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# INTERNATIONAL LAW NEWS

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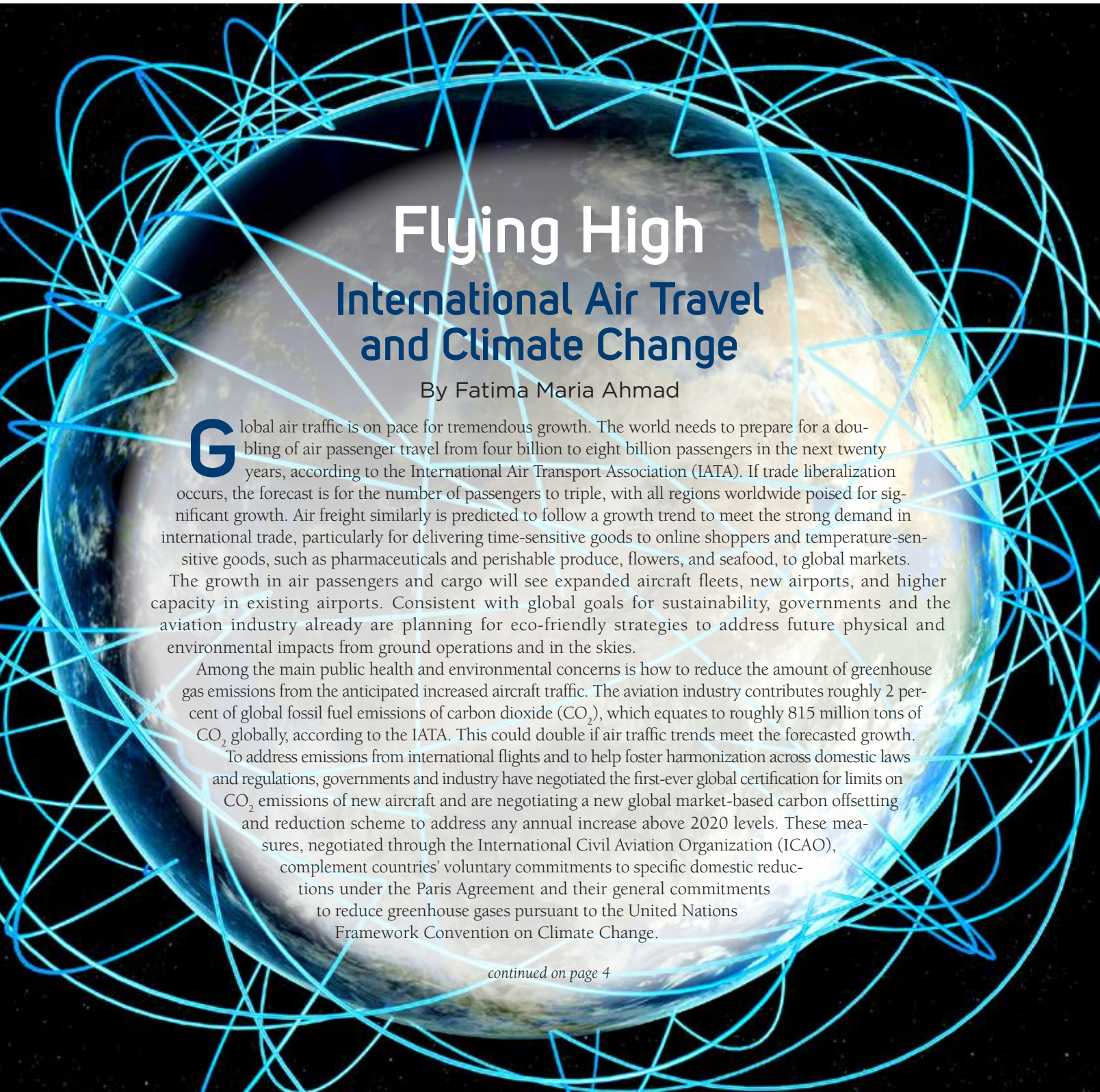

# Flying High

## International Air Travel and Climate Change

By Fatima Maria Ahmad

Global air traffic is on pace for tremendous growth. The world needs to prepare for a doubling of air passenger travel from four billion to eight billion passengers in the next twenty years, according to the International Air Transport Association (IATA). If trade liberalization occurs, the forecast is for the number of passengers to triple, with all regions worldwide poised for significant growth. Air freight similarly is predicted to follow a growth trend to meet the strong demand in international trade, particularly for delivering time-sensitive goods to online shoppers and temperature-sensitive goods, such as pharmaceuticals and perishable produce, flowers, and seafood, to global markets.

The growth in air passengers and cargo will see expanded aircraft fleets, new airports, and higher capacity in existing airports. Consistent with global goals for sustainability, governments and the aviation industry already are planning for eco-friendly strategies to address future physical and environmental impacts from ground operations and in the skies.

Among the main public health and environmental concerns is how to reduce the amount of greenhouse gas emissions from the anticipated increased aircraft traffic. The aviation industry contributes roughly 2 percent of global fossil fuel emissions of carbon dioxide ($CO_2$), which equates to roughly 815 million tons of $CO_2$ globally, according to the IATA. This could double if air traffic trends meet the forecasted growth.

To address emissions from international flights and to help foster harmonization across domestic laws and regulations, governments and industry have negotiated the first-ever global certification for limits on $CO_2$ emissions of new aircraft and are negotiating a new global market-based carbon offsetting and reduction scheme to address any annual increase above 2020 levels. These measures, negotiated through the International Civil Aviation Organization (ICAO), complement countries' voluntary commitments to specific domestic reductions under the Paris Agreement and their general commitments to reduce greenhouse gases pursuant to the United Nations Framework Convention on Climate Change.

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# CHAIR'S COLUMN

## "International Law 101" and Much More

**Steven M. Richman** (*srichman@clarkhill.com*) **is a Partner at Clark Hill PLC, where he practices domestic and international commercial law, and is Chair of the ABA Section of International Law 2017-2018.**

Our Section continues to demonstrate leadership in international law and the broader legal community by being a platform for promotion of the rule of law internationally, providing innovative, skills-based programing, bringing insights from world-class speakers, and delivering timely information on the forefront of cross-border legal practice and international law.

On January 12, 2018, we held our first all-day boot camp introductory program on international law at the ABA facilities in Washington, D.C. Attendees ran the gamut from law students to seasoned international practitioners. It is a way to provide substantive content concurrent with introducing attorneys in a variety of practice areas, and those new to international law, to the topic. The Section will host its second introductory boot camp to international law, to be known more colloquially as International Law 101, in Miami.

At the ABA Midyear Meeting in Vancouver, I moderated the Section's program on the "View From the Bench: The State of International Law," featuring both Canadian and U.S. judges and cosponsored by the ABA Judicial Division. The program explored the current status of international law in judicial decision-making, including cross-border enforcement of judgments, international precedent, and the continuing relevance of, and attacks on, the place of international law in U.S. courtrooms.

At the Section's Annual Conference in April 2018 in New York, we will continue the emphasis on the integration of public and private law. We are all human rights lawyers now, and the line between public and private lawyers continues to blur. Our programming will include a day of skills and methods that will mirror our substantive tracks through the body of the conference. Daniel Ellsberg, known for his release of the Pentagon Papers, will be one of our luncheon speakers, and we will open the conference with a plenary session exploring the rule of law in an age of international risk and instability.

We will hold our investor-state arbitration conference in Singapore on May 10-11, 2018, following our ILEX trip to converse with Indonesian practitioners, government officials, a Supreme Court judge, and members of the business community. Our other conferences include perceptions of risk in Africa (Cape Town, May 21-22, 2018), and health and life sciences (Copenhagen, June 10-12, 2018).

At the ABA's Paris Conference commemorating the 70th anniversary of the Universal Declaration of Human Rights (June 7-10, 2018), the Section will hold a program on corporate social responsibility and supply-chain issues. Human rights are a significant theme of this bar year for the Section.

Our Section continues to be a beacon for all those within the American Bar Association in the field of international law, and we continue to offer our resources, expertise, and assistance to the legal community, at the state, national, and international levels. ◆

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## Feature Articles



## Columns



## News



# International Air Travel

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ICAO is the United Nations agency responsible for facilitating agreement on international standards and policies under the Convention on International Civil Aviation (Chicago Convention). It works with the Convention's 192 member states, as well as other international organizations and the aviation sector. One of its strategic objectives is environmental protection, with a focus on local air quality and noise impacts, as well as on aviation greenhouse gas emissions.

## New Global $CO_2$ Emissions Certification Standard for Aircraft

A new global emissions standard adopted under the auspices of the ICAO aims to reduce the $CO_2$ emissions of aircraft. The standard becomes effective in 2020 for new aircraft designs and 2023 for aircraft designs in production. All new commercial aircraft seeking a certificate of airworthiness must comply by 2028, with exemptions requiring public disclosure of the impact on the environment. The standard has been added as a new Volume III on $CO_2$ Certification Requirement to Annex 16 of the Convention on International Civil Aviation (Chicago Convention).

## Global Carbon Offsetting and Reduction Scheme for International Aviation (CORSIA)

This year, ICAO, its member states, and airlines are preparing for the implementation of a new Carbon Offsetting and Reduction Scheme for International Aviation (CORSIA). In 2016, the ICAO member states adopted Assembly Resolution A39-3, which established CORSIA as a complement to the broader package of measures. The scheme will enter into a voluntary pilot phase in 2021.

CORSIA is significant because it is the first international sector-based approach to carbon emissions reduction and offsetting. CORSIA is a complement to the Paris Agreement because while emissions from domestic aviation are included in nationally determined contributions (NDCs) for countries with economy-wide targets, emissions from international aviation were not included in NDCs. Therefore, plans to reduce and offset these emissions supplement the Paris Agreement. They can help close the gap between the Paris Agreement pledges and the goal of limiting climate change to 2 degrees Celsius. It is encouraging that ICAO aims to harmonize CORSIA with the market-based mechanisms developed under Article 6 of the Paris Agreement because doing so will allow for greater efficiency and may lead to greater emissions reductions.

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CORSIA will be used to address increases in total CO2 emissions from international civil aviation above 2020 levels. Section 5 requires "taking into account special circumstances and respective capabilities." Section 8 explains that this language was intended to address equity between developed and developing nations. The carbon offsets will come from sources other than international aviation, and could include offsets developed under United Nations Framework Convention on Climate Change (UNFCCC) processes, such as forestry offsets developed under REDD+, which is the scheme for reducing emissions from deforestation and forest degradation and promoting forest conservation in developing countries. It also could leverage carbon offsets developed through the Kyoto Protocol clean development mechanism (CDM) and offsets developed under the Paris Agreement's Article 6 market-based mechanisms.

The amount of $CO_2$ emissions to be offset is calculated by reviewing an airline's annual emissions covered by CORSIA and a growth factor representing the increase in emissions from the 2019–2020 baseline. ICAO will calculate the growth factor. Many airlines from developing countries are growing faster than large airlines from developed countries. To promote equity between developed and developing countries, there will be a ramp-up to the use of an individual growth factor. Initially, between 2021–2029, the growth factor will be 100 percent sectoral. Between 2030–2032, at least 20 percent of the growth factor must be the individual growth factor. Between 2033–2035, at least 70 percent of the growth factor must be individual. Finally, from 2036 onwards, the growth factor must be

100 percent individual. The offset requirements will also be adjusted based on an airline's use of sustainable aviation fuels. An airline may purchase and cancel eligible emissions units to meet its offsetting requirements.

## Emissions Monitoring, Reporting, and Verification

Monitoring, reporting, and verification (MRV) of emissions will be an important part of CORSIA. Beginning in 2019, airlines from ICAO member states must monitor, report, and verify $CO_2$ emissions from all international flights, even if the carbon emissions from the international flights will not be offset through CORSIA. Every three years beginning in 2022, ICAO member states must ensure that their airlines are complying with CORSIA offsetting requirements where applicable.

The measuring of emissions will help provide data to be used to assess progress towards ICAO's aspirational goals to achieve carbon-neutral growth of the international aviation sector beginning in 2020 and an annual 2 percent improvement in fuel efficiency through 2050.

## CORSIA Timeline

In 2018, the ICAO Council will undertake several actions to prepare for the pilot phase. First, the ICAO Council will adopt guidance to implement the MRV system. Resolution A39-3, Section 20(a). The guidance will include the appropriate standards and recommended practices (SARPs) developed under ICAO processes. ICAO member states will then make arrangements to prepare to implement the guidance and SARPs for a Jan. 1, 2019, implementation date. Second, the ICAO Council will adopt guidance on emissions unit criteria to support purchase of emissions units for offset purposes under CORSIA. Resolution A39-3, Section 20(c). The emissions unit criteria guidance will take into account how Article 6 of the Paris Agreement will be implemented. The goal is for internationally transferred mitigation outcomes under Article 6 and credits from the successor to the CDM to be eligible under CORSIA as well. This will require review by the ICAO Council to ensure that there is no double counting. Finally, the ICAO Council will also develop policies and guidance to guide the establishment of CORSIA registries. Resolution A39-3, Section 20(f).

ICAO agreed upon phased implementation for CORSIA:

- 2021–2023: Pilot phase. Only member states that volunteer will participate.
- 2024–2026: First phase. Only member states that volunteer will participate.
- 2027–2035: Second phase. All member states whose individual share represents 0.5 percent of international aviation activity or whose cumulative share exceeds 90 percent of international aviation activity will participate, with exceptions for least developed countries, small island developing states, and landlocked developing countries.

Only flights departing from and arriving in member states that are participating in CORSIA are subject to offsetting requirements. During the pilot phase and first phase, both the departure and arrival countries must have volunteered to participate.

**Beginning in 2019, airlines from ICAO member states must monitor, report, and verify $CO_2$ emissions from all international flights.**

More than 70 nations have expressed their intention to participate in CORSIA's voluntary pilot phase and first phase. Any additional states that would like to participate in the pilot phase must notify ICAO by June 30, 2018.

## CORSIA Outlook: Clean Skies Ahead?

Continued progress on implementation of ICAO CORSIA suggests that during 2018, the public and private sectors will continue to work together on reducing carbon emissions, at least in international aviation. Market-based mechanisms are an important way to achieve efficiencies given the limited capital that is available. For this reason, CORSIA is an encouraging example of a sector-specific and market-based approach. Further, the global aviation industry prefers a single global carbon offsetting mechanism to a patchwork of regional and state market-based measures. These factors and the positive example of ICAO may also contribute to additional action on reducing carbon emissions in global shipping. In April 2018, the International Maritime Organization announced a goal of reducing carbon emissions by 50 percent from 2008 levels by 2050.

The details of this new strategy continue to be developed.

Looking ahead, ICAO continues to explore establishing a long-term global aspirational goal for reducing emissions pollution from international aviation. ICAO encourages a "basket of measures" to help achieve its goals of carbon neutral growth from 2020 onwards and improved fuel efficiency. The measures include improvements to aircraft related technology and standards, improved air traffic management and operational improvements, development of sustainable aviation fuel, and global market-based measures mechanisms, such as CORSIA.

CORSIA, however, has been criticized as lacking in ambition. Certainly, as ICAO member states develop experience with CORSIA, it may lay the groundwork for more ambitious goals. Financial incentives from ICAO member states will also be needed to promote investment in and accelerate deployment of new aircraft technology and sustainable fuels that could help make more ambitious goals possible.

There are also open questions about whether it is appropriate for member states to develop additional measures to reduce carbon emissions from international aviation. The debate on the appropriateness of additional carbon emissions reduction measures will likely continue as the internal politics of ICAO member states will differ on how aggressively to act on climate change.

The European Union (EU) Emissions Trading System is set up to exclude emissions from international aviation beyond the European Economic Area until 2024. At that point, the EU will review the implementation of CORSIA and determine whether to include emissions from international aviation. Some nations are not waiting. In October 2017, the Netherlands announced a proposal to impose an environmental tax on aviation. The Netherlands previously enacted an aviation tax in 2008, but the tax was removed after a year because air traffic to the Netherlands declined. Trade associations representing airlines have suggested that a new Dutch tax on aviation would be at odds with CORSIA. In April 2018, Sweden announced a new aviation tax on all flights departing from airports in Sweden of between 60 to 400 kronor to reduce carbon emissions. A similar legislative proposal was introduced in 2017, but the proposal was withdrawn. Sweden will have elections in September 2018, and, depending on the outcome, the new aviation tax may be repealed.

In the United States, one reason U.S. airlines support CORSIA is that they prefer one global regime to the challenge of multiple, overlapping regimes applicable to emissions from their operations. As such, U.S. airlines are generally supportive of CORSIA and would like to see the United States continue to participate. Thus far, the U.S. government has not expressed an intention to withdraw from CORSIA's voluntary phase, which begins in 2021. Industry support may prove to be instrumental in keeping the U.S. engaged with CORSIA in the same way that industry support for the Kigali Amendment to phase out the use of hydrofluorocarbons appears to have been helpful in encouraging the United States to honor it.

Certainly, increasing ambition and momentum on carbon emissions reduction will require mobilizing large sums of both public and private capital to invest in the transition to a lower-carbon economy. This will require political leadership. In 2018, civil society has an important role to play in communicating to policymakers that there remains an opportunity for the U.S. federal government to engage in international efforts on climate change in a way that both achieves domestic political objectives related to energy dominance and economic growth while also continuing to reduce carbon emissions. Corporate leadership, in particular, will be critical to help make the business case for programs like CORSIA, which achieve efficiencies for the private sector through the use of market-based mechanisms. ◆

# United Nations Peacekeeping

## Strengthening Accountability for Injuries to Third Parties

By Bruce Rashkow

The United Nations has come under increasing scrutiny amid allegations of sexual exploitation and abuse (SEA) and other crimes, including financial fraud and theft committed by United Nations (UN) peacekeeping personnel. Indeed, allegations of SEA have long plagued the UN and prompted many calls for action, including by the Section of International Law and the ABA more generally in regard to such abuses in the Congo. Last year, the ABA House of Delegates adopted Resolution 105 calling for the UN and its Member States to provide improved accountability for programs and services provided to victims of sexual and gender-based violence in areas of armed conflict.

The latest reports of sexual harassment and assaults of UN employees suggest a UN climate in which SEA is more widely tolerated and which, if true, present an issue that undermines the effectiveness and legitimacy of the UN. *See, e.g.*, Rebecca Ratcliffe, *Sexual Harassment and Assault Rife at United Nations, Staff Claim*, The Guardian (Jan. 18, 2018 11:00 EST), https://www.theguardian.com/global-development/2018/jan/18/sexual-assault-and-harassment-rife-at-united-nations-staff-claim.

These continuing allegations of the failure of the UN to accept accountability in the area of SEA are amplified by past incidences of the UN failing to accept accountability in regard to the failure of the UN to protect the inhabitants of a UN safe haven in Bosnia from armed attack, exposing UN protected refugees from armed hostilities to lead poisoning, and creating an enormous cholera crisis in Haiti.

As litigation in those cases demonstrated, accountability remains complicated by legal aspects of privileges and immunity of the UN and its Members States to step up and accept responsibility, including responsibility they have mandated in regard to SEA and under the special liability regime for harm to third parties arising from peacekeeping activities.

Ensuring timely and conscientious action to follow existing mandates and policies is vital to strengthening accountability, achieving the benefits of peacekeeping, and ensuring justice.

### UN Peacekeeping Accountability Is Not New

The accountability of the United Nations for injuries to third parties for its activities in the peacekeeping context is not a new issue and is not limited to concealing misconduct.

Accountability has been with the United Nations almost since its inception, dating back to the earliest of those missions in 1948 with the UN Truce Supervision Organization (UNTSO) and the UN Military Observer Group in India and Pakistan (UNMOGIP)—both of which continue to this day. Indeed, in all, there have been seventy-one UN peacekeeping operations since 1948, involving more than a million military, police, and civilian personnel, and costing some $70 billion. Today, there are fifteen peacekeeping missions employing some 95,000 uniformed personnel and more than 15,000 international and local civilian personnel and costing annually some $8 billion. *See* UN Peacekeeping, https://peacekeeping.un.org; United Nations Handbook 2017–2018, pp. 110–125.

Until relatively recently, the question of the accountability of the UN for injuries to third parties during peacekeeping operations was not a significant issue for the UN. For most of the history of the UN, peacekeeping missions were relatively small in size with the modest mandate of simply keeping the warring factions separated so as to encourage dialogue that would hopefully result in a lasting resolution of the underlying political issues. As both UNTSO and

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UNMOGIP demonstrate, the achievement of this ideal has proven in some cases to be elusive.

For the many years leading up to the end of the Cold War, UN peacekeeping missions with their modest mandates to separate the warring factions, generated relatively few claims for injuries to third parties that generally were of a routine nature. Most of these claims were generated by automobile accidents involving UN vehicles or by contractual disputes with those locals who may have been providing premises or other services to the missions.

## Evolving Mandates of UN Peacekeeping Missions

With the conclusion of the Cold War and the dissolution of the old Soviet Union towards the end of the 20th Century, there was a new approach to peacekeeping based on a new non-Cold War "consensus" of East and West. This period witnessed an expansion of UN peacekeeping activities in what was becoming a more complex world situation involving not simply conflicts between neighboring states, as had been the case in the past, but increasingly internal conflicts within states that threatened the peace and security within those states and also of neighboring states. This period also saw both an increased number of UN peacekeeping missions and the growth of proactive mandates of new missions. Unlike the past where the UN simply separated the warring factions, these new mandates have involved the UN often actively engaging the warring factions to protect civilian populations from being attacked or abused and to permit the distribution of humanitarian assistance to sustain those populations.

Indeed, the UN, for the first time in its history, authorized its peacekeeping forces in the Democratic Republic of the Congo (MONUSCO) in 2013 to proactively seek out and militarily strike armed elements that were threatening civilian populations with human rights abuses and the delivery of humanitarian assistance. The Security Council created, within the overall peacekeeping forces of that mission, a special "Intervention Brigade" with the responsibility "of neutralizing armed groups" for the "protection of civilians from abuses and violations of human rights and violations of humanitarian law, including all forms of sexual and gender-based violence and grave violations against children." *See* S.C. Res. 2098, ¶¶ 9–12 (Mar. 28, 2013).

The increasingly robust mandates of peacekeeping missions to protect civilians, especially the "Intervention Brigade," has been criticized as placing the neutrality of the members of such missions, particularly members of the military contingents serving in such missions, in question, exposing such personnel to claims by the warring factions to treat such individuals as "enemy combatants" who may be legitimate military targets. *See* Mona Khalil, *Humanitarian Law and Policy in 2014: Peacekeeping Missions as Parties to Conflicts, Professionals in Humanitarian Assistance and Protection* (PHAP, Feb. 13, 2014).

## UN Immunity and Responsibilities

Initially, there is the issue of the generally absolute immunity of the UN from any kind of jurisdiction in the courts of UN Member States. *See* UN Charter, arts. 1, 105; Convention on the Privileges and Immunities of the United Nations, art. 8, Feb. 13, 1946, 21 U.S.T. 1418. However, the UN has traditionally provided a means for these routine claims to be resolved. Virtually since its inception, the UN has had in place a worldwide insurance policy to deal with automobile claims throughout the world that has dealt with this issue on the ground in the various places where the UN manifests a presence. In addition, the UN has established internal administrative processes within each peacekeeping mission, including local internal claims review boards, to deal with claims against the UN, whether of a contractual or tort basis. These responses of the UN have generally been effective over the years to address claims by third parties in peacekeeping missions. *See* Bruce Rashkow, *Immunity of the United Nations: Practice and Challenges*, 10 Int'l Org. L. Rev. 332, 337–339 (2013).

However, with the end of the Cold War and with a dramatic increase in the number of UN peacekeeping missions and an expansion to more robust mandates of such missions, a large increase in the number and nature of third party claims in such operations led the UN to establish a special comprehensive liability regime to deal with those claims. That special regime spells out the extent of UN liability for both tort and contract claims, including personal injury and death and damage to property, arising out of the activities of UN peacekeeping missions. The special regime, which provides for claims to be addressed administratively by the UN principally in the field, as they have always been addressed, excludes certain kinds of claims, e.g., claims arising out of "operational necessity" as well as "military necessity"; and imposes certain temporal and financial limitations on the liability of the UN. *See* Bruce Rashkow, *Above the Law? Innovating Legal Responses to Build a More Accountable UN: Where Is the UN Now?*, 23 ILSA J. Int'l & Comp. L. 345, 348–349 (2017).

## Limitations of the UN's Special Liability Regime

Notwithstanding the efforts by the UN to responsibly address the changing nature of UN peacekeeping and the third-party claims resulting from such activities, three cases have arisen that have challenged the reputation of the UN as being fundamentally fair in dealing with such claims: Mothers of Srebrenica, Kosovo, and Haiti Cholera victims. The first two cases involve claims arising from the failure of the UN to protect innocent civilians threatened with armed attacks by one of the warring factions while the third case involves the purported negligence of a UN peacekeeping mission to properly maintain waste treatment facilities utilized by its military contingents. In all three cases, the UN declined to accept responsibility for the claims, successfully asserting its immunity in cases brought before the domestic courts in The Netherlands regarding the Mothers of Srebrenica and the United States in the Haiti Cholera case.

## Mothers of Srebrenica

The Mothers of Srebrenica case involved the failure of the UN peacekeeping mission in Bosnia to protect civilians under the protection of the UN peacekeeping force in a UN-established "safe area." The UN abandoned the area and the civilians to Serb forces in the face of a threatened attack on the area by such forces, resulting in the massacre of several thousand Bosnian men and boys. The mothers of the victims sued the UN and the Dutch government in Dutch courts, which ultimately recognized the immunity of the UN. They then appealed that judgment to the European Court of Human Rights, which affirmed the immunity of the UN but not the Dutch government. *See Stichting Mothers of Srebrenica and Others v. the Netherlands*, App. No. 65542/12, Eur. Ct. H.R. (27 June 2013). In upholding the immunity of the UN in that case, the courts focused on the mandate of the UN peacekeeping mission to use force under Chapter VII of the UN Charter to protect the civilians in the safe areas from armed hostilities. *See* Rashkow, at pp. 349–51.

## Kosovo

The Kosovo case also involved the mandate of a UN operation under Chapter VII to use force to protect threatened civilians. However, in that case, the claims against the UN were not based on the failure of the UN to protect people, but on the negligence of the UN in the exercise of that mandate. The Kosovo case involved the actions of the UN in placing internally displaced persons threatened by armed hostilities in protected areas that, because of environmental lead pollution of the areas, resulted in damage to their health. A complicating factor for the claimants was the fact that the UN in that case was not simply acting under its mandate as a UN peacekeeping force but, pursuant to the Security Council mandate, was also acting as the interim or temporary governmental authority in Kosovo pending the resolution of the underlying conflict between the warring factions. Based on these considerations, the UN declined to consider the claims asserting that the claims were not of a private law character that legally would warrant action by the UN. *See* Letter from UN Under-Secretary-General on Claim for Compensation on Behalf of Roma, Ashkali and Egyptian Residents of Internally Displaced Person (IDP) Camps in Mitrovica, Kosovo (July 25, 2011), *available at* http://www.sivola.net/download/UN%20Rejection.pdf.

## Haiti Cholera Case

The Haiti case also involved claims of negligence of a UN peacekeeping mission that the claimants allege resulted in some 10,000 deaths and injury to hundreds of thousands of Haitians. These claims stem from actions by the UN peacekeeping mission beginning in 2010 in allegedly failing to adequately screen peacekeeping troops for cholera prior to deployment in Haiti and failing to properly maintain its waste treatment facilities, thereby allowing the introduction and spread of cholera throughout Haiti. From the outset in 2010, the UN declined to consider these claims arguing that the claims, like those asserted in Kosovo, were not of a private law character that legally would warrant action. Accordingly, when the UN was sued in U.S. courts beginning in 2013, it asserted its immunity. Both the U.S. District Court and the Appellate Court that heard the case upheld that immunity. Only following the decision of the Appellate Court in August of 2016, and a constant stream of criticism from a number of quarters over a long period of its failure to accept legal responsibility, did the UN accept moral responsibility for not doing more to help the people of Haiti deal with the cholera epidemic. *See* Rashkow, at pp. 351–57.

In accepting moral responsibility for the UN, the Secretary-General launched a Two Track initiative to respond to the cholera crisis in Haiti. Track I focuses on intensifying existing efforts to reduce and end transmission of cholera, improve care and treatment, and address long-term issues of water sanitation and health systems in Haiti. Track II focuses on the development of proposals to provide material

assistance and support to those Haitians most directly affected by cholera, on an individual and community basis.

The Secretary-General identified the goal of raising $400 million for his initiative, $200 million for each track. Both tracks, however, rely on voluntary contributions from Member States and others, which thus far have not been significantly forthcoming, particularly in regard to Track II. Moreover, the "development" of proposals for the critical Track II initiative relating to material assistance to individual Haitian victims is apparently conditioned on the UN receiving funding up front for the implementation of such proposals even before development of the proposals can proceed—a significant obstacle to moving forward on that front depending on how the Secretary-General actually decides to proceed in this regard.

In the end, whether this Two Track initiative succeeds in providing significant relief to the people of Haiti—whether on a national or on a community or individual basis—is largely in the hands of Member States. It is they who will decide on whether to make the financial contributions called for in the initiative and, thus, whether to fund Track I or Track II, both, or neither! *See* Rashkow, at pp. 357–60.

## Sexual Exploitation and Abuse

Any discussion these days on the accountability of the UN for harm caused to third parties injured in connection with UN peacekeeping operations must take into account the many and continuing allegations of SEA of the vulnerable civilian populations for whose benefit these missions were established by UN staff and members of the military contingents that make up these missions. This became an issue in the early 1990s, and the UN has been dealing with the problem since. Since the 1990s, the UN has enacted a series of policies intended both to prevent such abuses in the first instance and, failing that, to bring to justice those UN staffers and military personnel who engage in SEA, ratcheting up in each instance its efforts to deal with this issue. *See* Rashkow, at pp. 360–70. Although the UN has succeeded in significantly reducing the number of SEA incidents, the problem remains.

On the accountability front, it is important to note at the outset, that the UN does not, in principle, view itself as responsible for SEA committed by its civilian staff or military contingent members of its peacekeeping operations. The UN has in place a number of programs that seek to assist the victims of SEA both in responding to the immediate medical and material needs of those victims and in seeking justice after the fact for those victims. However, these acts of SEA, which are forbidden by UN policy and regulation, are viewed as criminal acts by the individuals involved, and are not viewed as the responsibility of the UN for which it might be held legally liable by the victims. *See* Rashkow, at pp. 363–64.

The efforts of the UN to hold its civilian staff accountable for SEA are complicated by the fact that, while the UN can administratively act to dismiss or sanction such individuals for serious misconduct, it does not have the power to institute criminal proceedings against them. In such cases, the UN routinely refers the matter to the appropriate Member State's authorities to institute criminal actions, and relies on such authorities to follow up. Unfortunately, there are often issues of which Member State, if any, has jurisdiction over the matter under its own legislation, and, in any event, whether and how they may choose to proceed. The Secretary-General has made a number of suggestions to Member States for addressing this problem through domestic legislation or through multilateral action.

With respect to members of military contingents serving with peacekeeping operations, the matter is even more complicated because, as a matter of UN policy, these members are subject to the exclusive authority of the authorities of the Member States that have provided such contingents. The UN has adopted a number of policies to enhance cooperation between the UN and those Member States in the training to prevent SEA, the investigation of SEA incidents, and the follow up by those states regarding military contingent members who are accused of SEA. However, in light of continuing problems with SEA, the Secretary-General has recently made a number of additional far-reaching proposals to the General Assembly to reform the system for dealing with SEA generally to better ensure that allegations of SEA are effectively pursued and justice for the victims is achieved. *See* Rashkow, at pp. 364–70.

## Is the United Nations Above the Law?

It remains to be seen whether and to what extent the General Assembly, and in particular the Member States who provide military contingents to UN peacekeeping operations, will accept and act on proposals to strengthen the accountability for SEA within UN peacekeeping operations and more generally throughout the UN system, and whether and to what extent it will implement its special regime for harms caused to third parties in the peacekeeping context.

The UN needs to correct its past failures and must act in a timely and conscientious manner to implement existing policies and enact new policies to end a culture of impunity. It is clear that further concrete actions will be needed to achieve accountability and justice.◆

# EU's General Data Protection Regulation (GDPR)

## Key Provisions and Best Practices

By Aaron Schildhaus

Whether or not your company is doing business in the European Union (EU), it will be affected by the EU's General Data Protection Regulation (GDPR). Why? Because the scope and reach of the regulation are global and likely to touch companies everywhere.

On May 25, 2018, the GDPR comes into full force and effect, and companies around the world are preparing for it. Failure to comply with this new law will put companies at risk for enormous fines and penalties: up to the greater of 4 percent of annual global revenues or EUR 20 million for data controllers and up to the greater of 2 percent of annual global revenues or EUR 10 million for data processors.

This article reviews some of the following areas covered by the GDPR: its extraterritorial effect, the lawfulness of data processing, dealing with a personal data breach, data rectification, data portability, the right to be forgotten, data protection by design, and data protection impact assessments. Because a discussion of these provisions only scratches the surface of this far-reaching regulation, it is suggested that incorporating relevant GDPR requirements into the operating procedures of companies worldwide should be considered as best practices in the field of cybersecurity, data protection, and privacy. Practitioners also should keep in mind that the regulation is very comprehensive and many of its provisions overlap and interconnect. Therefore, a careful study and understanding of the regulation in its entirety is recommended.

### Background

The GDPR replaces the existing Data Protection Directive 95/46/EC (Directive), which has been the standard for data protection and data privacy in the EU since it came into force in December 1995. U.S. companies now in compliance with the Directive, including the more than 2,400 companies that have qualified for the EU-U.S. Data Privacy Shield and its analogue, the Swiss-U.S. Privacy Shield, should be aware that compliance with the current data protection regime will not be sufficient, in and of itself, to qualify under the GDPR.

The GDPR was designed to deal with the growing need to further protect Europeans from being compromised by the misuse of personal data in the possession of organizations. It is harmonizing privacy and data security laws across Europe and reshaping the way entities across the region approach data protection. The intent of the GDPR is set out in Article 1, which "lays down rules relating to the protection of natural persons with regard to the processing of personal data and rules relating to the free movement of personal data . . . (and it) . . . protects fundamental rights and freedoms of natural persons and in particular their right to the protection of personal data."

Because the GDPR is a regulation, and not a directive, it is directly applicable in all EU Member States. The GDPR applies extraterritorially by its terms.

Indeed, it is noteworthy that the United Kingdom's upgrading of its Data Protection Act with its Data Protection Bill essentially conforms to the GDPR so that its businesses can remain competitive with others in the EU despite Brexit. In any event, the U.K.'s exit from the EU will not take place before the GDPR takes effect in May; therefore, U.K. businesses will be subject to the GDPR as of May 25, too.

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## Extraterritoriality

The GDPR's implementation will have a profound effect on data protection and privacy not only in Europe but also worldwide, given the transborder realities of electronic data management and processing and the regulation's new extraterritorial provisions. The GDPR applies to all companies, regardless of location, that process the personal data of data subjects residing in the EU. Article 3 states that the GDPR also applies to the processing of personal data of data subjects in the EU by controllers and processors in the EU, wherever the processing takes place, whether or not in the EU.

Another extraterritorial provision of the GDPR is that the regulation applies to the processing of personal data of data subjects in the EU by a controller or processor not established in the EU, where the activities relate to the offering of goods or services to EU citizens (whether or not payment is required) and the monitoring of behavior that takes place within the EU. Previously, under the Directive, territorial applicability was ambiguous, referring to data processing in the context of an establishment. The extraterritoriality of the regulation is now clear; moreover, non-EU businesses processing the data of EU citizens will have to appoint a representative in the EU, as given in Article 27.

The GDPR and related EU and country legislation and regulations contain a myriad of requirements and provisions, all of which merit close examination by companies that have direct or indirect operations in Europe. Many global companies already recognize that it makes sense to incorporate practices and policies that will help protect themselves against claims of violating statutory standards of conduct and ethical norms by governmental entities or individuals. The potentially crippling fines that noncompliant companies would expose themselves to are reason enough for their boards of directors to mandate compliance with the GDPR.

## Lawfulness of Processing

For the processing of data to be legal, Article 6 requires at least one of the following conditions:

- Consent – the data subject has given consent to the processing of the data;
- Contract – the processing is necessary for the performance of a contract to which the data subject is a party or into which the data subject is seeking to enter;
- Legal Obligation of Controller – the processing is necessary for compliance with a legal obligation of the controller;
- Protection of Vital Interests – the processing is necessary to protect the vital interests of the data subject or of another natural person;
- Public Interest – the processing is necessary for the performance of a task carried out in the public interest; or
- Legitimate interests of controller or third party – subject to the data subject's fundamental rights and freedoms requiring protection, particularly those of a child.

Relative to the foregoing, a number of requirements are imposed on the controller. Among those, Article 12 requires any request for the data subject's consent to be given in a concise, transparent, intelligible, and easily accessible form. Further, the consent must be given for one or more specific purpose under Article 9(2), and the forms providing for data subject consent must be clear and intelligible under Article 12(7).

It should be noted that Article 15 provides data subjects the right to obtain a free report regarding the type and purpose of data, as well as the names of the data processors. Moreover, Article 7(3) requires the process for withdrawing consent to be as easy granting it.

## Personal Data Breach

Cybersecurity best practices include not only minimization of cyber risks but also comprehensive and detailed plans regarding how best to handle a breach if one occurs. A personal data breach is defined in Article 4(12) as "a breach of security leading to the accidental or unlawful destruction, loss, alteration, unauthorized disclosure of, or access to, personal data transmitted, stored or otherwise processed."

Article 33 sets forth the notice of breach obligations of data processors with respect to their Supervisory Authority, which are the relevant independent public authority or authorities responsible for monitoring the application of the GDPR in a given country. Articles 51–68 provide a comprehensive description of supervisory authorities . Article 68 describes the EU Data Protection Board. Articles 33 and 34 set forth the obligations with respect to data subjects and to their data controllers.

It is recognized that not all data breaches harm the data subject; however, in the event of a personal data breach that could result in a risk to the rights and freedoms of a data subject, the data processor is required under Article 33 to notify the Supervisory Authority "without undue delay" and no later than 72 hours from learning of the breach. If it fails to do so in this time frame, it must accompany the notice with the reasons for the delay.

The data processor also must notify the data controller "without undue delay" and must notify the data subject, also without undue delay and in clear and plain language, of the nature of the breach. Notice to the Supervisory Authority and to the data subject must identify the data protection officer or

other contact where more information can be obtained, must describe the likely consequences of the data breach, and must describe the measures, including where appropriate those to mitigate damages, that the data controller has taken, or intends to take, as a result of the breach.

The data processor must provide to the Supervisory Authority documentation regarding any personal data breaches, their effects, and the remedial actions it has taken so that the authority can verify the extent to which the processor is complying with its GDPR requirements.

## The Right to Rectification

Article 16 provides that the data subject shall have the right to obtain from the controller "without undue delay" the rectification of inaccurate personal data. The data subject also has the right to have incomplete personal data completed, which includes providing a supplementary statement.

## The Right to Erasure (Right to Be Forgotten)

Among the many rights of the data subject vis-à-vis the controller is the right to be forgotten. Article 17 provides that the controller must erase personal data without undue delay where the personal data is no longer necessary for the purposes collected or where the data subject withdraws consent and when there is no other legal ground for the processing. If the data subject exercises the right to object pursuant to Article 21 dealing with profiling and direct marketing, or if the personal data has been unlawfully processed, the data subject may invoke the right to erasure. The right to erasure applies as well if the personal data must be erased to comply with an EU or Member State law to which the controller is subject or where the personal data was collected relative to a child under the age of 16 as set forth in Article 8(1).

The right to erasure does not apply to the extent that processing is necessary to exercise the right of freedom of expression and information or to comply with a legal obligation that requires processing by EU or Member State law to which the controller is subject. Exemptions under Article 17(3) clarify that it does not apply to the performance of a task carried out in the public interest or in the exercise of official authority or for reasons of public interest in the area of public health. It also exempts archival purposes in the public interest, for scientific or historical research, for statistical purposes, or for the establishment, exercise, or defense of legal claims.

## Data Portability

Provided that it does not adversely affect the rights and freedoms of others and that it does not consist of processing necessary to perform a task carried out in the public interest or in the exercise of official authority vested in the controller, the data subject has the right under Article 20 to receive all personal data he/she has provided to a controller, in a structured, commonly used, and machine-readable format, and has the right to transmit such data to another controller where the data processing is carried out by automatic means. Such transfers must be based on one or more of the following:

- consent received from the data subject to process his or her personal data for one or more specific purposes pursuant to Article 6(1)(a);
- explicit consent received from the data subject, pursuant to Article 9(1), to the processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade union membership, biometric data for the purpose of uniquely identifying a natural person, data concerning health, or data concerning a natural person's sex life or sexual orientation; or
- processing necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract, as consistent with Articles 6(1)(b) and 20(1).

Where technically feasible, the data subject has the right under Article 20(2) to have the personal data transmitted directly from one controller to another. This right of data portability is without prejudice to the right set forth in Article 17 regarding the right to be forgotten.

## Data Protection by Design and by Default

Data protection by design under the GDPR means that data protection must be a consideration from the onset of the designing of systems, rather than an addition. The controller is required, under Article 25, to implement appropriate technical and organizational measures, such as pseudonymisation, which are designed to implement data protection principles, such as data minimization in an effective manner, and to integrate the necessary safeguards into the processing in order to meet the requirements of this regulation and protect the rights of data subjects.

The controller must implement measures to ensure that only the data necessary for the specific purpose of the processing are processed. As specified in Article 25(2), this includes the amount of data collected, the extent of its processing, and the data's storage period and accessibility.

## Data Protection Impact Assessments and Prior Consultations

Article 35 requires the controller to take into account the nature, scope, context, and purposes of any proposed processing. If it is likely to result in a high risk to the rights and freedoms of natural persons, the controller must carry out an assessment of the proposed processing on the protection of personal data and must seek the advice of the data protection officer. These Data Protection Impact Assessments (DPIAs) are absolutely required under Article 35(4) for specific processing operations that are publicly listed by the Supervisory Authority. Likewise, Article 35(5) provides that the Supervisory Authority may establish a public list of the kind of processing operations for which no DPIA is required.

The DPIA must contain:

- a systematic description of the proposed processing operation and its purposes, including the legitimate interest of the controller;
- an assessment of necessity and proportionality of the processing operations relative to the purposes;
- an assessment of the risks to the rights and freedoms of the data subjects; and
- the measures proposed to address the risks, including safeguards, security measures, and mechanisms to ensure personal data protection and compliance with the GDPR.

Article 36 reiterates the requirement for the controller to consult with the Supervisory Authority prior to processing where a DPIA indicates that the processing would result in high risk if no mitigating measures are taken by the controller. If the Supervisory Authority believes that the intended processing would infringe the regulation, particularly where the controller has insufficiently identified or mitigated the risk, the Supervisory Authority has up to eight weeks from the controller's request for consultation to provide written advice to the controller and the processor and may extend the period until it has obtained the requested information. The Supervisory Authority may exercise any of its Article 58 powers in this process.

## Data Protection Officer

Depending on the nature, scope, purposes, and core activities involved, controllers or processors may be required to appoint a data protection officers, whose qualifications and responsibilities are set forth in Articles 37–39.

Under the GDPR, it will not be necessary, as is currently the case, for data processors to submit notifications and registrations to each local Data Processing Authority (DPA) of data processing activities, nor will it be a requirement to notify or obtain approval for transfers based on Standard Contractual Clauses (SCCs).

Instead, there will be internal record keeping requirements. Also, the appointment of a Data Protection Officer (DPO) will be obligatory only for those controllers and processors whose core activities consist of processing operations that require regular and systematic monitoring of data subjects on a large scale or special categories of data or data relating to criminal convictions and offenses. The DPO must be appointed based on professional qualities, particularly expert knowledge on data protection law and practices, and may be a staff member or an external service provider. The DPO's contact details must be provided to the relevant DPA. In addition, the DPO must be provided with appropriate resources to carry out its tasks and maintain his/her expert knowledge. The DPO must report directly to the highest level of management and must not carry out any other tasks that could result in a conflict of interest.

The GDPR is changing the international legal landscape and is affecting businesses, governments, organizations, and individuals in many ways, and its impact will only increase. The issue of data protection and privacy will continue to be a core concern of persons and entities worldwide. Constant and in-depth review and incorporation of the GDPR's approach as best practices will help organizations as this critical area continues its rapid evolution. ◆

# Celebrating the OECD Anti-Bribery Convention at 20, the FCPA at 40, and Addressing the Challenges Ahead

By Nancy Boswell and Scott C. Jansen

Two important milestones in U.S. law and international law show the strengthening of domestic and global efforts to combat corruption. December marked the 40th anniversary of the Foreign Corrupt Practices Act (FCPA) and the 20th anniversary of the signing of the Organisation for Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Anti-Bribery Convention). Together, these landmark legal reforms have and are reducing corruption in international business and development.

Yet, challenges remain, including securing consistent vigorous global enforcement and addressing solicitation, kleptocracy, and opaque offshore vehicles misused to hide illicit assets. What has been accomplished so far, and what is planned for the future in the fight against corruption in international business?

Marking these anniversaries, the American University Washington College of Law Anti-Corruption Law Certificate Program, with the co-sponsorship of the ABA Section of International Law, the OECD, and the Association of Women International Trade, held a program on November 8, 2017, to review and celebrate accomplishments to date and to assess the challenges ahead. Speakers included current and former U.S. government officials, OECD officials, and representatives of international organizations. Kathryn Nickerson, Senior Counsel at the U.S. Department of Commerce, and Shruti Shah, a Vice President at the Coalition for Integrity, moderated panel discussions.

In introductory remarks, Nancy Boswell, the Director of the Anti-Corruption Law Program at American University Washington College of Law, stated, "Public officials and private practitioners studying in our Certificate Program note the profound and positive impact of the FCPA and the Anti-Bribery Convention and are inspired to tackle today's challenges to public and corporate integrity."

Ambassador Stuart Eizenstat, who served as Domestic Policy Advisor to President Carter, described the arc of progress, starting from the Watergate scandal, which led to the Ethics in Government Act of 1978 and other reforms. It also revealed corporate foreign bribe payments as a common business practice, leading the U.S. to enact the FCPA.

Subsequent concern that the law disadvantaged U.S. companies competing with companies from countries lacking similar prohibitions and, in some cases, even permitting tax deductions for bribes, led the United States to press the OECD to help create a more level playing field. By the mid-1990s, the time was right for the adoption of the OECD

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Anti-Bribery Convention and for the creation of the Working Group on Bribery (WGB) peer-review monitoring process.

As a result of these legal reforms and vigorous U.S. enforcement, most major exporting countries now have foreign bribery prohibitions, and major multinational corporations have adopted or enhanced their ethics and compliance programs.

On the key question of enforcement under the Trump Administration, John Cronan, Principal Deputy Assistant Attorney General at the U.S. Department of Justice (DOJ) Criminal Division, noted that corruption disadvantages companies that play by the rules, threatens U.S. national security, and fuels organized crime.

Therefore, according to Cronan, the United States will continue to lead on enforcement, notably in prosecuting individuals, as indicated under the April 2016 Pilot Program and the Revised FCPA Corporate Enforcement Policy, issued on November 29, 2017, rewarding corporations for voluntary self-disclosure. It will also foster enforcement by other countries, particularly through more coordinated negotiated resolutions. This will also help mitigate the possibility of companies paying twice for the same conduct, according to Cronan.

Other panelists expressed support for negotiated settlements provided they are consistent across countries and transparent. The WGB is working to ensure such consistency, according to Brooks Hickman, an Analyst in the OECD Anti-Corruption Division.

Speakers noted progress across the corporate community in adopting ethics and compliance programs and training. However, Heather Lowe, Legal Counsel and Director of Government Affairs at Global Financial Integrity, cautioned that the DOJ's emphasis on prosecution of individuals, although a powerful deterrent, risks lessening pressure on companies to create a culture of integrity. Panelists also questioned how prosecutors will assess the adequacy of corporate compliance programs in countries permitting such a defense.

The key issue of enforcement is a decidedly mixed picture outside the United States, according to Drago Kos, Chair of the WGB. He commended the United States, the United Kingdom, Brazil, and several central European countries for taking action, referring to the more than 500 ongoing corruption/bribery criminal investigations in twenty-one countries and the widespread adoption of corporate criminal liability laws, a groundbreaking change.

Nonetheless, he underscored the serious challenge presented by the twenty-two OECD members, who, after almost two decades of monitoring, are still not enforcing their laws. He also cited the major exporting countries who are not Parties to the Convention or members of the WGB. Thus, the WGB is now considering urgently needed measures, including naming and shaming, to foster enforcement among all members and to engage nonmembers to more actively engage.

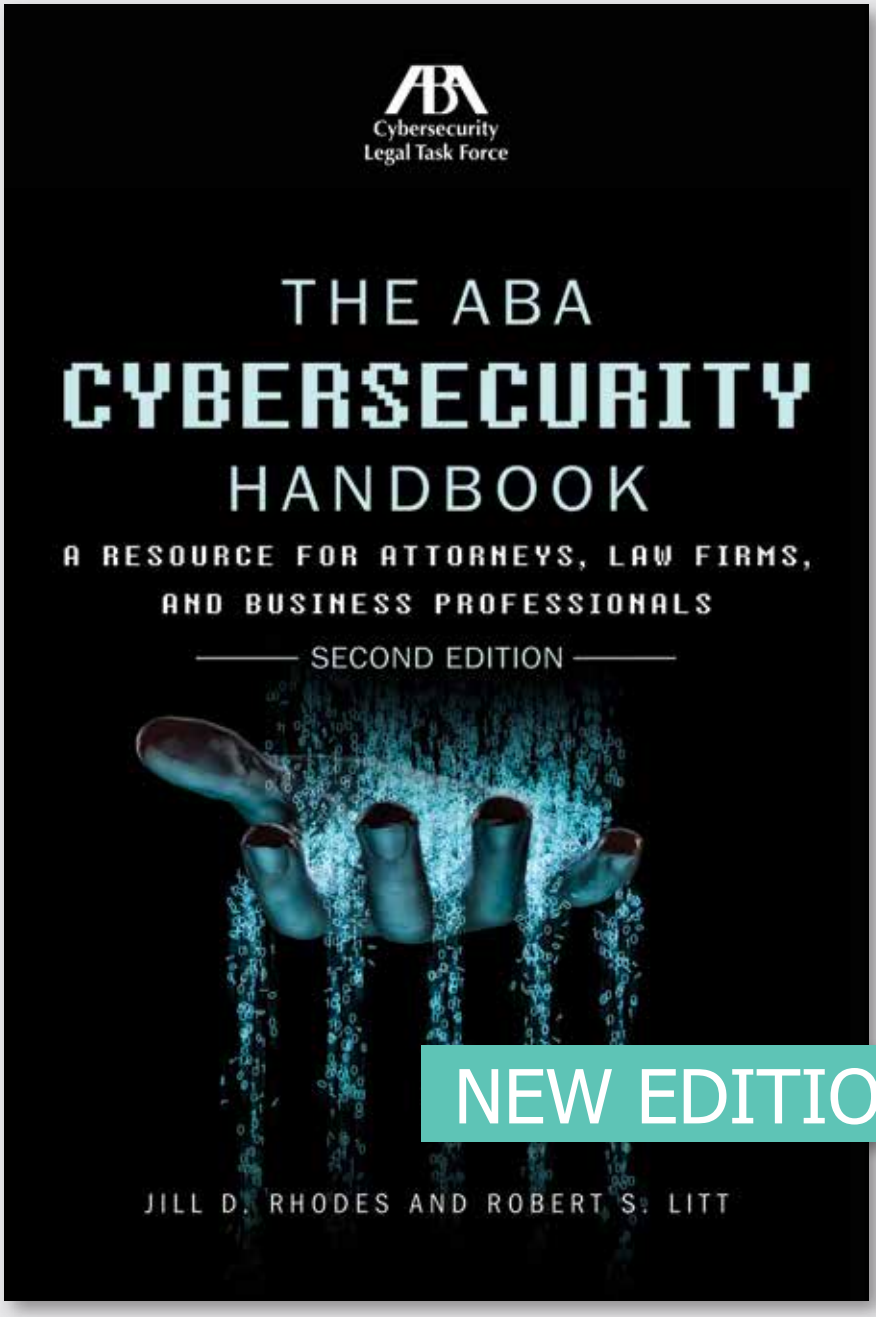
Securing vigorous enforcement by all major exporters is a priority for the U.S. business community, as is attention to the demand side of corruption transactions, according to Eva Hampl, the Director of Investment, Trade, and Financial Services at the United States Council for International Business (USCIB).

While there is little sign that countries are taking action against their own officials, DOJ is taking steps on the demand side, according to Leo Tsao, Assistant Chief of the Fraud Section's FCPA Unit. He noted charges against foreign public officials under money laundering, wire fraud, and other federal statutes. He also highlighted the need for capacity building and cooperation with foreign prosecutors in bringing cases.

Similarly, the DOJ Kleptocracy Unit has successfully tracked down and seized proceeds of foreign corruption in the United States, according to Dan Claman, the unit's Principal Deputy Chief. Increased legal cooperation among OECD members is leading to more cases against foreign public officials and confiscation of their illicit gains. Nonetheless, Claman underscored that obstacles remain.

Among those obstacles is the lack of beneficial ownership transparency, which according to Lowe, impedes law enforcement in tracking financial flows. She cited the revelations in the Panama Papers and Paradise Papers of the role of anonymous companies in hiding corruption-related transactions and pointed to the ease of establishing anonymous companies in the United States. Given the need for greater transparency of the true owner of bank accounts and legal entities, Lowe urged congressional action on proposed U.S. legislation requiring beneficial ownership transparency, at least to law enforcement authorities. Several other countries have and are taking even stronger action, including creating public registries for beneficial ownership information.

As to the way ahead, the panelists agreed on the need for continued U.S. leadership and for G20 action on both the supply and demand side of bribery, as well as on beneficial ownership transparency. ◆




The Second Edition of this top-selling cybersecurity book is a must-read for anyone working in the field including private practice attorneys and associates, in-house counsel, non-profit and government attorneys and others.

Since the release of the first edition published in 2013, cybersecurity breaches in law firms have made news headlines and clients are asking questions about lawyers' and firms' security programs. From the massive Panama Papers breach that led to the dissolution of the Mossack Fonseca Law Firm in April 2016 to the WannaCry and Petya Ransomware attacks, the latter that led to the several day work outage at DLA Piper in June 2017, it is imperative that attorneys understand the potential risk of weak information security practices to their practices and their clients. As hackers increase their capability to conduct cyber attacks, so must law firms step up their risk management game specifically in cybersecurity as a fundamental part of their sustainable business practices.

Co-edited by cybersecurity leaders, Jill D. Rhodes and Robert S. Litt, former General Counsel of the Director of National Intelligence, The ABA Handbook on Cybersecurity, Second Edition focuses on many of the issues raised in the first edition, while highlighting the extensive changes in the current cybersecurity environment. Aside from the length of the book (about 30% more extensive than the prior edition), this edition includes a chapter on technology basics for the technologically challenged.

This updated book will enable you to identify potential cybersecurity risks and prepare you to respond in the event of an attack. It addresses the current overarching threat as well as ethical issues and special considerations for law firms of all sizes. The Handbook also includes the most recent ABA Ethics Opinions and illustrates how you should approach the subject of cybersecurity threats and issues with clients as well as when and how to purchase and use cyber insurance.

**2017, Paperback, 6x9, PC 3550028**
**General Public $89.95**
ABA Members $71.95

**ambar.org/cybersecurity**

# NAFTA Renegotiation and the Mexican Economy

By Eduardo Sánchez Madrigal

The North American Free Trade Agreement (NAFTA) has become the most relevant international treaty for the Mexican economy since it came into force on January 1, 1994. The tri-country free trade zone among the United States, Canada, and Mexico created by NAFTA has resulted in an unprecedented net benefit for Mexico's manufacturing and agricultural sectors and boosted the share of exports from Mexico to its commercial partners. Moreover, despite being passed during a time of recession in Mexico, NAFTA was one of the main factors that contributed to the country's transition into a real democracy and that pushed its economy into the global marketplace.

North of Mexico's border, NAFTA represents a cornerstone for the U.S. economy. By eliminating tariff quotas in certain key exports, NAFTA reduced the overall costs of commerce among the three countries and boosted their economic growth. Lower tariffs have also resulted in lower prices in agriculture and oil imports, resulting in a significant political advantage for the United States when dealing with other exporters.

As in any multilateral relationship, the effects of NAFTA have several nuances. Concerns that the benefits are not as reciprocal as they should for all the parties involved is spurring the Trump administration to seek a renegotiation of the 24-year-old trilateral pact. The Trump administration's current trade agenda includes renegotiating the agreement; however, the United States could potentially withdraw if more beneficial conditions are not achieved.

The U.S. trade policy goal to renegotiate NAFTA with

## Panel Series on NAFTA-The Next Generation

The Section's Mexico, Canada, International Trade, and International Energy and Environment Committees are sponsoring a series of three panels on NAFTA in advance of a jointly sponsored panel program at the Annual Conference in New York.

The first panel, focusing on agricultural provisions, was held at the law firm of Faegre Baker Daniels in Chicago in January, featuring Chair-Elect Robert Brown, John Cruickshank, Consul General of Canada in Chicago, and Luis Martinez, Counselor for Agricultural Affairs in the Agricultural Office at the Embassy of Mexico in Washington D.C.

The second panel to explore industry and market perspectives will be held at Bennett Jones in Toronto on February 27, 2018, and will be held in collaboration with the Canadian Bar Association. Jesse Goldman, a Partner at Bennet Jones, will lead a moderated discussion with Alex Dewar, Senior Manager of Boston Consulting Group, Daniela Flores, an Associate Attorney with Ec Legal Rubio Villegas in Mexico, Sacha Kathuria, Manager of Regulatory and Industry Analysis at the Association of Oil Pipe Lines (AOPL), John Langrish, President of the Canadian Energy Round Table, and Andy Shoyer, a Partner in the Washington, D.C., office of Sidley Austin LLP and co-lead of the firm's International Trade Practice.

The third panel focused on the automotive industry will be held in April in Mexico City, in advance of the Annual Conference. Additional details will be announced on the committee listservs.

International trade lawyer Dunniela Kaufman will moderate the capstone program on "NAFTA-The Next Generation" at the Section's Annual Conference in New York City on April 19 at 9 a.m. Speakers will include Marney Cheek, a Partner at Covington and co-chair of the firm's Arbitration Practice Group, Fernando Holguin-Casa a Partner at Ec Legal Rubio Villegas in Mexico, and Matthew Kronby, a Partner in the Toronto office of Bennett Jones. The discussion will explore the industry, political, and social influences shaping the negotiations and whether the agreement might be expanded to include new sectors. It also will look at the potential influence of commitments made in the Trans-Pacific Partnership Agreement and Canada's Agreement with the European Union.

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better terms for the United States does not come as a surprise. During a 2016 U.S. presidential election debate, Donald Trump described NAFTA as "the single worst trade deal ever approved in this country." Full Transcript: First 2016 Presidential Debate, Politico (Sept. 27, 2016), https://www.politico.com/story/2016/09/full-transcript-first-2016-presidential-debate-228761. Then, on July 17, 2017, as a legal requirement to commence the renegotiation of NAFTA, the Office of the U.S. Trade Representative (USTR) issued a Summary of Objectives for the NAFTA Renegotiation and subsequently updated the objectives in November 2017. *See* Office of the U.S. Trade Representative, Summary of Objectives for the NAFTA Renegotiation (Nov. 2017), *available at* https://ustr.gov/sites/default/files/files/Press/Releases/Nov%20Objectives%20Update.pdf.

President Trump's determination to renegotiate NAFTA has not faded and has led so far to seven rounds of renegotiation between representatives of the three North American countries. They are expected to return for an eighth round in early April to speed up the process as Mexico's presidential elections approach.

So far, the negotiators have not struggled to find common ground in proposed changes to digital trade, energy, and regional manufacturing regulations, but, as could be expected, negotiating key issues, such as dispute resolution mechanisms and the inclusion of a so-called sunset clause, have proven to be quite challenging. In Mexico, the overall stance towards the NAFTA renegotiation is that it must be adapted to modern realities rather than repealed.

One criticism of NAFTA has been directed towards the migration of U.S.-owned factories into Mexico, or "*maquiladoras,*" and the adverse effects that the search for cheap labor force has had on U.S. jobs and wages. Some within the U.S. business community view modernizing the conditions of the agreement as a necessary step, as well as an opportunity to address changes to labor standards and the operation of *maquiladoras*. *See, e.g.*, Lorne Matalon, *U.S.-owned factories in Mexico Welcome the Prospect of NAFTA Changes*, Marketplace (June 27, 2017), https://www.marketplace.org/2017/06/27/business/us-owned-maquilas-welcome-prospect-change-nafta.

As the NAFTA renegotiation proceeds, uncertainty remains. NAFTA is not a perfect agreement, but its flaws call for an update and not for its end. Hopefully, the NAFTA renegotiation will result in a more balanced free trade pact where the trilateral relationship's potential can be directed towards a more fruitful future. ◆

## Conference on International Trade and Investment

**Mexico City, November 6–9, 2018**

Free trade agreements, including the future of NAFTA or NAFTA 2.0, will be a key topic at the Section's upcoming specialty conference in Mexico. On November 6–9, the Section will be hosting the 2018 edition of its Conference on International Trade and Investment at the Presidente InterContinental Hotel in Mexico City. The conference will feature twenty-six programs led by distinguished legal professionals, addressing hot topics such as anti-corruption, energy, immigration, and international trade and investment. The conference also will include a home hospitality night for small-group networking, two offsite receptions in venues chosen to highlight Mexico's cultural heritage and history, a special tour of Mexico City, and the opportunity to earn up to twelve continuing legal education (CLE) credits. Moreover, the conference agenda will be enriched by networking events and luncheons where attendees will have opportunities to interact with world-class speakers and colleagues with diverse professional backgrounds. Interested members are encouraged to register early to enjoy the special reduced rates.

The Planning Co-Chairs for Mexico Conference include Luis Perez, René Mauricio Alva, Robert Brown, Mario Piana, and Carlos Velásquez.

Visit the Section's website for additional information about the Mexico Conference on International Trade and Investment, November 6–9, 2018.

https://www.americanbar.org/groups/international_law/events_cle.html

INTERVIEW

# Benjamin Berell Ferencz
## U.S. Chief Prosecutor at Nuremberg Trials

*By Renee Dopplick*

**Benjamin Ferencz (New Rochelle, NY, 2001); photo by Der Spiegel**

**Benjamin B. Ferencz** was born in Transylvania in 1920 and moved to America when he was ten months old. After he graduated from Harvard Law School in 1943, he enlisted in the U.S. Army. Under General Patton, Ferencz fought in every major battle of the war. He was later transferred to a newly created War Crimes Branch to gather evidence of Nazi brutality. When the war was over, Ferencz returned to New York and was subsequently recruited for the Nuremberg war crimes trials. At 27 years old, Ferencz was named Chief Prosecutor for the United States in the Nuremberg Einsatzgruppen Case. The Associated Press called it "the biggest murder trial in history." Twenty-two defendants were charged with murdering over a million people. It was his first case. Since then, Ferencz has devoted his life to studying and writing about world peace and replacing the "rule of force with the rule of law." He lives with his wife, Gertrude, in New Rochelle, New York, and Delray Beach, Florida.

***Your legal career has been one of discovery, risk taking, and thinking about the future. What has motivated you to push for rule of law and a more peaceful, humane, and secure world?***

My parents fled poverty and persecution and came to the United States. We lived in poverty most of the time. Eventually, I won a scholarship at Harvard Law School for my exam in criminal law, and I had decided then, even before the war, to devote myself to trying to prevent crimes, which I had seen all around me living in Hell's Kitchen in New York.

At the Nuremberg Trials in 1946, the waging of aggressive war was indelibly branded as "the supreme international crime. I didn't have to go to Nuremberg to learn that. I was a combat soldier who entered the war shortly after the war began. I was then 23 years old. I saw the horrors with my own eyes. My assignment was to go into the concentration camps as they were liberated to collect evidence of the horrors and atrocities so that they could be used in the trial against the perpetrators and that is what I did.

After the war, I was unemployed like 10 million other solders, and I was invited by the Pentagon to return to Germany to help with the subsequent Nuremberg trials. It was there that I became the Chief Prosecutor of this most significant trial. What was most significant about it was it gave us and it gave me an insight into the mentality of mass murderers. They had murdered over a million people, including hundreds of thousands of children in cold blood, and I wanted to understand how it is that educated people – many of them had PhDs or they were generals in the German Army—could not only tolerate but lead and commit such horrible crimes.

The reason I have continued to devote most of my life to preventing war, is my awareness that the next war will make the last one look like child's play. We have devoted all of our energy and money to building new weapons. We have failed to build the instruments necessary for peaceful settlement of disputes, and the result is that the funds which are needed to care for refugees, for students, and for the aged, are wasted in an arms race for more destructive weapons from cyberspace, which can cut off the electrical grid on any city on this planet, with the result of almost immediate death to most of the population.

We will never succeed in ending wars totally; however, we can be a catalyst for moving in the right direction. That is what I have been doing. I've been moving a heavy rock up the hill, but there has been great progress. The progress goes up and then it comes down. It circulates—upward slowly and up and down. We have made fantastic progress over the years, but we still have a very long way to go because it's interrelated with so many other things; however, if I am going to have any impact at all, it seemed to me that I would be as a catalyst focusing on the rule of law and having that be used as a prime instrument to have people recognize that war itself has got to be abolished.

***During the course of your career, you saw the creation and expansion of international criminal law. How would you describe its growth?***

The main principles of the Nuremberg trials were affirmed by the UN General Assembly and have been accepted as binding principles of international law. Among those principles are the conclusion that crimes are committed by individuals, that the law must apply equally to everyone, that heads of state are liable, that there is no excuse for crimes despite your rank, and fundamentally that crimes which are so offensive as to shock the conscience of humankind should be condemned as crimes against humanity. These principles seem to me to be very sound then, and they continue to be very sound.

Declaring the law is one thing; respecting or enforcing it is another. The legal community, government leaders,

scholars, and every segment of society need to advance the vital importance of developing national and international criminal law to help protect the basic human rights of people everywhere.

***Why is the rule of law important?***

Nuremberg concluded that aggression was no longer a permissible heroic act. It was an international crime, and it should be punished as a supreme international crime. I believe that. I was a combat soldier in World War II. I am always guided by my supreme commander. General Dwight D. Eisenhower, when he became President of the United States, declared "The World can no longer rely on force. It must rely on the rule of law, if civilization is to survive."

***If you could adopt new laws or mechanisms tomorrow to curb international crimes and hold perpetrators accountable, what would those be?***

The crime of aggression still hangs in legal limbo. There is a dangerous gap in the law. If no court is competent to try aggressors, the crime is more likely to be encouraged than deterred.

War should be punishable universally as a crime against humanity, as genocide is condemned. The illegal killing—that is the killing of large numbers of innocent people without it being in self-defense or without it being approved by the Security Council of the United Nations—is a crime. It is a supreme international crime of aggression. Since aggression seems to be stalled, in that nations hesitate to give the International Criminal Court the jurisdiction to act on it, it should be condemned as a crime against humanity, which is punishable under many domestic statutes. We should study those national jurisdictions, which accept responsibility for holding accountable those leaders who are committing genocide whatever it's called, whether it be a crime against humanity or terrorism or anything else. These are improvements we have to make in the law, and, hopefully, we will be able to move in that direction as well. Putting it into more national laws will take us a big step forward.

Another step is to sue the individuals who are responsible in a civil court and hold them personally accountable for whatever crimes have occurred. It may be that they don't have any money, in which case you are stalemated, but they may also have hidden it someplace else. The fact that they know in advance that they may be held to account will certainly have some deterrent effect.

Let us not forget that certain crimes are so horrendous that they have been prohibited on the principles of universal jurisdiction and that should also apply to the illegal use of armed force.

Also, we live in a cyberspace age. The way you kill people today has been vastly increasing than what it was before. You cannot go with the old standards and the old laws. The laws must be modified to meet the needs of today. I hope I won't have to live another 97 years to see that it happens.

***You recently established the Ben Ferencz International Justice Initiative at the Holocaust Museum. Please tell us what you hope it will achieve.***

I've been trying all my life to create a more peaceful world grounded in the rule of law and justice. The International Justice Initiative seeks to strengthen the rule of law for atrocity prevention and response, promote justice and accountability in countries where mass atrocity crimes have been committed, and foster research and policy aimed at using international justice to deter, prevent, and respond to mass atrocities.

We cannot kill an ideology with a gun. We must teach people to have more respect, to be ready to compromise, to be willing to see the other's point of view, and to find peaceful resolution of the differences. You cannot continue to have the parties to the dispute be the only ones who determine for themselves when what they are doing is legal or moral. It's impossible. You'll never get a settlement that way.

We must go now to the public through every education means that we have to change hearts and minds in favor of not glorifying war but of glorifying peace and justice.

***What are the next big challenges for rule of law?***

The most significant challenge facing the rule of law today is the feeling that, since wars cannot be totally prevented, nothing needs to be done. Leave it to somebody else to do the job. That is a guarantee of failure. Wars can be changed and ended. We have to build the institutions necessary for that. Holland has been the center of the world for the creation of international courts. All of them are inadequate. Nevertheless, they represent the progress which we have been making in the last century.

For generations, war has been glorified as a road to peace and glory and pride of country. It can't be that way anymore. It is much too dangerous. We have to change our way of thinking. The court of last resort is the people themselves. They have to be educated. They have to be advised. They must recognize that war is a supreme international crime. There is no glory. There is no reason for mass killings of innocent people.

We have to create international courts, competent to enforce their judgments against those who defy the laws necessary for the peace and security of mankind. That is a challenge.

***What excites you about the future of international law for the next generation of legal practitioners, scholars, and jurists? Any advice for them?***

I am confident that the progress we have made so far in my lifetime has been rather enormous and very impressive, and it encourages me to believe that we will continue to make progress. Please visit my website, www.benferencz.org. Everything on the website is free. You are encouraged to use the resources for the purpose of creating a more humane and peaceful world.

"**Law, not war**" remains my slogan and my hope. Consider the proposition that law, not war, should be your guide. If you could do that, those three words—law, not war—will save billions of dollars every day, not to say how many millions of lives will be saved. How can you do that? I will give you three more words and three sentences:

Never give up.
Never give up.
Never give up. ◆

# INTERNATIONAL UPDATES

## International Criminal Tribunal for Yugoslavia Officially Closes

On December 31, 2017, the International Criminal Tribunal for the former Yugoslavia (ICTY) ended its operations and officially closed, ending twenty-four years of prosecutions for war crimes that took place in the 1990s. Created by the UN Security Council, the ICTY was the first war crimes court since the post-WWII Nuremberg and Tokyo tribunals. Among its legacy, it contributed to the development of international criminal law and procedure. http://www.icty.org

## International Court of Justice Issues Judgments in Costa Rica v. Nicaragua

On February 2, 2018, the International Court of Justice (ICJ) delivered its Judgment in *Certain Activities carried out by Nicaragua in the Border Area* (Costa Rica v. Nicaragua) and in the joined cases of *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean* (Costa Rica v. Nicaragua) and *Land Boundary in the Northern Part of Isla Portillos* (Costa Rica v. Nicaragua). In the *Certain Activities* case, the ICJ fixed the compensation amount due from Nicaragua to Costa Rica for environmental damage and other material damage caused by Nicaragua on Costa Rican territory. In the joined cases, the ICJ awarded Costa Rica disputed land, established a maritime boundary between the countries, and unanimously ruled that Nicaragua must remove its military camp from Costa Rican territory. http://www.icj-cij.org/en/decisions

## Eleven Countries to Sign the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)

The legally verified text of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) was released on February 21 in preparation for an official signing ceremony on March 8 in Chile. This proposed free trade agreement aims to streamline market access and trade among eleven countries: Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam. It is informally known as TPP-11 because it includes the eleven countries that were negotiating the Trans-Pacific Partnership Agreement before the United States withdrew in 2017 and includes many of those provisions. Once adopted in March, the CPTPP will take effect when ratified by at least six countries. https://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpgp/index.aspx?lang=eng

## Negotiations on International Legally Binding Instrument on Marine Biological Diversity Move Forward

An Intergovernmental Conference will soon begin negotiations on a new international agreement under the UN Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, referred to as BBNJ. The extensive discussions and reference documents of the Preparatory Committee and the Ad Hoc Open-Ended Working Group will assist delegations as they negotiate the specific wording. The Intergovernmental Conference will meet four times, with the aim of concluding the agreement in 2020. An organizational meeting will be held in April 2018. https://www.un.org/bbnj

## New Global Compact for Migration Edges Closer

Negotiations on a new Global Compact on Migration continue despite the United States pulling out at the end of 2017. The negotiation's co-facilitators released a "zero draft" in early February 2018, along with a schedule putting the agreement on track for finalizing by the end of the year. https://refugeesmigrants.un.org/intergovernmental-negotiations

## ILO Members to Debate New Convention on Sexual Harassment in Workplaces

The fifth item on the agenda for International Labour Conference to be held in Geneva from May 28 to June 8, 2018, is a discussion of whether to pursue a new treaty and international standards on harassment, violence, and assaults against women and men in public and private workplaces. The Conference convenes Member States of the International Labour Organization (ILO). An ILO report with proposed recommendations based on input from Member States and other stakeholders will serve as the basis for the discussion. http://www.ilo.org/ilc/ILCSessions/107

## International Seabed Authority Seeks Input on Draft Strategic Plan 2019–2023

The International Seabed Authority is seeking input from Members States, intergovernmental organizations, private industry, and other interested stakeholders on a proposed five-year plan that will guide its strategic

directions for implementing provisions under the United Nations Convention on the Law of the Sea and its 1994 Implementation Agreement. Among the proposed strategic directions, the plan calls for strengthening the international legal regime, applying the precautionary approach for environmental protection, promoting scientific research, develop equitable sharing criteria, and fostering greater transparency. https://www.isa.org.jm/news/secretary-general-international-seabed-authority-launches-consultation-its-new-strategic-plan

## OECD Invites Public Input on Anti-Bribery Compliance in Chile, Mexico, and South Korea

The OECD Working Group on Bribery invites interested parties to provide written submissions on the implementation of the OECD Anti-Bribery Convention in Chile, Mexico, and South Korea. The input will inform the fourth phase of the OECD's monitoring process of the evaluated countries. Interested parties from the private sector, NGOs, trade unions, nonprofits, academia, media, and others also are invited to submit their expressions of interest in participating in on-site visits this summer. Written comments and expressions of interest in participating in on-site visits must be submitted by April 1, 2018, for Mexico and by June 1, 2018, for Chile and South Korea. http://www.oecd.org/corruption/call-for-contributions-phase-4-evaluations.htm

## Trilateral Symposium Discusses Trade, Health Technologies, and Treaties

The World Trade Organization (WTO), the World Intellectual Property Organization (WIPO) and the World Health Organization (WHO) convened a symposium on February 26, 2018, to discuss the interlinkages of trade, public health, intellectual property, and technology and their role in achieving the UN Sustainable Development Goals (SDGs). Participants discussed multilateral responsibilities under the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), the WTO Trade Facilitation Agreement, and the WTO Government Procurement Agreement. The meeting is the seventh in a series of joint symposia. https://www.wto.org/english/news_e/news18_e/trip_02mar18_e.htm

## 70th Anniversary of the Universal Declaration of Human Rights

This year marks the 70th Anniversary of the adoption of the Universal Declaration of Human Rights (UDHR) by the United Nations General Assembly. The Declaration proclaimed fundamental human rights principles and inspired legally binding international human rights treaties. The UN Human Rights Office is leading a year-long global #StandUp4HumanRights campaign to raise awareness of the Declaration. The campaign leads up to commemorative events on the anniversary date of its adoption on December 10, which is also the annual observance of Human Rights Day. http://www.un.org/en/universal-declaration-human-rights

Be sure to check out #ABAstands4 on Twitter, Instagram, and Facebook and online at ABAstands4.org to see all the ways lawyers are making a difference to preserve the rights of all people, promote fair and impartial judicial systems, protect the independence of the legal profession, and advocate for justice worldwide. Get involved by submitting your story or video to the ABA on how you are making a difference as a lawyer, judge, or legal professional.

## 60th Anniversary of the Convention on the International Maritime Organization

The Convention establishing the Inter-Governmental Maritime Consultative Organization (IMCO) was adopted on March 6, 1948, and entered into force a decade later on March 17, 1958. The organization's name changed to the International Maritime Organization (IMO) in 1982. The IMO is a specialized agency of the United Nations with responsibility for the safety and security of shipping and the prevention of marine pollution by ships. http://www.imo.org

## 60th Anniversary of the Entry into Force of the Two Treaties of Rome

The European Union in March celebrates the 60th anniversary of the entry into force of the Treaties of Rome, which provided the foundations for the current European Union. The Treaty establishing the European Economic Community (EEC) and the Treaty establishing the European Atomic Energy Community (Euratom) were signed on March 25, 1957, and entered into force on January 1, 1958. The Treaties of Rome removed barriers to trade, promoted a generalized common market, and fostered cooperation, including in peaceful uses of nuclear energy. The EEC has since been amended by successive treaties and renamed to the treaty on the Functioning of the European Union. http://eur-lex.europa.eu/collection/eu-law/treaties/treaties-force.html ◆

*Have updates to contribute? The Editorial Board welcomes your input. Contributors will be acknowledged. Please email your contribution to Renee Dopplick, Editor-in-Chief, rdopplick@gmail.com.*

# COUNTRY UPDATES

## Argentina

The new Corporate Criminal Liability Law (Law No. 27,401) entered into force on March 2, 2018. The law imposes sanctions against private entities for corruption, domestic and transnational bribery, negotiations incompatible with public office, unlawful enrichment of public officials and employees, and falsified financials and reports aimed at concealing bribery or corruption. Entities may be held liable for direct or indirect involvement. The law also makes compliance programs mandatory for private entities engaging in some government contracts and identifies the minimal elements of a compliance or integrity program. (Official Gazette, in Spanish) https://www.boletinoficial.gob.ar/#!DetalleNorma/175501/20171201

## Canada

Two new initiatives aim to strengthen responsible business conduct by Canadian companies operating abroad. First, the newly created Ombudsperson for Responsible Enterprise (CORE) is empowered to independently investigate allegations of human rights abuses by Canadian companies, with an initial focus this year on the mining, oil and gas, and garment sectors. Second, a multistakeholder Advisory Body on Responsible Business Conduct will advise the federal government and CORE on the effective implementation and further development of laws, regulations, public policies, and best practices related to responsible business conduct and respect for human rights by Canadian businesses operating outside the country. The Advisory Body will meet for the first time on April 23, 2018. http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csr-rse.aspx

## China

A ban on the processing or selling of ivory and ivory products in China entered into effect on December 31, 2017. The ban applies to ivory acquired before and after the 1975 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). China previously allowed pre-Convention ivory when accompanied by certificates certifying its pre-Convention status. The State Forestry Administration will work with other governmental departments to enforce the ban. http://english.gov.cn/state_council/ministries/2018/01/02/content_281475998500410.htm

On January 31, 2018, the Special Administrative Region of Hong Kong, which was not covered by the ban on ivory sales in mainland China, approved a phased approach to end the ivory trade in Hong Kong by 2021 and increased penalties for the smuggling and illegal trading of endangered species under the local Protection of Endangered Species of Animals and Plants Ordinance, which implements CITES. The Amended Ordinance enters into effect on May 1, 2018. https://www.afcd.gov.hk/english/conservation/con_end/files/ES01_18e.pdf

## Democratic Republic of the Congo

A new Mining Code (Law No. 18/001), signed into law on March 9, 2018, substantially amends the sixteen-year-old code of 2002. The new law increases royalties and taxes, reduces mining licenses from 30 to 25 years, cancels and replaces the 10-year fiscal stability provision with a 5-year provision, and alters mining companies' obligations, such as requiring more local processing. (Official Gazette, in French) http://www.leganet.cd/Legislation/JO/2018/JOS.28.03.2018.pdf

## United Kingdom

A ban on the manufacturing of cosmetics and rinse-off personal care products containing microbeads became effective on January 9, 2018. The ban on the sales of such products will begin on June 30, 2018. In the government's notice of the proposed ban to the World Trade Organization (WTO)'s Committee on Technical Barriers to Trade in July 2017, the government stated that roughly 680 tons of plastic microbeads are used in cosmetic products sold in the United Kingdom each year, resulting in billions of the beads entering the oceans where they do not biodegrade and constitute a form of marine environmental pollution. http://www.legislation.gov.uk/uksi/2017/1312/made ◆

*Have updates to contribute? The Editorial Board welcomes your input. Contributions are welcome from all countries, and contributors will be acknowledged. Please email your contribution to Renee Dopplick, Editor-in-Chief, rdopplick@gmail.com.*

# BOOK REVIEW

## *East West Street* by Philippe Sands (Penguin Random House, 2017) and *Holocaust, Genocide, and the Law: A Quest for Justice in a Post-Holocaust World* by Michael Bazyler (Knopf, 2016); (Oxford University Press, 2016)

*Reviewed by Lawrence G. Albrecht*

### *East West Street*

Professor Sands' book focuses on two foundational architects of international human rights law, Rafael Lemkin and Hersch Lauterpacht, in the context of the Holocaust and subsequent Nuremburg prosecutions. Both studied law at Lviv University, a community that deeply resonates in Sands' narrative because his grandfather was born in Lviv (also known as Lwów, Lemburg, or Lvov depending on the "blurred borders" of historical political control). Despite their shared academic background, complex legal analysis separated their two competing legal approaches to the Holocaust. Lauterpacht was later influenced by his law professor in Vienna, Hans Kelsen, who strongly valued state authority but grounded democracy in the power of judicial review. Lauterpacht was profoundly committed to protection of individuals from state violence, but believed that both prior and proposed international legal efforts designed to expand individual legal protection to encompass minority groups' rights were neither philosophically sound nor functionally pragmatic. Lemkin, however, in his ground-breaking 1944 book, Axis Rule in Occupied Europe, advanced the express legal protection of minority groups from targeted crimes which he named genocide. Lemkin worked ceaselessly for prosecution of this new international crime, genocide, to redress crimes committed against Jews and other ethnic and religious groups of persons, whereas Lauterpacht emphasized the incremental but significant expansion of legal principles supporting criminal prosecution of mass crimes against humanity. Their respective intersecting and separate legal philosophies and personal narratives weaved by Sands are emotionally gripping and are framed in the broader international legal and political tensions confronting their respective visions.

Sands also intertwines the complex story of Nazi war criminal Governor-General Hans Frank, a leading jurist of National Socialism, who acted within Nazi law against the rights of both individuals and groups in ideological and murderous support of the omnipotent authority of the all-powerful State.

Sands' narrative reaches an important intersection with the Nuremberg prosecutions beginning in October 1945. While Lauterpacht was a key legal strategist and contributor to the prosecution team, Lemkin, mostly off-scene, nervously fretted over his limited success in introducing the novel and controversial crime of genocide into the criminal proceedings. One specific consequence was that Franks, the legal administrator who oversaw the extermination of over one million Jews in the Galicia region, including its capital Lviv, was convicted of crimes against humanity, though not genocide. Nevertheless, he was hanged. Significant evidentiary and political obstacles remained before genocide would be fully incorporated into international criminal law. On December 9, 1948, the U.N. General Assembly adopted the Convention on the Prevention and Punishment of the Crime of Genocide, which ushered in a new era of human rights enactments. Passage followed detailed groundwork by the General Assembly in 1946 and adoption of Resolution 96, which expanded upon the limited judicial introduction of the crime of genocide at Nuremberg and expressly declared that genocide is a crime under international law. Lemkin worked ceaselessly for international adoption of the Convention until his death in 1959. (The United States, however, did not become a party until 1988—forty years after its creation.) Separately, Lauterpacht's work was instrumental in the General Assembly's adoption of Resolution 95 which affirmed the crimes against humanity principles embedded in the Nuremburg Tribunal charter. Individual rights under international law were now black letter law. Ensconced again at Cambridge University, he worked on An International Bill of the Rights of Man which influenced the General Assembly's adoption of the Universal Declaration of Human Rights on December 10, 1948, which became legally binding in the European Convention on Human Rights signed in 1950 and created the first international human rights court. In 1955, he became the British jurist on the International Court of Justice in The Hague. The respective parallel, though conflicting, dedication of Lemkin and Lauterpacht, and so many lesser publicized human rights jurists,

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professors, politicians, and advocates resulted in the current regime of criminal tribunals, and the broad expansion of human rights law doctrines and enforcement mechanisms. Sands' comprehensive historical and political setting poignantly resonates today as the international community strives to confront multi-faceted manifestations of human rights abuses.

## *Holocaust, Genocide, and the Law: A Quest for Justice in a Post-Holocaust World*

Professor Bazyler's book addresses three primary subjects: the Holocaust as "a legal event," post-Holocaust criminal and civil proceedings within the development of internationally created judicial structures and courts, and the significant resulting precedent and policy developments relevant to future prosecution of genocide and human rights abuses. Bazyler presents a brilliant ground-breaking legal history of genocide in the 20th century, including the often overlooked German massacre of Herero and Nama ethnic group members in Namibia (between 1884 to 1914 known as the German colony of South-West Africa), the Armenian genocide under the Turkish Ottoman Empire, and the Holocaust's legal foundation cemented by the Nuremberg laws of 1935 and subsequent racist Nazi laws. His profound academic analysis of the Holocaust as proceeding within German law, which reflected the triumph of positive law over natural law, is both comprehensive and enlightening, and is certain to stimulate contemporary academic and legal debate (just as occurred in South Africa post-WWII where legal scholars debated whether apartheid law was really law and worthy of obedience). In the context of analyzing Holocaust law (sic), Bazyler also revisits the subsequent famous Hart-Fuller debates regarding "what is law?" which ever resonates. The recognition of law as a source and instrument of evil is a powerful undercurrent throughout Bazyler's theme which thoughtful readers will recognize as still relevant today regarding, for example, the legal treatment of minority groups, immigrants, and refugees in many countries.

Bazyler's analysis of selected post-Holocaust criminal accountability proceedings often parallels Sands' work, although Lauterpacht is absent in his history. Bazyler's recital of the Nuremburg legacy cannot be easily circumscribed because the post-WWII era ushered in international criminal courts and tribunals, legal doctrines such as universal jurisdiction, expansion of human rights law, and unprecedented advocacy by NGOs and human rights organizations as a direct consequence of public support from diverse interest groups which had fused in the Nuremburg proceedings and its aftermath. One recent pertinent development he addresses is the Canadian-born responsibility to protect ("R2P") civilians doctrine, adopted by the United Nations Security Council, which authorizes U.N. placement of personnel in multiple countries, including the 17,000 peacemakers currently in South Sudan. Bazyler also specifically addresses the contemporary impact of the Nazi legal theorist Carl Schmitt's doctrine of the "state of exception," which buttresses uberpowerful state executive power in times of crisis. Bazyler analyzes prominent U.S. Supreme Court post-9/11 cases, which he wistfully concludes cabin the President's powers. But he laments the recent Kiobel v. Royal Dutch Petroleum Co., 133 S.Ct. 1659 (2013) decision, which rejected universal jurisdiction principles statutorily circumscribed in the Alien Tort Statute, 28 U.S.C. § 1350 (2006).

## Concluding Thoughts

Together, both books offer a chronological and comprehensive narrative of the unprecedented work of the international legal community to prosecute and redress genocide and crimes against humanity, institute international civil law victims' compensation proceedings,123 as well as domestic legal structures and venues for victims.

Perhaps governmental impunity and individual immunity from justice are, indeed, no longer nearly sacrosanct legal doctrines, despite plenty of evidence to the contrary embedded in contemporary international human rights catastrophes (such as the use of chemical weapons in Syria, which have been banned ever since the Hague Convention of 1899). However one judges the contemporary international legal culture, the intersections and divisions in the legal thinking of these two foundational architects during and after the Holocaust continues to frame international criminal and human rights law. Both books deserve deep accolades for their respective contributions made to our understanding of the origins of contemporary human rights law. No doubt the pursuit of justice for human rights victims will be never-ending. But, as Thomas Buergenthal, a former International Court of Justice judge and distinguished human rights professor positively noted in his address at Marquette University Law School on March 23, 2017: "Things are happening." An expression of optimism from the author of A Lucky Child, who was born only a few hundred miles from Lviv and survived Auschwitz as a child. ◆

# Statement of ABA President on Anniversary of the Universal Declaration of Human Rights

*By Hilarie Bass*

*December 8, 2017*

On December 10, 1948, in the wake of two world wars, the new United Nations proclaimed the Universal Declaration of Human Rights. Its central premise—that "All human beings are born free and equal in dignity and rights"—forms the bedrock of international law.

The American Bar Association promotes this principle by advocating for diverse populations in America and around the world. We work on behalf of survivors of domestic and sexual violence; persons with disabilities; immigrants; persons experiencing homelessness and poverty; human rights defenders; emerging or struggling democracies; and oppressed populations. Our efforts have taught us that the Universal Declaration is a touchstone across seemingly intractable differences.

On this anniversary in the history of human progress, the ABA calls on all members of the legal profession around the world to renew their commitment as indispensable guardians of human rights and the rule of law. ◆


THE UNIVERSAL DECLARATION OF Human Rights

UNITED NATIONS

## Did you know?

- This year will mark the 70th Anniversary of the Universal Declaration of Human Rights.
- Eleanor Roosevelt chaired the drafting committee.
- The Universal Declaration of Human Rights is the most translated document in the world and is available in more than 500 languages.

# Statement by ABA Section of International Law Chair on "Polish Death Camp" Law

*By Steven M. Richman*

*February 13, 2018*

The American Bar Association condemns the just enacted law in the Republic of Poland, which criminalizes certain speech and other expressions of thought relating to "claims that the Polish Nation is responsible or co-responsible for Nazi crimes committed by the Third Reich."

As a matter of principle, we are concerned about any law that infringes individuals' freedom of expression. This fundamental right is reflected in core international human rights instruments including the United Nations' Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

The basic concept of the freedom of expression, including freedom from government interference in scholarship, debate, and the exchange of ideas, is the bedrock of an open and democratic society. We urge the government of the Republic of Poland to repeal this law. ◆

# From Our City Chapters

The Section's City Chapters in locations worldwide have exciting initiatives and activities planned for 2018. We are excited to welcome the launch of the Vienna City Chapter, the São Paulo City Chapter, and a New York City Chapter this year.

These local chapters bring international law and local expertise together to address and better support local programs, initiatives, and partnership development. City Chapters welcome attorneys, judges, professors, law students, and other legal professionals who are interested in regional activities, networking opportunities, and educational programs.

In addition to acting as meeting points for ABA members, City Chapters serve as the local hosts for ABA and Section leadership visits and meetings.

Are you interested in taking a leading role in forming a City Chapter to connect fellow members and help take the value of Section membership to the next level? Please contact Membership Officer Patrick Del Duca (pdelduca@zuberlaw.com).

## San Diego | Tijuana

The San Diego | Tijuana City Chapter met over dinner in San Diego on February 5, 2018, to discuss goals and initiatives and to outline events for 2018. Anyone interested in joining or participating in Chapter activities should contact the San Diego | Tijuana City Chapter Chair Antonio Maldonado (am@maldonadomyers.com) for information on getting involved.

San Diego Tijuana City Chapter members, February 5, 2018

Vienna City Chapter members, February 2018

## São Paulo City Chapter

The São Paulo City Chapter will hold a happy hour on March 22, 2018 at Astor JK. The Sao Paulo City Chapter serves as a hub and meeting point in Brazil for the ABA worldwide legal community, organizing local activities and connecting people.

Interested in participating in Chapter activities? Please contact São Paulo City Chapter Chair Marcelo Freitas Pereira (mfpereira@ctpadv.com.br) for information on getting involved.

## Tokyo

The Tokyo Chapter hosted a holiday event in December 2017.

The Tokyo City Chapter will host an event on the future of artificial intelligence and how AI will impact your legal practice, featuring Hiroyuki Sanbe, a Partner at the Tokyo law firm of Atsumi & Sakai, on Monday, March 19, 2018. The discussion will cover the use of AI in legal practice and law practice management, including ethical issues. He is a member of the subcommittee on AI Research and Development Principles of the "Conference toward AI Network Society" of the Japanese Ministry of Internal Affairs and Communications. Yoshimichi (Leonard) Makiyama of the law firm Kitayama and Makiyama will moderate the discussion.

Hiroyuki Sanbe also will be speaking on the panel on "What Will Be the Ethics and Other Impact of AI on Legal Practice and Law Practice Management?" at the Section's Annual Conference in New York in April 17-21, 2018.

For more information about upcoming events and getting involved, contact Tokyo City Chapter Co-Chairs Kenji Hirooka (kenji.hirooka@amt-law.com) and Harumichi Uchida (harumichi_uchida@tmi.gr.jp).

## Vienna

The Section launched a Vienna City Chapter in February 2018. The City Chapter aims to organize regular meetings to present and discuss legal and business of law topics relevant to its members. Though the Chapter is seated in Vienna, participation is open to the wider region. Members throughout Austria and the Central and Eastern European region are encouraged to get involved.

Among its inaugural activities, the Vienna Chapter and the International Anti-Corruption Academy (IACA) jointly will present a program on "Out of Reach of U.S. and U.K. Anti-Corruption Laws? Think Again?" at KNOETZL law firm on Wednesday, April 11, 2018. The event will feature Andrew B. Spalding, who is a Professor at the University of Richmond School of Law, Senior Editor of the FCPA Blog and a member of the Frequent Visiting Faculty of IACA. An interactive discussion will explore the reach of the U.S. Foreign Corrupt Practices Act (FCPA), the benefits and risks of self-reporting, multi-jurisdictional investigations, and trends in enforcement.

To register for the event or to learn more, please contact Vienna City Chapter Chair Dr. Nikolaus Pitkowitz (n.pitkowitz@gpp.at) and Vice Chair Anthony Hernandez (aphernandez@bargerprekop.com). ◆

# Meet Publications Officer Nancy Kaymar Stafford

**Nancy Kaymar Stafford** (*nancykaymar@hotmail.com*) is the ABA Section of International Law Publications Officer for 2017-2018.

***Your legal career has focused on accountability for human rights, including corporate accountability. How did you get involved initially in human rights?***

When I was in law school, I was fortunate enough to have the opportunity to attend the UN Human Rights Committee hearing on Hong Kong's report under the International Covenant on Civil and Political Rights (ICCPR) in Geneva, Switzerland. I was hooked on both the issues and the process. A year later, I went to Hong Kong for a year to work with the premier human rights organization there, the Hong Kong Human Rights Monitor, as a research officer. It was one of the best decisions I have made in my career. It is very important in this field to take all opportunities to network and develop connections in the areas you are interested in. The Section of International Law provides a fantastic platform for this.

***Prior to your legal career, you were in the banking and financial sectors. How has that background helped or influenced your work in corporate social responsibility?***

Understanding the finance community is very important to understanding what drives corporations in their decision making. Fortunately, many more companies are taking social issues seriously in the development of their corporate policies and procedure. Unfortunately, many are still not. The international community is fully committed to corporate social responsibility, and it is clear that more and more countries will be requiring at least minimum standards from entities incorporated in their jurisdiction.

***This year celebrates the 70th anniversary of the Universal Declaration of Human Rights. This milestone document has heavily influenced the development of international human rights, constitutions, and laws. Do you have any thoughts on legal accomplishments, shortcomings, or challenges since its adoption?***

Quite a broad question . . . but a good one. Even if we discard some of the more serious human rights issues going on in the world (DRC, Afghanistan, Iran, etc.), there are still grave issues regarding the rule of law and deterioration of the rights of people. The situations in China, Poland, and Tanzania come to mind. In fact, even in Hong Kong, there recently have been major setbacks in rights under their Constitution, called the Basic Law. However, you can also look at the positive. Places like Swaziland and Saudi Arabia are improving the rights of women, in large part due to their international obligations and public pressure, which is supported by the UNDHR and the human rights treaties that followed, including the regional human rights agreements. Moreover, rule of law is now being closely linked to development and developing countries.

***Do you have a favorite concrete example where efforts by lawyers made a difference in combatting human rights abuses?***

I have worked closely for years with the International Women's Human Rights Clinic at Georgetown University Law School. Back in 2003, the Clinic, with their Ugandan in-country partner Law and Advocacy for Women – Uganda, brought test case litigation under the Ugandan Constitution to allow women to divorce their husbands on the same basis as men can divorce their wives. Without too much detail, men could divorce with a very low bar to prove, if any, whereas women had an arduous level of proof in order to divorce their husbands. Using international obligations, including the UN human rights treaties, the Clinic and LAW-U were able to have the divorce law declared unconstitutional! It may seem like a small win, but if you were a woman in Uganda in an abusive marriage, it was a huge win. It is also important to remember that not all human rights wins have to be "big" wins. Human rights lawyers on the ground are working tirelessly to support and uphold international and regional human rights norms. This strengthens the legal gravitas of the norms and gives meaningful relief to the victims they are working for.

***What advice do you have for law students or attorneys currently thinking about a career in human rights?***

Do it! I am an example of someone who has been able to have both a successful corporate legal career and a successful human rights career. You have to balance what is important to you but also your expectations. No one gets out of law school and becomes the Executive Director of Amnesty International. Like in every other field, you need to decide what issues are most important to you. Research, write, and volunteer for assignments or internships in that area. It is a very enriching and fulfilling area of law where a lot of work needs to be done. It is not generally lucrative, but there are many other benefits from work in human rights. A great way to get started is to publish with the ABA, including the many opportunities to publish through the Section of International Law.

***In addition to International Law News, what are some ways that Section members can get involved in publishing through the Section and the ABA?***

There are so many options for members who want to publish. Most of our committees have newsletters, which is a great way to parse out a new topic or area of

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# Meet Revenue Officer Marcos Ríos

**Marcos Ríos** (*mrios@carey.cl*) is a Partner at Carey in Chile and is the ABA Section of International Law Revenue Officer for 2017-2018.

***What does the Revenue Officer do?***

The Section's revenue team—comprised of the Revenue Officer, the Revenue Deputies, and the Revenue staff—is essentially in charge of monitoring the Section's operational funding and sources of income, while attempting to increase both. We are a part of the Section's planning, budgeting, and fundraising efforts and are intimately involved in planning and enabling some of the Section's main activities, such as our annual, regional, and special conferences. Some of the main duties and tasks of the Revenue Officer include participating in planning meetings and calls in connection with Section events (e.g., our fantastic upcoming 2018 conferences in Singapore and Cape Town), following up on ongoing funding goals and efforts (such as sponsorship for our awesome next conferences in Copenhagen and Mexico City, also in 2018), and contacting past and potential sponsors (e.g., for our great Annual Conference in Washington, D.C. in 2019).

As Revenue Officer, I also participate in the Section's Council, Executive Committee, and Administration Committee, all of which entail a number of strategic, oversight, and decision-making duties that touch on virtually all substantive and technical matters of the Section, including policy, administration, membership, programming, relationship with the "big ABA," etc.

***What are your goals for this year?***

My main goals are to: (1) get new long-term sources of revenue for the Section, (2) diversify our pool of sponsorships beyond—and in addition to—the traditional law firm sponsor profile, and (3) re-enchant and bring back some of the Section's past sponsors and conference attendees. We have recently made progress on the first goal with two sponsorship agreements signed, each committing funds for Section activities and events for a period of three years. In addition to providing more funding for our activities, long-term agreements such as these give us much needed certainty and predictability in our budgeting processes. We are working on other potential long-term agreements with other sponsors and expect to get traction on these soon.

As to diversifying our sources of revenue, we have identified and are in conversations with various non-law-firm prospects that have showed interest in the Section and the market and audience that our Section members offer them. In fact, one of our recently engaged long-term sponsors is not a law firm but one of the world's leading content and technology providers for the legal industry.

Regarding the third goal, we plan to meet with various former supporters of the Section—institutional and individual—to discuss their current needs and how the Section can better serve them, with an aim to developing specific plans and offers to bring them back and retain them as Section members, conference attendees, and/or sponsors.

***How did you get into international law?***

I was born in Chile and raised in Spain, where I attended an international school with students from approximately 60 countries. My closest friends growing up (age four to 15) were Muslim, Jewish, Hindu, Catholic, and atheist. Being bilingual and having a multicultural upbringing, all things international were kind of second nature to me. So during law school, while I clerked at a corporate law firm in Chile, I was naturally driven—and drawn by my bosses—to assist clients from the United States, Europe, and Asia. I then started to learn and like the intricacies of interpreting law and culture to international clients.

Later, towards the end of law school, I participated in the Jessup Competition, won the National Rounds, and participated in the International Rounds in Washington, D.C. That experience was a great window to the international legal community and an eye-opener regarding how, with hard work and focus, one could match up to top students from some of the best law schools in the world who were likely to become leading international legal practitioners in the future. It was then that I decided that my practice would always be "international," in the broadest sense of the word—i.e., involving crossborder and/or multi-jurisdictional matters, international clients, international and/or comparative law, practicing law in different countries, etc.

My first job immediately after law school was as in-house counsel at a multinational mining company in Havana, Cuba, where I lived for two years. Cuba was the first of the five jurisdictions where I have practiced law since—the others being Chile, New York, Washington, D.C., and Miami. In all of these jobs, including three large law firms, I have done nothing but international-related work, including multi-jurisdictional acquisitions, restructurings, dispute resolutions, and multiple crossborder

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# Refer a Friend to Join the ABA and the Section of International Law!

This is a fantastic opportunity to introduce your colleagues to a network of 17,000+ Section members worldwide. They can also join the Section's 50+ regional and practice specific committees FREE and enjoy many other Section benefits that will enhance their overall participation in ABA activities.

## Membership Benefits

- Global Networking via Committees, Communities, and City Chapters
- Professional Development & Education at the Fall Meeting in Miami, Florida, October 24–28 & at the Spring Meeting in New York, April 17–21, 2018
- Regional Forums in Asia, Europe and Mexico
- Leadership Appointments to Elevate Your Professional Profile
- Opportunities to Publish
- Career Advancement via Speaking Engagements at Section Meetings and Committee Programs
- International Projects to Advance the Rule of Law Around the World
- Nominate Someone or Yourself for Awards

To direct your friends and colleagues to join the ABA and the Section now, visit ambar.org/join and apply promotion code: DISCOUNTABA18 at checkout. As an Associate member the cost to join the ABA is approximately $80.00 and the Section is FREE! For Lawyer members, the rate will range from $50 to $250 depending on bar admission date.

**Visit ambar.org/join and use promotion code: DISCOUNTABA18**

# Meet Rule of Law Officer Mikhail Reider-Gordon

**Mikhail Reider-Gordon** is Vice President, International Development at Nathan Inc. and is the ABA Section of International Law Rule of Law Officer for 2017-2018. She is a Senior Advisor and Past Co-Chair of the International Anti-Corruption, Anti-Money Laundering and Corporate Social Responsibility Committees.

***Your legal practice focuses on white-collar and complex transnational financial crimes. Could you tell us about how you got into this type of legal work?***

In some ways, you could say I happened on it. I had spent some time at RAND researching terrorist groups and other non-state actors involved in conflicts and the impacts their actions had, such as on development and justice. When I went to work for the U.S. Department of Justice much of my work was focused on transnational organized crime. Economic crimes such as threat financing, money-laundering, trafficking, corruption, and the environments where conflict flourishes are all intertwined.

***What has been one of your favorite professional achievements?***

I would have to say joining the faculty of the International Anti-Corruption Academy. I have been teaching with IACA for over three years now, and it is more rewarding with every class. We enjoy extremely diverse classes of students – both at the Master's level, and for our tailored trainings for government groups. Our students hail from all corners of the earth – South Sudan to Azerbaijan, Nepal to El Salvador – and from a range of backgrounds – from prosecutors to senior officials with their respective countries' anti-corruption commissions. They are dedicated professionals all with the same goal of combating corruption. Some of our Master's students are doing really exciting research and work in the field of anti-corruption, and it is such a privilege to be part of IACA.

***Through the United Nations Office on Drugs and Crime (UNODC) Anti-Corruption Academic Initiative (ACAD), you've collaborated with experts from around the world to develop a comprehensive set of resources on corruption and corruption-related issues for colleges and universities. Could you tell us about these resources? Are these resources intended for professors or students?***

The ACAD offers terrific resources! They are intended for professors and other educators, but students can benefit independently from the reading lists we offer. For instance, under our "Sources of Anti-Corruption Law" are links and documents that can be downloaded to help explain corruption laws and international conventions. Some of the materials include articles and books from our ABA Section of International Law colleagues. Also on the website, you can find the model course and additional resource materials; we're always adding to it. Visit their website at: http://www.track.unodc.org/Education/Pages/ACAD.aspx

***You have been involved in a range of leadership positions within the Section, including as a Committee Chair of several committees, liaison to external organizations, Division Chair, and Council Member. Why did you feel it was important to become active as a leader within the Section?***

We are so fortunate to have built and maintained over decades the most dynamic section in the ABA. When I look around the room at Council meetings and I see some of the incredibly talented professionals who have made time in their careers to help lead and grow the Section, I am always astounded at the depth of experience and knowledge gathered there. The nature of the profession is changing, and we need to help lead the change for the positive. Whilst some response to change may include ABA internal infrastructure improvements, the more important work is with and through our people.

In our Section alone, we have over 17,000 members. That may sound like a lot, but it can and should be bigger. If we want to help keep the profession dynamic and relevant, we need to continue to add members. This isn't about revenue (that comes when constituents are getting what they need from the organization). This is about much more: helping to strengthen the foundations of the rule of law worldwide (from Poland to Chile); standing up for the profession here and in other countries; bolstering our connections with colleagues; not being afraid to tackle tough issues; and being a premier forum for presenting analysis of new legal developments. Think about it—we are a critical global hub. Where else are you going to bring together judges, prosecutors, big law, solo practitioners, top legal academicians, in-house counsel, representatives from government, and students from around the world to share knowledge in such a convivial yet intellectual environment?

Lawyers everywhere are having to address significant changes in the firm model. So too, they need new ways to think about identifying, retaining, and promoting attorneys who better reflect

society as it truly is and who can bring a broader cultural perspective to the practice of law. We need to hold genuine dialogue about technology—gaining greater understanding of both its benefits and pitfalls for our profession and society as a whole. We need Section members who appreciate what we're about to stand up and join in. Leadership is a group effort here. Being part of the Section leadership team is work, I won't sugarcoat that, but it is definitely worthwhile. We need to build on our past success and lead in the way the practice of law is evolving and shifting. We can't complain about changes to the profession if we aren't the ones shaping it. I want to see more of our members put their hand up and help.

***As the Rule of Law Officer, what are some of your responsibilities?***

My role includes helping to draft statements on behalf of the Section, or to send to the ABA President's office when there are specific topics involving the Rule of Law. I am here as a resource for our committee ROL vice-chairs, and I offer ROL boot-camps and events. I can help launch programming on subjects related to ROL issues and provide guidance to Section members if they have questions about the ROL. With our policy officer, my office can assist committees that may want to draft proposed policy if it relates to the rule of law. I also try to help ensure our Section meetings include topics related to the rule of law.

***What are some ways that Section members can help promote the rule of law?***

Each committee is focused on a particular region or area of focus. We count on constituents from our committees to alert us when there are developments—including good ones—that relate to the rule of law. This could be the identification of attacks on lawyers or judges; it might be the quiet transformation of emergency law into ordinary law that allows for the infringement of civil liberties; it may be lack of support from a judiciary when efforts are begun to tackle corruption somewhere. We are looking to our ROL Vice-Chairs to gather information from fellow committee members and bring to us issues they believe warrant consideration. Committees are first-line expert groups, so we expect them to know the latest developments of the committee's area of law. The ABA is a powerful voice, and we have options to respond that range from working with the ABA President's office to issuing public statements, to organizing programming around topics, or turning the spotlight on an issue as it is unfolding. We don't need to wait for seasonal meetings to address a ROL topic.

Another way committees can get involved in is a project I am launching—a podcast series on the ROL. We are looking for volunteers from around the world who are willing to be recorded on the ROL. What do I mean? What does it mean to you? How do you see it in action every day? Or, what are the challenges to it in your country? How do you explain it to a lay-person? Tell us of a time the ROL manifested itself in some way relevant to your life and/or practice—this could be a time you witnessed it being eroded and how you responded; it could be about how you chose to work through an organization to protect fundamental human rights; how you confronted bribery; worked on obtaining women's inheritance rights in your country; or how you practice in a jurisdiction with weak ROL.

We have Section members from 100+ countries, and we want at least one voice from each of those countries! We want law students, law professors, NGO and civil society workers, government counsel, public defenders, judges, investigating magistrates, public and private lawyers, and practitioners from every walk of life. The goal is to have a sufficient number of people willing to be recorded with their stories that we can launch a podcast series available for listening and download to anyone with a connection to the Internet. We'll build from there. Not only will this help raise the Section's profile, but my hope is that through the collective voices, we'll also help to educate and inspire others to recognize and help protect the rule of law. ◆

## Nancy Kaymar Stafford

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law, in addition to detailing changes in law. *The International Lawyer* is a tri-annual renowned law review focusing on topics of international law. *The Year in Review* is an annual publication that surveys the status of laws throughout the world. Committees contribute to the publication and capture the germane legal developments, key pieces of legislation, and landmark decisions that have occurred throughout the year. Through ABA Publishing, section members can propose book projects, which can be authored content or a compilation of authored pieces in an edited volume. To learn more, visit https://www.americanbar.org/groups/international_law/publications.html. ◆

# Meet Section Member Reid Whitten

**Reid Whitten** (*rwhitten@sheppardmullin.com*) is the Managing Partner of Sheppard Mullin's London office and also serves clients out of the Washington, D.C. office.

***What experiences do you think prepared you for a legal practice in international trade law and business transactions? Did you know going into law school that you would pursue these areas?***

After graduating from the College of William and Mary, I moved to the South of France where I worked as a teacher and bartender. This experience was a defining point in my career goals, and the experience of living and working in Europe helped me select law school as the next step and that I wanted to focus on international law.

After a year clerking in the Western District of Virginia, I interviewed with Scott Maberry, a Partner at a small D.C. firm that focused on international trade and business transactions. I knew that I found my professional calling. Scott would become my mentor and would provide the support and direction that I needed as a young Associate to excel in the competitive field of international trade.

***Can you tell us about your experience in Europe and how it compares to working with U.S.-based clients?***

London and Brussels have been amazing cities to work in and provided a tremendous amount of new professional colleagues all over Europe that I can collaborate with as I assist my clients in making decisions. The primary difference with Europe-based clients vs U.S. is that EU regulations can be interpreted differently from country to country, including the same regulation, so I try to help my clients adjust to new policies and help them recognize the changes in law as an opportunity to expand their business.

***What are some recent developments in international trade law that excite you?***

The Trump Administration's foreign policies have created many challenges and opportunities for my clients. This will continue to be a work in progress and requires me to stay on my toes on the changing laws and policies and how best to advise. This is one of the areas that my great network of Section contacts is very useful when I need the advice and guidance of a legal expert in another jurisdiction.

***You have been active in the Section's mentoring program and outreach to law students in the United States and Europe about careers in international law. You also are teaching international law as a Visiting Professor at the Université Catholique de Lille in France. What advice will you be giving this year's graduates?***

I tell my students the best thing they can do is go out and make contacts, get involved in the Section, and volunteer on a committee. There are innumerable opportunities to raise your profile, publish, and make connections that you can reach out to over the course of your career. I also highly recommend finding a mentor that can help you evaluate different paths that you can take as you establish yourself as a lawyer.

You've challenged law students and early career lawyers to consider the foreign policy events shaping our world, from the Paris Agreement to combat climate change, to new regional trade agreements, to the conflicts in the Middle East, and more. What topics do you see emerging?

Sanctions and foreign investment regulations, such as CFIUS reviews in the U.S., are the very hot areas right now, as are emerging markets. The legal landscape changes daily as policies, regulations, and trade agreements across borders have to be monitored and the advantages and disadvantages have to be explained in detail on the potential legal impact they may have on businesses. It's a really exciting time, and my role is to help my clients make the best decisions they can in an ever-changing global marketplace.

***Do you have an example of how being a member of the Section of International Law influenced or helped your professional career?***

Being active in the Section of International Law has been instrumental in helping me build up my network of professional contacts. I have met so many colleagues from speaking on Pathways to Employment in International Law programs, organizing young lawyer programming for past Spring Meetings, and serving as a Committee Vice-Chair.

***What would you tell someone about becoming a member?***

Membership in the Section is a terrific way to learn about new emerging areas of international law, speak on legal topics important to me, and a great way to network and make lifelong friends. ◆

# Meet Section Member Belle Toren

**Bellanne ("Belle") Meltzer Toren** (*belle@belletoren.com*) maintains her own practice as an international petroleum consultant in Canmore, Alberta, Canada. She is a Senior Advisor to the Section's International Energy and Natural Resources Committee.

***Your legal practice focuses on energy law and transnational negotiations. Could you tell us about how you got into this type of legal work?***

As a law student at Duke University, I had a keen interest in studying international law, but I was also charmed by the wit and talents of my oil and gas law professor, Richard C. Maxwell. Upon graduating law school, I chose to follow in his footsteps and practice oil and gas law at the Dallas office of Thompson & Knight LLP. In early 1989, I joined the firm's legal team defending Texaco Inc. against the IRS's tax deficiency claims related to the ARAMCO Advantage. The IRS claimed that the Arabian-American Oil Co. (a consortium of Texaco, Exxon, Chevron, and Mobil) obtained large quantities of Saudi crude at a discounted market rate, the "Aramco advantage," and sought to have the profits from the "Advantage" realized by their respective foreign subsidiaries with the intent of avoiding U.S. taxation. Texaco and the other Aramco defendants ultimately prevailed. My appetite for international petroleum was immensely whetted by my work for Texaco. By mid-1991, I had leaped into a primarily international petroleum practice at Triton Energy Limited, a NYSE company, and joined the Association of International Petroleum Negotiators (AIPN).

***You were recently recognized as a Featured Member of the Association of International Petroleum Negotiators (AIPN) for your more than three decades of work in the petroleum industry. What has been one of your favorite moments or accomplishments?***

While at Triton, I managed an efficient and resourceful legal, procurement, and negotiating team. I was able to deputize engineers, accountants, and geologists from within Triton into the negotiating or legal operations team that I headed for country entry or new projects by mentoring them in the Triton form of contract and contract philosophy. The reliance at Triton on the term sheet (for country entry) or model contracts (for petroleum operations) was the norm in 2001 when Triton was acquired by Hess Corporation. The common acceptance of a corporate philosophy to terms in operating contracts had an added benefit, the elimination of litigation in large part due to the early notification to the legal department of a potential contractual dispute by Triton's operations personnel. In 2001, when Triton was acquired for US$3.2 billion, it had no known potential claims brewing or litigation regarding its global petroleum operations. Litigation can chip away at or destroy shareholder value; emerging disputes were dealt with swiftly at Triton with beneficial results.

***As a negotiator, what are some of the key hard and soft skills that are needed when working on transnational contracts?***

On the hard skills that should be implemented, first and foremost is the need for preparation, which includes knowing the contract form; researching the applicable law, historic events relating the parties or the type of contract being negotiated, your client's position, the other parties' aspirations; and familiarizing yourself with your team members and the other party's team members capabilities (experience, education, and potential biases), local practice, and culture.

On the soft skills, you need to exhibit a variety of personal skills, like empathy, fairness, reliability, sincerity, and, above all, the ability to listen and combine these skills with a predictable, firm, and clear managerial process and a decision-making capability. I find that philosophically, the best negotiating objective is to seek a win-win result. Best contract results are realized by the negotiators or teams, who achieve mutual respect and trust, and, at the conclusion of the signing ceremony, feel that they have a practical contract supported by a working relationship that will be resilient even in their personal absence or upon the divergence of interests.

***What do you see as an important trend in international energy law that legal practitioners should learn more about?***

The world is spinning at an ever accelerating rate since I started working in international energy. In 1991, we relied upon carbon copy sheets, a fax machine and a few courier services with most negotiations being conducted face to face around a table in a foreign land. Today, I don't travel as much; I can whip out my smartphone and communicate instantly via text, Skype, WhatsApp, email, etc. Hence, it is more difficult to develop personal relationships based upon mutual trust and respect needed for enduring long-term energy contracts. In the near future, I expect the use of artificial intelligence and implementation of blockchain technology to be essential to the practice of international energy law.

***You have been involved in a range of leadership positions within the Section,***

***including as a former Co-Chair of the International Energy and Natural Resources Committee and liaison to external organizations. Why did you feel it was important to become active as a leader within the Section?***

Active participation in the Section enables growth and refinement of a person's soft skills in a way that will benefit clients and the volunteer, and, along the way, you learn a lot. The Section facilitates work with a variety of persons from across the globe. As a leader in the Section, you can practice and improve your management skill and assume responsibility for motivating and mentoring others. Moreover, you become part of an amazing network of professionals that you might never otherwise access without the benefit of the Section, its committees, and their respective programs. My international standing and contact list, in part developed over years of activism in the Section, AIPN, and other organizations, is to my practice what trade secrets are to a corporation.

***You've been running around the world, literally, in the sense that you have been doing marathons in various countries. What got you into marathons?***

I am the accidental runner. After Hess closed the Triton office in Dallas in 2003 and moved personnel to Houston, I chose to work as a contractor for Hess from my home in Coppell, Texas. To create a new social network now without my traditional workplace, I joined the North Texas Chapter of the Leukemia and Lymphoma Society's Team in Training. I ran my first half marathon in January 2004 and never truly stopped running. I have competed in half marathons (my preferred distance) in many U.S. states, three Canadian provinces and Israel. I have run three marathons.

My most rewarding run was my last marathon, the Marathon of Afghanistan. I was one of the fifteen foreigners who participated in this marathon with about 300+ 10k and marathon runners of both genders from Afghanistan and my amazing running companion, Mahsa Torabi, from Iran. She broke all rules by sneaking onto the course for the first international marathon held in Iran (intended as an all-male event) in 2016 and finishing the race. The co-sponsor of the Marathon of Afghanistan, a non-profit organization, Free to Run operates in three provinces of Afghanistan and also in Hong Kong. During my 7 days in Bamian, Afghanistan, I was able to meet with the members of Free to Run on a group hike and when they were kayaking at Band-e Amir National Park. "Free to Run's mission is to use running, physical fitness, and outdoor adventure to empower and educate women and girls who have been affected by conflict." My Afghanistan running experience has inspired me to identify and remove social stigmas or legal barriers to women or disadvantaged persons. I have come a long way since I entered Duke Law School, and there is more yet to come to my journey, professionally and as a runner. ◆

## Dr. Robert Brown Receives Prestigious Award from Emperor of Japan

**Dr. Robert Brown**, the Chair-Elect of the Section of International Law, received the prestigious Order of the Rising Sun, Gold Rays with Rosette from the Emperor of Japan for his work to strengthen ties between Japan and the United States. It was announced by the Emperor on November 3, 2017, and awarded January 19, 2018. The Order of the Rising Sun, Gold Rays with Rosette was established by Emperor Meiji on April 10, 1875, by decree of the Council of the State as the first national decoration awarded by the government.

Robert is an attorney at Lynch, Cox, Gilman & Goodman, PSC. He represents emerging companies, which includes newly established companies as well as more mature companies seeking new markets.

He is Chair of the National District Export Council appointed by the U.S. Secretary of Commerce, Chair of the Kentucky District Export Council, former Chair of the Kentucky World Trade Center, former Chair of the World Affairs Council of Kentucky and Southern Indiana, and former Chair of Crane House, a leading Asian cultural and business society. He is Chair of the Japan/America Society of Kentucky, and Treasurer of Sister Cities of Louisville. He has served as Chair of the Japan Society in San Francisco and twice as Chair of the Japan Society in Kentucky. He previously was admitted as a foreign lawyer in Japan and has written several books on doing business in Asia.

In addition to his law degree, he earned M.B.A. and master's degrees in urban economics from the University of Louisville, a master's degree in Japanese business from Jochi University in Tokyo, and two PhDs in law and development from the University of Cambridge and The London School of Economics and Political Science. He earned an LL.M. in world trade from the University of London. He also passed the CPA exam. ◆

# UPCOMING EVENTS 2018

**February 2–4**
ABA Midyear Meeting
Vancouver, Canada

**February 15**
Live from L: Cyber Issues in International Law
Briefing by U.S. State Department Office of the Legal Adviser
Washington, D.C. and Webcast

**April 14–16**
Section Retreat
Princeton, New Jersey

**April 17–21**
Section 2018 Annual Conference
New York, NY

**May 10–11**
Investment Arbitration and Trans-Pacific Transactions Conference
Singapore

**June 7–10**
ABA Program on the Universal Declaration of Human Rights
Paris, France

**June 10–12**
Life Sciences Conference
Copenhagen, Denmark

**August 2–5**
ABA Annual Meeting
Chicago, IL

**August 27–September 1**
AIJA Annual Congress
Brussels, Belgium

**September 27**
10th Annual Moscow Conference on the Resolution of International Business Disputes
Moscow, Russia

**October 17–19**
The New Engine of Growth Investment and Technology Conference!
Seoul, Korea

**November 7–9**
International Trade and Investment Conference
Mexico City, Mexico

# ABA 2018 PARIS SESSIONS

## JUNE 7–10

## INTERCONTINENTAL PARIS LE GRAND HOTEL

## PARIS, FRANCE

## Marcos Ríos

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investments, projects, and transactions. I've loved every minute of it (well, mostly…), and, to this day, I continue to be passionate about international work and fascinated at the opportunity to build and help clients cross bridges between different cultures and legal systems.

***What is an interesting thing you have done with the Section?***

The Section has brought many great experiences to my life. Travelling with and getting to know Justice Scalia during the 2010 ILEX trip to Australia and New Zealand is definitely up there on the list, as was meeting Daniel Ellsberg at our recent Annual Conference in New York. Most importantly, however, those and many, many other unique experiences lived with the Section have helped me build some of the dearest friendships in my life, and that's definitely the best thing I've achieved during my 15 years with the Section. ◆