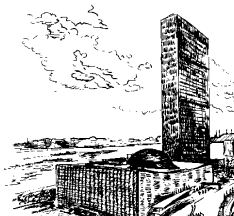


Part 6



Legal Developments

International Court of Justice (ICJ)

The International Court of Justice (ICJ) is the principal judicial organ of the United Nations. The Court decides cases submitted to it by states and gives advisory opinions on legal questions at the request of international organizations authorized to request such opinions. In recent years, the Court has had more cases on its docket than ever before.

The ICJ is composed of 15 judges, no two of whom may be nationals of the same state. As of December 31, 2001, the Court was composed as follows: Gilbert Guillaume (France—President), Shi Jiuyong (China—Vice-President), Shigeru Oda (Japan), Raymond Ranjeva (Madagascar), Geza Herczegh (Hungary), Carl-August Fleischhauer (Germany), Abdul G. Koroma (Sierra Leone), Vladlen S. Vereshchetin (Russia), Rosalyn Higgins (United Kingdom), Gonzalo Parra-Aranguren (Venezuela), Pieter H. Kooijmans (Netherlands), Francisco Rezek (Brazil), Awn Shawkat Al-Khasawneh (Jordan), Thomas Buergenthal (United States), and Nabil Elaraby (Egypt). Judge Elaraby succeeded Judge Mohammed Bedjaoui of Algeria, who resigned from the Court in September 2001.

The UN General Assembly and the Security Council, voting separately, elect the Court's judges from a list of persons nominated by national groups on the Permanent Court of Arbitration. Judges are elected for nine-year terms, with five judges elected every three years. The next regular election will be held in the Fall of 2002.

The United States has been involved in the following matters in the Court since the last report.

Iran v. United States of America

On November 2, 1992, Iran brought a case against the United States claiming that U.S. military actions against Iranian oil platforms in the Persian Gulf during the conflict between Iran and Iraq violated the 1955 Treaty of Amity between the United States and Iran. The incidents cited by Iran followed attacks by Iranian military forces against United States naval and commercial vessels in the Gulf. The United States filed a Preliminary Objection to the Court's jurisdiction, which was considered at

hearings in September 1996. In December 1996, the Court decided that it did not have jurisdiction under two of the three treaty articles invoked by Iran, but that it had jurisdiction to consider a third treaty claim. On June 23, 1997, the United States filed its Counter-Memorial and a counter-claim. Following further proceedings regarding the counter-claim, the Court held on March 10, 1998, that the counter-claim was “admissible as such” and directed the parties to submit further written pleadings on the merits. Following two requests for extensions, Iran filed its Reply and defense to the U.S. counter-claim on March 10, 1999. Because of developments in the dispute Germany v. United States of America (see below), the United States requested and received an extension of time for filing its Rejoinder, originally due on November 23, 2000. The United States filed its Rejoinder on March 23, 2001. Iran subsequently requested and received authorization to submit an additional written pleading relating solely to the U.S. counter-claim, which it filed on September 24, 2001.

Libyan Arab Jamahiriya v. United States of America

On March 3, 1992, Libya brought cases against the United States and the United Kingdom charging violations of the 1971 Montreal (Air Sabotage) Convention. Libya claimed that the United States and the United Kingdom interfered with Libya’s alleged right under the Montreal Convention to try two persons accused by U.S. and Scottish authorities of bombing Pan Am Flight 103 over Lockerbie, Scotland, on December 21, 1988. On June 20, 1995, the United States filed Preliminary Objections to the Court’s jurisdiction in the case; the United Kingdom also filed Preliminary Objections. The Court held hearings on both sets of Preliminary Objections on October 13–22, 1997. On February 27, 1998, the Court denied some of the U.S. and British Preliminary Objections and held that others could only be decided at the merits stage of the case. The United States and the United Kingdom both filed Counter-Memorials on March 31, 1999. Shortly after, on April 5, 1999, the two suspects arrived in the Netherlands in the company of the Legal Counsel of the United Nations. They were detained by Dutch authorities and were then extradited to the custody of Scottish authorities for trial in a Scottish court constituted in the Netherlands. In June 1999, the Court held a meeting with the parties to both cases to discuss further scheduling in the two cases in light of these developments. The Court subsequently ordered that Libya file its Replies to the U.S. and U.K. Counter-Memorials by June 29, 2000. Following Libya’s filing of its Replies on that date, the Court set the date of August 3, 2001 for the filing of the U.S. and U.K. Rejoinders. The U.S. and U.K. Rejoinders were filed on August 3, 2001 and August 1, 2001, respectively.

[Also see the section on “Libya” in Part 1.]

Germany v. United States of America

On March 2, 1999, Germany filed a case against the United States based on the failure of Arizona authorities promptly to inform Walter and

Karl LaGrand, two German nationals convicted in Arizona of a 1982 murder and attempted bank robbery, of their right to have German consular officials notified of their arrest and detention. (The LaGrand brothers were German nationals who had moved to the United States when they were aged three and five years and who had lived in the United States almost continuously thereafter.) The case was filed the day before the scheduled execution of Walter LaGrand in Arizona; Karl LaGrand had been executed previously.

Germany accompanied the filing of its case with a request for the Court to indicate provisional measures against the United States. On March 3, 1999, acting without a hearing and without receiving the substantive views of the opposing party, the Court issued an order stating that “the United States of America should take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings.” This order, issued a few hours before the scheduled execution, was promptly communicated to the Governor of Arizona by the Department of State. The State of Arizona executed Mr. LaGrand later on March 3, 1999, after the U.S. Supreme Court declined to intervene.

As ordered by the Court, Germany filed its Memorial on September 16, 1999, and the United States filed its Counter-Memorial on March 27, 2000. The United States participated in oral proceedings in the case held by the Court from November 13–17, 2000. The Court issued its decision on June 27, 2001. After concluding that it had jurisdiction and that all of Germany’s submissions were admissible, it found as follows on the substantive issues before it: that the United States had breached its obligations to Germany and to the LaGrand brothers under Article 36(1) (which the United States had conceded) and Article 36(2) of the Vienna Convention on Consular Relations; that by failing to take all measures at its disposal to ensure that Walter LaGrand was not executed pending the final decision of the Court, the United States had breached its obligation under the Court’s provisional measures order of March 1999; that the United States had undertaken a commitment (to ensure implementation of the specific measures adopted in performance of its obligations under Article 36(1)(b)) that met Germany’s request for a general assurance of non-repetition; and that should German nationals be sentenced to severe penalties without their rights under Article 36(1) of the Vienna Convention having been respected, the United States shall by means of its own choosing allow the review and reconsideration of the conviction and sentence by taking account of the violation of such rights. The U.S. Government is consulting with state officials regarding the implementation of the Court’s decision.

International Law Commission (ILC)

The International Law Commission (ILC), which first met in 1948, works to promote the codification and progressive development of international law. Its 34 members are persons of recognized competence in

international law who serve in their individual capacities. The General Assembly elects them for five-year terms. Mr. Robert Rosenstock of the United States was elected to his third term as a member of the Commission in 2001 and participated fully in the work of the Commission at its 53rd session.

The Commission studies international law topics referred to it by the General Assembly or that it decides are suitable for codification or progressive development. It usually selects one of its members (designated a "special rapporteur") to prepare reports on each topic. After discussion in the Commission, special rapporteurs typically prepare draft articles for detailed discussion by the members of the Commission. A drafting group considers and refines the articles prior to formal adoption by the Commission. The Commission reports annually on its work to the Sixth (Legal) Committee of the General Assembly.

At its 53rd session in 2001, the Commission concluded its long-running project on a set of draft articles on State Responsibility. The Commission produced a complete set of revised draft articles on the subject, with detailed commentaries. It also continued its work on guidelines concerning Reservations to Treaties, International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law (Prevention of Transboundary Damage from Hazardous Activities), Diplomatic Protection, and Unilateral Acts of States.

During the annual consideration by the Sixth Committee of the UN General Assembly of the Report of the International Law Commission in 2001, the representative of the United States stated that the Commission's "revised articles and commentaries on the Responsibility of States for Internationally Wrongful Acts represent[ed] a significant contribution for which all participants in the process, past and present, should be commended." The representative proceeded to make detailed comments on various procedural and substantive aspects of the draft articles on State Responsibility and their commentaries. He expressed the view that the United States does not believe that it would be advisable to attempt to convert the draft articles into a binding instrument, such as a Convention, largely because the draft articles have been treated as influential in their own right and because of the risks associated with opening up for further review at a diplomatic conference difficult issues on which the Commission had reached a satisfactory resolution. The U.S. representative also provided detailed comments on the continuing topics of the Commission's work, to be taken into account by the Commission during its 54th session in 2002.

UN Commission on International Trade Law (UNCITRAL)

The UN Commission on International Trade Law (UNCITRAL), established by UN General Assembly Resolution 2205(XXI) in 1966, con-

tinued its technical work on harmonizing national laws to promote trade and commerce, with a focus on economic aspects of law and market effects. This is accomplished through multilateral conventions, model national laws, UN legal guidelines, and technical assistance on trade and commercial law. It continues to avoid political issues that may arise in the work of other bodies. The Commission currently has 36 elected member states, including the United States. The Commission usually holds several weeks of working group meetings annually on each topic, which are then reviewed at its annual plenary session. The General Assembly's Sixth Committee (Legal Affairs) favorably reviewed the Commission's work in 2001. In Resolution 56/79, the General Assembly in December reaffirmed the Commission's mandate as the core legal body within the UN system in the field of international trade law.

The Commission is headquartered in Vienna, Austria at the UN's International Center, and operates with a small staff of approximately 12 professionals, 2 of whom are U.S. nationals. Currently, the Chief of the Trade Law Branch is a Slovenian national whose appointment was supported by the United States. The Commission works largely through legal and economic input provided by member and observer states. The United States is particularly active in that regard through bar and trade associations, assuring full consideration of U.S. private sector concerns and objectives.

Specialized nongovernmental organizations (NGOs), with U.S. support, actively participated in Commission projects in view of their expertise, market experience, and non-political functions. Drawing on laws already enacted in countries such as the United States, these NGOs generally backed modern commercial law reform. In this area of UN activity, NGO participation supports efforts by the United States to expand trade and commerce.

The Commission at its Plenary Session in June adopted the UNCITRAL Convention on Assignment of Receivables in International Trade, capping a five-year effort by the United States to support modern finance law through the United Nations. This Convention allows many countries to promote economic growth by accessing private-sector capital markets, and can significantly affect developing states and states in transition. The Convention reflects newer concepts of commercial law, in which payment rights are used as collateral for international commercial transactions, which in turn supports a secondary finance market. The Convention would be a marked change in the laws of many countries, and in an optional annex sets out the U.S. proposal for an international computerized registry system which could significantly assist extension of new credit to developing countries. The UN General Assembly in December endorsed the Convention and opened it for signature and ratification.

In July, the Commission adopted the final text of an UNCITRAL Model Law on Electronic Signatures, to provide commercial predictability for e-signatures and message authentication systems in international trade. The General Assembly in December endorsed the Model Law. Unlike almost all other work done by the Commission, which tends to be solidly in line with U.S. commercial sector interests, this electronic signature issue stood out as an exception. At the end of a difficult three-year effort, amid contentious negotiations, an agreement was completed only after some final concessions to the U.S. positions. In the end, the gap was narrowed between the United States, the European Union (EU), and other states on the extent to which new laws on e-commerce should be limited to enabling laws (the U.S. position), as opposed to a regulatory approach (often the direction EU efforts have taken). The same conflict was evidenced in the gap between recent federal law and uniform state laws in the United States, on the one hand, and the adoption of EU directives on e-commerce on the other.

The Model Law, which, in its earlier drafts, overly favored certain technologies and a regulatory approach, moved toward the U.S. position at the 2001 Plenary session. It now provides non-exclusive criteria for creation and validity of e-signatures and for their effectiveness under certain circumstances when used across borders, and moves closer to equal treatment of signature technologies. Sufficient changes were made to allow conditional U.S. support of the final text, subject to further technical amendments the United States will circulate to countries considering adoption of the Model Law.

UNCITRAL's Secretariat continued its effective technical assistance primarily to developing countries in the field of implementation of modern trade law. These efforts have materially assisted modernization of commercial law in a number of states. The Commission's work in modernizing commercial law has facilitated transactions made available through trade agreements or otherwise, but which are often difficult to realize if obstacles remain by virtue of older legal standards incompatible with up-to-date commercial and finance laws. In addition, the Commission continued to publish abstracts of decisions involving UNCITRAL conventions and its other trade law texts through its "CLOUT" system which appears in the six official UN languages (A/CN.9/SER.C/Abstracts).

In addition to its current work, the Commission authorized new projects, including a joint project with the Comité Maritime Internationale at Brussels to prepare a draft convention on carriage of goods at sea; a project to prepare a UN Model Law on Secured Finance; and a project to review existing multilateral treaties to make them effective for electronic commerce.

Given the increase due to globalization in requests for immediate work on commercial law reform, the Commission almost doubled the number of

active projects, while at the same time reducing the average length of working group meetings so as to accommodate the work load. The Commission at the same time sought an increase in its professional staffing level, since it has remained at its original level despite the work program. In order to enhance the participation of more states, the Commission requested an increase in its present size, established in 1973, of 36 member states; action by the General Assembly's Sixth Committee had not yet been taken on this as of December 31, 2001.

Host Country Relations

The UN General Assembly established the Committee on Relations with the Host Country in 1971 to address issues relating to the implementation of the UN Headquarters Agreement and the Convention on the Privileges and Immunities of the United Nations. It is authorized to deal with questions of the security of missions accredited to the United Nations and the safety of their staff, the responsibilities of such missions, and issues related to the functioning of the missions. The committee serves as an important communication link between the UN diplomatic community and the host country and host city.

Following the terrorist attacks of September 11, the Chair of the Host Country Committee issued a press statement which expressed the solidarity of the UN diplomatic community with the people of the United States. His statement noted the outrage of the diplomatic community to the acts of terrorism inflicted upon the host country and host city of the United Nations, and also noted the gratitude of the community to the efforts of the men and women involved in rescue and recovery efforts.

The 19-member Committee met in plenary on four occasions during 2001. Members raised a number of concerns affecting the UN diplomatic community, including, for example, property tax responsibility for mixed-use foreign government-owned buildings, the refusal of some New York landlords to rent to diplomats, immigration and customs procedures, travel controls on members of certain member states, parking of diplomatic vehicles in New York City, diplomatic bank accounts, and visa issuance. The most frequently discussed concern of the Committee was the host country's continued imposition of travel restrictions on personnel of certain missions and staff members of certain nationalities of the UN Secretariat.

On December 12, the General Assembly adopted without a vote the "Report of the Committee on Relations with the Host Country" (Resolution 56/84), which the United States supported. The resolution expressed condolences to the families of the victims of the acts of terrorism on September 11; noted the Committee's continued concern about the imposition of travel controls on certain member states and requested once again that the host country consider removing the controls; requested the host country to take steps to resolve the problem related to parking diplomatic vehicles in a fair, balanced and non-discriminatory way; and requested the host

country to continue to issue visas in a timely manner. Finally, the resolution expressed the Committee's appreciation for the efforts of the host country.

Strengthening the Role of the United Nations

The Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization (Charter Committee) held its 26th annual session April 2–12. The General Assembly Sixth Committee debated and adopted in the fall a resolution adopting the report of the Committee's work, and a resolution on its chief substantive agenda item concerning "Implementation of Charter Provisions Related to Assistance to Third States Affected by the Application of Sanctions." The General Assembly subsequently adopted the resolutions by consensus on December 12 (Resolutions 56/86 and 56/87, respectively).

The Special Committee recommended to the General Assembly that it continue to consider, in an appropriate substantive manner and framework, the report of the Secretary General on the results of the June 1998 *ad hoc* expert group meeting on methodological approaches to assessing the third-country effects of sanctions. The Special Committee also strongly encouraged the Secretary General to expedite the submission of his own commentary on the expert group's report, which would take into account the work of the Security Council's *ad hoc* working group on sanctions and other recent developments on the subject. The U.S. delegation to the annual meeting reiterated its support for enhanced procedural and other attention, including that of international financial institutions, to this issue, while opposing such proposals as that calling for a UN trust fund, funded by assessed contributions, for such aggrieved third states.

Other subjects considered by the Special Committee and supported by the United States as having practical merit included ways and means of (1) improving the Organization's dispute prevention and settlement capabilities by enhancing mediation and other tools available to the Secretary General, and (2) improving the working methods and increasing the efficiency of the Special Committee itself. On the latter subject, the United States was supportive of the Japan-led initiative to streamline the Special Committee's work, including through a mechanism for deleting from the Committee's meeting agenda long-standing, often politically-charged proposals that were duplicative of matters being considered elsewhere in the Organization and/or stood no chance of achieving consensus. In this regard, the United States once again took a lead role in the Special Committee in opposing continued efforts by certain other delegations to foster new, generic criteria with respect to the imposition of sanctions, peacekeeping operations, the use of force, and General Assembly vs. Security Council prerogatives.

International Criminal Tribunals for Rwanda and the Former Yugoslavia

The International Criminal Tribunals for Rwanda and the former Yugoslavia have jurisdiction for the prosecution of those accused of having committed genocide, crimes against humanity, and other serious violations of international humanitarian law in Rwanda and the former Yugoslavia respectively. The UN Security Council established the International Criminal Tribunal for Yugoslavia (ICTY) in May 1993 and the International Criminal Tribunal for Rwanda (ICTR) in November 1994. The United States has been a leading supporter since their inception. The tribunals are a subsidiary organ of the Security Council to which they report regularly.

Carla del Ponte (Switzerland) is Chief Prosecutor for both tribunals. The Chief Prosecutor and a Deputy Prosecutor for the ICTY are located in The Hague, the Netherlands, where the ICTY hears cases. The ICTY has a staff of approximately 1000 from 75 countries. The Rwanda tribunal, with a staff of approximately 900 from more than 85 nations, hears cases in Arusha, Tanzania; its Deputy Prosecutor is located in Kigali, Rwanda.

As of the end of 2001, the ICTY had indicted 117 individuals, of which 66 persons were in custody, 26 were convicted, 5 acquitted, and 11 were standing trial. The ICTR had indicted 76 individuals, of which 56 were in custody, 8 were convicted, 1 acquitted, and 17 were on trial in three trial chambers. While the ICTR has increased the number of ongoing trials, the slow pace of the trials and case backlog is a concern that the United States continues to press the Tribunal to resolve.

A record number of indictees were transferred to the ICTY and ICTR in 2001, totaling 29 persons for both tribunals, compared to 26 during 1999 and 2000 combined. The most prominent among these indictees at the ICTY, Slobodan Milosevic, former President of the Federal Republic of Yugoslavia, was transferred to The Hague on June 29, 2001, and is facing trial for crimes committed in Kosovo, Croatia, and Bosnia. Preparations for the trial of Milosevic continued through the end of 2001. The United States continued to press states for the transfer of indictees to The Hague and Arusha. In the Balkans, despite steps taken by Serbia and, to a lesser extent, the Republika Srpska entity in Bosnia and Herzegovina, a number of indictees, including Radovan Karadzic, Ratko Mladic, and the "Vukovar 3", remain at large. With respect to Rwanda, persons indicted for war crimes are believed to be present in the Congo and other African countries.

The 2001 UN budget for both the ICTY and ICTR was \$202.3 million. In calendar year 2001, U.S. assessed contributions totaled \$42.9 million for the two tribunals. Since the tribunals' inception, U.S. assessed contributions total approximately \$277 million. The United States is the largest financial contributor to both tribunals, the U.S. assessed share being 23.5

percent of the total budget. In addition, the United States has provided the tribunals approximately \$28 million in voluntary contributions since their inception. The United States continued to provide information to assist the ICTY and ICTR in their investigations, and other support as appropriate.

In a November 2001 address to the Security Council, Chief Prosecutor Carla del Ponte assessed the work of the tribunals in fulfilling their mandates and outlined steps toward an “exit strategy.” The United States continues to engage tribunal officials on ways to streamline and focus the work of the tribunals and enable regional states to undertake the prosecution of cases deferred to domestic jurisdiction so as to conclude trials by 2008.

Throughout 2001, the tribunals continued efforts to improve efficiency and institute management reforms. The General Assembly elected a pool of 27 *ad litem* judges to the ICTY in June 2001, following the adoption of Security Council Resolution 1329 (2000). Six of the judges joined the ICTY in September 2001 to begin work on three new cases. The ICTR submitted a similar request for *ad litem* judges in 2001 to help address the case backlog and move toward completion of the Tribunal’s work.

In February, the UN’s Office of Internal Oversight Services (OIOS) issued a report on its investigation of fee-splitting arrangements between defense counsel and indigent claimants. ICTY and ICTR began implementing the report’s recommendations and the OIOS investigation continued through year’s end. To improve the oversight of the tribunals, the United States successfully advocated the appointment of on-site auditors and investigators, the General Assembly authorized in December 2001.

Law of the Sea

The UN Convention on the Law of the Sea (LOS Convention) entered into force on November 16, 1994. Responding primarily to the concerns of industrialized countries, including the United States, a supplementary “Agreement Relating to the Implementation of Part XI” (deep seabed mining) was negotiated in 1994, and entered into force on July 28, 1996. At the end of 2001, a total of 136 states and the European Union had ratified the Convention, and 103 had ratified the Agreement. Taken together, the Convention and the Agreement meet a basic and long-standing objective of U.S. ocean policy: conclusion of a comprehensive law of the sea treaty that will be respected by all nations. The LOS Convention was submitted to the Senate for its advice and consent in 1994. The Bush Administration announced its support for the Convention in an address November 27, 2001, by Ambassador Sichan Siv, at a UN plenary session on the annual resolution on oceans and the law of the sea.

The International Seabed Authority (ISA) held its seventh session in July 2001. The United States attended the meeting as an observer, since it lost its vote and its seat on the ISA Council and on the Finance Committee in 1998 at the expiration of provisional application of the 1994 Agree-

ment. The budget for 2001–2002 is \$10,506,400, which represents a minimal increase of 2.1 percent above the 1999–2000 budget of \$10,286,900. The United States is currently in arrears for its payment of dues to the ISA for the year 1998, when it served as a provisional member with a vote. At the next ISA meeting (August 2002), the Council will again consider the Russian request to develop regulations for exploration of polymetallic sulfides and cobalt-rich crusts.

In December 2001, the United Nations received a submission from the Russian Federation for consideration by the Commission on the Limits of the Continental Shelf. A 3-week meeting of the Commission was scheduled for March 2002, just before elections for all 21 seats on the Commission. The United States planned to submit public comments on the Russian continental shelf claim to areas beyond 200 nautical miles.

The International Tribunal on the Law of the Sea opened its new headquarters in Hamburg, Germany in 2000. The Meeting of States Parties, which the United States attended as an observer, approved the Tribunal budget for financial year 2002; it decreased slightly from the previous budget (to \$7,807,500). One-third of the 21 judges will be elected during the next Meeting of States Parties in April 2002. In 2001, the Tribunal considered a request for provisional measures in a case involving Ireland and the United Kingdom. The case concerns U.K. authorization of operations at a British nuclear facility near the coast of the Irish Sea, and transport of MOX fuel produced at the plant through the Irish Sea. Ireland asked the Tribunal to suspend operation of the plant and to take certain other protective steps pending constitution of an arbitral tribunal to hear the case on the merits. The Tribunal denied Ireland's request on December 3, 2001, but did prescribe consultations between the parties on several matters. The Tribunal also heard a prompt release case involving France and Belize in 2001. The case was dismissed for lack of jurisdiction, as Belize did not produce clear evidence that a fishing vessel in question was registered in Belize.

Pursuant to the 2000 UN General Assembly resolution on oceans and the law of the sea, an informal, open-ended consultative process was held for one week at UN headquarters in May 2001. Governments focused on two main issues: piracy and armed robbery at sea, and marine science and technology. The meeting produced elements that were subsequently incorporated in the 2001 UN General Assembly Resolution 56/12 adopted November 28, 2001. The resolution included a section calling for the third informal consultative process to take place in April 2002. The session will focus on protection and preservation of the marine environment and on capacity-building, regional cooperation and coordination, and integrated ocean management.

