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Message de la Présidente

L'impact du droit international sur les vies des individus, y compris les Canadiens, a été mis en valeur dans les médias récemment. De l'incident du *GTS Katie* au Congrès sur les enfants affectés par la guerre à Winnipeg, il devient bien plus évident comment le droit international touche la vie de chacun et chacune. Ceci fournit d'autant plus de raison de participer aux Congrès annuels du CCDI, qui vous fournissent toujours la plus récente information sur ces questions, parmi tant d'autres.

Le Congrès Annuel 2000 présente également une occasion de discuter pour la dernière fois le *Rapport sur le Futur du CCDI* (inclus avec votre dernier *Bulletin* et disponible sur le site Internet du CCDI). La question du futur du CCIL a attirée notre attention tout récemment par une réduction significative des ressources gouvernementales habituelles vis à vis le soutien du Congrès annuel. Ceci a mis en valeur l'importance critique de développer un fond capital dont des revenus peuvent être utilisés pour financer nos activités pour les membres, par exemple le Congrès annuel, le *Bulletin*, le site Internet et l'exécution générale de l'organisation. Vos suggestions, soutien et engagement (même donations exemptées d'impôts!) ne peuvent pas arriver à un meilleur moment.

Vu l'augmentation de l'impact du droit international sur la politique nationale et la vie des individus, il est important qu'une organisation instruite et articulée existe afin de stimuler les débats et apporter des contributions aux développements. Depuis plus de 25 années, le CCDI a été cette organisation. Votre assistance aux Congrès apporte une contribution très immédiate et pratique à continuer cette activité.

Une autre façon de faire une contribution tangible est de devenir plus impliquée dans des efforts continus pour développer la capacité du CCDI à partager l'information. Le Conseil d'administration considère plusieurs recommandations pour améliorer nos services d'information, y compris une meilleure utilisation du site Internet et des changements au contenu et format du *Bulletin*, entre autres. Les résultats de ces efforts deviendront évidents au cours de la prochaine année, tant que l'information sur la façon dont tous nos membres peuvent jouer un plus grand rôle dans la valeur ajoutée du CCDI. ◅

President's Message

The impact of international law on the lives of individuals, including Canadians, has been highlighted in the media recently. From the *GTS Katie* incident to the conference on war-affected children in Winnipeg, it is becoming even more clear how international law touches everyone's life. This provides all the more reason to attend the CCIL Annual Conferences, which always reveal the latest information on these and other issues.

The 2000 Annual Conference also provides an opportunity for a last discussion of the *Future of the CCIL Report* (included with your last Bulletin and available on the CCIL web page). The issue of the future of the CCIL has been brought rather dramatically to our attention recently by a significant reduction in support for our Annual Conference from our usual governmental sources of funding. This has highlighted the critical importance of developing a capital fund from which revenues can be used to fund our member-oriented activities - the Annual Conference, the *Bulletin*, the website and the general operation of a not-for-profit, non-governmental organization. Your suggestions, support, commitment (even tax-deductible donations!) could not come at a better time.

As the impact of international law on national policy and individual lives increases, it is critical that an educated, articulate organization exists to foster debate and make contributions to legal and policy developments. For over 25 years that organization has been the CCIL. Your attendance at the Annual Conferences makes a very immediate and practical contribution to continuing this activity.

Another way to make a tangible contribution is to become more involved in ongoing efforts to develop the CCIL's information sharing capacity. The Executive Committee is currently considering several recommendations for improving our information services, including an expanded use of the Web site, and further changes to the content and format of the *Bulletin*, among others. Results of these efforts will become evident over the next year, as will information on how our members, especially students, can play a greater role in our value-added information services. ◅

Kim Carter
Présidente / President

Case Comment: *Metalclad Corporation* v. *United Mexican States:* Before an Arbitral Tribunal Under NAFTA Chapter Eleven

By Valerie Hughes*

For the first time, a NAFTA government, Mexico, has lost a claim on the merits under Chapter Eleven of the NAFTA. Mexico won two previous cases and Canada successfully defended a claim brought by a U.S. investor under NAFTA Articles 1106 (performance requirements) and 1110 (expropriation).

The *Metalclad* Tribunal's decision of August 30, 2000, is particularly significant because it imposes a very high standard on NAFTA governments to ensure transparency in regulating international investment. The Tribunal held that transparency includes "the idea that all relevant legal requirements for the purpose of initiating, completing and successfully operating investments made, or intended to be made, under the Agreement [NAFTA] should be capable of being readily known to all affected investors of another [NAFTA] Party. There should be no room for doubt or uncertainty on such matters."

General Commentary

Metalclad Corporation, a United States company, brought a claim against the Government of Mexico under Chapter Eleven of the NAFTA, alleging that Mexico had violated its obligations under Articles 1105 (minimum standard of treatment) and 1110 (expropriation). On August 30, 2000, the Arbitral Tribunal, composed of Elihu Lauterpacht (UK), Benjamin Civiletti (USA) and José Louis Siqueiros (Mexico), issued its award, finding in favour of Metalclad and ordering the Government of Mexico to pay $16,685,000 in damages (the cost but not, as Metalclad had claimed, the value of its investment).

"The *Metalclad* Tribunal's decision … imposes a very high standard on NAFTA governments to ensure transparency in regulating international investment"

The Tribunal based its decision on NAFTA objectives of transparency and securing a predictable environment for business planning and investment. It also relied on the ILC *Draft Articles on State Responsibility*. The decision will disappoint those who had hoped for a thorough analysis of Articles 1105 and 1110 or for detailed guidance as to the interpretation of these provisions.

The Facts

The claim related to the refusal by a municipality in Mexico to grant a construction permit to Metalclad in connection with its plans to develop and operate a hazardous waste landfill. Metalclad had received federal and state permits and had made significant progress in constructing the site when the municipality denied a construction permit. Metalclad had been told to obtain a municipal construction permit, but was allegedly assured by federal officials that it would be issued as a matter of course since there were no grounds for denying it.

Article 1105 (Minimum standard of treatment)

Article 1105 provides that each Party "shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security". There has been considerable debate in international trade law circles as to what Article 1105 means.

The *Metalclad* Tribunal found that the denial of the construction permit by the municipality was improper because it had nothing to do with construction aspects or flaws of the physical facility (the only things over which the municipality had jurisdiction). In addition, the Tribunal said the Government of Mexico failed to ensure a transparent and predictable framework for Metalclad's business planning and development, as required by the NAFTA. The Tribunal considered that Government of Mexico had a duty to ensure that the investor understood all the relevant laws and requirements, including municipal ones. The Tribunal concluded that:

> The absence of a clear rule as to the requirement or not of a municipal construction permit, as well as the absence of any established practice or procedure as to the manner of handling applications for a

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> municipal construction permit, amounts to a failure on the part of Mexico to ensure the transparency required by NAFTA.

The Tribunal found that Metalclad was led to believe and did believe that the federal and state permits were sufficient and that they allowed for the construction and operation of the landfill. The Tribunal said that "[p]ermitting or tolerating the conduct of [the municipality] … amounts to unfair and inequitable treatment" in breach of Article 1105.

Article 1110 (Expropriation)

Article 1110 provides that "no Party may directly or indirectly … expropriate an investment … or take a measure tantamount to … expropriation…" except for a public purpose, on a non-discriminatory basis, in accordance with due process of law and on payment of compensation.

The *Metalclad* Tribunal did not analyze Article 1110 in detail. Having found that the municipality had no authority to deny the permit on grounds unrelated to physical construction, the Tribunal said that Mexico's action in tolerating the municipality's conduct toward Metalclad, and in "participating or acquiescing in the denial to Metalclad of the right to operate the landfill, notwithstanding that the project was fully approved and endorsed by the federal government…", constitute a measure tantamount to expropriation in violation of Article 1110(1).

Implications of the Award

The finding of liability on the part of a NAFTA Party, on the basis of "acquiescence" to a municipal action, and on the basis of a duty, read into the NAFTA, to ensure investors' awareness of even the municipal rules which apply to their undertaking, sets a very high standard for NAFTA governments and could lead to increased recourse by foreign investors to the dispute settlement mechanism provided for in Chapter Eleven.

The award of the Tribunal binds only the parties to the dispute. Nevertheless, the apparent logic of the Metalclad Tribunal that one level of government's failure to act consistently with assurances given by a higher level of government can amount to unfair and inequitable treatment contrary to Article 1105 and to expropriation contrary to Article 1110 may well be relied upon by future Chapter Eleven tribunals. ≺

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ECONOMIC SANCTIONS AND HUMAN RIGHTS

U.N. ECOSOC, Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights: *The Adverse Consequences of Economic Sanctions on the Enjoyment of Human Rights* (Working Paper Prepared by Mr. Marc Bossuyt) E/CN.4/Sub.2/2000/33 (June 21, 2000)

The Working Paper on "The Adverse Consequences of Economic Sanctions on the Enjoyment of Human Rights" ("Paper") was prompted by concerns about economic sanctions "in the light of the need to respect" relevant international law documents, including *inter alia* the U.N. Charter and Geneva Conventions. Para. 1. The Paper found that the two "basic kinds" of economic sanctions are trade and financial sanctions, while other types of sanctions include travel, military, diplomatic and cultural sanctions. Paras. 10-17.

The Paper opined that the most important international law implication for sanctions is that "the right to impose sanctions is not unlimited." Para. 18. The Paper suggested that sanctions that directly or indirectly causing deaths could violate the right to life. Para. 26. The Paper also found the "theory" of linking economic pressure on civilians to pressure on governments "bankrupt, both legally and practically." Paras. 48-50.

The Paper asserted that: 1) the U.N. sanctions against Iraq were "unequivocally illegal" under existing international humanitarian and human rights law; and 2) the economic, social, and cultural rights of the Iraqi people had been "swept aside." Paras. 67, 71. The Paper also concluded that the economic sanctions imposed on Burundi by neighboring states had "immensely deleterious effects . . . on all aspects of society" that had outlived the sanctions themselves. Paras. 74, 79. The Paper also criticized the U.S. for: 1) unilateral economic sanctions against Cuba, which had caused "deprivations" to Cuban citizens that had "impinge[d]" on their human rights;

and 2) using "coercive measures" in attempting to turn a unilateral embargo into a multilateral embargo through secondary sanctions. Paras. 98-100.

The Paper asserted that economic sanctions should be "rethought entirely," and suggested a periodic review of all sanction regimes at intervals generally no longer than six months. Paras. 53, 104. The Paper also proposed that the full scope of legal remedies be made available for victims of sanctions regimes that are "at any point in violation of international law, if the imposer refuses to alter them." Para. 106.

The Paper proposed a six-prong test to evaluate sanctions, on the basis of whether they: 1) are imposed for valid reasons; 2) target the proper parties; 3) target the proper goods or objects; 4) are reasonably time-limited; 5) are effective; and 6) are "free from protest" arising from violations of "principles of humanity" and "dictates of the public conscience." Paras. 41-47; Specific recommendation No. 1 to the U.N. bodies.

The paper is archived at: <http://wwwunhcr.ch/>.

EU REPORT BY THE WISE MEN

(on Austrian commitment to common European values, and the nature of the Freiheitliche Partei Oesterreichs) (September 8, 2000)

Fourteen Member States of the European Union ("EU") requested Martti Ahtisaari, former President of Finland, Jochen Frowein, former Vice-President of the European Commission of Human Rights, and Marcelino Oreja, former Secretary-General of the Council of Europe ("Appointees"), to report on: 1) the Austrian Government's commitment to common European values, particularly those concerning the rights of minorities, refugees and immigrants; and 2) the evolution of the political nature of the Freiheitliche Partei Oesterreichs ("FPO").

The Appointees noted that in regard to minority, refugee and immigrant rights, both binding and non-binding documents "enshrine the positive obligation" of European States to protect human rights, fundamental freedoms, pluralist democracy, and the rule of law. Para. 1.

The Appointees concluded there was no indication that the new Austrian government had deviated from its predecessors' principles regarding asylum applicants, (Para. 40), and noted that it "can be stated" that the Austrian Government's immigration policy "shows a commitment" to common European values. Para. 51. The Appointees also concluded that the present Austrian Government is "committed" to fighting against racism, anti-Semitism, discrimination and xenophobia in Austria. Para. 63.

The Appointees noted, however, that the Austrian Government's determination must be evaluated against the "ambiguous language" repeatedly used by some FPO high representatives. Para. 64. The Appointees noted that "[o]ne of the most problematic features" of the FPO is attempts to silence or criminalize political opponents for criticism of the government. Para. 93. The Appointees stated that "any move" by a government or government minister to suppress criticism "must be seen as a grave threat" to common European values and fundamental principles enshrined in the EU Treaty. Para. 95. The Appointees asserted that in such a case all members of an EU government have a "positive obligation" to defend such values. Id.

The Appointees stated that the "binding case-law" of the European Court of Human Rights fully protect the right to criticize and aggressively debate governments. Para. 10. The Appointees also opined that the language and statements of government parties must be under "much heavier scrutiny" than those of opposition parties. Para. 90.

The Appointees concluded that the Austrian Government "is committed to … common European values," (Para. 108), but that the Austrian Federal Government should be as ready as the Austrian Federal President to condemn xenophobic or defamatory expressions. Para. 111. The Appointees also determined that sanctions would "if continued . . . become counterproductive and should therefore be ended." Para. 116.

The Appointees strongly recommended the development of an EU mechanism to monitor and evaluate Member State commitment and performance in regard to common European values. Para. 117. The report is archived in PDF format at <http://www.austria.gv.at/e/>.

EFFECTIVENESS OF UN SECURITY COUNCIL

U.N. Security Council: Resolution 1318 (on ensuring an effective role for the Security Council in the maintenance of international peace and security, particularly in Africa), S/RES/1318 (2000) (September 7, 2000).

The U.N. Security Council, meeting at the level of Heads of State and Government at the Millennium Summit, reaffirmed: 1) the importance of peaceful settlement of international disputes; 2) its determination to give equal priority to the maintenance of international peace and security in every region of the world; and 3) the need to give special attention to promoting peace and sustainable development in Africa, given the specific characteristics of conflicts there. Paras. I-II.

The Security Council affirmed its determination to strengthen U.N. peacekeeping operations by adopting clearly defined, credible, achievable and appropriate mandates, and by including effective measures for the protection of U.N. personnel and, wherever feasible, the civilian population. Para. III. The Security Council welcomed the August 21, 2000 Report of the Panel on U.N. Peace Operations (S/2000/809) (see ILIB, August 26 - September 1, 2000 for abstract of Report), and decided to expeditiously consider those Report recommendations falling within its scope. Para. IV.

The Security Council called for effective international action to prevent the illegal flow of small arms into conflict areas, and stressed that perpetrators of crimes against humanity, crimes of genocide, and war crimes be brought to justice. Para. VI. The Security Council also emphasized the importance of inter alia: 1) continued cooperation and effective coordination between the U.N. and the Organization of African Unity ("OAU"); and 2) enhanced support for the OAU Mechanism for Conflict Prevention, Management and Resolution. Para. VII. The report is available in PDF format at <http://www.un.org /Docs/scres/2000/resl318e.pdf>.

ILO INSTRUMENTS ON MATERNITY PROTECTION

The International Labour Organization Maternity Protection Convention, 2000 (C183), adopted June 15, 2000, revises its 1952 Maternity Protection Convention (Revised) to *inter alia* further promote the "equality of all women in the workforce and the health and safety of the mother and child." Preamble; Art. 13. The Convention applies to all employed women, including those in "atypical forms of dependent work." Art. 2(1). Parties to the Convention may, however, wholly or partly exclude limited categories of workers for which the Convention's application would raise "special problems of a substantial nature." Art. 2(2).

Parties shall adopt appropriate measures to ensure that pregnant or breast-feeding women are not obliged to perform work determined to be prejudicial or cause significant risk to the health of the mother or child. Art. 3. The Convention provides for a period of maternity leave of not less than 14 weeks, including a period of six weeks' compulsory leave after childbirth, unless otherwise agreed on the national level. Art. 4(1), (4).

The Convention guarantees a woman's right to return to the same or equivalent position and pay rate at the end of maternity leave. Art. 8(2). The Convention also makes unlawful the termination of a woman's employment during: 1) pregnancy; 2) absence on maternity leave; 3) absence on medical leave related to pregnancy or childbirth; or 4) a nationally prescribed period following return to work, except on grounds unrelated to pregnancy, childbirth and its consequences, or nursing. Art. 8(1). An employer shall bear the burden of proving that the reasons for dismissal are unrelated to such factors. Id.

Parties shall adopt appropriate measures to ensure that maternity does not constitute a source of discrimination in employment or access to employment. Art. 9(1). Such measures shall include a prohibition on requiring a pregnancy test or certificate of such a test, except when the work involved: 1) is prohibited or restricted for pregnant or nursing women under national laws and regulations; or 2) bears a recognized or significant risk to the health of the woman and child. Art. 9(2). The Convention comes into force twelve months from the date on which two ILO Members have registered their ratifications with the ILO. Art. 15(2).

The Maternity Protection Recommendation, 2000 (R191) states that Parties should endeavor to extend maternity leave to at least eighteen weeks, from the fourteen weeks established by Convention Article 4, and that provision should be made to extend maternity leave in the event of multiple births. It also provides that Parties should take measures to: 1) ensure the assessment of any workplace risks related to the safety and health of a pregnant or nursing woman and child; and 2) make the results of such assessments available to the woman concerned. Recommendation, Art. 6(1).

More information is available on the ILO web site at: <www.ilo.org>.

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Book Review: Economic, Cultural and Social Rights

McChesney, Allan, *Promoting and Defending Economic, Social and Cultural Rights: A Handbook.* Published by the American Association for the Advancement of Science (AAAS) & Human Rights Information and Documentation Systems, International (HURIDOCS), Washington, 2000).

Reviewed by Robert Young*

In a world in which the vigorous protection of intellectual property is growing globally, it is rare and refreshing to pick up a book that includes the message: "You are free to copy this *Handbook* or any part of it. You may share it freely (and free of charge) with anyone who might use it. In fact, we encourage you to do so."

This message reflects the purpose of Allan McChesney's "Promoting and Defending Economic, Social and Cultural Rights: A Handbook". It is intended for "NGOs and others active in civil society who want to prevent or stop violations of economic, social and cultural rights and promote fulfillment of these rights at the national levels." While aimed at a non-legal audience, this inexpensive volume would be a useful addition to the library of any lawyer or law student, including the non-specialist, whose work touches on human rights advocacy or teaching or the currently popular fields of "democratic development" and "good governance".

"The *Handbook* is to be welcomed as a timely reminder of the importance of economic, social and cultural rights, so often overshadowed by civil and political rights."

The first two thirds of the *Handbook* consists of a dozen chapters grouped broadly as follows:

- Summary information on human rights, especially those contained in the International Covenant on Economic, Social and Cultural Rights (the Covenant);
- Violations of Covenant obligations and specific Covenant Rights (including a helpful article-by-article commentary, with examples of specific actions and inaction by government); and
- Roles for NGOs in promoting and defending Covenant rights.

Chapter 10, found in the section on roles for NGOs, includes a detailed step-by-step guide on how NGOs can play a part in the state monitoring by the UN's Committee on Economic, Social and Cultural Rights. The practical, accessible approach found in this guide and again in Annex F, "NGO Checklists for the Promotion and Defence of Economic, Social and Cultural Rights", is the book's strength. We find here the achievement of the author's claim for the Handbook: that it builds on the reality of the work done by NGOs rather than an official UN view, on how to be effective in the UN system of human rights.

The last third of the *Handbook* contains nine excellent Annexes. These include short but solid lists of sources and acronyms; contact information for UN and regional human rights bodies and NGOs; two fictional case studies which will be of interest to teachers and trainers; and the full text of the Covenant. Two innovative annexes focus on the website of the UN's Office of the High Commissioner for Human Rights, and the use of the Internet for human rights work.

The author, Allan McChesney, is well-qualified to have produced this work – he is a Canadian human rights lawyer, advocate and training specialist, with a long track record with national and international non-governmental organizations, regional intergovernmental groups, government and UN agencies, and community-based groups (and a long-time member of the CCIL). His involvement with these organizations is reflected in the extensive consultative process that produced the *Handbook*, which included input from the Philippines, South Africa, Argentina, Geneva, the Hague and Canada. Indeed, this consultative approach is meant to continue, as the final chapter calls for suggestions to improve future editions of the *Handbook.*

One suggestion: the *Handbook* could be improved by the addition of an index. This shortcoming is

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partly overcome by a good table of contents, which includes a separate listing of the seventeen real-life case studies scattered through the book that will inform and motivate readers.

Finally, the *Handbook* is to be welcomed as a timely reminder of the importance of economic, social and cultural rights, so often overshadowed by civil and political rights. The author argues convincingly in the first chapter that the Universal Declaration on Human Rights makes no distinction between all these rights, and that they are indeed inter-dependent.

In short, this *Handbook* is certain to be a useful tool for human rights advocacy and training. Canadian international lawyers in any field would do well to bring several copies of the *Handbook* along to meetings abroad and pass them on to colleagues. For ordering information visit the AAAS website at <http://shr.aaas.org/escr/>

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REPORT ON SPECIAL COURT FOR SIERRA LEONE

Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, with annexed U.N.-Sierra Leone Agreement on the Establishment of a Special Court for Sierra Leone, and enclosed Statute of the Special Court for Sierra Leone, S/2000/915 (October 4, 2000)

The U.N. Secretary-General, acting at the U.N. Security Council's request in its Resolution 1315, concluded with the Government of Sierra Leone an agreement to establish a Special Court for Sierra Leone to prosecute those persons "most responsible for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996." Report, Paras. 1-3, Sect. III.C.1; Agreement, Preamble, Art. 1; Statute, Art.1.

The Special Court shall have the power to prosecute: 1) crimes against humanity, (Statute, Art. 2); 2) the commission or ordering of violations of Article 3 common to the Geneva Conventions for the Protection of War Victims and Additional Protocol II thereto, (Statute, Art. 3); and 3) serious violations of international humanitarian law, including the abduction and forced recruitment into armed forces of children under 15 for their active participation in hostilities. Amnesty granted for such crimes shall not bar prosecution by the Special Court.

The Special Court shall hold persons committing such crimes individually responsible regardless of their official position. Superiors knowing or having reason to know of their subordinates' imminent or past violations shall be criminally responsible for failure to take necessary and reasonable prevention or punishment measures. Action by order of the Government or a superior may, however, be considered in mitigation of punishment should the Special Court determine that justice so requires.

The Special Court shall also have the power to prosecute certain crimes under Sierra Leonean law related to the abuse of girls or the wanton destruction of property.. Sierra Leonean law shall govern individual responsibility for such crimes.

The Special Court shall have jurisdiction over accused persons who were 15 years old at the time of the alleged crime's commission. An accused below the age of 18 shall be treated with "dignity and a sense of worth," taking into account the accused's age and the need for the accused's rehabilitation, reintegration, and assumption of a constructive role in society.

The Special Court and Sierra Leonean national courts shall have concurrent jurisdiction, although the Special Court shall have primacy, and may formally request a national court to defer its competence at any stage of procedure. No person already tried by the Special Court shall be tried before a Sierra Leonean national court for the same acts. The Special Court may, however, try persons already tried by Sierra Leonean courts if *inter alia* the proceedings were not impartial, independent or diligently prosecuted, or shielded the accused from international criminal responsibility.

The Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda shall be applicable *mutatis mutandis* to Special Court proceedings, although the Special Court judges as a whole may amend the rules or adopt additional rules as needed.

The Special Court shall have its seat in Sierra Leone, and shall consist of two Trial Chambers and an Appeals Chamber. The Appeals Chamber's deliberations shall be guided by decisions of the Appeals Chamber of the *International Criminal Tribunal for the Former Yugoslavia and Rwanda*.

More information is available in PDF format at <http://www.un.org/Docs/sc/reports/2000/915e.pdf>.

RWANDA - THE PREVENTABLE GENOCIDE

The Organization of African Unity formed the International Panel of Eminent Personalities to investigate the 1994 genocide in Rwanda, and to contribute to the prevention of further conflicts in the region. The Report estimated that between 500,000 and 800,000 "women, children and men, the vast majority of them Tutsi," were massacred in little more than one-hundred days in the spring of 1994.

The Panel endorsed the finding of the earlier Carlsson Inquiry report that the U.N.'s Rwandan failure was systemic and due to a lack of will. The Panel asserted that "[j]ust about every mistake that could be made was made." Para. 13.9. The Panel found that the U.N. did not perceive the U.N. Assistance Mission to Rwanda ("UNAMIR") as a particularly difficult mission, and so did not provide UNAMIR with an adequate force or mandate. The Panel also argued that the U.N. had compromised its integrity by maintaining "insistent and utterly wrong-headed neutrality regarding the genocidaires."

The Panel suggested that the U.N. Security Council and Secretariat had paid too much attention to cease-fire negotiations, rather than to ending the massacres. Paras. 10.5, 13.9. The Panel also condemned U.N. bureaucrats and western countries for evacuating foreign nationals while leaving behind Rwandans who would soon be slaughtered.

The Panel found clear evidence that a "small number of major actors," including Belgium, France and the United States, could have directly "prevented, halted or reduced the slaughter." Para. 15.40. The Panel asserted that none of the key actors in the Security Council or Secretariat "has ever paid any kind of price," and that "[i]nstead of international accountability, it appears that international impunity is the rule of the day." Para. 15.41.

The Panel recommended that all leaders of the Rwandan genocide be brought to trial with the utmost speed. The Panel also called on the U.N. Secretary-General to establish a commission to determine, on the basis of the U.N. report "The Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms": 1) a formula for reparations to Rwanda; and 2) which countries should be obliged to pay such reparations. Para. 24.4.A.12.

The Panel called for a substantial re-examination of the 1948 Genocide Convention, with attention to, inter alia: 1) the definition of genocide; 2) a mechanism to prevent genocide; and 3) the legal obligation of states when genocide is declared. Para. 24.4.E.30. The Panel also proposed the institution of a Special Rapporteur for the Genocide Convention, within the Office of the U.N. High Commissioner for Human Rights, to provide the U.N. Secretary-General and Security Council with pertinent information concerning situations that are at risk for genocide. Para. 24.4.E.31. The full report is available at: <http://www.oau-oua.org/Documents/ipep/ipep.htm>.

BOOK ANNOUNCEMENT

(Reprinted from Pinochet Watch Announcement)

The Pinochet Papers: The Case of Augusto Pinochet in Spain and Britain
Edited by Reed Brody and Michael Ratner

The arrest of General Augusto Pinochet in October 1998 was a wake-up call to tyrants everywhere. The two subsequent rulings by the British House of Lords rejecting his claim of immunity forged legal history. This book traces the legal proceedings in the Pinochet case from the investigation in Spain, through the October 1999 ruling by a London Magistrate that Pinochet could be extradited to Spain, to the final decision to release Pinochet for health reasons. By including the full text of the British judicial decisions as well as the arrest warrants, translations of the key Spanish court rulings, excerpts from the legal arguments put forward by all sides, and commentaries by participants in the case and legal scholars, this volume gives the reader an understanding of the factual, political, and legal context of this historic prosecution.

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Internet Commerce and the World Trade Organization: The Issues

By Yasir A. Naqvi [*]

Governments and various international organizations have initiated a process to understand the scope of Internet Commerce. It encompasses many diverse activities including electronic trading of goods and services, on-line delivery of digital content, electronic fund transfers, electronic share trading, electronic bills of lading, commercial auctions, collaborative design and engineering, on-line sourcing, public and private procurement, direct consumer marketing and after-sales service. These services are commonly referred to as E-Commerce (business-to-consumer) and/or E-Business (business-to-business).

Essentially, Internet Commerce is not any different than commerce in the "real space." The difference lies in the medium of the commercial activity. In order to ensure that there are no trade barriers, tariff and non-tariff, to Internet Commerce, the World Trade Organization ("WTO") is attempting to implement a framework for the global electronic marketplace. The WTO is concerned with three key issues to ensure 'free e-trade': customs duties on electronically transmitted products; increased access to the Internet; and market access.

"The World Trade Organization is attempting to implement a framework for the global electronic marketplace."

Customs Duties

In 1998, the WTO adopted the *Declaration on Global Electronic Commerce*. The Declaration recognized that "global electronic commerce is growing and creating new opportunities for trade." The WTO declared that "Members will continue their current practice of not imposing customs duties on electronic transmissions." In other words, the WTO imposed a temporary moratorium on customs duties on electronic transmissions. The prohibition on customs duties denied States the opportunity to consider electronic transmissions as imports. The scope of the moratorium was limited to those products that were traded in a digital format.

Currently there is no moratorium as the WTO Members failed to reach an agreement at the Third WTO Ministerial Conference in Seattle. There is consensus, however, that the prohibition be extended for 18 months when negotiations resume in Geneva in early 2001. To date, there are no States that have imposed customs duties on goods and services traded via Internet Commerce.

Access to the Internet

The WTO Study on E-commerce, entitled *Electronic Commerce and the Role of the WTO*, stressed that "[g]reater availability of and access to the infrastructure is a *sine qua non* of participation in electronic commerce via the Internet." The WTO has concluded two agreements to enhance the free trade of goods and services essential for Internet Commerce: (a) the *Declaration on Trade in Information Technology Products*; and (b) the *General Agreement on Trade in Services' Agreement on Basic Telecommunications*.

a) Information Technology Agreement

In 1996, at the First Ministerial Conference in Singapore, 28 WTO Members adopted the *Information Technology Agreement*. Currently, there are 52 signatories to the agreement, representing more than 90% of the world trade in information technology products. The *Information Technology Agreement* covers computers, telecom equipment, semiconductors, semiconductor manufacturing equipment, software and scientific equipment. The main feature of the agreement is the progressive elimination of tariffs on information technology products. The agreement has undertaken to reduce the tariffs on information technology products to zero percent by January 1, 2000.

b) Agreement on Basic Telecommunications

Access to Internet Commerce is next to impossible without an efficient telecommunications network. The *Agreement on Basic Telecommunications* allows market access by providing the private sector with the ability to reach local, long-distance and international service of those WTO Members

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who have committed to liberalize their telecommunications services. Negotiations, under *GATS*, on telecommunications services began in May 1994, with the participation of 33 WTO Member States. By April 1996, 48 Member States made offers to include telecommunications services in their *GATS* Schedules of Commitments. Currently, 89 WTO Member States have made commitments to liberalize telecommunication services, representing more than 91% of global telecommunication revenues.

The basic telecommunications services included in the agreement are: voice telephony, data transmission, telex, telegraph, facsimile, private leased circuit services, fixed and mobile satellite systems and services, cellular telephony, mobile data services, paging and personal communications systems. The *Agreement on Basic Telecommunications* is vague on how far the commitments on telecommunications services cover the supply of Internet access services. It is not clear whether the agreement covers the liberalization of supply of Internet access services. The WTO has taken the position that failure to make a specific commitment for the supply of Internet access services does not mean that the services are not implicitly covered in a broader definition of telecommunications services. Essentially, it is not clear whether the WTO Members have to specifically commit to liberalize the supply of Internet access services, or a broader commitment to liberalize the basic telecommunications services is sufficient.

"Internet Commerce blurs the distinction between a good and a service"

Market Access

An unencumbered access to market is essential for a free trade regime. Different rules apply, however, depending on whether the trade is in goods or services (*GATT* vs. *GATS*). This distinction between 'goods' and 'services' becomes acute in case of Internet Commerce. In fact, Internet Commerce blurs the distinction between a good and a service.

Canada and the E.U. have taken the position that electronically-transmitted products should be classified as services under *GATS*, regardless of physical equivalent. The U.S. argues that electronically transmitted products with physical equivalents, such as books, films and software, should be classified as goods and, thus, covered under *GATT*. Japan has proposed that digital products should receive the most liberal treatment possible, regardless of the applicable agreement. Thus far, no apparent resolution is imminent except for the recognition that electronic supply of services falls within the scope of *GATS*.

It is imperative that the WTO ensure freer e-trade before any barriers to Internet Commerce are erected. WTO Members must negotiate practical rules of classification so that electronically-traded goods and services could be properly distinguished. Most importantly, a permanent ban on customs duties on goods and services traded on-line must be sought to facilitate the growth of Internet Commerce.

Concours de procès simulé Charles-Rousseau

Germans do! Americans do! Romanians do! Why don't you take part in the *Concours de procès simulé Charles-Rousseau*?

The Rousseau Moot competition in Public International Law is very similar to the Jessup except that the memorials and the pleadings have to be in French. A growing number of francophile universities are taking part in this gathering of aspiring internationalists, open to undergraduate and graduate students in law or political science. Canada has, until now, been represented by a Quebec team. Queen's and the University of Ottawa have been the only Canadian participants from outside Quebec. We hope you will agree that it is time for you to follow the example of other non-francophone universities. The number of teams selected for the international rounds increases with the number of participants at the national level.

Une invitation de la *Société québécoise de droit international* aux professeurs de droit international et à leurs étudiant(e)

Last May teams from the United States (Duke University), Belgium (Université libre de Bruxelles and Vrije Universiteit Brussel), Germany (Ludwig-Maximilians-Universität zu München and Walter-Schuecking Institut fur Internationales Recht

an der Universitaet Kiel), Romania (University of Bucarest), Congo Université de Brazzaville), Cameroun (Institut des relations internationales du Cameroun, Université de Younde II et Université de Dschang), Togo (Université du Bénin), France (Paris I - Panthéon-Sorbonne, Paris X - Nanterre and Paris XI - Sceaux) and Canada (McGill University) met in Germany, first at the Ludwig-Maximilians-Universität zu München, in Kiel, for the round offs, and then at the *Tribunal for the Law of the Sea*, in Hamburg, for the semi-final and final rounds.

The national rounds take place at the end of February or the beginning of March. In 2001, they will be held in Montreal while the international rounds will be held in Brussels, Belgium. For more information, I invite you to visit the Competition's web site: <http://www.concours.rousseau.org>, or to contact the Canadian administrator, Professor René Provost at <provost@falaw.lan.McGill.ca>.

We hope to see you in Montreal next February. Come one, come all!

Carol Hilling, President
Société québécoise de droit international

Profil: Carol Hilling, Présidente de la SQDI

Membre du Barreau du Québec depuis 1990, Carol Hilling détient une maîtrise en droit de l'Université de Montréal. Après avoir combiné, pendant plusieurs années, l'exercice du droit et l'enseignement du droit international public à la faculté de droit de l'Université de Montréal, elle oeuvre maintenant à plein temps au sein de l'étude Hutchins, Soroka & Dionne, spécialisée en droit autochtone. Elle continue toutefois de s'occuper de l'encadrement d'équipes préparant un concours de procès simulé, tant pour garder le contact avec les étudiants du droit international, notre relève, que pour l'occasion d'explorer des secteurs différents de son champ de pratique.

Carol Hilling s'intéresse plus particulièrement au droit international des droits de la personne, des minorités et des peuples autochtones. Cependant, privilégiant une approche globale du droit international qu'elle considère indispensable pour une protection effective des droits de l'Homme au sens large, elle apprécie l'occasion que lui procurent les concours de procès simulé d'approfondir ses connaissances et d'élargir les sources d'alimentation de ses réflexions et de ses recherches.

Présidente de la SQDI depuis deux ans, Carol Hilling a, avec la collaboration du professeur René Provost, de l'Université McGill, mené à terme le projet de stages au Bureau international du travail amorcé sous la présidence du professeur Katia Boustany, de l'Université du Québec à Montréal. Pour la troisième année consécutive, des jeunes juristes (cinq cette année) effectueront un stage de sept mois au B.I.T., subventionné par le ministère du Développement des ressources humaines du Canada. La SQDI est particulièrement fière de ce programme qui permet de promouvoir l'excellence des juristes canadiens à l'étranger tout en permettant à ces derniers d'acquérir une expérience internationale.

Parallèlement à ses activités professionnelles, Carol Hilling poursuit un doctorat en droit à l'Université libre de Bruxelles. Sa thèse porte sur les rapports des peuples autochtones avec les puissances coloniales et vise à proposer une grille d'analyse des traités qu'ils ont conclus, verbalement ou par écrit, ainsi que des stipulations en faveur de peuples autochtones dans des traités entre les puissances.

COMPLIANCE MATTERS

Recent Developments Relating to Compliance under Multilateral Treaties in the Area of Disarmament and International Security

• *THE MARKLAND GROUP* •

I. THE CHEMICAL WEAPONS CONVENTION — CHALLENGE INSPECTIONS

'Challenge Inspection: National Papers' in Synthesis, *Journal of the Organization for the Prohibition of Chemical Weapons (OPCW), May 2000*

Reviewed by Sean Howard, Ph.D.[*]

In February, the British Government and the Organization for the Prohibition of Chemical Weapons co-hosted a seminar in The Hague on the issue of challenge inspections (CI) under the 1993 *Chemical Weapons Convention* (CWC). Nine national papers presented at the seminar – from Cuba, Canada, China, India, Iran, Pakistan, Russia, South Africa, and the UK – were reproduced in the May 2000 issue of the OPCW journal *Synthesis*. They illustrate an alarming gulf in perceptions of the nature, rationale and utility of challenge inspections, both in the CWC context and more broadly.

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Widely heralded as one of its greatest achievements, the Convention's CI provisions require the Director General to dispatch an inspection team promptly upon the request of any member state. The target state can prevent the inspection only by mustering a three-quarters majority vote in the Executive Council within twelve hours of the request being filed. Under normal circumstances, the maximum period between the filing of a request and the arrival of a team on site is set at only 120 hours, or five days (Article IX.10,23). (For a fuller summary of these issues, see Douglas Scott, *Proceedings of the 1994 Annual Conference of the Canadian Council on International Law*.)

No challenge inspections have been requested since the Convention's entry into force in April 1997. For the UK and Canada, such events should be regarded as a normal component of a healthy verification regime. While not abusing the right to call inspections, states should not feel dissuaded from exercising that right if in reasonable doubt. Canada refers to the fourteenth 'principle of verification' adopted by the UN in 1988 (resolution 43/81 B) in which inspection requests are described as "a normal component of the verification process." For the UK, the long-term goal is to make CIs "more routine", arguing that only by assuming such a character will the "deterrent power" of the CI provision will be truly effective.

For the other states attending the seminar, making CIs more routine would undermine the political solidarity crucial to the success of the overall regime. In the striking phrase of the Indian paper, one "cannot seriously argue that entering another's house should be a casual, routine, repetitive activity!" A number of papers stressed the importance of the Convention's mechanisms for censure and "punishment" if, after an inspection is completed, it is deemed to have been inappropriately sought (Article IX.23). The question thus begged is how to distinguish between reasonable doubt and malicious intent.

South Africa sought to chart a course between these divergent perspectives, advocating an "intermediate step," a "mechanism which falls between the routine industrial inspection and the politically loaded challenge inspection." Such a proposal is surely worth consideration. Perhaps options for a "consultative mission" could be examined, containing elements of intrusive inspection without any accusative connotation against the inspected state, and without the state seeking compelling evidence of compliance being castigated for making an unfriendly gesture.

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[*] Sean Howard Ph. D (University of Bradford) is the editor of **Disarmament Diplomacy**: <http://www.acronym.org.uk> He lives in Louisbourg, Nova Scotia.

II. ENFORCEMENT MEASURES FOR THE NPT

Strengthening the Enforcement Provisions in the Non-Proliferation Treaty -- Comments from Ben Sanders

Note: Ben Sanders is the Executive Chairman of the prestigious *Program for the Promotion of Nuclear Non-Proliferation* (http://www.soton.ac.uk/~ppnn/) He is a former official with the International Atomic Energy Agency (IAEA). He is a member of The Markland Group's committee of occasional consultants. He wrote to **Compliance Matters** on 6 March commenting on the article in Issue No. 7 of **Compliance Matters** dealing with the enforcement measures for the NPT. The following are excerpts from his letter"

> The remarks, in Issue No. 7 on Measures to Strengthen the Enforcement Provision of the Non-Proliferation Treaty are apt. I have heard the Under-Secretary-General for Disarmament Affairs, [Jayantha] Dhanapala, say similar things.

[The article in Issue No. 7 argues that an enforcement regime similar to the regime in the Chemical Weapons Convention is needed for the NPT. The article can be seen at <http://www.hwcn.org/link/issue_no._7.html>.

> An obvious major problem with regard to the enforcement of compliance with non-proliferation measures (and I daresay also with disarmament measures such as, eventually, one hopes, the Comprehensive Test Ban Treaty) is the role of the Security Council. We have seen that in connection with the DPRK and, more recently, with Iraq. The latter case, of course, does not arise from the NPT but from the Council resolutions of the nineties, but it illustrates how disagreement among the P-5 can stop effective enforcement …
>
> It will be excessively difficult to create a body with the authority to act in such cases; the issues … are obviously politically loaded. But I think one can start along the careful lines referred to in the last paragraph of your comments, and it would indeed be a good thing if the Canadian delegation at the forthcoming Review Conference could move that way …

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III. NATIONAL MISSILE DEFENCE — NEWS ABOUT THE LEGAL ASPECTS

In the last issue of **Compliance Matters**, Samina Kahn wrote about how the Reagan administration in 1985 tried to re-interpret the ABM Treaty so as to permit the deployment of the Strategic Defence Initiative (dubbed Star Wars) and how this effort was defeated (to the great satisfaction of those who believe in the force of international law). When the son of Star Wars [National Missile Defence] first appeared on the scene, there was little talk about re-interpretation. It seemed that the US had learned its lesson as a result of its failed attempt during the Star Wars debate to gain acceptance of the concept of re-interpretation. Now, however, it seems like something suspiciously like re-interpretation is coming to the surface again. Dr. Sean Howard, writing in the June issue of **Disarmament Diplomacy** (p. 53), reports on recent developments:

> On June 14, it was reported that lawyers advising President Clinton had reached a determination that the US could proceed with the construction of an NMD system without automatically violating the ABM Treaty. According to the reports, the gist of this interpretation seems to be that whereas completion or deployment of a new ABM system — most likely, a complex of radars and 100 missile-interceptors on Shemya Island in the western Aleutian islands of Alaska — would break the accord, beginning work on it — 'pouring the concrete' — would not constitute a breach, despite a legal understanding provided to the Soviet Union by the Reagan Administration that any work on a system not permitted by the Treaty would be considered a *de jure* as well as a *de facto* transgression. In fact, the details of the legal advice seem to point to a view that considerably more than 'pouring concrete' would be allowed before the violation-border was crossed; substantial construction would also be considered permissible. According to an unnamed Administration official: "Basically the Administration is working hard to free up as much wiggle room as it can before it has to make a decision. And that makes sense. There's still a long way to go to come to an arrangement with the Russians." Questioned as to how the Administration had been able to

obtain this significantly new and more convenient legal advice, an unnamed Pentagon official told the *New York Times:* "Better lawyers."

Editor's Note: The definition of an "ABM system" in the ABM Treaty (Article II) is rather long, but it does mention a system that includes (inter alia) "ABM launchers … under construction." Sean Howard advises that this story appeared in the *New York Times* on 15 June "Clinton Lawyers Give Go-Ahead To Missile Shield." [DS]

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IV. THE BWC COMPLIANCE PROTOCOL

Negotiations On A Protocol To The BWC – An Update

By Andrea Gede-Lange*

At the time of this writing, the Ad Hoc Group of States Parties to the 1972 Biological and Toxin Weapons Convention is meeting for its twentieth session of negotiations on an effective Protocol to improve the implementation of the Convention. For the previous update on this matter, see Issue No. 11, June 2000 of Compliance Matters. A more detailed review can be found in Issue No. 7, February 1999.

Prospects for the emergence of an efficient Protocol do not look promising. While most of the Western Group of States Parties favour an intrusive system of compliance measures, which most interpret as necessitating strong provisions for random visits, this majority does not always include the United States, Japan and Germany. To date, the US, in particular, has appeared to pursue a strategy aimed at reducing the impact of the Protocol on its bio-technology industry and its bio-defense infrastructure. Various states, including the US, are concerned not only about their bio-defense programs, but also about protecting their commercial proprietary information. In the case of the US, Henrietta Wilson, writing in a UK periodical, observes that the former concern is ironic given the level of openness about American defense programs. Moreover, Wilson points out, other states in the AHG and external observers believe that espionage in an international regime such as the BWC is minimal – far easier methods of uncovering state secrets exist than through an international inspectorate.[1]

On the topic of challenge investigations, the European states and most of the West (although not the US) favour a "red light" mechanism (a term used by some expert commentators), whereby an investigation could be stopped only if the Executive Council voted by a specific majority against it. Some non-aligned states and the US, on the other hand, fearing that misuse of the system could lead to frivolous or abusive inspections of their facilities, argue for the "green-light" procedure. By this mechanism, the challenge inspection would not proceed unless a majority of states voted explicitly in favour of undertaking the investigation.

Graham S. Pearson, former Chief Executive of Britain's Chemical and Biological Defense Establishment, asserts that investigations are the ultimate compliance measure in the Protocol. Although some states fear abuse of investigation procedures, Pearson points out the existence of provisions to protect against such abuse already in the text of the draft Protocol, such as the Executive Council voting to stop an investigation (the "red-light" mechanism) or imposing penalties if it concludes that abuse has occurred.[2] Moreover, he argues, experience with the CWC indicates that abusive requests are not being made for challenge inspections and are unlikely to occur.[3] In fact, there have been no challenge investigations initiated to date under the CWC. A "green-light" mechanism, Pearson maintains, would make for a much weaker regime.

As the Fifth Review Conference approaches, the 2001 "deadline" mandated by the Fourth Review Conference in 1996, it is hoped that differences of opinion delaying negotiations can be resolved and talks concluded before the target date. The AHG has one more session scheduled for this year, 13-24 November, though it has reserved two alternate two-

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[1] Henrietta Wilson, "Verification of the Biological Weapons Convention: Politics, Science and Industry," *Trust & Verify*, Issue 89, February 2000, p 2.

[2] Graham S. Pearson, "The Protocol to the Biological Weapons Convention is Within Reach," *Arms Control Today*, June 2000, p 6. Available on the Web at http://www.armscontrol.org/ACT/june00/bwcjun.htm.

[3] See the Review Article on Challenge Inspections elsewhere in this issue.

week sessions, 25 September-6 October and 27 November-8 December. The decision whether to use one of these alternate sessions is to be made during the present session. Unfortunately, the US remains one of the most powerful among those countries insisting on weaker inspections measures. With very little time left for other states to persuade the US to moderate its views, the end result may well be the emergence of an inadequate Protocol, and a BWC that lacks the strength to enforce its provisions

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V. THE SPECIAL ECONOMIC MEASURES ACT — MR. AXWORTHY'S PROPOSALS

The Special Economic Measures Act was enacted in 1992 (c. 17) to give the Governor-in-Council the authority to enact regulations imposing economic measures (including economic sanctions) upon a foreign state when Canada is called upon to do so by the United Nations or by another multinational body of which Canada is a member or in the event of a threat to international peace. Foreign Minister Axworthy has recently announced his interest in considering an extension to the act in order to cover sanctions and other measures that Canada might want to impose in future on a unilateral basis — unrelated to any international effort — and irrespective of the existence of a situation that could be termed a threat to international peace. He has indicated that such legislation might be necessary to deal with situations such as that currently unfolding in Sudan relating to the operations of the Canadian company Talisman Energy Inc..

Mr. Axworthy's proposals are the subject of a recent Markland Group Paper by Michael Nash, a lawyer practising in Hamilton. Despite the brevity of the paper, it is too long to be reproduced here. It is available on the internet at <http://www.hwcn.org/link/mkg/sema_paper.html>. Alternatively, The Markland Group would be glad to forward a hard copy to anyone interested. [DS]

Calendrier — Calendar

16-30 November, 2000

The *Centre for International Legal Studies*, in Salzburg, Austria, is hosting via the Internet an *Arbitration2000* conference. More information is available from the web site at:
<http://www.arbitration2000.com>.

30 November - 1 December. 2000

For its 3rd annual conference, the *Policy Research Initiative* invites paper proposals from researchers engaged in multidisciplinary analysis of any element of its Conference theme of "Canada in a Global Society". Proposals may address general questions, for example: what structures and frameworks are required to support human development in an interdependent world? See the web site at:
<http://policyresearch.schoolnet.ca/2000conference/call-e/htm>.

11-22 December, 2000

The 4th annual Session of the *Conference of the Parties for the Convention to Combat Desertification* will be held in Bonn, Germany.

26-27 January, 2001

The International Law Association - American Branch will be holding an International Law Weekend - West at Pepperdine University of Law.

Watch for details of these and other events on the CCIL web site at: <http://www.ccil-ccdi.ca>, click on *Other Activities*.

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<http://www.ccil-ccdi.ca>

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Publié trois fois par an, le *Bulletin* contient des renseignements relatifs aux développements du droit international et aux activités se rapportant à ce domaine au Canada et ailleurs. Vos idées pour des articles, des annonces de publication et événements, ou d'autres textes pour le *Bulletin* peuvent être envoyés au bureau du CCDI ou directement par courriel à l'adresse *bulletin@ccil-ccdi.ca.*