

THE HAGUE: THE WORLD'S COURTHOUSE

ABA Section of International Law Delegation

October 23-25, 2005

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Sunday, October 23:

The opening evening of the Hague Program, Sunday, October 23, presented a fine opportunity for the thirty-one Section of International Law Delegation members to meet and interact prior to beginning their fascinating but exhausting itinerary in the World's Courthouse the following day.

The introductory reception, sponsored by Dutch law firm Houthoff Buruma N.V., included remarks from ABA President-elect Karen Mathis, and Section Chair Michael Byowitz. Daryl Mundis, Senior Prosecuting Trial Attorney at the International Criminal Tribunal for the former Yugoslavia and the Section's tremendous on-the-ground-organizer in the Hague, prepped the delegation for their Monday and Tuesday visits to various international courts and institutions.

Monday, October 24:

International Criminal Court

Starting off the two-day Hague Program with a powerful impression, the Delegation's first visit on Monday was to the International Criminal Court (ICC). There, President Phillippe Kirsch, Ms. Christine Chung (Senior Trial Lawyer and, notably, an American) and Mr. Didier Preira (Head of the Registry's Division of Victims and Counsels) addressed the delegation.

President Kirsch, Ms. Chung and Mr. Preira spoke to issues including the jurisdictional limitations of the Court and the United States' relationship, or lack thereof, with the ICC. The speakers, namely President Kirsch, emphasized significant aspects of the ICC that are unique from the structure of the ad hoc international tribunals, such as the participation by victims in the judicial process as well as the safeguards for judicial independence of the ICC from its member states.

The speakers also addressed the current case-load of the ICC: As of the end of October, four cases have been referred to the Court, three of which – Uganda, Democratic Republic of Congo and Darfur, which was referred by the United Nations Security Council – have received approval from the pre-trial chamber and have proceeded to the investigatory phase. The first warrants by the ICC were publicly announced on October 14 in relation to the Uganda case, clearly signifying the forward momentum of the nascent institution.

Iran-U.S. Claims Tribunal

Following the morning visit to the ICC, the Delegation attended a noteworthy presentation and dialogue at the Iran-U.S. Claims Tribunal. The Delegation was briefed by Mr. Maurizio Brunetti, Registrar, from Switzerland, Ms. Lela Scott, Legal Assistant to Judge Gabrielle Kirk McDonald, from the U.S., and Mr. Sohrab Rabiee, Legal Assistant to Judge Koorosh H. Ameli, from Iran. As Mr. Brunetti explained, this arbitral tribunal, established by the Algiers Accords of January 19, 1981, has been one of, if not the only point, of consistent cooperation between Iran and the U.S. since the Iran Hostage Crisis.

The Claims Tribunal was established to hear claims between the citizens, corporations, agencies and governments of Iran and the U.S. that arose prior to the conclusion of the Algiers Accords. To date, the Tribunal has heard more than 3900 claims, with its decisions awarding approximately three billion dollars to the U.S. and more than one billion to Iran.

Arguably, the Iran-U.S. Claims Tribunal has done much more than addressed claims between its two member states; the Tribunal has likely contributed both more prolifically and significantly to the

development of international commercial and international sovereign arbitration law than has any other arbitral institution. Most significant have been the Tribunal's decisions relating to arbitral procedure (the Tribunal adopted a modified version of the UNCITRAL rules, which are now one of the most popular and widely-used bodies of arbitration rules) and to the law of expropriation and of dual nationality.

The Hague Conference on Private International Law

Concluding Monday afternoon's events, the Delegation then visited The Hague Conference on Private International Law, an international organization dedicated to "work for the progressive unification of the rules of private international law." Current treaties produced by the Conference include the well-known Hague Service Abroad and Taking of Evidence Conventions as well as others such as the Hague Children's Convention and the Recognition of Divorce Convention. A presentation by General Secretary Hans Van Loon and First Secretary Dr. Andrea Schulz explained that the Conference's latest product, The Hague Convention of Choice of Court Agreements, attempts, as do each of its conventions, to increase predictability and certainty for parties in international disputes of varying contexts, here in disputes arising from exclusive choice of court agreements.

Notably, not only the sixty-five member states of The Hague Conference can sign and ratify treaties produced by the Conference, but non-member states may do so as well. Some treaties have broad participation by member and non-member states alike. Thirty-six signatories to the Hague Legalisation (Apostille) Convention, for example, are not member states of the Conference. The U.S., which is a member state, is party to a handful of Conference treaties including the Evidence and Service Conventions as well as the Child Abduction and Adoption Conventions.

Rounding out the evening was a delightful and relaxing reception hosted at the downtown Hague law offices of De Brauw Blackstone Westbroek.

Tuesday, October 25:

International Criminal Tribunal for the Former Yugoslavia

On Tuesday, the Delegation began its tour with a morning-long visit to the International Criminal Tribunal for the former Yugoslavia (ICTY). The ICTY was established in 1993 by the United Nations Security Council under its Chapter VII authority as a response to the threat to international peace and security posed by serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.

Addressed by Registrar Hans Holthuis, Judge Fausto Pocar (who was the ICTY Vice-President and was subsequently elected as President) and Chief of Prosecutions Gavin Ruxton, the Delegation learned that the ICTY has developed far more international criminal law and international criminal procedure in the past decade – along with its sister court in Rwanda – than has been developed in total since the Nuremberg trials at the end of the Second World War.

Although the ICTY has received much public criticism for its expensive operation costs, the Tribunal strongly feels that it has succeeded in transforming from the extremely skeletal form mandated by the Security Council into a fully functioning system of justice. Furthermore, the ICTY has adopted a completion strategy in order to wind down its functions by 2010, as mandated by the Security Council. As of 2004, all indictments were filed at the Tribunal; by 2008 all trials should be completed and it is hoped that as of 2010 all appeals will also be finished. The Tribunal, however, views completion of its mandate – the restoration of justice to the former Yugoslavia – as potentially conflicting with the imposed 2010 deadline and will, if need be, push for an extended existence to complete that mandate.

Following the engaging discussions with Registrar Holthuis, Judge Pocar and Prosecutor Ruxton, the Delegation had an opportunity to view the Milošević trial proceedings for nearly an hour. The Milošević trial, arguably the most important for the ICTY, is now approximately halfway through the

defense's allotted time and should, barring further difficulties with Mr. Milošević's health, finish proceedings in 2006.

International Court of Justice

The final stop for the Section of International Law Delegation was at the renowned Peace Palace, where both the International Court of Justice and the Permanent Court of Arbitration are located.

Beginning the session at the Peace Palace was Judge Pieter H. Kooijmans of the International Court of Justice, who introduced the Delegation to the structure and function as well as the decisions of the Court.

The ICJ is, essentially, the judicial "branch" of the United Nations, though it has no compulsory jurisdiction. That is, states must agree to always accept the jurisdiction of the court (which the U.S. did until renouncing that acceptance during the famous Nicaragua case in 1984) or the Court may have jurisdiction on a case-by-case basis through other binding treaties, such as CEDAW, which provide that any dispute grounded in that treaty is to be referred to the ICJ.

Two recent cases in which the U.S., specifically, was hailed before the Court were in the LeGrand and Avena cases, brought to the Court by Mexico under the Vienna Convention on Consular Relations (which the U.S. has since unsigned, due to the decisions in those cases). In LeGrand, the ICJ held that the U.S. must address and correct the problem of alien individuals being held and criminally charged without being given their right to contact their consulates, as the Vienna Convention provided. In Avena, the follow-up to the LeGrand case, the Court necessarily further entered into the internal jurisdiction of the U.S. in holding that the U.S. had not appropriately addressed the problem from LeGrand and that, very specifically, judicial review of such cases – not mere executive review – was required.

Judge Kooijmans also spoke about the ICJ's ability to issue advisory opinions at the request of the UN General Assembly. The Legal Consequences of Construction of a Wall in Palestinian Territory was one such recent opinion that the ICJ accepted jurisdiction (though, Judge Thomas Buergenthal of the U.S. notably dissented from accepting jurisdiction, finding that the ICJ should elect not to exercise its advisory jurisdiction over matters so clearly political). Another significant advisory opinion issued by the ICJ was the Legality of the Threat or Use of Nuclear Weapons Case. As to the highly divided opinion in this case, Judge Kooijmans was the first to admit that even he "couldn't make heads or tails of it," except for the fact that the Court unanimously found that the use or threat of use of nuclear weapons could only possibly be legal when the very *existence* of a state – not its mere well-being – was threatened.

Permanent Court of Arbitration

Concluding the Delegation's visit to the Peace Palace was a presentation by Permanent Court of Arbitration General Counsel Judith A. Freedberg on the Permanent Court of Arbitration, followed by a tour of the beautiful Peace Palace itself.

The Permanent Court of Arbitration was established in 1899 as a product of the first Hague Peace Conference. Arbitration was, at that time, seen by many – including important proponent Czar Nikolas of Russia – as the best option to armed conflict for resolving disputes between states. The Peace Palace itself was constructed with the gift of \$1.5 million from international peace philanthropist Andrew Carnegie.

After the First World War, the Permanent Court of International Justice (the judicial body of the League of Nations) was established and joined the Permanent Court of Arbitration in the Peace Palace. The PCIJ, which would become the ICJ with the founding of the United Nations after WWII, would by far be the more active institution in the building for quite some time; as a matter of fact, the Permanent Court of Arbitration did not hear a single case between 1914 and 1980. However, since the revolution in Iran in 1979, which generally rekindled the global interest in international arbitration (see, Iran-US Claims Tribunal), the Permanent Court has again been doing a brisk business. Currently, the Permanent

Court has seven pending cases, which cover topics ranging from the United Nations Convention on the Law of the Sea to bilateral investment treaties.

After a thorough afternoon at the Peace Palace, the Section of International Law Delegation headed to Brussels, stopping on the way for a delightful walking dinner that was graciously hosted at the Antwerp home of Section members Ellen Yost and Louis Lafili. The dinner was a wonderful way to unwind after two exciting days in the Hague and to simultaneously prepare for the vigors of the fantastic three-day Brussels Conference. A very heartfelt thanks to Ellen and Louis for so generously sharing their Belgian home with the Delegation!

Sincere thanks as well to all Section of International Law staff and members, especially to Daryl Mundis of the ICTY, for organizing a tremendous two-day program for the Hague Delegation! The dialogues, impressions and general fond memories of the Hague Program will last a lifetime for those who had the opportunity to participate.