and text messaging for marketing purposes. However, where a business obtains a customer's data in the context of the sale of a product or service, the business may use those data for direct marketing if the recipient is given a clear and distinct opportunity to opt out of such use of the contact details. When emails are used for direct marketing, the sender's identity and address must be provided.

Electronic Signature

On July 14, 2003, the European Commission published standards for the electronic signature products under the Electronic Signature Directive. There are two types of standards. The first relates to the quality of the systems and cryptography to be used by certification service providers (who provide certificates authenticating electronic signatures). The second relates to the hardware or software used to generate the electronic signature. Compliance with the standards is not compulsory. However, if these and certain other standards are followed, the signature should be afforded a higher level of recognition in all EU Member States: it should be regarded as equivalent to a handwritten signature and should be admissible as evidence in legal proceedings.

EU Data-Transfer Rules for Multinational Companies

The Data Protection Working Party has recently adopted a working document to facilitate the international transfer of personal data within a corporate group. According to this document, data transfers and e-commerce should be easier for multinational companies while still maintaining high standards of data protection. Multinational groups would be exempt from these strict provisions of the Data Protection Directive, if they adopt a code of conduct to govern the transfer of personal data originating from the European Union. In addition, either the multinational's headquarters (if based in the European Union) or one designated EU-based group member should be responsible for the group's data transfer obligations. Data subjects would be entitled to take action against the corporate group if the code is breached. Such an action would be heard in the jurisdiction of either the group member from which the disputed transfer originated or the group's responsible member, to be chosen by the data subject. Multinationals should establish internal procedures to ensure that all group members are aware of their responsibilities. The working document also mentions audits, which would be carried out by external auditors to ensure that the corporate codes comply with relevant EU data protection legislation.

CASENOTES

The *International Law News* welcomes casenote contributions from all committees and all Section members. If you would like to contribute a casenote or simply have come across an interesting decision, please contact David G. Forgue at Barnes Richardson & Colburn, at 303 E. Wacker Drive, Suite 1100, Chicago, IL 60601; email dforgue@brc-chi.com.

German Appellate Court Rejects Recovery for World War II Claims of Greek Nationals

Bundesgerichtshof, III ZR 245/98 (2003)

Germany's Federal Court of Justice (*Bundesgerichtshof*) has denied compensation to the descendents of Greek nationals massacred by German soldiers during World War II. The massacre took place at Distomo in Greece after a clash between the German military and resistance fighters. The German military carried out a reprisal against a village, killing the plaintiffs' parents and 300 further civilian inhabitants, as well as a handful of combatant prisoners.

Plaintiffs (unnamed, since German cases typically are not captioned with party names) sought compensation for the deaths in parallel actions in Greece and Germany. The German action was eventually stayed pending resolution of the issues in Greece. In the interim, the Greek trial court awarded plaintiffs compensation against Germany in October 1997. Plaintiffs attempted to collect on their judgment against property of the German state located in Greece, but the Greek government would not provide the necessary approval. Plaintiffs subsequently appealed for collection to the European Court of Human Rights, but were unsuccessful. This appeal to the German court for collection followed.

First, the German court decided not to recognize the earlier decision of the Greek trial court, because Germany had not waived its sovereign immunity to local judicial process. The Greek court's failure to overcome this obstacle had been recognized both by a special Greek court in a similar case, as well as the European Court of Human Rights as described above.

On the merits of the claim regarding the massacre, the German court addressed the three theories of German liability presented by plaintiffs:

First, plaintiffs argued that Germany was directly liable for the actions of Nazi soldiers during World War II. This argument was rejected because plaintiffs did not comply with the terms of a German federal statute that provided for such liability. Second, plaintiffs argued that Germany was liable as a successor state to National Socialist (Nazi) Germany. The court applied international law at the time of the massacre (1944) to determine the obligations of the Nazi state in terms of compensation. Thus the court found that international law at the time held that claims for compensation as a result of a military's violations of the law of armed conflict or of human rights law could be made only by another state on behalf of its affected nationals, and not by any individuals themselves. This was true even if the affected nationals had been civilian noncombatants. Finally, plaintiffs argued that Germany was liable under the law established by Germany's last legitimate government prior to 1944, i.e., that of the Weimar Republic, pertaining to the official actions of members of Germany's military. The chamber held that members of the military were not susceptible to suit for harm they inflicted outside of Germany in time of war. Any disputes about such use of force were to be resolved between the warring parties, and, again, any individual victims had no standing.

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D.C. Circuit Declines to Address World War II Human Rights Abuses

Joo v. Japan, 332 F.3d 679 (D.C. Cir. 2003)

In *Joo* 15 women from across Asia sued the Government of Japan in a U.S. court to recover damages for their subjection to rape and torture during World War II. The women alleged that between 1931 and 1945 Japan forced them (as well as many other women and girls) to serve as "comfort women"—sex slaves—for Japanese soldiers. The women were forced to serve at "comfort stations" operated by the Japanese Army and open to soldiers for a fee. For years Japan claimed comfort stations were the work of entrepreneurs employing "voluntary prostitutes;" in 1992, however, it finally admitted involvement. Nonetheless, in the face of the women's suit, Japan successfully had the case dismissed on the grounds of foreign sovereign immunity at the district court.

Under U.S. law, a foreign state may be required to defend itself in a U.S. court only if the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §§ 1330, 1602–1611 permits the suit against the state. Since 1952, the United States has utilized a doctrine of sovereign immunity known as "restrictive immunity," which includes a presumption of immunity from suit, but embodies an exception for actions based on a foreign sovereign's com-

mercial acts that were either performed in the United States or performed outside the United States but with a "direct effect" in the United States. This doctrine was codified in 1976 in the FSIA and was the basis of plaintiffs' appeal.

Plaintiffs alleged the commercial activity exception applied to Japan because its commercial activity—operating comfort stations—was performed in two U.S. territories (Guam and the Philippines) and had a "direct effect" in the United States. Plaintiffs also alleged that Japan impliedly waived its sovereign immunity by violating *jus cogens* norms against sexual trafficking, and that the Alien Tort Statute created a cause of action for violations of customary international law. Both the district and circuit courts dismissed the Alien Tort Statute claim on the grounds that the FSIA was the sole means of acquiring jurisdiction over a foreign sovereign in a U.S. court.

However, the court never reached the issue of whether Japan's acts constituted commercial acts. Rather, it held that the FSIA's commercial activity exception was no help to plaintiffs because it could not be applied retroactively to reach Japan's alleged pre-1952 acts. The court's holding was based on two conclusions: (1) applying the commercial activity exception would have retroactive effect; and (2) Congress did not "clearly intend" to legislate retroactively.

Agreeing with Japan and amicus curiae the United States, the court found that applying the FSIA exception to pre-1952 acts (i.e. pre-"restrictive immunity" acts) would upset settled expectations of foreign sovereigns without fair notice. The court noted that the Japanese here had "settled expectations" embodied in treaty. The 1951 Treaty of Peace between Japan and the Allied Powers settled that "all claims against Japan arising out of its prosecution of World War II are to be resolved through intergovernmental settlements," not the court system. According to the court, as a "matter of foreign policy it would be odd indeed for the United States, on the one hand, to waive all claims of its nationals against Japan and, on the other hand, to allow non-nationals to proceed against Japan in its courts."

Thus, with evidence that retroactive application would upset Japan's settled expectations and without evidence of clear congressional intent to legislate retroactively, the court declined to apply the commercial activity exception to Japan's comfort station operations. The court also rejected plaintiffs' claim that Japan impliedly waived sovereign immunity by violating *jus cogens* norms against sexual trafficking. A *jus cogens* norm is a universally accepted rule of law from which the international community permits no derogation. Quoting binding D.C. Circuit authority, *Princz v. Federal Republic of Germany* (which the 7th and 2nd Circuits have followed), the court held that the FSIA's waiver provision required intentionality, which plaintiffs could not show: "A sovereign cannot realistically be said to manifest its intent to subject itself to suit inside the United States when it violates a *jus cogens* norm outside the United States."

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PAUL G. HEARNE AWARD FOR DISABILITY RIGHTS CALL FOR NOMINATIONS

The American Bar Association Commission on Mental & Physical Disability Law, in conjunction with the National Organization on Disability, is pleased to announce that it is now accepting nominations for the sixth annual Paul G. Hearne Award for Disability Rights.

Each year, a $1,000 cash award and a commemorative plaque are presented to an individual or an organization that has performed exemplary service in furthering the rights, dignity, and access to justice for people with disabilities. The 2003 award went to the Disability Rights Advocates, a nonprofit law firm that works to end disability-based discrimination in many areas including employment, education, and housing.

Please note that self-nominations are not accepted. The deadline is March 31, 2004 (postmarked).

For a nomination form, please visit our website at www.abanet.org/disability. Or please contact us at 202/662-1573 to request a nomination form or more information.

American Bar Association
Section of International Law and Practice

Upcoming Activities

February 6-8
ABA Midyear Meeting
San Antonio, TX

February 27
Export Controls and Sanctions: Emerging Trends and Compliance Challenges
Palo Alto, CA

April 14–17
Spring Meeting 2004
Beyond Globalization: Issues and Opportunities
New York, NY
See page 5 for further details.

August 4–8
Annual Meeting, preceded by Leadership Retreat
Atlanta, GA

October 13–16
2004 Fall Meeting: The Americas Conference
Houston, TX
See page 16 for further details.

Don't miss out on the ABA CLE Teleconference Series.
See page 9 for further details.

Visit the Section website at *www.abanet.org/intlaw* or contact 202-662-1663 for further information.

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