

GLOBAL ACTION

A Newsletter of the **International Law Section** of the Cleveland Bar Association

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EDITOR'S NOTES

Jeffrey R. Hartwig

The International Law Section of the Cleveland Bar Association is pleased to present Issue 2 of Global Action. In Issue 2, Global Action has attempted to give equal weight to important issues of public and private international law.

In the public realm, Kristine A. Huskey provides a compelling insider's view of the legal and moral issues surrounding Guantanamo detainees and the War on Terror. Her linking these issues to Cleveland, via the 2006 Niagara Moot Court Competition, demonstrates that attorneys and professors from the area are, by applying rational analysis to issues related to the War on Terror, indeed ahead of the curve. The recent U.S. Supreme Court Decision in *Hamdan v. Rumsfeld* appears to bear this out.

Also in the public realm, Case Western law student, Joshua Joseph, explores the difficulty that the crisis in Darfur, Sudan poses in prosecuting culpable parties and how high the bar is for prosecuting enabling governments under the charge of genocide.

On the side of private international law, Dominic F. Yen, a Cleveland entrepreneur and attorney, offers an important discussion of what U.S. companies must do to compete in

the global economy, particularly as it relates to China and manufacturing. Mr. Yen's piece provides a wake-up call to those who would prefer to complain about China's purportedly unfair advantages instead of innovating around them.

I am also happy to introduce my new co-editors, Dane M. Rogers and Laurent Gloerfelt. Dane and Laurent have brought their expertise and enthusiasm to Global Action and will extend its reach to local law schools and other organizations. Indeed, new sections, such as "Goings On Around Cleveland" and the upcoming "Local Spotlight" were proposed and will be expanded through their efforts. If you would like to contribute to Global Action, nominate a local international practitioner for the Local Spotlight, or announce your organization's event, please do not hesitate to contact Dane, Laurent or myself. Our emails are under the Editors section on the sidebar.

Enjoy Issue 2 and please remember your suggestions and contributions are always welcome.

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A MESSAGE FROM THE CHAIR

Stephen J. Petras, Jr.

The International Law Section of the Cleveland Bar Association continues to develop as a real-time resource for understanding the practice of law on an international level. Over the past five months our members have learned about issues of international joint ventures, immigration and human rights just by reading the first edition of this newsletter. Members have also shared, in Global Forums, their experiences and solutions to problems concerning the use of the United Nations Convention on Contracts for the International Sale of Goods, obtaining service of process in a foreign country, and the status of various immigration visas. The Newsletter and the Global Forums represent two very important ways to learn from the writings and experiences of others. By chairing the respective committees, Jeff Hartwig and Javier Pacheco are providing valuable service to our international legal community.

At the first Global Forum, our members learned how important it is for any lawyer involved in the sale of goods internationally to know that the UN Convention applies unless it is specifically excluded. If it applies, then its provisions apply instead of the Uniform Commercial Code, even if the contract states that Ohio law applies. The Convention, because of its treaty status, is the law of Ohio.

Once you know it applies, then you need to know how it operates. At the Global Forum, we heard many experiences about the Convention, how to research its provisions and whether or not to try to exclude it in international sales agreements. All who attended learned a lot through a very informal and collegial roundtable discussion. If you missed this Global Forum, then don't miss the next one. Mark your calendar for August 23, 2006 at the CBA offices, when the next forum will cover International ADR: The Best Arbitral Bodies. We invite everyone to attend and contribute.

How do you keep up with what is going on in our international legal community? Simply read this newsletter. Here in Cleveland, we have the opportunity to attend many important international events. In our newsletter, we hope to let you know about the law-related ones. For instance, we list the luncheons of the Greater Cleveland International Lawyers Group and encourage your attendance. The first one for the 2006-2007 academic year is set for September 19, 2006 at the City Club.

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Finally, we are continuing in our planning for a symposium to address just how competitive our city and region are in the world. A comprehensive study by the Maxine Goodman Levin College of Urban Affairs and The Nance College of Business Administration of Cleveland State University is to be commissioned for the symposium. The results of this study will be presented at the symposium, which we hope to set for early 2007. At that event, we will have a meaningful dialog about the study's results, and we hope to focus the attention of our businesses, governments and firms on making Cleveland and Northeast Ohio a world-class player. The study that we want to undertake is costly, and we are still in the fund-raising mode. Through the generosity of member law firms and businesses we have raised over two-thirds of the cost of

the study. If you or your firm or company has not contributed, then please do so and be a sponsor of the study and/or the symposium.

There is a lot going on, and Cleveland is a great city in which to practice international law. Through our Section, it keeps getting better. We look forward to your involvement.

Steve Petras

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Chair, International Law Section
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RIPPED FROM THE HEADLINES:

The Niagara Moot Court Competition – Does Fact Meet Fiction?

EDITOR'S NOTE:

While the article below was sent to press, two significant events occurred that will likely impact Bush Administration policy with respect to Guantanamo detainees.

On June 29, 2006, the United States Supreme Court, in *Hamdan v. Rumsfeld*, invalidated in a 5-3 decision the authority of the Bush administration to subject foreign terrorist suspects detained in Guantanamo Bay, Cuba to special military tribunals or commissions. A military commission may only try individuals charged with offenses against the law of war. On this issue, the United States Supreme Court determined that conspiracy to commit an act of war is not itself a war crime. This would allow detainees charged with conspiracy or unspecified crimes – a large majority of the Guantanamo detainees according to Kristine Huskey – to successfully challenge their condition as “prisoners of war” in civil court.

On July 11, 2006, the Bush Administration reversed policy and announced that detainees at Guantanamo Bay indeed were entitled to Geneva Convention protections against torture and humiliating treatment.

It was March in Cleveland, and we were before the International Court of Justice. That's a fact. We were participating in the 2006 Niagara Moot Court Competition sponsored by The Canada-United States Law Institute. I am the faculty advisor to Howard University Law School's international moot court team, which is why I found myself in Cleveland before the ICJ, coaching Howard's Niagara team (Anita Cochran and Justin Baham). As all moot court competitions go, the team represented both sides—the United States, claiming it hadn't tortured or arbitrarily detained poor Mr. Aziz and Canada, claiming just the opposite. It was no easy feat to argue both sides but it was substantially harder to argue on behalf of the United States. The judges—esteemed attorneys and professors from the area—simply weren't buying its position. They strongly resisted the argument that sleep and light deprivation, the use of stress positions, exposure to loud music and extremely warm and cold temperatures, intimidation with dogs, desecration of the Koran, and the threat of imminent harm or death was somehow not torture or cruel, inhuman and degrading treatment. And, they had difficulty accepting that the law would allow an individual to be detained indefinitely without access to counsel, without charge or trial, or without prisoner of war status merely because he is an “enemy combatant.” They tried to be fair and even in their questioning of the “student-agents” but it was clear that the judges were harshly critical of the U.S.'s position. Everyone was.

If only there was more fiction in the truth.

I am also an attorney with Shearman & Sterling LLP. In that capacity, I represent several Kuwaiti citizens detained at Guantanamo. I have been involved in the case since 2002 when my colleagues and I were among the first lawyers to file suit in federal court. The government refused us access to

the detainees because they were allegedly “enemy combatants” and thus had no rights to counsel, a hearing or prisoner of war status. Both the D.C. District Court and the D.C. Circuit Court bought the government's arguments. Maybe those judges weren't from Cleveland. It wasn't until two years later when the Supreme Court ruled in *Rasul v. Bush*, holding that our clients had the right to bring their habeas claims in court, that we were even allowed down to Guantanamo to meet them.

Since that ruling, I have been to Guantanamo almost a dozen times. Through their own words I learned that my clients had been beaten, subjected to sleep deprivation, loud music and bright lights 24/7, intimidated with dogs, threatened with rape and death, had their genitals squeezed, short shackled for up to 6-8 hours, exposed to extreme temperatures, and spent months in isolation. They had been given very little physical exercise, at most only once or twice a week for 30 minutes at a time; they were given no reading materials except for the Koran, which was routinely desecrated by guards and interrogators alike.

At first, the government denied that it had engaged in such practices but when FBI documents confirming the mistreatment became public, the government changed its position and defended itself by claiming that the treatment was not torture and, even if it was, the Executive had the right to defend the country. Now, “torture” is in the realm of public discourse across America. Very smart people sit around and actually debate the fine points of whether and when it is legally and morally okay to torture an individual. They sit on panels and, in quiet, lawyerly and intellectual ways, judge the actions of the United States. Few are harshly critical, publicly. Many say that the treatment is not torture or that whatever it is, it is acceptable under the circumstances. Likely, those people are not from Cleveland either.

Furthermore, only 10 detainees have been charged with a war crime. The remaining men remain indefinitely detained on account of their enemy combatant status. Unlike the ICJ judges in Cleveland, the public and the courts have largely accepted the position of the United States that these men can be detained without charge or trial and without prisoner of war status even though we are in a “War on Terror” that has no conceivable end.

My Niagara experience in Cleveland was an uplifting one. I felt empowered by the strong reactions against the U.S. I couldn't wait to go to Guantanamo and tell my clients what the wonderful people of the Midwest think about their situation. And, then I remembered that Niagara was a fiction and Guantanamo a fact. And, never the twain shall meet.

Kristine A. Huskey is an attorney with Shearman & Sterling LLP and an adjunct professor at Howard University Law School and The George Washington University Law School, International Human Rights Clinic.

FEAR OF FALLING: Chinese Manufacturing

Abstract: “Be afraid, be very afraid”, not of the tenuous growth of China’s economy, but of the failure of developed economies to innovate and invest in wealth building capital. China’s growth is fueled by cost-saving final processing and assembly operations. Eventually China’s economy will move beyond labor-intensive manufacturing. Developed economies must continue to innovate to leap beyond the current arithmetic boundaries of labor and capital costs.

Notwithstanding the many issues of the day, there has been a consistent complaint that unfair competition by the Chinese is destroying the American manufacturing base. Politicians, Labor leaders and businessmen, alike, seize upon this contention to milk it for its emotional impact while turning a blind eye to any inspection of foundations in fact.

If one looks closely at the circumstances of the relationship between the United States and China, one must eventually conclude that there may have been some basis in fact for such contention of unfair competition some time ago, but that time has long passed.

Mao’s China established a system based on traditional Chinese despotism, but the economy was based on the Soviet system of “mono-capitalism”. As such, the command economy was planned and resources allocated from above. History has shown, with horrible consequences to hundreds of millions of Chinese, that this experiment was a total failure.

When Deng Xiao Ping rose to control China in 1978, while continuing to adhere to the socialist principles required by political expediency, he and his advisors made it clear that pragmatism must govern economic activity, and instituted the evolution of changes that focused on decentralized decisionmaking and privatization of state-owned enterprises. China’s entry into the World Trade Organization allowed China’s entrepreneurs to “come out of the closet,” creating more economic activity in the last few years than in all of China’s prior history since the 1949 Revolution (or Liberation, depending on your perspective).

The China of almost thirty years ago, however, was an economy suffering many of the same problems that we see in American companies saddled with excessive labor, pension and healthcare costs, i.e., state-owned enterprises required to support millions of workers and their “iron rice bowl”.

While it might not seem so now, it was a long, slow process of decentralization and privatization that continues even today. It is only recently, since 2002, that all the resources of China’s low skilled as well as industrial/proletarian labor force have been unleashed in China’s urban centers.

It is important to keep in mind that China has more than 200 cities with populations over one million, and 15 million new workers are entering the workforce every year. Initially lacking capital, China’s economy must export to grow. It is clear that China’s economy yields lower costs to manufacture simple items and, as such, follows the natural market-oriented path of lower costs for manufactures over time through lower production factor costs.

The focus of attention in contending unfair competition by China is the trade deficit between the United States and China, today rising to approximately \$200 billion.

But is this figure truly indicative of any unfair trade practices by the Chinese?

In 2005, China released the controls over the Renminbi (Yuan) – U. S. Dollar exchange rate – but it has resulted in only a relatively minor, 2.5% increase in value of the Renminbi.

The availability of capital must also not be ignored, and certainly popular wisdom would say that China’s position with over \$850 billion in foreign exchange reserves might put upward pressure on the Renminbi. However, such is not the case. The market recognizes that at least for now, the availability of low cost resources in China, primarily labor, but also capital, will prevent any “inflation” in the value of the Renminbi.

These are a result of market forces, not practices by the Chinese government. Notwithstanding China’s capitulation to international pressures to free the exchange rate, many do not favor a drastic revaluation, fearing the onset of a catastrophic recession similar to that which occurred when Japan succumbed to American pressures to revalue the Yen. China cannot afford a decades-long recession, regardless of a high savings rate similar to Japan’s.

While positions are indeed changing, the United States remains the largest manufacturing country with almost 25% of world output and leads the world in precision engineering. One must also keep in mind that the United States economy is now primarily a service economy, with many products no longer made here.

The composition of the industrial output between the United States and China must be examined carefully. Chinese manufactures are relatively simple manufactures with Chinese value added often limited to final processing and assembly which suffer from low profit margins. Some sources indicate that as much as two-thirds of the value of Chinese exports in the United States are derived from imports.

As China’s economy grows and becomes more sophisticated, i.e., follows the same path as that followed by other developing nations, the nature of the manufactures will inevitably become more sophisticated, encroaching further on the traditional markets of developed countries. One example of this trend is China’s growth in steel production, currently approximately 300 million tons per year. While daunting to international markets, this is also cause for much concern within China. Without adequate innovation, cheap steel will become unprofitable to sell and eventually consolidation and shrinkage in the steel industry must occur, as is happening outside of China even today.

Developed countries must anticipate this trend and work not to “fight the future” but enhance technical innovation that provides true competitive advantage in a world economy.

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Dominic F. Yen is a Cleveland attorney and entrepreneur with more than 25 years of direct investment experience in and between the United States and China. He can be reached at **Email:** dfy@aya.yale.edu or dfy@abanet.org; Voicemail/Fax: 419-844-9513.

GOINGS ON AROUND CLEVELAND: Lunch with an International Flair

For those of us with a taste for international issues, Cleveland has a lot to offer at the noontime hour.

The Greater Cleveland International Lawyers Group held its last luncheon of the season at the Cleveland City Club on Tuesday, June 13. The speaker was Ronn Richard, President and Chief Executive Officer of The Cleveland Foundation. His topic was "Internationalization of Cleveland – What Can We Do Better?"

Mr. Richard's presentation, which attracted a blockbuster crowd, addressed realistic expectations for the increased internationalization of Cleveland. Specifically, he highlighted the perceived threat of globalization in what is still, intrinsically, a manufacturing city.

Mr. Richard's message to Cleveland is compelling. He urges us to embrace globalization, rather than bemoaning it. His vision is bigger than a new

Convention Center, or any other discrete project. Its implications are unavoidable: when Cleveland steps up to the global challenge to create new high-tech industries, the city will have become a vital part of its own evolution.

Mr. Richard suggests several concrete ways in which Cleveland can begin its ascent of the global challenge. The overarching theme of his strategy is the increased cooperation of the public, private and philanthropic sectors. This merger is one that Mr. Richard can speak to with considerable insight. His long career has spanned all three sectors and has paved the way for a fascinating perspective on the path to an international Cleveland.

The Greater Cleveland International Lawyers Group resumes its luncheon series in September. For more information see <http://www.gcilg.org/>.

CRISIS IN SUDAN: Genocide or Crime Against Humanity?

President Bush recently asserted that the mass murders, rapes, kidnappings, and de-population currently under investigation in Darfur, the western province of Sudan, amount to state-sponsored genocide. Chairman of the United Nation's Special Commission on Darfur, Antonio Cassese, in contrast, concluded that the atrocities more properly align with the legal standards for crimes against humanity. The international community is currently at odds over whether to label the crisis as genocide or as a crime against humanity.

While the legal definitions for both crimes describe some of the most heinous of offenses inflicted upon humankind, the elements of each are not interchangeable. Both crimes punish attackers for committing any of a series of violent acts (e.g., rape, murder) against a civilian population. Crimes against humanity, however, are distinguishable from genocide because they do not require "intent to destroy in whole or in part," and merely require that a given group carry out a policy of "widespread and systematic violations" against any civilian population. While only an international tribunal such as the International Criminal Court ("ICC") can make a final determination on this delicate issue, the debate is relevant because ICC prosecutors will need to make a determination on the nature of the charge to bring before the Court.

Authorities have accused Sudanese government forces and Arab militia groups called the "Janjaweed" of using systematic rape, murder, and forcible depopulation against the villages of black Africans in the Darfur region since at least February of 2003. While tensions between the ruling Arab class and non-Arab peoples have existed for centuries, the current conflict began when two rebel groups associated with the Fur, Masalit, and Zaghawa tribes attacked government forces and installations in Darfur. The Sudanese central government responded by sending troops to the region to squash the insurgency. This initial political conflict quickly sparked ongoing and widespread violence throughout the region. As a result, more than 1.2 million black Africans have been internally displaced, and an additional 200,000 Sudanese refugees now exist in bordering Chad. Almost all of these refugees report witnessing murder, kidnapping, beatings, and rape on a mass scale.

While intervention in the region from outside sources has been painfully slow, some international leaders have been quick to classify the acts of violence and aggression as genocide. It is likely that the Prosecution will have sufficient evidence to charge the Sudanese government with crimes against humanity, but it is less clear that evidence exists to charge the government with acts of genocide. The determination

hinges on whether the Prosecution can establish the requisite genocidal intent on behalf of the Sudanese central government. Charging Sudanese officials with crimes against humanity merely requires the Prosecution to show that the government had "knowledge" of "widespread and systematic" acts of violence against civilians, while genocide requires the Prosecution to provide evidence that the government intended to destroy a "national, ethnical, racial or religious group."

Establishing such intent may prove burdensome for the Prosecution. Numerous reports have found that the Sudanese government covertly supported Janjaweed militia by supplying them with arms, communications equipment, salaries and uniforms. Other sources have posited that the government adopted an official policy of complicity, allowing the Janjaweed to engage in acts of aggression and violence. For its part, the government has denied any connection with the Janjaweed militia.

The Prosecution should have little trouble proving that the Sudanese government engaged in outrageous acts of violence against civilians. However, it may be more difficult to establish that they had intent to destroy a race. First, it is possible that the government intended to force black Africans out of Sudan, which may or may not qualify as racial destruction. Secondly, it is not at all clear that the conflict is race-related. In fact, it may be essentially political or economic in nature. The fighting began when two rebel political groups associated with black Africans attacked government forces and installations in Darfur. Some have asserted that the conflict is economic in nature and relates to competition between pastoralists (generally Arab) and farmers (generally non-Arab) for land and water. Neither the genocide convention nor the Rome Statute of the ICC gives standing to political or "economic" groups to make a claim for genocide. While these crimes are outrageous and shocking, it is not clear that they meet the high evidentiary standards necessary for genocide. This issue is sure to be at the forefront of international debate in the coming months, as the case proceeds before the ICC in The Hague.

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UPCOMING EVENTS

The Cleveland Bar Association, International Law Section

The International Law Section has partnered with Cleveland State University to conduct an in-depth study of international business in northeast Ohio. The findings of this study will be presented at the International Law Symposium in late November. The research project will cost over \$30,000 and has attracted the following sponsors: NEOTEC, Baker Hostetler, Eaton Corp., Kahn Kleinman, Benesch, Friedlander, Coplan & Aronoff, Cavitch, Familo, Durkin & Frutkin, Porter Wright Morris & Arthur, Parker-Hannifin, STERIS Corporation, CSU, CBA-International Section, Ulmer Berne, Margaret Wong & Associates, and RPM International, Inc.

If you, your firm or company are interested in sponsoring this essential study, please call Donnie Long at 696-3525.

The next Global Forum will take place on August 23, 2006 at the Cleveland Bar Association. The topic will be International ADR: The Best Arbitral Bodies. For more information, please contact Javier Pacheco at

JPacheco@porterwright.com.

The Cleveland Council on World Affairs

The Cleveland Council on World Affairs Young Professionals Program provides a forum for young, internationally-minded professionals to discuss world events and international policies. On August 9, the organization will hold a roundtable discussion on current U.S. immigration policies and how they affect Northeast Ohio's population and economy. The event will be held from 7-9 p.m. at D'vine Wine Bar located on West Saint Clair. For more information on these and other Young Professionals events, or to become a member, visit the Cleveland Council on World Affairs website at <http://www.ccwa.org>.

The Cleveland Council on World Affairs kicks off its 2006-2007 Major Lecture Series in September. On Wednesday, September 13, John Podesta, former White House Chief of Staff to President Clinton, will present "Reclaiming Control: A Progressive Approach to National Security in the 21st Century." In his lecture, Podesta will map the national security environment and propose a new strategy to promote American security interests. Tickets are \$15 for CCWA members and \$25 for non-members. For reservations or for more information call 216-781-3730 x 102.